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Book Intitled, *A General Abridgment of Law
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Titles, &c. By Charles Viner, Esq;

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A General Abridgment of Law and Equity

Alphabetically digested under proper Titles with Notes and References to the Whole.

By CHARLES VINER, Esq;

Favorunt Deo.

ALDERSHOT in Hampshire near Farnham in Surry: PRINTED for the Author, by Agreement with the Law-Patentees.
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(C) Destruction of the Appendant. [In part or in all.] 

1. If there are two parochial Churches, of which one is appendant to the Manor of D. and the other in grots, and the Patrons and Ordinaries are willing to annexe and consolidate them into one Church, and upon the same Union it is agreed that the Patrons shall in all and present to the said Churches by turns, in this Case the Advoqfon 9 V. 3 in shall be in Grots for one Turn, and appendant for the other Turn to the Manor of D. as it was before the Union. D. 9 Eliz. 259. 20. Blake, and he also cited Windsors's Case. Cro. E. 688. as Authorities in Point that an Union does not destroy an Appendant, and that since at Common Law Union would not destroy it, much less will Union, made by Act of Parliament, do it, which is an Act of the Highest Law, and design no Wrong to any, but only to take away the Incumbrancy, and to give to each a due Turn instead of it, and in the same Plight as he had the Advoqfon before. But Nevil and Treeby Ch. J. c contra, and hold that the Appendant was destroyed by the Union; And as to the Case of D. 259. which is the only Case where Quare Impedit is brought upon a united Church the Words of the Book are (Erifinct remble en Paüer cafe per l'opinon d'aucun) which imply, that others were of a contrary Opinion. This Point of Appendant is an unnecessary Question there, as appears by reading the Case. As to Windsors's Case in Cro. E. 688; that was not a Church united, nothing of it appears in any of the other Reports of the Case, nor in the Record itself, but it seems to be an imaginary Discussion of Coke; but yet there were the Words absolute pertinent, which are wanting in this Case, but there was no Neefity there to speak of an Union, for he would suppose (which is not at all improbable) that there were two Lords of two adjoining Manors, who contributed to the Building of the Church, the one contributed more by one part than the other, and so referred to himself two Turns, and the other Lord had the third Turn, so that there was no Necessity to refer to Coke's Imaginations of a Union to maintain the Declaration in Windsors's Case; but this Supposition is very probable and agreeable to the Rules of Law, for Patronum faciunt Dos, Adificiatio, Fundus.

2. A Man is listed of a Manor to which an Advoqfon is appendant, and a Stranger brings an Action of Darrein Prefentment, or Writ of Covenant against him of the Advoqfon, upon which the Stranger levies a Fine for Conuance de Droit tantum to the Defendant, and he D. 259. b. pl. re-grants that the Conuitor shall have the next Prefentment, and he himself the 2d. and so by Turns for ever; in this Case the Advoqfon remains appendant as before, every other Turn, because by this Fine it is made appendant, except every other Turn, which does not belong to the Grantor. 43 C. 3. 35.

3. A Fold-courfe, selletic, Common of Pature for 300 Sheep in a Cro. E. 432. certain Field, may be appurtenant to a Manor, sellectic, that the Lord, and all those whose Estates he hath at, have had Time out of E. Common there for 300 Sheep as appurtenant to the said Manor, S. C. but it without faying levant and couchant upon the said Manor. Nift, 10 Car. W. K. in a Writ of Error between Day and Spooner, per Captiam agreed. S. P. does not appear as to the Levancy and Couchancy. —— See Tit. Common (L) pl. 7. --- Scheeverel v. Porter, S. P.

4. In the said Case when such Fold-courfe is appurtenant to a Manor, if the Lord grants or leases to another Parcel of the Manor, several Acres Parcel of the said Manor with the said Fold-courfe, S. C. adjudges this will pass as appurtenant to the said Acres, and shall be appurtenant to them. Nift. 11 Car. W. K. between Day and Spooner above cited in Err. for: for being in Err. upon B. 50
Appendant [or Appurtenant.]

Nature of a Common

upon the Manor, and it is not any Prejudice to the Owner of the
Land where the Common is to be taken.

may well be divided or annexed to Parcel of the Manor, and there cannot be any Prejudice to the Ter-
tenants; for they shall not be charged with more than they were before.——Jo. 35; Pl. 1 S. C. and
Judgment affirmed.——See Common (O) pl. 3. b. C.

If a Man

5. If a Man grants the Manor of D. and in the same Deed grants
the Advowson of D. naming it as in Gros, per being appellant before
it will pass as appellant. 49 Ed. 3. 4. b.

or of a House whereof a Shop is Parcel, and gives by Deed by Name of Manor and Advowson, or House and
Shop, yet this is no Effoppel to say that the Advowson is appellant, and the shop Parcel of the House.

Br. Effoppel, pl. 47, cites 48 E. 3. 4. per Finch.—S. P. and in Advowson after he may demand the
Manor once peremptorily or the House only, and by this he shall recover the Advowson and Shop; for the
Gift does not make Disappendency or Severance. Br Demand, pl. 2 cites S. C.

6. If a Patron presents to an Advowson appellant as in Gros, this
will make it Disappendant. 21 Ed. 4. 2.

7. If a Man hath an Advowson appendant to a Manor, and grants
every 2d Presentation to another in Fee, per the Advowson continues to himself appellant for the other Presentation. 43 Ed. 3. 35.

8. If a Man seised of a Manor to which an Advowson is appendant accepts a Fine to a Stranger, by which the Stranger acknowledges all his Right in the Advowson to him, this does not make the Advowson in Gros. 43 E. 3. 35.

9. But if he had acknowledged his Right in the Advowson to have been to a Stranger, this had made the Advowson in Gros, and this could not be made appellant after by any Grant. 43 E. 3. 35.

10. If a Man be seised of a Manor to which an Advowson is appendant, and leaves the Manor without Deed for Life, referring the
Advowson, this makes the Advowson in Gros, tho' it be without
Deced. 29 E. 3. 36 b. * Ca 5. 11. b. it is in Gros during the Ef-
tate for Life.

* In Fee's

Cafe. —

After the

Death of the

Lessees it is

appendant

and adjudged and

affirmed in Error. Jenk. 310. pl. 91. cites Paich. 3 Jac. Tuck's Cafe.

II. If Tenant

11. If a Man has Advowson appellant and suffers Ufurpation, this
Life be of a Manor, to

which an

Advowson

is

appendant, and be in Repressio usurp, tho' the Advowson be in Gros during the Life of the Tenant for
Life, it is appellant again after his Death; Per Holt Ch J. Skinn. 662. Mich. 8 W. 3.

If an Infant has a Manor to which an Advowson is appendant, and suffers a Ufurpation when the Church
becomes void, and afterwards at full Age grants the Manor to Fee, and afterwards the Church becomes
void, the Infant shall present, and not the Feoffee of the Manor, for the Advowson was seised by the
Ufurpation, and yet the Infant may present to the same. P. N. B. 24 (X). — Ibid (X) in the new Notes there (F) cites it accordingly adjudged 16 E. 5. F. Quare Imp. 67; but contra by Danby, 55
H 6. 12. in the like Cafe. Yet if the King was so seised, and granted the Manor cease ad vocatius, at the
next Turn the Grantee shall present; per Cur. for it was not made disappendant by the King's Uf-

12. And per Thorp, if a Man purchases a Manor with the Advowson
appendant, and suffers Ufurpation at the first Avoidance, he is without

Remedy
Remedy for ever: for he cannot have Quare Impedit after the 6 Months, and he cannot have Writ of Right of Advowson because he never had Possession; Quod Nota. Br. Quare Impedit, pl. 29. cites 43 E. 3. 14. per Belk.

13. If A. seised in Fee of a Manor to which an Advowson is appurtenant, makes Composition with B. by Fine to present by Turn, by this Composition the Advowson is appurtenant every 2d. Turn, because it was never disappurtenant by this Fine but every other Turn, which belongs not to the Grantor &c. D. 259. b. pl. 20. cites 43 E. 3. 35. a.

14. Tho' the Advowson may be fevered and made in Gros, this ought to be when the Owner is seised of the Land to which &c. but not by Presentment when he is out of Possession; Per Danby Ch. J. Quod Nota good Reafon, and Needham J. agreed. Br. Præsentation, pl. 39. cites 9 E. 4. 38.

15. If Advowson which was appurtenant be reserved and excepted in the Partition of the Land, this makes the Advowson in Gros notwithstanding it was appurtenant before. Br. Præsentation, pl. 24. cites 2 H. 7. 5.

16. A seised of a Manor, with Advowson appurtenant, may give Part of the Manor to which &c. with the Advowson or Villein, to J. S. and this makes it appurtenant to this Parcel. Br. Incidents, pl. 15. cites 4 H. 7. 10.

17. If Things are appurtenant to a House, yet if the House falls, the Br. Bar, pli Things remain appurtenant to the Soil where the House stood. Br. Incidents, pl. 40. cites 16 H. 7. 9.

18. A seised of a Manor to which an Advowson is appurtenant, eüsefts D. 43. b. B. by Deed of one Acre, Parcel thereof, and by the same Deed grants the Advowson. The Advowson shall pass as in Gros; for they are several Grants, tho' but one Deed. Arg. 4 Le. 216. 217. pl. 349. in Case of Long v. Hemings, cites 33 H. 8. D. 48.

19. If an Advowson be appurtenant to a Manor, by the Grant of the Manor cum pertinentis the Advowson paffes, but not by the Grant of an Acre of Land, Parcel of the Manor cum pertinentis; per Williams J. Bullif. 35. Trin. 8 Jac. Anon.

20. In Case of a Fine levied of the Manor, if the Advowson be not specially named, nor cum pertinentis, the Advowson will not pass. Arg. Bullif. 101. cites 12 E. 1. Fitzh. Tit. Grants, pl. 87.

Apportionment.

22. The King granted the Manor to J. S. for Life, except a
Advocatenion. This is only a Disappendency pro tempore; per to
23. The King granted the Manor and Advowson to J. S. to be held by
several Tenures, the Manor in Chivalry, and the Advowson in Socage;
but the Juttices agreed, that there may be several Services, and yet the Manor and the Advowson not sever'd. Het. 14. Pashc. 3 Car. C. B. cites the Lord St. John's Cafe.
24. Bargain and Sale of a Manor, to which an Advowson is appendant,
by Indenture not inrol'd, does not pass the Advowson; for it was not
intended to pass as sever'd, but as appendant, and as appendant it cannot
pass; for the Manor does not pass. Jenk. 265. pl. 68.

The Advowson by
this is be-
come in
Grofs; but
when the
Condition
is perform'd,
and the Deed avoided, it is appendant again. Arg. Show. Parl. Cafes, 218. in S.C.

For more of Appendant [or Appurtenant] in General, see Common
Grants, (A. a) (A. a. 2) Houses, Incident, Manor, and other Pro-
per Titles.

Apportionment.

(A) Of what Things there shall be an * Apportionment.

* Apportion-
ment signifies a Divi-

1. No Apportionment shall be of a Rent-charge. 32 M. 10. Ten-

port C. r. Avowry 226.

Apportion-

ition or Par-

tion of a Rent, Common &c. or a making it into Parts. Co. Litt. 147. b.


The Statute of Quia Emptores terrarum does not aid Rent-charge; and before the said Statute it was
the fame of Rent-service as it now is of Rent-charge; but by the said Statute Rent-service shall be ap-
portioned, be it by the Purchase of the Lord, or by any other; for the Statute is only for the Los of
the chief Lord. Br. Apportionment, pl. 28. cites Fitzh. Tit. Avowry, 120. 241. —— If Grantee of a
Rent-charge possesses Parcel of the Land, all the whole Rent shall be extinct. Mo. 93. in pl. 251.

Says it was agreed in C. 3.

See Tit. Rent (G. a) ——Rent for
a Warren (which is in Nature of a Sum in Grofs) by the Grant of the Reversion of Part, tho' the Lea-

fe
Apportionment.

3. Common apportion to Land, for Cattle lechant and couchant* * Cro. C. upon the Land by Grant, shall be apportioned, if Part of the Land is granted over to another. [br. 13 Car. B. R. between * Sacke1, word and Porter, per Curiam, adjudged, upon a special Verdict. [br. v

4. Services shall be apportion’d upon Diffusin. Br. Ce.lavit, pl. 27. Suit of Court cites 8 E. 3. is not apportionable; but if the Part of one of the Joint tenants, who holds by Suit, comes to the Lord, all the others shall be discharged of the Suit. Br. Apportionment, pl. 2. cites 40 E. 3. 40. — S. P. because the Lord cannot take the Suit, and be contributory to himself of the Suit. Br. Apportionment, pl. 17. cites 34 Afft. 15.

5. An Affent cannot be apportioned. Arg. Le. 129. 132. in Case of Coulbourn v. Burniones; as if the Reversion of 3 Acres is granted, and the Tenant for Life attorns for one Acre, it is good Attornment for the Whole; for he cannot apportion his Affent; Cites 18 E. 3. Variance 63.

6. A Man retained another to serve for a Year for 10l. at two Feasts, the Br. Contrarfs, Master died after the first Feast, the ser vant shall not have Wages but for the first Feast; and if he be retained for one Year for 10l. and departs before the End of the Year, he shall not have any Wages; for it cannot be apportioned; because it is not due till the End of the Year, because Contrarfs cannot be apportioned. Br. Apportionment, pl. 26. cites 27 E. 3. 84.


8. In Scire Facias; if a Man leases Land rendering Rent, and if the Rent be arrear by 4 Days that he may re-enter, and that the Lessee shall S. P. render 40 s. Nonine Paine for the Rent arrear, the Leffor re-enter’d into two Acres, but not into all, he shall not have the entire Paine, but feudum ratain. per Hull; and if it seems that a Penalty shall not be apportioned. Br. Apportionment, pl. 15. cites 1 H. 6. 4.

9. Where a Man is bound to repair a Bridge by Reason of his Land, and aliens part of it, he shall be rated according to the Portion. Br. Apportionment, pl. 21. cites F. N. B. 234. 235.

10. An Obligation cannot be apportioned, because it shall be forfeited, or faved in all. Nota. Br. Apportionment, pl. 1. cites 20 H. 6. 4. on. pl. 6. cites 6. 23.
Apportionment.

Br. Contract. 11. A Contrat cannot be severed nor apportioned, therefore on Lease of a Chamber and boarding of the Lease, rendering Rent for the Chamber and Boarding 6 s. by the Week, if he pleads in Debt upon it, quod non diminit Cameraum, this goes to all, because a Contract is entire, and if it cannot be di- vided; admitted by three Justices. Cro. E. 51. 1. S. Hill. 41 Eliz. in the Case of Ardes and Wat- kins.—The Law is, that no Contrat can be apportioned; per Cur. Mo 110. in pl. 260. patch. 20 Eliz. Anon.—The Duty arising upon Contract personal, is not apportionable. Finch’s Law. Fol. Lib. 2. cap. 15. 45. b.

Finch’s Law. 12. Upon sale of a Thing of his own, and of another Thing of another Man’s for 10 l. the Owner retakes his Thing, yet the Buyer shall render the entire Sum to the Vendor. Br. Contract. pl. 16. cites 9 E. 4. 1.

Br. Labour- ers. pl. 40. cites S. C.—If a Man re- tains a Ser- vant after the Year, he shall not have any Thing, because it is not due till he has served; and it is not like where I fell you a Horfe for 10 l. there the 10 l. is due immediately; Contra here. Br. Apportionment. pl. 15. cites 10 E. 4. 18.

Br. Apportion- ment. pl. 27. cites S. C.—Br. Dette. 14. In Debt a Man seized in Right of his Wife, sold 400 Oaks for 20 l. and the Venue took 200 in the Life of the Feme, the Feme died, the Baron was not being Tenant by the Curtesy, the Heir entered, and the Baron brought Debt of 10 l. for the Nendec had paid the other 10 l. in the Life of the Feme; and per tot. Cur. because the Contrat was good at the Time of the Bargain, and is entire, and cannot be severed, he has Share of the Oaks—and might have taken all the 400 in the Life of the Feme, and did not, therefore his Folly, and he shall render the entire Sum. Br. Contract. pl. 26. cites 18 E. 4. 5.

Br. Extinguishment, pl. 49. cites 33 H. 8. S. P. So if he gives Land in Tait, and the Leafe enters Part of the Land to the Donor &c.

See Tit. 15. There was no Apportionment of Rent at Common Law by the Act of the Party, but by Act of Law. D. 4. b. pl. 4. Trin. 24 H. 8.

16. If a Man leaves Land for Life of Years, rendring Rent with Clause of re-entry, if the Leffer enters into any Part of the Land, he cannot re-enter for Rent Arrear after, by Reason that Condition cannot be apportioned, nor the Rent. Br. Condition. pl. 139. cites 33 H. 8 and 9 E. 4. 1.

See Tit. Condition. (G.d.) —S. P as by Defent. —The Leffer having Issue two Sons dieth, each of them shall enter for the 2. 3. 20. Condition broken, and likewise a Condition shall be apportioned by the Eliz. C. B. Act and Wrong of the Leffe. Co. Litt. 215. a.

17. By All in Law, a Condition may be apportioned in the Case of a common Peron, as if it a Lease for Years be made of two Acres, one of the Nature of Burrough English, the other at the Common Law, and Godt. 5. pl. the Leffer having Issue two Sons dieth, each of them shall enter for the 2. 3. 20. Condition broken, and likewise a Condition shall be apportioned by the Eliz. C. B. Act and Wrong of the Leffe. Co. Litt. 215. a.

Cafe at Common Law is a Condition apportionable by the All of the Party so that Parcel shall remain, and Parcel shall cease; by Periam J. and cites many Instances. Mo. 203. pl. 539. Patch. 27 Eliz. in Knight’s Cafe.

18. A
Apportionment.

18. A Relief cannot be apportioned; so that if two Coparceners are, and one of them dies, her Heir of full Age, she shall not pay a Relief; for if the should pay any at all, she should pay but a Moiety, which the cannot do for the Reason above, and that because Coparceners are but one Tenant to the Lord; held per tot. Cur. 3 Le. 13. pl. 30. Mich. 8 Eliz. C. B. Anon.

19. Money payable for Tythes by Composition, on Sale of Part of the Land shall be apportioned; and per Cur. each Purchaser shall pay his Share, and an Auditor was aligned to apportion it. Savil. 4. 5. pl. 12. Pach. 22 Eliz. Anon.


Bradshaw's Case, is, that Unity extinguishes Prescription for Common appendant, but not Common for Arable Land &c.

21. A Contrai\ by the Father with another to board his Son for a Year, S. P. Sid. is well apportionable, because it being for Tabling which he had taken, Mich. 16 there ought to be Recompence, altho' be departed within the Year, or that the Contrai\or died within the Year; and Judgment for the Plaintiff. Cro. E. 575. 756. pl. 20. Pach. 42 Eliz. C. B. Brett v. J. S. and his Wife. Gunstone, where he put his Daughter abroad to be instructed in Needlework for a Year, and Judgment for the Plaintiff, because if there be any Variance from the Agreement, it is to the Defendant's Advantage, viz. to pay less than he ought; for the Effect is, that he shall pay for her Board not exceeding a Year; and if she was there for a Month, and then had run away or died, the Defendant should be charged for it within this Assump- fit.—S. C. cited Arg. 3 Mod. 154. in the Case of Plymouth (Counties) v. Throgmorton, as adjudged, because, as the Book says, if there be any Variance in the Agreement it is for the Advantage of the Defendant; but in the principal Case there, Judgment was given for the Defendant.

22. Fold Courses, appurtenant to a Manor, for 300 Sheep in 70 Acres of Jo. 275. pl. Land, being in Nature of a Common certain, may be well divided, or annexed to Parcel of the Manor; and to a Judgment in C. B. affirmed. Cro. C. 432. pl. 2. Hill. 11 Car. B. R. Spooner v. Day.

23. An Attorney covenanted to allow his Clerk 2 s. for every Quire of Paper which he should copy out. In Covenant by the Clerk, the Breach of it was, That he copied out a Bill containing 4 Quire and 3 Sheets, for which 8 s. 3 d. was due to him, which the Defendant had not paid. After Verdict and Judgment for the Plaintiff in C. B. Error was brought, and affi'd that there could be no Apportionment in this Case, the Co- venant being to allow 2 s. for every Quire, and no Mention of pro Rata, and therefore Judgment was reversed. All. 9. Pach. 23 Car. B. R. Needler v. Gueit.

Breath thereupon, whatever the Intent of the Parties was that were Parties to the Articles.—S. C. cited Sid 226. pl. 19. Mich. 16 Car. 2. B. R. and the Court agreed that such Declaration was ill, because it did not purifie the Agreement.—S. C. cited 3 Mod. 155. Arg. as reversed, because it was an entire Covenant, of which no Apportionment could be made pro Rata.

24. A. appointed C. to receive his Rents, and promised to pay him 100 l. a Year for his Service. In 3 Quarters of a Year afterwards A. died, during which Time C. served him, and demanded 75 l. for the three Quarters, and had Judgment in C. B. by Nil dicit. Upon Error brought it was argued, that without a full Year's Service nothing could be due, and that it is in Nature of a Condition precedent; that if Rent be referred yearly, and at the End of 3 Quarters the Tenant be evtited, the Lettor shall have no Rent; for Rent shall never be apportion'd in respect of Time, and so it is of Wages, Annuity, and Debt; Annual nec Debitum uterum. Hence the Action not well

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brought for Judgment was reversed. 1 Salk. 65. pl. 1. Hill. 3 Jac. 2. B. R. Plymouthe (Counthys) v. Throgmorton;

and for this Reason the Judgment was reversed, Nisi &c.—This is now alter'd as to Rent by Statute of 11 Geo. 2. cap. 19.

Authority (as of a Sheriff to his Under-sheriff, not to meddle with)

25. A Power is apportionable, but a Seigniory or Condition is not; As a Warranty, tho' it be destroy'd as to the Fee-simple, yet continues annex'd as to the mean Estates; per Hale Ch. B. Hard. 416. Patch. 17 Car. 2. in Cam. Scacc. in Case of Edwards v. Slater.

Executions beyond such a Sum cannot be so apportion'd. Nay 51. in Case of Burchier v. Wilfman.


Ibid. in Marg. is cited Yelv. 134. which is the Case of Bettifworth v. Campion, Mich. 6 Jac. 2. B. R. but there the Agreement was laid to be to pay Secundum Ratum of 40s. to Tun, and therefore the Declaration being there, it was adjudged that the Defendant ought to pay for odd Pounds &c. over and above the Tun.

Carth. 466. 

26. An Agreement was laid to pay 2l. for every Tun of Iron which should be deliver'd &c. The Declaration was, that be deliver'd &c. one Tun and a half. Tho' there was a Verdict for the Plaintiff, yet it is cited Sid. 225. in pl. 19. as adjudged to be ill.


28. Where there are two Parceners, and one will take Advantage of a Forfeiture, and the other not, there must be an Apportionment. 1 Salk. 186. per Powell J. Trin. 10 W. 3. C. B. in the Case of Etcourt v. Weekes, cites 1 Inft. 355. Kelw. 105.

Finding that Gentlemen are in great Expectation of the Case of Worth v. Diner, tried at Guild-hall in December last, and recommended at the same Time by Sir John Strange (of Counsel against the Defendant) to be inferted in his Abridgment, I fully intended to have oblig'd those Gentlemen with it under this Head and this Letter of Title Apportionment; and for that Purpose thought it could not be improper to crave his Assistance, which I did by a Letter to him as follows, viz.

Sir,

Being assured by several Gentlemen, as well as News-Papers, of the Honour you did me publicly at Guild-hall in last December, to recommend my publishing, in my Abridgment, the Case then tried of Worth v. Diner, I must intreat the Favour of your accepting my Thanks for it.

But as I cannot do myself that Honour of complying with your Recommendation, without being supplied with a true Report of the Case, I must beg the Favour of your supplying me with it, and do assure you I will take care to publish it.

I have likewise this further Favour to desire of you, that you will point out to me some Cases, or One single Case at least, out of the Year-Books, Fitzherbert, or Brooke, or any Book of Reports since, down to this Time, wherein it has been adjudged that a Contract for Wages is apportionable; because I perceive some Gentlemen have always taken the Law to be otherwise, and I would willingly have the Point clear'd up to them, which my next Volume will give me an Opportunity of doing, under the Head of Title Apportionment, and you will thereby highly oblige. Sir,

Inner-Temple, 18 June, 1747. Your most Obedient &c.

"In
In Consequence of which Letter, a Gentleman, at Sir John's Request, came to me about 10 Days after the Receipt thereof, to acquaint me that Sir John had look'd over his Papers, but could not find any Memorandums to enable him to give me a Report of the Case; nor did his Memory otherwise serve him for the doing it. Whereupon I told the Gentleman, that there was another Part of my Letter defiring the Favour of some one Case as to the Point of apportioning Contracts for Servants Wages; but as to that, Sir John had sent me no Answer. I then mention'd, that I never yet had met with any Case that would support such Apportionment, nor could I find any Gentleman at the Bar that had, tho' I had ask'd several; That I thought every Gentleman ought to do the best he could for his Client, so far as was consistent with Justice; but he ought to stop there; that any proceeding further, and procuring Injustice to the other Side, is utterly unjustifiable; and that, if there was no Case to support such Apportionment, the Verdict was against Law.

As I have not heard from Sir John since, I am left to suppose that he has not yet met with his Papers, or found any Case to support what he had laid down so earnestly and preingly to the Jury, that they were guided by him, and not by the Court, who (as I am assured by all the Gentlemen that I ever yet heard speak of it) fum'm'd up the Evidence strongly for the Defendant.

That the Agreement for a Year's Service was fully proved, both under the Hand of the Plaintiff, and likewise from his own Mouth, Positively, and without any Salvo, is Matter of Fact, and undeniable, viz. That he had agreed with the Defendant for so much a Year from the Midsummer following. Not a Word has been fuggeled to be then dropt, to qualify or abridge the Agreement, whereby it might be construed otherwise than for a Year absolutely. But in order to get over this, and to enervate such strong and positive Proof, Recourse was had by Sir John to the private Thoughts and Imagination of the living Witnesses, (and that without fuggelling any Thing to ground them upon) viz. Whether they believed the Intention was, that the Plaintiff should have no Wages if he went away before the Year was ended; and this was so much harangued upon, that the Jury were supposed to be influenced and inveigled by it.

Upon this Question being started to one of the Witnesses, I am assured his Answer was, That he knew not what to say to it; and that the Court, in summing up the Evidence, took Notice of that Answer, and said, Nor indeed did He know how he should.

There is no considering Man but will soon see the Consequence of introducing Belief and Imagination for Evidence, in Opposition to Positive Proof; that it must be very fatal and dangerous, as well to the Lives as to the Property of Mankind, and may well be dreaded, and therefore hope will not be repeated.

If Sir John shall please, at any other Time, to favour me with a true Report of this Case of \( \text{Worth} \& \) Diner, or of any Case to support it, I shall have other Opportunities of inferring it; but should I fail of that Honour, I shall endeavour that the Case shall not be lost to the Profession and the Publick.

As Sir John call'd upon me so publickly to print this Case, I could not (in Justice to myself) say less than I have done.

Many Gentlemen continue this as an intended Slur upon the General Abridgment; but I should rather think, that no Gentleman at the Bar would behave with so little Decency to so many Great Men, who have approved and encouraged the Work. And I do hereby most solemnly declare, that I do not know that ever I had done, said, or wrote any Thing which might any ways offend him; and for the Truth thereof I appeal to the whole World.

For more of this, see Tit. Attaint, Contract, Evidence, and other Proper Titles.

D (B) What
(B) What Act or Thing will make an Apportionment. [Or in what Cases there shall be an Apportionment.] Acts of the Parties.

1. If there be Lord and Tenant of 20 Acres, by Fealty and 10 s. Rent, and the Tenant alien's 2 Acres in Fee, the Alien shall hold the 2 Acres pro particula, by the Statute of Quia emptores terrarum & the Rent shall be apportion'd according to the Value. Cro. E. 593.

2. If a Man leases for Years Freehold, and also Copyhold Lands, by the Licence of the Lord, referring a Rent; and after grants the Reversion of the Freehold Land to another, and the Lessee attorns, the Rent shall be apportion'd; for this waits upon the Reversion. Mich. 40, 41 El. B. R. between Collins and Harding.

3. So if the King's Tenant leases for Years, rendering Rent, and after grants the Reversion of 2 Parts to another, and dies, and his Heir is in Ward for the 3d Part of the Reversion which descends, and the King grants the 3d Part over, the Grantor shall have an Action of Debt for the 3d Part of the Rent; for it shall be apportion'd. Mich. 43, 44 El. B. R. between Clench and Laffels, adjudged.

4. If Lessee for 20 Years leases for 10 Years, rendering 341. 6s. 8d. and after devives 20 s. of this Rent to 3 Persons, to hold to each of them one third Part divided, and dies, this Rent shall be apportion'd according to this Devise, and each Devisee may have an Action of Debt against the Lessee for his Part, lessee, 65. 8d. tho' thereby the Lessee may be charged in several Actions; for it seems it might be so divided upon a Grant with Attornment, and in the Devise an Attornment is supplied. Mich. 40, 41 El. B. R. between Arge and Watkins, adjudged. Will. 41 El. B. R. the same Case.

Cro. E. 641. pl. 8. Ardes v. Watkins, S. C. Clench and Fenner. Held accordingly, because it is a Contract Rent; for if the 3d Part of a Reversion is granted of a Lease for Life or Years, and the Tenant attorns, the Rent is apportionable, and he chargeable to 2 Diffirest by his own Act; and cites 8 E. 3. Quia Juris clamat; and so upon the Queen's Grant, where Attornment is necessary.

Cro. E. 651. pl. 8. Ares to Watkins, S. C. Gawdy and Fenner. Held it apportionable, for the Reason here given; but Popham and Clench contra, & adjudg'd. — Ibid. 641. pl. 8. S. C. and then Clench agreeing with Gawdy and Fenner, Judgment was enter'd for the Plaintiff with the Consent of Popham, in regard the other 3 agreed.— No. 539. pl. 737. S. C. says that Popham agreed that the Rent is divisible, and purses without Attornment; but that there is no Privity for an Action; and Judgment for the Plaintiff.
5. If Leissee for Years of Land, rendering Rent, accepts a new Lease from the Lessor, of Part of the Land, which is a surrender of this Part, the Rent shall be apportioned; for this comes by the Act of the Parties. Hill. 43 El. B. R. between 
Fife and Campton, per Curtain.

6. If a Man leases two Messuages in London divisible rendring 
Rent, and after the Leissee devifes the Reversion of one Messuage to 
To a Stranger, the Rent shall be apportioned. Patch. 1 Jac. B. 
dubitat.

7. If a Man leases three Acres for Life, or Years rendring Rent, 
and granted the Reversion of one Acre, the Rent shall be apportioned. Hill. 10 Jac. B. Co. Lit. 144. and there cites Patch. 39. 
233. B. R. between Collins and Harding, Hill. 42 El. B. between 
†Ewer and Moyle. Trin. 43 El. B. Rot. 243. Contra Hill. 6, 7, 6. 
Bendows.

† Cro. 2. 771. pl. 15. S. 
C. but S. P. does not appear—S. P. 8 Rep. 79. b. in Wyat's Wild's Cafe.—S. P. by Coke Ch. 
J. accordingly 2 Brownl. 298.

8. If Tenant by Knights Service by his last Will, devifes the Re- 
version of two Parts, the Devisee shall have two Parts of the Rent. 
Co. Lit. 148. cites Trin. 43 El. Rot. 243. between *Welf and Lef- 
sels, and Hill. 42 El. Rot. 108. B. between †Ewer and Moyle, Co. 
Bagnia Charta, 504 contra P. 6. 6 I 7. 6. † Bendows. 
58. cites S. C. and S. P. accordingly. 
† Cro. E. 771. pl. 15. S. C. adjudged for the Avowant. 
—The Cafe of Ewer and Moyle is in several other Books, but not the same Point.—S. C. 
cited 13 Rep. 58. that the Avowry is good. 
§ S. C. cited and denied. 2 Inf. 504.—S. C. cited and denied 13 Rep. 9, 53. 
A Devise was of an entire Reversion and Rent, which was sold for a third Part, because it was helden in 
Capite, and Debt was brought for two Parts of the Rent, and held maintainable. Cro. E. 652 in pl. 8. 
mentions it as a Cafe cited as adjudged Patch. 25 Els. Rot. 544.—S. P. and by Anderson J. If the 
Devise is good but for two Parts then is the Reversion apportioned, and the Rent destroyed. Le. 
310. in pl. 429. Patch. 33 Eliz. C. B. Obiter.—

9. If the Grantee of 10. Rent out of Land grants 51 thereof 
to the Grantor, this does not extinguish the Residue. Trin. 1 Jac. 
B. between Allen and Payne, dubitat. 

10. [So] If the Grantee of a Rent out of Land releases Part of 
the Rent to the Grantor, per this does not extinguish the Residue, 
but it shall be apportioned. Tr. 1 Jac. B. between Allen and Payne. 

Cur. obiter, that by the Release of Part of one entire Rent, all it gone, and there can be no Apportion-
ment.—But it was said by Drew Arg. what if the Grantee of a Rent charge releases Parcel of the 
Rent to the Grantor, or his Heirs, the Residue may be apportioned, and the Land shall remain charge-
able still for that Residue; but if he releases one Acre Parcel of the Land charged, then all the Rent is 
that which is his own, viz. the Rent, and not with the Land, as in Cafe of Purclial of Part. Co. 
Lit. 148. and so he says it was helden, Hill. 46 Eliz. in C. B. which he himself heard and observed. 
—See Tit. Rent. (B. a.)

11. But otherwise it is of a Common. Trin. 1 Jac. B. said to be 

Cro. E. 193. 
503 pl. 55. 
Mich. 39 & 
40 Eliz. it 
was said per 
Adjudged.

so. 5 Eliz. C. B. Rocheman v. Green, held by 2 J. contra Walmsley, that a Release in Part discharges the 
Whole; for the Common is entire through the whole Land, and Judgment accordingly.—Nov. 6. S. C. 
and the Court held the Common extinct.—Goldsb. 114. pl. 6 it is said, Arg. that if a Commoner takes
Apportionment.

12. If a Share leaves for Life, or Years reserving a Rent, and after the Lessee surrenders Part of the Land to the Lessee, the Rent shall be apportioned. Co. Lit. 158. Co. B.agna Charta. 504.

S. P. contra per Cur. Obiter. Godb. 94. pl. 107. Mich. 28 & 29 Eliz. C. B.—Mo. 93. in pl. 211. S. P. and that the Rent shall be apportioned; cites it as reported to have been agreed in C. B.—Mo. 114. pl. 255. Patch. 20 Eliz. S. P. Obiter by Dyer and Manwood.


—S. P. accordingly by Dyer and Manwood. Mo. 114. in pl. 11. Patch. 20 Eliz.

14. So if the Lessee enters for a Forfeiture into Part of the Land, the Rent shall be apportioned. Co. Lit. 148.


D. 56 a. pl. 15. Trin. 55. Part of the Land is evicted, or recovered by a Stranger by elder Title, the Rent shall be apportioned. D. 35. 8. 36. 14.


17. If there are two Jointtenants of a Term, and the one assigns over his Part to the other, it seems, that the Rent reserved upon this Term shall not be apportioned; for the Lessees by their own Act cannot divide the Rent, by which the Lessee should be put to separate Distresses for his Rent. Dubitatur. Trin. 14 Jac. S. B. by the Bailiff of Ipswich against Martin and Parker.

18. If a Man seiz'd of 60 Acres of Land, prescribes to have Common in other Land, for all his Cattle Levan and Coochiant thereupon, and he makes a Fee-farm in Fee of five of these Acres, his Forester shall have Common proportionably pro Rata; for the Common is joint and several, and no Surcharge or Debt is due therefore to the Tenant. Mich. 7 Jac. between Moreton and Wood adjoin'd, cites Hill. 7 Jac. B. per Coke.

19. [So] If a Man prescribes to have Common to two Parts of Lands, for 4 Beasts, 4 Horses, and 60 Sheep, seek'd when the Land to be S. C. is fowed, to have Common after the Severance of the Corn, and when the
Apportionment.

the Land is not sown, to have Common all the Year; and after he and Judges or, in Tail, rendering Rent, and the Leffe or Donne leaves it to diverse several Persons, the several Leffors shall not compel the Leffor or Donor to avow upon them by Portions. Quære. Br. Apportionment, pl. 18. cites 22.

21. If a Man purchases part of the Land wherein Common Appendant is to be had, the Common shall be apportioned, because it is of Common Right. Co. Litt. 122. a.


23. If a Man leaves the Land, whereof he is seised of Parcel by Dilettis, in such Cafe the Rent is illusing out of all the Land, and by the Entry of the Dilettis the Rent shall be apportioned; because the Leafe thereof was not void but voidable. Mo. 50. pl. 150. Pasch. 5 Eliz. per Dyer.

24. A seised of a Warren extending into three Vills in Fee made a Leafe, and 26 pl. thereof for Years by Deed, rendering Rent, and afterwards by Deed 39. cites Hill 6 & 7 the Grantor in one of the Vills to B. and the Leffe attorned.

The Court of C. B. held, that neither the Grantee or Grantor should seem to have any part of the Rent; for the Law is, that no Contraét can be apportioned. Mo. 115. pl. 260. Pasch. 26 Eliz. Anon.

Says Quære bene of this Case, for it seems that the Sum reserved is to Rent, but due annually to be paid to the Leffor, and is merely a Debt, though it is mentioned to be paid annually, — 5 Le. 1 pl. 1 6 E. 8. S. C. in the same Words with Mo. 115. — Ow. 10. cites S. C. as reported by Bandles in 14 H. 7. accordingly.

25. A lefted two Closes called W. to B. who grants all his Estate in one Goldsb. 44. of them to C. and in the other to D. — A. devised all his Land called W. in pl. 2. S. C. the Tenure of C. to J. S. who brought Debt for Rent against B. But for the Court held that the Rent should not be apportioned, because a Term Rhode held is out of the Statute. And at another Day Anderson Ch. J. laid, That it is not apportionable.

If the Leffor of two Acres grants the Reversion of one Acre, the whole — Le. 232.
Apportionment.

Arg. cites v. Wallinger.
S. C. as held that all the Rent was destroyed.

 Fol. 236.

* It seems that by this is intended that which is printed pl. 15, but I do not observe this very Point there. — See Tit. Rent (I. a) pl. 18. and the Notes there.

(C) By Act of God.

1. If a Man leaves Land for Life or Years rending Rent, and after part of the Land is surrounded by Fresh Water, this will make any Apportionment of the Rent, because the Soil remains, and the Lessee only shall have the Fish in the Water, and by ordinary Intendment this may be regained again. Contra 35 P. 8. D. 56.

2. But if a Man leaves for Life or Years rending Rent, and part of the Land is surrounded with the Sea, this will make an Apportionment of the Rent, for the the Soil remains to him, per the Water is part of the Sea, and so is Common to every Man to fish there- in as well as the Lessee, and by ordinary Intendment there is not any Possibility of regaining it. Contra 35 P. 8. Dier 56.

3. If part of the Land in Leave be burnt with Wildfire, per this will not make any Apportionment, for the Land remains notwithstanding, and cannot be so confirmed but some Benefice may be made thereof. D. 35 P. 8. 56. 14.

4. If the Land in Fee descends to two Coparceners, of which one had a Rent in Fee infusing out of the same Lands, and after they make Partition, the Rent shall be apportioned, that all descended to her per nie & per tute before the Partition, because this happened by Act of Law. 34 All. 15. adjudged.

5. If part of the Land out of which a Rent-chargue issues, descends to the Grantee of the Rent, this shall be apportioned, because it is by the Act of God. 34 All. 15. adjudged.

6. If Land held by Rent descends to two Coparceners, and after before Partition one grants over her part to a Stranger, the Rent shall be apportioned. 2 C. 2. Quorey 184. adjudged that an Actory upon both shall abate, because there ought to be two Adoptions upon them.

7. If
Apportionment.

7. If the Consonor of a Recognizance alien to several Men, and after part of the Land descends to the Cononsee, all the Land is discharged, because he cannot make Contribution, so that an Apportionment might be. 34 At. 15.

Debt is inire and cannot be extinguished in part but in toto. Br. Extinction, pl. 31. cites S. C.

— See Finns(A. b)

8. If Land for which Suit is due in several Men's Hands, and after part of the Land descends to the Lord, all the Suits is entire, and there can be no apportionment, because it is inire, and the one should do the Suit, and the other should make Contribution. 34 At. 15.


9. If Donee in Tail dies without Issue, the Donor enters, and the Feme of the Donee gets Dartor, or if Tenant in Fee dies without Heir, the Lord enters for Escheat; the Feme of the Tenant is endowed, by this the Feme shall render the third Part of the Services, because the Extinction is the Act of God. Br. Apportionment, pl. 17. cites 34 At. 15.

10. A Leaf was made of Land and of a Pack of Sheep, rendering Rent, S. C. cited All. 27.

All the Sheep died. Several Justices and Servants were of Opinion that the Rent was apportionable, and many others that it was not, but all thought that it was equitable and reasonable to apportion it. And afterwards the Case was argued in the reading of Moore the Lent following, and it seemed to him, and to Brooke, Hadley, Fortescue, and Brown Justices, that the Rent should be apportioned, inasmuch as no Default was in the Lease. D. 56. pl. 15. Trim. 35 H. 8. Anon.

(D) By Act of Law.

1. If the King's Tenant leaves for Years, rendering Rent, and after he'll grants two Parts of the Reversion to another, and dies, his heirs in Ward to the King, and the King grants the Ward of the Body and Land to another, and after Rent is arrear, the Patentee of the 3d part of the Reversion shall have an Action of Debt for the 3d part of the Rent, for it shall be apportioned. 9. 43. 44. Gl. 2. R. between Wold and Leases, per Curtiam adjudged.

2. If the Lands of a Monastery were granted to A. referring to 28 I. Lane 56 S. C. ordered accordingly.

Rent per Annum, for the 10th of all the Land according to the Statute of D. 8. and after B. grants the greater part of the Land to B. and after by Agreement between A. and B. B. used to pay 20 l. of the Rent per Annum for that which held, and after the Grantee is attainted, by which his part of the Land comes to the King; that all the 10th part was originally chargeable and leviable upon all and every Parcel of the Land, yet inasmuch as part is (*) come to the King, it shall be apportioned, and B. shall pay only his 20 l. as he paid before. 9. 8 Inc. Scaccario, Sir 7. Littleton's Case, adjudged.

3. If a Man, being seized in Fee of Black Acre, and possesed for 20 Years of white Acre, leaves both for ten Years, rendering Rent, and dies, by which the Reversion of one Acre comes to his Heirs, and the other Acre to the Executor, the Rent shall be apportioned, because
it happens by Act of Law. Dabitur Patron. 14 Jac. 3 R. between Wood and Carlton.

— Cro. J. 290. pl. 3. Hill, 13 Jac. 3 R. Moody v. Germon S. C. but as to this Point no Opinion was delivered; id. adjournatur. 3 Bullet, 153, 154. S. C. and the Court agreed clearly upon the Apportionment, that by the Act of Law this may well be, and that there is no doubt of it, but Judgment was given upon the Aburdity of the Words of the Condition, viz. (refrain) for (chaff) — Rol. Rep. 350, pl. 37. S. C. adjournatur; and ibid. 367; pl. 20. S. C. but; as to this Point, whether the Condition shall be apportioned the Court did not speak of it, because the Verdict found that the Lessee was pos-

sessed of part of the Land for Years to come, and of part in Fee, and made the Lease, and after died-

fied of the Reversion for Years, and therefore the Court seemed clearly that no Apportionment can come in Quetion; for it might be that he had surrendered or granted over the Reversion of the Term, and to the Condition fevvered by his own Act, and the Condition cannot be apportioned, and for this last Judgment was given clearly against the Plaintiff. — See Tit. Rent (B. a) pl. 5. S. C.

4. If a Man leaves for Years, reserving Rent, and after one Mioery of the Reversion is extended upon an Elegit, he shall have one Society of the Rent, and it shall be apportioned. Hill. 10 Jac. 2. Sir Thomas Campbell's Case, per Curiam revised.

5. If the Husband makes a Lease for Years, reserving Rent, and after his death his Wife recovers the 3d part of the Reversion for her Dower, she shall have one third part of the Rent, and shall have an Action for it. Hill. 10 Jac. 26. per Curiam.

6. So if the Feme be endowed of the 3d. part of the Rent-service in Fee, the shall abow for the 3d. Part of the Rent, as if the Tenant holds by 3 Pence, the shall abow for 1 Penny. 24 P. 8. Brook Aboardy 139.

7. A Feme who had a Rent-charge married with the Tenent, the Baron died, the Feme disfroud and made Aowory, after which she was endowed of the same Land, and by the best Opinion the Rent shall be apportioned. Br. Apportionment, pl. 20. cites 5 E. 2. and Fitzh. Aowory, pl. 206.

8. If Land descends to one Daughter, and the Seigniory of it descends to her and to another Daughter, the Seigniory shall be apportioned, and shall not be extinct but for the Mioery. Br. Apportionment, pl. 17. cites 34 Aff. 15.

9. Where the Lord purchases the Land, and the Feme of the Tenant is endorsed after, the shall render no part of the Services, because the Act of the Party. Br. Apportionment, pl. 17. cites 34 Aff. 15.


11. At Common Law, if A. had made Leafe of 2 Acres, one in Borough Englishe, and the other in Gevelkind, rendring certain Rent, and had Issue 2 Sons and dies, in this Case the Rent shall be apportioned. D. 4. b. pl. 5.

12. A. has Common of Pature fauns Nunsme in 20 Acres of Land, and 10 of those Acres descend to A. the Common fauns Nume is intire and uncertain, and cannot be apportioned, but shall remain; but if it had been a Common certain, (as for 10 Beasts) in that Case the Common should be apportioned; and so it is of a Common of Estates, of Terra-

ry, of Psichary &c. and yet in none of these Cases the Descent, which is an Act in Law, shall work any wrong to the Tenant, for he shall have that which belonged to him; for the Act in Law shall work no wrong. Co. Litt. 149. a.
(E) How it shall be made. See Rent
(E. a) (F. 4)

1. The Court in an Action of Debt for all the Rent cannot make an Apportionment upon Demurrer, for it ought to be done by the Jury. Hill. 43 Eliz. B. R. between Fish and Campion, per Curiam.

2. But it seems, that a Sum may bring an Action of Debt for all the Rent, and if the Jury see Cause of Apportionment, yet the Plaintiff shall recover so much as he ought to have upon the Apportionment. Dubitatatur. Hill. 43 Eliz. B. R. Pashch. 14 Jac. B. R. per Coke.

S. P. by Coke Ch. J. Roll Rep. 368. Pashch. 14 Jac. in Cafe of Moody v. Gar-

If in Case where Rent referred upon a Lease shall be apportioned, the Lessee in an Action of Debt demands more than he ought, yet upon Nil debit he shall recover so much as shall be apportioned and attested by the Jury, and be barred for the Refusals. 5 Rep. 26. a. per Popham Ch. J.

Sid. 6. in pl. 1. Arg. cites this Opinion of Popham. S. P. resolved accordingly. Brownl. 53; Hill. 10 Jac.


4. So if the Lord disfains for Rent, and the Tenant makes Remonstrance, and the Lord brings an Allie, and the Tenant pleads no Tort to the Lord had distrain'd for 10 S. Rent, yet if there ought to be an Apportionment, and not so much due, the Jury shall apportion it. Co. H. Ch. 503.

5. But when a Rent is to be apportioned, he who will demand the S. C. and S. P. Rent, by Force of a Condition to avoid the Eftate, ought to demand by Coke, Ch. J. Roll Rep. 363. pl. 23. Pashch. 14 Jac. B. R. in Cafe of Moody v. Gar. Non.—S. C. and S. P. by Coke Ch. J. for Conditions are odious in the Law, and therefore to be taken strictly; and that in such Case, the Plaintiff ought to be sure, as it were, to hit the Bird in the Eye, or not to re-enter. 3 Bulst. 153.

6. But if there be a Cause of Apportionment of a Rent Service, and the Lord avows, or makes Title in an Allie, for less Rent than he has made Title to have. Co. H. Ch. 504.

Garnen, says, that in that Case the Plaintiff's Demand was of less, than upon the Apportionment he ought to have, but that nothing was laid to it, whether it was good or not.

7. Lease was made of Land and House for 21 Years rending one entire Rent for the Whole; afterwards, Lessor granted the Reversion of the Land; Lessee attorned. Afterwards the Lessor and Grantee, with Consent of the Lessee, made an Apportionment of the Rent; viz. that the Lessor should have so much, and the Grantee so much. Dyer and Manwood held the Apportionment good. Mo. 114. pl. 255. Pashch. 20 Eliz. Anon.
MONEY was covenanted to be laid out on Land to be settled to the Use of A. for life, Remainder to the first &c. Son of the Marriage in Tail Male, Remainder to A. in Fee; and in the mean Time, the Money being 10,000l. was to be placed out upon Securities, and the Interest arising, to be paid to such Persons as should be entitled to the Rents of the Lands, when purchased and settled according to the Limitations. There was no Life of the Marriage; the 10,000l. was placed out on a Mortgage, and the Interest payable half Yearly. A. died in the broken Part of the half Year. Lord Macclesfield said (as the Reporter says he understood him) that tho' A. died in the broken Part of the half Year, yet, this Interest should not be taken as a Rent, but should be apportioned, and a Proportion go to A.'s. Administrators.


By a Trust in a Marriage Settlement, Portions for Daughters were to be paid, payable at 18, or Marriage; and Maintenance in the mean Time, payable half Yearly at Lady-Day and Mich. until the Portions become payable. The eldest Daughter attained 18 in August; the Question was, if any Proportion of the Maintenance was to be paid from the Lady-Day, to the Time in August? And the Matter of the Rolls decreed Maintenance, to be paid for that Time in Proportion; and said, that Maintenance is always favoured, being for the daily Subsistence of Children, and not like Interest, which is only for Delay of Payment of what is due; whereas, in this Cafe, the Portion is not due till 18.


Upon a Petition at the Rolls by Sir Robert Raymond, Ch. J. and Ventris Esq; Administrators with the Will annexed to the late Lord C. J. Holt, and being also appointed Trustees by the Court, to execute the Trusts of the said Will (the Executors and Trustees by the said Will having renounced their Trust) for Direction of the Court on this Cafe, viz. The Residue of the Tenant's personal Estate was decreed to be laid out in Purchases of Land, to be settled according to Directions in the Will; and until proper Purchases could be made, the Money was to be put out in Government or other Securities, with the Approbation of the Matter; and the Interest of the Money was to be paid to the Trustees to be accounted for by them to such Persons as should be firdt and foremost entitled to the Rents of the Lands, when purchased, according to the Will &c.

Part of the trust Money was invested in South Sea Annuities; Mr. J. H. being Tenant for Life (with Remainder to his Brother Mr. R. H.) died 25th, of January, 1728. The Widow and Administratrix of J. H. claims an Apportionment of the half Years Dividend or Annuity, due and paid the Lady-Day next after her Husband's Death, as Interest due to him, at the Day of his Death; on the other Hand, R. H. as next in Remainder, infils, that in Regard his Brother J. H. the Tenant for Life, died before Lady-Day, 1729. when the half Year's Dividend or Annuity became due and payable, he, as next in Remainder, is entitled to the whole Dividend, as he would have been to the whole half Year's Rent, if the Money had been laid out in Land. It was ordered, that the said half Year's Dividend should be apportioned by the Trustees, and that so much thereof, as by Computation was due to J. H. at the Day of his Death, should be paid to the Administratrix, and the Refidue to R. H. the next in Remainder; for that these Annuities are in Nature of Interest, which tho' payable but half Yearly (as Interest is often referred on Mortgages, and other Securities) yet, where
Intereft is given for Life, it is always computed to the Day of the
Death of the Tenant for Life, or to the Day of paying the Principal.
But as to another Claim by her as Administratrix to her Husband, as to the
growing Intereft of 6000l, South Sea Annuities, which were held by the
Trustees 11th August 1727, in Order to raise Money for a Purchafe,
from the Lady-Day next before such Sale; the Court was of Opinion, that
the was not entitled to any Allowance, for Intereft of that Sum, tho'
the Trustees having purchafed the fame in the Middle of the half Year,
when three Months Intereft had incurr'd upon them, and Mr. J. H.
had made an Allowance for fo much Intereft as was incurr'd at the
Time of the Purchafe, out of his Estate for Life, and the Sums so de-
ducted by the Trustees out of the next Dividend, were added to the prin-
cipal fruit Money; yet the Court would not make her any Allowance,
for the Intereft incurr'd from Lady-Day 1727, to August 12th following,
when the Annuities were sold; because they being sold to make a
Purchafe of Land, J. H. the Tenant for Life, would be entitled to the
growing half Year's Rent at Michaelmas, in Lieu of Intereft,
and ought not to have both; Per Jekyll, Mafter of Rolls. M. S., Rep.
Hill. 3 Geo. 2. Raymond Ch. J. and Ventris.

Apprentice.

(A) Who shall be said to be.

1. Covenant between the Mafter and a third Person, the Servant not being Party, makes no Apprenticeship. 2 Salk. 479. pl. 28. Trin. S. C. and S. P. — Comb. 436. Terrifon's Cafe, S.
C. and S. P. admitted — 12 Mod. 112. The King, and Jerifon, and Inhabitants of Chelfefield, S.

An Apprentice must be by Deed, and cannot be discharged but by S. P. arg.; Deed; per tot Cur. 6 Mod. 182. Trin. 3 Anne B. R. the Queen v. 5 Mod. 579.

(B) The Power of the Mafter.

1. An Apprentice to a Surgeon, was sent by his Mafter to the East Indies; adjudged that a Mafter cannot send his Apprentice beyond Sea, except himself goes with him; but he may send him to any Part of England. Brownl. 67. Hill. 13 Jac. Coventry v. Windall.

Apprenticeship doth import it, as if the Mafter be a Merchant, Adventurer or Sailor. Hob. 154. pl. 135. Coventry v. Woodhall. S. C.
2. If the Apprentice, an Infant, misbehave himselt, the Master may correfl him in his Service, or complain to a Justice of Peace, to have him punished. Cro. C. 179. pl. 3. Hill 5 Car. B. R. Gibert v. Fletcher.

3. Information was brought against the Matter for unreasonable Beating his Apprentice by Indenture, and held that it lay, and the Defendant was convicted. 2 Show. 289. pl. 288. Patch. 35 Car. 2. B. R. the King v. Keller.

4. If an Apprentice in London marries without his Master's Consent, the Master cannot turn him away for that Reason, but he must sue his Covenant. 2 Vern. 293. pl. 443. Hill. 1704, at the End of the Cafe of Stephenfon v. Houlditch.

(C) Actions &c. by the Master. In respect of Strangers. And Pleadings.

1: Trespass Quare N. Apprenticeium sum capit &c. is good, without counting taken he was detained, and how many Years he should be Apprentice; for he shall not recover the Apprentice, but Damages; Br. Faux. Latin. pl. 38. cites 38 H. 6. 31.

2. Trespass of an Apprentice taken shall be Quare Apprenticeium capiit, and not Servientem; for then the Count shall abate the Writ. Br. Faux Latin, pl. 38. cites 21 H. 6. 31.

3. Action on the Cafe by A. against B. for inticing his Apprentice (A. being a Tradefman in London) to depart from his Service for 6 Days, and diverse times to take Money out of the Box of the Shop, and pay at Cards with B. and that B. cozen'd the Apprentice; the Court thought A. might well have Action for the Departure, and losing the Money is a Damage to A. and the Cozenage is but an Aggravation of the Olience, and for that the Apprentice himself only shall have an Action; but in this Cafe, because the Damages were intire with respect to the Cozenage as well as to the Departure, A. could not have Judgment by the better Opinion of the Court. Noy. 105. Mich. 43 & 44 Eliz. C. B. Valley v. Richmond.


5. Indictment for causing an Apprentice to absent himself from his Master, and keeping and desiring him in that Absence. It was moved to quash it, because not a Thing of a publick Nature, being no other than an Action on the Cafe; but the Court said it was a great Olience, and would not quash it; but deff the Party to demur if he would. 12 Mod. 195. Trin. 1o W. 3. the King v. Kitchner.

6. An Indictment was for procuring an Apprentice to depart unlawfully from his Master, and seducing him to take and carry away his Master's Goods. The Defendant was found Guilty, and it was moved that this was only a private Injury, for which Cafe lies, and not in its Nature publick to maintain an Indictment; besides, no Fact is laid to be done in pursuance of this inticing, and as to the carrying away the Goods no Venue is Lid where the Goods were taken away; and Judgment was arrested. 1 Salk. 382. pl. 17. Hill. 2 Ann. B. R. the Queen v. Daniel.

Apprentice.

7. A common Action of Trespass will not lie for enticing an Apprentice or Servant from his Master; but if one will take away my Apprentice or Servant with Force, Trespass will lie for the Master, declaring upon the Force, per quod Servitium amilit; per tot Cur. 6 Mod. 182, Trin. 3 Annæ B. R. the Queen v. Daniel.

8. If a Man knows that an Apprentice ran away from his Master, and he keeps and employs him, the proper Remedy is to bring an Action for so much Money paid to the Plaintiff's Apprentice in wrong of the Plaintiff; Per the Ch. J. Barnard Rep. in B. R.'s Pach. 2 Geo. 2. at the Sittings at Guildhall, Ayneworth v. Wood.

(D) Of suing Bonds for Apprentice's Fidelity &c.

1. In Deft on Apprentice's Bond, that if Apprentice should embezzle it is not sufficient to say that Proof was made, but Plaintiff a Confession under Hand of the Apprentice is not Proof sufficient, the Apprentice being not Fide Dignus, and Notice and Proof ought to be given to them both together, and not to one at one time, and the other at another time. Plaintiff should shew in what Place he became Apprentice, and that he was such a Person as might be Apprentice by 5 El. and that the Statute is not pleased Defendant shall take Advantage thereof, because it is a general Statute. Cro. E. 723. pl. 55. Mich. 41 & 42 Eliz. C. B. Cardinall v. Heskett. he must also allege How the Proof was made. Cro. J. 488. pl. 8. Trin. 16 Jac. B. R. Lee v. Fyde.

2. Bond was given for the Truth and Honesty of an Apprentice. The Master pretended Goods were lost, and got the Apprentice to sign a Note as of Particulars of the Goods lost and the Value of them, but let the Note sleep for two or three Years without acquainting the Obligor with it. An Illue was directed on a Quantum Deminutus, but the Note not to be given in Evidence, and afterwards the Defendant, the Master, being Nonuit upon full Evidence, a perpetual Injunction was decreed against the Bond for all Breaches past before the Action brought by the Master against. Fin. R. 47. Hill. 25 Car. 2. Trif. v. Buckeridge.

3. A. a Father, on putting out his Son Apprentice to B. was bound in a Bond of 1000 l. Penalty for his Son's Fidelity. The Son embezzled about 300 l. more, and is it flood for several Years, when upon Account it appeared he had embezzled 2750 l. but of this B. gave no Notice to A. till two Years after the Apprenticehip ended. The Master of the Rolls decreed A. to pay the 1000 l. over and above the 203 l. before paid, but Lt. C. King decreed the Payment of so much as would make it in all 1000 l. and the 203 l. to be as part of it. 2 Wms's. Rep. 288. Trin. 1725. Shepherd v. Beecher.
Apprentice.

(E) Chargeable. In what Cases. And How.

1. Apprentice shall not be charged to Account by a Writ of Account, for
   Apprentice by the Name of an Apprentice is not chargeable in Account. 11 Rep. 9a. b cites S. C. & S E. 5. 46 & 7 H. 4. 14. b.

   But an Apprentice may be charged in Account upon collateral Receipts, which do not concern the ordinary Trade of his Master. 3 Le. 63. pl. 92. Hill 19 Eliz. B. R. Rivers v. Pudley.

2. Trespasses upon the Statute of Labourers against a Servant for departing within the Term, the Defendant said, that he was Apprentice with him in the Mystery of &c. and he would not teach him the Mystery, but beat him so that he could not dwell with him. Judgment &c. and it was held double, viz. the Teaching and the Battery, by which he relied upon the Teaching. Br. Double, &c. pl. 70. cites 39 E. 3. 22.

   If Master brings Covenant for leaving his Service at such a time, and Defendant justifies by virtue of a Licence, at that time the Master cannot on that Declaration give Evidence of a leaving him at another time, for the time is material, and is not like a tranitory Matter in Trespasses; Per Holt. Ch. J. 6 Mod. 70. Mich. 2 Anne. B. R. Anon.

3. Where a Man is bound that he shall serve for 10 Years, and shall not absent himself without special Licence of his Master, there is sufficient to say that he served 10 years and did not absent himself without special Licence &c. without showing the Number of Licences and the Time; for it may be that he licenced him 1000 times, and where a Licence is pleaded he ought to show the Place where &c. Br. Pleadings, pl. 96. cites 6 E. 4. 2.

   An Infant of 16 Years bound himself Apprentice in London, and after went away with some of his Master's Money. In the Indenture an Infant above the Age are these Words, That the Apprentice shall be loyal &c. &c. there are these Words, That the Apprentice shall be loyal &c. &c. without other Words of Covenant expressed. In Covenant may bind himself Apprentice, but the Court held, that thofe Words imply Covenant, and feemed of Opinion, that by the Custom of London the Action lay against him. Mo. 135. pl. 258. Trin. 25 Eliz. Stanton's Café.


   In an Action of Covenant upon an Infant's Indenture of Apprenticehip, the Plaintiff set forth the Custom of London, that one above 14, and under 21, unmarried, may bind himself Apprentice, and that the Master thereupon shall have tale Remedium against him as if he were 21, and alleged that Defendant went from his Service. per quod &c. The Court held, that by the Words (tale Remedium) an Action of Covenant lies against him as against a Man of full Age, and the by Common Law or the Statute his Covenant shall not bind him, yet by the Custom it shall. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler. Admitted that Covenant lies. 2 Vern. 492. pl. 445. Hill. 1704. at the End of the Café of Stephenfon v. Houlditch.

5. Debt was brought on a Bond entered into by an Apprentice to deliver up a true and just Account of all Wares delivered to him to trade withal. It was objected, that this was void by the Statute of 5 Eliz. [cap.4]

   But per tot. Cur. clearly, all such Contracts are out of this Statute, that being only to make Contracts void for the having an Apprentice, whereas this is only for the making a just Account, which is a collateral Thing; and Judgment for the Plaintiff. 3 Bulk. 179. Pauch. 14 Jac. Bennet v. Belfield.

6. In Action of Covenant brought against an Infant-Apprentice, for departing from his Service without Licence, it was held that he is not bound by any Covenant or Obligation of his, either at Common Law, or by the Statute of 5 El. Cro. C. 179. pl. 3. Hill. 5 Car. B. R. Gilbert v. Fletcher.

7. One
Apprentice.

7. One bound Apprentice to a Taylor in Oxford, 
maries at the End Sid. 107. pl. of 2 Years, and after served out the rest of his Time. Covenant will
lie against him; but it is no Loss of his Freedom, and a Mandamus will lie to make him free. Lev. 91. Hill. 14 & 15 Car. 2. B. R. Townsends's Oxford, S.C.
Cafe.
does not appear. — Raym. 69. S. C. but S. P. does not appear; but Ibid. 92. S. C. & S. P. ad-
mitted.

8. Debt upon Bond, for the faithful Service of an Apprentice, condi-
tioned amongst other Things, That the Apprentice should give an Account of his Master's Wares &c. upon reasonable Demand. The Defendant pleaded
Performance. The Plaintiff replied, that such Goods came to the Hands of the Apprentice at H. and that he was required to give an Account there-
of, but refused. Exception was taken to the Replication, that it was not said who required the Apprentice to account, nor to whom; and likewise that it was ad
tune & ibidem recusavit, but not adhuc recusavit; and held to be ill. Lucw. 356. 389. Hill. 1 & 2 Jac. 2. C. B. Elwes v.
Vaughan.

9. An Apprentice was turned over to A. according to the Custom of the City of London, before the Chamberlain &c. The Aflignee cannot maintain Covenant on the Indenture of Apprenticeship; for he is no Party to the Deed, and Custom cannot make an Aflignee. Show. 4. Pach. 1
W. & M. Barker v. Beardwell.

10. Covenant lies not against an Apprentice, being an Infant. 7 Mod.
15. Pach. 1 Ann. B. R. Lilly's Cafe.

11. A Waterman's Widow took an Apprentice, who went to Sea [* be-
ing pres'd into the Queen's Service] and earn'd 2 Tickets, which came to the Defendant's Hands. She brought Trover for the Tickets, and had Judgment; for whatever an Apprentice gains belongs to the Master; and he may have Action for it. 1 Salk. 68. pl. 8. Trin. 2 Ann. B. R. Barber
v. Dennis.

12. An Apprentice's embezzling or making use of his Master's Cape,
will be a Forfeiture of his Indentures; for he has only the Custody of his
Master's Goods; per Cur. 10 Mod. 144. Hill. 11 Ann. B. R.

13. Apprentices under 15, robbing their Masters, are not excluded from
having their Clergy by 12 Ann. cap. 7.

14. In Indentures of Apprenticeship the Father covenants to pay the Ap-
prentice-Money; the Son covenants to account for his Master's Goods; and in the Conclusion Father and Son each bind themselves for the true Per-
formance of all Covenants and Agreements therein. Per Cur. The End
of binding the Father was to answer Wrongs done by the Son, and he vant, but not
must answer for any; and the Covenant that each did bind himself &c.
must be fo, where the Son is bound to perform the Thing for which the
Covenant was made, and this Clause is usually inserted, that the Covenants
may be taken distributively, viz. That each of the Covenantors should perform his Part, and this makes the Covenant of the Son bind the Fa-
ther, who covenanted for him as well as for himself. 8 Mod. 193.

(F) Affign-
(F) Assignable, or not.

But by the Cullom of London he is assignable; per Holt Ch. J. 1 Salk. 204. pl. 2. Paefch. 4 Ann. R. R. in Case of the Mayor of Win- ton v. Wilks.

1. A pprentice is not assignable. He cannot be bound nor discharged without Deed. 1 Salk. 68. pl. 7. Mich. 13 W. 3. B. R.

2. But tho' Apprentice is not assignable, yet such Assignment amounts to a Contract between the two Masters, that the Child should serve the latter. 1 Salk. 68. pl. 7. Mich. 13 W. 3. B. R. Caflor v. Eccles Parish.

3. The Justices at the Sessions in Wiltshire made an Order to enforcing B. to take his Apprentice. B. had assigned him over to another Person, and the Justices adjudged the Assignment void. Per Cur. The Justices cannot try an Assignment, a private Right, in such a collateral Manner, in being a Matter of private Concern, which must be try'd in a Civil Action; and tho' it cannot pass as an Assignment, yet it will enure by way of Covenant and Contract between the two Masters to serve the latter, and no Inconvenience will ensue; for if the other is a better Master, then it is for the Advantage of the Apprentice; if worse, then an Action of Covenant will lie against the first Master. Poor's Settlements, 76. pl. 101. Paefch. 1717. B. R. The King v. Barnes.

(G) Executor of Master. How liable &c.

Per Holt Ch. J. A pprentice remains Apprentice to Executor, tho' the Executor cannot teach him his Trade; and Executor must provide Meat, Drink &c. for him during the Term. Sid. 216. pl. 21. Trin. 16 Car. 2. B. R. Wadsworth v. Gye.


Show. 405. 3. Covenant lies against Executor, and there is no Inconvenience in it, S. P. & seems because he may plead no Assets, or Debts of an higher Nature; per Eyre J. to be S. C. 12 Mod. 27. Trin. 4 W. & M. The King v. Pratt, S. P. by Eyre J., and seems to be S. C.—It lies if he does not instruct him, or find him another Master of the same Trade, so that he may be taught, according to the Covenant, Lev. 177. Trin. 17 Car. 2. B. R. Walker v. Hull.

(H) Dis-
Of placing out and discharging Apprentices.

1. 5 Eliz. I If any Difference shall arise between the Master and the Apprentice, one Justice of Peace in the County, or Mayor, or Head Officer in a Corporation or Market-Town, shall have Power to reconcile it, if they can; if not, then to bind over the Master to the next Quarter-Sessions, where the Justices of Peace, or any 4 of them, (1 Qu.) or the Head Officer, with the Consent of 3 of his Brethren, shall upon Default found in the Master, in Writing under their Hands and Seals, have Power to discharge the Apprentice of his Service.


3. It has been adjudged upon 43 Eliz. 4. that an Apprentice cannot be forced on a Man. They may force me to put a poor Child out, but not to take him; per Archer J. Arg. Cart. 116. v. Clarke, accordingly, except the Party personally occupies Husbandry, cites Mich. 29 Car. 2. B. R. The King v. Pyne; but lays that later Resolutions are contra.

4. Four Justices at a private Session discharged an Apprentice, and after at a General Session, the Justices finding their Miistake, set that Order aside; and it was moved to have the Order at the General Sessions set aside; for that the first Order was according to Law. But the Court denied it, and said that an Apprentice could not be discharged but by General Sessions according to 5 Eliz. Skin. 98. Hill. 35 Car. 2. B. R. Anon.

5. A poor Boy was put out an Apprentice by the Justices, and after 3 Years Service it plainly appear’d that he was a natural Idiot, and not capable of learning his Trade. Hereupon the Justices discharged the Master of him, and lent him back again to the Parish by an Order of Sessions, which Order was moved to be quash’d; but the Court refused it, and said it was a good Order, it being hard a Master should keep one who could do him no Service, and the Parish in the mean time go free. Skin. 114. Trin. 35 Car. 2. B. R. Anon.

6. In Orders to discharge Apprentice, the Discharge must be under the Hands and Seals of 4 Justices of Peace, according to the Statute; But in a Certiorari to remove the Order, it is sufficient in the Return to take Notice of the Order to make; and it is not necessary to certify the Discharge itself. 2 Salk. 470. pl. 2. Mich. 7 W. 3. B. R. Anon. the Order, not being under the Seals of the Justices, which is expressly required by the Statute, to be a material Defect, and therefore it was quash’d.

Execution was taken to an Order for discharging an Apprentice, that it was not under the Hands and Seals of 4 Justices, as the Statute directs. See non allocatur; for it sufficieth that it is signed in the Record, that the Order was under their Hands and Seals, the Order itself being delivered to the Master for his Indemnity. Camb. 344. Mich. 7 W. 5. B. P. Gately v. Green.

An Order of Justices for discharging an Apprentice upon the Statute of 5 Eliz. was quash’d; it being not signed by them, as the Statute requires. And it was said, that one Piece of Wax might be the Seal of all of several People, putting their Seals severally to it. Mod. 55. Mich. 1 Ann. B. R. The Queen v Harris.
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Apprentice.

7. By the Custom of London a Master may justify turning away his Apprentice for frequenting Gaming, and may justify it before the Chamberlain; per Cur. 2 Vern. 291. pl. 291. Trin. 1693. Woodroffe v. Farnham.


9. Sessions may order Money to be returned to the Apprentice; per Eyres J. but Holt Ch. J. contra; for the Statute relates only to Apprentices in Husbandry, and such like. Camb. 204. Patch. 5 W. & M. in B. R. The King v. Cherry.

10. Order by Justice, that an Apprentice, whose Master was dead, should serve the Remainder of his Time with his Master's Widow's second Husband. Upon Motion the Order was quashed; for the Justices cannot turn over an Apprentice, tho' he applied to them that cannot give them a Jurisdiction. Camb. 324. Patch. 7 W. 3. B. R. The King v. Chaplain.

11. Power to discharge Apprentice extends only to such Trades as are specially named in the Statute. 2 Salk. 471. pl. 4. Mich. 7 W. 3. The King v. Gately.

12. It seems reasonable, if a Master, who is bound to keep an Apprentice, turns him out, whereby he is likely to become chargeable to the Parish, upon Complaint of the Church-wardens the Justice may order the Master to take him again; and it seems that the Remedy must be by way of Indictment; per Holt Ch. J. Cumb. 405. Hill. 9 W. 3. B. R. Anon.
Apprentice.

13. Justices at Sessions are proper Judges, whether fit to oblige H. to take Apprentice or not. 2 Salk. 491. pl. 27. Trin. 13 W. 3. B. R. Minchamp's Café.

14. If a Master licences his Apprentice to leave him, he cannot afterwards recall that Licence; per Holt Ch. J. 6 Mod. 70. Mich. 2 Ann. Anon. 15. Per Cur. since we allow the Justices Power to put out Apprentices, we must allow an Indictment for Disobedience, either in Café of Not receiving, Turning off, or Not providing for such Apprentice as the Law requires. 1 Salk. 381. pl. 29. Pach. 3 Ann. B. R. The Queen v. Gould.

16. An Order was made at the Quarter-Sessions under the Hands and Seals of 4 Justices to discharge an Apprentice; for that it appeared to them, upon the Oaths of Physicians and Surgeons, that he had the King's Evil to such a Degree as render'd him incapable of Serving, the Order was quah'd per tot. Cur. First, because it was not said that any of the Justices was of the Quorum, which the Statute 5 El. cap. 4. S. 23. expressly requires. 2dly, because the Justices have not Power to discharge for any such Cause. MS. Cafes, Trin. 4 Geo. B. R. The King v. the Inhabitants of Hales Owen, Com. Shrop.

17. An Apprentice bound in London before the Chamberlain to a Freeman who is a Glazier, which is no Trade within the 5 Eliz. cap. 4. may be discharged by the Justices if he serves his Master out of London, notwithstanding Paragraph 40 of that Statute expressly faves the Liberties and Privileges of the City of London as to having and retaining of Apprentices, and it is declared that that Statute shall not be prejudicial to them; for per Cur. the Apprentice being out of London, and serving his Master out of the City, there can be no Proceedings against him before the Chamberlain. 2 Ld. Raym. Rep. 1410. Mich. 12 Geo. the King v. Collingbourn.

(I) Custom of London.

1. In Action of Covenant on an Apprenticeship, Defendant pleaded a By-Law in London, where he was Apprentice, by the Common Council there, that, if any Freeman took the Son of an Alien Apprentice, the Covenants and Bonds should be void, and adjudged no Plea, for they cannot make the Covenants and Bonds void, but may fine or punith such Master. Mo. 411. pl. 562. Trin. 37 Eliz. Doggerel v. Pokes.

2. By the Custom of London, an Infant above the Age of 12 Years, may bind himself Apprentice, Cro. E. 653. pl. 12. Hill. 41 Eliz. B. R. But upon a Covenant to serve as an Apprentice an Action lies, but then the Custom of London shall be set forth. See Keb. 576. 312 Monf. v. Wallis.


4. Water-
Apprentice.


5. Other Cities than London, have no such Custom to make Infants Apprentices, to assign Apprentices, and that after such Apprenticeship they are free; Per Holt. 1 Salk. 204. pl. 2. Patch. 4 Ann. in Cafe of the Mayor &c. of Winton v. Wilkes.

(K) Settlement by Apprenticeship. Where.

5 Mod. 328. S. C. according to
Skin 671. S. C.

Poor's Settlements 70. pl. 92. S. C., says, that a
evenment was
between the
Master and
Apprentice
that one
Quarter of
the Year he
should live
with his Fa-
ther and the
other with his
Master, but
did not live
40 Days at a
time. It was
objected,
that a Parol
Agreement cannot avoid a Deed it being no Defeasance, and here is no Fraud alleged to evade a
settlement; Per Cur. it is said he never served 40 Days at a time. Pratt Ch. J. said, the a Parol Agree-
ment cannot discharge the Deed, yet it is sufficient Evidence to prove a Fraud, but not living 40 Days
at a time was held no Settlement.

3. Apprentice in Law is not assignable; but if under the Assignment he serves his Time in another Town, he gains Settlement there. 12 Mod. 553.
Trin. 13 W. 3. the K. v. Inhabitants of Aicles.

4. A poor Child being bound Apprentice at A. was assigned over to an-
other Master that lived in B. Held he should gain a Settlement at B. where his second Master lived; 1 Salk. 68. pl. 7. Mich. 13 W. 3. B. R.
Coffin v. Aicles Parth.

5. The Son was bound an Apprentice to his Father, and the Father gave
up his Indenture to the Son, and bound him out to a Service into another Parth for a Year, where he served, but did not cancel the Indenture, and
becoming poor the Justices ordered him law legally settled in the Parth where the Father lived, because the Indenture being still in Force, his Apprenticeship continued; Per Cur. the Indenture not being can-
celled, the Obligation of the Apprentice continues; and if the Father should
Apprentice.

should get the Indenture into his Hands again uncanceled, and sue the Son thereupon, the aforesaid Agreement would not be a good Plea for the Son. 6 Mod. 190, 191. Trin. 3 Anne. in B. R. Thurley Parlih's Cafe.


7. B. was bound Apprentice for 4 Years to J. S. and lived out these 4 Years at St. Brides with him; J. S. was only a Lodger, and had no Settlement there, and the Court held the Apprentice was well settled at St. Brides; for he was not a Perfon removeable, nor does his Settlement depend on his Master, as that of a Wife on her Husband for a Settlement, but he gains a Settlement for himself within 14 Car. 2. by 40 Days Inhabitation; and so of a hired Servant. 2 Salk. 553. Hill. 4 Ann. B. R. St. Bride's Parlih v. St. Saviour's Parlih.

v. Weybridge, by Name of St. Brides v. the Savoy; and says, because the Service was performed in the Parlih of St. Brides, it gained the Servant a legal Settlement.

8. Where a Perfon is bound Apprentice by Indenture, wherever this Shaw's Paising continues 40 Days in the Service of his Master or Mistress, such Apprentice gains a Settlement; and where any Perfon serves the S. P. Juft. Ch. J. in the Parish of St. Alban's v. the Parish of St. Botolph's Bishopgate. - MS. Cafes, Trin. 9 Ann. B. R. the S. P. For the Act says, that such Binding and Service shall make a Settlement.

9. A. removed by Certificate from B. to C. takes an Apprentice, who serves out his Time at C. and lives 2 Years, cannot be removed with his Master. 11 Mod. 204. Hill. 7 Ann. B. R. St. Giles v. Weybridge Parlih.

10. A Gardener took an Apprentice, but having no Work for him made an Agreement with a Man who lived in another Parlih, that his Apprentice should work with him for Wages, which he accordingly did, and the Master had the Wages. Powis J. was of Opinion at Dorchester Assizes Lent 1709, that this Apprentice did not gain a Settlement by this Service in the Parlih where he work'd, this Matter coming in Question before him upon a Case stated. MS. Cafes.

11. A. was bound Apprentice to one D. who was an Inhabitant and settled in All Saints, and there dwelt with him above a Year, the Man removed to W. and lived there 5 Years, but gained no Settlement. The Question was upon a Special Order, whether the Apprentice was to be settled where he was bound and lived the first Year with his Master, or where he lived the last 5 Years with his Master; and per Cur. whether the Master has a Settlement or not, the Apprentice gains a Settlement by his Service. MS. Cafes Trin. 9 Ann. B. R.

Hill. 1 Geo. 1. B. R. the King v. the Inhabitants of Bury-Pomroy. - Poor's Settlements 65. pl. 8. S. C. by Name of Stoke-Cleaving v. Bury-Pomroy, says the Court inclined he had gained a Settlement at B. but adjourned.

12. If an Apprentice be bound to one who has no right to take an Apprentice, yet the Apprentice will gain a Settlement under such an Indenture by his Service. MS. Cafes Trin. 9 Ann. B. R.
Apprentice.

But where an Apprentice served his term, and was not bound by indenture, or a sured servant, to any person who did come into any parish by certificate, and did not afterward have a settlement in any other parish, such Apprentice by such apprenticeship, and such servant by serving with his master in another parish to which his master removed, and the master having no certificate, this was a settlement of the Apprentice in the last parish; for the above statute relates only to certificate of masters to mod. 279, B. R. Hill 1 Geo. 1. the king v. bury-Penroy Parishes.

A Certificate Man with his Apprentice went to S. where the man purchased a house of the value of 60 l. and there the Apprentice served the first 6 months of his time, he married and died, his wife is settled at S. because his master by his purchase gained a settlement, but he came with the certificate; and this is the settlement of the Apprentice, he having served the last 40 days of his time there.

A work'd several years in the parish of St. John, and was afterwards bound Apprentice to one living there, but always in the parish of St. James, and had his meat, drink, and lodging there, except in fair-time, by agreement, and the court held he gained a settlement in St. John's parish by the apprenticeship. S. mod. 285. trim. 10 geo. the king v. the parishioners of St. John &c.

15. A Person was bound Apprentice to a Cobbler, who lived in one parish, and his Stall was in another; the Apprentice lived with his master in a third, and it was held per cur. that he gained no settlement as an Apprentice. Poor's settlements. 8o. pl. 156. Parch. 1717. the parish of St. Olave Jury's Cafe.

16. One G. was an Apprentice to J. S. a Seafaring Man; who lived in the parish of St. Olaves Jury; the Apprentice lived with his master 3 months, but always on ship-board out of the parish. Prat. j. said, it does not appear that he was sent by his master to watch on ship-board, if it had, it had been carrying on his master's business, and continuing in his service, and doing his duty. The court adjudged he was not settled in the parish; for there must not only be an apprenticeship, but a residency: and a man is deemed to be resident where he lodges. Poor's settlements 79. pl. 105. Parish of St. Mary's Cole Church v. the Hamlet of Radcliff.

17. One born in A. is put an Apprentice in B. where he served two years, and then his master died, when he went back to A. and married, had children, and died; the wife and children shall be sent back to B. 8 mod. 169. trim. 9 Geo. 1. St. Giles in Reading v. everley black Water.

18. Where one is bound Apprentice by indenture, it cannot be discharged but by deed or by the sessions, and a hiring after he is bound, or any confinements arising upon such hiring, are entirely void whilst the indenture subsists, and till it is destroyed; for when an Apprentice serves 40 days, by virtue of the indenture he cannot gain another settlement, tho' his master confesses, because he had a settlement by the service under the indenture. Admitted per cur. 8 mod. 236. Parch. 10 geo. buckingham parish v. Sevington.

S. P. For binding an Apprentice and fetting will not make a settlement, but the settlement must be by inhabiting, which cannot be but where the Party lodges; Per Forrebee & Raymond J. 2. ad. Raym. rep. 1734. S. C. by name of the inhabitants of St. John Baptist in Devizes v. the inhabitants of bishop's Cannings.

20 A.
Apprentice.

20. A bound Apprentice to a Butcher in Cirencester lived with his Master for the first 6 Years, and then came and lived with his Master up and down for three Quarters of a Year. It was objected, that it did not appear that he lived 40 Days with his Master; Per Cur, it is set forth that he lived 40 Days with his Master, so room to intend he was resident 40 Days. Poor's Settlements 118. pl. 159. Trin. 1724. B. R. in Cave of the Chapelry of St. James's in the Parish of Bishop Canning's v. Inhabitants of St. John's in the Devizes in the County of Wilts, cites the King v. Cirencester (Inhabitants).

21. A. was bound Apprentice to B. who lived in St. Olave's, afterwards A. by his Master's Consent, lived with another Person in Allhallow's, and per Cur, he gained a Settlement in the late Place; for a Person may serve his Master in another Place or Parish, and although he serves another Man, yet it is by Consent of his Master, and the Benefit accrues to the Master. Poor's Settlements 114. pl. 154. the Parish of St. Olaves Southwark v. Allhallow's.

hollow's; and if so, then he could not gain a Settlement there upon Account of his Apprenticeship, because it cannot be said that he served in that Parish as an Apprentice. But per Cur, the very Point was determined in Mich. 3 Geo. between the Parish of St. Leonard Shorebitch and Trinity Parish, and adjudged a good Settlement in that other Parish where he last served; for it shall be fully intended that he served his first Master upon that Agreement, and that it was but a Continuance of his Apprenticeship, and so it was adjudged in the principal Case. — S. C. reported thus: A Boy was bound Apprentice by a Woman to a Farrier in St. Olave's. He served there 2 Years, and then his Master fail'd, and afterwards the Master agreed with a Farrier in All-hallow's to serve with him, he finding Clothes during the Rest of the Term; but the Apprentice was not turn'd over either according to the Custom of the City or otherwise, only by Parol Agreement. He served out his Apprenticeship, and it was held a good Settlement. And per Eyre, this Service with the second Master was in virtue of the Contract with the first: That Master had a Right to the Service of his Apprentice, which might give over to another by Parol, without any Contract in Writing, and this Service with his Consent will be the Service of the first Master. It would have been good also, if the Apprentice had come and entered into Covenant with the second Master; and so good, whether a Servant or an Apprentice. And the Case of Trubody the Infant was cited, who had two Boys bound to him Apprentices, and he put out one to the Trade of a Barber, and he served his Time with the Barber; and held a Settlement where the Barber lived. MS. Cale, Patch. 9 Geo. B. R. S. C. by Name of the King v. the Inhabitants of All-hallow's, London Wall, and St. Olave's, Southwark.


21. A Person was bound Apprentice to a Gentleman who made Use of him as his Huntsman, and lived with him three Quarters of a Year, and then went away; Per Cur. here is a Living for 40 Days, and so the Person gains a Settlement. It was objected, that he served a Gentleman, and consequently no Trade; But per Cur. he is bound out as an Apprentice, and the Master may make Use of him in what Manner he pleases, and therefore held a Settlement accordingly. Poor's Settlements 122. pl. 166. Trin. 1726. B. R. the King v. the Inhabitants of Whitchurch.

23. J. S. agreed to be put Apprentice to J. N. and was bound for 7 Years, and 20 s. was paid J. S.'s Mother; After J. S. had served three Years his Master died. The Indentures were not stamped, nor the Duty paid; On an Order of Sessions that it was a Settlement, and a Reference to the Judges of Assize, Fortescue J. was of the same Opinion, but it was moved to quash it, because 3 & 4 W. & M. says Apprentices bound by Indenture shall be intitled to a Settlement, and this Indenture being not stamped, is as no Indenture by 3 Anne, and so held the Court. 4 Geo. 2. B. R. Gibb. 167. Anon.
(L) Decrees in Equity relating to Apprentices.

1. It was said to be usual in Cafe of Apprentices, after they are out of their Time, to exhibit a Bill to put their Masters to sue their Covenants within a certain Time, or else to deliver up their Indentures. Chan. Cafes, 70. Hill. 17 & 18 Car. 2. Baker v. Shelbury.

2. Apprentice, being ill fled, brought his Bill. Decreed that the Master deliver up the Indentures, and a Bond of 100 l. for his Honesty, and repay Part of the Money given with the Apprentice, with full Costs; the Apprentice having before had a Verdict in the Lord-Mayor's Court, and the Master ordered to provide a new Master, which he refused to do. Fin. Rep. 124. Mich. 26 Car. 2. Lockley, Widow and Executrix of Lockley, and David Lockley v. Eldridge.

3. Bill by a Merchant against one that was his Apprentice, for an Account of Goods and Money which he was intrusted with, both during his Apprenticeship and after, as his Factor and Agent. The Defendant pleaded the Statute of Limitations 21 Jac. The Plea was allowed good as to the Goods &c. received during his Apprenticeship, and till he was made free, but not after his Apprenticeship ended; so ordered to answer that Part of the Bill, but without Costs. Fin. Rep. 370. Trin. 30 Car. 2. Fincham v. Hobbs.

4. The Master received with the Apprentice 250 l. and died within 2 Years, the Apprentice having for that Time been employed only in inferior Affairs. Decreed, after Debts and Specialties paid, that the Executors repay the 250 l. as a Debt due on simple Contract, deducting after the Rate of 20 l. per Ann. for the Maintenance of the Apprentice during the Time he lived with his Master. Fin. Rep. 396. Mich. 30 Car. 2. Soam v. Bowden & Eyles.

5. A placed his Son as Clerk to an Attorney, and gave with him 120 l. The Master agrees to return 60 l. of the Money, if the Master died within a Year. The Master was sick at the Time, and of that Sicknes died within three Weeks. Jeffries C. decreed 100 Guineas to be paid back to A. Vern. Rep. 460. pl. 437. Trin. 1687. Newton v. Routé.

6. An Apothecary turned away his Apprentice for Negligence and Mistakes laid to his Charge, but the Court decreed the Master to refund 30 l. of the Money he had with him, and the rather, because the Indentures were not inrolled, so as the Matter was not properly cognizable before the Chamberlain of London. 2 Vern. 64. pl. 57. Trin. 1688. Herman v. Abell.


8. Indentures of Apprenticeship were decreed in the Mayor's Court of London, whither the Cause was sent back out of Chancery, to be deliver'd up, because not inrolled, the Non-Inrolment was at the Instance of the Master, which could not excuse the Master, who had covenanted to inroll the Indentures; and altho' the Apprentice was bound for 7 Years, yet he covenanted to make him free at the End of 5 Years. 2 Vern. 492. pl. 443. Hill. 1704. Stephenson v. Holditch.

9. A puts his Son Apprentice to B. and gives 1000 l. Bond for his Fidelity, and at the same Time B. covenants with A. to see the Apprentice make up his Craft once a Month at least. Per Wright K. The Meaning is that B. not only see the Figures right, but the Craft effectually made up, so that B's pretence that the Apprentice had inferred Banker's Notes &c. as remaining, when he had disposed of them, is no Excuse, and the Bond and Covenant.
Appropriation.

Covenant are as one Agreement, that the Plaintiff A. would be answerable Monthly, provided Accounts were taken Monthly, and would be liable but for one Month's Impezzlement, and decreed A. to answer no more than B. proved impezzled in the first Month, when the Impezzlement began. 2 Vern. 518. pl. 468. Mich. 1705. Montague, Executor of Ewer, v. Tidcombe & Hoskings.

For more of Apprentice in General, see Master and Servant, Trade, and other Proper Titles.

Appropriation.

(A) By what Patron. [And who must assent to it.] Fol. 238.

1. If an Abbot be seised of an Advowson in Fee, held of a common Br. Appropriation, an Appropriation may be made thereof to him by the Patronage, without the Assent of the Lord of whom it is held. 21 Ch. 3. 5. b.

2. The Patron of the Advowson ought to agree to the Appropriation, otherwise it is not good. Com. Grendon, 497. b. Curia, 29 C. 3. 10. For in every Cafe of Appropriation of a Benefice to a House of Religion, the Patronage is thereby gone and extinct for ever. Kelw. 48. b. pl. 2. at the End, cites it as said by Prowick in 3 H. 7. Quod nota.——An Appropriation cannot be without the Assent of the Patron; per Doderidge J. Roll Rep. 464.——It cannot be made without the Patron; for his Advowson being a Lay-Inheritance, cannot be divested without his Consent; neither can it be made without the Consent or Concurrence of the King, because the Advowson itself is held of him mediately or immediately, and he shall not lose his Possibility of Restoration or Sale, without his Consent; but an Appropriation may be made by the Patron, and the King acting as supreme Ordinary without the Bishop; and the Reason is, because before the Reformation it might have been made by the King, by the Patron, and the Pope, and whatever the Pope might have done is now veiled in the King, by the Statute of H. 8. 5 Salk. 45. (out of Pl. C. 18 & 19 Eliz. Grendon v. the Bishop of Lincoln.)——And therefore the King uses the following Words in his Charter, (Autoritatem soffer Regia suprema & Ecclesiastica qua jungimus.) Pl. C. 498. Grendon v. the Bishop of Lincoln.

3. If there be Lease for Years of an Advowson, the Reverson in Fee, the Assent of the Reversoner to appropriate the Church is not sufficient to bar the Lease for Years. 29 C. 3. 10. But formerly it was taken as good, if made by the Pope without the Ordinary, in regard he was look'd upon as supreme Ordinary. Pl. C. 497. b. 498. The Cafe of Grendon v. the Bishop of Lincoln.
Appropriation.

5. 19 Ed. 1. Rot. Pat. Zincbrana 25. in Schedula annera. The Archbishop of Canterbury, with the Consent of the Dean and Chapter, appropriated a Church of his Diocess, and belonging to his Coflation, to a Hospital of Lepers in Compensation Summae Pecuniae debita by the Archbishop; and now the Successor of the Archbishop, with the Consent of the Pope, and of the Dean and Chapter, and of the Matter of the Hospital, revoked the Appropriation.

6. An Appropriation by King William the Conqueror only, is not good. 7 Ed. 3. Quare impedit, 19. adjudged.

An Appropriation made by the King only, without the Bishop, is as good as if made by the Bishop, or as good as if made heretofore by the Pope; but neither the Bishop or the Pope could make it without the Good Will of the Patron and the King, and in Appropriations the Patron is a Party; for he ought to accept it. Pl. C 49. n.

An Appropriation may be by the King alone, where he is Patron; but there is no Book that it might be by the Patron alone; [per Cur. as it seems.] Poph. 144. Trin. 16 Jac. B. R. obiter, in Case of Nicholas v. Ward.

7. 2 H. 4. Rot. Parl. numero 51. The Commons prayed that no Appropriation of any Church at any Time thereafter should be made, and he that should enjoy such Appropriation for the Time to come should incur the Pain contained in the Statute of Provisors, except Religious, or other Persons whatsoever, who have [having] Possessions amortized, might exchange or give such Possession amortized to a secular Hand, to have any such Benefice appropriated by the Licence of the King, Patron, Lord, and Founder. Answer, The King will advise.

8. In Affile of Darrein Presentment, Appropriation of the Advowson was pleaded in the Time of King H. 3. by Licence of the King, and of the Bishop, and Dean and Chapter, and of the Apostle [Pope] and be himself who appropriated was Patron, as he ought always upon Appropriation; and so it seems here, that the Licence of the Bishop is not for his Time, without the Dean and Chapter. Br. Appropriation, pl. 4. cites 46 All. 4 and 19 E. 3. Fitzh. Judgment 124.

9. Appropriation of an Advowson cannot be, but where the spiritual Man, who appropriates it, has the Advowson to him, and to his Successors. Br. Appropriation, pl. 3. cites 38 H. 6. 21. by the Matter of the Rolls.

(B) To whom it may be.

1. An Appropriation of a Church may be to a Bishop, and his Successors, Da. 1. 80. b.

2. Constitutiones Othoboni capituli de Appropriationibus Ecclesiasticum non faciendis, in Lignum, Fol. 51.

3. An Appropriation of a Church may be to the Dean of a Free Chapel of the King. 33 Ed. 3. Abl del Roy. 193. admitted.

4. A Church may be appropriated to two Priories, for this is not as if a Woman was married to two Husbands, for both may well have the Care of one Church. Mich. 15. Jac. B. R. in Freeson and Kemp's Case Dobedidge said, that upon the Trial of this Case in his last Circuit, such Appropriation was given in Evidence confirm'd by the Pope; and he (') inclined that this was a good Appropriation, as well as a Patronage may be the Body of two Prelates, as 21 Ed. 3. 18, but the Court said, this is a strange and rare Case, to have such Appropriation; Quare this Case, for he, to whom the Appropriation is made, ought to have the Advowson of the Church, and therefore it seems that it ought to be intended that the Priores were Tenants in Common of the Advowson.

5. An
Appropriation

5. An Appropriation can not be but to him who is Patron and Parson. 14 B. 4 14.
6. At Common Law an Appropriation could not be made, but to a Body politic, or to a Corporation; for a natural Person is not capable of it because he cannot be perpetual, and an Appropriation makes an Incumbent perpetual. And at Common Law it could not be made to a Lay Person, for as he could not be an Incumbent by a Presentation, so he shall not by an Appropriation, which is but a more lasting Incumbency. These Appropriations at first were made to Abbeys, Deans, and sole Corporations, who might administer Sacraments, and be Care of Souls; but afterwards by Dispensations they were made to spiritual Corporations aggregate, who had no Care of Souls, as to Deans and Chapters, and at left to Nuns, under Pretense of Hospitality. Grande nefas, as Dyer calls it. 3 Salk. 43. [abridged from Pl. C. 496. b. &c. Grendon v. B. P. of Lincoln.]

(C) For what Causes it may be.

1. An Appropriation may be made to an Abbey or Priory cau- la Paupertatis, Constitutiones de Predbohydron capitulo de Appro- priationibus Ecclesiarum non faciendis in Linwood 51.
2. An Appropriation ought to be made but caussa paupertatis only, or other lawful Cause. Constitutiones de Predどうしても capitulo de Appri- priationibus Ecclesiarum non faciendis in Linwood, Fol. 51.

(D) At what Time it may be made.

1. An Appropriation can be made of a Church which is full of Appropriation, but in a special manner to take Effect after the Death of the Incumbent. Co. ii. Priddle and Napper. Co. iii. Grendon 499. b. vide 50 C. 3. 27. admitted good in praenenti.

the Life of the Parson, to take Effect after his Death, or after Resignation, and well; quod nova. Br. Appropria- tion, pl. 2. cites 50 E. 3. 26 — Br. Quare impedii, pl. 42 cites S. C. — Pith. Grants, pl. 57. cites S. C. — Br. Appropriation, pl. 4. cites 6 H. 7. 15. 14. that if Appropriation be made when the Church is full, it is void. — S. P. by Hobart C. J. that in such Case it is utterly void, unless it be made by express Words, de futuro quando vacaverit. Hob. 150. at the End cites Grendon's Case.

2. But when the Church is full, it may be appropriated by * proper Words. Co. ii. Priddle and Napper. Com. 499. b. 41 Ed. 3. 6.

b. 50 C. 3. 26. b. 27.

3. As when a Church is full, it may be appropriated by Words in future after the Death of the Incumbent. Com. 499. b. Co. 11. Priddle 11.

and may retain the Glebe, and the Fruits to his proper Use; this will make a good Appropriation when the present Incumbent shall die, or an Avoidance happens; and the Doubt which had been conceived to the contrary before, was, because the present Parson had Fee simple in the Manse, and Glebe, and Tithes, and no Reversion or Interest in any other, but in the Incumbent, when there isone; agreed by all the Justices, Pl. C. 499. Mich. 18 and 19 Eliz. Grendon v. the Bishop of Lincoln, &c. See the References in the Notes at pl. 1.

4. If a Prior was seized of an Advowson in Fee, this being then full of an Incumbent, and the King gave to him Licence to appropriate b. in & c. [This]
Appropriation.

of Priddle and Napper says, the Incumbrance of Appropriation is always general, and that 16 are all the Precedents.

this Church, and to hold it appropriate without mentioning the Incumbent, and after the Ordinary appropriates it, tua quod after the Death of the Incumbent the Prior and his Successors pollute tenere in propriis usibus in this Case, though the Licence of the King be general without mentioning the Incumbent; yet the Appropriation being after well made, this is a good Licence and a good Appropriation. Ca. 11. Priddle and Napper 11. resolved. Stich. 16. Car. B. R. between Fee and Haffelrigg per Curiam upon Evidence at the Bar agreed.

5. If the King gives Licence to a Chantery to purchase an Advowson of a Church in Fee, and to appropriate it to them and their Successors, and afterwards they purchase the Advowson in Fee, and present their Clerk to the Church upon a Permutation, who is instituted and endowed, and after the Bishop appropriates it to them and their Successors, this is a good Appropriation, notwithstanding the intervening Presentation made by themselves, between the Licence and Appropriation. Stich. 16. Car. B. R. between Fee and Haffelrigg per Curiam upon Evidence at the Bar ruled.

6. If an Appropriation be in the Incumbent's Life-time by future Words, as it may, yet it will not be executed till after the Avoidance. Pl. C. 500.


 Fol. 240.

(E) How it may be made.

1. If the King gives Licence to the Warden and Chaplains of a Chantry to purchase an Advowson of a parochial Church presentative, to them and their Successors, and to have this Appropriation to them and their Successors, and after this is appropriated to the Warden of the Chantry and his Successors by the Bishop by Force of this Licence, if the Chantry be known as well by the Name of Warden and Successors, as by the Name of Warden, and Chaplains, and Successors, and to all one Corporation, this is a good Appropriation. Stich. 16. Car. B. R. between Fee and Haffelrigg, per Curiam, upon Evidence at the Bar; (but Quere how a Corporation aggregate and a sole Corporation can be one Corporation politic.)

2. 15 R. 2. cap. 6. In every Licence to be made in Chantry of the Appropriation of any Parish Church, it shall be expressly provided, that the Diocesan, according to the Value of such Churches, shall ordain a convenient Sum of Money out of the Profits of the said Churches, to be distributed yearly by the Appropriators to the poor Parishioners; and also, that the Vicar be sufficiently endowed.

3. 4 H. 4. cap. 12. Churches appropriate since 15 R. 2. contrary to the said Statute, shall be reformed, or the Appropriation to be void.

From henceforth every Church to be appropriated shall have a secular Priest ordained, perpetual Vicar thereof, and Canonically instituted and invested in the same, and conveniently endowed by the Discretion of the Ordinary to do Divine Service, and keep Hospitality.

The other Statutes 15 R. 2. and 4 H. 4. say, that there must be a Vicarage endowed upon every Appropriation, yet they do not extend to Appropriations prior to the making of the said Acts; Arg. Gbb. 251. Patch. 4 Geo. 2. B. R. in Case of the Bishop of London and Lewen v. the Mercer's Company.

A Prior was feu'd of the Advowson of a Parsonage, and 24 H. 8. the Church being void, the Bishop gave him Licence to hold in propriis Usius, and there was not any Endowment of the Vicarage. The Question was, whether the Appropriation was good, there being no Endowment of the Vicarage, this Statute being in the Affirmative, that Vicarages shall be endowed, or that all Appropriations are void unless the Vicarage be endowed? And whether an Appropriation by the Bishop's Licence without the King's, be good? Williams J. said, that it had been resolved, that whether Appropriations begood or
Appropriation.

or not cannot now be called in Queftion, but they shall be intended to be good, and to have all requisite Circumstances. Cro. J. 252. pl. 6. Mich. 3 Jac. B. R. Huntton v. Cocket.

5. If a Bishop, Dean, or the like, has the Advowson to him and to his Heirs, and appropriates it by Licence to him and his Successors, this it not good, because he had it not to him and his Successors before, but there be ought to alien in Fee to another, and then retook to him and his Successors by Licence, and then to appropriate it by Licence, and detain in proper Use without presenting a Stranger, because otherwise he is bound to present an Incumbent as the Patron shall do, and cannot retain more than 6 Months without Lapse; QuodNota. Br. Appropriation, pl. 3. cites 38 H. 6. 21. In an Appropriation of great Antiquity, a Licence has been presumed tho' none appeared. Arg Vent. 257. in an Anonymous Case.

6. The Appropriation was made by the Patron and the Ordinary and the Dean and Chapter by Licence of the King, without any Mention of the Licence of the Patron. Br. Appropriation, pl. 8. cites Lib. Intrat. That the Incumbency itself, which is a Spiritual Thing, vested in the Appropriate. Pl. C. 496. b. Grendon v. Bishop of Lincoln.

7. An Appropriation of an Advowson, Church, Glebe, Title &c. must be to some Body politic or Corporation, and when it was made by the Patron or first Founder the Form was thus; Ego W. R. de H. concibo Ecclesiam & Advocationem unam de H. cum Terris & Decimis omnibus ad em pertinentibus Abbati de S. &c. lo that not only the Advowson and Profits of the Church, but the Incumbency itself, which is a Spiritual Thing, vested in the Appropriate. Pl. C. 496. b. Grendon v. Bishop of Lincoln.

8. Watf. Comp. Inc. 8vo. 341. cap. 17. says, That the safest way is, that it be expressly said that he to whom the Church is appropriated shall be Parson, and that in all Grants of Advowsons from the Crown to any Spiritual Parson and his Successors the Clause of Non-Obstante the Statute of Mortmain be inferred, or that a precedent Licence be had, and that these Matters be pleaded when any Action is brought concerning the same.

(F) Whar Act or Thing will disappropriate an Appropriation; and by whom. The Act of the Party.

1. If the Parson appropriate presents to the Church, and the Presenter is instituted and inducted, this disappropriates the Church. Br. Confutation, pl. 1. cites S.C. Fitzh. Confidential.

on, pl. 4, cites S.C. —See (G) pl. 2. in the Notes there, where it is said that the Law forms the same tho' there be no Institution &c. —S. P by Manwood. Pl. C. 501. a. Mich. 18 & 19 Eliz. in Case of Grendon v. the Bishop of London. —Hob. 152. Hobart Ch. J. says, that no Act of the Ordinary can disappropriate the Church; but if the Parson appropriate (who is Patron) had presented, it did disappropriate, and cites 38 H. 6. 20. 11 H. 6. 18. B. N. B. 55. and says he is of Opinion, that if his Clerk be refused for just Cause, and Notice given, Lapse shall inure; for the Appropriation gives him a Charge to hold or not, as appears by the Form of an Appropriation in Grendon's Case, which by the Pretenience he has renounced.

2. If there be a Parson appropriate and Vicar endowed of the same Church, and after the Parson and Ordinary re-unite the Vicarage to the Parsonage, yet this does not disappropriate the Appropriation, L. for
Appropriation.

for the Vicarage was derived out of the Patronage, and how it is come back to that out of which it was derived, and so it is in its first State, and therefore cannot disappropriate the Church. 7 Jac. resolved at Serjeant's Inn by the Judges upon a Reference out of the Court of Wards, in one Stafford's Case.

1. If a Chapel be annexed to a Church, if there be a Presentation by a Stranger to the Chapel as to a Church, and his Clerk is included, this Chapel is hereby made a Church. * 47 C. 3. 5. 21. b. 17 C. 3. 58.

For he is Patron during the Term. Br. Consultation, in pl. 1. cites S. C.— Fitzh. Consultation, pl. 4. cites S. C.

5. If an Incumbent be presented by the Abbot, and admitted after the Appropriation, by this the Appropriation is determined for ever. Br. Spoliation, pl. 4. cites 38 H. 6. 19.

By such Presentation the Patron and Ordinary have gained Interest de novo; by Shute Baron. Sav. 21. in pl. 51. Pauch. 24. Eliz. Oxner. Cleric doubted, but Manwood agreed. * 5 Le. 101. pl. 147. Trin. 26 Eliz. Manwood Ch. B. said, that at this time a Patronage may be disappropriated, but that ought to be by a judicial Act, as by Pretenement, and not by any private Act of the Proprietor, and so, he said, a Church was disappropriated by the Ed. Dyer by a Pretenement which he of late made to it. — 2 Le. 85. pl. 106. S. P. in toto in Verbis.

As in the Cafe of the Templers, a Church appropriated to that Orper could not be by them transferred to the Hospitallers, but what was appropriated to them was disappropriated by the dissolving of their Order. Pl. C. 497. a. in S. C. cites it as said by Herle in 3 E. 3.— [This is Pauch. 3 E. 3. 11. b.]

7. All the Appropriations of Abbeys that were surrendered between of 31 H. 8. 27 & 31 H. 8. were ipso facto dissolved with the Dissolution of the Corporation, and were prefervative, and might have new Incumbents. Appropriations Lay Fee, but as soon as the Statute of 31 H. 8. came, the Appropriations were restored and given to the King, and the Incumbents ousted; Per Hopkins Ch. J. Hob. 308. Hill. 15 Jac. and they are never prefervative nor spiritual Functions; per Cur. Jo. 5. pl. 5. Mich. 18 Jac. B. R. in the Cafe of Wright v. Gerard and Hildersheim.

8. 17 Car. 2. cap. 3. 8. 7. Owners of Improprations may unite the same to the Patronage and Vicarage of the Parish Church where the same do lie.

(G) Acts of a Stranger.

1. If a Man recovers the Advocey in a Writ of Right, this disappropriates the Church, 17 C. 3. 51. b.

2. If
Appropriation.

2. If a Stranger presents, and his Clerk is instituted and induced, Br. Consitution, pl. 1. ed it, till it be recovered again by Writ of Right; 44 C. 3. 7. 44 Vitab. Constitution, but it seems that this is not Law for; Co. 5. 101. Pet Institution, pl. 4. Cit S. C. Curiai, there cannot be an Injuration upon such an Appropriation, &c.

A Pre-.

2. If a Stranger presents, and his Clerk is instituted and induced, but the Bishop himself presents unto the Bishop his Clerk to an Advowson which is appropriated to his House, this Pretention doth disappropriate the Advowson, and make it presentable after; and if he do not present within 6 Months after every Avoidance, the Bishop shall present for Lacke. F. N. B. 35. (F) So that it seems the Pretention without Institution &c., is a Disappropriation. F. N. B. 35. (F) In the new Notes there (b) cites 11 H. 6. 52. 53. Br. Quare Impedit, 38. 111. 38 H. 6. 59.

3. If a Woman be endowed of an Advowson, which is appropriate, and the presents, and she thereupon is admitted, instituted, and induced, this disappropriates the Church. 2 C. 3. 8. per Scrope laid to be adjudged. Co. Lit. 46. b. and after the time Church is appropriated to him and his Successors, to that they are perpetual Parson Imparison. If in this Case, the Feme of the Grantor is endowed of the Advowson, and presents a Clerk, who is instituted and induced, the Appropriation is defeated for ever; for the entire Estate of the Parson Imparison is avoided. 7 Rep. S. in the E. of Bedford's Case, cited per Cur. to have been disposed, as Sir Jeffery Scrope reported in 2 E. 3. Fol. 8. and says, that in such Sense is the Book to be understood, and that is a Quare in Dier, 6 E. 8. Fol. 7. 2, [72] is well resolved.

(H) Who shall be bound by the Disappropriation.

1. If a Lessor for Years of an Appropriation present thereto, this S. C. Sociation, pl. 1. cites S. C. Autumn, 44 Vitab. Constitution, pl. 1. cites S. C. Potab. Constitutional, pl. 1. cites S. C. of a Church by Licence be granted to a Priory, or His Successors, and after the time Church is appropriated to him and his Successors, so that they are perpetual Parson Imparison. If in this Case, the Feme of the Grantor is endowed of the Advowson, and presents a Clerk, who is instituted and induced, the Appropriation is defeated for ever; for the entire Estate of the Parson Imparison is avoided. 7 Rep. S. in the E. of Bedford's Case, cited per Cur. to have been disposed, as Sir Jeffery Scrope reported in 2 E. 3. Fol. 8. and says, that in such Sense is the Book to be understood, and that is a Quare in Dier, 6 E. 8. Fol. 7. 2, [72] is well resolved.

(I) The Effect thereof as to spiritual Jurisdiction.

1. Mproprietor was sued in the Ecclesiastical Court, and by Sentence Mod 248, there, the Profits were sequestrued for Repair of the Chancel; the pl. 1. Anon. Matter went for a Fault in the Pleading; but the Court, as to the Matter of Law, inclined that there could be no Sequestration, for be-—2 Mod. ing made a Lay Fee, the Impropration was out of their Jurisdiction, 254 S. C. &c. and it was now only against the Parson, as against a Layman lor not re-—Ibid. 256, the pairing the Church. 2 Vent. 35. Pach. 32 Car. 2. B. Wlwin v. Auberry, whole Court preter Arc. 181, Kits 1. held, that the Lay Appropriation was not to be sequestered for the Repair of the Chancel; but Judgment was given against the Defendant upon the Point of Pleadings, which all the Court agreed to be ill—Frem. Rep. 250. pl. 240. S. C. adjournatur.

The
Arbitrement.

2. The Court seemed of Opinion, that notwithstanding the Appropriation of a Benefice to a Prior, or a Dean and Chapter, the Bishop may visit to see how the Church was served, Sacraments administered &c. and might proceed to suspension ab Officio & Beneficio; but they held clearly, that he could not deprive him. 10 Mod. 68. Mich. 10 Ann. B. R. Dr. Harrison v. Dublin (Archbishop.)

For more of Appropriation in General, see Presentation, Watson’s Clergyman’s Law, Cap. 17. Malory’s Malle Imp. 40 to 46.

Arbitrement.

(A) Of what Things it may be. [Or, of what Things an Award may be made, in Respect of the Thing to be awarded.] [Things Real]

* S. P. by 1. Arbitrators cannot make an Award of a Freehold, as to adjudge the Land of one to another. * 14 P. 4. 19. 23 P. 8. Hill. 99 b.


but by Needham, if he does not perform it, the Obligation of Submission is forfeited.—Arbitrement for Freehold is not good, unless the Submission be by Deed indented; Per Foiler J. W. 2 Brownl. 130 Peto v. . . . . cites 11 H. 4. 44. b.

It is a Question, whether the Title to Land is convertible, because it is in the Real; Per Powell J., but Treby Ch. J. said, that Things in the Reality might be submitted, as well as Things in the Personality, but they could not be recovered upon the Award. Ld. Raym. Rep. 115. Mich. 8 W. 5. in Cafer of Marks v. Marriot.

Crom. J. 74. pl. 4. Trin. 1 Jac. B.R. is D. F.

3. A Partition cannot be made by Award, for a Freehold cannot pass without Livery. Paff. 1 Jac. 3. Horton v. Horton.

4. An Arbitrator cannot make an Award of a Lease for Years of Land, as to adjudge the Land of one to another, by which the Interest and Eschat of one shall be transferred to the other, because this is a Chattel Real.

submitted to the Arbitrement of J. S. who awarded, that one of them shall have the Lands; this is a good Gift of the Interest of the Term, and cites 12 Ass. 25; but if it had been, that he should permit the other to enjoy the Term, this would not give an Interest in it; and so it was agreed upon Evidence. Cro. E. 223. pl. 3. Pach. 33. Eliz. B. R. Trufloe v. Yewre. 2 Le 104. pl. 130. Pach. 31. Eliz. B. R. Trufloe v. Ewer. S. C. & S. P. agreed for Law, and cites 12 Ass. 25. 14 H. 4. 19. 24. & 9 E. 4 44. S. C. cited D. 183. a. pl. 57. Marg. by the Name of Frellow v. Kayre, and says, that the land Diversity was agreed. —— But it is said there, that if the Arbitrators award that the Possessor should hold the Term, it seems that this would not bind the Right of the other, for the award does not extinguish the Right there, as it does to pass the Possession in the other Case. Ibid.
Arbitrement.

5. It seems, that in Co. 9. Pezzo 78. this is admitted, for there it is held, that an Award is in no Plea in an Ejectment, because it is an Action of Trespass.

6. An Arbitrator may make an Award of the Arrears of a Rent, referred upon a Lease for Years. 4 H. 6. 17. b. & S. P. by Marton — See (R) pl. 6, S. C. and the Notes there. — — See (U) pl. 8.

7. Arbitrement, that the one Party shall have Land out of the Possession of the other, does not give Frankentement; and if he refuses to permit him to have the Land, he has no Remedy if he has no Obligation to stand to the Arbitrement. Br. Arbitrement, pl. 52. cites 21 E. 3. 26.

8. An Award was, that the Plaintiff should pay the Defendant 30l. in full Satisfaction of all Demands the 15th of Sept. and that Defendant on Payment should surrender up to the Plaintiff the Possession of a House in which he lived, and deliver the Plaintiff a Deed whereby the House was intial'd to the Plaintiff &c. The Plaintiff paid the 30l. The Court held the Award good; and Judgment for the Plaintiff. *Ld. Raym. Rep. 114. Mich. 8 W. 3. Marks v. Marriec.

(A. 2) Arbitrators. What Persons may be.

1. NEITHER natural or legal Disabilities do hinder any one from being an Arbitrator. If they are incompetent Judges, the Fault is in those that chuse them. They are called Arbitrators, because they have an arbitrary Power, if their Judgment be according to the Submission. If they obverse their Communion, and keep within their Jurisdiction, their Sentences are definitive, from which there lies no Appeal. R. S. L. 1 Vol. 193. cites Wood. 921.

2. A Bond is given to J. S. to stand to his Award by the Parties in Difference, being J. D. and J. R. Adjudged good by the Court, tho' it was objected that the Referree would make an unreasonable Award, to intitle himself to the Penalty of the Bond. Cumb. 104. Mich. 4 Jac. 2. B. R. Owdy v. Gibbons.

3. Submission was to the Plaintiff himself and another; and this being objected in Arrest of Judgment was held good; per Cur. Cumb. 218. Mich. 5 W. & M. in B. R. Matthew v. Ollerton.

4. Dolben J. said he remember'd a Case where a Gentleman's Steward brought an Action in his Master's Name, and Defendant enter'd into Rule by Confent to pay what the Plaintiff should think fit; and my Ld. Hale held it to be a good Submission. Cumb. 218. Mich. 5 W. & M. in B. R. in Cafe of Matthew v. Ollerton.

thus, viz. The Serjeant took a Horfe from the Archbp. of Canterbury's Steward for a Deedand, and the Archbishop brought his Action; and it coming to a Trial at the Allies in Kent, the Serjeant by Rule of Court refer'd it to the Archbishop to fet the Price of the Horfe, which he did; and the Serjeant afterwards moved the Court to set aside the Award, because the Submission was to the Plaintiff himself; but it was deñied by my Ld. Hale and the whole Court.

M

(B) Where
(B) Where the Submission is with a Condition to perform it, in what Cases the Condition is broke, if it be not performed. Condition. Award.

1. If the Condition of an Obligation be to perform an Award between the Parties of such Things, if the Arbitrator awards a Thing to be done merely out of the Submission, he is not bound to perform it. * 8 S. 6. 18. b. 9 C. 4. 43. b. 44.

2. But otherwise it is if the Award be of a Thing depending upon the Principal. 8 S. 6. 18. b.

3. If the Submission be of a Term, and all thereupon depending, and the Award is made of the Rent which shall become due at Michaelmas next ensuing, this is void, because it is not within the Submission, and the Obligo is not bound to perform it. Sich. 10 Jac. B. R. between Grey and Wicker, adjudged.

4. If the Condition of an Obligation be to perform an Award of all Actions between them, and the Arbitrators make an Award that one shall make a Release to the other of all Actions till the Day of the Award made, which was after the Submission, this is a void Award, because it comprehends more Time than was submitted; for by the Submission such Actions only which were then between them were submitted, and this is intire, and therefore the Obligo is not bound to perform it. My Reports, 14 Jac. * Vanlone against Tribb, adjudged. Co. 10. + Moor and Beadle, 131. 132. adjudged. D. 42 El. + Knapp and Moore, Rot. 211. adjudged. D. 12 Jac. B. R. between * Lindsey and Apsin, adjudged. D. 12 Jac. B. R. between §§ Lumley and Hutton. *

5. If the Condition be to stand to the Award &c. and the Award is that one shall pay 15 l. to the other, and that J. S. a Stranger shall enter into an Obligation to pay it at a certain Day, this Award is void as to the Entry into an Obligation by the Stranger, and the Obligo is not...
not bound to perform it, because it is out of the Submill. Co. 10. * Moor and Bedell, 131, b. adjudged, and there cites p. 24 Cl. pl. 1. Ecclefead v. Malfard, adjudged.

6. So it is where the Award is to pay a certain Sum of Money to b. C. The Stranger who is out of the Award, this is void. Co. 10. Moor and Bedell, 131, b. Contrâ 22 H. 6, 46, b. Curna.

It should pay to the Son of the other Party s l. which was bequesth'd to him, and adjudged that the Action did not lie; for he was not bound to pay the Money, being to a Stranger to the Award. — Godb. 12, pl. 18, Atom. S. C. & S. P. held accordingly; for it is in the Election of the stranger, whether he will accept the Money or not. — S. P. and tho' the Truth was, that the said Stranger was Attorney to the Plaintiff, and that by the Intent of the Arbitrators he was to receive it for his Matter, yet because it was not recited expressly in the Award that he should have it for his Matter, it was adjudged insufficient. D. 242, b. Marg, pl. 52, cites Trim. 5 Jac. B.R. Furse v. White.

So where the Award was, that the Servant of the one Party should pay to the Servant of the other Party s l. the Court held the Bond not forfeited; for the Servants of either are Strangers to the Submill: But if the Award had been, that one of the Parties should pay to the Servant of the other s l. it had been good, because the Matter of the Servant is Party to the Submill &c. 3 Lea. 62, pl. 91. Trin. 18 Eliz. B. R. Dudley v. Malony. — See (E) pl. 1. S. C. & S. C. cited Godb. 15; pl. 18, and there is a Quere made as to this Case; for that it seems not to be Law at this Day. — See (E) pl. 4. S. C.

7. If a Condition be to stand to the Award &c. and the Award is Cro. E. 42, that one shall affure Lands to the other and his Wife, where the Wife is a Stranger to the Submill, there he is not bound to perform this Award as to the Submill: 9. 37, 38 Cl. B. between Samon and Pitt, per Curtain. for it being an intire Thing which was appointed to be done, and being void in Part, it is void for the Whole; but other wise it is where he appoints two Things to be perform'd, and the one is within the Submill, and the other not, and they are awarded to be perform'd severally, it is good for what is within the Submill, and void for the other. But to this Point none of the other Judges spoke. — No. 539, pl. 529. Sims v. Pitt, S. C. & S. P. adjudged accordingly. — 5 Rep. 77, b. 58, a. Samon's Case; S. C. — See (N) pl. 7.

8. If A. is indebted to B. in 20 l. by Single Bill, and they submit all Matters between them to the Award of J. S. who awards that A. shall pay a certain Sum, &c. Iiffe, a Joint Sum to B. in Satisfaction of the said Bill, tho' he pays the Money according to the Award, yet this cannot be any Bar of an Action to be brought upon the said Bill, because the Article is grounded upon a Deci; yet if each of them was bound to perform the Award, he ought to pay the Money, or otherwise he hath forfeited the Obligation; for if he pays it, and the other fuseth the Bill, he hath forfeited his Obligation. Hill. 15 Jac. B. R. between Lamley and Hatton, adjudged, upon Demurrer. 9. 23 Jac. B. R. the same Case.

action; and if he does not accept thereof, and fuses the Bill, he forfeits the Bond; for he does not stand to the Submill, which is a sufficient Tie upon him that he accept thereof; and being accepted, the Arbitrement is a good Bar. — Roll Rep. 270. S. C. & S. P. by Coke Ch. J. to which Haughton J. agreed. — S. C. cited by Doderidge J. Palm. 123.

If a Man submits a particular Controversy, and the Arbitrement a general Award, which are executed, they release no more than the particular Controversy. Ld. Raym. Rep. 115, cites it as resolved Mich. 8 W. 3. B. R. Stevens v. Matthews.

9. If a Condition of an Obligation be to perform an Award, where the Submill is of all Matters depending, and the Award is after made of all Matters generally, this is void, and the Obligor not bound to release the Matters depending. Tr. 4 Jac. B. R. between Humes and Armitstead adjudged.

If a Man submits a particular Controversy, and the Arbitrement a general Award, which are executed, they release no more than the particular Controversy. Ld. Raym. Rep. 115, cites it as resolved Mich. 8 W. 3. B. R. Stevens v. Matthews.
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10. If two submit to the Award of J. S., of all Matters between them till the Submiision, and then each of them promises to perform the Award, and J. S. after awards, that whereas one was bound in an Obligation to the other, (which was made after the Submiision, and before the Award) that the Obligee should deliver up the Obligation to the other in full Satisfaction of all Matters between them, and awards further in such Manner that all was good, if the aforesaid Award was good; though this Obligation be out of the Submiision, because it was made after the Submiision, yet he is bound to perform it, because it is to be given in Satisfaction of Matters contained within the Submiision, as a Horse or Money may be given in Satisfaction, that they are not within the Submiision. 

11. And it seems, that if the Award be to give his Horse to the other in Satisfaction, that he is not bound to perform this, because this is out of the Award, for he may as well award him to give his Sown or other collateral Matter, but Money is Necessity termin, and therefore it may be awarded to be paid in Satisfaction. Contra 9 E. 4 44 per Style.

12. If all Award be that one shall serve the other 2 Years in Satisfaction of an Action, he is not bound to perform this. 9 E. 4 44 per Lit.

13. If the Award be that one shall release all his Right in certain Lands (*) of which the other is seized, in Satisfaction of a Trespass, he is not bound to perform this. Contra 9 E. 4 44 per Style.

14. If the Condition of an Obligation be to stand to the Award of J. S. for a Title of certain Land, and the Arbitrator: awards the Land to one, and that the other shall release to him it, the this Award is void as to determine the right and to change the Estate, because it is real, yet because it is within the Submiision he is bound to perform it. 9 E. 4 44.

15. If the Condition of an Obligation be to stand to the Award of J. S. of certain Matters, and the Award is that one shall make a Release to the other, if they do no nor do it the Condition is broke, though there is not any Means to compel them to make the Release itself. 9 E. 4 44.

16. If the Condition of an Obligation be to stand to the Award of J. S. if the Award be impossible the Condition is not broke. 8 E. 4 1 b.

17. * As if the Award be to pay a Sum at a Day pass, the Condition is not broke. 8 E. 4 1.

* Fol. 244.


An Award was, that the Plaintiff up on all Occasions abide ind should hold 2 Seats in such a Church peaceably and quietly without Disturbance by the Defendant, and that on 1 Nov, the Defendant should deliver up the Seats to the Plaintiff. The Defendant pleased, that the Plaintiff enjoyed the Seats prout till 30 Oct. next after, on which Day they were pulled down without his Knowledge or Consent, per quod he could not deliver them to the Plaintiff on the said 1 Nov. This Question was, whether this should excuse the Performance of the Award. The Case was argued, but Curia adiuvare voluit. See 2 Mod. 27. Pach. 27 Car. 2. C. B. Bridges v. Bedingfield.

* Roll Rep. b. in pl. 7. Arg. cites 8 E. 4. S. P.
18. If there be a Controversy for a certain Thing between A. and B. of the one part, and C. and D. and E. of the other part, and C. in Consideration of 6 d. given him by A. and B. submits the Matter for himself, C. that D. and E. and assumes to stand to award, and A. and B. submit of the other part, and the Arbitrators award that C. shall pay so much to A. and B. in Satisfaction of the Controversy, this is a good Award, and C. is bound to perform it, tho' it concerns two Strangers to the Subdivision, for C. hath undertaken for them. D. 14 Jac. Bullock v. Dalby and Gardwood at Serjeant's Inn in a Writ of Error adjudged, and the Judgment affirmed. * 22 Ed. 4. 25. P. 10 Jac. B. R.

Strangers to the Obligation, because named in the Condition thereof. Br. Arbitrement, pl. 41. cites S. C. but not exactly S. F.

19. If the Condition of an Obligation be to perform an Award, and the Award is that the Obligor and a Stranger shall pay to the other Party 10 l. though this is void as to the Stranger, yet it is good as to the Obligor, and he is bound to perform it. P. 10 Jac. B. R. per Curtiam, between Gray and Wacker.

20. If the Condition be to stand to the Award of J. S. and J. D. and they award that he shall stand to the Award of another, he is not bound to perform this Award. Hill. 37 El. V. between Lower and Lower, per Curtiam.

21. If a Condition be to stand to the Award of J. S. of all Matters etc., quod Arbitrium fiat de Premissis, and the Award is made that one shall do two Things, of which one is to make a Release of all Actions till the Release which is out of the Award, and so void, and the other is good, the Obligor is bound to perform that which is good, because they are not intire, and tho' the Award be that he shall release all Actions, yet it does not appear that there were any Actions between them, so that the Release is made de Premissis for any thing that appears. By Reports, 44 Jac. Vanlere and Tribb, adjudged.

22. So it would be a fortiori if the Condition was without this Clause quod Arbitrium fiat de Premissis. Co. 10. Moor and Beadle, 131. b. adjudged, because there is a Recompence of each Side, tho' not all the Recompence which was intended.

23. If a Condition be to stand to the Award of J. S. of all Matters etc., quod Arbitrium fiat de Premissis, and the Award is made upon the Premisses that one shall * release to the other all Matters till the Award, which is out of the Subdivision; tho' there are Matters the Court a between them which arose after the Subdivision and before the Award, yet the Award is good, if it be not averred to the Court that there were Matters between them in the mean time. P. 17 Jac. between Alabaster and Clifford, adjudged.


—S. C. cited ; Lev 344. in Case of Nicholas v. Chapman, Mich. 4 W. & M. in C. B. in which Case it was adjudged, that where an Award was made to release all Demands generally, this shall relate to the time of the Subdivision only, and a Release to such time is a good Performance. It was held, that an Award of a general Release of all Demands till the time of the Award is good; for nothing shall be intended to arise in the mean time; and if any new Controversy or Demand did happen in the mean time, the Award as to that new Demand or Controversy is void, because it was not within the Subdivision, and therefore it is a good Performance of it to Tender a Release of all Matters in Controversy to the time of the Subdivision, which is all that he is bound to release; and if any new Controversy has happened, which is not to be intended, he that pretends to esquire the Non-performance of his Pleading to have it. 1 Salk. 54, pl. 14, Tit. 2 Ann. B. R. Simon v. Gavill.—S. P. by Holt Ch. J. 2 Ed. R.yn. Rep. 964 in Case of Spire v. Grewey S. C. —See (O) pl. 12, 13, 14, 15.
24. If the Condition be to stand to the Award of J. S., of all Matters depending till 29th Jan., ita quod & c. and the Award recites, that whereas there (*) were) being the said 29th Jan. divers Matters &c. and he awards de & super Premilis of all Matters till the 28th Jan. yet this is a good Award, because it does not appear, that any Matter was depending the said 29th Day of Jan. which was) not depending before the said 28th Jan. and therefore without special Matter fiction, it shall be intended a good Award with the said Averment de & super Premilis. Tr. 7. Car. B. R. between Warde and Unwin, adjudged, which interritur Tr. 6 Car. Rot. 590.

Palm. 109. 
Paich. 17 
J. B. K. 15 

112. S. C. was moved again in Mich. Term, and the whole Court agreed, that there ought to be actual Signing under their Hands, because it was conditional and not general, and Judgment accordingly.—2 Roll Rep. 183. S. C. adjoinur; but S. P. was cited there, and affirmed to have been adjudged accordingly in Ealings' Cafe. —Ibid 243. Mich. 20 Jac. C. Thaire of Thaire v. Thaire was cited by one at the Bar to have been adjudged accordingly.

So where the Award was delivered to the Defendant in Writing under their Seals, but not under their Hands, it was adjudged for the Defendant. Palm. 121. Mich. 19 Jac. Gavrunt, vt. in St. B. &c. cited. Ibid., cites S. P. adjudged accordingly, in Cafe of Saltefi v. Gillings. —Built. 116. Paich. 9 Jac. Scott v. Scott, S. P. adjudged accordingly; and it was agreed per rot. Cur. that if an Arbitrator cannot write his Name, he ought in such Cafe to set his Mark to the Award. —2 Mod. 77. Paich. 22 Car. 2. C. B. Columbe v. Columbe, S. P. as to it's being under the Hand as well as Seal, adjudged accordingly.

26. If two put themselves in Arbitrement of all Actions Real and Personal, or of the Possession and Right, and the Arbitrators give their Award for one of the Parties, or for one Thing only, this is a void Arbitrement; but Walsh said, that if the Parties are bound the one to the other to stand to the Award, they are bound to perform the Award, tho' it be void, to save the Penalty; quod Brown and Dyer neverrun, for a void Arbitreement is as none, and cited Trin. 22 H. 6. 46. Dal. 43. pl. 27. 4 Eliz. and says, that it was adjudged; Paich. 24 Eliz. that the Condition to perform an Award which is void, is void, and that he is not bound to perform it.

27. Debt by J. H. against J. B. upon an Obligation, the Defendant said, that Actio non, for the Condition is, that if the same J. B. and his Partners shall stand to the Arbitrement and Judgment of J. H. of all Trepasses and Judgments between J. B. W. F. and K. P. and their Partners, that then &c. and said that J. H. awarded, that the said Defendant pay 10l. to W. F. which he tendered, and the other refused, and alleged what Day, and that he did not make another Award, and the Plea awarded good; for it may be that there was no Cause that any other of the Companions of the said W. F. should have any Thing, but he was compell'd to bew, what Day the Award was made, and what Day he tendered, so that it might appear if there was Laches in him or not.
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for when the Award is made, that he shall pay so much, he ought to pay it immediately when no day is limited, and ought to seek the party quod nota, and see that the Obligee and the Arbitrator were one and the same person. Br. Conditions, pl. 182. cites 22. E. 4. 25.

28. Memorandum; where Men enter into Arbitrement, and every one is bound to the other in an Obligation or other such Covenants, and are obliged to perform it, and it is awarded, that each Release to the other, all Actions &c. there it ought to be expressly all Actions before such a Day, which shall be before the date of the Obligation; for otherwise, the Obligations of the Award, or the last Obligations to perform the Covenants, shall be also released, which ought always to be taken Care of. Br. Assurances, pl. 4.


Where Releases have been awarded, the Submission Bond shall be intended to be excepted; said by Treby Ch. J. to have been to hold. Id. Raym. Rep. 115, 116.

Award to make general Releases till the Time of the Award is good; because as to Meffrs. between the Submission and Award, the Award is void, and therefore does not exceed the Submission; cited. Id. Raym. Rep. 116, as adjudged, Hill. S. W. 5. B. R. Cooper v. Pierce.—S. P. and it is good for so much as goes to the Time of the Submission, and void for the Rest. 10 Mod. 201. Hill. 12 Ann. B. R. Abraham v. Brandon.

29. Debt upon Obligation to stand to the Award of J. S. of all Controversies between them; J. S. awarded, that the Defendant should deliver to the Plaintiff 6 Kentish Cloaths, which were barred by J. D. for the Third of the Plaintiff; it was objected to be out of the Submission; the Court laid it shall be intended to be in Controversy, if the contrary be not shown, and that they were in the Hands of the Defendant, and Judgment for the Plaintiff. Cro. E. 177. pl. 5. Pasch. 32 Eliz. B. R. Vanvieve v. Vanvieve.

30. Award was that one pay to the other 10 l. and also to give Sec. Roll. Rep. curity to him for the Payment thereof; this Award, as to the Security to be given, was held clearly void; but the Defendant who is to pay the Money, may, by his own Affent, give Security to pay it, but cannot be enforced by Award to do it, and Judgment accordingly. 2 Bullit. was to find Surety for Payment of the Sum awarded. Exception was taken that it was not good, because the Arbitrators cannot compel him to find Strangers to be Sureties for him; and cited 5 Rep. Samon's Cafe. But G. Crooke feemed e contra, for that the Award is, that he shall find Surety by Obligation for the Sum; the Meaning whereof is, that he shall become bound for it, and not that he is bound to find Sureties. Roli. Rep. 270.

in Cafe of Lumley v. Hutton.

31. A Submission was of Controversies between the Plaintiff and Defendant, and his Wife, for divers Sums of Money laid out for the Wife at her Request, dima sola fuit. The Award was that the Defendant should pay the Plaintiff 340 l. for all Monies laid out by him for the Wife, dima sola fuit; and all the Suits between them should cease. The Court held the Award void, it being to pay 340 l. for all Sums laid out for the Feme (omitting the Words, 103, at her Request) and so is more than was submitted; and so Judgment was reversed. Cro. J. 639. pl. 3. Trin. 2o Jac. B. R. Waters v. Bridges.

32. Where there is an ipa quod in the Clause referring to the Arbitrators, and the Award is made by the Umpire, yet the ipa quod by Contraction still relate as well to the Umpire as the Arbitrators; agreed per Cur. tho' they for some time doubted thereof. Lev. 139. 143. Mich. 16 Car. 2. B. R. Bean v. Newberry.

33. An Award was made 5th Feb. de & Sup. Premissis, that the Defendant within a Week after the Award should pay the Plaintiff 7 l. 10s. 11
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in Satisfaction of all Demands; and that upon Payment thereof, each should release to the other all Demands; after the Submission, and before the Award, a new Controversy did arise, (viz.) on the 6th Feb. for that the Defendant did break and enter the Plaintiff’s Cloze called B. whereof the Arbitrators had Notice; after Argument, it was resolved, per tot. Cur. that the Award was good; and a Diversity taken where the Award is, in Satisfaction of all Demands till the Award, or a Release of all Demands till the Award, this is ill, but where the Award is general, without Limitation to what Time, and made de & super Praemissis, it shall be intended till the Time of the Submission, which is good, and Judgment for the Plaintiff. 3 Lev. 168. Mich. 36 Cur. 2. C. B. Robinet v. Cobb.

34. Submission of all Matters to the Time of the Award; the Award was made in October, that one of the Parties should release all Actions in December following, per Cur. ‘tis good, unless it should be flown, that some new Cause of Action intervened. Camb. 156. Short v. Maynard.

An Award to release all Matters to the Time of the Award, has been held good for a long Time, (tho’ Anciently otherwise) because it shall not be intended, unless the contrary be flown, that any other Matter arose, between the Subdivision and making the Award, and if no Matter did arise, the Arbitrator has awarded no more than he should do; and since that a second Reason has been added, that fapping other Matters to have arisen, yet as to that, the Award is void; the general Words being to be expounded of all Matters in Controversy at the Time of the Submission, and as to other Matters arising since, to be void; and if in such Case, the Party submitting to the Award, should make a Release to the Time of the Submission, it would be a good Performance of the Award. Jud. pro Quer. 12 Mod. 116. 117. Hill. 8 W. 3. Hooper v. Pierce.

35. Award was that the Defendant pay 10l. in full of all Demands, and that the Plaintiff release to him &c. The Court held, that if the Plaintiff would not receive the 10l. because he would not be obliged to release when the Defendant tendered, and he refused, he was as much obliged to release upon the Tender and Refusal, as if he had received the Money. 1 Salk. 74, 75. pl. 14. Trin. 2 Anne, B. R. Simon v. Gavil.

36. The Arbitrators awarded the Bonds of Submission to be surrendered. It was objected that this exceeded their Authority; and Holt Ch. J. held it void, for they could not award any Thing concerning them. Ld. Raym. Rep. 553. Hill. 11 W. 3. Doyley v. Burton.

37. Where the Submission is special of all Controversies between the Plaintiff and Defendant as Administratrix &c. and the Award is, that they should execute mutual general Releases according to the Extent of the Submission; it was held by Holt Ch. J. that the special Words of the Submission explain the Generality of the Award. Ld. Raym. Rep. 533, 534. Hill. 11 W. 3. Doyley v. Burton.

38. Submission was of all Actions &c. between the Plaintiff and Defendant. In Debt on the Bond, the Defendant pleaded no Award, the Plaintiff replied, and set forth an Award of all Actions between the Plaintiff and Defendant and his Wife, and that Defendant pay the Plaintiff 20l. in Satisfaction of Law-Charges due to him by the Defendant’s Wife, as Executrix of &c. It was mov’d in Arrest of Judgment, that the Submission should have been of all Actions between the Plaintiff and the Defendant and his Wife; but it was held that it was good as it is, because upon the Defendant’s Inter-Marriage with his Wife, who was the Widow and Executrix of her former Husband, the Plaintiff had an immediate Demand on him; and the Court being of that Opinion, held the Award good, and so the Judgment was affirmed. 8 Mod 212. Hill. to Geo. Morfe v. Sury.
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(C) Of what Things they may make an Award. [Pursuant to the Submission.]

1. If the Submission be of all Actions, they cannot make an Award but 6. br. Arbitrement, of such Things of which the Parties have Cause of Action. 36 ch. of 11. pl. 50. cites S. C. and it, that Butler, is where the Submission is of all Actions and quarrels. 36 ch. 6. 11. b.

Actions Personal, they cannot make an Award of a Servant taken, unless Action be thereof pending; per Pliot, but Mayle contra.

2. But otherwise it is where the Submission is of all Actions and if a Man submits himself, self of all.

3. If a Submission be of all Actions between them, and the A-See (B) pl. ward is to make a Release of all Actions till the Day of the Award, & 21. which is after the Submission this is a void Award, because the Time between the Submission and the Award is not submitted. By S. C. reports 14 Inc. vauture and Tribb 29. adjudged. Co. 10. Moor and Beadle. 132. adjudged.

4. They may make an Award of a Thing which depends upon the Principal.

5. As if two submit all Trespasses, and the Arbitrator makes an Award, and awards further that the Parties put their Seals to the A-ward, they are bound thereby to put their Seals to the Award, for this depends upon the Principal. Arbitramento. 8 ch. 6. 18. b. by Newton, but Chantre x contra.

6. So if the Submission be of all Trespasses, and the Award is that one shall pay 10. l. to the other, and that he shall enter into an Obligation to him for it, this is good, and he ought to enter into the Obligation, because this makes the Award effectual. 8 ch. 6. 18. b.

7. Upon a Submission of an Action, if the Award be in part, that the one Party shall be at such a Place with his Counsel to hear the Award, this is void, because this is out of the Submission. 19 ch. 6. 36. b.

8. If the Submission be of a Term for Years of Land, and of all thereupon depending, and the Award is that one shall pay to the other 10. l. for the Rent that shall become due on this Term at Michaelmas next ensuing, this is no good Award, for the Rent is not within the Subdivision, malniss such as the Rent may be extenuate by Surrender, Evidence x. before Michaelmas. ch. 10 inc. B. R. between Gray and Wicker, adjudged.

Subdivision; to which it was answord, that as to the Payment of the Rent, this it be a future Act, yet being Matter of Satisfaction it is good, tho not express in the Submission. But Roll ch. 1. said that the Words (supremilli) brings the Payment of the Rent within the Subdivision, otherwise the awarding the Payment thereof would not be good by way of Satisfaction; but here the Controversy is for the Land, for which the Rent is to be paid, and the Matter does not appear to be out of the Subdivision, and it is not necessary to aver that the Land was in Controversy. Sy. 306. 505. Mich. 1651. Barnard v. King

An Award made 25 June ordered 20. l. Rent, which by the Award itself appear'd not to be due till the 24th. to be paid by A. to B. in Satisfaction of 61. which the Arbitrators did judge to be owing to B. This was held to be void by Parker ch. J. who declared the Opinion of the Court, and cited this Case in Roll as an express Authority, and said that the Reason is plain, viz. because the Rent may become extinct, either by Surrender or Election before it is due. 10 Mod. 224. Hill 12 Anne, B. R. Barnardillon

Fowler.—See (B) pl. 5. S. C. & S. P.

O

9. Where
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9. Where 2 Men for Variance of the Manor of D. put themselves in Arbitrement of 2 of this, and of all Aclions and Demands, and it is awarded that he shall make Partition of the Manor, and that the one deliver to the other a Deed of Annuity, which the other claims in Jure Uxoris, this is a good Award, tho’ the Manor between the Parties was the principal Cause, and this by reason of these Words, all Demands; for where he claims the Deed of another in Jure Uxoris, this is a Demand. Quod nota. Br. Arbitrement, pl. 22. cites 21 H. 6. 18.

10. Award was, that R. the Defendant should have the Land, yielding and paying 10l. a Year, and that T. the Plaintiff, in further Assurance, should pay a Fine to R. and that R. should grant and render to T. The Words (yielding and paying) do not make a Condition, because it is not not to the Land by the Owner himself, but by a Stranger, viz. the Arbitrator; but it is a good Clause to make the same an Article in the Award, which the Parties are bound to perform on Pain of Forfeiture of the Recognizance; which Wray concedes, and that this Rent shall not cease by Eviction of the Land. 3 Le. 58. pl. 98. Mich. 17 Eliz. B. R. Treffah v. Robins.

11. Submination was of all Debts, Trespaifes, and Injuries. The Award was for the Defendant to pay &c. and to release all Aclions, Debts, Duties, Trespaifes, and Demands. It was objected, that the Words (Duties and Demands) extend further than the Words in the Submination, and so the Award exceeds the Submination, and therefore void. Doderidge and Whitlock J. held the Award well made, and according to the Submination. Jones J. thought the Award more large than the Submination. But the Breach being assign’d in the Non-payment of the Money according to the Award, the whole Court agreed that this is within the Submination, and so good, and Judgment for the Plaintiff. 3 Bullst. 311. Mich. 1 Car. in B. R. Cable v. Rogers.

A Submination was of all Debts, Sums of Money, Claims, and Demands &c. The Award was, that the Plaintiff release to the Defendant all Bonds, Specialties, Judgments, Executions, and Extents. It was objected that this exceeds the Submination; fed non allocatur; for Debts, Sums of Money, and Demands, whether due by Bond, Judgment, Execution, or Extent, are within the Submination, and consequently the Arbitrators may award a Release of them. 2 Saund. 185. 193. Mich. 22 Car. 2. Roberts v. Mariet.—2 Saund. 75. S. C. but S. P. does not appear.—Lev. 200. S. C. but not S. P.—Mod. 42. pl. 95. S. C. but S. P. does not appear.—Ibid. 298. S. C. & S. P. seems to be touch’d at.

12. Upon a Submination to stand to the Award, touching all Matters in Difference between the Parties, the Award was that they make General Releases to each other of all Demands. Upon Error brought it was infirmit, that the Word (Demands) is of a larger Signification than the Word (Differences.) But Roll Ch. J. answered, That if the Release be more large in Words, yet it is good enough; for it shall be intended only of all Matters in Debate between the Parties, and the Court will not intend other Matters, unleas thrown in Pleading; and to this the Judges agreed, and Judgment for the Plaintiff, Nifi &c. Sty. 170. Mich. 1649. White v. Holliard.

13. An Award ordered 8l. to be paid for Charges and Expenses. Exception was taken, that this was not submitted by the Parties, and no Award ought to be made of them. But Roll Ch. J. held that it was within the Submination, because the Arbitrators have Power to allow Charges; and afterwards Glyn Ch. J. held accordingly. Sty. 459. Trin. 1655. Dod v. Herbert.

14. Where the Submination is general and conditional to end all Controversies, an Indictment for a Barret they is not a Controversy between the Parties within the Meaning of the Submination; for that is the King’s Suit, and if the Arbitrators award the Ceasing of such a Prosecution, it would be void, because it would be to obstruct Justice. Resolved. Freem. Rep. 204. pl. 228. Mich. 1675. Horton v. Benson.

(D) What
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(D) What Things shall be said to be submitted.

1. If the Baron and Feme are parties of a Term in the Right of the Feme, as Executrix of her late Husband, and a Stranger pretending Title thereto, and the Baron by writing submits to an Award for the Interest and Title of the Leafe, and the Arbitrator awards one Part to the Pretender, and the other Moeity to the Baron and Feme, the Feme, after the Death of the Baron, shall be bound by this Award. D. 2 Eliz. 153. 57. Dilecte.

2. If a Feme be indebt to J. S. in a certain Sum, as Administratrix Cr. J. 447, to J. D. and she takes Husband, and the Husband and J. S. submit all Matters between them to the Award of W. N., he may make an Award of this Debit, which is due by the Husband and Wife, though it be due in the Right of his Wife, and as Administratrix; for he is now chargeable by the Inter-marriage. H. 15 Jac. B. R. between Lamley and Hutton, adjudged upon a Demurter. H. 12 Jac. B. R. the same Case.

so it was adjudged here in 12 Jac. in Case of Vanlore v. Dribbler. — Roll Rep. 269. S. C. and Coke 'Ch. J. said, that in this Case, the no Actions come to the Hands of the Baron, yet he is chargeable for Devolution made by the Wife before Coperture, whences the Reporter infers that he inclined that this Submission extends to this Debt.

3. So upon such a Submission the Arbitrator may make an Award S. C. cited of a Debt due to a Feme as Executrix. 21 H. 7. 29. b. per Curiam. Arg. Roll Rep. 269. — Bridgm. 91. Arg. cites S. C.

4. If A. and B. submit to the Award of J. S. of all Suits and if an Award Actions depending between them two, the Arbitrator cannot make be made between A. and B. that all Suits &c. between A. and B. that all

should cease, it could neither be the Intention of the Arbitrators that their Award, nor of the Parties that their Submission should extend to Suits between A. and B. and others; and the Law is plain that the Protection of a Suit between A. and B. and others, is no Breach of the Award, be the Intention of the Parties what it will; Per Parker Ch. J. 10 Mod. 204, 205. Hill. 12 Ann. B. R. Barnardston v. Foutter, and he cited the principal Case here of Brockes v. Savage as a much stronger Case; because Husband and Wife are to many Purposes in Law considered as one Person.

5. If A. and B. of the one Part, and C. of the other Part, submit themselves to the Award of J. S. of all Matters between them, J. S. may make an Award of any Matter between A. only and C. though B. hath nothing to do therewith; for the Submission shall be taken distributively. Rich. 9 Car. B. R. between Arnold and Pole, adjudged upon a Demurter.

Note, by 5 justices of the Law in the Exchequer Chamber, that if J. N. and 3 others put themselves in Arbitrement, in the Award of W. P. of all Actions and Demands between them, that in the Cases the Arbitrator has good Authority to make Award of all joint Matters between them, and of all general Matters alike, and of every Matter between the three and the fourth, and if he makes Award that the one of the three shall give something to the fourth, and that the others shall be quit, and he finds that the fourth owes to one of the three 20s. which he awards that he shall pay him, and if he owes nothing to the other two, he awards that he shall be quit against them, this is a good Award. Br. Arbitrement, pl. 42. cites 2 R. 5. 18.

But it seems clear, that they have not Authority to determine in Arbitrement Matters between the three; for they are one Party against the fourth, but he may determine between any of the three and the fourth; Quod Nota. Ibid.

Arbitrement.

ment to J. S. by this Submission J. S. may arbitrate any Causes between A. and B. of the one Part, as well as between them and C. because the Intentions of the Parties by their Submission was to have Peace and Quiet. Yelv. 209. per Car. cites 2 R. 3. 18 b. —Brownl. 112. cites S. C. but it is only a Translation of Yelv. —— S. P. accordingly, 8 Rep. 98. in Bathole's Case. —— Bridg. 91. Arg. cites S. C. —— S. C. cited by Haughton J. 3 Bully. 65. as held by Hulley, Fairifax, and Cateby J. in the Exchequer Chamber; and says, it is a good Case, and if an Award be made for any of the three it is sufficient; for this being in Case of an Arbitrement, which by Intendment of Law is to make Peace and put a perfect End to Controversies in Question, a reasonable Construction is to be made.

Submission, by Rule of Court was, of all Matters in Difference between A. of the one Part, and B. and C. of the other Part, (without saying between them and either of them) an Award that C. should pay so much due by him to A. is good; for such Submission imports all Matters that either had against the other jointly or severally. Comyns's Rep. 547. pl. 225. Parch, 9 Geo. 2. B. Athedlone v. Moone and Willis. —— If A. and B. of the one Part, and C. on the other Part submit to Arbitration, the Arbitrators may make an Award not only of Matters in Difference between A. and B. jointly, or A. and B. separately, and C. but also of Matters between A. and B. Vern. 5.9. pl. 252. Mich. 1654. Carter v. Carter. —— See (O) pl. 8.

* S. C. and same Diversity cited per Car. accordingly, 8 Rep. 85 b. 4. 43 b.


6. If a Submission be of all Actions Personal, festis & querelines, the Arbitrator cannot make an Award of any Suit, Action, or Quarrel which is Real, but only of such which are Personal; for the Word (Personal) refers to all which comes after in the Copulative. * 9 C.

7. But if the Submission had been of all Actions Personal, ae festis & querelines, the Arbitrator might have made an Award of Real Things; for the Word (ae) disjoins them. 9 C. 4. 44 per Choke.

8. If there be a Controversy between the Parion and Parishioners, whether Tythes should be paid in Specie or not, and they reciting the said Controversy submit themselves to the Award of J. S. for all Matters, as well Spiritual as Temporal, from the Beginning of the World to the present Day; and the Arbitrator awards that the Parson shall have 7 l. for the Tythes due before the Submission, and that the Parishioners shall pay 4 l. per Annum for the Tythes that shall grow due after, this is a good Award for the Tythes which shall grow due after the Award; for the Right of the Tythes was in Question, and not the Possession, and to the Right of them was submitted to the Award. P. 42. El. B. R. 8. between Buckingham and Hunter, adjudged.

9. If A. and B. submit themselves to the Award of J. S. touching a Suit depending between them in an Ejective Firma, J. S. upon this Submission cannot make an Award of the Land for which the Action is brought. P. 10. Car. B. R. between Taylor and Walton, adjudged in Arrears of Judgment, in an Action upon the Case for Non-performance of this Award, after a Verdict for the Plaintiff. 10. Within a Submission of all Actions to Arbitrement Causes of Actions are not contained. Co. Litt. 285. a. (k)

(E) What shall be a good Award. Where the Award is to do a Thing out of the Submission to a Stranger, or by a Stranger. [And who shall be said a Stranger.]

See (B) pl. 5. S. C. and the Notes there. —— See infra pl. 4. in the Notes. —— See (F) pl. 2. —— See (N) pl. 7. —— Brownl. 66. Mich. 16. Jac. Gates v Smith S. P. there was a Demurrer, because it was out of the Submission, and was not in the Defendant's Power to perform it.

2. If
Arbitrement.

2. If an Award be, that one shall pay so much to the other at the * Balf. House of J. S. this is good, for he may come to the House without entering the House, and to be shall be no Trespasier. By Reports, 10 Jac. B. R. the same Cafe adjudged. Pach. 12 Jac. B. R. the same Cafe adjudged. Pach. 13 Jac. in Scaccario upon a Writ of Error adjudged in the same Cafe. Mich. 22 Car. B. R. between + Linnen and Williamon adjudged upon Demurer. Intructur Pach. 22 Car. Rot. 101. and this was after affirmed upon a Writ of Error in Parliament. Trin. 24 Car. B. R. between + Wicker and Roll Rep. Langly adjudged upon Demurer. Intructur Hill. 23 Car. Rot. 792.

3. But it seems, that if the Owner of the House has Lands adjoining to Cro. C. 216. the Houe, so that he cannot come to the House without doing a Tres- pl. 3. S. C. pafs, that this is a void Award, for the Arbitrator cannot subject him to an Action of Trespass. Mich. 7 Car. B. R. between Fawven and skiny adjudged per Curtian upon Demurer.

Day at the House of W. S. in C being the Sign of the Cock; and all the Court agreed the Award to be good; for the appointing the Payment at a Stranger's Houe (especially it being by Intendment a common Inn) cannot be unreasonable, or shall make an unlawful Act, but by Intendment the Plaintiff will procure that the Money may be paid there, but if he cannot, it may peradventure excus the Defen- dant; but the Award of itself prima facie is good enough; and so adjudged for the Plaintiff. See (F) pl. 10.

4. If an Award be, that one of the Parties shall pay so much to a Br. Condition. Stranger, this is void, because it is out of the Submission. 22 H. 6. 46 b. Curia. Co. 10. Door. bound to stand to the Award, it ought to be performed; otherwise not; Note the Diversity. S. P. but per toto Curt. notwithstanding that the Award is void, yet he ought to perform it by reason of the Obligation; for otherwise the Bond is forfeited, but Action of Debt upon the Award does not be, because the Award is void, by which the Plaintiff recovered the Award, but Brook says, good minur for this is no Award between the Plaintiff and Defendant. Br. Arbitrement, pl. 24. cites 22 H. 6. 46. S. C. cited 10 Rep. 121 b. says the Cafe is good Law but ill reported, and that the Exception taken by Afton to the Plea that because it appears that the Arbitrement is void, the Obligation remains in Force, is a Non sequitur; for if no Arbitrement, or a void Arbitrement is made, which is all one in Law, the Bond is not forfeited, nor shall the Oblige take any Benefit of it, and so all that follows there, (as Ed. Coke thinks) is a Mistake of the Reporter, it not being pertinent to the Cafe in Question. A. and B. were mutually bound to stand to the Award of M. who awarded that A. with three Sureties, should be bound to B to pay a certain Sum; this was adjudged a void Award; for the Arbitrator had no Authority to award any thing concerning a 2d. Person, but in that Cafe it was said, that if the Award had been to pay 10 l. to J. S. or that the Party shall be nonuitied or discontinue his Action the Award had been good, because they are Acts to be done by the Party himself, and if he tenders the 10 l. to J. S and he refuses, or if he offers to be Nonuit, or to discontinue the Action, and the Court refuses, the Award is faved, but that he ought to plead Tender of Payment and offer to be nonuitied &c. Cro. E. 4 cites it as adjudged Mich. 18 & 19 Eliz. Norwich v. Norwich. 3 Le. 62. pl. 91. S. C. the Court held, that if he tenders his own Obligation it is sufficient, and agreed accordingly as to the other Points. See (B) pl. 5. and the Notes there, and (B) pl. 6. S. C. See (E) pl. 1. 4. See (N) pl. 7.

5. It seems that it is to be intended that this Payment could not be The Arbi- any Advantage to the other, for no Advantage to the other appeared. Tr. awarded 10 l.
Arbitrement.

6. If J. S. and J. D. are bound in 20 l. at my Request, and the
Request of W. N. and after there is a Controversy between us 2, which
of us shall pay this Money among other such Bargains between us, upon
which all Matters in Controversy are submitted to Arbitrator, and
the Arbitrator awards that I shall pay one moiety of the Money
with the use, and W. N. the other moiety to the Obliger, this is a
good Award, though he be a Stranger to whom it is to be paid
by those who submitted themselves, for here appears to be an Ad-
vantage to the Parties. [Dash] 16 Jac. 3 R. between Gray and
Grey, per Curiam.

7. An Award that one of the Parties shall surrender his Copyhold
into the Hands of 2 of the Tenants of the Manor whom shall present it, it
is a good Award, though this is to be done to Strangers who are
not compellable, because they are to be used but as Instruments. [Dash] 13 Jac. 2 B. between Cotte and PooL, per Curiam.

8. So it is a good Award that one of the Parties shall make a Deed
of Feoffment with a Letter of Attorney to J. S. to make Liverp., for
there J. S. is to be used but as an Instrument. [Dash] 13 Jac. 2 B.
per Curiam.

9. If there be a Controversy concerning certain Lands, between A.
B. and C. and therefore A. of the one part, and B. and C. of the
other part submit to the Award of J. S. and therefore A. binds him-
self in an Obligation of 1000 l. to B. and C. with Condition to per-
form the said Award of J. S. touching this, and B. and C. because
they would not be bound the one for the other, enter into several Ob-
ligations of 1000 l. each to A. with several Conditions for the Per-
formance of the Award of the said J. S. and the Arbitrator's award
that A. shall make a Release of all (*) his Right in the Land to B.
and C. and in Consideration thereof B. and C. should pay 300 l. to A.
In an Action of Deed by A. against B. upon his Obligation for Non-
performance of the Award, and Breach assigned that neither B. nor C.
paid the 300 l. at the time appointed according to the Award, this is
a good Award, all this Matter being disclosed in Pleading; for up-
on all the Matter shewn it appears that C. is no Stranger to the
Award; for he and B. submitted themselves jointly, and tho' they
entered into several Obligations, yet this did not make C. any
Stranger to the Award. Hill. 11 Cat. 2 B. between Hayes and
Hates, adjudged upon a Deamere. [Incurv. Hill. 10 Cat. Rot.
1045.

See pl. 19.

10. If a Submission be touching a Title of Land between A. and B.
and the Arbitrators award that A. and his Wife, and Son and Heir ap-
parent, by the Procurement of A. shall pass such Assurance of the Land
to B. as B. shall require, this is a void Award as to the Wife and Son,
because they are Strangers to the Award. P. 13 Cat. 2 B. be-
tween Barney and Fairechild, adjudged per Curiam, in Arrest of
Judgment.

11. If there be an Award, that one shall acquit the other of an Obli-
gation of 200 l. in which they both are bound to B. for Payment of
125 l.
Arbitrement.

1051. This is a good Award; for tho' he cannot compel B. being a grant, S. C. Stranger, to deliver up the Obligation, or to make a Release by the Common Law, yet if the Obligation was not forfeited, he might pay the 1051 to B. at the Day, and this would acquit the other; and if the Obligation was forfeited, yet he might pay the Penalty to B. and to acquit the other; or he might, upon Satisfaction given, compel B. in a Court of Equity to deliver up the Obligation, or to make a Release. P. 15 Car. 2. B. and B. R. between Barney and Clipshams, adjudged upon a Devenure. Intratuct. C. 14 Car. Rot. 161.

and Judgment for the Plaintiff.—Io. 451. pl. 4. Bardy v. Clinton, S. C. accordingly.—Mar. 18. pl. 42. S. P. and seems to be S. C. held accordingly. And Jones J. said, that tho' the Bond were forfeited, he might upon Payment compel the Oblige, by Subpoena in Chancery, to deliver up the Bond; or that he suffer an Action to be brought against him, and then to discharge and pay it.—S. C. cited Mod. 9 pl. 28. Mich. 21 Car. 2. B. R. in Case of Becket v. Taylor, which was an Award, that one of the Parties should discharge the other from his undertaking to pay a Debt to a 3d Person, who was no Party to the Subscription; and therefore it was objected that he was not compellable to give a Discharge; but it was answered that he is compellable; for in case the Debt be paid him, he is compellable in Equity to give a Release to him that had undertaken to pay it.

12. If a Man impleads another by Action, and the Arbitrator awards that the Party who has submitted himself, and who is a Stranger to the Action, shall make the Defendant in the Action, who is a Stranger to the Subscription, to confess the Action of the Plaintiff, this is a void Award. Quod nota: Br. Arbitrement, pl. 39. cites 17 E. 4. 5.

13. The Subscription was of the Right, Title, and Possession of certain Mo. 2. pl. Lands in Controversy between the Parties. In such Case the Arbitrators S. C. accordingly cannotaward that the Obliger shall cause the Lord of the Manor, of whom the Land is held, to grant it by Copy to the Oblige, or that he cause a Stranger to make a Release of all his Right therein to the Oblige; per Baldwin Ch. J. of C. B. Bendl. 29. pl. 44. Mich. 34 H. 8. Anon.

14. A. and B. submitted Matter of Dilapidations, and all Actions, Suits, &c. The Dilapidations were of Parfonage Barns &c. where Y. was late Parfon, and M. the present. The Award recited, that he (the Arbitrator) being indiscriminately elected between B. in the Name and for the Pension on all Behalf of M. now Parfon &c. and A. Executor of T. late Parfon &c. did award that A. should do such and such Repairs, and then that B. should indemnify him against M. &c. The Court held this Award void; and because it was contrary to the Subscription, Judgment was awarded that the Plaintifflit capitai &c. Bendl. 107. pl. 146. Mich. 3 & 4 Eliz. Browne v. Meverell.

and therefore is to be look'd upon as a Stranger to the Matter of the Award &c. And Weiton held the Words (In the Name and for the Behalf of M.) void.—Bendl. 110. Marg. says that Judgment was not enter'd, because the Parties agreed.

15. The Award was, that one of the Parties to the Subscription should pay J. N. a Stranger 20s. But it was held that this was void, and the Arbitrators cannot award a Man to do what is not in his Power; for it is in the Election of J. N. whether he will receive the Money or not. Godb. 12. 13. pl. 18. Patch. 24 Eliz. C. B. Anon.

16. Two submit to an Award, which was, that one shall cease all Suits, and that he shall procure J. N. to be bound with a Stranger to the Subscription, and to make a Fragment &c. of his Manor of D. all which was out of the Subscription. Now in this Case the first Thing only is good, viz. to cease all Suits; the 2d is against the Law, and the 3d out of the Subscription; yet the Award being good in Part, ought to be performed in that, or otherwhise the Bond is forfeited. Godb. 256. pl. 352. Patch. 12 Jac. B. R. Obiter.

17. There being a Controversy between a Parson and his Parishioners Hot. 4. Mass. Tithes &c. six of the Parishioners were bound that they and all the Part. d. v. Man. riffioners &c.
Arbitrement.

feems to be only a bad

risbioners should perform the Award. An Award was made, and Harvey thought it good, tho' all the Parishesioners had not submitted to it, because these 6 were bound for them; and cited 18 E. 4. 22. and 19. 1. and in the next Term Judgment was given for the Plaintiff accordingly. Litt. Rep. 30. Patch. 3 Car. C. B. Mudy v. Osam.

18. Award, that the Father and Son should release all their Right, was held void, because the Son was no Party to the Submission. Hardr. 46. Arg. cites Trin. 5 Car. B. R. Humphery v. Ladd.

Money awarded to be paid to the Baron and Feme, where the Feme was no Party to the Submission, was held good; for by Roll Ch. J. the Baron may submit for his Wife. Syl. 551. Mich. 1652. Smith v. Ward.

20. Upon a Submission of all Actions, Matters &c. Part of the Award was, that a Submission should be made before the Mayor of T. and three others. It was objected, that the Defendant cannot compel any to come before the Mayor &c. because they are Strangers, and so the Award void. But Bridgman Ch. J. and Tirl. J. held it good, if it had been to be made before the Mayor only, tho' he be a Stranger to the Award, [and so feem to admit it not good, being to be made before him and 3 others:] but Hide J. held it void as to doing it before the Mayor only. Sid. 12. pl. 9. Mich. 12 Car. 2. B. R. Spigurnel v. Jones.

21. Award was, that the Defendant should pay to the Plaintiff such Cofts as the Prothonotary should tax in such an Action now depending &c. whereas a Prothonotary, in respect of his Place, and as Officer, is not to tax Cofts but upon a Nonfuit, Verdict &c. and the Arbitrators cannot award that he shall do any Act in his private Capacity, nor is there any Means to compel him, if they did; but adjudged that the Award is good; for it is in the Power of the Parties to the Submission to make themselves liable to have Cofts tax'd, and the Prothonotary is a public Officer, and it is as well as if they had awarded one of the Parties to execute such a Conveyance as the Counsel of the other shall advise, or that he shall pay such an Attorney's Bill. Sid. 258. pl. 12. Hill. 19 & 20 Car. 2. B. R. Worrell v. Atworth.

22. An Award was laid to be, that the Defendant should pay 30 l. out of the Estate of one W. The Submission was general of all Controversies, and no Mention was made therein of the Submission of W. or that the Defendant had any thing of his Estate, nor that any thing of his was liable to the Payment of Debts of W.'s; and for those Reasons Exception was taken that the Award was void, and Judgment was arrested. 2 Show. 61. pl. 47. Trin. 31 Car. 2. B. R. Adams v. Staley.

23. The Award was, that the Defendant or his Executor should release to the Plaintiff. Holt Ch. J. inclined to think that the Disjunctive (he or his Executors) might be help'd by construing that, as to the Executors, void; not but that an Award may extend to Executors, and bind them, because the Executors as Representatives would be liable of course. Salk. 69. pl. 1. Hill. 3 W. 3. B. R. Freeman v. Bernard.

24. Award was to pay 28s. to W. the Plaintiff's Solicitor. Exception was taken that W. is a Stranger, and therefore ill, except in some Cases where
where it appears that it is for the Plaintiff's Benefit, or to discharge Money owing by him, but that nothing of that appears in this Case, and therefore as to that the Award is ill. Quod Curia concensit. Ld. Raym. Rep. 123. Mich. 8 W. 3. Bedam v. Clerkfon.

25. Submiffion was of all Suits between the Parties. The Award was that all Suits between the Parties, or any others upon their Accounts, should cease; and that the Defendant should pay 5 l. to the Plaintiff towards his Costs at Law, and Apothecary's Bill &c. and assigned the Breach in not paying the 5 l. It was objected that this Award was void, because it was that all Suits shall cease between others, who were no Parties to the Submiffion, and the 5 l. being to be paid in Consideration of ceasing such Suit, the Defendant upon Payment of the Money could not have the Benefit of the Award, because those who were no Parties to the Submiffion are not bound by this Award; for they may still prosecute their Suits against him. Sed non allocatur; and the Plaintiff had Judgment. Lutw. 536. Trin. 10 W. 3. Onyons v. Cheefe.

26. The Obligor [C.] was bound to E. T. being a Feme folle, in a Bond of 200 l. in Trust for F. T. and afterwards the Obligee E. T. married the Plaintiff Lynch; and there being Controversies about Payment of the Money, the Obligee [Obligor] became bound in another Bond to Lynch and F. T. that Lynch alone, and the Obligee [Obligor] should stand to the Award of certain Arbitrators, to determine all Differences between them, or either of them. In an Action of Debt brought on this Bond by Lynch and F. T. the Defendant pleaded Nullum Arbitrium. The Plaintiff replied, and flewed an Award, which, amongst other Things, was to pay the Plaintiff F. T. 83 l. and that upon Payment thereof Lynch should execute a General Release. The Defendant rejoined, that F. T. was no Party to the Submiffion; 'Tis true the Defendant became bound to him as well as to Lynch, but the Condition of the Bond was to stand to the Award to be made between the Defendant and Lynch alone; for F. T. is not so much as named in the Condition of the Bond of Submiffion, all which was objected upon a Demurrer to the Rejoinder; but adjudged, that Money awarded to be paid to F. T. shall not be as if he was a Stranger to the Submiffion, because, if it had been awarded to be paid to Lynch, it had been in Equity a Payment to F. T. For Lynch was his Trustee, and it was his Money; so that it is the same Thing in Effect as if the Money had been awarded to Lynch. Nelf. Abr. a. 245. pl. 4. cites 1 Lutw. 571. [Mich. 11 W. 3.] Lynch & Templem. v. Clemence.

27. An Award was, that the Plaintiff and Defendant should pay 25 l. yearly to A. for the Use of B. their Mother. Exception was taken, that this was to award a Thing to be done to a third Person, who is a Stranger to the Submiffion, and consequently of a Matter out of the Power of the Arbitrators. Holt Ch. J. was of Opinion, that a general Award of Money to a Stranger was good; for it shall be intended the Submittants were bound as Trusteers, or were liable to pay the same; and the Payment shall be intended for their Benefit, unless the contrary appear. But Powell J. held that it must appear to be for their Benefit, and it shall not be so intended, unless it does appear; but in the principal Case he held, that it should be intended to be for their Benefit, or rather that it appeared to be so, because the Payment was to be for the Use of the Mother. Afterwards the Matter was reffer'd to the Counsel on both Sides, and so no Judgment was given. 1 Salk. 74. pl. 13. Trin. 2 Ann. B. R. Bird v. Bird.

28. If Award be, that the Defendant pay a Sum of Money for the Plaintiff's Benefit to such Person as the Plaintiff shall appoint to receive it, it was said, Arg. that it would hardly be contended but such Award would be good; and the Court was of the same Opinion, and gave Judgment accordingly; Nelf &c. 2 Barnard. Rep. 291. Trin. 6 Geo. 2. in Cafe of Dale v. Mottram.
Arbitrement.

(E. 2) What Things may be awarded to be done.
A Thing impossible.

1. If they award a Thing impossible, it is void; as to make an Obligation to another immediately after the Award, this is void; for a Space is requisite. 18 C. 4. 21.


2. But otherwise it is, if he awards that one shall make a Feoffment to the other of one Acre, and shall immediately deliver the Charter, this is good, so that he shall make an Obligation, and immediately after pay the Money; for it is possible. 13 C. 4. 21. But an Award to pay 20 l. where he hath not 20 l. or to pay 20 Ton of Wine, where he hath not one, is no good Award, 19 C. 4. 1.

J. agreed; and Brooke says the Reason seems to be, for that he may acquire so much after.—Br. Arbitrement, pl. 52. cites 3 H. 7. 23. S. C. & S. P.—Ibid. pl. 51. cites S. C. & S. P.

(F) Impossible. Unreasonable.

1. If it be awarded, that he shall procure a Stranger to do a Thing, and he hath no Means by Law to compel the Stranger to do it, the Award is void; but if he has any Means to compel the Stranger to do it, either by the Common Law or in Chancery, he is bound hereby. 17 C. 4. 5. b. per Curtin. 21 C. 4. 75.

Br. Arbitrement, in pl. 59. cites S. C. & S. P.—S. P. For tho’ a Man may bind himself by Obligation upon Condition to cause a Stranger to infeoff the Obligee, this is his Folly; but an Arbitrator is a Judge intended to be indifferent, and therefore he shall not award that a Man shall do a Thing which does not lie in his Power; for he has no Means to compel the Stranger to be bound. Br. Arbitrement, pl. 59. cites 17 E. 4. 5.—See (N) pl. 7.

3. If the Award be, that he shall levy a Fine before the Justices de Banco, before such a Day, it is good, though this cannot be done without the Act of the Court. 19 C. 4. 1. * 5 H. 7. 22. b.


4. But if the Award be, that one shall command the Justices de Banco to make him to levy a Fine before a certain Day, this is void, because it is not in his Power. 19 C. 4. 1.

Finn. Arbitrement, pl. 17. cites S. C. & S. P.—Br. Arbitrement, pl. 51. cites S. C. & S. P.—Ibid. pl. 52. cites 5 H. 7. 23. S. C. & S. P.—An Award was, that the Plaintiff should not présenter, nor proceed in such
Arbitrement.

6. The same Law is of a Non Suit, (admitting ut supra.) Dubita-

cites S. C.

& S. P. It was at first held otherwise, but afterwards they thought such Award good.— Ibid. pl. 52. cites 5 H. 7. 25. S. C. & S. P. that such Award is good.— Fitzh. Arbitrement, pl. 17. cites S. C.

7. So it is a good Award, that the Defendant shall make Default. Br. Arbitrement, pl. 31. cites S. C. & S. P. accordingly, and so it is that the Award is not to be done by the Court as well as the Party. 5 P. 7. 22. b.


8. It is a good Award that one shall pay 10l. to a Stranger &c. * Br. Arbitrement, pl. 31. cites S. C. & S. P. — Ibid. pl. 52. cites S. C. & S. P.

It is a good Award that one shall enforce a Stranger of certain Lands, though he cannot compel the Stranger to accept thereof. 5 P. 7. 22. b. (it is to be intended that there is Benefit to the other Party) Patch. 16 Jac. B. R. between * Grey and Gray per Curiam.

— See (E) pl. 6. S. C. and the Notes there.

9. It is a good Award that one shall pay 15l. to the other, apud (E) pl. 2. S. Domum J. S. a Stranger, for he is not bound to pay it in the House of J. S. but as near as he may, and then he shall not be any Tres-
passer. Patch. 13 Jac. B. R. Afton’s Case, in Camera Secarei

adjudged.

10. It is a good Award that one shall pay 1000 l. to the other, and the Notes there.

11. If A. & B. Merchants of a Ship one the one Part, and C. & D. Sydney, the other Part, submit the Award of J. S. of all Matters concerning a Prize taken, by Way of Reparation, and A. & B. enter into an Obligation, and C. & D. into another Obligation to perform the Award, and J. S. awards that A. and B. the Merchants, shall pay 1000 l. to C. & D.

C. and D. for the use of them, and the Restue of the Part-Owners and Mariners; this is a good Award, for if A. and B. do not pay the Money, the Part-Owners and Mariners may have an Action of Debt against them, in as much as all have submitted to the Award, and if they pay the Money to C. and D. to the use of them, and the Restue of the Part-Owners and Mariners, though it be not divided how much each one shall have, yet in as much as they have jointly submitted, it may be jointly awarded to be paid to them; and that it be to be paid to C. and D. for the use of them, and the Restue of the Part-Owners and Mariners, and it was objected, that the Restue of the Part-Owners and Mariners had no Remedy for their Part, but by Action, yet this is a good Award, for it is a good Award to award that one shall enter into an Obligation to pay a Sum, which is but a Thing in Action, and the Rest of the Part-Own-
Owners and Mariners may have Remedy, at least in Chancery, against C and D, if not at Common Law. *Milch, 24 Car. 23 R. between Wood and others Plaintiff, and Thompson and Clement Defendant, abjudged upon Demurrer. Hill. 22 Car. Rot. 803.

12. Upon a Submission between the Parson and Parishioners, as to Tithes &c. the Award was, that when the Parishioners clip the Sheep, they should give Notice to the Parson, so that he or his Servants may be there. Hutton J. thought it unreasonable for the Parishioners to be seeking every where after the Parson; but Crooke J. held it good, and that the Parson is always resident on the Parfonomage, and Judgment was given accordingly for the Plaintiff. Palm. 30. Pach. 3 Car. C. B. Mudy v. Olam.

13. Award to pay 450l. to an Infant, and that Guardian shall give Bond that Infant at his full Age convey the Lands in Question was set aside because unreasonable; per Finch C. 1 Chan. Cares, 280. Trin. 28 Car. 2. Cavendish's Cafe.

14. A. and B. were Partners. A. in Behalf of himself and Partner, referred all Differences &c. between them and the Plaintiff to J. S. and promised to perform his Award; J. S. awarded, that all Suits prosecuted by the Plaintiff against the Defendant should cease, and that he pay the Plaintiff &c. Exception was taken, because the Submission was only of Matters concerning the Partnership, whereas the Award is, that all Suits shall cease; and also that it was of all Suits between the Plaintiff and Partner, and the Award, is, that all Suits prosecuted against the Defendant only shall cease; and likewise that B. the other Partner is no Party to the Submission. Sed non allocatur; for no Difference shall be intended, but what concerned the Plaintiff and Defendant, as the Defendant was concerned with B. in Trade only, unless the contrary appears, and if so it should be shewn on the other Side; and it shall be likewise intended, that all Suits shall cease only between the Plaintiff and Defendant, and that was an Award on both Sides, because it has the Effect of a Release; and also A. the Defendant may undertake for B. his Partner, and having promised that he should perform the Award on his Part (tho' B. he not bound) yet if B. refues, it is a Breach of A.'s Promise, and so the Plaintiff had Judgment upon the first Argument. 2 Mod. 227. Pach. 29 Car. 2. C. B. Strangford v. Green.

15. An Award that one of the Parties shall do a Thing out of his Power, as to deliver up a Deed which is in the Custody of J. S. is void; agreed per Cur. 12 Mod. 585. Mich. 13 W. 3. C. B. Lee v. Elkins.

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I. An Arbitrator awards a Thing against Law, this is void.

2. An Award was, that Interest should be paid to the Plaintiff for Money &c. Defendant demurred, for that the Award was void, because it was for Payment of Interest, and Usury is a Thing unlawfull; but it was answered, that it shall not be taken for Usury, but rather for Damages for Forbearance of the Money; but admitting it was for Interest in the proper Signification of the Word, yet 'tis good, for by the Statutes &c. Contrasts for Interest Money are not void, so as they did not exceed so much as is limited by those Laws; and the Opinion of the Court was, that the Award was good; for an Arbitration shall not be taken absolutely upon the Bare Words. No Judgment was given. Win. 114. 125. Hill. 22 Jac. C. B. Gibbon v. Ferrers.

(G. 2.)
(G. 2) Award, good in General.

1. **T**O make a good Award, there are five **Things** are requisite: 1. In the Form of every Arbitrement, five Things are specially to be regarded: the Things compromised, and every other Circumstance. 2dly, That it be a final End of the Controversies compromised. 3dly, That it appoint either Party to give or do unto the other something beneficial in Appearance at least. 4thly, That the Performance thereof be possible. 5thly, That there be a Means how either Party may by Law attain unto that which is awarded unto him. For if it fall in any of these Points, then is the whole Arbitrement void, and of none Effect. 2 Welt's Symbolol. 167, b. S. 44.

2. A. of the one Part, and B. and C. of the other Part, **submitted** to the Award of J. S. so as the Arbitrement be made and published *Utrique Partium predicta* before such a Day. It was made, and published to A. and B. but not to C. The whole Court held it no sufficient Publication, for it ought to have been delivered omnibus Partibus, because it ought to and also be performed by every Party, and the Word *Utrique* should be expounded *separando* and not *Conjunctim*; and adjudged for the Defendant. Cro. E. 885. pl. 24. Pach. 44 Eliz. C. B. Hurgate v. Meafe and Smith. Part, a Delivery to one of each Part, would not be sufficient.——Mo. 642 pl. 885. S. C. held accordingly.——S. C. cited, 3 Mod 331.

3. A. Man is bound to **stand** to the Arbitrement of A. B. C. and D. of Yelv. 223. all Actions and Demands, so as it be made in Writing by the said A. B. C. and D. or any two of them, under their Hands and Seals; two of them make the Arbitrement; resolved to be good, if it be under their Hands and Seals, for the Arbitrators are made Judges by the Agent and Election of the Parties; and the Parties here, did not fix their Truit in any thing or four of them jointly, but Conjunctim & Divilig. Cro. J. 277. pl. 8. Pach. 9 Jac. B. R. Shallows v. Girling. accordingly.——S. C. cited, per Cur. Cro. J. 400. pl. 8.——S. C. cited, arg. 5 Bull. 65. 64.

Debt upon Obligation *to stand* to the Award of 4, naming them particularly, so as the same be made, and delivered up in Writing, under the Hands and Seals of the 4, or any 3 of them; three of them made an Award, under their Hands and Seals; Resolved, that tho' at the first the Words are to them 4 jointly, yet it is sufficiently disjoined afterwards by the Words (so as the same be made and delivered by any three of them) and an Authority may be well divided, but an Interest cannot, and Judgment in B. R. was affirmed, in Camp. Scacc. Cro. J. 599. pl. 5. Pach. 14 Jac. Berry v. Peryng.——Mo. 849. Barry v. Perty, pl. 1134. B. R. the S. C. agreed to be well made; and that Arbitrement shall be taken by Equity, that all the Parts may stand.—Roll. Rep. 225. pl. 19. S. C. S. adjournate.——Ibid. 275. pl. 57. S. C. adjudged and affirmed accordingly.——3 Bull. 62 S. C. adjudged accordingly, in B. R. and Ibid. 169. S. C. affirmed in Camp. Scacc. Bridg. 90. Mich. 12 Jac. Peryng v. Berry, S. C. adjudged, and Judgment affirmed.

Submission was to 4, so that they made it by the 16th Nov. and signify'd it under the Hands and Seals of 2 of them; an Award under the Seals of two was held good upon Demur and Judgment, for the Plaintiff; Vent. 50. Mich. 21 Car. 2. B. R. Hill v. Langley.

4. An Award took Notice, that there was 721. in Controversy, and awarded only 50 l. in SatisfACTION, and general Releases to be given; it did not appear, that any other Matter was in Controversy, tho' the Submission was General; and it was objected that 50 l. could not be in Satisfaction for 721. it was adjudged, that the Award was good, because the Arbitrators might consider other Matters between the Parties; besides, it did not appear that 721. was due, but only that it was in Controversy; and it is unreasonableness for him to find Fault with what is done in R.
his Favour; and his Objection is, that himself ought to pay 72 l. and that the other is Content with 50 l. 2 Mod. 303. Patch. 36 Car. 2. C. B. Godfrey v. Godfrey.

(G. 3) Award. Good. The Submission being by Attorney.

But if it had been said that the 20 l. &c. shall be in Satisfaction on of all, it had been good, or that they have examin ed the Accounts, and this was all that was due; or that this was for all due, or for the Account, and cited Roll Arbitrement 255. and tho' they have averred that this was for all due, yet if the Award itself does not justify the Averment it is not sufficient. It was adjudged for the Defendants. Skin 679. 680. S. C.—Had the Release been awarded to the Defendant in the Use of J. S. or De & Super Premissis, it had been a mutual Award; but the Award not being so, the pleading it to be made De & Super Premissis cannot mend or extend it. 1 Salk. 70. pl. 3. S. C.—Comb. 413. S. C. adjudged for the Defendant—Bacon. 412. S. C. and the Award adjudged void. But per Cur. the Submission by the Defendant as Attorney for J. S. is good, and would have obliged him to pay the Money awarded, if the Award had been reciprocal with respect to J. S. allo.—Ld. Raym. Rep. 246. S. C. adjudged for the Defendant.

2. If a Person submits to an Award on the Part and Behalf of a Stranger, it was said, that his Bond shall be forfeited if the Stranger does not do what the Award requires him to do, and the Court inclined so. Comyns's Rep. 184. pl. 115. Trin. 8 Ann. C. B. in Case of Shelf v. Baily.

(H) How it may be made.


1. THE Arbitrators cannot make their Award by Parcels. 19 E. 4. 1. per Choke.

S. P. by Danby J. and be held that that and the After-A wards are void; but per Mayle contra if all be done before the Day assigned. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.—Fitch. Arbitreme t, pl. 23.
Arbitrement.

3. But the Arbitrators may at one Day* consider one Point, and at another Day another, and at a 3d. Day the 3d. Point, and then give one Judgment upon all the Points, so that the Judgment ought to be one and not several. 39 P. 6. 12.

*Commoner for one Point) and cites 39 H. 6. 9.——Fitzh. Arbitrement, pl. 13. cites S. C. but I do not observe S. P. there.

4. If the Arbitrators award that one of the Parties shall pay 10 l. to the other, and in Surety of Payment he shall be bound in an Obligation to the other by the Advice of the Arbitrators, this is no good Award, because they cannot award by Parcels. 19 E. 4. 1. per Choke.


But if the Award be that one shall pay 10 l. to the other, and in Surety of Payment he shall be bound in an Obligation to the other by the Advice of his Counsel, this is good, for it is incident and pursuant that his Counsel shall make the Payment here to be paid. 19 E. 4. 1. per Choke.

S. C. and 18 E. 4. 22. 23. [which is the first part of the S. C]——See pl. 7. infra.

5. But it had been otherwise if the Security had been to be made As by the Advice of a Stranger, 19 E. 4. 1. per Choke.

By the Advice of the Counsel of the Party. Br. Arbitrement, in pl. 39, cites S. C. by Brian and Choke——Br. Arbitrement, pl. 51. cites 18 E. 4. 22. 23. and 19 E. 4. 1. [which is a Continuation of S. C.] Award was, that the Defendant should release all Allions &c. as such a one [a Stranger] should advise. Adjudged void to refer it to the Act of another, and that the Defendant is not bound to perform it. Cio. E. 726. pl. 59. Mich. 41 & 42 Eliz. C. B. Emery v. Emery.

6. If there be an Award that one Party shall pay 10 l. to the other, and by that other shall make a general Release as fully and beneficially as Counsel shall advise, this is a good Award, for the Counsel hereby had not Power to do any Judicial Act, but a Ministerial only, for the Arbitrator had directed the Extent of the Release, which he was to perform. And the Counsel are only to make it as strong in Law as they can. Cr. 1650. between Cater and Startin, adjudged upon Demurrer. Intitutur. Hill. 1649. Rol. 1025.

7. If the Award be that one Party shall pay 10 l. at such a Day, and if he does not pay it at the Day, that he shall pay after at such a Day 110 l. this is a good Award, for it is but a Penalty for the Non-payment at the Day, which was all in the Power of the Arbitrators. Hill. 2 Jac. between Ryspen and Rydal adjudged.

8. If the Award be that one Party shall pay 10 l. at such a Day, and if he does not pay it at the Day, that he shall pay after at such a Day 110 l. this is a good Award, for it is but a Penalty for the Non-payment at the Day, which was all in the Power of the Arbitrators. Hill. 2 Jac. between Ryspen and Rydal adjudged.

9. If
9. If 2 submit themselves to the Award of J. S. and the Arbitrators award that one shall pay 5l. to the other for 10 Load of Wood, and awards several other Matters P. for other Things, and after this they award that it be he that is to pay it can be unproved or better prove the Payment of any of the said Sums before them, or any of them before the said Feast of Michael, then is much as is proved shall not be paid at the said Feast, this is a good Award, for the first part is good, and to thereby the Authority of the Arbitrators cited, and then a Reference to prove or disprove is merely void. *Pitch. 16. Inc. B. between Beckwith and Warley adjudged. Dide (as it seems) the same Case Hobart's Reports, Case 251.

10. If an Award be made touching certain Curtains, that if the Defendant before the 20 December can make it appear that the Curtains were delivered to the Plaintiff, that then the Arbitrators should make a further Award within 14 Days after if they can agree, otherwise (*). J. S. as Umpire should conclude it within 7 Days, and that the Plaintiff and Defendant should stand to the Award of the Arbitrators, if they make any, or of the Umpire $c., and if the Defendant before the said 20 December, do not shew any such Testimony, then the Arbitrators award that the Plaintiff shall not pay for the Curtains, but shall be free from any other Claim; and also the Arbitrators award that Defendant shall pay 19 l. 12s. before the first Day of January alter, if nullum ulterior Arbitrium sierit for the Curtains before the said Time, this Award is void, though it be averred that no other Award was made before the said first of January, for the Award, that if it be made appear $c. that they will make another Award, or make an Umpire is void, for they cannot make an Award by Parcles, nor make an Umpire, and then the last Clause that the Defendant shall pay 19 l. 12s. if no other Award is made before the 1 Jan. has Dependancy upon the first Part of the Award, which was void, and it was not intended that the Defendant should pay the Money if the Arbitrators or Umpire made any Award before, and if they had made any Award this had been void. *Pitch. 9 Car. B. R. between Brown and Dalton, adjudged per Curtains. Intrac. Tr. 7 Car. Rot. 920.

11. The Arbitrators cannot award that they shall stand to the Award of others, for the Trust reposed in them cannot be transferred to others, for by the Submission they are made Judges.

In Debt the Defendant pleaded, that they put themselves in Arbitrement of 2 who awarded that they stand to the Arbitrement of W. P. which W. P. made an Award, which he has performed, and there admitted that Arbitrators may award that they stand to the Arbitrement of another. *Br. Arbitrement, pl. 9. cites 47; E. 3. 20, but the Law is contrary, as it seems, which see Anne E. 4. upon which such Award is void.

12. If an Award be that the Award before made by J. S. shall stand in all Things, but whereas in the said Award one was to pay 10 l. at Michaelmas, now they award that he shall have Day to pay it till the Feast of Christmasts after. *Tr. 3 Inc. B. Dubitator.

13. If an Award be, that one shall pay so much Money to the other, and if it can appear that more was due, and due Proofs is made thereof within one Month, then he shall pay this also, and the Submission is quod Arbitrium flat before such a Day, which was before the End of the Month, it seems that this is not a good Award, because it is not final. *Br. 10 Car. B. R. between Aenas and Forch dubitator, the Muse being Nullium Fereunt Arbitrium, and this found for the Plaintiff. Intrac. Tr. 9 Car. Rot. 470, but Hill. 10 Car. the Judgment in Banco was affirmed upon the Words of the Submission, admitting this part to be void, because it was not averred that there was any Doubt thereof before the Submission.
Arbitrement.

14. If there be a Submission of all Controversies touching a Voyage to Cro. C. 35; but S. C. Award is made that one shall pay his Part of the Ypoge, and shall allow his proportionable Part of the Load that shall come to the peace; but the Award being to pay the Sum by the Ypoge, upon Account; and it is awarded further of the other Part, etc. Tho’ this Award be of itself uncertain, yet it is reduced as it may be reduced to a Certainty, this is a good Award. Nid. 10. Car. B. R. between Beale and Beale, adjudged upon a Demurrer in an Action of Debt upon an Ozciation. Intr. acct Car. Rot, 566.

15. Where a Man is bound to stand to the Award &c. who awards Award that that Action shall be taken between the Parties by Advice of W. and P. this is a good Award; for by this W. and P. are not Arbitrators, but Executors of the Arbitrement; per rot. Cur. except Yelverton. But per Yelverton, Advice of it is not good for the Uncertainty, because W. and P. shall make Advice, f. 3. is good; which is uncertain till it be notified. Br. Arbitrement, pl. 37. cites 8 for this Reference is not but for Execution of W. and P. this had been void; for he cannot give his Power over the Award. Ibid.

16. But if he had awarded that the Parties stand to the Arbitrement of W. and P. this had been void; for he cannot give his Power over the Award. But the Arbitrement in the Name of them and a third Person to whom no Substitution was made, nor can they alter it after it is made. Jenk. 128. pl. 61.

17. A suit to have an Award made (by B. and C. Arbitrators differently chosen) performed, and both Parties were bound each to other for Performance of the Award, and one Part of the Award was, if any Question did grow between the Parties, the Arbitrators should end it. It is ordered a Subpœna to shew Caufe. Cary’s Rep. pl. 80. 19 Eliz. Barker v. Barker.

18. Award was, that each should give to the other, within 4 Days after the Award, a general Release of all Demands till the Day of the Obligation; Sherey v. provided that if either of them dislike the Award within 20 Days after the Award, and shall pay to the other within the said 20 Days 10s. the Arbitrement to be void. It was held in this Case, that the first Part of the Award was good, and the Produce, being repugnant, void; and that, by the Award the Non-performance of the Release within 4 Days, the Bond was forfeited, and the Produce cannot save the Bond forfeited; and adjudged for the Plaintiff. Cro. E. 291. pl. 1. Hill. 35 Eliz. B. R. Sharley v. Plaintiff. Richardson.

S. C. cited Sid. 59. pl. 27. Arg. Mich. 13 Car. 2. B. R. in Case of King v. Fines, which was an Award between A. and B. that A. should pay 50 l. and that B. should release, provided if one of them shall be [as the now]
Arbitrement.

19. The Condition of the Bond was, of all Matters &c. till the making the Obligation. The Obligation was made May 11th, at 12 O’Clock at Noon. The same Morning Notice was given to the Arbitrators of a Difference about a Trespass done by the Plaintiff the same Morning, whether this Trespass should be arbitrated, because there cannot be a Fraction of Days, was not argued, or any Opinion of the Court delivered; only Coke cited 5 E. 4. 298. that they ought to arbitrate of that, because the Condition was of all Matters till the making of the Obligation. Brownl. 123. Trin. 11 Jac. Penniworth v. Blaw.

20. Submissin was of a Controversy concerning the Lease of a House which the Defendant claimed by Lease from B. for 6 Years, at 15 l. per Ann. payable quarterly, which Rent was arrear for a Year. The Award was, that he should pay to the Plaintiff for this Rent 13 l. 6 s. 8 d. and that he should enjoy for three Years and a half, and should pay for it yearly 15 l. at Lady-Day and Mich. or within 40 Days after, and that if he failed of the Payment, then the Award for his enjoying it should be void. It was held, that this conditional Award is good enough as to the Enjoyment; for it is absolute if the other pays the Rent, and otherwise it is his own Default; and Judgment for the Plaintiff. Cro. J. 423. pl. 4. Pach. 15 Jac.

Furter v. Prowd.

21. Tho’ several Matters are in Controversy, yet if one only is notified to the Arbitrator, he may make an Award thereof; for the Arbitrator is in Lieu of a Judge, and his Office is to determine Seundum Allegara & Probata; and it is the Duty of the Parties grieved, and who know their particular Grievs, to notify their Causes of Controversy to the Arbitrator who is a Stranger to them, and every one ought to do what lies in his Notice. 8 Rep. 98. a. b. Hill. 17 Jac. Furter v. Prowd.

22. If an Award be made by me, that the one shall do such an Act to the other, and that if any Doubt arises touching my Award, that then I will expound it, this is an ill Award; per Doderidge J. to which Montague Ch. J. agreed. 2 Roll Rep. 215. Mich. 18 Jac. B. R.

23. Submissin to J. S. of all Actions and Demands, to be made before the 8th of March. He made an Award that all Suits between them should cease, and that C. one of the Obligers should pay to the Plaintiff 40 l. viz. 10 l. at Mich. &c. and if before the last Payment, videretur to the Arbitrator, that C. was engaged for the Plaintiff in any Debt not satisfied, they should repay unto him so much as the said Debt not satisfied did amount to; and if any Doubt shall arise concerning the Award, the Parties should stand to his Exposition. Resolved it was a void Arbitrement; for first it appoints the Payment of 40 l. and after appoints Si videretur to him that C. was engaged &c. that he should repay back, and so it was not a final Award, but referred Part to his future Judgment, which an Arbitrator ought not to do; and when in this Part it is void, so as it cannot be performed, it is totally void; and it was adjudged for the Defendant Cro. J. 584. pl. 5. Mich. 18 Jac. B. R. Winch v. Sanders. Deeds to such a Sum, that this Sum certain should be paid, peradventure it had been good enough. Cro. J. 585. in S. C.—2 Roll Rep. 214. S. P. by Doderidge in S. C.—S. P. by Doderidge in S. C. Palm. 146.

If the Award had been, that if it appears before such a Day that he is indebted, that then he shall pay 10 l. this is a good Award; per Doderidge J. to which Montague agreed. 2 Roll Rep. 215. Mich. 18 Jac. B. R.
Arbitrement.

24. It was provided by the Award that if any Doubts arose, the Arbitrators were to expound the same. But they cannot refer to the surviving Arbitrators a Doubt arose for want of the Word (Heirs) whether an Estate in Fee or for Life only was awarded. The surviving Arbitrators, by Writing under their Hands and Seals, declared, and the 2 Survivors executed at a future Day, Cro. J. 515. pl. 16. Mich.

Chan. Rep. 84. 10 Car. Scot. v. Wray.

25. A Submission was of all Actions, Matters &c. The Award was, that the Defendant pay to the Plaintiff 100 Marks, which was for the Costs of one Suit only, and that &c. It was objected, that this Award was void, because the Submission was general of all Suits &c. and of that Opinion were all the Court; and adjudged for the Defendant. Sid. 12. pl. 9. Mich. 12 Car. 2. B. R. Spigurnel v. Jones.

26 Debt upon Bond conditioned, that whereas the Defendant by [for] himself and his Son had submitted to the Award of A. and B. Its said &c. if they made none, then to the Award of such Umpire as they should choose, to be made before 1 June. The Arbitrators made no Award, but the Umpire awarded &c. that the Plaintiff should seal three Bonds to the Defendant, and that the Defendant should pay to the Plaintiff 100l. which he had not done; and upon Demurrer this was adjudged a void Award, because nothing was awarded concerning the Soil. Lev. 139. Mich. 16 Car.


27. On a Submission to an Award by Rule of Court by Consent, and that such Award should be final, and stand ratified by Decree without any Appeal, the Arbitrators had determined some Matters, and had left others undetermined, and submitted these other Matters to the Court; Judges were and whether this was therefore such an Award (being Part of the same Matters referred') as was fit for the Court to decree, was the Question, and tho' at Law an Award may be good, tho' but for Part of the Matters referred to, unless the Submission be conditional to make an Award on the State Premises; yet Equity, as it was infused, ought not to decree such an Award, unless it be of all Matters referred to, and no one was both the Judges, and cited the Cases of that Opinion; for it is not a Determination pursuant to the Reference, and fo the Award was set aside. Per Ld. Keeper and Master of the Rolls, Sir F. Cottrell, and 13 Car. 1667.


28. An Award was, that the Defendant should pay Money, and that all the Bond Suits shall cease. It was objected there, because no Release was awarded to be given, that this Award was not mutual. But per Cur. the Awarding all Contro- that all Suits shall cease hath the Effect of a Release, and the Submission and Award may be pleaded in Discharge as well as a Release; and Judgment accordingly. 2 Mod. 227. 228. Patch 29 Car. 2. C. B. Strangford v. Green.

2 Frem. Rep. 133. pl. 162. S. C. and the others undetermined, and submitted these other Matters to the Court; Judges were and whether this was therefore such an Award (being Part of the same Matters referred') as was fit for the Court to decree, was the Question, and tho' at Law an Award may be good, tho' but for Part of the Matters referred to, unless the Submission be conditional to make an Award on the State Premises; yet Equity, as it was infused, ought not to decree such an Award, unless it be of all Matters referred to, and no one was both the Judges, and cited the Cases of that Opinion; for it is not a Determination pursuant to the Reference, and fo the Award was set aside. Per Ld. Keeper and Master of the Rolls, Sir F. Cottrell, and 13 Car. 1667.


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2 Frem. Rep. 133. pl. 162. S. C. and the others undetermined, and submitted these other Matters to the Court; Judges were and whether this was therefore such an Award (being Part of the same Matters referred') as was fit for the Court to decree, was the Question, and tho' at Law an Award may be good, tho' but for Part of the Matters referred to, unless the Submission be conditional to make an Award on the State Premises; yet Equity, as it was infused, ought not to decree such an Award, unless it be of all Matters referred to, and no one was both the Judges, and cited the Cases of that Opinion; for it is not a Determination pursuant to the Reference, and fo the Award was set aside. Per Ld. Keeper and Master of the Rolls, Sir F. Cottrell, and 13 Car. 1667.


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2 Frem. Rep. 133. pl. 162. S. C. and the others undetermined, and submitted these other Matters to the Court; Judges were and whether this was therefore such an Award (being Part of the same Matters referred') as was fit for the Court to decree, was the Question, and tho' at Law an Award may be good, tho' but for Part of the Matters referred to, unless the Submission be conditional to make an Award on the State Premises; yet Equity, as it was infused, ought not to decree such an Award, unless it be of all Matters referred to, and no one was both the Judges, and cited the Cases of that Opinion; for it is not a Determination pursuant to the Reference, and fo the Award was set aside. Per Ld. Keeper and Master of the Rolls, Sir F. Cottrell, and 13 Car. 1667.
Arbitrement.

An Award was, that a Suit in Glancy should be dismissed. It was objected that this was void, because not final; for the Party may dismiss his Bill, and begin again, and so it is like an Award to be Non-fuit. The Court said, that an Award to be Non-fuit is not final in the Nature of the Thing, but they would intend this a Substantial Dismissal and perpetual Ceaser in this Case. 1 Salk. 75. pl. 17. Mich. 5 Ann. B. R. Knight v. Burton.


29. Where Matters are submitted, they ought to Award all absolutely, without referring to any future Examination; and that he knew but one Case where Arbitrators may refer to a future Act, and that is, where they award the Payment of such Costs, as an Officer of the Court shall tax, the Plaintiff which has been allowed per Holt, fed adjournatur. 12 Mod. 139. Mich. 9 W. 3. Selby v. Ruffel.

21. Where the Submission is simply without Condition, an Award of Part is good. 12 Mod. 385. in Case of Lee v. Elkins. 31. The Award should be certain and final, yet if they are as certain and final as the Nature of the Thing will bear 'tis sufficient; by 3 J. contra Page J. Gibb. 272. Patch. 4 Geo. 2. B. R. Phillips v. Knightly.

(1) How it is to be made. [Satisfactory, &c.]

1. If a Trespass be put to Award, if they Award nothing to be paid or done by him that did the Trespass, it is worth nothing. * 43 E. 3. 28. b. + 46 E. 3. 17. b. + 19 D. 6. 37. 20 D. 6. 19.

2. So if they Award that he shall wage his Law that he is not guilty, and that he shall be quit, and he does it accordingly without S. P. and Satisfaction. 46 E. 3. 17. b.

Wiche and Finch held, it is a good Arbitrement. But Brooke says, Quare; because the Defendant afterwards pleaded not guilty. — Fitz. Arbitrement. pl. 21. cites S. C. & S. P.

Fitzh. Arbitrement, pl. 19. cites S. C. * 552. + S. P. accordingly, by the best Opinion. Br. Arbitrement. pl. 52. cites 12 H. 5. 14. 15. — But contra by Tremble, if the Award had been that he should carry them from such a Place to such a Place. Ibid.

3. [So] If a Trespass for taking his Cattle be put to Award, if they Award that the Owner shall have his Goods again; this is not good, because there is no (*)& Satisfaction awarded for the Damage of the taking and Detinue. 45 E. 3. 10.

4. An Award to pay Parcel of a Debt due, is not good. 45 E. 3. 16. contr.

Br. Arbitrement. pl. 7. cites S. C. accordingly; that an Award to pay Part, and retain the Rest, is not good, or to pay the Moiety and retain the other Moiety, it is no Plea; but Brooke says, Quare, for it is not adjudged; but he says it seems, that it is no Plea.

5. So an Award, that the Owner shall have Parcel of his own Goods, and [the other] the other Parcel is not good; contra * 45 E. 3. 16. S. P. says 10 H. 4. Arbitrement 19.

Quare for it is not adjudged, but it seems that it is no Plea.

6. Where
Arbitrement.

6. Where each Party is indebted in 40s, the one to other, it is a good Award, that the one shall be quit against the other, for there is a sufficient Satisfaction. 19 H. 6. 37. b.


8. In a Writ of Account against * a Master of a Ship, it is a good idea for the Defendant to say, that there was a great Tempest upon the Sea, so that he was driven to land, and upon the Point of being drowned and thereupon he was at much Cost upon the ship, and that after the Plaintiff and Defendant submitted to the Award of J. S. who awarded, that he should deliver to the Plaintiff the same Goods, on which he demanded an Account &c. the which he hath delivered &c. (for in this Case he ought to have been allowed the Costs, which might amount to more than the Profits he made of his Goods.) 2 D. 5. 2.

9. If two submit an Account of a certain Thing to the Award of certain Arbitrators, who award that the one shall Account before such Auditors that the other shall allign, and that if he be found in Arrears, he shall pay them, and into fact, each shall be quit against the other, this is no good Award. 30 H. 6. Arbitrement 27. adjudged, and Statham Arbitrement, tame Case.

10. If a Man and a Woman submit themselves to an Award, it is no good Award that they shall intermarry &c. for this is not intended any Advantage. 9 C. 4. 44. per Choke.

11. So it is no good Award that one shall go to Rome or Paul’s, for this is not any Advantage. 9 C. 4. 44. per Choke.

12. It is no good Award, that one shall make a Release to the other Fizh. Arbitrement, in Satisfaction of an Action, if he, to whom the Release is made, had nothing in the Land at the Time, for then it is no Advantage to him. 9 C. 4. 44. b.

13. If a Man makes to me a Release of certain Land of which I am seized, and after he gets the Release again, and then he and I submit all Matters to the Award of J. S. who awards that he shall deliver to me all the Evidences concerning the Land in Satisfaction of a certain Action, this is a good Award though these are my own Evidences, for this is an Advantage to me to have them without Suit. 3 C. 4. 44. b. per Carthy.

14. If an Award be one of the Parties shall release all his Right to the other in certain Land, of which the other is seized &c. though he who is make the Release hath not any Right, yet this is a good Award, for it is an Advantage to have such Release. 9 C.

15. An Award ought to be a final Determination of the Matter, Br. Arbitrement, otherwise it is not good. 19 H. 6. 37.

16. As if 2 have Actions the one against the other, and the Award * Br. Arbitrement, pl. 21. cites S. C. &

S. P. — Fitzh. Arbitrement, pl. 6. cites S. C. — See (H) per tum.

17. As if 2 have Actions the one against the other, and the Award * Br. Arbitrement, pl. 21. cites S. C. &


18. As if 2 have Actions the one against the other, and the Award * Br. Arbitrement, pl. 51. cites S. C. and the Court at first thought it not good, yet afterwards they
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they inclined otherwise. — Ibid. pl. 52. cites S. C. & S. P. and that such Award is good. — Fitzh. Arbitrement, pl. 17. cites S. C.

* This seems misprinted, and that it should be 5 H. 7. 22. — Br. Arbitrement, pl. 31 cites 5 H. 7. 22. S. P. — Ibid. pl. 52. cites S. C. — Fitzh. Arbitrement, pl. 17. cites S. C.

17. So it is no good Award that one shall discontinue an Action which he hath against the other, and that the other shall do the fame of an Action which he hath against him, because it is not any final Determination of the Matter between them. Contra * 15 H. 7. 22. per Curiam.

18. But it is a good * Award that the Plaintiff in an Action shall make a Retraction (for this is a good Bar) 5 H. 7. 22. b.

Br. Arbitrement, pl. 31. cites S. C. & S. P. — Fitzh. Arbitrement, pl. 17. cites S. C. — * Orig. is (Barr.)

19. Where it is awarded that A. shall release the Surety of the Peace which he has against B. which B. before this, had purchas'd Superfedeas of the Peace, the Award is void; for by the Superfedeas the Surety of the Peace is determined, because Surety was found before. Br. Arbitrement, pl. 40. cites 21. E. 4. 38, 39.

And if they award that he shall release his Suit against B. and he has not any Suit against him, this is a void Award. Br. Arbitrement, pl. 40. cites 21 E. 4. 38, 39.

21. A. and B. submitted Matters to award. The Matters of A's Side were pardoned by the Act of Indemnity made 12 Car. 2. and the Award was made after that Statute. It was moved that this Award was void of one Part, and consequently void in toto. But the Court held it good of both Parts; for they would intend that some of the Matters are not pardoned, (unless it be pleaded otherwise) or rather than the Award shall be void, that the Party here concerned is a Party therein excepted. Sid. 178. pl. 11. Hill. 15 & 16 Car. 2. B. R. Anon.

(K) How it may be made. An Award of one Part only is not good. [And what shall be said such Award.]

1. * An Award of one Part only is not good. Co. 8. Balvoie 98.

2. [As] If the Award be that one shall go quit of all Actions had and the Plaintiff of all Quarrels between them. who award that the Garnihee shall go quit of all Actions and Quarrels had by the other against him, and nothing is said of the Actions which he hath against the other, this is void. 7 H. 6. 41. Co. 8. * Balvoie 98. 21 H. 6. Arbitrement 9. † 22 H. 6. 39.

Strange, if the Garnihee pleads by the other against him, and nothing is said of the Actions which he had against the Plaintiff, the Award is void; Quod fuIt concension; and thereupon the Defendant amended his Plea. Br. Arbitrement, pl. 17. cites 7 H. 6. 40. — S. C. cited 8 Rep. 98. a. Arg. and admitted per Cur. because there the one should be discharged of all Actions, and the other would receive nothing in Satisfaction thereof. † Br. Arbitrement, pl. 23. cites S. C. & S. P. per Danby.

Arbitrement that the one shall go quit is not good, per Danby; but per Portington, Arbitrement that the one has done a Trespass to the other, by which the other likewise has done a Trespass to him, and therefore that the one shall go quit against the other, and the other against him likewise, is a good Arbitrement, quod Newton conceiveth. Br. Arbitrement, pl. 23. cites 22 H. 6. 39.

"
Arbitrement.

It two submit themselves in Arbitrement of all Trespasses, and they award that the one shall make amends to the other, and award nothing that he shall do to him again, this is a void Award, for all is for the one Party, and nothing for the other. Br. Arbitrement, pl. 29. cites 39 H. 6. 9. per Priori.

3. [So] if the Award be that one shall pay 10 s. to the other with. Poph. 344. out laying for any Matter in certain, or for all Matters, this is not good, for it cannot be known for what Matter this was to be paid, and to no Matter discharged thereby, and to the Award but of one Rep. Part. Hill. 15 Jac. B. R. between May and Samuel, per Curiam, Samuel v. Mawe v. S. per Cur. Hob. 49. 50. pl. 55. Hill. 12 Jac. in Case of Nichols v. Grummination, obiter.

4. But it is otherwise, if this is to be paid in Satisfaction of all Matters for by this the Matters are discharged. Hill. 15 Jac. B. R. between May and Samuel, per Curiam.

5. If an Award be that one shall pay to the other in Consideration of 2 Brownl. such a certain Debt of 20 l. long while due, and for the great Coil in this part sustained, the Sum of 22 l. this is a good Award, for he who paid the Money shall be discharged of the said Debt, and to the Award of both Parties. Co. 8. Baillepoole 98. Resolved.

the no express Mention was that the other should be discharged of his Affirmpt; for the Award was a good Discharge in Law, and may be pleaded in Bar in another Action brought upon the Affirmpt, and so it was for both Parties — Cro. J. 289. pl. 1. S. C. Mich. 6 Jac. B. R. in Error brought there the Court without Argument adjudged the Award good, and would not hear any further Argument concerning it. — Hill. 144. Baillepoole v. Freeman, S. C. the Court delivered no positive Opinion, but inclined to affirm the Judgment. — Roll Rep. 270. Arg. cites S. C.

6. If ² submit all Matters between them, and the Award is made S. P. held De & super Praemissis in Manner and Form following, sedicit, that one shall pay 40 s. to the other, this is a good Award of both Parts; J. and after for in as much as this was made de Praemissis, it cannot be intended by Roll Ch. Glyn Ch. J. accordingly, but that the Award was made in Satisfaction of all Matters, for this cannot be intended to be paid for any other Cause, and the Words express that it is Satisfaction of all Matters. Hill. 15 Jac. B. R. between May and Samuel, per totam Curiam, accord.

Where a Submission is of all Actions, Trespasses and Demands, and not with an Isa good far de Praemissis &c. if they take an Award ² pay and not of all Matters howe'er them, it's of no use to them, yet it is good for that whereof they make Award; for if the Submission had been Conditional it had been otherwise, and in such Case the Award would be void in all; Per Coke Ch. J. who said he had known it to adjudged. Cro. J. 355. pl. 9. Mich. 12 Jac. B. R.

7. So a fortiion, if it be awarded that one shall pay 101. to the other Roll Rep. ² for all Matters between them, this is a good Award, for this is a good Discharge of all Matters. Hill. 15 Jac. B. R. between May and Samuel. S. C.

An Award to pay 50 l. Exception was taken that it was not paid for what, or that it was to be paid in Satisfaction of any Thing; but it was answered, that it was not necessary to shew for what; but however that it was shewn, viz: for the Ending of all Differences; and Roll Ch. J. held accordingly, that it was not necessary to be shewn, for all Differences are to be concluded upon Payment of the Money. Sty. 355. Mich. 1052. Smith v. Ward.

8. [But] If an Award be made de & super Praemissis submitted in ² Roll Rep. Manner and Form following, sedicit, that one shall pay 40 s. to the other, and that the other shall make a general Release of all Matters till the Award made, this is void as to the Release, because it comprehends more Time than was submitted; in this Case, the Award is void in all, for it cannot be intended that the 40 s. shall be paid in Satisfaction of all Matters, nor is it paid in Part of Satisfaction,
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in this Café, the Award had been good.


Section, so that this is a good Discharge of all Matters which the other hath against him, being attended with the general Release; for the Arbitrators intended that the Release with the Money given should be a Satisfaction for all Matters between them, and not the Money without the general Release. Hill. 15 Jac. B. K. between Mr. and Samuel; adjudged upon a Demurrer per tocam Curiam proter Houghton, who was against the Judgment, because the appointing of the Release shews their Intention, that this should be the Discharge (peradventure there was some Obligation in Controversy, which cannot be discharged by an Award without a Release.)

9. If an Award be that one shall give 40s. to the other, in Satisfaction of all Matters between them, and that the other shall make such a Release as aforesaid, which is void, yet the Award is good; because the 40s. of itself is a good Discharge of all Matters, and the Release was made but to make it the more sure.

10. If an Award be that all Controversies shall cease, and that one shall give 12 d. to the other, this is a good Award, though the other hath nothing given to him, for it may be, that he hath done a greater Treachery than the other. B. 8 Jac. B. Cole’s Café per Curiam.

Hob. 49. pl. 55. S. C. — Brown. 58. Nichols v. Grimwim. S C. says, that Judgment was given for the Plaintiff, for tho’ the Award be made but of one Part, yet if the Defendant may plead it in Bar of the other Action brought against him for the same Cause, in all such Cases the Award is good — Syt. 44. Trin. 25 Car. Roll. Ch. J. said it was held 1 Jac. that the Words super Premissis in the Award will not help an Award made but of one Part, and seems to intend this Café.

11. If an Award be de & super Premissis in Manner and Form following, in that the one shall depart from his House, remove his Day, and shall pay to the other 3 l. this is no good Award, because it is but of one Part only, for it is not made de Premissis generally, but modâ & forma sequentâ, by which he refers it to the Court upon the Matter. B. 13 Jac. B. between Nichols and Grimwim adjudged, vide fame Café, Dobart’s Reports 68. where it is said, that no Judgment was given therein.

12. If an Award be de & super Premissis, that each of the Parties shall make a Release the one to the other of all Matters till the Award, and that one of the Parties shall pay 10 l. to the other at a Day, & good Parties prædicte continuarent amantes & Amici ut in priori Tempore, this is a good Award, for though it be admitted that the Award as to the general Release till the Award made, is void (though the Court included e contra as to this) yet the Award for the Payment of 10 l. is an Award of both Parties, because it shall be intended to be in Satisfaction of all Matters between them, especially in this Café, when it is said the Parties shall be Friends ut in priori Tempore, Tr. 8 Car. B. K. between Raymond and Popley, adjudged upon a Demurrer in Debt upon an Obligation for Non-Performance of the Award, and the Breach alleged in non-payment of the Money, and the same Term also adjudged upon Demurrer in another Café upon the same Award between Popley and Popley, I my self being de Contito Querentis.

Syt. 44. S. C. (the Writings awarded to be paid for by B. were the Bonds of Submission) and Roll I held the Exception good, and said, the Charge for making them, is not within the Submission, for the Bonds were made before the Submission; and that it was held 15 Jac. that the Words super Premissis in the Award will
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will not help an Award made but of one Part. — All. 10. S. C. adjudged a void Award, because of Side only; for it did not appear that B. was bound to pay for them, which was the only Recompense for A. Besides this Matter is subsipient to the Submission, and so cannot be intended a good Re- compense. — S. C. cited, Hary. 45. arg. — S. P. agreed, Bridgm. 91. Mich. 12. Jac. in Case of Perin and Bradley. — S. P. held to be void. Cro. J. 578. pl. 6. Trin. 18 Jac. B. R. in the Case of Butfield v. Butfield.

14. So if the Award be that one shall pay to the other 10 l. that both S. C. cited, Parties shall pay and discharge the Reckoning of the Houfe, which was expended at the Meeting upon making the Award; this is an Award but of one Part; and the Discharge of the Reckoning is out of the Sumnission, this coming after the Submission. Tr. 1650. Hall and Maffey adjudged upon a Demurrer. Intrarit. Hill. 1649. Rot. 673.

15. If two submit themselves to the Award of J. S. for the Title Cro. J. 108. of certain Copyhold Land, and J. S. awards that one, scilicet A. shall pl. 8. Gen- pay to the other, scilicet B. 61. upon the 21st Day of May, and 61. at pings v. Michaelmas next ensuing, and that B. shall release to A. all his Right in the Copyhold super praed. primo Die Maii omitting vice versa, and awards further, that he shall make further Assurance within 3 Days after sq. this is a void Award, for the Award for making of the Re- lease super praed. primo Die Hall is void, there being no such Day before-mentioned, and it appears, that the Release at the said Day should be the principal Contemplation of his Part, who ought to make it, and then the Rest of the Award for further Assurance, which is good, is not sufficient, this being but Part of the Confederation and Award of his Part. Hill. 4 Id. B. R. between Markham and Jennings, adjudged upon Demurrer.

it is void in all. Sed Adiuvatur. — Yelv. 97. Martham v. Jemis, S. C. and it was argued that this Clause for further Assurance depends upon the repugnant Clause of the Release to be made; for the Arbi- trator intended, that the Release limited to be made super Pradicium primum Diem Maij (whereas there is no such Day) should be the first Assurance, and that the Assurances to be made by the subssequent Clause, were intended only to strengthen the first Release; quod futurum sic est per Carliam, and they held that the Deeds shall be construed according to the Intent of the Parties, and upon the Words to be collected thereupon, yet Arbitrement is in Nature of a Judgment and sentence, in which there ought to be Plainness, and no Collection of the Intent of the Arbitrator; for ought it to be his Judg- ment, and not the Judgment of another upon his Words. — Brownl. 93. Markham v. Jones, S. C. and seems a Translation of Yelv.

16. If two submit themselves to the Award of J. S. of all Con. S. C. cited, troveries, and J. S. awards that (*) one shall pay 10 l. to the other, at such a Day, and that the other upon the Receipt of the 10 l. shall make a general Release to the other, without appointing any other thing to be done by him who shall have the Money, and not expressing J. of the same that the 10 l. shall be in Satisfaction of Matters in Controversy, and tho' it is objected, that if he, to whom the 13 l. is to be paid, refuses to receive it, then he is not bound to make any Release, and then noth- ing is to be done by him, and to the Award is but of one Part, and only at the Will of him, whether he will make a Release; yet it was adjudged a good Award, because when one is Award to pay 10 l. to the other, the other is by Implication awarded to accept it, as if one had been awarded to pay 10 l. in Satisfaction of all the Con- troversies to the other, if the other refuses to accept the 10 l. yet this is a good Award, because he is implicitly awarded to accept it in Satisfaction of. Rich. 22 Car. B. R. between Linnen and Williams; for adjudged upon Demurrer; Intrarit. J. 22 Car. Rot. 101. and this was after affirmed in Writ of Error in Parliament, by the Advice of all the Judges.

17. If Am.
Arbitrement.

17. If the Condition of an Obligation be to perform the Award of J. S. of all Controversies &c. its quod that de Premissis &c. and the Award is in this Manner of Writing, &c. super Premissis, &c. he recites the Submission, and then says that the Differences being understood by them, [to be] pro eo quod certain Things in a Bill by the Plaintiff exhibited, or likely to be exhibited, in the Star Chamber against the Defendant, were for the most Part acknowledged by the Defendant, namely, that the Defendant had taken of the Plaintiff 40£. for a Superfluous to reverse an Outlawry against the Plaintiff, but had not performed it, & pro eo quod the Defendant had taken of the Plaintiff 20£. more as a Fee, pretended it to be due to him upon an Execution of 26l. sued against the Plaintiff, the which the Defendant, or any for him never executed, (he being then Under-Sheriff of the County of Dorset) & pro eo quod the Plaintiff by the Means of the Defendant, was imprisoned by J. S. who arrested him without any Warrant to him directed, and the Plaintiff was compelled by J. S. to pay 20£. for the said injurious Arrest, before he was permitted to go at large, &c. pro eo quod the Plaintiff was an honest Man, and of good Reputation, and an Artisan, Anglese a Tradesman, having a Wife and six Children, and by the said Means had sustained great Damage, Difcredit and Scandal, he awarded in ea parte modo & forma sequentibus, videlicet, that the Defendant shall pay 500l. to the Plaintiff at certain Days &c. this is a good Award, though it was objected nothing was awarded of the other Part, for he does not say that he awarded the 500l. to be paid in Satisfaction of the said Wrongs, nor in Consideration of them, nor for them, so that it cannot be pleaded in Bar of the said Wrongs, for the Words (pro eo quod) are not intended for the Wrongs, but only for a Reason of the Award, which induced him to give the Money, and the Words (in eo Parte) do not imply it to be in Satisfaction, but he made his Award in ea Parte, videlicet, upon the Premisses. Nich. 16 Car. B. R. Buckridge and Reynolds in a Bill of Error upon a Judgment in Banco, where this was adjudged a void Award upon Demurrer, but now the Court seemed to incline that the Award was good, but they affirmed the Judgment for another Clear Decret in the Readings of the Award. Inventeq Ctr. 15 Car. Rot. 1657, for it cannot be intended that the Money was paid for any other Cause than that which is mentioned in the Award.

18. Where 2 or 3 Things are put in Arbitrement jointly, and they make award of Part and not of all, this is a void Award, by Reason that it is a joint Submission; per Prior; quare inde, for it seems that his Opinion is not Law. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

19. Where a Submission is of all Trespasses between A. of the one Part, and B. and C. of the other Part, and an Award is made that A. pay 10l. S. P. acord. to B. but says nothing of C. yet the Award is good, for it might be that A. had offended B. but had not offended C. Nota. Br. Arbitrement, pl. 44. cites 22 E. 4. 25.

20. Submission was of all Suits between the Parties then depending in the spiritual Court, concerning Tythes; the Award was, that the Defendant should pay to the Plaintiff 40s. on such a Day for the Tythes &c. Adjudged, that the Award was void, because there was not any Thing awarded for
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For the Defendant to have, or that he be freed from the Suits, and so he has no Advantage thereby. Cro. E. 904. pl. 8. Mich. 41 Eliz. Coliton v. Harris.

21. Upon a Submission of all Trespasses, Duties, and Demands, the Award was that the Defendant should pay to the Plaintiff, in Satisfaction of all Trespasses done to him by the Defendant before the Day of the Submission, so much. In Debt upon this Award the Defendant demurred upon the Declaration, and inferred that the Award was void, it being of one Side; for the Plaintiff was to do nothing. But adjudged good; for by the Payment of the Money be is acquitted of all Trespasses done to the Plaintiff, and it is a good Bar against him, and it shall not be intended that the Arbitrators had Notice that Defendant had any Cause of Action against the Plaintiff, unless shown on the Defendant's Part; and Judgment for the Plaintiff, Haughton resistante. Cro. J. 354. pl. 9. Mich. 12 Jac. B. R. Ormelade v. Coke.

22. If an Award be, that an Obriger in a single Obligation shall pay the Debt, this is no Award, unless it be provided that he be discharged; for Payment in that Case is no Discharge. Hob. 49. in pl. 55. Hill. 12 Jac. obiter.

23. But if the Award be, that the one shall pay to, for Trespass, it is good; for a Satisfaction implies a Discharge, and that is the Reason of the Judgment in Bapool's Case. Hob. 49. 50. in pl. 55. Hill. 12 Jac. obiter.

24. An Award that one shall pay Money, and the other shall execute a Release to him who paid it, is a void Award; but this must be intended where the Submission is by Word; for in such Case the Award is void, because it is of one Side; for when the Money is paid, the other hath no Remedy to enforce the Execution of a Release; for he cannot have an Action on the Case; and the Reason why it will not lie upon an Award is, because that is in Nature of a Judgment. Poph. 134. Mich. 15 Jac. May v. Samuel.

The same Reason why Case will not lie on Arbitrement is given by Coke Ch. J. Godb. 18. pl. 256. Patch: 10. Jac. C. B. in Case of the Ld. Mountangle v. Penruddock; and said it was wisely done by Manwood Ch. B. when he made an Award that a Release, or such like collateral Thing, should be done, to make his Award, that should make the Release or pay so much Money, for which the Party might have a Remedy; and at another Day the Opinion of the Court was with Coke.

25. Award was, that the Defendant pay the Plaintiff 10l. and that the Plaintiff pay the Defendant the Expences at making the Award, and that upon all this being done, each shall give the other a general Release. It was objected that the Award was void, because nothing is awarded to the Defendant but the Release, and that is not to be made till all be performed, in C. B. in which cannot be, because the Award of the Expences at the making the Award, which the Plaintiff is to pay, is subsequent Matter, and out of the Submission; but Hale Ch. J. inclined that the Release shall be made upon the Performance of what is well awarded, and not to it till that be performed which is void, and so the Award may be good. Sed adiunct. 2 Lev. 3. Patch. 23 Car. 2. B. R. Pinkney v. Bullock.

Ibid. there is added a Nota, that afterwards 7 W. & M. in C. B. of Bargrave v. Atkins, at 7 W. & M. is added upon Performance of what is well awarded, and that the Award ought to be made, and that the Award was good, tho' the former Objection was made by Levins, as here.—3 Lev. 415. Hill. 6 W. & M. in C. B. Bargrave v. Atkins, adjudged for the Plaintiff.

26. Award was, that the Defendant should be bound with Suresties, such as the Plaintiff should approve, in the Sum of 150l. to be paid to him at such a Time, and that then they should seal mutual Releases. It was moved that S. C. The Sureties are Strangers to the Submission, and so the Defendant not Court held bound to procure them; and per Cur. the Award is void, it being such it void as to
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as the Plaintiff should approve; whereas if he does not like the Security given, then he is not to fail a Release, and then the Award is only of one Side. 3 Mod. 272. Hill. 1 W. & M. in B. R. Thirlivy v. Helbot.

Upon Exception taken it was held to be mutual, and implied a Delivery by the Plaintiff. Arg. Ld. Raym. Rep. judges it as lately ad

27. H. and W. submit to the Award of J. S. who awards that H. shall pay to W. 15 l. which was adjudged the said W. to have sustained in Costs and Damages, by reason of a Suit without Cause commenced by H. against W. and that all Suits and Differences between them, depending before the Date of the Bond, shall cease. It was argued, that it does not appear that any Difference was between the Parties, except the Suit on which the 15 l. Costs were awarded, which was H.'s own Suit, and so no Benefit to him to stay it, and pay 15 l. Costs. It was anwier'd, that other Differences might be intended, tho' not for forth, and that this Award stops H. from applying for Costs, which W. might be subject to in the Action mentioned in the Award; and the Court inclined that the Award was good; Sed adjornatur. 2 Vent. 221. Mich. 2 W. & M. in C. B. Watmough v. Holgate.

28. Award was, that the Defendant should pay the Plaintiff 7 l. 15 s. (but did not say in Satisfaction of all Demands) and that both of them should be at equal Charge at the Payment of the Money &c. And upon Demurrer to this Plea it was objected that the Award was void, it being only of one Side; for the Money was not awarded to be paid in Satisfaction or Discharge of any Thing; and Judgment for the Plaintiff, per to. Cur. Lutw. 281, 283. Bache. 3 W. & M. Ruffel v. Williams.

29. Two submit to an Award. Nothing was awarded as to one, but only that all Actions shall cease; yet the Court held this to be a good Award. Comb. 212. Trin. 5 W. & M. in B. R. Edwards v. Pierce.

30. A Subdivision to award was of all Matters in Controversy by Rule of Court; and Award was made, that so much Money should be paid on one Side, and nothing was awarded of the other Side; and moved to set it aside, as being an Award only Ex parte. Per Holt, The common Exceptions against an Award will not hold here, it being an Award upon Subdivision by Rule of Court; for tho' there be no Release awarded of one Side, yet the Subdivision was of all Matters in Controversy; and we will not grant an Attachment before they tender a Release; for if one comes to have Aid of the Court, he shall do that which is fair and equitable before he has it. 12 Mod. 234. Mich. 10 W. 3. ... v. Palmer.

31. Award was, that the Defendant should pay the Plaintiff 12 l. before such a Day, and within a Week afterwards should fetch away his Mare and Colt from the Plaintiff. After 2 Arguments Judgment was given for the Plaintiff by the Opinion of 3 Justices, contra Blencow J. because it appears by the Award that the Plaintiff had the Possession of the Mare and Colt at that Time, which shall not be intended a wrongful but rather a legal Possession; as for Damage feasant, Bailment, or the like, whereby the Plaintiff might have justified the detaining them, and then the Award would be mutual. But a Writ of Error was brought. Lutw. 539. 540. Patch. 12 W. 3. Cooper v. Hirtt.

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(L) How
(L) How it is to be made. Where the Submissio...general without an Ita quod &c. de Premissis. [Fol. 256.]

1. If there be a general Submissio the Award may be of Part of Br. Arbire...that which is submitted, without the Residue, and this shall be good. 19 H. 6. 6 b. Curna.

2. If a Submissio be by two to certain Arbitrators of all Matters Cro. J. 200. &c. without any Clause de Ita quod de Premissis &c. in this Case the Arbitrators have Power to make an Award of Part of the Matters between them, and not of the rest. 5 Jac. 2, between Middleton and Wikes, per Curnam.

3. So if in Things in particular are submitted generally the * Br. Arbitrators, they may make an Award of any of them without the others. Contra 39 H. 6. 11 b. P Преф, that it is a void Award, by reason that it is a joint Submissio; but Brooke five Quere inde: for it seems that his Opinion is not Law. — Cro. J. 200, in pl. 51. Mich. 5. Jac. B.R. S.P. per Coke Ch. J. that they ought to make the Award of those that are particularly named, without other Notice. — Cro. J. 255, in pl. 9. Mich. 12 Jac. B. R. the S. P. accordingly by Coke Ch. J. — 8 Rep. 98. a. S. P. resolved accordingly, Hill. 7 Jac. in Bafpole’s Cafe.

4. If the Submissio be of the Right, Title, and Possession of c.c.t. Br. Arbire...tance, pl. 29. cites 39 H. 6. 11 b. Curna. as to the Right &c. of 50 Acres, and the Award was that one should enter, and have to him and his Heirs 15 Acres, and that the Plaintiff should have to him and his Heirs the other 5 Acres. — Fitzh. Arbire...pl. 3. cites S. C. accordingly.

5. So if the Submissio be of all Actions Real and Personal, an Award of Actions Personal will be good, tho’ he makes no Award of Actions Real. 19 H. 6. 6 b. P fitzh. Arbire...pl. 5. cites S. C. accordingly.

6. If a Submissio be to the Award J. S. &c. upon all the Premisses Br. Arbire...or any part thereof, in this Cafe J. S. may make an Award of any Parcel only. 39 H. 6. 11 b.

7. If the Submissio be of all Controversies between &c. ita quod &c. Cro. J. 200. the Award ought to be made of all Controversies of which they have pl. 31. S. C. Contumace, or otherwise the Award is void. 5 Jac. 2. between Middleton and Wikes, per Curiam. P fitzh. Arbire...pl. 5. cites S. C. & S. P. by Newton.

Jurisprudence inclined to that Opinion. — Godb. 256. in pl. 51. S. P. obiter. — S Rep. 98. a. S. P. S. P. Noy 62 Patch. 29 Eliz. in Cafe of Smith v Woodstock — 4 Le. 45. in pl. 194. at the End, S. P. Arg. — Cro. E 838, 839. pl. 14. Trin. 43 Eliz. B. R. Ridlen v Ingler, S. P. held accordingly, and that it is all one where the Words are, so that the Award be made of the Premisses &c. and is at the same Award be made before &c. For (the same Award) refers to all Things mentioned before; so that if any Part be omitted in the Award, it is void for all. — Godb. 256. pl. 14. Hill. 45 Eliz. Hamond v Hatfield, S. P. by Gavdy, and after adjudged accordingly. — The Words in the principal Cafe in Cro. J. 200. arc, viz. So that the same Award be made of the Premisses before &c.
8. But upon such general Submission with an Ita quod &c. if the Arbitrators make an Award of all Controversies, of which they have Coniance, and not at others of which they have no Coniance, yet the Award is good, because without Information of the Parties they cannot take Coniance thereof. 9. 2. N. between Mid- 
thion and Wikes, per 3 Justices against 2.

9. If the Submission be special as of such a Thing and such a Thing, 
&c. Ita quod &c. the Arbitrators ought to make an Award of all 
Things so specially named, or otherwise the Award is void, for they 
ought to take Notice of those which are mentioned in the Submission 
without other Information. 10. 8. N. between Middleton 
and Wikes, per Curiam agreed.

10. Where a Submission is general of all Actions &c. without any 
Condition of Ita quod the Award be made &c. in such Case, be- 
cause Generale nihil certi implicat, it may stand well with the Generality 
of the Words, that there was but one Cause in Controversy between the Par- 
ties, and therefore an Award made of one Thing shall be good, per 
cordingly.

11. Where a Submission is to the Award of J. S. with a Bond for Per- 
formance, and the Submission is with an Ita quod they do arbitrate de & 
Super Praemissis, in such Case they must make their Award of all Mat- 
ters, or else the Award will be void for all; for by the Ita quod it is 
intended by them to have a final End of all Matters; and to the Diff- 
ference is where the Submission is in such special Manner with Bonds to per- 
t the Defen- 
s. 32. Mich. 18 Car. B. R. Birks v. Tripper. —— Sid. 527. pl. 10 
S. C. but S. P. does not appear.

12. Award was, that the Defendant should pay to the Plaintiff 5 l. to- 
wars his Charges at Less, and the Apothecary's Bill, and other his Charg- 
es; It was objected, that this is not final, but is only for part of the 
Charges, and if so, then the Plaintiff may proceed against him for the rest;
(M) What shall be an Award of all.

1. If the Submission be of all Actions personal ita quod Arbitrium that de Praemissis before Eacter, and the Award is made before Hobart, both Eacter and Super Praemissis, that one shall pay to the other 20 l. at B. C. adjudged. Midsummer next ensuing, and that then the one shall release to the other ed. Hobart all Actions personal in Satisfaction of all Matters personal between them, this is made super Praemissis, for by this it is intended that the Re- lease shall be only of Actions till the Submission, and not till Midsum- mer. B. 5 Inst. between Goft and Brown, per Curtailing adjudged, super Prae- miffis may import a Re- 

train to the Things submitted, or else that no new Caufes shall be supposed except they were alleged, (in pleading of Awards of Caufes they do not aver that these were all) or else, that the Award of all Caufes may be reasonably understood all Caufes submitted, being joined to De Praemissis, and that therefore a Release made should be a good Performance of the Award.——Mo. 885, pl. 1242. Cites S. C. as adjudged. Trin. 5 Jac. C. B. Rot. 1608.——S. C. cited All. 26.

2. If the Submission be of all Matters between the Parties, and the Award is made of all prater one Obligation, and of this the Award is that it shall (*), and, this is a good Award of all, for he is not bound to discharge this without Cause, and it shall be intended there was no Cause. Hill. 14 Jac. between Berry and Perin, at Ser- 

Jean's Inst adjudged, and Judgment was affirmed there in a Writ of Error accordingly.

held this a sufficient Declaration of their Purpose concerning all Controversies, and no Disclaimer to 

middle with any. Mo. 849. pl. 1154. Barry v. Perin, S. C. but S. P. does not appear.—Bridge- 
g. Perry v. Barry, S. C. and Judgment affirmed.——3 Bulk. 62. Berry v. Perry S. C. but S. P. does not appear.—Ibid. 69, but wrong page 67.] Perry v. Berry S. C. & S. P. and Judgment affirmed in Cam. Sacc, and held that they could not have made a better Award thereof to have this land and be in Force.—Roll Rep. 358, pl. 31. S. C. but I do not observe S. P.

Where an Award was that (They excepted certain Bonds &c.) this is as much as to say, They award that they shall stand in Force, which is a good Award, and therefore it was adjudged for the Plaintiff. Cro. J. 277, 278. pl. 8. Patch. 9 Jac. B. R. Sallows v. Giriing.—Bulk. 123, 124. S. P. accordingly in S. C.

3. If A. and B. submit all Controversies of Woods and Underwoods, and all Quarrels and Suits between them ita quod &c. and the Award is that A. shall have the Underwoods, and the shall pay to B. 50 l. and says nothing of the Woods, but awards further, that all Manner of Actions, Quarrels, &c. between them shall cease, this is a good A- 

ward of all, because the Beginning of the Award was (We do award of the Premisses) and also the Award is of all Actions ita Ergo, Nunc, 5 Jac. B. between Humphrey and Wilton, per Curtain.

4. If a Submission be of all Matters, Actions ita. between them ita See (B) pl. quod sit de Praemissis, and the Award is that one shall make a cer- 

tain Release of all Actions, which is void, because it comprehends more than was submitted, and that he shall pay a certain Sum of the Notes Money, and awards also of the other part, this is a good Award for 

the Money, though the Award be void for the Release. My Reports 

14 Jac. Vanlore and Trib adjudged, for though the Award is
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To release all Actions, yet it does not appear by this that any Actions were between them.

5. If two submit all Controversies the 4th of May to the Award of J. S. Ia quod Arbitrium fiat de Premissis, and J. S. makes an Award de Premissis of all Controversies till the 2d of May, though here he hath not made any Award for part of the Time submitted, but the Award is shorter, yet because it is made de Premissis it shall not be intended there were any mean Controversies between them between the 3d of May and the 4th of May, unless this be shown of the other Part, and therefore the Award is good enough. Trin. 46 El. B. Rot. 1447, between Barnes and Green adjudged, Hill. 15 Jac. B. between Ley and Paine, which was agreed per Curiam, and the same Term, which was also agreed in B. R. per Curiam, between May and Samuel. Vide the Case cited Hobart's Reports 258.

6. If a Condition be of all Controversies, Doubts &c. had, made, moved or stirred between the Parties from the Beginning of the World until the Day of the Date of the Bond, and the Arbitrators award that one shall pay 10 l. to the other, which appears by his Con- fledion that he hath received, and if it shall appear within one Month, and due Proof thereof shall be made that he hath received more than this, which he hath to confess, then he shall pay that also; though this last part be void, yet the Award is good, though it was objected that all Doubts are referred, and the Condition is Ia quod fiat de Premissis, and do they have not made an End of all Doubts, for it appears the Arbitrators doubted of this whether more was due or not, but per Curiam adjudged good, because it is not averred that this was a Doubt moved or stirred between the Parties at the Time of the Submission, for perhaps this Doubt arose between the Arbitrators after the Submission, and it shall not be intended without an Abatement that this was a Doubt at the Time of the Submission, and this was made in Halorei Cauetam by the Arbitrators. Hill. 10 Car. B. R. Jeanes and Fourth, per Curiam adjudged in a Writ of Error upon a Judgment in Banco, and the first Judgment affirmed accordingly, Innsbruck Mch. 9 Car. B. R. Rot. 470.

7. An Award was made general of all Controversies indefinitely without any Limitation, and adjudged good; and in this Case the Arbitrement will not discharge any Action which was not submitted, (as perhaps a Tref- pas &c. done afterwards) and then it is only Surcharge, which shall not avoid the Award, tho' the Plaintiff hath more Recompence by the Arbitrators, in respect that the Defendant shall be discharged of Trespasses until the making of the Arbitrement. Hutt. 9. cites Trin. 5 Jac. Hilton v. Brown.

8. Submission was by R. and S. of all Controversies concerning a Wine-Licence, and the Arrears of certain Rent out of LAND, and the Arbitrators meeting 15 l. to be due to R. to make an Award that S. shall pay 7 l. 10s. to R. in Satisfaction of Part of the said 15 l. and shall assign the Wine-Licence to R.
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R. without saying that it was to be in Satisfaction of the Residue; so that 7 l. 10 l. Parcel of the Debtor, remains unsatisfied. Roll was of Opinion that this is a void Award, as to the Alignment of the Wine-Licence. But Bacon held that it should be intended in Satisfaction of the other 7 l. 10 s. But both agreed, that the Submission not being with an Ita quod &c. the Award as to Parcel was good; and so Judgment for the Plaintiff. All. 51. Patch. 24 Car. B. R. Role v. Spark.

9. An Award recited that there were several Differences between Plaintiff and Defendant concerning a House and Garden and Arrears of Rent, and that to make a final End of all, award the Defendant to pay the Plaintiff 4 l. for all the said Arrears of Rent. Defendant demurred, for that this is an Award only of one Part and not of all Differences, but adjudged for the Plaintiff; for they held this Award mutual, because the Words (for the Arrears) signify (in Satisfaction of the Arrears) and they are thereby discharged, and though the Award recites other Matters, yet it shall be intended that they were otherwise determined, or at least the Award saying (to make an End of all Differences) shall be intended that the 4 l. was in Satisfaction of every Thing, the others not appearing but by the Recital of the Award itself. Lev. 132. Trin. 10 Car. 2. B. R. Hopper v. Hackett.

Parties, and that the Plaintiff had paid to the Defendant all his just Demands, and that there remained due to the Plaintiff 50 l. which the Defendant had not paid, tho' he was awarded to pay it; and upon Demurrer it was objected, that this was an Award only of one Side, for it was only that the Defendant should pay the Plaintiff 50 l. but adjudged, that because the Award recites Dealings between them, and that the Plaintiff had paid all that was done to the Defendant, and then ordered him (the Defendant) to pay 40 l. to the Plaintiff, it shall be intended that this was to be in Satisfaction of the Debt due from the Defendant to him. Lutw. 541. Trin. 11 W. 3. Elliot v. Cheval.

10. An Award that the Parties shall give mutual Releaves, is an Award for both Parties of both Sides, and shall bind; per Cur. Freem. Rep. 51. pl. 62. Mich. 1672. C. B. Anon. 11. An Award that the Defendant pay to the Plaintiff 10 l. and that each shall make the other good Releaves. The Words (good Releaves) shall be intended Releaves according to the Submission, and that makes it an Award of both Parts; and Judgment for the Plaintiff. Freem. Rep. 356. pl. 450. Mich. 1673. Vezy v. Daniel.

12. In a Quantum Meruit for Work done, the Defendant pleaded an Award that the Plaintiff should accept a Bill of Sale of such a Ship; but the Award said nothing that the Defendant should deliver it, and therefore Exception was taken to it; for that nothing was awarded to the Plaintiff. And Holt Ch. J. held that this is no Bar to the Plaintiff, nothing being awarded to be done by the Defendant in Satisfaction. Leop. Rep. 612. Mich. 12 W. 3. Clapcott v. Davy.

13. Award was, that the Defendant pay to the Plaintiff 50 l. and thereupon the Plaintiff to seal a Release to him of all Actions &c. touching the Premises. It was objected, that the Release of Actions &c. touching the Premises, should be taken to relate only to the 50 l. and not to the Actions &c. submitted; but the Court held, that it should be taken to relate to the Controversies; and Judgment accordingly. 2 Ld. Raym. Rep. 898. Trin. 2 Ann. Anon.

14. Award was, that the Defendant pay to the Plaintiff 21 l. and that the Plaintiff should deliver up to the Defendant such a Bond (being the Matter then in Controversy) to be cancel’d, and that the Plaintiff and Defendant give one another mutual Releaves to the Day of the Date of the said Bond. In Debt on the Submission-Bond the Plaintiff had Verdict and Judgment in C. B. Error was brought in B. R. and Holt Ch. J. held the Award good; for the Bond awarded to be deliver’d up, was the Foundation of all the Controversies between the Parties, and nothing else appears to have arisen since, and consequently the Awarding the Bond to be deliver’d was correct.
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ver'd up to be cancell'd, and a general Release to the Defendant to the Day of the Date of that Bond, will end all Controversies between them. Powell J. held, that the Award was mutual and final, if the Release was left out of the Cafe; and Judgment affirm'd. 2 Ld. Raym. Rep. 1141, 1142. Pach. 4 Ann. Bell v. Gipps.

(M. 2) Construction of Awards.

1. Arbitrement is to be taken according to the true Meaning of the Parties, notwithstanding the Words do inforce it otherwise; per Haughton J. Arg. 3 Bullit. 64. in Case of Berry v. Perry, cites 5 Rep. 193. Trin. 43 Eliz. C. B. Hungate's Cafe.

2. If there be any Contradiction in the Words of an Arbitrement, so that the one Part cannot stand with the other, the first Part shall stand, and the other be rejected; but if the latter be but an Explanation of the former, there both Parts shall stand; per Doderidge J. Arg. 3 Bullit. 66. Trin. 13 Jac. in Case of Berry v. Perry.

3. Arbitrement is in Nature of a Judgment and Sentence, in which ought to be Plainness, and no Collection of the Intent of the Arbitrator. Brownl. 92.

4. It was agreed to be a stated Rule in Awards, that are said to be de & super Premissis, that if the Words used in them are in their own Nature more comprehensive and extensive to Things not within the Submision, yet they shall be intended that there was no other Matter between the Parties for them to lay hold on but what was submitted, if the contrary be not shewn. So e converso, if the Words are more narrow than to take in all the Matter of Submision, yet it shall be intended that no more was in Controvery than what the Words naturally comprehend, if the contrary be not likewise shewn. 6 Mod. 232. Mich. 3 Ann. B. R. in Cafe of Knight v. Burton.


(N) In what Cases an Award shall be void in Part, or in all.

* Roll Rep. 437: pl. 2. S. C. Doderidge J. took a Deviery, when an Action is brought upon the Award, and where upon the Bond:

1. If 2 submit the 1st of May all Controversies between them, and an Award is made that one shall make a Release of all Controversies till the Time of the Submision [Award,] which was the 4th of May, this Award is void in the Whole, because the Release which is to be made comprehends more Time than was submitted; for perhaps there were other Controversies between them between the 1st of May and the 4th, and the Release is entire, and therefore being void in Part, it is void in the Whole. By Reports, 14 Jac. B. R. between * Vanlore and Tribb, adjudged. Co. 10. * Moor and Bedell, 132. adjudged.

* In the last Cafe, if the Bond be with &a quo de Premissis, and the one Part is void, all is void, and
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and that he had known several Judgments accordingly; and Crooke of Counsel said that he agreed this, where it appears that there are several Actions depending besides those whereof the Award is made, because there it appears that the Award is not made de premisulis; but in the principal Case, though the Award is to release all Actions, yet it does not appear that there were more Actions whereof the Award was not made, and cited 24 Eliz. Ballarding's Case. And by Mountague Ch. J. if he bound himself to perform all things contained in the Award, he ought consequent to perform so much as is good, tho' Part is void; and Judgment was given accordingly per Cur. Voltner Dodergidge, who said nothing, but seems it as satisfied with the Diversity put by G. Crooke; for he said nothing after. — Bridgem 58. Vandlove v. Dribble, S. C. and agreed per Cur. that the Award was good for all that was submitted to, and void for the rest; and the Breach being affidid in a Matter submitted to, gives a sufficent Cause of Action to the Plaintiff; and Judgment accordingly. — S. C. cited per Cur. as adjudged accordingly. All 87. — Heath's Max. 21. S. C. (C) pl. 2. S. C. (M) pl. 4. C. S. — See (C) pl. 2. 21. S. C. (C) pl. 2. S. C. (M) pl. 4. C. S.

† Gouldbe 91. pl. 4. Trin. 50 Eliz. in Cam. Scacc. Bedel v. Moor, S. C. & S. P. agreed by all the Justices; but because this was an Error not moved before, they gave the Defendant in Error a further Day. — Le. 170. pl. 238. Bedel v. More, S. C. in Cam. Scacc. but S. P. does not appear. — Jenk. 264. pl. 67. S. C. & S. P. adjudged erroneous. But says, understand this Case that there was no Averment taken by the Defendant, that the other Controversies were between the Days. — S. C. cited Bridgem. 58. — Std. 154. pl. 4. Mich. 15 Car. 2. B. R. Roux v. Nun. The Award was, to release at a Day future to the Submissum; and the Court held it good notwithstanding, because if any Thing new had happen'd after the Submissum, it should be shewn of the other Side, and if there had it is only void pro tanto. — See (C) pl. 5. S. C.

2. But in these Cases it appears to the Court, that by this Release * a Roll the Obligation or Allimpit by which the other was bound to perform Rep. 1. the Award, should be released, which are not within the Submissum. Hill. 15 Jac. B. R. between * May and Samuel, adjudged upon a S. C. ad- Demurrer, for the said Reason. Mich. 24 Car. B. R. between —

† Kinmifion and Jones, agreed per Curtiam.

* All 87. S. C. — St. 97. Kenfifon v. Jones, adjournat. Submissum was, of all Matters between them till the 9th Day of March 18 Jac. and the Award was, that each of them should release to the other all Matters &c. till the 9th Day of March &c. It was objected that by this Release the Bond, upon which the Action is now brought, was discharged; but it was ruled a good Award; for tho' it be void as to that Part, yet it shall be good for the rest. Winch. 1. Patch. 19 Jac. C. B. Norton v. Lakins. Debt upon Bond for Performance of an Award. Upon Nullum Arbitrium pleaded the Plaintiff replied, and set forth an Award, that the Defendant should pay the Plaintiff $1. presently, and give Bond to pay $10. more on the 29th of November following, and to sign general Release now; and upon Demurrer it was objected that the Award was void, because mutual Releases then given would discharg the Bond. Sed per Cur. it shall discharge only such Matters which were depending at the Time of the Submissum. 3 Med. 264. Mich. 1 W. & M. in B. R. Rees v. Phelps. — See (O) pl. 5.

3. But if 2 submit the 1st of May all Matters between them, and the Award is that one shall pay to the other 20$. in Satisfaction of all Matters between them till the Time of the Award made, which was the 4th of Day, though this comprehended more Time than was submitted, yet because it shall not be intended there were any Matters bet- between them meane between the Submissum and Award, unless it be shewn of the other Part, the Award is good. Mich. 24 Car. B. R. between * Kinmifion and Jones, per Curtiam. Hill. 15 Jac. B. R. between * Lea and Pain, adjudged. The Reporter thought this is good Law, but that this is not the Reason of the Case, 'tho' the Court relied upon this; for this crov't the Reason of the Judgment supra; for the Award is void, because there may be other mean Controversies; but it seems the Reason of this Case is, for that although there were other Matters mean between the Submissum and Award between them 20$. and to the Award for thee Matters void, yet here is no entire Act to be done, as in the Cae supra of the Release, but the said 20$ continues a good Satisfaction of the other Matters submitted; and all the Inconvenience is, that prejudicethc Money to be given was incrased for the mean Matters, and to he was at some Prejudice, but there is no Prejudice on the other Part, in this Case a Pre- cedent was cited to be Hill. 43 Et. B. Rot. 2079. between Goodwin and Fountain, which was adjudged in Point. Vide accordingly.

* All 87. S. C. but not very clear. as to this Point. — St. 97. S. C. adjournat. * See (M) pl. 5. S. C. adjournat.
have satisfied and discharged any
Trespass &c. done by the Defendant to the Plaintiff between the Date of the Bond and the Award, be-
causethatitmightbeaver'd a Satisfactory for it.
Submission was to land to the Award of J.S. of all Matters and Controversies depending between
them. The Award was made de & super Promissis, viz. That all Actions and Controversies between them
shall cease, and the one to pay to the other 40 £. Exception was taken, that the Award was of Contron-
versies depending at the Day of the Award, and which is more than is Submitted. But it was refused
(abiente Anderson) to be good, and the Court seem'd to extend to more than the Submission, yet the Words
43 & 44 Eliz. C. B. Goodman v. Fountain, S. C.— S. P. and the Award adjudged good; for the
Court shall not concede any new Controversy, and the rather because it was pleaded to be De & super Pre-
misfits, which carries an Intendment proportional to the Submission. All. 26. Mich. 25 Car. B. R.
Gurman v. Hill.

4. Upon a Submission by A. & B. of all Suits between them, con-
cerning certain Tythes, if the Award be that A. shall pay to B. such a
Sum of Money, and that B. shall suffer all Suits to be discontinued
which he hath against A. where he hath against A. other Suits which
do not concern the said Tythes, by which the Award is void for this,
yet the Award is good for the Rest, for this is not so entire as a Re-
lease. Trin. 18 Jac. 25 R. between Ingram and Webb adjudged.

5. If the Submission be of all Matters depending, and the Award
is, that he shall not prosecute any Action depending, or arising till
the Award made, where there are mean Actions depending between the
Submission and the Award, by which the Award is void for these, yet the
Award is good for those which are submitted, because this is not so
entire, but that this Part of the Award which is good may well be
performed. Trin. 8 Jac. 25 R. between Sayer and Sayer adjudged.

6. If the Submission be of all Matters depending et, and the A-
ward is, that one Seilicte A. shall pay to the other Seilicte B. the 1000. at
such Days, et. and Awards further, that all Actions, Contro-
versies, and Matters in Difference whatsoever between the said Parties,
shall immediately cease, determine, be void, relinquished and die be-
tween them; and it is further awarded, that each Party shall make
general Releases of all Matters and Demands between them, till such a
Day, which by Submission comprehends the Obligation of Submission,
et altho' this Award be void as to the Release, because if it should
be made, it would release the Obligation of Submission, yet the
Award is good, in as much as there is an Award of both Sides
preter this, submission the Payment of the 1000. and also that all
Matters between them in Controversy shall cease, which is good,
and to the Award of both Parties, and Recommodation to them. Nich.
24 Car. B. R. between Kinnington and Jones adjudged upon a spec-

(6) If the Award be void in Part for the Unreasonableness or
Impossibility, yet that which is reasonable is good.

7
7. If the Arbitrators award, that one shall pay so much to the other, * Br. Arbitrators, award, in an Obligation with 2 Sureties, that this is void as to the Sureties for the unreasonable fees, yet this is good to bind the Party himself. * 19 E. 4. +. 18 C. 4. 23.


An Award was to pay the Plaintiff £100. or to procure A. a Stranger to be bound to the Plaintiff for Payment of 121. a Year to the Plaintiff for his Life; the Court held that the Award as to the left Point was merely void, but as to the Payment of the 121. the same is good, and shall bind the Parties, and the Plaintiff had Judgment to recover. Le. 504. pl. 424. Trin. 29 Eliz. C. B. Wilmer v. Oldhcll. — Ow. 113. Oldhcll v. Wilmor, S. C. & S. F. cited; and by Anderson and Persam, tho' the Defendant had caused A. the Stranger to be bound, the Obligation is broken, because as to this Part it is merely void.

— Sav. 120. pl. 189. S. C. & S. F. admitted.

An Award was, that the Defendant should give Bond with sufficient Surety, to pay the Plaintiff a certain Sum of Money, and in aumtum aliquid for Breacl, that the Defendant did not become bound to the Plaintiff Modo & Forma, as it was awarded; adjudged that tho' the Award was void as to the finding Surety, yet it was good as to the Defendant, and the Bond was admissed that he did not become bound, and the Modo & Forma refers to himself only, and not to the Surety. 2 Lev. 6. Pach. 23. Card. 2. B. R. Coke v. Whoorwood. — 2 Saund. 537. pl. 56. S. C. adjudged accordingly. — See (B) pl. 3. (E) pl. 4. (F) pl. 2. and the Notes at those several Places.

8. If the Arbitrators award, that one shall make an Assurance of a certain Land, within the Submission, to the other and his Wife, where the Wife is a Stranger to the Submission, and therefore the Award is void as to her, yet the Award is good for the rest, for he ought to make the Assurance to the Party the Husband. Rich. 37. 38. Et. B. R. between Samson and Pits, for this may be severed.

9. If A. & B. submit themselves to certain Arbitrators, touching the Title of certain Land, and the Arbitrators award that all Controversies touching the Land shall cease, and that B. shall pay to A. 81. and that A. his Wife, and Son and Heir apparent, by the Procurement of A. of A. shall pass to B. such Assurance of the Land as B. shall require; Arg. and awards further, that one of the Arbitrators promises to repay 20s. Part of the 81. to B. upon Payment thereof to A. if A. does not repay it. This Award is void in the whole, for A. is not bound to procure his Wife and Son to pass any Assurance of the Land, they being Strangers to the Award, and it may be that the Wife and the Son have the Estate of the Land in them, and it was intended that they should pass their Estate, and this was the Consideration, that 81. was awarded to be paid by B. to A. and therefore the Award is void in the Whole, though there be other Considerations of both Parts in the Award. P. 13 Car. B. R. between Barney and Fairchild, per Curiam adjudged in Action of Judgment, after a Verdict for the Plaintiff A. who had brought an Action upon the Case for the non-performance of the Award, and had assigned for Breacl that B. had not paid the 81.

If there be a Submission to the Award of J. S. of all Matters till the Submission, ita quo de Praem. and thereupon an Award is made at a Day after the Submission, that one shall make a general Release of all Matters till the Award, and that the other shall pay 101. tho' there be an Award of both Parts, prefer the Release which is void, yet the Award is void in the Whole, because it was intended that the Release should be Part of the Consideration. Trin. 16 Car. B. R. between Munday and Smith, per Curiam adjudged as I conceive the Case, Quære thereof.

Z. 17. An
11. An Arbitrement made in the Night is good; for it is a judicial Act, and Personal Attendance is not necessary, and Notice may be given to the Party any other Day after. Cro. E. 676. pl. 5. Trin. 41 Eliz. B. R. Withers v. Drew.

12. An Award was made that the Defendant should convey such Lands to the Plaintiff for Life, Remainder to J. S. a Stranger in Fee; the Court held that tho' the Award was void as to the Stranger, yet it was good as to the particular Estate for Life, and ought to be performed. Cro. E. 758. pl. 27. Hill. 42 Eliz. Brettion v. Pratt.

13. Award was that a Stranger, viz. one of the Arbitrators should enter Bond, and after that the Plaintiff to release all Actions; it was objected that the Award was void, and that by such Release the Bond would be released, and that a void Award is no Award; the Court admitted the Award void as to the Bond to be entered by into the Arbitrator, and also as to the Extinguishment of it by the Release; but they conceived that the Arbitrement confined of two Matters, which were distinct and might be severed; for tho' it be void as to one Matter, yet it shall be good as to the other; and Forster J. held that the Award to make the Release might be severed, viz. that it should be good for all Actions except the Bond; but Coke e contra and said, that it is so entire that it cannot be divided; but the Court conceived, that the Award was good as to the Bond to be made by the Defendant, altho' they were void as to the Arbitrator. Godb. 164. pl. 230. Patch. 8 Jac. C. B. Pits v. Wardal.

14. An Award to pay Money, and to do several other Things, and amongst the Rest, that the new Plaintiff should pay G. W. 6 s. 8 d. for drawing and engrossing the Award, it was objected, that the whole Award was void, because G. W. was a Stranger to the Submission, and that this is a Thing agreed on after the Submission; agreed that it was void as to C. — Roll Rep. 222. Jac. Perry v. Barry.

15. Debt was brought upon an Obligation to perform an Award, which was good in Part, and void in Part, and the Breach assailed upon the good Part, and the Award was to pay Money, but no Time of Payment, and afterwards it was demanded; the Award is good. Brownl. 53.

16. An Award made the same Day that the Bond of Submission is entered into is good; per Dodridge J. who said it had been so adjudged, and he held that if the Arbitrator makes the Award before and publishes (Bishop) v. it after, it is sufficient. Lat. 14. Mich. 2 Car. Anon.

17. An Infant submitted himself to an Award (as the Court held he might) and Money was awarded to be paid him at several Times, and that upon the last Payment he should release; it was moved, that if he should not be of Age at such Time, that Part of the Award which was to be performed by him [viz. the Release] is void, and consequently the other Part is also; and of this Opinion was the Court prima facie, and therefore advised the Plaintiff to discontinue or move it again. Mar. 142.

and ibid. 144. by Bramston Ch. J. who said, that it is a Case of no Authority, because no Judgment was given; but that all in that Case agreed, that the Award was void, because of the Release to be made.
It is impossible for 3 Men to make Arbitrayment by Word of Mouth, because it cannot be jointly pronounced, but it must be in Writing in such Case, and the pronouncing by one and Agreement by the other is not sufficient. Claryt. 17. August 1663. by Dampert J. Lawson's Cafe. 19. The Condition of the Bond of Submissión is an entire Thing, and therefore if it is void in part, in respect of one of the Parties who submits himself &c. it is void against the rest; As for instance, where an Infant and 2 more submit themselves to an Award, the Bond was void as to the Infant, and shall be so likewise as to the rest; agreed by Brampton Ch. J. Heath and Mallet J. Mar. 111. pl. 189. Trin. 17 Car. Rüeflone v. Yates.

20. Where an Award consists of several Parts, and one of those parts was to pay 5l. to the Poor of the Parish of D. which was not within the Submissión, and so not good; yet Roll Ch J. held, that if it be void as to that, it is good as to the rest; because it is perfect as to the ending all Differences between them which are submitted, and Judgment nisi &c. Sty. 39. Trin. 23 Car. Terry v. Baxter.

21. An Award in the first part of it was, that all Suits and Controversies shall cease, and tho' in the whole Award after nothing is well awarded but of one part only, yet the Court agreed that it is a good and mutual Award upon the first part only. Lev. 158. Hill. 13 & 14 Car. 2. C. B. Harris v. Knipe.


23. An Award was, that the Plaintiffs should release to the Defendant all Demands to the Time of the Submissión, and that the Defendant should release to them all Demands to the Time of the Award. The Court held, that tho' that part of the Award as to the Defendant's Release to the Plaintiffs was void in Law because it over-reaches the Submissión, yet because there were other Matters awarded on both Sides which were good the Award was sufficient. Hardr. 399. Pasch. 17 Car. 2. in the Exchequer, Joyce v. Haines.

24. Submissión was to Arbitrators of all Actions Ita quod the Award be made at or before 23 Jan. but if the Arbitrators shall not agree upon their Award, then they shall chuse and chuse an indifferent Man, and they shall stand to his final End, Determination and Judgment which he shall give and determine under his Hand and Seal, that then this Obligation shall be void &c. The Umpire awarded the Defendant to pay Money to the Plaintiff. It was objected, that the Condition being, That the Arbitrators shall chuse an indifferent Man, and (they) shall stand to his Award, so that (they) must mean the Arbitrators and not the Defendant, and therefore is void and inefifiable, and so that the Defendant is not bound to perform it. But adjudged per tot. Cur. that the Condition is good enough as to this Matter, tho' it be not very properly expressed, and that the Defendant had forfeited his Bond by not performing the Award.
Award of the Umpire; and Judgment for the Plaintiff. Saund. 65. Pasch. 19 Car. 2. Butler v. Wigg.

25. Where the Satisfaction awarded to one is made any part of the Consideration of his paying Money, or doing something for the other, and if by the Award itself be both no Possibility of having or recovering that Satisfaction, there the Award being void as to that part is void in the whole. Nelf. Abr. 241. pl. 14.

26. If an Award be, that Defendant should pay the Plaintiff two Sums at several times, and that several Releases shall be given presently. It was objected, that by giving such Releases the Bond and Money would be discharged, and therefore the awarding the Release was void against the Plaintiff, and so there is nothing of his Side to be done; and of that Opinion were all the Court. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. R. Adams v. Adams.

27. If two Things are awarded, one within the Submission and the other not, this last is void, and the Breach must be assigned only on the first. And if there is a Submission of a particular Difference, and there are other Things in Controversy, and a general Release is awarded, it is ill, and those other Things in Controversy must be shewed on the other Side to avoid the Award for that Cause. And also if the Submission be of all Differences till the 10th. Day of May, and a Release is awarded of all Differences till the 20th. Day of May, if there are no Differences between the two Days the Award is good, but if there are any it must be shewed in pleading, otherwise the Court will never intend any; held per Cur. 2 Mod. 309. Trin. 30 Car. 2. C. B. Hill v. Thorn.

28. Debr upon Bond for Performance of an Award; the Defendant pleaded no Award made; the Plaintiff replied and set forth an Award, which was, that the Defendant should pay the Plaintiff 50 l. and ask his Pardon in such Manner and Place as the Plaintiff should appoint, and that then each Party should execute mutual Releases; The Court held this ill; For the Arbitrator was to determine, and not to make the Plaintiff Judge in his own Cause, and tho' the Time and Place are but Circumstances, yet in this Sort of Satisfaction they make the most considerable part, and therefore the Award was held void as to this. 1 Salk. 71. pl. 5. Trin. 10 W. 3. C. B. Glover v. Barrie.

29. The
29. The Bond of Submission was dated 2 July, 7 W. 3, in an Action of Debt; the Defendant pleaded no Award made; the Plaintiff replied, S. C. and showed an Award that the Parties should sign mutual Releases to each of all Demands until the 12th of August following; and upon Demurrer to this Replication it was objected, that the whole Award was void, because the Arbitrators had exceeded their Authority, for they were only to arbitrate about all Matters between the Parties to the Date of the Bond of Submission, and they had awarded Releases to be executed above 6 Weeks afterwards, which they had not Power to do; but adjudge not, that tho' thatpart of the Award concerning the Releasemight

be void, yet it does not follow that the whole Award should be so too, because it may be void for one part and good for another. Nell. Abr. 242. pl. 19. cites 1 Lucw. 520. Marks v. Mradyott.

and this will be well enough; but if they award general Releasesto be executed until the Time of the Award made, this will be ill because it exceeds the Submission, and will release the Bond of Submission itself and all other Acts, and warrant this Difference; and he cited Hill. 16 & 17. Car. 2. C. B. Rot. 503. 1 Keh. 444. But by Treby Chief Justice it has been held in such Case that the Submission Bond shall be intended to be excepted, but nevertheless, in the principal Case they held the Award good enough and reciprocal, because the Plaintiff was to pay 50 l. to the Defendant, and the Defendant to surrender the Possession of the House to the Plaintiff, so that no Fault in the Releasewill vitiate it, and therefore Judgment for the Plaintiff.

30. Till King James the first's time the Law was held all along, that Lt. Raym. Rep. 715. Hutt. that an Award might be void in part and good in part; per Holt Ch. J. 12 Mod. 534. Trin. 13 W. 3.

31. A Difference is taken where the Thing to be done on one Side is only applied to one particular Thing of the other Side, there tho' the Award be void in other Parts, it may be good in that part, focus where a particular Thing of one Side is applied by the Award to all that is to be done of the other Side, if any of the other Things be ill awarded the Award cannot be good for the reft; per Powell J. 12 Mod. 587. in C. B. Mich. 13 W. 3. in Case of Lee v. Elkins.

32. And if an Award were that one of the Parties with his Wife and Son join in a Conveyance to the other, and the other pay them 100 l. that Award is good as to a Conveyance to be made by himself, and that only had been awarded for the 100 l. it had been well; but fure such Award would be wholly void; for the other was to have had a Title made to him from the Party, his Wife and Son, and it would be unreasonable if it were that one should be obliged to pay his Money and not have fuch Title made to him as the Arbitrators designed; per Powell J. 12 Mod. 587. Mich. 13 W. 3.

33. It has been often resolved, that if an Award be void in part, as being only Ex Parte, yet if it be mutual for another part it shall be good for that part, per Powell J. and he cited 10 Rep. 131. b. Osborn's Case, where if an Award be of some Matter within the Submission, and for that void as to that part, and though it appears by the Award that it designed both should be recompence of what is to be done of the other Side, yet if there be ever so small a Matter to make it mutual, it shall stand for the Matter within the Submission; but he said, that this was Durus Sermo, and that that Judgment was after reversed upon a Writ of Error, and that the Rule put there will not hold of the Extent which Coke gave it. 12 Mod. 587. Mich. 13 W. 3. in C. B. in Case of Lee v. Elkins.

Arbitrem. 89

The Arbitment. 10 Mod. 204. Hill. 12 Ann. B. R. in Case of Barnardiston v. Folyer.
Arbitrement.

34. One recovered 90l. Damages in Waffe, and then the Matter is submitted to Reference; and it is awarded that the Defendant should at one Time pay 10l. to the Plaintiff, and that at another Day he should pay him 15l. and that for Payment thereof another and the Defendant should become bound in a Bond; this being good in Part, tho' void for the rest, was held good; but Powell J. who cited the Case, said true that was hard, and would not pass at this Day. 12 Mod. 387. Mich. 13 W. 3. in Case of Lee v. Elkins.

35. Submission of all Differences, Ita quod & c. The Award was, to pay to the Plaintiff 12l. 15s. at or upon the 24th Day of February &c. and to deliver 3 Boxes and several Books, and affirms the Breach that the Defendant had not paid the Money secundum formam Arbitri. Resolved that the Award as to the Books is uncertain, unless it had been said that they were in the Boxes; and this being upon a conditional Submission, the whole Award is likewise void. LuHw. 550. 554. Trin. 13 W. 3. Cock- fon v. Ogle.


(N. 2) Void by Misrecital.

1. Submission is of all Suits depending in Controversy after 7 Jac. and before 9 Jac. The Award recites the Submission of all Things depending before the 7 Jac. and that he made Award de Praemissis, and therefore it was objected not to be good. Quod suit conceffion per Coke Ch. J. Roll Rep. 362. pl. 15. Pach. 14 Jac. B. R. Ingram v. Webb.


3. The Bond of Submission was, Ita quod it be made before or upon the 22 Dec. or to chuse an Umpire. The Arbitrators made no Award, but chose an Umpire, who made an Award, reciting that the Parties submitting had bound themselves to his Award. Exception was taken hereto, because it is not true. Sed non allocatur, because it is only Recital. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. B. Adams v. Adams.

(O) How to be made. When the Submission is Ita quod fiat de Praemissis.

* See (B) pl. 1. If an Award be made de & super Praemissis, and the Condition is Ita quod fiat de Praemissis, and the Award is, that one shall make general Releafe to the other of all Matters till the Award, and that the Parties shall be Friends, and loving, this is good; for the Award
2. *Pit. 1* Car. B. R. between Franklyn and Emlyn, in an Action upon the Cause for Non-performance of an Award. Per Curiam, such Award is good for the Cause aforesaid; and I do believe it was adjudged accordingly. *Intrat. Bill.* 10 Car. Rot. 1275.

3. *But Pit. 13* Car. B. R. between Durward and Ven, which *Intrat. Cas.* 13 Car. Rot. 1063. If the Subdivision be by Obligation, dated 17 Nov. 111 Car. to be made before February after, and the Award is made 27 January, that the Defendant shall make a Release of all Actions &c. till the Award; and in Debt upon an Obligation for Non-performance of this Award, the Breach is adjourned in not making a Release, and it is aver'd that no other Matter was between them, yet this is no good Breach, because if he should make this Release, it would release the Obligation of Subdivision. *Adjudged per totam Curiam upon Demurrer.*

4. If a Condition be to stand to the Award of J. S. *Ita quod fiat de Premillis &e.* and the Award is made, that A. shall pay to B. the other Party 10l. two Months after the Award, and upon Payment thereof each of the Parties shall make a general Release, the one to the other, to the Time of the Payment: this is a good Award, though it comprehends more Time than was submitted; for when the Money is paid, then there is an End of the Subdivision and all, and so no Prejudice, tho' it releases the Obligation or Promise of Subdivision. *Judicat. B. 14* Car. B. R. between Atomek and Orvel, this being moved in Arrest of Judgement, and the Postea said thereupon.

5. [So] upon such Condition of Subdivision, if the Award be, that *See (B) pl.* A. shall pay to B. the other Party 10l. in Satisfaction of all Actions, *See (B) pl.* Suits, and Accounts that B. may have against A. for any Matter till the Award made; and that all Suits then depending, or that thereafter should depend between them, for any Matter from the Beginning of the World till the Award made, shall cease; this is a good Award, that it comprehends more Time than was submitted, because till the Award made, which was after the Subdivision; for without having thereof it shall not be intended that there were any Matters between the Subdivision and Award. *B. 23* Car. B. R. between Lawe and Hills, adjudged. *Intrat. B. 23* Car. Rot. 28. upon Demurrer.
6. If the Condition be to stand to the Award of J. S, of all Suits, Controversies and Debates, except a certain Obligation by Name &c. * Ita quod fiat de Premissis, and after J. S. makes an Award of all Demands, which comprehends the Obligation excepted, and therefore all the Award is void. * D. 14 Car. B. R. between Doley and Bad, per Curiam, adjudged.

Award was, that one should pay to the other 20l. at a Day subsequent, and that he should give the other a Bond for Payment of the Money accordingly, within 4 Days, and that all Protests and Suits should cease till Failure of Performance. This was held to be final; for if he paid the Money &c. the Award was absolute, and the Cession perpetual, and he shall not take Advantage of his own Non-performance. 2 ld. Raym. Rep. 962. Arg. cites it as adjudged Patch. 11 W. 3 B. R. Ball v. Haskett.

8. If three Persons, select, A. B. and C. of the one Part, and D. of the other Part, submit themselves to the Award of J. S. Ita quod &c. and he makes an Award between A. B. and D. of the other Part, and makes no Award between C. and D. this is not good, because the Submission is conditional, and it is recited in the Submission that there were divers Controversies between them all, for this differs from the Case in * 2 R. 3. 18. b. because there the Submission is not conditional. * D. 14 Car. B. R. between Harris and Painter, per Curiam, Coke and Barr, no others being present. Intr. b. 12 Car. 12.

9. Submission was of all Actions and Controversies. Ita quod the Award be made by such a Day. An Award was, that the Defendant deliver certain Apparel &c. to the Plaintiff. The Plaintiff brought an Affirmant, and adjudged it does not lie, because the Arbitrement being conditional, with an Ita quod &c. it ought to have been made for all Quarrels &c. according to the Submission; but if the Submission had been general without such Clause, then the Arbitrator had had absolute Authority; and in such Case, if the Award had been made but of Part, it is good for that Part, and ought to be performed. Noy 62. Patch. 39 Eliz. Smith v. Woodstock.

10. Award more large in time than the Submission is good, and Diversity was taken by the Court between a Particular thing submitted as Such Trespasses Ita quod &c. for there it ought to be anwiered by the Award and between general Submission, for there de Premissis is good. Sid. 252. pl. 21. Patch. 17 Car. 2. B. R. Manning v. Warren.

12. An Award was, that the Defendant should release to the Plaintiff to the Time of making the Award; It was objected, that this would discharge the Bond of Submission; fed non allocatur; because divers Things are to be done together, and if all had been done the Release would be no Prejudice, and differs from the Case where Money is to be paid after the Release is to be given; And Judgment for the Plaintiff. Raym. 169. Mich. 20 Car. 2. B. R. Barker v. Durrant.
1. If a Submission be to the Award of certain Arbitrators, and if they cannot agree, or are not ready to deliver their Award in Writing before the 1st. of May, then the Submission is made to J. S. to pl. 42. S. C. be the Umpire, to be made before a certain Day after; if the Arbitrators do not treat of the Matter, so that there is not Disagreement between them, yet if they do not make any Award before the Day, the Umpire may make an Award upon this Submission; for the Words (and if they cannot agree) are not to be taken literally, but as if they had been ("if they do not agree upon any Award,") D. 153a. B. R. between Lamley and Hutton adjudged upon a Demurrer.

*The Words (if they do not agree) have the Intendment, if they do not agree and make their Arbitration in Writing (as the Case is) before such a Day. See Cro. C. 226. pl. 3. Mich.; Car. B. R. Taverner v. Skingle.

by Saunders, that if in this Case the Arbitrators would meet before the Time lapsed and disagree and declare their Disagreement, the Umpire after this, and within the Time, may make his Umpire, and it will be good, as may be collected from the same Book, which says, that he cannot make his Umpire till Disagreement of the Arbitrators, for this implies, that after their Disagreement he may do it within the Time limited, but that if the Arbitrators defer their Disagreement to the last Instant of the Time, then is the Power of the Umpire merely void as the Book says, viz. by this Matter Ex post facto, but the Submission was good at first, and might have taken Effect in the Umpire, and the said Book does not imply the contrary.

2. If a Submission be to stand to the Award of certain Arbitrators, and that it disagree, then to the Umpare of J. S. Its quod the Award or Umpare are made before the 1st. of May; in this Case the Umpire cannot make any Award till a Disagreement made by the Arbitrators, and the Arbitrators have Time to make the Award at any Time before the said Day, and for no Time is limited for the Umpire, and so his Power merely void. Hill. 15. Fac. between Barber and Giles per Curtian, but referred to Composition.

S. C. cited 2 Vent. 115. S. C. cited 2d. 415. Arg. per Cur. S. C. cited Arg. 2d. Saund. 150. but ibid. 151, 152. It was argued for the pleadings that the Arbitration was good at first, and might have taken Effect in the Umpire, and the said Book does not imply the contrary.

3. If two submit themselves to two others with such a Clause, viz. viethels if they do not end it within 10 Days, they shall nominate another that shall end it within the 10 Days, and after they cannot agree within the 10 Days, by which they appoint another per this Car. who makes an Award within the 10 Days, this is good, because it is the Appointment of the Parties and their Special Agreement, and by making the Umpire the Authority of the Arbitrators determines.

Bitch. 11 Fac. B. between Fyay and Varier adjudged.

4. If the Condition of an Obligation be to stand to the Agreement Submission of A. and B. being Arbitrators chosen for that Purpofe, to end a Con- troverfly between the said Obligor and Obligee, and J. S. being Umpire for (*) both Parties ag. in this Case, if A. and B. who are the Ar- bitrators make an Award without J. S. this is a good Award, for though the Words are in a manner prima facie uncertain, yet because the common Usage is to limit an Umpire to make an End if the Arbit- rators shall it be so interpreted, and that the Words (J. S. and being Umpire) shall be taken as an Affirmative presc. that he is an Umpire. Bitch. 12 Car. B. R. between Osborn and Reyon adjudged per Curtian in a Part of Error upon such Judgment in the Court of King. upon Thanes. Intrar. Hill. 12 Car. Red. 513.

5. The 4 Persons and the 5th. as Umpire made the Award, and the Party refused to perform it. The whole Court held the Award good and pursuing the Submission; but that it had been otherwise if they had been divided in the Submission, as it had been, that if the 4 could not agree, then the Submiss.
Arbitrement.

5. If A. and B. submit themselves by Condition of an Obligation to the Award of J. S. it quod the Award be made upon or before the last Day of May next ensuing, and if he does not make any Award upon or before the said last Day of May, then if they stand to the Award of such Person who shall be elected by the Arbitrator to be Umpire, that the Condition is repugnant, that the Arbitrators together with the Umpire should make an Award, for that it is a Conradiadh that they and the Umpire too should make it, because an Umpire is a Judge by himself and cannot be an Arbitrator. But nothing appears more than the Argument of the Counsel for the Defendant. Hard. 43, 44. Hill. 1655. in Scaccario.

Sry. 152. Mich. 24. Car. Wood v. Clemence, S. C. but S. P. does not fully appear, but upon Demurrer it was objected, that it appears by the Pleading that the Umpire was chosen before he ought to be, for that it appears that the Arbitrators could not agree in making the Award &c. but Roll Ch. J. thought the Exception not material; & adjournatur.—Ibid. 152. S. C. but S. P. does not at all appear; adjournatur. Ibid. 152. S. C. adjourned for the Plaintiff nifi, but S. P. does not at all appear.

Where there were 4 Arbitrators chosen, who were to make their Award to deliver in Writing on or before the 20th of July, and if they could not agree, then to such Umpire as they should name, so as the Umpire be made before the 25th of July following. The Arbitrators made no Award on or before the 20th of July, but on the 18th of July 5 of the Arbitrators, and to which the 4th agreeing on the 21st of July, by their Writing dated the 18th of July nominated J. S. Umpire, who before the 25th of July made an Award Super Premiis; Revoluted, that here was no complete Nomination till the Agreement of the 4th. Arbitrator with the other 3, viz. on 21 July, and the Writing is not to have Effect till that Time, and is not Writing by Intendment till sealed, tho' it be dated before. And if they had nominated the Umpire before the Time expired of making their Arbitrement, yet it is good enough when no Arbitrement is made by them within the Time; and Judgment for the Plaintiff. Geo. C. 262. pl. 10. Trin. 8 Car. B. R. Jennings v. Vandeput. —S. C. cited 2 Saund. 135. in a Nast.—S. C. cited by Twidten J. Mod. 275.

If Arbitrators chuse an Umpire before the Time allowed for their Award be expired, it is ipso facto void tho' they absolutely resolve to make no Award themselves. 1 Salk. 70. pl. 2. Patch. 9 W. 5. B. R. Reynolds v. Gray.—12 Mod. 220. S. C. & S. P. agreed, that they cannot chuse an Umpire till after the Day for making their Award.—Ld. Raym. Rep. 222. S. C. & S. P. by Holt Ch. J.—S. P. & S. C. cited, and the Court said they were satisfied that the Umpire might be maintained, not only upon the Cafe in 1 Salk. 70. 1 Le. 52. and Raym. 21. cited, but also upon the Authority of this Cafe in Roll's Abr. and 2 Jo. 167. 2 Barnard. Rep. 154. Trin. 5 Geo. 2. Cowell v. Walker.

Sry. 306. S. C. adjudged in. S. C. cited Sid. 455. pl. 25. per Car. and Twidten J. said, he was in Court when the Cafe was adjudged, and that Roll was then of.
Arbitrement.

7. If two Men submit themselves for all Matters to the Award in this Case of certain Arbitrators to be made before a certain Day, and that it is not practicable to meddle with the Ordinance and Judgment of J. S. if the Arbitrators make an Award, but if they have not made any Award, because they had no Power given but if the Arbitrators make no Award. 39 P. 6. 10. \\


8. But if the Submissiun be, that the Arbitrators make no Award Br. Arbitre- of the Premises, or of any Parcel thereof, that then the Umpire shall

have Power to make an intire Award, or of Parcel which remains, as the Cafe is ; in this Cafe the Arbitrators may make an Award of Parade, and the Umpire of the Residue, because this is expressly ordi-

ned. 39 P. 6. 11. b.

9. Submissiun was to A. and B. so as they made their Award before the 1st. 2 Kebo. 15. of May, and if they do not agree, then to the Umpirage of such a Person as pl. 55. 18. Fitzh. Arbitrement, pl. 13. cites S. C. but S. P. does not ex-

actly appear.

S.C. cited by Holt Ch. J. Ed. Raym. Rep. 6* 1. as resolved that such Umpirage to made is good. S. C. cited 1 Salk. 72 pl. 7 & S. P. adjudged accordingly in all the said Books. Fitzh.
Arbitrement.

15 W. 3. Bitchi v. Carrig. But a Distinction is taken in all those Books, viz. That if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their Award in, to be expired.

Lev. 284. Copping v. Hurried, S. C. Moreton J. doubted, but the other 3 held it void, but that if the Submission had been to the Arbitrators, and that if they make no Award, then to such Umpire as they shall name, it might be good, because by their Election of the Umpire they had waver the Submission to themselves, and Judgment for the Defendant. - Sid. 428. pl. 14. Copping v. Herould, or Hurried, S. C. and fame Divertiity, by all the Judges, but adjourn. — Ibid. 455. pl. 25. S. C. the Court held the Umpirage void, and that there cannot be a concurrent Jurisdiction; for then the one may award one way and the other another way. And tho' the Plaintiff declared that the Arbitrators could not agree, yet this will not aid it; and Judgment for the Defendant still &c. — 2 Stand. 159. S. C. adjudged for the Defendant after Advirement for 2 or 3 Terms; and the principal Reason was, because the Averment in the Declaration that the Arbitrators non sequent nec facere pouerunt aliud Arbitrium was not sufficient, and tho' the Arbitrators had not, at the Time of the Umpirage, made any Award, yet that did not hinder but that they might either then or afterwards make their Award, and so the Umpire has made his Umpirage before it came to his Turn; and the Non-pouerum is idle, for nothing appears to the Court but that they might have made the Award if they would; but true it is, if the Plaintiff had shown to the Court that one of them had been dead, then it would have appeared to the Court that the Arbitrators could not make their Award; and if the Plaintiff had declared that the Arbitrators had disagreed as to making the Award, and that they had declared they would intermeddle with the Award no farther, then per Cur. prater Twifden J. the Umpire might well have made his Umpirage, but the Cafe as it appears on the Record was adjudged for the Defendant by the whole Court. — Mod. 15. pl. 41. S. C. but is only a Note.

Raym. 205. 11. The Arbitrator's Power is not absolutely determined by the Election of an Umpire within the Time limited to themselves, unless they absolutely refuse to make any Award, and in such Cafe an Umpirage made within the Time is void; Per Twifden and Morton J. who inclined strongly to this Opinion; but Rainsford seemed e contra, & adjourn. Lev. 302. Mich. for tho' the 22 Car. 2. B. R. Donavan v. Maccall.

The Arbitrators may chuse an Umpire at any Time during the Continuance of their Power; yet that Umpire cannot act till the Arbitrator's Time is expired, as it is in this Cafe; Per Twifden and Rainsford J. — Mod. 214. pl. 26. Delavallv. Machell, S. C. The Court inclined, (as Twifden says) that the Award so made in the principal Cafe was naught, because the Authority of the Arbitrators was not determined till after the Day of the Award made by the Umpire. It is true, the Arbitrators may chuse him upon that Day or before, but yet they might still have made an Award, and therefore the Umpire could not; but adjourn. — 2 Vent. 115. S. C. cited. — S. C. cited J. 167, but Ibid. 168. The Court conceived the Cafe not to be good Law. — S. C. cited Lev. 285. — Per Twifden J. if the Arbitrators lay down the Buffet and give it off, yet they may refuse it and make an End when they please, so as inbre in their Time; and Judgment for the Plaintiff. Freem. Rep. 57. pl. 492. Mich. 1674. Anon.

3 Lev. 263. 12. Submission was to 2 Arbitrators, and if they make no Award, then to the Award of such Umpire as they shall chuse. They chose J. S. Pollexfen Ch. J. who refuses. Afterwards they chose W. R. who makes Award. The termination Question was, if it was good? For if he that was chose and refused was of the Pow. Umpire, then they have executed their Authority and cannot make another, and that other, but otherwise they may. No Opinion was given. Show. 76. by the Pleadings it is agreed, that they had elected an Umpire, and if to the after Election is void. But the other 3 Judges contra, and held that by the Refusal, the first Election was void and as to Election, that infallible Acts are no Acts, and Judgment accordingly — 2 Vent. 115. S. C. adjudged accordingly by 3 Judges, who held that this Refusal immediately upon his Nomination, made it amount to no more than a bare Propofal to him, and is to stand for nothing. — 5 Mod. 43. Tippet v. Eyre, S. C. adjudged accordingly. — If the Arbitrators, when their Time is expired, chose an Umpire, their Authority is executed, and they cannot revoke or chuse again, tho' the Person elected refuses to accept; after if they
Arbitrement.

they chose their Umpire, upon Condition that he does accept the Umpirage, for then he is not Umpire unless he accepts it; per Holt Ch. J. But Rookey doubted whether an express Condition would make a Difference, because it seemed to be implied. 1 Salk. 72. pl. 2. Pacl. 9 W. 3. B. R. Reynolds v. Gray. — 12 Med. 120. S. C. & S. P. agreed per Cur. ——Ld. Raym. Rep. 222. S. C. & S. P. by Holt Ch. J.

13. Umpire by the Submission was to make his Award the same Day as was limited to the Arbitrators, if the Arbitrators did not make theirs; 'tis not good. 2 Vern. 100. pl. 95. Pacl. 1689. Anon.

14. Submission was its good, the Award be made by the Arbitrators on or before the 23rd of May, and if not made before that Day, then to stand to the Award of an Umpire &c. the Arbitrators made no Award, but chose an Umpire on the 20th of May, who awarded, that the Defendant should pay to the Plaintiff 451. before the 11th Day of June following; it was objected that they had no Power to choose an Umpire on the 20th of May, because the Arbitrators themselves had Power till the End of 21st of May to make their Award; fed non allocatur, for the Arbitrators not having made any Award, the Award of the Umpire is good; and Judgment for the Plaintiff. Lutw. 541. 544. Trin. 11 W. 3. Ellot v. Cheval.

15. An Award made by the Umpire was (amongst other Things) that the Defendant should deliver to the Plaintiff several Goods particularly named, and that if any of those Goods should be lost, then the Defendant to pay the Value of them, to be appraised by the Arbitrators and Umpire; it was moved, that the Umpire was void, because of the Umpire's referring to himself and the two Arbitrators (who were elected to determine the Matters before him) to make a Valuation of the Goods lost or mislaid; Trevor Ch. J. and Blencow held that this was a Thing judicial, and not merely ministerial, and therefore the Award void; but Powell J. was of another Opinion. Lutw. 550. 554. Trin. 13 W. 3. Cockson v. Ogle.

16. Arbitrators not making an Award, and having Power to choose an Umpire, but not agreeing on a Person, one naming A. and the other naming B. conclude to determine by Cross and Pyle, whose Nominees should stand; the Umpirage fell upon B. who made an Award; but the Court thought it Reason sufficient to set it aside. 2 Vern. 485. pl. 440. Hill. 1704. Harris v. Mitchell.

17. Submission to 2 and an Umpire in Case they should differ, the Arbitrators meet, and one of them declared himself not clear, the other was for the Appellant, upon which the Umpire made his Award. The Question was, whether the Umpire had any Power in this Case, for it was not come to him till the Arbitrators differed, which they had not yet, and might still make their Award, but the Objection was over-ruled. MS. Tab. January 9th, 1721. Middleton v. Chambers.

18. It is settled that Arbitrators cannot proceed on a Reference, after they have once named an Umpire, for then their Authority ceases, tho' the Time for making the Award is not expired. Rep. of Pract. in C. B. 116. Pacl. 8 Geo. 2. Danes v. Monfay.

C c

(Q) In
(Q) In what Cases the Award shall be void for Uncertainty.

The Award is, if an Award be uncertain it shall be void, for the Arbitrators are Judges of the Case, and the Award ought to be certain, so that thereby the Controversie be decided, and that for the uncertain: it be not the Cause of a new Controversie. Co. s. Samon. 78.

2. If two submit all Matters in Controversie between them, and the Award is, that one shall pay the one Moiety to J. S. and the other the other Moiety; if adjudged Debit to T. S. by two Strangers, who were bound to the said J. S. at the Request of them two; this is no good Award, because it doth not appear within the Award in what Sum they were bound, tho' it be annex'd in the Plea after, because it cannot be known what Sum they intended. P. 16. In B. R. between Gray and Gray, per Dodderidge and Houghton, but Montague contra.

3. But Houghton inclines that he might have helped it, by an Averment that there was not any other Obligation beside this.

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3. But Houghton inclines that he might have helped it, by an Averment that there was not any other Obligation beside this.
5. If 2 submit all Controversies concerning the Right, Title, and Possession of 200 Acres of Land, called Kelston-Linge, and the Arbitrators, award, that in the Waste Lands of the Town of Kelston, one shall have the Brakes there growing during his Life, paying to the other 2s. per Annum, without giving any Name of the Land in the Award, this is a void Award, and it cannot be helped by an Averment, that the Land, where the Brakes grow, is the said Land called Kelston-Linge, submitted and not other, nor divers, for he cannot expound the Intent of the Arbitrators. D. 8 Eliz. 242. 52.

6. If an Award be that one shall pay to the other 6 l. 21 Mar. see (K) pl. and 6 l. at Michaelmas following, and that the other shall release all his Right in such Lands super praecl. primium Diem Maii (omitting viceanimus) this is a void Award, because there was not any 11th Day of May mentioned before. Hill. 4 J. B. R. between Markham and Jennings, adjudged.

7. If an Award be made between A. & B. touching certain Quarters of Malt before delivered by A. to B. that B. shall pay to A. so much for every Quarter, as one Quarter of Malt was then sold for, this is a void Award, because it is not mentioned in which Place the Sale should be, for perhaps in one Market or Place it was sold for more than in another Market or Place, and therefore the Award void for the Uncertainty. Rich. 10 Car. B. R. between Hurst and Bambridge, per Curiam upon a Demurrer; this Award being pleaded in Bar of an Action upon the Award, but after the Demurrer was waived by the assent of the Parties. Inratuir Hill. 9 Car. B. R. Rot. 1159.

8. If an Award be that one shall acquit the other of an Obligation of 200 l. due to ciceriter, in which they are bound, for the Payment of 150 l. due to ciceriter to B. this is a good Award. P. 15 Car. B. R. between Barley and Chipsham, adjudged per Curiam upon a

9. If the Condition of an Obligation be to perform the Award of J. S. between A. & B. of all Controversies and Demands between them ye. and an Award is made of the Premises, that A. shall permit B. to enjoy certain Leases of certain Land, then in S. C. & S. P. his Possession, which were the Lands of W. S. and then the Inheritance of A. he (the ciceriter B.) paying the Rents, and performing the Covenants in the Leases; and that B. shall deliver the Copies of the Leases to A. made by the said W. S. and that B. shall pay the Arrears of Rent due to the said A. after the Purchase thereof made. This Award as to the Payment of the Arrears (so it be aver'd that there was 28. of the Arrears of Rent then due) is not good for the Uncertainty, because it does not appear by the Award how much Rent was due after the Purchase, for B. the Lessor, does not know when A. the Plaintiff purchased the Reversion of W. S. nor hath any Means to know it, unless A. or W. S. will shew it to him, which he cannot compel them to do. Hill. 1652. between Masey and Aubrey, adjudged after Verdict for the Plaintiff. Inratuir Hill. 1651. Rot. 1328.

10. The Award was, that the Defendant should pay to the Plaintiff 20 l. I do not find per Ann. during the Continuance of a Lease for Years then in Being. It was objected that this was uncertain, because the Term was not expressed in the Award, and this cannot be helped by the Averment of the Plaintiff what but it is taken the Term was, and how long it was to continue; but adjudged that an out of
Arbitrement.

Hughes's

the Payment of the Money, referring to the Continuance of the Lease, is cer-

tain enough: for certum eit quod certum reddi poteft. Nell. Abr. 244.

pl. 3. cites Patch. 3 Jac. Girling v. Gofhold.

pl. 7. cites Patch. 3 Jac. B. R. Rot. 478.

This Case is at 8

Rep. 97. b. to 99. a. and

Cro. J. 285,

pl. t. and

Bulst. 144.

but I do not observe the

S. P. in

either of

those Books.

An Award was to pay a
certain Sum

of Money, but no Time of Payment was appointed. The Money was afterwards demanded. It was held

that the Award is good. Brownl. 55. Patch. 16 Jac. Raylon v. Windor.—Brownl. 65. S. C. and

the Demand was held good.

S. C. cited by the Name of Hine v.

Rigby,

Palm. 147.

by Moun-
tague and

Dodridge J.


11. An Award was to pay Money, but express'd no Place where it should

be paid. Refolved that in Law this should have a reasonable Construc-
tion, and the Party ought to have a reasonable Time for the Payment ;

but Fosler conceived it not good, because in such Case the Bond of Sub-
mission would be immediately forfeited, because there was neither Time

nor Place where the Money should be paid. But in Anfwer to this were
cited 3 H. 7. and 16 E. 4. where it is laid, that if an Arbitrator awards

that one Party shall pay fo much such a Day, and keeps the Award in

his Pocket till the Day be past, yet the Bond shall not be forfeited, and

so it was adjudged by all the other Justices. 2 Brownl. 311. Hill. 7 Jac.


12. Award that Defendant fhall give Security to the Plaintiff for Pay-

ment of 16 l. at 2 Days, is void for the Uncertainty, not shewing what

Security he should give, whether by Bond or otherwise. Agreed by all

the Judges and Barons; and fo a Judgment reversed. Cro. J. 314. 315.

13. An Award was, that one Party should pay to the other so much Mo-

ney as fhall be due in Conscience; Judgment nil &c. against the Plaintiff.

Sty. 28. Trin. 3 Car. B. R. Watfon v. Watfon.

14. An Infant submitted himself to an Arbitrement, and the Award

was that the Infant should pay 5 l. for Quit- rents, and other small Things,

and it doth not appear what those small Things were; so that it might be for

such Things for which the Infant by the Law was not chargeable, and there-

for it is void for the Uncertainty; per Heath J. and Brampton Ch. J.

But by Brampton, if it had appeared certainly that the Things had been

such for which the Infant is by the Law chargeable, perhaps it had been


15. The Award was, that one fhall keep and enjoy the Goods, paying so

much Money to the other. It was objected that this was void, because

they have not awarded that the Money shall be paid, but that they shall

have the Goods, paying &c. But Windham J. held the Award good;

for tho' it is not expressly to pay, yet it shall be taken according to the

Intent, which without doubt was, that Money should be paid. Sid. 54.

16. Award was, that one should pay to the other for Task-work and Day-

work; but did not mention How much. This is void by reafon of the Un-
certainty, and the Averment that the Task-work and Day-work amount-
ed to so much, will not help it. 2 Saund. 292. 293. pl. 48. Hill. 22 &

17. An Award, that a Man shall pay so much as such Land is worth, is

void. Arg. and agreed by Jones Ch. J. Skin. 248. Hill. 1 & 2 Jac. 2.

B. R.

18. An
Arbitrement.

18. An Award that the Defendant should pay 12 Guineas, and all such Moneys as the Plaintiff had expended about the Prosecution of such a Suit, was that the Defendant should pay to; but the Court held it good; for it may easily be reduced to a Suit in an inferior Court, and then to give mutual Reliefs. Per Cur. An Award to pay such Guineas at the Master shall tax, is good, because it may be reduced to a Suit; but this is uncertain, and carries it further than has hitherto been allowed. 1 Salk. 75. Trin. Ann. B. R. Winter v. Garlick.

6 Mod. 195. S. C. and Holt Ch. J. said that it has been held a good Award to pay such Guineas at the Prothonotary shall tax, and that carries it far enough; but that surely they should either ascertain it themselves, or refer it to a proper Officer. And Powell J. said that that Case, referring it to a proper Officer of a Court, has been settled on Debate; for cer- tain, if good, certain re- dundancy will appear what was laid out in that Suit. 2 Vent. 242. Mich. 2 W. & M. in C. H. Hanson v. Leveredge.

19. Subdivision was of all Differences &c. concerning a Piece of Ground 6 Mod. 244. used as a Wharf, and all Ereotions therein, which were Nuisances to the Plaintiff's House. The Defendant pleaded no Award. The Plaintiff re- plied, and set forth the Award; by which it was awarded that the De- fendant should enjoy the Wharf, and that the Ereotions should be pulled down 2 d. Ramm within 38 Days from the Date of the Award; but did not stay by whom, nor S. C. ad- ded to the Date of the Award. And upon Demurrer it was objected to be uncertain; for tho' an Award to pay Guineas to be taxed by the Prothonotary has been allowed, 1 Sid. 358. yet here no Person is named who is to tax the Guineas, and therefore an Award to pay Guineas of Suit in an inferior Court is void. 1 Salk. 75. and here it is to pay Guineas to the Bailiff, and therefore is like the Case in 3 Lev. 415. to pay all reasonable Expenses in such a Suit, which was held to be void. See non allocutus; for an Award to pay Guineas in such a Suit is sufficient, without saying any thing more; for they may be ascertained. Comyn's Rep. 329. 330. pl. 367. Mich. 6 Geo. 1. C. B. Thomlinson v. Arriskin. See the Case of Worsall v. Alworth, at (E) pl. 21 and Linfield v. Ferne, at (H) pl. 14.

(R.) Of what Things they may make an Award.

In what Actions it shall be a good Bar.

1. In an Action of Debt for the Arrearages of an Account, an Action is no Plea, because the Debt is certain. 3 D. 4. 4. that of such Arrearages found before Auditors, Arbitrement is no Plea; because the Debt is now of Record, and the Plea is only Matter in Fact. — See pl. 6.

2. If two submit to a certain Debt in Controversy between them, arbitrators cannot make any Award thereof, because it was certain before the Subdivision. 2 D. 5. Arbitrement 23. and there it is cited to be 2 D. 5. 2. But this is not in the Book at large. 10 D.

7. 4. * 4 D. 6. 17. b. In Debt upon a Contract, Arbitrement is a good Plea; per Marten J. Br. Arbitrement, pl. 25 cites 4 H. 6. 17. — Tho' a Debt
Arbitrement.

upon a Bill or Contract cannot by itself be put in Arbitrement, yet where one claims 5 l. as Expenses pro diversis Negotiosis, this may well be put in Arbitration. Cro. E. 422. pl. 18. Mich. 57 & 58 Eliz. B. R. Sower v. Bradford.

3. [But] If two submit a certain Debt and other Things, the Arbitrators may make an Award of the Debt and other Things, because this is an entire Submission, and the Debt with the other Things are uncertain. 2 H. 5. Arbitrement 23 and there it is cited to be 2 H. 5. 2. But this is not in the Book at large. * 4 H. 6. 17. b. 10 H. 7. 4. Cr. 22 Car. B. R. between Powar and Bates, adjudged. Intra t. 22 Car. Rot. 162, after a Verdict for the Plaintiff, this being moved in Arent of Judgment. Contra 6 H. 4. 6.

yet being joined with Trefpasses, the Damages whereof are uncertain, therefore the Nature of the one shall draw to it the other; per Newton. Br. Arbitrement, pl. 25. cites S. C. — S. C. cited All. 5. — S. P. Cro. E. 756. pl. 20. Patch. 42 Eliz. C. B. in Case of Brett v. J. S. and his Wife.

† S. C. cited All. 5, but says it was like wise agreed, that where Arbitrement is no Plea in Debt, it is no Plea in Assertment upon the Debt. Mich. 22 Car. B. R. Farrer v. Bates.

An Action of Account may be submitted to an Award, and the Arbitrators may make an Award thereof; for it is uncertain. 2 H. 5. 2. Arbitrement 23, adjudged.

Rent and a Wine Licence is good. Allen. 52. Patch. 24 Car. B. R. in a Note at the End of the Case of Rose v. Spark. — See (A) pl. 6. S. C.

6. In an Action of Debt for 201. Rent arraizs, upon a Lease for Years, an Award to pay 101. for this Debt and other Trefpasses, is a good Bar of the Action, tho' it is a less Sum than the Debt demanded, and tho' the Action is for a Debt certain, inasmuch as other Things are submitted with this, and so altogether are uncertain; and it may be the Sum of 201. was abridged to 101. in respect of a Trefpass done by the Plaintiff to the Defendant. 10 H. 7. 4.

Rent and a Wine Licence is good. Allen. 52. Patch. 24 Car. B. R. in a Note at the End of the Case of Rose v. Spark. — See (A) pl. 6. S. C.

An Award is no Plea in Assertment, or other Matter of Record; but if the Matter of Record be mix'd with a Matter in Fact, then it is a good Plea. Heath's Max. 59. cites 13 Ed. 4. 5.

8. In Debt upon a Contract, Lease, or Arrearages of Account before the Plaintiff himself, Arbitrement is a good Plea, (altho' the Demand be certain.) Otherwife of Arrearages of Account before Auditors, because it seems to be Matter of Record, and the Defendant cannot wage his Law. Quare in Debt upon a Lease for Years. Heath's Max. 59. cites 4 H. 7. 16.

9. Damages recover'd do not lie in Arbitrement; per Anderson J. But per Periam J. they will lie well enough among other Things; quod Anderson non negavit. Gouldsb. 92. pl. 4. Trin. 30 Eliz. obiter.

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11. If there be a Clause in a Will, that whatever Controversy shall arise upon the Construction of it, it shall be decided by such and such Arbitrators; the Parties have their Election to decide their Controversies either by Arbitrators or by Law; per Powis J. 10 Mod. 59. Mich. 10 Ann. B. R. Arg.

(S) In what Actions. In Actions grounded upon a Record.


Record, and the Plea is only Matter of Fact. † Br. Arbitrement, pl. 25. cites S. C. cited D. 51. a. pl. 14. — See (R) pl. 1. and pl. 6. and the Notes there.

2. In an Action upon the Statute of Labourers, an Award is a good Plea in Law; for the Action is not merely grounded upon the Statute, but partly upon a Matter in Pais, stilket, his Departure. 12 R. 2. Arbitrement 24.

(T) In Actions grounded upon a Deed.

1. In Debt upon an Obligation, an Award is no Plea. * 4 Hen. 6. * D. 51. a. 18. 10 Hen. 7. 4. pl. 14. S. P. and cites S. C.

Debt upon Obligation was brought by 3 Executors, and the Defendant pleaded that diverse Controversies were between Defendant and one of the Plaintiffs, whereupon they submitted to Award, and the Award was, that the Defendant should be quit of the Obligation. On Demurrer the Court held, that a Bond by itself is not submitable, because it is a Debt certain; but otherwise where it is submitted among other Things. And Keeling and Twifden held the Plea good, notwithstanding the Controversies were between one of the Plaintiffs only and the Defendant; but Morton J. doubted, not only for this Reason, but likewise because an Award is not of so high a Nature as an Obligation, and consequently cannot be a Bar. Ad. journatur. Lev. 292. Trin. 22 Car. 2. B. R. Morris v. Creech.

2. When a Duty accrues by the Deed in Certainty, tempore Confectionis scripti, as by Bill, there is a certain Duty, and it takes its Essence and Operation originally and only by Writting; and therefore in Debt thereupon an Award is no Plea. Co. 6. Blake 43. b.

3. So it is in an Action of Debt upon an Obligation upon Condition to pay a certain Sum; for there the Duty commences originally and only by the Deed. Co. 6. Blake 43.

4. So it is in an Action of Covenant for Non-payment of a certain Sum, which he cohenanted to pay. Co. 6. Blake 43. b.

5. When no certain Duty accrues by the Deed, but a wrong or De: In Certarni fault subsequent, together with the Deed, gives an Action to recover Damages, which are only in the Personalty for such Wrong or Default, an Award or Accord with Satisfaction is a good Bar. Co. 6. Blake 44. Resolved.

6. As
6. As in an Action of Covenant for not doing a certain Thing, As for not repairing of a House, or for the Non-delivery of certain Pieces of Iron, or such like, an Award or Accord with Satisfaction is a good Bar. Co. 6. Blake 43. b. adjudged for not repairing.

7. Contra 3 Jac. B. R. between Middleton and Chapman, adjudged, where it was for the Non-delivery of Pieces of Iron.

8. Erin 18 Jac. B. R. between Rabbit and Stocker adjudged upon Demurrer, that an Accord with Satisfaction is a good Bar of an Action of Covenant, tho' the Accord was made before the Covenant broke; for this may be in Satisfaction of Damage to come; and also in the same Case adjudged so, where the Covenant was broke at the Time of the Accord.

(U) [Pleadings. Award, good Plea in what Actions.]

In Actions Real [or mixt.]

Br. Arbitrement, pl. 2.


2. But otherwise it is in Trespass for taking the Charter, for this Action is only to have Damages for it. 9 H. 6. 60. b.

3. In an Annuity for an Annuity in Fee, or for Life, an Award is no Plea. 9 H. 6. 60. b. (it seems that this is intended by Prescription, for if it be by Deed, it is no good Plea against the Deed.)


4. An Award without Writing is no Plea in Bar of Actions Real.

Fol. 266.

5. The same Law in Actions mixt, in which the Land of an Estate of Freehold as it seems, shall be recovered. 19 H. 6. 37. b.

6. As in an Affire it is no Plea in Bar. 19 H. 6. 38. b.

7. The same Law it is, if the Submission and Award be in Writing. 19 H. 6. 37. b.

Br. Arbitrement, pl. 25. Leafe for Years, an Award is a good Plea in Bar. 4 H. 6. 17. b. cites S. C.

See (A) pl. 6. S. C. —— See (R) pl. 6. and the Notes there.

8. In an Action of Debt, for the Arrears of Rent, reserved upon a

9. In an Action of Waite in the Tenuit upon a Leafe for Years, and Award or * Accord with Satisfaction is a good Bar. Co. 6. Blake 44. Co. 9. P. 778.
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10. If an Action of Waifte in the Tenuit upon a Leafe for Life, Geo. E. 5. s. 37th. an Accord with Satisfaction is a good Bar. Fitzh. 37. El. 2. be pl. 1. S. C. & S. P. re- solved per Suteheurit and Bagnell, adjudged, which Incurtive Patch. 36 El. Rot. 93. for this founds in the Perlonalty, and Damages only to be recovered, where Land is to be recovered in Writ of Waifte, peradventure it is otherwise, and Judgment for the Defendant, as to the Point of Accord, see Tit. Waifte (8. a. 3.) pl. 50. and the Notes there. [But that Point of Accord only does not answer this Head of Arbitrement.]

11. In an Ejectione firma, an Award or Accord with Satisfaction is a good plea in Bar, for tho’ the Possession is to be recovered, per this Action is in Nature of a Trepais. Chitty, 5. Peto 78. re- solved per Certam.

(X) What Award shall be a good Bar of Actions.

1. If the Award he to do a Thing &c. that the other hath not Br. Arbit. means to compel him to do, if the Action he brought before it trement, pl. is performed, this is no Bar thereof, for then the other should be 56. cites S. C. without Remedy, as if the Award be to enter into an Obligation, of Arbitre- to find Sureties, he ought to plead in Bar. Def. 6. 38. *ment. pl. 21/ cites 19 H. 36.

2. As [So] If two have Actions one against the other, of which the Br. Arbitre- Days of Appearance are severall, and they submit, and it is awarded ment, pl. 21. that each shall be Non-Suit; this Award is not any Bar of the Act on in which the first Appearance is, because he hath no Means to make the other be Non-Suit in his Action, when the Day comes. 19 H. 36. 6. 37. b.

3. So it is not any Bar of an Action, that it was awarded that Br. Arbitre- he should have an Acre of Land in Satisfaction, if he doth not pay he- ment, pl. 21. t. 19 H. 6. 36. cites S. C.

6. cites S. C. & S. P. by Newton. ——But it was said, that if [in the Cases above] they had awarded the Party to be bound by Obligation to have done it, this had been a good Arbitrement, and good Bar if it had been found accordingly; for this had been an Act executed, per Fation good non negotiam, and afterwards the Plaintiff recovered. Br. Arbitrement, pl. 21. cites 16 H. 6. 39.

4. In Trepais it is no good Bar that the Arbitrator awarded that Br. Arbitre- each should be quit of Trepaisles against the other, and the Plaintiff ment, pl. 2. should make a Release to the Defendant, and [should pay to the Def- s. C. & s. P. and by lendant] 20 s. and that after the Defendant should release to the Plain- tiff, and this is not any good Bar; for if the Plaintiff should release, he hath no Means to compel the Defendant to release. 22 H. 6. 13. B. 19.

E ee 5. 3f
5. If any Thing be awarded to be paid in Satisfaction of an Action, this will be a good Bar of the Action. 46 C. 3. 17. b.

6. In Trespass an Award to pay a Quart of Wine to the Plaintiff, and Performance, is a good Bar of the Action. 43 C. 3. 33. 45 C. 3. 16. b. 13 P. 4. 12. 9 D. 6. 50. b. 9 E. 4. 44.

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7. If it be awarded, that he who is supposed the Trespasser shall make his Law that he is not guilty thereof, he shall be quit of the Trespass if he wages his Law accordingly; yet this is no Bar of the Action, because this is no Satisfaction, nor can be intended the same Trepasses of which he hath waged his Law. 46 C. 3. 17. b.

8. An Award without a Deed of Submission or of Award, will be a good Bar of a Trespass. 43 C. 3. 28. b.

9. In Affise it was said, that if two put themselves in Arbitrement of Land whereof the one has no Title, and Award be made between them, without Writing, that they shall hold in Common, this is a good Bar in Affise. Br. Arbitrement, pl. 30. cites 12 Aff. 25.—Brooke says Quere tamen; for 11 E. 3. 24. is, that Partition between Privies is a Bar; contrary between Strangers.

10. In Debt the Plaintiff counted upon Recovery of Debt and Damages in a Court of Record at King'son upon Hull, and the Defendant pleaded that they were dismiss'd by the Court in the same Action by Affent of the Plaintiff, because it appear'd to the Court that the Parties had put themselves in Arbitrement, and therefore to say that he is dismiss'd, Judgment fi Atio, and it was awarded by the Court, that the Plaintiff take nothing by his Writ, and so a Bar; and per Hank. and Thim, Arbitrement made, or Arbitrement pending, and not finish'd, is a good Bar in Action Personal; and per Hank. fo in Action Real; but Skreene contra. Br. Dette, pl. 61. cites 11 H. 4. 12.

11. Arbitrement that the Defendant shall pay 1 d. in Satisfaction of all Manner of Actions, which be has paid, is a good Bar; per Moyle. Br. Arbitrement, pl. 23. cites 22 H. 6. 39.

12. An Award, reciting that the Defendant has received 20 d. and that the Plaintiff has done divers Trepasses to the Defendant, and the Defendant has done divers Trepasses to the Plaintiff, by which it was awarded that the Defendant shall pay to the Plaintiff 20 d. in full Satisfaction of all Trepasses, Receipts, and Demands, and that the Plaintiff shall be quit against the Defendant of all Actions and Demands, by which the Defendant at Dale paid the 20 d. to the Plaintiff; Judgment &c. and the other said that he did not pay the 20 d. prift &c. Br. Arbitrement, pl. 23. cites 22 H. 6. 39. per Moyle.

13. In Debt upon a Bill, the Defendant pleaded that after the Money became due he and the Plaintiff, by Parol, did submit themselves to an Award, and it was awarded that the Defendant pay &c. The Plaintiff demurred, because the Plea of a Submission by Parol after the Day of Payment Limited by the Bill, is not good to discharge a Debt due by Specialty. Roll Ch. J. said, that to take away a Duty created by Bond by Parol would be inconvenient, and therefore gave Judgment for the Plaintiff. Sty. 330. Mich. 1652. Luddington v. White.

14. An Award without Performance is a good Bar to an Action on the Case for the same Matter, if the Parties have mutual Remedies against each other to compel the Execution of the Matters awarded; but it is other-
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otherwise if they have no mutual Remedies to enforce the Performance.

15. In Case on a special Promise by the Defendant to deliver Hops at such a Day &c., the Defendant pleaded an Award, that the Defendant should release to the Plaintiff, and that he should release to the Defendant all Actions and Demands whatsoever. Adjudged that this Award was no Bar to the Action on the Cafe, th' the Thing awarded, when executed, would be a Bar. And a Difference was taken by the Court, that where any Thing is awarded in Satisfaction, there the Award itself is a Bar before it is performed; but where nothing is awarded but Releases on both Sides, there, when the Award is executed, the Release will likewise be a Bar, but not before; for the Award without the Release is no Bar; but per Cur. the Defendant may bring his Action against the Plaintiff for not releasing according to the Award, and therein ought to recover all his Damages and Costs left in the Action against him. Carth. 379. Pasch.


For when the Thing is awarded to be done in Satisfaction, it raises a new Duty in lieu of the old one discharged. As if Money be awarded to be paid, the Debt lies for it; but in the Cafe of a Release there is only a Method ordered to discharge the Action: If the Award itself discharge the Action, there needs no Release to be given, because Action was gone before; but the Action being not discharged till the Release comes, till it comes actually it cannot be a Bar. Judgment pro Quer. 12 Mod. 435. Trin. 9 W. 3. Freeman v. Bernard.—— Ed. Raym. Rep. 247. 248. S.C.—t Salk. 69. pl. 1.

16. Holt Ch. J. said that Nicholls's Cafe amounted to no more than that Money paid on a void Arbitrement may be pleaded as an Accord and Satisfaction. 1 Salk. 71. pl. 3. Trin. 9 W. 3. in Cafe of Bacon v. Dubarry.

17. In Indeb. Assumpsit and Quantum Meruit for Work done and Goods sold and deliver'd, the Defendant pleaded an Award, that the Plaintiff for the Work done &c. should accept a Bill of Sale before made of the 8th Part of such a Skip, and that the Plaintiff and Defendant should give to each other General Releases. Holt Ch. J. said that this is the same with the Cafe of Freeman v. Barnard; for as to the Goods sold and deliver'd, there is nothing awarded but a General Release; that if the Bill of Sale had been awarded in full of all Demands, it had been good; but this Release awarded here is not a perfect Bar till it be executed. And it having been objected that the Goods sold and deliver'd is the same Demand with that for Work done, yet Gould J. said that the Court cannot take Notice of that upon such a Generality; but that if the Defendant had shine it by particular Agreement, it might have been construed to be within that Part of the Award. Judgment for the Plaintiff. Ed. Raym. Rep. 611. Mich. 12 W. 3. Clapcott v. Davy.

18. Cafe upon three several Promises, and an Award ordering mutual Releases was pleaded in Bar. Per Cur. 'tis no good Plea, because nothing is awarded that bears an Action; but if there were any Thing awarded, for which an Action would lie, it would be a good Plea, tho' it were not performed; and Judgment pro Quer. 12 Mod. 423. Mich. 12 W. 3. Anon.

19. Anciently if an Award was made to pay a Sum, this might have been pleaded in Bar tho' without Satisfaction, because the Law gave an Action of Debt for the Money upon the Award, and for a Remedy; and tho' that Law be now altered, yet now when 2 Persons submit to an Award, this amounts to mutual Promises; per Holt Ch. J. 11 Mod. 171. Pasch. 7 Ann. B. R. in Cafe of Lupart v. Welfen.
(Y) Arbitrement and Accord, in what Actions they shall be a good Bar, and in what not.

See (A) pl. 1. C D. 9 Henry De Poytoe 78. vide in what Actions an Accord is a good Plea.

11—See Tit. Accord (B) pl. 8, 9, 10, 11, 12.

The Year Book is that the Plaintiff impart'd.

2. In a Writ of Conspiracy, an Accord with Satisfaction is a good Plea. 18 E. 4. 24.

3. Arbitrement is no Bar in Detinue of Charters, for such Action is mixt with Realty. Nor is it any Plea in Writ of Annuity, for a Man shall recover the Annuity. Br. Charters de Terre, pl. 7, 9 H. 6. 60. per Babington.

(Y. 2) In what Arbitrement and Accord differ.

1. Arbitrement is a good, tho' the Day of Payment was to come, but Accord ought to be executed; for upon Arbitrement he may have Action of Debt, but if the Arbitrement be, that he shall be bound in an Obligation at a Day which is to come, he shall not plead it in Action of Trespass; for then the Plaintiff shall be bar'd, and has no Remedy to compel the other to make the Obligation to him &c. Note the Diversi-

ty between a Sum of Money and another Thing. Br. Arbitrement, pl. 36. cites 5 E. 4. 7.

2. Arbitrement that each shall go quit against the other; because that each has done a Trespass to the other, is a good Arbitrement, for the Parties have deputed the Arbitrator for their Judge; but contra of Accord, for this ought to be executed, and there ought to be Satisfaction or Recompence, & quid pro quo, and therefore Debt does not lie upon Accord, contrary upon Arbitrement; for if the Party offers the Money upon the Accord, and the other refuses it, the Accord is void, contrary of Arbitrement, for Debt lies. Br. Arbitrement, pl. 38. cites 16 E. 4. 8.

(Z) At what Time it shall be a good Bar of Actions.

1. If an Award be to pay Money at a certain Day, in Satisfaction of an Action, if the Money be not paid at the Day, this Award is no good Bar of an Action, tho' he may have Debt upon the Award, because it was his own Fault that the Money was not paid, and therefore he shall not compel the Plaintiff to bring an Action upon the Award, and bar the first Action. 49 E. 3. 3.

2. But if the Defendant refuses to perform the Award at the Day, this Award is no Bar of the Action. * 7 H. 4. 30. b, 11 H. 4. 44. b, 21 H. 6. Arbitrement 10. 22 H. 6. 52. b.

* Br. Arbitrement, pl. 12. cites 7 H. 4. 31. that the making the Award does not of itself extinguish the Action—Br. Trespass, pl. 84. cites 7 H. 4. 30.—Frith. Replication, pl. 52. cites S. C. and that by the Refusal he was referred to his Action.
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3. If an Award be that one Party shall pay a certain Sum of Money to the other in Satisfaction &c., at a certain Day; in an Action before the Day of Payment, this Award shall be a good Bar, because he may have an Action upon the Award. 22 H. 6. 52. 6. * 5 C. 4. 7.

It was admitted that an Award not executed, as to pay Money, is a good Plea where no Default is in the Party; and so it seems, where the Day of Payment is not come. Br. Arbitrement, pl. 3. cites 20 H. 6. 18, 19.

In Trespass, the Defendant said that they put themselves in Arbitrement of W. P. of this Trespass, and of all Quarrels and Debates, who awarded, that the Defendant pay to the Plaintiff 10s. for Amend at Michaelmas next, which Day is not yet come, Judgment &c. Action; and the Plaintiff said that this is no Plea, if he does not plead that he has paid, or has been at all Times ready to pay; but Quare inde. Br. Arbitrement pl. 1. cites 29 H. 6. 12.

† All the Editions of Brook are (Defendant) and therefore certainly misprinted.

4. But if an Award be that one shall enter into an Obligation of 100l. * Br. Arbitrement &c. before a certain Day, in Satisfaction &c., in an Action before the Day, this Award is no Bar, because the other cannot compel him to enter into an Obligation at the Day. 5 C. 4. 47. 5 C. 4. 7.

5. If an Award be that one shall pay 10l. to the other in Satisfaction of all Trespasses &c., if he who ought to pay it tenders it at the Day, and he the other refutes, and after brings an Action for the Trespass aforesaid, this Award shall be a good Bar of the Action, because it was his own Fault that it was not paid, and he hath his Remedy for the Money.

6. If A. & B. submit themselves to the Award of J. S. of all Actions, who awards that A. shall make an Obligation which shall be sealed with Wax, and shall bring it to B. and B. shall seal it to A. in Satisfaction &c., if A. does not bring the Obligation to B. to seal, yet Fitch. This Award shall be a Bar of Actions brought by A. which are with in the Award, tho' he hath no Means to compel B. to enter into an Obligation, because the Default was in himself. 5 C. 4. 7.

good Plea, where no Default is in the Party. Br. Arbitrement, pl. 3. cites 20 H. 6. 18, 19.

It is no Plea in Trespass, that the Parties put themselves in Arbitrement &c., by which it was awarded that he should pay 20l. Judgment &c. without pleading Payment; but per Choke, it is a good Plea, if the Day of Payment be not yet come. Br. Arbitrement, pl. 26. cites 9 E. 4. 51.

7. An Award to pay Money in Satisfaction is plenteable in Bar, tho' the other Party be not awarded to accept it; for the Award of Payment of Money visits a Duty in the Party, and is a Bar in Debt, or Trespass, or Affirmait; per Holt Ch. 2 Ld. Raym. Rep. 965. Trin. 2. Ann. in Case of Squire v. Grevett.

(A. a) What Persons shall be bound by their Submission. * Fol. 268.

I f an Infant submits a Battery done to himself, and an Award is made thereupon, yet this shall not bind the Infant. 13 H. 4.

12. Dubitatur.

2. So if an Infant submits a Trespass done to him in his Land, and an Award is made thereupon, yet this shall not bind him. Contrary to 10 H. 6. 14.

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3. An Award made upon the Submission of the Predecessor Prior shall bind the Successor. 2 H. 4. 4. b.

So where an Award was between the Plaintiff and the Intestate in Writing, it was for the same Reason adjudged for the Defendant. Cro. E. 600. pl. 8. Mich. 39 & 40 Eliz. B. R. Bowyer v. Garland. —— See (E) pl. 23; Freeman v. Barnard.

Mar. 141. pl. 215. S. C. argued by the Court, and adjudged accordingly.

— Frencm. Rep. 159, 160. pl. 160 Arg. cites S. C. but the Court seemed to deny it; for tho' it be void as to the Infant, yet the Obligation is forfeited if he does not perform it. Hill. 1673; in Cafe of Gill v. Ruffel.

S. C. cited Comb. 318. Hill. 6 W. 3. B. R. Roberts v. Newbold, but the Court held, that tho' an Infant cannot submit, yet his Guardian may submit for him, and bind himself that the Infant shall perform the Award, as was done in this Cafe; and Eyre J. said, that there are several Cases that the Submission of an Infant is not void but voidable, contrary to Mar. 141.


6. A Man may submit for the Debt of another, but then it must be mention; for the Court is to judge upon the Record before them, and not upon Affidavits that more was submitted than is expressed. 2 Show. 61. pl. 47. Trin. 31 Car. 2. B. R. in Cafe of Adams v. Staley.

(B. a) Who shall take Advantage of an Award.

Br. Trespaß, 1. If A. hath the Custody of my Cattle, and during the Custody they do a Trespaß to B. and A. and B. submit this Trespaß to Arbitrement, and an Award is made, and A. performs it, if B. brings Trespaß against me for this Trespaß, I may plead in Bar the Award between the Plaintiff and the Stranger. 7 H. 4. 31. b.

Br. Arbitrement, pl. 13. cites S. C.

— Ibid. pl. 48. cites S. C. & S. P. accordingly; for there is Satisfaction by the Stranger and Privity; quo non negatur; but Brooke says, Tamen vide Librum inde. —— Fitz. Barre, pl. 176. cites S. C. the Plaintiff pleaded No Award, and the other contra; Quod Nota.

(B. a. 2) Set aside for Misbehaviour.

1. B. EFORE the making the Award the Arbitrators insiffs upon three Guineas a-piece to be paid them by each of the Parties for their Trouble and Expenses, which the Defendant refused to do, and thereupon the Plaintiff paid the whole Money. The Court thought it dangerous to suffer one Side only to give Money to Arbitrators, and set aside the Award. 2 Barnard. Rep. in B. R. 463. Trin. 7 Geo. 2. Shepherd v. Brand.

(B. a. 3)
Arbitrement.

III

(B. 3) Actions. What Actions lie on an Award.

And what shall be said Parcel of the Award.

1. If a Man be bound to stand to stand to the Arbitrement of F. N. who

awards that he shall pay 101. there the Obligee shall not have

Debt upon the Obligation and upon the Arbitrement also; per Littleton,

Quare; for some said, where Trespass is put in Arbitrement &c. who

awards as above, and the Defendant will not obey the Arbitrement, the

other shall have Trespass, and shall recover his Damages, and shall

have Debt upon the Arbitrement also; Quare. Br. Dettle, pl. 23. cites

33 H. 6. 2.

2. Debo upon Bond for Performance of an Award; the Arbitrators [Ibid. cites

awarded, that Defendant should enjoy such a House, of which the Plaintiff

was Lessee for Years, during the Term, paying to the Plaintiff yearly 20 s.,

and for Non-payment thereof Debt was brought. The Court held, 18 & 19 E.

clearly that this part of the Award, and that Debt lay on the Bond, viz. in Case


15 Eliz. B. R. S. C & S. P. by Wray, and that this Rent should not cease by Eviction of the Land.

—— A. and B. are bound to each other to stand to an Award; The Arbitrators award that A. shall

make a Lease for Years to B. rendering Rent to A. — A. makes the Lease. B. does not pay the Rent.

The Justices held that the Obligation is not forfeited, because Disputes or Debt are the proper Remedies.

But if the Award had been that the Lease should pay the Rent: the Obligation had been forfeited.


for the Words (rendering certain Rent) are not Parcel of the Subsidence of the said Award, but

the making the Lease is the Effect thereof.

3. If a Man is bound to perform an Award of Arbitrators, and according to the

Award to pay Money, in such Case the Person to whom it is to be paid may have an Action of Debt for the Money, and de- 

clare upon the Award, and afterwards he may have another Action upon the Award for not performing the Award; Per for. Cur. Brownl. 55. Mich. Cur. Anon. ——— Rep. 415.


(C. a) Declaration upon an Award.

1. In Debt upon Arbitrement the Plaintiff ought to count for what Cause

they put themselves in Arbitrement. Br. Arbitrement, pl. 34. cites

5 E. 4. 1.

2. In Debt &c. upon an Award, the Plaintiff set forth an Award, that

the Defendant should pay to the Plaintiff 101. in full Satisfaction &c. It

was objected, that this Declaration was not good, because it did not ap- 

pear that any thing was awarded to the Defendant; but the Court was

clear of Opinion, that the Plaintiff is not bound to set forth the whole

Award in his Declaration, but only so much of it as does intitle him to the

Thing &c. and if the Defendant will impeach the Award, it must come of his Side. Le. 72. pl. 97. Mich. 29 & 30 Eliz. C. B. Smith v. Kirfoot.

Award with an Inter alia; and Judgment accordingly. Litt. Rep. 312, 313. Mich. 5 Car. C. B. Le-ke
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Leske v. Butler.—Mod. 36. pl. 87. Hill. 21 & 22 Car. 2. B. R. Rich v. Morris, the Declaration being Inter alia was held naught, by Twifden J.—It was initialed, that in Debt on an Award the Plaintiff need not let forth more of the Award than makes for him ; and this was agreed to be so, but it was said to be otherwise in Debt upon a Bond of Submissijn for there the Plaintiff must reply the whole Reward 7 Salk. 72. pl. 9.

If a void Part of the Award be omitted, so that it be such Part as does not avoid the whole Award, it may be well enough; for where an Award contains several Matters to be done on the Plaintiff's Side, all which are well awarded and to be performed by the Plaintiff, and he sets out enough only to induce him to an Action, and they come and plead No Award, and upon Oyer it appears that the Plaintiff was to do more than he set forth, and that those Things were well awarded, viz. that the Award was well as to them. It was said, that in Debt on an Award he need only set out so much as would induce him to an Action, but that he ought to swear so much of it as was necessary to make it good; and Holt seemed to approve the Case in Le. 72, that Debt lies on an Award without setting it all out; Per Holt Ch. J. 12 Mod. 534. Trin. 15 W. 5. in Case of Purlong v. Thornigold.—Ld. Raym. Rep. 719. Foreland v. Thornigold, says, that if the Plaintiff had shown all the Part of the Award that was good, and had omitted to swear part of it that was ill in itself and void, upon Issue of Null Award that would not have been a material Variance; and Holt Ch. J. said it had been ruled before upon Evidence at a Trial at Nifi Prius at Guildhall; and Gould J. ruled it accordingly at the Summer Affixes in the Home Circuit.

The Declaration needs not to express any Time or Place certain where the Award or Submissi6n was made; but if the Defendant pleads that the Arbitrators made no Award, or that the Parties did not submit themselves to their Award, the Plaintiff may reply that the Arbitremt or Submissi6n was made at such a Place; agreed by all the Justices 2 Brownl. 137. Mich. 9 Jac. C. B. in Case of Holcroft v. French.

If Money be awarded, and the Plaintiff brings Debt for the Money generally without shewing the Award of both Parts, this is good and the Plaintiff shall have his Judgment; agreed by Twifden J. who said it had been so adjudged. Sid. 161. in pl. 14.


3. If a Party pleads an Arbitrement in Bar, that the Defendant should pay to the Plaintiff 20 $. upon which the Plaintiff demurs, because he does not allege a Place where the Submissijn was, and cited 9 H. 6, S. 5, nor does he allege Performance of the Arbitrement, and does not answer to the Vi & Armis; and for these Causes it was adjudged for the Plaintiff. Cro. E. 66. pl. 13. Mich. 29 & 30 Eliz. B. R. Hare v. Gorge.

4. In Debt upon the Bond of Submissijn there was a Demurrer, because (as was initialed) the Action here is merely grounded on the Award, and therefore there ought to have been a Pofert of it in Curia ; but Roll Ch. J. said it is not necessary; and Glyn Ch. J. was afterwards of the fame Opinion, though the Award must be pleaded in Writing, and the Action is not brought on the Award but on the Submissijn; for the Award is only the Inducement, and the Court has nothing to do with it but to see whether it be in Writing or not; and afterwards he said, that an Award under Seal is no Deed, and therefore need not be produced; and Judgment accordingly. Sty. 459. Trin. 1655. Dod v. Herbert.

5. An Award that Defendant should pay to the Plaintiff 50 l. and that the Defendant should deliver such Writings and sign a Release; the Plaintiff set forth the Award, but did not allege that it was in Writing. The Plaintiff had a Verdict, but Judgment was stay'd and given for the Defendant, because the Award was void; for the Defendant has no Remedy for the Writings and Release upon this Parol Submissijn, for it does not imply a Promise to perform it, and so it is an Award of one Part only. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French.

6. An Award was, that Defendant pay the Plaintiff so much Money at such a Time and Place. In Debt upon the Bond the Defendant did not aver that he was ready at the Place to receive the Money; and Exception being taken thereto, Holt Ch. J. held that it needed not, because the Defendant ought to do the first Act, and therefore it he does not come and tender the Money, tho' the Plaintiff be not there to receive it the Bond will be forfeited. Ld. Raym. Rep. 533, 534. Hill. 11 W. 3. Doyley v. Burton.

(D. a)
(D. a) Plea, Replication &c. The Manner of setting forth an Award in Pleading.

1. IN Audita Querela, Finch said for Law, that Arbitrement is no Plea in Trepasses, if the Defendant does not say that the Arbitrators awarded that he should give something to the Plaintiff, more or less. Quod non nagatur. Br. Arbitrement, pl. 6. cites 43 E. 3. 28.

2. In Debt upon Arbitrement the Defendant cannot plead Nulli Submiss; for he may wage his Law, and there he cannot traverse the Cause of the Debt nor the Contref. Br. Traverfe per &c. pl. 64. cites 8 H. 6. 5.

3. In Debt upon an Obligation the Defendant pleaded Indorsement to stand to the Award of two, Ia quod fiat citra Mich, and that they made the Award after the Day, alifle box that they made the Award before the Day. Cotton J. said, you plead ill; for it suffices to say Quod non fece
tur Arbitrium ante Dieum, and give the Matter in Evidence, and so he did; quod nota. The Plaintiff said that they made Award before the Day, and that the Parties put their Seals to the Award, and the Defendant put his Seal, and required the Defendant to put his Seal, and be refud, and so the plaintiff accurr &c. And so fee that upon Award the Plaintiff ought to declare How he has performed his Part, and in what the Defendant has broke his Part; quod nota; and so it was agreed [in Time of] H. 8. Chan
tor said the Submissiun was only of all Trepasses, and therefore this is out of the Submissiun; But per Newton, this is a Thing which depends upon the Submissiun. Br. Arbitrement, pl. 18. cites 8 H. 6. 18.

4. In Trepasses it is a good Plea that they put themselves in Arbitrement, and the Arbitrators awarded that the Defendant shall pay to the Plaintiff at such a Day, which is to come; for Debt lies of it when the Day is come. Br. Arbitrement, pl. 46. cites 20 H. 6. 12.

5. Detinue by W. against J. of 2 Obligations, who said that they were delivered to him by W. and T. upon certain Condition, and pray'd Garni
fhment, and had it, and T. came and said that the said T. and W. the Plaintiff put themselves in Arbitrement of the said J. and B. &c. and that the Obligations were delivered to the said J. upon Condition to stand to the Award of the said J. and B. and that if each of his Part perform the Award, that each shall re-have his own Obligation; and that if the one breaks the Award, and the other performs it, that he who performs it shall have both Obligations; and that they awarded that the said W. should receive the Profits of the Manor of C. from Mich. 25 H. 6. till the Feast of the Annunciation then next ensuing, and should pay to the said T. at the said Feast of the Annunciation 10 Marks, and that the said W. sever the Manor by itself, and the Land in D. by itself into two Parts, and that the said T. should choose which Part he would have, and hold it without Impeachment of the said W. and that if the said W. pay to the said T. the said 10 Marks at the Day aforesaid, then be should suffer the said W. to occupy the said Moiety peaceably, and said that the said W. did not pay to him the said 10 Marks, to his Obligation belonged to him; and as to his own Obligation said that the said W. did not make Partition of the said Manor; and in Case he had made the Partition he was ready to have chose his Part, and to suffer him to retain his Part, and to his own Obligation belonged to him also; and the Court held the Plea * double, viz. the not making of the Partition, and the Non-payment of the 10 Marks. Br. Arbitrement, pl. 22. cites 21 H. 6. 18. But Brooke lays Quaere inde.

6. Where-
Arbitremet.

Debt upon Bond for Performance of an Award. The Defendant pleaded that the Submission was of all Actions depending between them, and the Arbitrators award'd that all Suits should cease, which he aver'd had done. The Plaintiff replied that they further award'd that the Defendant should pay the Plaintiff 15 l. on such a Day, which he had not paid, and traversed that they awarded only as the Defendant had alleged. The Defendant rejoined that the Award was to pay this 15 l. at the House of J. D., a Stranger, and then the Plaintiff to release all Actions to the Day of the Release, which he had not done. Upon this Plea the Plaintiff demur'd. It was objected that the Replication was ill; for that the Plaintiff had traversed that the Arbitrators made such an Award only as the Defendant had set forth in his Plea, when in Truth he did not allege any such Thing; and a Thing which is not expressly alleged cannot be travers'd; but per Coke Ch. J. the Plea here is good without a Travers, and also with a Travers as it is here; and per Cur. the Travers is good. And Doderidge J. said that when the Defendant pleaded that the Award was that he should cease all Suits, this shall be intended to be the whole Award; and the other having pleaded that they awarded more, he may well traverse as before. And Coke and Doderidge said, that when an Issue is above, without traversing that the Award was only as the Defendant had alleged, no other Matter can be pleaded as here of a further Award. Judgment for the Plaintiff in B. R. and affirmed in the Exchequer Chamber. Roll Rep. 5. pl. 7. Patch. 12 Jac. Linsey v. Atton — 2 Blifft. 58. S. C. the whole Court agreed clearly that the Defendant's Pleading is altogether vitious; that the Plaintiff's Replication is good, and so Judgment for the Plaintiff. — Godb. 235. pl. 332. S. C. adjudged for the Plaintiff.

Br. Travers per &c. pl. 58. cites S. C.

6. Whereupon he took the Non-payment by Protestation & pro Placito quod non fact Partitionem. Markham said the Obligations were deliver'd upon Condition as above, and that the Arbitrators awarded that the Plaintiff should pay the 10 Marks to the said T. and make the Partition as above; and further award'd that after the Partition made, that each of them should release all his Right to the other, and that T. should make the said Moity, abique hoc that they made such Award only Mode & Forma, proit &c. And per Paton, if all is as you have said, yet no Default is in T. For if T. has perform'd his Part, he ought to have his own Obligation; and if W. has not perform'd the Award, T. has Caufe to have both; by which Markham said that he made the Partition, and paid the 10 Marks, and that he was at all Times ready to have released to the said T. and T. had not releas'd to him, and fo the Obligation belong'd to him; abique hoc that they awarded only Mode & Forma, proit the said T. has alleged; and after per Paton, the (only) cannot make Issue. Br. Arbitremet, pl. 22. cites 21 H. 6. 18. But Brooke says quay inde.

† See pl. 6.

S. C. cited per Cor. 8 Rep. 82. b. to have been held a good Bar, without averring any Notice to have been given; and says that it is adjudged in 28 H. 6. 6. b. 6 H. 10. &c.

7. Thereupon Markham said by Protestation, that they awarded that he should pay the 10 Marks, and that the said T. should have the Releas, which is not deliver'd; but for Plea says they awarded that the Partition should be made of the said Manor, and of other Land in D. together, which he did, and the said T. refused this Partition, abique hoc that they awarded the Partition to be made severally of the Manor by itself, and of the Land by itself, proit &c. and Paton maintain'd the Partition to be made generally, and jo ad Partition; and it was said there that Anno 19, the Party was not permitted to take Issue upon the (* Only.) Brooke says Quod miror. Br. Arbitremet, pl. 22. cites 21 H. 6. 19.

8. In Debt, where Arbitremet is pleaded, it is a good Plea that after the Submission, and before any Award made, the Plaintiff discharge'd the Arbitrator such a Day, Year, and Place &c. For it may be countermanded. Br. Arbitremet, pl. 49. cites 21 H. 6. 32.

He must shew where the Submission was made; and so likewise where the Award was made. Br. Pleadings. pl. 10. cites 5 H. 9. 11.

In Trefpass the Defendant pleaded an Award in Bar, that he should pay the Plaintiff 20 l. but because he did not allege a Place where the Submission was, according to 9 H. 6. 5, nor allege Performance, nor answer to the Vi & Arms, it was adjudged for the Plaintiff upon Demurrer. Cro. E. 66. pl. 15. Mich. 29 & 30 Eliz. B. R. Hazl v. Gorge.

9. In pleading an Award the Party ought to shew where the Submission was made, and the Names of the Arbitrators; quod nota. Br. Arbitremet, pl. 1. cites 29 H. 6. 5.

10. In
10. In Debt the Condition was to stand to the Arbitrement of J. K. between the Defendant and the Tenants of W. C. The Defendant said that he did not make any Award by the Day. The Plaintiff said that he made Award between the Defendant and P. and Q. Tenants &c. The Defendant said that they were not Tenants at the Time &c. and a good Plea, without saying Nor ever after; for they should be Tenants at the Time of the Arbitrement. Br. Conditions, pl. 219. cites 39 H. 6. 6.

11. Debt upon an Obligation by J. C against A. S. Wangford said Actio non, for after the Obligation the Parties made Indenture of Defence upon it, good fi utereque eorum ete rerit ordini R. B. and J. W. of all Actions, Quarrvls, Debts &c. and of the Right, Title, and Possession of the 3d Part of the Manor of L. ita quod the Award be made and deliver'd before Michaelmas next &c. and that if they do not make Award by the Day, then they shall stand to the Arbitrement of W. G. so that this Award be made before Christmas, that then the Obligation of him who performs the Condition shall be void, and the Obligation of him who breaks it shall be in Force, and that the Arbitrators took upon them the Charge of the Arbitrement, and such a Day, Year, and Place awarded that A. S. would pay to the said J. C. 10 l. and that A. S. should cease from all Suits which he had against the said J. C. and that she should make certain Persons to cease a Decies tautum which they had brought against certain Juors who passed between the Plaintiff and Defendant in Affr, and that they perform the Award which the same Arbitrators at another Time made between them of the 3d Part of the said Manor, and after these Things performed that each should release to the other all Actions; and the Defendant said that she, viz. A. S. for her Part had performed the Award, and paid the 10 l. and ceased the Suits; and as to the 3d Part of the Manor &c. said that the Arbitrators did not make any Award of it, & hoc &c. and Laicem demur'd, and the other the like, and Exception was taken to the Plea, because it is Quod uterque eorum staret to the Arbitrement, which is, that as well the Plaintiff as the Defendant should perform every Part, and yet well per Cur. For this shall be intended Quod uterque pro parte sua sitabil & performabil &c. and not that each should perform both Parts; and this is also explained in the End of the Defance, which is that the Obligation of him who performs shall be void, and the Obligation of him who breaks his Part shall be in Force, and therefore this is each for his own Part, per Cur. And another Exception was, because the Defendant said that they made no Award of the 3d Part of the Manor &c. and did not say if the Umpire made any Award of it, and yet a good Plea per Cur. For if the Arbitrators meddle with any Part, the Umpire cannot meddle by the Words as above, which are that the Arbitrators shall make it citra Feilum Mich. and if they do not make it, that then the Umpire shall make it. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

12. And another Exception was taken, because the Defendant said that she has ceased in the Suits, and did not say in what Suits, nor in what Court, nor how, by Noninit or otherwise, or if she did it at her own Costs, and yet good per Cur. For ceasing does not lie in Record, but Continuance lies in Record, which shall come of the other Part to shew if any such Thing be. Br. Arbitrement, pl. 29. cites 39 H. 6. 9.

13. Where an Arbitrement is pleaded in Berr, it is sufficient to say that that they put themselves in Award generally. Br. Arbitrement, pl 29. cites 39 H. 6. 1.

14. Debt upon an Obligation to stand to the Arbitrement &c. The Defendant said that the Arbitrators did not make any Award, and the Plaintiff John'd, pl. 32. cites S C. — Prift that they did, and so to Iffue, and this is Jealiff for the Plaintiff shall show certainly what Award and * where, and that the Defendant in gen. pl. 35. such Point did not perform it; and the Defendant shall say that they cites S C. made no such Award, and the Plaintiff shall say then Prift that they did, & S. P. by and which they
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were award and the Defendant shall say Prif that they did not. Br. Pleadings, pl. 88. cites 5 E. 4. 108.

after the Defendant would have pleaded in Bar de Novo, and was not suffer'd, unless it were a Thing that happen'd since; for the Bar was good before, and the Replication ill, and they upon Repleader shall commence at the Default, and not before; quod nota.

* Debt upon Bond for Performance of an Award. The Defendant pleaded Nulium Arbitrium. The Plaintiff repled, and set forth the Award made, but did not shew where it was made, and which is insuff. It was adjudged against the Plaintiff upon a General Demurrer, because it is Matter of Subsistance. Cro. E. 758. pl. 27. Patch. 42 Eliz. C. B. Brettton v. Pratt.

In Debt upon Bond for Performance of an Award, the Defendant pleaded no Award made. The Plaintiff replied, and confessed no Award made, but says that on the 15th of Auguft &c. the Urnprage made and delivered to the Defendant at his House &c. an Urnprage &c. and to settle it forth, and affigns a Breach. Upon Demurrer it was objected that the Plaintiff did not shew where the Urnprage was made, which is trasversible; but per Cur. this cannot be objected after No Award or Urnprage pleaded, because if he shews any Thing to make the Award void, it would be a Departure; and Judgment for the Defendant, Nif &c. 5 Lev. 258. Mich. 1 Jac. 2. C. H. Barnes v. Harvey.

In Debt on Arbitration-Bond the Defendant pleaded no Award. The Plaintiff repled, that after the Bond made, and before the Time limited for making the Award, viz. 30 Die Novembris Anno &c. per quod Scriptum fum Arbitri advisce & ibidem fiatum &c. and then set forth the Award. The Defendant demurred, because no Place was mentioned where the Award was made. The Court held that the Arbitrators & ibidem cannot be referred to the Place in the Declaration, and there is no Place mentioned in the Replication; and so Judgment for the Defendant. 2 Vent. 72. Mich. 1 W. & M. in C. B. Leigh v. Ward.

But if the Condition was Iris quad Arbitrium fuit, & reductio partis in scriptis by such a Day, then a good Plea that they did not make Award in Writing, or that they did not deliver any Award in Writing, by which he said that they did not make any Award by the Day, and the other he said what Award, and that the Defendant did not pay &c. and the Defendant said that Non fecerant Arbitrium modo & forma &c. and the other that fecerant tale Arbitrium, prif &c. Ibid.

Debt upon Bond for Performance of an Award, so as the same be deliver ed in Writing; the Defendant pleaded, quod non deliveravit in scriptis &c. The Plaintiff replied, and set forth the Award in Writing, but did not dis so as it was truly Answer the Plea of delivering it in Writing, but only by Way of Argument made by the Court, and upon Demurrer all the Justices were against the Plaintiff. 2 Mod. 269. Arg. cites D. 343. [pl. 56. 57. Mich. 7 & 8 Eliz.]

Debt upon Bond for Performance of an Award, so as the same be deliver ed in Writing; the Defendant pleaded, quod non deliveravit in scriptis &c. The Plaintiff replied, and set forth the Award in Writing, but did not dis so as it was truly Answer the Plea of delivering it in Writing, but only by Way of Argument made by the Court, and upon Demurrer all the Justices were against the Plaintiff. 2 Mod. 269. Arg. cites D. 343. [pl. 56. 57. Mich. 7 & 8 Eliz.]

15. In Debt upon an Obligation the Defendant said that it is indorfed, that if he stand to the Arbitrement of A. and B. of all Actions &c. and this performs of his Part, so as the Arbitrement be made before Ascension-Day &c. that then &c. and said that the Arbitrators did not give him Notice of any Award made before the Day, and no Plea by the Clear Opinion of the Court; for he has bound himself to take Notice by this Word, that he shall perform the Award. Br. Condition, pl. 124. cites 1 H. 7. 5.

16. In Debt on Bond to perform an Award, so as the same be delivered in Writing; the Defendant pleaded, quod non deliveravit in scriptis &c. The Plaintiff replied, and set forth the Award in Writing, but did not dis so as it was truly Answer the Plea of delivering it in Writing, but only by Way of Argument made by the Court, and upon Demurrer all the Justices were against the Plaintiff. 2 Mod. 269. Arg. cites D. 343. [pl. 56. 57. Mich. 7 & 8 Eliz.]

17. Submission was to stand to the Award of J. S. Ita quod the Award be written, and sealed, and signed by the said J. S. An Award was made and sealed, and signed by the said J. S. but not signed. All the Justices held this good notwithstanding, for Sealing is a Signing thereat in Law; but otherwise, if the Words had been that it should be wrote and signed by the Hands of J. S. for there it ought to be actually subscribed. Palm. 97. Hill. 17 Jac. C. B. Bradlaw v. Walker.

S. P. and that if the Plea of a Condition was re taken, the Defendant was re verted. Cro. was ruled to be ill, because he did not shew that the Award was sealed J. 2; 8. pl. 5. at the Time of the Delivery. Palm. 121. cites Pash. 18 Jac. B. R. Sallows v. Girling, in a Note there at the End of the Case.
19. A Submission was of all Controversies &c. to A. and B. so as the A. 2 Roll Rep. award be made under their Hands and Seals on or before the 5th Dec. following. Buffield, in S. C. and the Court divided under the Hands and Seals at the Castle at York, then and there ready to be delivered at the Shop of G. H. in the Exchange London. Dodridge, the Debt upon the Bond the Plaintiff pleaded, that they made their Award under the Hands and Seals at the Castle at York, then and there ready to be delivered at the Shop of the said G. H. in the Exchange London. Dodridge, and Haughton J. held this a void Publication, and not according to the Submission; but Montague Ch. j. contra, and held that the publishing it there, and alleging that it was aducne & ibidem ready to be delivered at the Shop in the Exchange was sufficient, Curia advifare vult. Cro. J. 577. pl. 6. Trin. 18 Jac. B. R. Buffield v. Buffield.

20. Debt on an Arbitration Bond; the Plaintiff declared of an Award made May 28th, in such a Year, ready to be delivered up the 29th Day of the same May; the Defendant pleaded no Award, the Plaintiff replied an Award made by the Umpire 28th May, ready to be delivered the same Day. Upon Demurrer it was objected, that the Plaintiff had set forth double Matter, that the Award set forth in the Declaration, and that in the Replication, could not be intended to be the same; but Roll Ch. J. answered, that the litle to be tried is not to be taken upon the Day of the Award made, and no requires no Anwer, and so cannot be double, and Judgment nili &c. for the Plaintiff. Sty. 41. Trin. 23 Car. Tyler's Cate.

21. Debt on a Bond of Award, upon nullum Arbitrium pleaded the Plaintiff, and heued an Award made; the Defendant rejoind, that there were other Things submitted, and so no Award. Adjudged upon Demurrer that this is a Departure; for Defendant should have plead ed this special Matter at the first. Sid. 180. pl. 16. Hill. 15 & 16 Car. yet Judg ment was for the Plaintiff, and says the S. P. was adjudged accordingly, Mich. 14 Car. 2. B. R. between Horfe and Lauder. Raym. 94. S. C. adjudged accordingly.

22. Debt upon Bond for Performance of an Award &c. so it be made and ready to be delivered to the Parties on or before such a Day; the Defendant pleaded No Award made &c. the Plaintiff replied, and set forth the Award, but did not aver, that it was ready to be delivered to the Parties, and for that Reason adjournatur; but afterwards the Court held, that he need not, for that was supplied by setting forth the Award itself. Hard. 399. pl. 3. Patch. 17 Car. 2. in the Exchequer. Joyce v. Haines.

Exception was taken that he faith, that they made the Award before the Day (sic. such a Day) under their Hands and Seals, but does not say ready to be delivered, but all the Court held well enough; for the Words are not (and to deliver) but (ready to be delivered) Cro C. 541. pl. 5. Patch. 15 Car. B. R. Bradley v. Clyifton. Jo 441. pl. 4. S. C. but S. P. does not appear.—Mar. 18. pl. 42. S. C. but S. P. does not appear.—S. P. and Holt Ch. J. said, that as soon as it was made it was ready to be delivered, and that he remembered it to have been adjudged. 6 Mod. 52. Mich. 2. Anne B. R. Robinson v. Calwood. S. P. by Holt Ch. J. 2. Id. Raym. Rep. 930. Trin. 2 Ann. Anon. but seems to be fame S. C.—S. P. by Holt Ch. J. 535. Hill. 11 W. 3. in Cae of Doyley v. Burtonon—S. P. held accordingly. Laws. 524. Trin. 8 W. 3. Marks v. Marriott—S. P. Arg. laid to be lately adjudged in B. R. accordingly; which Powell J. seemed to agree. Id. Raym. Rep. 115 in S. C.

In Debt on Bond for performing an Award, Its quod it be made by such a Day, and ready to be delivered to the Parties, or to each of them as for itself; the Defendant pleaded Not Award &c. the Plaintiff replied an Award to pay &c. but did aver that it was ready to be delivered to the Defendant; but per Car. if an Award is being made, it is then ready to be delivered, but if it was being held here (to each of them as for itself) it must be deferrd and if then denied, the party may plead the Matter specially. 3 Mod. 350. Mich. 2 W. & M. in B. R. Rowsby v. Manning.——Show. 68. S. C. & S. P. by Holt in H h
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Ch. J accordingly; but adjutor.——Show 2.42. S. C. says, it was in Writing, and therefore ready to be delivered, and adjudged for the Plaintiff.——Cath. 158. Reusby v. Manning, S. C. adjudged for the Plaintiff.

23. Debt upon Bond, the Defendant demanded Oyer of the Condition, which was for the Performance of the Award of A. P. so as it be made on or before 27th June &c. and if not, then to stand to the Impriyage of &c. the Defendant pleaded, no Award made before 27th June; the Plaintiff replied, and shew’d, that the Umpire made an Impriyage, and assigned a Breach, which was ill; and Defendant demurred. Keeling Ch. J. held that Judgment should be for the Defendant, tho’ his Bar is ill; for the Condition upon the Oyer is Part of the Declaration, and so it appears by the Replication, that there is no Cause of Action. But all the other Justices e contra, and that a Bar to ill in Substance cannot be cur’d by the Replication, tho’ it seems to admit, that no Award was made on the 27th of June, because it lets forth an Impriyage made after that Day; but such Implication cannot cure the Bar, for if an Award was made on that Day, then the Impriyage is void in itself. Adjournatur to be mediated by Friends, it being between two Brothers. Sid. 336 pl. 2. Trin. 19 Car. 2. B. R. Bamfield v. Bamfield.

24. In Debt on Bond for performing an Award, and no Award pleaded; the Plaintiff replied, that ante Exhibitionem Bille vix. 24th June, the Arbitrators made award; the Defendant demurred generally; it was agreed by all, that if the Demurrer had been special, Judgment should have been for the Defendant, because the Plaintiff ought to have been replied, that the Arbitrators made their Award before the Day limited for it; but because the Demurrer was general the Plaintiff had Judgment. Nor. the 24th July was within the Submiſsion. Sid. 370. pl. 19. Trin. 20 Car. 2. B. R. Skinner v. Andrews.

25. An Award was that the Defendant should pay $100l. to the Plaintiff, and that they should give each other general Release; in Debt upon the Submiſsion Bond, the Defendant in his Plea confessed, that the Award was, that he should pay so much, and execute a general Release, and then averred Performance; the Plaintiff replied, and tendered an Issue upon Non-Payment, the Defendant waved the Issue, and pleaded an insufficient Rejoinder; and because neither the Plaintiff nor Defendant had set forth that the Plaintiff was to execute a Release to him, and so the Award as pleaded was of one Side only. It was held that the Plaintiff could not have Judgment, but the Court looking upon it to be a Trick in Pleading, they would not give Judgment for the Defendant, but gave the Plaintiff Liberty to discontinue upon Payment of Costs; but afterwards it appearing on an English Bill in the Exchequer, that there was male Practic of the Plaintiff with the Arbitrators, and it being likewise a Cafe of great Extremity upon the Defendant, the Money awarded being $100l. more than the very Penalty of the Bond, ubi reversa there was nothing due to the Plaintiff, but he was indebted to the Defendant, the Defendant was relieved against the Bond. Saund. 326. Mich. 21 Car. 2. Veale v. Warner.

26. Debt upon Bond for the Performance of an Award &c. The Defendant pleaded No Award made &c. the Plaintiff replied, and shew’d an Award made, and ready to be delivered to the Parties; the Defendant rejoined, that the Award was not tendered to him on the Day, &c paratus eft verificare, and upon a Demurrer, this Rejoinder was held ill, because it was a Departure from the Plea, for that was No Award made; but the Rejoinder was, that the Award was not tendered, which implies it was made; besides, this Rejoinder was ill concluded, for the Replication sets forth, that the Award was ready to be delivered to the Parties, the Rejoinder says it was not, which is a negative and affirm
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mative, and that is a plain Issue; therefore he should have concluded to the Country, and not have avowed the Rejoinder. Arg. 2. Saund. 188, 189. Mich. 22 Car. 2. Roberts v. Mariett.

27. Debit upon Bond for Performance of an Award, so as it be ready to be delivered to the Parties at such a Day and Place; the Defendant pleaded No Award made; the Plaintiff replied, and set forth an Award delivered to the Parties before the Day, and at another Place than mentioned in the Subdivision, and upon Demurrer, Hale Ch. J. held the Replication ill, because it being only the Execution of an Authority, it ought to be made at the same Day and Place; but the others contra, and adjudged for the Plaintiff, because the Award was delivered to the Parties themselves. 2 Lev. 68. Mich. 24 Car. 2. B. R. Elborough v. Gates.

28. Bond was for performing an Award de Premissis vel aliqua Parte inde; the Defendant pleaded No Award made de Premissis. On Demurrer it was objected that it was not in writing, nec de aliqua Parte inde, for if a Bond be to perform an Award of 2 or either of them, it is not sufficient to plead that those made no Award, without adding Nec aliquis eorum; but if an Award is to be made of the Manors of D. and S. or either of them, and the Award is made of D. only, it is well enough. But as to the first Part it was answered, that Nullum secerunt Arbitrium de Premissis is well enough; for that implies nec de aliqua Parte inde, especially if the contrary is not shown in the Replication, and therefore it shall never be intended that an Award was made of some Part; Curia adijifare vult. 2 Mod. 27, 28. Pach. 27 Car. 2. C. B. Bridges v. Bedingfield.

29. Debit upon Bond, the Defendant craved Over of the Bond and Submission Condition, which was to perform an Award, so as it be in Writing un- quid the Award be not made over the Hand and Seal of the Arbitrator; and upon nullum Arbitrium plead- ed the Plaintiff replied, and set forth an Award under the Seal of the in Writing, Arbitrator; the Defendant rejoins no Award under Hand and Seal, accord- ing to be delivering to the Condition of the Bond, and upon a Demurrer to the Rejoinder, the Defendant had Judgment; for per Cur. the Plaintiff ought to have replied an Award under the Hand as well as the Seal of the Arbitra- Award under tor, for he must plead it formally as well as produce it. 2 Mod. 77. the Arbitra- Pach. 28 Car. 2. C. B. Columb. v. Columb.

the Hands and Seals and ready to be delivered to the Parties. Exception was taken, because it was not expressly averred that the Award was made in Writing as required by the Subdivision; sed non alloco- tur, because it must necessarily be intended that it was in Writing, it being pleaded that it was under the Hands and Seals of the Arbitrators; but Hale then Ch. J. of C. B. doubted. Cited by Dolben J. Carth. 139. as a Case in C. B. when he be was at the Bar, Fuller v. Lane.—S. P. and the Court held the Replication sought for want of an Averment. Freem. Rep. 415. pl. 550. Mich. 1675. Jenk- kinson v. Alliton.

Submission was of all Controversies between the Parties, and the Arbitrators to make and publish their Award in Writing under their Hands and Seals &c. Upon Nullum Arbitrium pleaded the Plaintiff re- replied, and set forth an Award, per Scriptum suum inditamentum sealed with the Seals of the Arbitrators, to pay the Plaintiff 66 l. and .<...>, that the Award was ready to be delivered to the Parties under the Hands and Seals of the Arbitrators, and alligned the Breach in Non-payment; it was objected, that it is not averred that the Award was made and published under the Hands and Seals of the Arbitrators, but only by Writing indented sealed with their Seals; but it was answered, that it is afterwards said that it was ready to be delivered &c. under their Hands and Seals, which is sufficient; and Judgment for the Plaintiff; and affirmed in Error. Lutw. 538. Mich. 11 W. 3. Lambard v. Kingsford.

30. Debit upon Bond for Performance of an Award; upon nullum Ar- bitrium pleaded the Plaintiff replied, that he was poofed of a Mill, to which the Defendant pretending Title, brought an Ejeáment, and had Judgment by Default; and the Dispute was, whether the Defendant should have it, or the Plaintiff should keep it, and thereupon they submitted to the Award &c. and afterwards, but before the time for making the Award, the Defendant brought an Habere facias Possessionem upon the said Judgment, and the Mill was delivered to him, and sic non fit: Arbitrio &c. Upon a Demurrer to this Replication, it was insinuated for the Defen- dent, that the he had the Possession, yet that Matter is still arbitrable; 
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fed per Cur. a particular Controversy is set forth in this Pleading, and the Defendant by his own Act having taken away the Subject Matter, has also taken away the Possibility to make an Award of it. 2 Jo. 134. Hill. 31 & 32 Car. 2. B. R. Green v. Taylor.

31. In Debt upon Bond to perform an Award; the Plaintiff pleads an Award that the Defendant should pay to the Plaintiff so much &c. and that he rendered it accordingly, and that the Plaintiff refused; the Plaintiff replied that the Umpire awarded the Money to be paid in Satisfaction of all Controversies, and that the Defendant did not tender it, and concludes to the Country; and upon a Demurrer it was insisted, that the Plaintiff having alleged new Matter in his Replication, he ought not to have concluded to the Country, for by that Means he had deprived the Defendant of his Traverse to the new Matter, and therefore cannot have Judgment, especially since it does not appear by the Pleading whether the Award was good or not; and of this Opinion were Jones Ch. J. and Charlton, but Windham and Levins e contra, because the Defendant having admitted the Award to be good, and taken upon him to plead Performance, he shall not afterwards be admitted to traverse it to prove it no Award. But if the Award was not in Satisfaction of all Controversies, and so Award of one Part only, the Defendant should have pleaded at first No Award, but to admit him Now to a Traverse to prove it no Award would be a Departure. Court divided. 3 Lev. 164. Pach. 36 Car. 2. C. B. Seal v. Crow.

32. In Debt on Bond to perform an Award in Writing or by Word of Moutb. The Defendant pleaded No Award. The Plaintiff replied, that at the Time of the Bond and Award he had an Action for scandalous Words against the Defendant, and that the Arbitrators did declare and publish their Award thus, viz. That the Defendant should pay the Plaintiff 12 Guineas, and all such Money as he had expended in and about the Prosecution of the Plea aforesaid, and that the Parties should give mutual Releases to the Date of the said Bond &c. It was objected, that the Award is void, because it does not mention any Suit before to refer the (Plea aforesaid) unto. But per Cur. if the Award had been in Writing with such Form of Expression it could not be good, but in setting out an Award by Pardel it is sufficient to shew the Effect and Substance of what was awarded by Word of Mouth, and it is sufficiently shewn that this Award was made concerning the Action of Slander; and Judgment for the Plaintiff. 2 Vent. 242. Mich. 2 W. & M. in C. B. Hanlon v. Leveredge.

33. And it was also held, that the Plaintiff need not shew that there was Cause of Action; for that is left to the Arbitrators, and they have yet the Award will be no Cause of Action, because the Parties have made them their Judges. good Curth. 2 Vent. 242, 243. Mich. 2 W. & M. in C. B. Hanlon v. Leveredge.

If the Suit were not the Cause of Action; for that is left to the Arbitrators, and they have yet the Award will be no Cause of Action, because the Parties have made them their Judges.

34. Submissior was, Ita quod the Award be made &c. by the Arbitrators, and if not, then Ita quod it be made de Praemissis by the Umpire, either in Writing or by Word of Mouth, before two Witnesses, at or before &c. The Defendant pleaded Nullum Arbitrium; the Plaintiff replied, and shewed an Award made by the Umpire by Word of Mouth, but did not...
(E. a) Pleadings. Of setting forth the Breach of the Award.

1. In pleading Performance where the Award is that A. shall pay to B. 20l. and then B. shall release to him totally, and A. brings Debt upon an Obligation, it is sufficient for B. to shew this Matter, and that A. has not paid the 20l. Br. Arbitrement, pl. 28. cites 36 H. 6. 15.

2. So be he shall say if he himself has released; for he is not bound to release till the other has paid the 20l. Br. Arbitrement, pl. 28. cites 36 H. 6. 15.

3. It was said, that in Debt upon Arbitrement he may traverse the Arbitrement or wage his Law. Br. Travers &c. pl. 245. cites 13 E. 4. 4.

4. In Debt upon an Obligation, the Defendant pleaded Condition to stand to the Arbitrement of J. and N. so that the Award be made before such a Day, and said that the Award was not made by the Day, the Plaintiff may say that they made such Award before the Day, which the Defendant in such a Point, and shew certain in what, has broken; for he shall shew the Breach in some Point certain, for otherwise Action does not lie; Quod Nota. Br. Arbitrement, pl. 42. cites 31 H. 8.

5. Submission was of all Matters, Suits, Quarrels, Actions and Debates whatsoever, now depending between them at Law, or otherwise in Controversy between them. The Award was to pay the Plaintiff such a Day 5l. in Satisfaction of all Accounts, Suits at Law, Arrears of Tithes unjustly taken at any time before &c. The Breach was alleged for not paying the 5l. The Defendant demurred, because the Plaintiff did not aver that there was any Suit depending &c. at the Time of the Submission; for if there...
was the Award was void and out of the Submissions, but adjudged by 2 Justices (only present) for the Plaintiff, because it shall be intended to be adjudged for Matters in Suit, and an Averment needs not; for otherwise every Award may be avoided by such a naked Surmise. Cro. E. 66. pl. 14. Mich. 29 & 30 Eliz. Fuller v. Spackman.

6. In Debt on an Arbitration Bond, the Defendant pleaded, that the Award was, that Defendant pay the Plaintiff such a Day 100 l. or find two sufficient Sureties to be bound with him for Payment at 20l. a Year, and that he had performed the said Award. The Plaintiff replied, that the Defendant had not paid him the said 100 l. and so assigned the Breach of the Award in the Non-payment. Upon Demurrer by the Defendant the Court was clear of Opinion that the Replication was good; for tho' the Award be in Words disjunctive, yet in Law and Substance it is single; for as to the finding Sureties the Award is void, and so nothing is awarded but the Payment of the 100 l. at the Day, to which the Replication is a full Answer; and Judgment for the Plaintiff. Le. 140. pl. 194. Hill. 30 Eliz. C. B. Oldfield v. Wilmer.

7. A Submission was about an Inclusion between Barton-Down and North-Down. The Award was of an Inclusion between the Down of the Defendant and the Down of J. S. and it is not averred that they are all one. And then tho' the Issue was upon Null title Arbitrement, yet the Breach not being well assigned there can be no Judgment for the Plaintiff. Fenner and Clench J. absentibus alicis, held this a material Exception, and so Judgment was stay'd. Cro. E. 676. pl. 5. Trin. 41 Eliz. B. R. Withers v. Drew.

8. Debt upon Bond to perform an Award, the Defendant pleaded No Award; the Plaintiff replied, and set forth the Award, but assigned no Breach. It was moved after Verdict, that the Replication not having assigned any Breach there was no Cause of Action; for the Bond is not for Debt, but guided by the Condition, and unless the Court be satisfi ed that the Plaintiff has good Cause of Action the Court cannot give Judgment, and this is a Defect in Matter of Substance, and not helped by any Statute. And of this Opinion was the Court, and Judgment was stay'd. Cro. J. 221. pl. 2. Pach. 7 Jac. B. R. Barret v. Fletcher.

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5. Arbitrement.

Cafe upon a Promise to perform an Award, the Submission was of one Thing, and the Award was of that Thing, and another not in the Sub mission, and the Breach assigned was, that the Defendant had not performed that which was submitted and arbitrated, see Arbitrement, performavit in aliquo, and so to Issue, and found for the Plaintiff; it was moved in Arrest, that the Award was void as to Things not submitted, and the Breach was assigned.
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ed in that as well as in the other, and the Jury had given entire Damages; sed per Curiam, the Words nec Arbitrum performavit in aliqua, refer only to that which was within the Submission, and for the rest the Award was void, and by Consequence no Award, and therefore Damages could not be given for that. 2 Roll Rep 46, Trin. 16 Jac. B. R. Tomkins v. Webb.

20. The Defendant was awarded to pay the Plaintiff 20l. at Mich. The Bull. 178. Plaintiff before Michaelmas released to the Defendant all Actions and De- feats; and the whole Court conceived that this is no Bar to the Plaintiff's S. C. says Action; and Williams J. took a Difference where an Obligation is ent- ered into for Payment of Money at a Day to come, It is there a Debt Court in- and Duty presently, and may be discharged by such Release before the Day of Payment; but that it is not so in Case of Annuity, Rent, or in Opinion of the fame An Action of Debt for Non-performance of an Award for Payment of Mo- ney at a Day to come. But no Judgment was given. Cro. J. 350. pl. 4. liams J. and Patch. 10 Jac. B. R. Tynan v. Bridges.

11. On a Submission of a Battery the Award was that the Defendant re- lease the Action and the Plaintiff to pay him 10s. in Satisfaction for the Battery. The Plaintiff set forth that he tender'd a Release, and the De- fendant refused to seal it. Defendant rejoined, that he refused to seal because he was not paid the 10s. in Satisfaction of the Battery. The Court held clearly that this is a good Breach, and not to be help'd; for by tender- ing the Release according to the Award the Payment of the 10s. was not thereby discharged, and therefore the Sealing it by Defendant ought to precede, because this Release goes only to discharge the Action as to the Battery, and the Refusal to seal it is a clear Breach; and Judgment for the Plaintiff. 2 Bullit. 117. Trin. 11 Jac. Bilbrod v. Flint.

12. The Award was to pay Money on or before the 16 June &c. The Bullit. 69. Breach assigned was, that he did not pay it on the 16 June; but all did agree that this was well assigned; for when it is alleged that it was not paid on the 16th of June, it was not paid before the Day. Bridgm. 90.


where a former Judgment was affirmed.—S. P. adjudged accordingly, 3 Lev. 293. Hill. 2 W. & M. in C. B. Watmough v. Holgate.—2 Vent. 221. S.C. the Court inclined that the Award was good. Sed adiuvatur.

13. If there are divers Breaches of an Award, you may assign but one Breach of them in Action brought for Breach of the Award. Sic dictum fuit. Sci. 429. Hill. 1654. in Case of Fowkes v. Coplye.

14. An Award to make a Lease before the 21 Off. which was two or three Months after, and that upon making thereof the Leesee shall pay 50 l. The Question was, whether the Lesseor ought to give Notice to the Lef- see when he would make the Lease; for otherwise he must always carry 50 l. about him. Revolved per Cur. that Notice was not necessary. Vent. 93. Trin. 22 Car. 2. B. R. Collet v. Padwell.


Genne v. Tinker, S. P. adjudged accordingly.

16. An Award was that the Defendant should pay 29l. upon Delivery of the Award to him. The Plaintiff aver'd that the Award was deliver'd to him, and that the Money was not paid. It was objected that the Law, by a reasonable Contrauction of the Award, would allow a rea-
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Honorable Time to pay the Money, because it was to be upon the Delivery of the Award, and that might be when the Defendant was on a Journey, or far from home; besides the Plaintiff should have alleged that it was not paid upon the Delivery of the Award, nec unquam posita. But the Opinion of the greater Part of the Court was that the Breach was well aligned, and that it shall not be intended that the Money was paid after; and if it had been paid after within a reasonable Time, the Defendant ought to have pleaded it; and Judgment for the Plaintiff. Lutw. 389. 393. Hill. 2 & 3 Jac. 2. Strong v. Saunders.

17. Where the Matters awarded are distinct, and not the one depending on the other, there the Award may be good as to one Part, and void against the other; and in that Case the Breach must be aligned in that Part that is good; per Cur. 12 Mod. 585. Mich. 13 W. 3. C. B. Lee v. Elkins.

18. An Award was that all Suits should cease between A. and B. Resolved that the Prosecution of a Suit by A. against B. and C. is no Breach. 10 Mod. 205. Hill. 12 Ann. B. R. Barnardilton v. Foulyer.

(F. a) Pleading. Of the Performance thereof.

Br. Trefpafs. 1. In Trefpafs the Defendant alleged Arbitrement that he should give to the Plaintiff a Piece of Cloth, the which he was at all Times ready to give, and yet is, and brought it into Court; Judgment fi Astitio; and a good Plea. The Plaintiff said that he required it, and the Defendant refused to give it, and the Issue taken that he did not refuse. Br. Arbitrement, pl. 12. cites 7 H. 4. 31.

no Plea, if he does not say that he has paid the Sum awarded, or has been at all Times ready to pay, and yet is, and offer the Money in Court; and this where the Day of Payment is past, as it seems. Br. Arbitrement, pl. 19. cites 8 H. 6. 25.—S. P. Br. Double Plea, pl. 43. cites 8 H. 6. 25.

2. Arbitrement is a good Plea in Raisement of Ward, that the Defendant should re-deliver the Infant to the Plaintiff, which he has done; and fo it seems very often, that he who pleads Arbitrement shall plead the Performance of it, and it is a good Plea as here without Deed; contrary in Assise; per Horton, quod Hank, conceisit. But quere if this be a good Plea in Assise, tho' it was by Deed. It seems that it is not. Br. Arbitrement, pl. 16. cites 14 H. 4. 24.

In Debt on a Bond for Performance of an Arbitrement, the Defendant cannot say that he has performed it; but ought to shew the Award, and how he has performed it. Mo. 3. pl. 9. Parch. 28 H. 8. Anon.

3. He who pleads Arbitrement ought to plead that he has performed his Part, and shew what or how, or to say that he is at all Times ready to perform it; for otherwise it is no Plea. Quod nota. Br. Arbitrement, pl. 45. cites Fitzh. Arbitrement, 10. P. 22 H. 6. 52. and 19, 45 E. 3. 16.

4. So in Debt upon an Obligation with Condition to perform an Award, which was to enoffe, or releafe, or pay 20 l. The Defendant pleads Performance generally, not shewing which of them he hath performed, and ill; for the Performance of any one of them would have been a good Excuse, yet he must shew what he hath performed. Heath's Max. 51. cites 27 H. 6. 1.

5. So A. and B. were jointly and severally bound to stand to an Award to be made between them and J. S. The Arbitrators awarded that A. should pay
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pay 30 l. to B. and that B. should pay unto J. S. 10 l. In Debt on the Bond it will be no good Plea for A. to say that he had performed the Award, without shewing in what manner it was performed, and likewise how B. had performed it; for he is bound to him alto. Heath's Max. 51. cites Bendl. 5.

6. In Debt upon an Obligation the Defendant said that the Obligation was indorsed to stand to the Arbitrement of W. N. who awarded that the Plaintiff shall pay to the Defendant 20 l. at T. before Michaelmas, and that then the Defendant shall make a Release to the Plaintiff, and that the Defendant shall be Non-suited in such an Action, and that the Plaintiff has not paid the 20 l. and a good Plea; for the Defendant is not bound to do anything as here, if the Plaintiff does not first pay the 20 l. by which the Plaintiff said he came there at the fourth Hour of the Vigil of St. Michael, and there was continually till the Feast of St. Michael, and neither the Defendant nor any for him came there to receive the 20 l. whilst the Plaintiff was there ready to have paid it, and the Defendant said that he was there from the 11th Hour of the Vigil till the Feast &c. abique bos that the Plaintiff was there ready to pay. And per Cur. the Traverse shall not be suffer'd; for Ifue is tender'd before, viz. in the Negative, that the Plaintiff was there ready, and the Defendant did not come there, therefore it suffices for the Defendant to say that he was there ready &c. and it is the Part of him, who shall pay, to tender the Money, and it is not for the other to demand it; but if it be tender'd, and it retires, there the other may allege that which may make Ifue. And per Danby and Boyle J. if the Plaintiff be ready any Time before Michaelmas to pay, it suffices, and he is not bound to be there continually. Br. Conditions, pl. 91. cites 36 H. 6. 15.

7. Award was that H. discontinue his Suit against K. and bring to K. one E. his Servant, by such a Day at L. and he said that he discontinue the Suit, and delivered E. to N. by Command of K. at S. in the County of W. whereas H. and K. were Strangers to the Obligation, and it was agreed that the Award was void as to E. because the Submission was of all Actions Personal, and it is not alleged that any Action was pending between H. and K. for E. the Servant of K. at the Time &c. and therefore it is out of the Submission; contrary if the Submission had been of all Actions and Quarrels; but per Boyle it is sufficient if Cause of Action was then between them; Brooke says, Quare inde; for contra per Prius plainly. Br. Arbitrement, pl. 27. cites 36 H. 6. 8.

in what Court, nor if it was by Plaint, or by Writ; for he ought to have said, that he continued it to such a Day, and not after. And also the Delivery of E. at another Place, and to another Person than to K. and by the Command of K. is not good; for K. and H. were Strangers to the Obligation, and a Stranger to my Obligation cannot discharge with my Obligation, and between Strangers it shall be performed strictly; but the Party and Privy may discharge with it, As where it is to pay 10 l. he may take another Thing in Satisfaction, or take it at another Place.

8. But where it was awarded that H. shall pay 20 d. to him who brings E. to K. and this same H. brings E. to K. there he need not to plead that he paid 20 d. for he cannot pay it to himself. Ibid.

9. Two submitted themselves to stand to the Arbitrement of J. S. of Br. Arbire- all Trepassers &c. who awarded that the one shall pay to the other 40 l. failing 10 l. in Hand, and that he shall find three several Sureties to be bound every one in 10 l. to pay the 30 l. Refund at a certain Day, and by the Opinion of the Justices the Award was void; but he shall plead the Award verbatim as the Arbitrators give it, and in the Performance he shall say, that he himsely was bound for the Payment of the 30 l. Refund at the Day &c. and shall not say if he found Sureties or not; and yet he shall be excused, because he cannot compel the Sureties to be bound. Br. Arbitrement, pl. 39. cites 17 E. 4. 5.
10. If Arbitrators award, that the Party shall be bound to pay the 10l. by their Advice, this is void; for they cannot give their Award twice; contra, if they Award that he shall be bound by the Counsel of the other; per Brian, Nele and Choke; Note the Diversity. Br. Arbitrement, pl. 51. cites 19 E. 4. 1.

11. Award was on the 1st of May, that A. should withdraw his Suit in Trespafs against B. and that B. in Satisfaction of the said Trespafs done to A. shall pay A. 10l. and that A. shall Release the Surety of the Peace which he has against B. in the King's Bench; A. by his Attorney, retraxit his Suit, this is a Breach of the Award; for it ought to be done in Person. Jenk. 136. pl. 80.

12. Award was made 1st of May, and that B. should pay to A. 10s. in Satisfaction of the Trespafs, without mentioning any Time of Payment; and tender was made of the said 10s. in Othabis Michaelis next, this is a Breach of the Award. The Arbitrement is good, tho' no Time be mentioned. Payment or Tender ought to be in convenient Time after the Award; and 5 Months as in this Case, between the Award and Tender, are not a convenient Time. A Tender and Refusal of the 10s. in a convenient Time, had faved the Obligation as to this Point. Jenk. 136. pl. 80.

12. If two are bound each to the other to stand to the Award of J. N. who awarded that the one shall pay to the other 20l. and that the other rel ease to him all Affixons; per Rede Ch. J. the one shall attend upon the other to perform this Award, but each is bound to perform his Part as soon as he can, in Pain of forfeiture of his Obligation; and so fee here that there needs no Request by him. But per Kingsmill, all shall be performed at one Time; and per Brudnell, the one is not bound to release till the other has paid; the Reason seems to be, in as much as by the Release, the Obligation, which is his Remedy to obtain the Sum, shall be determined as it seems. Br. Conditions, pl. 86. cites 21 H. 7. 29.

13. Debt upon Bond conditioned to perform an Award of certain Persons &c. so as it be made and given to the Parties, or one of them before &c. the Defendant by Way of Proteftation said, that the Arbitrators made no Arbitrement & pro Placito dicta non deliberaverunt in scriptis &c. not denying, but that it was delivered by Parol to some of the Parties, for it was delivered to any of the Parties, tho' not to all, it is sufficient; and fo it was adjudged by Welton, Brown, and Dyer. D. 218 b. pl. 5. Mich. 4 & 5 Eliz. Anon.

whereas the Condition is (given up in Writing,) and therefore it should be (non reddiderunt in Scriptis,) but says this is otherwise reported in Dyer, and that he (Bendloes) was of Council with the Plaintiff.

Bond of Submission was, so as it be ready to be delivered to both Parties on or before such a Day; the Defendant pleaded No Award made; the Plaintiff replied, and they'd an Award ready to be delivered to the Defendant, that he should pay to the Plaintiff 5l. and aligned the Breach in not paying it; the Defendant demurred, for that the Plaintiff did not shew that it was ready to be delivered to both Parties, but to the Defendant only; but adjudged, it shall be intended to be ready to be delivered to both, and if it was not, the Defendant ought to have pleaded it at first, and his pleading it after is a Departure. Lev. 135. Trin. 16 Car. 2. B. R. Garret v. Weeden.

Bond of Submission was, its Coal be made, and ready to be delivered such a Day; the Defendant pleaded an Award made, the Plaintiff replied, a Parol Award, and added it was made, and ready to be delivered such a Day. On Demurrer it was infifted that a Parol Award was deliverable, for a Man is faid to deliver a Maffage as well as a Letter, and there is an oral as well as a manual Tradition; and a Parol Award is capable of delivery, fo it is ready to be delivered from the Time it is agreed upon; and Judgment accordingly for the Plaintiff. 1 Sulk. 75. pl. 15. Trin. 3 Ann. B. R. Oates v. Bromhill. — 6 Mod. 160. S. C and the Court at first thought the Words (ready to be delivered) must mean a Delivery in Writing; but afterwards ibid. 156. S. C the Court notwithstanding a Case of 81 020 b. 2 Rob. 2 Caps. in C. B. all held, that a Parol Award is capable of a Delivery, viz. a Declaration of it to the Parties, or either of them if they defire it; and that it is ready to be delivered as soon as agreed upon, and the Readiness need not to be averred, because the very alleging the Award made imports it; and per tot. Cur. Judgment for the Plaintiff.
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14. An Award was to pay the Plaintiff 10l. the Defendant pleaded Performance; the Plaintiff replied Non-payment; the Defendant rejoined, that he had performed the Award, and blew how, and now in the Rejoinder is only a Tender and Refusal, which is not a Performance of the Award, although it be not any Breach of it. 4 Le. 79. pl. 168. 29 Eliz. C. B. Clinton v. Bridges.

15. In Debt on an Obligation with Condition to perform an Award, which was, to deliver up all the Houses he had; the Defendant pleaded, that he delivered up all &c. without showing what they were; the Court were clear of Opinion, that the Plea was ill. Le. 71. pl. 95. Mich. 29 & 30 Eliz. Brett v. Auder.

16. It was awarded, that Defendant should discharge and save his neighbors from such an Obligation; he pleads Noli damniﬁcatus; this was held ill, for he ought to shew how particularly, and it is not enough to answer to the Damniﬁcation only. Le. 71. pl. 95. Mich. 29 & 30 Eliz. Brett v. Auder.

17. In Debt on Bond to stand to the Award of J. S. Ita quad it be The Submiss delivered to either of the Parties before Michaelmas. The Defendant pleaded, that no Part thereof was delivered to him before Michaelmas. It was awarded by the Rejoinder, that if it were delivered to any of them, it is sufﬁcient; but all cases to either the Justices (absent Anderson) held, that one Part of the Award ought to be delivered to each Party, so as he might take Notice thereof, and to amend the Word (either) shall be expounded as (every). But when Anderson came into Court, he doubted thereof, and the Matter was referred again to Arbitration. Cro. E. 448. pl. 13. Mich. 37 & 38 Eliz. C. B. Parker v. Parker.

18. An Award was, that the Defendant should make Submissiﬁon, and acknowledge himself forry for all Trostes and Words, at or before the next Court, to be held for the Manor of P. the Defendant pleaded, that he went to the next Court to make his Submissiﬁon, and to acknowledge himself forry &c. and was there ready to perform it, but that the Plaintiff was not there ready to accept it; per Cook and Foster, the Defendant had done as much as he ought to do, and because the Plaintiff was not ready to accept his Submissiﬁon, he was discharged; for it is Personal and with Intent to make them Friends, and both should be present; but Walmley and Warburton contra, for he might have made his Submissiﬁon, tho’ the Plaintiff was not ready to accept it, as well as a Man may submit himself to an Award of a Man who is absent; for the making it is only to shew himself forry for what he had done and said. Et adjornatur; and the Court mov’d the Parties to end it, because it was a trilling Suit.


19. In Debt for performing the Award of J. S. the Defendant pleaded that 3. S. awarded, that whereas there was a Suit in Chancery by the Defendant against the Plaintiff, that Suit should cease, and that the Plaintiff should stand acquitted of all Actions in said Contenta; and averred, that he did not further prosecute the said Suit, and that the Plaintiff always has paid.
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S. C. and Judgment accordingly; per cot Car. — Brownl. 22. Freeman v. Shields, S. C. adjudged accordingly. Afterwards sitit inde quietus. It was objected on Demurrer, that saying quod flerit quietus was not sufficient, without showing that he was discharged thereof in fact, and how; and of this Opinion was Doderidge J. on the first Motion; but afterwards all the Justices the Plea good, and that the Words (stare acquitatarus) mean only, that by that Award he shall be acquitted, and it differs from an Award to acquit him of a Debt, for there he must procure an actual Discharge; but an Award that one shall be quit against the other, is a good Bar in Action brought by any of them, and Judgment for the Delendant. Cro. J. 339, 340. pl. 5. Pach. 12 Jac. B. R. Freeman v. Sheen. 

But if it be awarded to be paid in such Manner, and at such Times as is exprifed in the Indenture, then it must be set forth at large. Vent. 87. Trin. 22 Car. 2. B. R. Anon. The like of an Award for Payment of Money given by a Will. Vent. 87. Trin. 22 Car. 2. B. R. Anon.

It is a good Performance of an Award, which ordered a Release to be given of all to the Time of the Award, if the Party gives a Release of all &c. to the Time of the Submission; for that Part of the Release which extends to the intermediate Time is out of the Power of the Arbitrators. 10 Mod. 200. B. R. Arrath and Brandon.—Per Powell J. 12 Mod. 588, 589. in Cae of Lee v. Elkins, cites 1 Roll Ab. 260. and Sid. 265. [564] per Windham, and Hunt. 29. contra to Roll 244. [354] and Nevill J. cited Hob. 109. contra to Roll Abr. 254. To conclude a Tender of a Release to the Time of Submission to be good, where the Arbitrators have ordered a Release to the Time of the Award, would be to make an Award, and not declare the Law upon it, and then firewell all Awards; per Trevor Ch. J. 12 Mod. 589, 590. in Cae of Lee v. Elkins—-Show. 272. Trin. 3 W. & M. Phelps v. Alcock, S. P. If the Arbitrators award Releaffs ab Iniito until the Time of the Award, and the Party releaffs until the Time of the Submission, this is a good Performance of the Award; per Holt Ch. J. Lt. Raym. Rep. 116. Mich. 8 W. 3.

If it appear that a void part of an Award was intended as a Confederation of a Thing’s being done on the other Side, it must be as observed where an Award consists of divers Things, and one of them is void, it and be expressly said that upon Performance of that void Thing the other Party shall do such a Thing, then the Doing of the void Thing is a Condition precedent, and must be aver’d before Action against the other for not doing his Part. But where there be several Things in an Award, and some are good, and others not, and it is further said that upon Performance praeviufom the other shall release for the Purpofe, there it suffices to make Averment of Performance of what is well awarded, without more. 12 Mod. 588. Mich. 13 W. 3. per Powell done, or else here is not that Advantage for the other Side which was design’d for it, and he has a Wrong done him by being forced to pay for a Consideration which he has not; per Trevor Ch. J. 12 Mod. 590. Lee v. Elkins. Cites 2 Lev. 3. adjudged in the Cae of Bargrave v. Atkins.

(G. a) Plea in Bar.

S. P. Br. Negativa &c. pl. 58. cites 5 H. 7. 7. and So quod non deliberavit Arbitrum in scriptis.

DEBT upon an Obligation to stand to the Arbitrement, Non secundum aliquem Arbitriun ante Diem is a good Plea, and not Negative pregnant. Br. Negativa &c. pl. 17. cites 8 H. 6. 19.
2. In Detince of an Obligation the Defendant pray'd Garnishment. The Garnishee said that it was upon Condition to stand to the Award of W. N. so that it be made before Easter, and that it was not made before Easter, and therefore be pray'd Delivery, and the Plaintiff said that it was made upon Condition, so that the Award was made before Pentecost, before which Feast they made the Award, which he has performed, absque hoc that the Submission was made, so that the Award was made before Easter modo & forma; and well, and not pregnant. Br. Negativa &c. pl. 51. cites 21 H. 6. 52.

3. In Trefpas the Defendant pleaded Award made by A. B. &c. at W. in Com. M. such a Day, that the Defendant should pay to the Plaintiff 20l. in Satisfaction of all Actions &c. which he paid &c. Aldern said the Arbitrators at D. in the County of C. before the Award which you mention, made an Award that the Defendant should pay 20l. and a Horse, which Horse he has not paid. The Defendant maintain'd his Bar, absque hoc that they made Award in the County of C. as the Plaintiff has alleged, before the Award made at W. Prift, and the others e contra. Br. Confes & Avoid, pl. 20. cites 22 H. 6. 52.

4. In Debt the Defendant pleaded Condition to stand to the Arbitriment of J. N. so that it be made before Michaelmas, and deliver'd in Writing, and said that he did not make Arbitriment by the Day, nor deliver'd it in Writing; notwithstanding that the one may suffice, yet because it is only one intire Condition, therefore he may traverse it in all; by the Opinion of the Justices. But Brooke makes a Quere of this Opinion; for it does not seem to be Law. Br. Negativa &c. pl. 41. cites 10 E. 4. 6.

5. In Debt on Arbitration-Bond the Defendant pleads an Award made of 3 Things. The Plaintiff cannot reply that it was made of those 3 Things which he has perform'd, and also of another Thing which the Defendant has not perform'd, and for which he brings his Action. If the Defendant says the Award was of 3 Things only, absque hoc that it was of the 4th Thing, it is ill; but he ought to traverse Absque hoc that the Award was made of 4 Things; for an Arbitriment is an intire Thing which must be entirely traversed. Arg. Pl. C. 95. a. Hill. 5 &c. 6 E. 6. in Case of Woodland v. Mantell.

6. Submission was of all Controversies between the Plaintiff and a Stranger, (Brother of the Obligor the Defendant.) The Award was, that the Bro- ther should pay the Plaintiff 30l. viz. 20l. at Easter, and 10l. at Michaelmas next. The Defendant pleaded Payment of the 20l. at Easter; but as to the 10l. be pleaded that his Brother died before Mich. All the Justices held the Obligation forfeited; but would not give Judgment, because the Penalty (being 200l.) was great for so small a Duty. Cro. E. 10. pl. 6. Kingvel v. Knapman.

7. Debt upon Bond to stand to the Award of A. B. who awarded that the Defendant should pay to the Plaintiff 20l. but appointed no certain Day. The Defendant confess'd the Award, but said the Plaintiff never required him to pay it, and upon Demurrer it was held no Plea, because the Defendant at his Peril ought to pay it in convenient Time, and the Plaintiff need not make any Request; and Judgment for the Plaintiff. Goldsb. 63. pl. 1. Mich. 29 & 30 Eliz. Brett v. Andrews.

a Duty. —Raym. 415. 416. S. C. cited per Cur. as adjudged, On a Submission by A. and B. the Award was that A. pay to B. or his Assigns 30l. within two Months, and that upon Payment they should give mutual Releases. B. died within the 2 Months, and left the Plaintiff his Executrix. Adjudged that the 30l. shall be paid to the Executrix, and that the ought to release all Demands which the Testator had against the Defendant. 2 Vent. 249. Mich. 6 W. & M. in C. B. Dauney v. Velcy.


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8. Submission was to perform an Award, its quod it be made before Easter, of all Controversies &c. The Defendant pleaded No Award. The Plaintiff replied, and shew'd an Award, and assign'd the Breach. The Defendant rejoined that on 16 Mar. before the Award made, he discharged the Arbitrators, and so concluded as before, No Award. The Court held that Judgment should be for the Plaintiff; for by the Rejoinder the Defendant had shew'd that he had forfeited the Bond, to be another Matter than is in the Replication, and fo he shall have Judgment super totam Materiam according to Statutis's Case. Win. 75. Pauch. 22 Jac. C. B. Weftly v. King.

9. Where the Submission was to an Award, and in an Action of Debt upon the Bond, and Nullum Arbitrium pleaded, the Plaintiff replied, and set forth the Award; but did not allege that it was delivered up by the Arbitrators according to the Submission. Upon Demurrer to the Replication it was held well enough, tho' the Award was not alleged to be delivered according to the Submission. Style 110. Trin. 24 Car. B. R. Langly v. Wybord.

10. A Submission was by Parol of all Controversies to the Award of A. and B. when they should have Leisur to make it, and promis'd each to pay the other so much if he did not stand to the Award. In Case upon this Promise the Plaintiff aver'd that Defendant did not stand to it &c. The Defendant pleaded that 2 Days after he revoked the Submission. The Plaintiff reply'd that 2 Years after he request'd A. and B. to make Award, and that they had Leisur &c. but he did not answer to the Revocation, and therefore the Replication was held ill. Sid. 281. pl. 10. Pauch. 18 Car. 2. B. R. Nugate v. Degelder.

11. In Debt on an Award the Statute of Limitations is no Plea in Bar, because it is not an Action which is grounded upon Lending or Contract, which Debts are only within that Statute. Sid. 415. pl. 16. Pauch. 21 Car. 2. B. R. Hodgdon v. Harridge.

Lev. 273.
Hodgson v. Harris.
S. C. the Court inclin'd that it was not within the Statute; & adjournatur.—2 Saund. 64. S. C. adjudged for the Plaintiff.


12. Debt upon Bond condition'd to perform an Award. The Defendant pleaded No Award made. The Plaintiff reply'd, and shew'd Award. The Defendant rejoined, and shew'd other particular Matters, which he aver'd to be notified to the Arbitrators, and of which they made no Award &c. And upon a Demurrer it was object'd that this Rejoinder was ill, because the Defendant did not traverse the Award set forth in the Replication; but Jones and Whitleck J. held that the Traverse should have been by the Plaintiff, and Defendant ought only to maintain the Bar, it being in the Negative; for a Negative waves an Affirmative before, and he that pleads in the Negative shall not take the Traverse; and here the right Order of Pleading is, when the Defendant pleaded No Award, for the Plaintiff to reply an Award, and then to set it forth, and assign a Breach, (and yet the Breach is not traversable) and then the Defendant shall rejoin Nullum tale fecerunt Arbitrium, and so maintain his Bar. Palmi. 511. Hill. 30 Car. 2. B. R. Farrer v. Gate.

13. An Award cannot be pleaded in Bar of any Action, unless it appears that a present Satisfaction of the Demand of the Plaintiff was given by the Award itself, or one that was executed after, and before the Action brought, or for which the Plaintiff may have Action. This was cited by Treby Ch. J. in pronouncing Judgment for the Plaintiff, as mentioned by the Plaintiff's Counsel; and he said that the Books go upon these Differences, viz. If the Award be for Payment of Money, and the Day of Payment is past, the actual Payment must be pleaded, or a Tender and Refusal, which is a Payment in Law; but if the Day of Payment is not past,
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The Submissions of Chan., but for the pasting of a Performance, per Holt; but per Powell it must be averred. Accordingly, accordingly, by Holt Ch. J. — 2 Ld. Raym. Rep. 1012. Purflow v. Baily, S. C. accordingly; but the Court would not give Judgment, because it was a trifling Affair.

(H. a) Submissions and Awards, by Rule of Court.

1. WHEN the Party submits himself to an Arbitrement by an extrajudicial Confe, as by Consent, there cannot be said in Equity or imprisoned for Non-performance of the Award, unless be has at any time agreed or assented to it; but when by any Court the Matter is referred to Gentlemen of the Country, and the Party will not stand to it, the Court may commit him, for upon the Matter that was the Award of the Court. Nov. 141. Bendick v. Thatcher.

2. At Nisi Prius Submission by Rule of Court was to Hale Ch. B. but A. and B. the Party, against whom the Award was afterwards made, revoked it before the making it. The Award being tendered to him to be performed, he insisted that he had revok'd it. An Attachment was prayed against him for this Contempt, but the Court denied it, tho' some Cales were cited in which it had been lately done; for they said it was a new Practice to imprison Men thus without being heard; but that the Party griev'd might have his Action on the Café in which the whole shall be tried. Sid. 452. pl. 20. Pach. 22 Car. 2. B. R. Trenehenre v. Trehilian.

3. Such Award made pursuant to an Order of Chancery must be confirmed on Motion, as is done upon a Matter's Report, and either Party has Liberty to except to it, and then it will properly come before the Court on those Exceptions. Vern. R. 469. pl. 455. Trim. 1687. Crely v. Carrington.

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4. A judge of Nisi Prius may, by Consent of Parties, make a Rule to refer, and then oblige them to stand to the Determination, yet the Sessions cannot so do, tho' it be by Consent, yet we must allow them such a Power; They may indeed refer a Thing to another to examine and make a Report to them thereof, but not as in this Case to be finally determined by him; per Cur. 12 Mod. 87. Hill. 7 W. 3. Holford v. Lawrence.

Motion was made for an Attachment for Non-performance of an Award and per Cur. there must be a positive Affidavit of personal Notice of Award and Demand of the Money all at one Time, because it brings the Party into Contempt, but if the Party keeps out of the Way on Purpose, there must be an Affidavit thereof, and of Endeavour used to find him out and serve him, and it is but of late that Attachments have been the Means to compel Performance of Awards, but the old Remedy was Cafe. 12 Mod. 237. Mich. 10 W. 3. C. B. Anon.

Where the Party moves the Court to set aside a Submission to the Award of the three Foremen of the Jury for Irregularity, the Court held, that while the Matter was sub judice the Non-performance was no Contempt, and so denied an Attachment. 1 Salk. 73. pl. III. Passch. 2 Ann. Morris v. Reynolds.

6. 9 & 10 W. 3. cap. 15. S. 1. It shall be lawful for all Persons after the 11th of May, 1698, who are desirous to end any Controversy, Suit, or Quarrel, for which there is no Remedy but by personal Action or Suit in Equity by Arbitration, to agree that their Submission of the Suit to the Award, or Simplicity of any Person or Persons, shall be made a Rule of any of his Majesty's Courts of Record, the Parties shall submit to, and infert such their Agreements in the Condition of the Arbitration Bond, which Agreement being so inserted, shall upon producing an Affidavit thereof made by any one of the Witnesses thereto in the Court of which the fame is agreed to be made a Rule, be entered on Record, and a Rule shall be made by the said Court, that the Parties shall submit to, and finally be concluded by, the Arbitration or Simplicity which shall be made concerning them by the Arbitrators or Umpire, pursuant to such Submission, and in Case of Disobedience in any of the Parties, they shall be subject to all the Penalties of Contempting a Rule of Court, and the Court on Motion shall fine the Process according, which Process shall not be stopped or delayed by any Order, Rule, Commands, or Proces of any other Court of Law or Equity, unless it appear upon Oath that the Award was obtained by Corruption, or any other undue Means.

S. 2. Any Arbitrator in Simplicity procured by Corruption or undue Means, shall be deemed void, and set aside by any Court of Law or Equity, so as Complaint thereof be made in the Court, where the Rule was made for Submission to such Arbitrator &c. before the last Day of the Term next after such Arbitration made and published to the Party.

7. Where a Rule is entered into by Consent to refer a Matter to the Judge of Affairs, there needs no Motion to make his Order a Rule of Court, for the former Rule gives it a Sanction. Comb. 479. Passch. 10 W. 3. B. R. Anon.

It was moved to set aside an Award because
9. Award made by Rule of Court that Money should be paid on one Side and nothing awarded on the other, the Court will not grant Attachment till a Receipt be tendered. 12 Mod. 234. Mich. 10 W. & M. v. Palmer.

10. A Rule was made at Nisi Prius to refer a Matter to the 3 Foremen of the Jury, and the Plaintiff to have a Verdict for his Security: the Plaintiff may either have an Attachment for Non-performance, or else Judgment may be entered on such Verdict at his Election, but this last cannot be done without Leave of the Court. 1 Salk. 84. pl. 3. Mich. 11 W. 3. B. R. Hall v. Mitter.

11. A Submission to an Award being by Rule of Court, an Attachment was moved for Non-performance; Per Cur. there ought to be Affidavit of Award demanded, and we never grant an Attachment for Non-payment of Money upon an Award the first Day, tho' the Defendant be to do the first Act. 12 Mod. 317. Mich. 11 W. 3. Chandler v. Driver.

12. The Court was moved to make a Submission a Rule of Court but denied, because the Affidavit set forth that the Award was then made pursuant to the Submission, and the Award was then produced, and Trevor Ch. J. said, that since the Award was made they would not make the Submission a Rule of Court without seeing the Award, whether it was a good and legal one. MS. Rep. Trin. 12 Ann. C. B. Anon.

13. Bond of Submission bad this Clause in the Condition, (viz.) and if Ed. Ramm, the Obliger shall consent that this Submission shall be made a Rule of Court, then the Bond shall be void; upon a Motion to make this Submission a Rule of Court it was opposed, because these Words do not imply a Consent, but if he would forfeit his Bond he need not let it be made a Rule accordingly. of Court; yet because this Clause could be inferred for no other End than to shew the Consent of the Obliger, the Court took these Words to be a sufficient Indication thereof, and therefore they made the Award a Rule of Court. 1 Salk. 72. pl. 8. Patch. 13 W. 3. B. R. Baily v.ingly. Cheeley.

14. When it is moved to have Submission to an Award made, a Rule of Court there ought always to be an Affidavit of Notice, because the Act gives the Court Power to examine the Justice of the Award; per Cur. 12 Mod. 525. Trin. 13 W. 3. Anon.

15. For snatchng Papers, and so hindering the Award, according to 1 Salk. 72: a Rule of Court there ought to be Attachment, if the Party did not enlarge the Rule and pay Costs; per Holt Ch. J. 7 Mod. 8. Patch. 1 Ann. B. R. Davila v. Dalmanfor.

16. Submissions to an Award was made a Rule of Court in Chancery, can Proc. and an Attachment issued for not performing the Award. The Party was afterwards found a Lunatic, and died. A Subpoena Scire Facias was taken, and that because
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this concerned all the Courts as well as Chancery, the Judges were content in it, who were all of Opinion that the Prosecution determined by the Death of the Party, and could not be revived or carried on farther. — And ibid, says, that the Award be established by the Court, yet it is not in the Nature of a Judgment or Decree to be prosecuted, but in Nature of a Contempt, which dies with the Person, and so held all the Judges.

17. A Submission by Bond was made a Rule of Court, according to the Act. Afterwards an Award being made, the Plaintiff moved for an Attachment against the Defendant for not performing the Award, which was granted, and pending the Attachment be likewise brought an Action of Debt upon the Bond; and upon a Motion that he might not proceed both Ways, it was ruled that he might, because the Plaintiff has no Satisfaction upon the Attachment; and so the Defendant was put to answer Interrogatories. 1 Salk. 73. pl. 12. Pach. 2 Ann. B. R. Anon.

18. Bill to set aside an Award made pursuant to a Rule of Court in B. R. for Misdemeanour in the Arbitrators upon this Case. The Plaintiff and Defendant enter'd into Arbitration-Bond, and submitted to make it a Rule of Court, and an Award was made pursuant to the Submission by Rule of Court; but the Plaintiff not liking the Award, applied to the Court of B. R. to set aside the Award, and made several Objections to it; and the Court being divided in Opinion, a Rule was made to hear Counsel why the Award should not be set aside, and afterwards that Rule was discharged; but the Court being divided in Opinion, the Plaintiff could not obtain a Rule for an Attachment for Non-performance of the Award, and therefore brought an Action upon the Arbitration-Bond, and got Judgment upon it; and then Ward the Defendant at Law brought this Bill to be relieved against the Award. The Question was, whether the Plaintiff at Law, not having pursued the Method prescribed by Stat. 9 W. 3. cap. 15. by Attachment, but has brought an Action upon the Arbitration-Bond at Common Law, and has not pleaded the Statute to the Jurisdiction of this Court, whether upon these Circumstances the Court may not proceed to examine the Award &c. The Council for the Defendants insisted, that the Award being made by Rule of Court, pursuant to the Stat. 9 W. 3. cap. 15. and set out to be so made by Defendant's Answer, and the Defendant ought to have the Benefit of the Statute as well as if he had pleaded it, and the Parties to the Award have no Remedy but by Application to the Court where the Rule was made; that this Statute was pleaded to the Jurisdiction of this Court tempore Cowper C. and the Plea was allow'd. Ordered that the Matter should make a State of the Case for the Resolution of the Court. MS. Rep. Pach. 6 Geo. in Canc. Ward v. Periam & al.

19. When Submission to an Award is by Bond, which is afterwards made a Rule of Court, the Court will allow the same Objection to the Award as they would do when the same came before them on an Action on the Bond; otherwise there might be a Contradiction; but when a Submission is only by Rule of Court, that Court will not receive Objections to it; for it is the same as if the Whole had been in the Rule, and the Court will not relieve when the Matter has been examined by another Court that had Jurisdiction, unless the Equity be that some Matter of Fraud in the Award hath come to the Knowledge of the Party since the former Examination, which
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which did not appear before the other Court; per Ld. Chancellor, who had taken formerly the same Distinction in B. R. MS. Rep. Coxeter v. Anderson.

(I. a) Cases in Equity. As to Awards.

1. Any Award made by Justices of Affise was ordered to be performed. Cary’s Rep. 66. cites 2 Eliz. Fol. 174. Burton v. Redman.

2. Whereas there was an Award in Writing exhibited into this Court, made between the said Parties by Sir Christopher Wray, Knt. Ld. Ch. J. of England, whereunto the Ld. Chief Justice’s Hand as well as the Parties are subscribed. It was requested by the Plaintiffs that the same might be decreed by this Court, which this Court refused to grant until the Defendants were made privy. There Process is awarded. Cary’s Rep. 92, 91. cites 19 Eliz. Wakefield & Ux. & Al’ v. Hawfon & Ux. & Al’.

3. The Suit was to cause the Defendant to perform an Award of Arbitrators chosen by themselves, contrary to which Award the Defendant has put in Suit an Obligation of 100l. wherefore an Injunction was granted for Stay of the Suit; and upon the Defendant’s shewing his Readiness to perform the Award, ‘twas ordered that the said Award shall be duly performed by both said Parties. Cary’s Rep. 151. cites 21 Eliz. Rignolds v. Latham.

4. An Award was made, whereby Money was awarded, and the Plaintiff would have had it decreed, but it could not, because it was not made by any Warrant of this Court. Toth. 78. cites Trin. 24 Eliz. Day v. Wood.

5. The Court ordered an Award or Agreement to be performed concerning a Lease and other Things. Toth. 78. cites 40 Eliz. Twyn v. Twyn.

6. An Award was obtained by Fraud, by which the Arbitrators did award that one of the Parties to the Submission should seal and deliver a Bond to the other, after general Releases first given; all which was done pursuant to the Award, and on a Bill to be relieved it was decreed, that the Bond to stand to the Award, and the Arbitration itself, and the Releases, and the other Bond executed by the Parties, should be brought into Court and cancelled. N. Chan. Rep. 6. per Ld. Coventry, Pach. 3 Car. 1. Norgate v. Ponder.

7. Bonds entered into for Performance of an Award, were upon Non-Bill to be performed, yet stayed by Injunction. Toth. 89. cites Mich. 6

8. An ancient Award touching a Term of 500 Years, performed by one Party was decreed. 3 Chan. Rep. 20. Poole v. Pipe.

Auction at Laxo on the Bond of Submission. The Defendant pleaded as to so much of the Bill as sought to stay and pay the Defendant’s Proceedings at Law, and be set forth the Submission and Award to be fairly made &c. But the Plea was overruled, because it covered too much; for the Plaintiff, in all Events, is entitled to Relief against the Penalty of the Bond, tho’ the Merits are with the Defendant. MS. Rep. Mich. 1734. Potter v. Davy. But Quare, if the Money awarded had been equal to or exceeded the Penalty of the Bond, whether then the Plaintiff is not entitled to any Relief.

9. The
Arbitrement.

The Court refused to confirm or over throw an Award submitted to the Parties, and Bonds given to perform it, unless Circumvention or Corruption were proved; but otherwise it is if the Award were made by Order of Court. 3 Chan. Rep. 88. 11 Feb. 1635. Greenhill v. Church.

Award made by 3 Persons nominated by 2 Arbitrators by Assent of the contending Parties, and who bound themselves to stand to their Award, was decreed good in Equity. Chan. Rep. 141. 15 Car. 1. Church v. Roper.

If one Party performs his part of the Award, Chancery will compel the other Party to perform his, tho' the Award was not made originally by the Direction of this Court. Chan Rep. 142. 15 Car. 1. Bishop v. Bishop.

An Award made by Cordall and the Bishop 40 Years since decreed against the Successor for the Manner of Titling. Tottn. 79. cites Mich. 21 Car. Colt v. Smith.

Award was set aside because the Party did not actually assist to the Reference. Chan. Cafes 87. cites it as the Cafe of Brooks v. Dickens.

A Reference was by Consent in Court. Exceptions were taken to the Award, but the Court by reason of the Consent refused to look back into it, and so it was confirmed, per Ld. Chanc. N. Ch. R. 83. about 13 Car. 2. Halford v. Bradliah.

The Plaintiff had Land descended to him from his Brother who had bought it, but the Defendant brought an Ejectment upon a Leave for 500 Years, and an Award being made concerning the Title under which the Plaintiff claimed, and the Party that had the Leave had not performed but kept the Leave, and it came to the Defendant, and the Bill is to hold the Land; and decreed if it had been enjoyed under the Award, 14 Jac. and a perpetual Injunction against the Leave. 3 Chan. Rep. 20. 18 Car. 2. Poole v. Pipe.

The Bill was to be relieved against a Bond of 1000l. Penalty for the Performance of an Award, whereby Possession and Profits of Lands are awarded to the Defendant. The Defendant inuits, that there was no Surprise in the said Award, but it was by the Direction of the Plaintiff's Friends, and ought not to be set aside, which if it was, it would involve many Suits; and inuits, that the said Award is in the Nature of an Agreement, and ought to be performed. The Court taking Notice that the Award in Question was not made by the Order of this Court, but that it proceeded from the voluntary Submission of the Parties; two Judges being chosen by themselves, declared their Opinion that they saw no Cause to decree the Award to be set aside, nor on the other Side to confirm, or to relieve the Plaintiff, but ordered both Bills to be dismissed, the Plaintiff electing to go to Law. 2 Chan. R. 34. 21 Car. 2. Eyre v. Good & al.

The Plaintiff's Suit is to have the Benefit of an Award, to which the Defendant demurred, and says, that the Plaintiff ought to take his Remedy at Law. The Court over-ruled the Demurrer. 2 Chan. R. 30. 21 Car. 2. Alford v. Pitt.

A Submision to an Award by Consent of Parties by Order of this Court is revocable; for nothing under a legislative Power can make such a Submision irrevocable which in its Nature is revocable, but an Attachment will be granted. Chan. Cafes 185. Tr. 22 Car. 2. Palmer v. Whettenhall.

19. An...
20. Submissions to 2, an Award by one only is not good. Fin. R. 87. Hill. 25 Car. 2. Sowton v. Spry.

21. An Award that if the Plaintiff performed it within such a time he should have the Groats; he did not perform it within the time limited, to No Relief. Fin. R. 22. Mich. 25 Car. 2. Eves and Reeves v. Blackwall.


23. An Award made that Defendant should convey such a Parcel of Ground to the Plaintiff as was agreed on; Defendant pleads, that before the Submission he and his Wife were jointly seized thereof, and that the is not a Party to the Submission, besides that the Award itself is void because of the Uncertainty thereof; for a Piece of Ground is to be conveyed without mentioning what Estate therein; Plaintiff's Counsel agreed that this was a good Bar to the Award, yet the Court decreed Defendant to convey according to the Agreement, and the Master to settle it. Fin. Rep. 180. Mich. 26 Car. 2. Berry v. Wade.

24. Finch C. said, he would never decree an Award that should bind an Infant. Chan. Cales 280. Trin. 28 Car. 2. Cavendish v. ...

25. Award that Guardian procure an Infant to convey, and give Bond for that Purpose was set aside as unreasonable; Per Finch C. Chan. Cales 279. Trin. Trin. 28 Car. 2. Cavendish v. ...

26. Arbitrators promised to hear Witnesses, but making the Award 2 Show 238, before they had so done, the Award was set aside. 2 Vern. 251. in pl. 272. Hill. 2 & 3 Jac. 2. B. R. the S. C. but S. P.

P. does not appear. —— If an Award made a Rule of Court by Consent of Parties be had in Point of Law, yet the Court will compel the Parties to perform it, unless there be some Corruption, or one Party not heard &c. per Holt. Cumb. 353. Mich. 6 W. & M. In B. R. Skip v. Chamberlain, A hard Award made without leaving one of the Parties was denied to be set aside, because he had Notice, and might have been heard if he pleaded, and as to the Hardship, the Arbitrators were Judges of their own choosing, and therefore decreed that the Bill and dismissed with Costs. 9 Mod. 65. Mich. 10 Geo. 1. Waller v. King.

27. Arbitrator promised not to make his Award till Smith (who was not well) should come abroad; Lord Nottingham inclined for that Reason to set it aside, but it ended by Compromise. 2 Vern. 251. pl. 238. cited as the Cafe of Smith v. Coriton.

28. An Award made, and a Release given pursuant thereunto, shall not be of such as are no Parties to it. Fin. R. 441. Hill. 32 Car. 2. Davy v. Harvey, Executors of Audley v. Rea, Beauly and al.

29. To set aside an Award made on a Reference by Rule of Court Vern. 157, in a Dispute of Wafte done by Tenant for Life were allowed 1. Ex. pl. 147. S. C. and the Bill cited therein of Damages 2. Midemeanour in the Umpire, viz. that before the Umpire made, Umpire declared he would not meddle, and after Umpire declared he made it for fear he should be arrested; whence his bate; Ld. Counsel interred that he had been menaced, 3. That after the Submissions, the corpus, that where there appears that the Plaintiff repaired the Premises, and proved Repairs were made, and that as would perfect the Repairs, and therefore prayed a new Trial, a manifest
Arbitrement.

The Submittion was to Arbitrators, who differed as to the Sum to be allowed, and one was for giving $5 l. and the other insisted on giving $50 l. expecting the Defendant would receive it, as he gave him Intimation he would, and tendered him the 500 l. and a Release executed by the Plaintiff, and tho' there was no other Execution on the Plaintiff's part of the Award, and tho' the Award was extrajudicial, and not good in Strictures of Law, yet the Lord Chancellor decreed it should be performed in Specie. 2 Vern. 24 pl. 16. Pach. 1687. S. C. — But where a Bill was exhibited to have an Execution of an Award, which was performed by neither Party, and the Defendant demurred, because there was no Precedent that a Court of Equity had ever carried such Awards into Execution, and the Demurrer was allowed. Abr. Equ. Cases 51, pl. 9. Mich. 1704. at the Rolls, Bishop v. Webster.

At the End of the Case is added viz. Quære, if the Decree upon tho' not known then to be so; a Commission of Bankruptcy being after a Rehearing wards taken out, the Assignee brought a Bill to set the Award aside, but there appearing no Fraud or Collusion, the Court denied it. 2 Vern. 229. pl. 209. Pach. 1691. Whitney v. Pawling.
Arbitrement.

34. Award was, the Arbitrators being interested in the Thing of which the Award was made, and therefore set too great a Value thereon, and in five Days after the Award, the Money awarded was attached by the Arbitrators, for Money owing them by the Defendant. 2 Vern. 251. pl. 238. Hill. 1691. Earle v. Stocker.

35. Award was set aside for Partiality in the Arbitrators, As where the Submission was to 3, and because one did not agree with the other two, the 2 had Meetings by themselves; that alone is sufficient to vitiate the Award, and then to set one of the Parties be present at their private Meetings, and admitting him to be heard to induce an Alteration in the Award, and industriously concealing their Meetings from the other, and leaving the drawing up the Award to the Defendant’s Attorney, are Proofs of the Partiality, and decreed at the Rolls to be set aside; and confirmed per Wright K. because the Proceedings of the Arbitrators were partial and unfair. 2 Vern. 514. pl. 463. Mich. 1703. Burton v. Knight.

36. If it appears that the Arbitrators went upon a plain Mistake, either as to Law or Fact, it is an Error appearing in the Body of the Award, and sufficient to set it aside; but Plaintiff failing to make out his Case by Proof the Bill was dismissed per Cowper. C. 2 Vern. R. 705. pl. 626. Mich. 1715. Cornforth v. Geer.


37. A. seized in Fee of a House, devised it to M. his Wife for Life, Remainder to his 6 Daughters in Fee equally. Upon a Trial in an Action brought by M. against J. S. for stepping Lights, all Matters in Difference as to the Title to the House were referred to Arbitrators, who awarded J. S. to pay Costs, and also 155 l. for the Purchase of the House, and M. on Payment to convey in Fee. J. S. paid the Costs, and brought a Bill against M. to convey and procure the Daughters to join; some of the Daughters were examined as Witnesses by the Defendant, the Mother, wherein they swore, that they were willing to join in the Conveyance. The Mother died, and J. S. brought a new Bill against the Daughters, and the Husbands of 4 that were married, and one that was unmarried, in order to compel them to convey, and to procure an Infant Heir of one of the Daughters deceased to convey when of Age. Ld. C. King said, If the Daughters had been fole, he should upon such Controvetey decreed them to convey, but all but one of them being under Coverture, and one being dead leaving an Infant Heir, not Party to the Bill, their Answers could not bind themselves, much less their Husbands, as to their Inheritance, and it is impossible to bind the Infant Heir; and dismissed the Bill as to such Part as prayed a Conveyance. 2 Wm’s Rep. 450. Hill 1727. Evans v. Cogan.

38. Bill was for an Account and to impeach an Award made between Plaintiff and Defendant Bercher, touching a Partnership in buying and selling Diamonds in France in 1719, and the Bill was against the Arbitrators, as well as the Party; Defendant B. (the Party) as to the Account &c, pleads the Award &c, and the Arbitrators as to a Discovery of several Particulars prayed by the Bill, and as to any Relief against them, plead the Submission, and that by Contenit it was made an Order of this Court &c, within the two Months; — Barnard Rep. in B. 152

Quere the Case of Lord v. Matter, if the Bill there was not brought not brought over-ruled the Plea of the Arbitrators, as covering too much (viz.) several Particulars which might tend to show a Partiality &c in their Proceedings &c. Nota, in Debate of the Case it was argued, that an Award made upon a Submission pursuant to the Statute W. 3. could not be admissible.
not be set aside, but for Partiality or Corruption in the Arbitrators complained of within two Terms after the Award made, and in the present Case, tho' the Act of Parliament was not particularly relied upon, yet it appeared that the Submiflion was made an Order of this Court, and that was laid to be sufficient to bring it within the Statute; but the Bill was filed within a few Days after, so that no Advantage could be taken of not complaining according to the Act within 2 Terms &c. and it was urged, that tho' the 2 Terms do elapse before any Complaint, yet that does not out this Court of Jurisdiction and Power to set the Award aside at any Time for Misbehaviour &c. And a Case of Ward and Walker was cited by Mr. Attorney General, of an Award so set aside by Ld. Macclesfield, which had been made under a Submiflion made a Rule of Court. But Ld. Chancellor seemed to doubt of, as thinking the Act of Parliament giving 2 Terms &c. concluded all Courts, and all Manner of Equity &c. MS. Rep. Mich. 4 Geo. 2. Canc. Godfrey v. Bercher.

39. A Bill was brought against the Defendant a Supercargo for an Account in 1721, who in his Answer set forth that there was a Submiflion and Award, and Releafes given. A Bill was now brought to set aside the Award, at least so far as related to a particular Parcel of Goods charged to have been Sold by him to one J. S. abroad, to the Amount of 10,000 l. setting forth, that Plaintiffs had received an Account of this Transaction since the Award, and urges that Defendant had concealed all this from the Arbitrators, omitting it out of the Account laid before them, and that the Sale of these Goods was entered in a particular Book &c. The Defendant as to Discovery and Relief pleaded the former Proceedings, Award, Releafes &c. Ld. Chancellor said, that the Rule that awards cannot be set aside, unless for Partiality or Corruption in Arbitrators is too narrow; for if there be Fraud made use of by either of the Parties to mislead the Arbitrators that is a Reason. So in Case of a Judgment at Law or a Decree here. And the Facts charged amount to this, as suppressing the Book &c. and omitting Goods out of Account laid before Arbitrators. Defendant denies suppressing the Book by Answer, but if he did fell and not enter, or not disclose, that amounts to the same Thing, and the Defendant is affected by this as well as the other. The Plea goes too far, being to Relief as well as for Discovery, for if Defendant be not bound to discover, yet if Plaintiffs can prove their Case, it is too much to say they are not intitled to Relief. MS. Rep. Hill. Vac. 15 March, 1734, S. S. Company v. Bumstead.

For more of Arbitrement in General, See Account, and other proper Titles.
Affets.

(A) What Things shall be Affets to an Heir in Debt.

1. **AND by Defcent in Ancient Demesne shall be Affets in Debt.**

S.C. & S.P. by Hank. Nota there is Franktenement and Base Tenure in Ancient Demesne.


3. If Lands descends to an Heir, this is Affets before Entry, for he may enter when he will. 42 C. 3. 10 b.


5. Copyhold Inheritances, or such Custumary Inheritances shall not be Affets to charge the Heir in Action of Debt upon an Obligation made by his Ancestor, tho' he binds himself and his Heirs. Resolved. 4 Keeper. 2 Chan. Cases 201. Mich.

26 Car. 2. — S. C. cited Arg. 1 Salk. 188. pl. 7. towards the Bottom.

6. A Right (without any Estate in Possession, Reversion or Remainder) for which a good Remedy is given by Action, is not Affets till recovered and reduced to Possession. — 6 Rep. 58. a. b. per Cur. Hill. 4 Jac. C. B. in Brediman's Case.

5. A Rent-seeck which descends, for which the Heir has no Remedy S. P. by Cokel Ch. J. Croo. J. 122. pl. 20. in Case of Brediman v. Bromley. S.C. — S.P. but it is not because it is not an Inheritance, but because there is no Remedy for it, and after Seisin it is Affets. Arg. Litt. Rep. 44. cites 11 E. 3. 14.
8. If one deni ses Lands to A. and his Heirs during the Life of J., S. or if Tenant for Life gaults his Estates to A. and his Heirs, and A. dies, his Heir shall take only as special Occupant, and he shall not be charged hereby as Heir in an Action of Debt. 10 Rep. 98. a. Mich. 10 Jac. in the Hands of Seymour’s Cafe.

If he comes to it as a special Occupant, as Ailts by Defect; and if no special Occupant, then it shall be Ailts in the Hands of the Executors or Administrators of the Party.———See Oldham v. Pickering.


10. Lands were purchased by A. but conveyed to A. and B. but B. to take nothing. A. dies, B. is decreed to convey to the Heirs of A. these Lands, being Trust Lands, are no Ailts in Equity, though the Trust be decided in Equity. Chan. Cases 12. Trin. 14 Car. 2. Bennet and Brownlow v. Box & al’.

The lands were so great, that the Revenue would not pay the Interest, for which Reason resolved to be no Ailts in Equity.—S. C. cited by Ld. Keeper. Chan. Cases 128. Pauch. 21 Car. 2. in Cafe of Pratt v. Colt, where it was held, that a Trust of Lands was no Ailts.—2 Freem. Rep. 139. pl. 177. S. C.


Land purchased in Trust was decreed to be Ailts to pay Judgments 2 Chan. Rep. 145. 50 Car. 2. Grey v. Colvill.—But Vern. 172. pl. 167. Trin. 35 Car. 2. Creed v. Cowle, S. C. Ld. Keeper doubted, whether the Trust of an Estate in Fee descanted on the Heirs is Ailts in Equity to the Satisfacti on of a Debt by Bond in which the Heirs is bound? Trust of a Surplus where Lands are devised for Payment of Debts &c. if it be a refulting Trust to the Heir, and is not defided away, is Ailts by Defect in the Hands of the Heir upon the Statute of Frauds and Perjuries; per Pratt Ch. J. 9 Mod. 190. in Cafe of Roper v. Ratcliff.


12. Feoffment of a Manor, excepting and referring Black Acre to himself for Life only Habend’ except before excepted, to the Use of A. in Tail. Resolved there is no Limitation of Use of Black Acre, for it results and descends, and is Ailts. Lev. 287. Pauch. 22 Car. 2. B. R. Wilton v. Armorer.

13. Mortgagor and Mortgagee; the Mortgagor died, and the Heir of the Mortgagor and Mortgagee join in a Sale of those Lands; Queere, whether the Money that comes to the Hands of the Heir by this Sale shall be Ailts to charge him in Equity; and per Finch, Ld. Keeper, it shall not, no more than he shall be charged at Law after Alienation bona fide. Freem. Rep. 303. pl. 369. Hill. 1673. Anon.

Frem. Rep. 248. pl. 263. Brittaine v. Charnock, S. C. the Court in-clin’d that the Heir was not in by Defect, but as a Purchaser by reas of the Charge of the 20l.
but they seemed to take this Rule, that Wheresoever the Heir hath his Election to take one way or the other, and that he comes to the Estate both ways alike, there the Law for the Benefit of Creditors adjudges him in by Decent rather than by Purchase and Devise; but here unless the Devise be void, he cannot take but upon the Payment of 201.

15. Reversionary Lands purchased in the Names of A. and B. after the Death of C, who has Estate for Life in the said Lands, were decreed to go towards Satisfaction of Judgments. 2 Chan. Rep. 145, 146. 30 Car. 2. Grey v. Colvill.

16. Where a Lease for Years is to wait on the Inheritance, it shall be iid. 156. in Assizes as to Debts, as well where the Interest of the Lease is in the Hands of a Stranger, and not in the Owner of the Inheritance, as when it is in Cafe, ty que Trust of the Inheritance, and the Interest of the Inheritance in a Strange Trustee; per Ld. Keeper. 2 Chan. Cales, 152. Mich. 35 Car. 2.

Reason. — Where the Inheritance is in Trustees, and a Man has a Term in his own Name which is limited to attend the Inheritance, and dies indebted, the Term in that Cafe shall be liable to his Debts; for it is Assizes at Law; per Ld. Chancellor; But he said that if one seated in Fee raises a Term, and lodges it in Trustees to attend the Inheritance, and afterwards dies indebted, he never heard that the Term should be made Assizes, but he had heard it often denied. Vern. 541. in pl. 553. Mich. 1685. 2 Vern. 54. 55. Pach. 1688. Arg. says that in such Cafe where the Inheritance is taken in the Trustees, it was never pretended, but that the Term should be Assizes. —— Chan. Prec. 247. Pach. 1765, the Master of the Rolls cited Ld. Hale's Opinion Mich. 20 Car. 2. in Sir John Saunders' Cafe, that a waiting Term shall be Assizes if it attends an Inheritance in Fee-simple; but not if it attends an Estate Tail, which is not subject to Debts in Equity. —— S. P. by Hale Ch. B. Hardr. 489. Mich. 20 Car. 2. in Scacc. in Sands' Cafe. —— 11 Mod. 5. pl. 22. Pach. 1 Ann. But it has been Quere if Tenants in Tail contrives Debts by Bond, and dies, and it can be made appear that some of his successors have bought the Estate found an old Mortgage upon it for a long Term of Years, which was kept on Foot to exist in the Freehold and Inheritance, whether such Lease in Equity would not be Assizes in the Hands of the Heir in Tail, because it is Equity only makes such Leases defend, and it is the highest Equity that a Man's Debts should be paid. —— 9 Mod. 125, 126. Arg. cites it as resolved in the Cafe of the Creditors of the Earl of Pembroke, by simple Contract, that they should be paid out of an unmerged Term he had in him, because such a Term was a Chattel liable to their Demands; but that if the Term had been for the Earl, it had been otherwise.

17. Upon a Question if the Equity of Redemption of a Mortgage for Years in such Cafe of an Estate in Fee be Assizes, the Ld. Chancellor's present Opinion was, the Heir alien'd the Real Estate before a Bill brought. The Question was, it the Obligees was receivable here against the Heir and Purchaser on the Statute to prevent fraudulent Devises; or if he was to be sent to Law to get Judgment first. Per Ld. Keeper Wright. That Statute being Introductory of a new Law, the Relief on it must be at Law, and that a Bond-Creditor must first have Judgment at Law before he can redeem a Mortgage for Years, tho' it might be otherwise in Cafe of a Mortgage in Fee. Chan. Prec. 198. pl. 159. Trin. 1702. Bateman v. Bateman. —— Note, Chancery at this Days gives Relief upon the Statute of fraudulent Devises in such Cafe. Ibid. added as a Note of the Reporter. The very Equity of Redemption of a mortgaged Term is Assizes to pay simple Contract Debts; per Ld. Macclesfield. Wma. Rep. Hill. 1721. in Cafe of Coleman v. Which.

18. If the Equity of Redemption of a Mortgage in Fee, since the Equity of the Statute of Frauds and Perjuries, should be Assizes in Equity to satisfy Bond Debts, the Ld. Chancellor inclined that it was; but relitig his Decree till the Master had reported a State of the Cafe. Vern. Rep. 411. pl. 385. Mich. 1686. Plucknet v. Kirke.

Estate is forfeited; but the Heir having a Right in Equity, that ought in Equity to be liable to satisfy a Bond Debt, and if the Heir has alien'd or released his Equity of Redemption, to prevent the Creditors of the Satisfaction of their Debts, the Court will follow the Money in the Hands of the Heir or his Executors. 2 Vern. 61. pl. 54. Pach. 1688. Sawley v. Gower. —— Chan. Cales, 149. S. P. but no Decree. M. 21 Car. 2. Trevor v. Perrier.

19. The Heir claiming under a voluntary Settlement fells the Land. Vern. 415. The Purchaser before his Purchase had Notice that there was a Bond, pl. 427. Pach. 1687; but there was no Original filed; and before the Commencement of the S. C. Suit.
Suit he had covenanted to pay the Residue of his Purchase. On a Bill filed the Questioun was, if "the Money in the Purchasor's Hands is liable to the Payment of this Bond Debts; and the Court thereupon inclined to dimifs the Plaintiff's Bill. 2 Vern. Rep. 44. pl. 40. Patch. 1688. Sagitary v. Hide.

20. A seised in Fee, demifed to Trustees for raising 1500 l. a Year for his Wife's Jointure, who re-demifed to him for a feiter Term, paying a Pepper Corn. This Term fo re-demifed, being raised only for a particular Pur- pofe, shall not be Affets for Payment of other Debts than the Inheritance would have been liable to; per 2 Justices, the Matter of the Rolls, and Ld. C. Jefferies. 2 Vern. 52. pl. 50. Patch. 1688. Baden & al' v. the Earl of Pembroke & al'.

22. A. having a Lease for 3 Lives to him and his Heirs from the Church, and mortgaged it for 99 Years, if the 3 Lives lived so long, and died, the Mortgage being forfeited, decreed this Mortgage Term, which would not have been Affets at Law, to be sold for the Payment of Debts. Arg. 2 Vern. Rep. 54. pl. 50. Patch. 1688. cited as decreed in Ld. Nottingham's Time in Took's Cafe.

An Equity of Redemption is every Day made. Affets in Equity. Arg. Vern. 173.

24. The Judgment against an Heir, who has a Reversion in Fee de- cended to him, is only of Affets quando accidentur; and the Creditor cannot by Bill in Equity compel the Heir to fell the Reversion, but shall expect till it falls. 2 Vern. 134. pl. 132. Hill. 1690. Forrey v. Forrey.

25. A. on Sale of Lands takes a Bond from the Purchasor to pay any Sum or Sums of Money not exceeding 500 l. as A. should by Will appoint. Per Cur. A. having Power to dispose of the 500 l. must be look d on as Part of his Estate, and decreed it to be Affets liable to the Plaintiff's Debts. 2 Vern. Rep. 319. pl. 306. Trin. 1694. Thomon v. Towne.

26. In Debt upon Bond brought against the Defendant as Heir to his Father &c. and Riens per Defempt pleaded, the Plaintiff replied Affets, and Iffue thereupon. And the Evidence was, that the Obligor, the Defendant's Father, devised to the Defendant, his Son and Heir, certain Meffiuages in Eschebter-Alley in Fee, but chargeable with an Annuity or Rentcharge payable to the Defendant's Mother. And it was held by Holt Ch. J. that these Meffiuages defecanted to the Defendant, and were Affets; for (by him) the Difference is, where the Defcif makes an Alteration of the Limitation of the ESTATE from that which the Law would make by Defecant and
and where the Devise conveys the same Estate as the Law would make by
Defcent, but charges it with Incumbrances. In the former Case the Heir
takes by Purchase, in the latter by Defcent. ld. Raym. Rep 728.
Trin. 13 Will. 3. B. R. in Guildhall, London. Emeron v. Inch-
bird.

27. A. having a Power to charge 3000 l. on his Estate for such Purposes as he would think fit, by Deed appoints the 3000 l. as a Collateral Secu-

Cham. Prec. ry for quiet Enjoyment of an Estate he had sold; but the Appointments
232. pl. 193. to be void, if no Incumbrance appears. A devoted it to his Daughter.
S. C. because the
The Creditors of A. brought a Bill to have the 3000 l. apply'd to Pay-
ment of Debts, and decreed accordingly; per Wright Ld. Keeper. 2
Place of Creditors, and he had before made an Appointment which satisfied his Power, by appointing

28. A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
Cleere and Peacock's Cafe, Cro. E. 359. tho otherwife in a Formedon
at Law and the Trustees of the Advowson, and pray a Sale of the
1704. of Deed, and cited Anderson Ch. J. in Sir Edward
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
was argued for the Plaintiff that an Advowson is Aflets at Law; that
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

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Treas. 374. b. is general that it is Aflets. It is true it
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at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
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at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
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at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.

Treas. 374. b. is general that it is Aflets. It is true it
nevertheless was not Aflets. It was argued for the Plaintiff that an Advowson is Aflets at Law; that
A. being seised of the Trust of an Advowson in Gros in Fee, dies
edebted by Specialty &c. The Creditors bring a Bill against the Heir
at Law and the Trustees of the Advowson, and pray a Sale of the
Advowson. The Heir at Law infifted that the Advowson was not Aflets.
ducing no annual Profits will not hold, because that proves likewise that no Value ought at all to be put upon it; and the sole Difficulty here is the Manner of Valuing or Charging; but that is no Difficulty in this Court, which will decree a Sale of Assets descended as a more ready and compendious Method of Satisfaction; and even at Law since the Statute of W. 3. against fraudulent Devices, if the Heir aliens the Assets he is chargeable according to the gross Value &c. wherefore &c. Ld. Chancellor, as to the Point of the Adwowsfon being Assets &c. held that if it be not Assets at Law this Court would not make it so, because that would be to alter the Law &c. and seem'd that as a gross Value, (as it is admitted) may be put upon it, so it may be capable of a Valuation per Annum &c. At another Day Ld. Chancellor declared his Judgment, and held that the Adwowsfon was Assets, and accordingly decreed it to be sold &c. He held that it was a Rule that all Lands, Tenements and Hereditaments were extenable; and that an Adwowsfon was so in the Case of the King, he cited Sir W. Jones 24. An Adwowsfon was a Thing valuable, and lay in Tenure, and might be held by Knights Service &c. He refer'd to Fleta and Britton. The 23d of March following this Decree was affirmed in the House of Lords, Eyres Ch. J. of C. B. Price J. and Comins B. being the only Judges in Town, attended; and being asked their Opinion, whether an Adwowsfon in Gross was Assets in such Case at Law, declared it was; and the House did not divide. MS. Rep. Mich. 1730. Robinson v. Tong.

(B) What Estate.

1. I ought to be in Fee. 42 E. 3. 10. b.

If a Man leaves for Life rending Rent, and the Lessee dies, the Heir is vouched, and has no other Assets except this Rent, this is good Assets, and shall be render'd in Value; per Patton, which none denied; and yet it is agreed that he had no Fee-simple in this Rent. Br. Assets per Defcent, pl. 17. cites 7 H. 6. 3. 4.

2. If a Reversion upon a Lease for Life, with Rent reserved, descends to the Heir, it is good Assets. Br. Assets per Defcent, pl. 23. cites 16 E. 3. and Fitzh. Voucher, 85.

As in foc for

3. In Case of the Defcent of a Franktenement without Profits, or where the Heir had the Profits without the Franktenement, Quære if in either of these Cases it would have been Assets to charge him at Common Law.

4. An
4. An *Annuity* is no Allests, for it is only a *chose in Action*; *Quod Calum incerti temporis*.

5. If a *Mayor descends to an Infant*, and after a *Tenancy echeats*, such Land echeated shall be Allests by Defcent. *Finch 17. b.*

(C) At what *Time* it shall be Allests by the having of it.

1. If he hath Allests at the *Day of the Writ purchased*, or after, this shall be Allests, and shall charge him. *42 E. 3. 10.*

2. But if he had Allests by Defcent, but not at the *Day of the Writ purchased*, or after, this is not Allests to charge him. *42 E. 3. 14, 15*.

Debt brought he is discharged; Contra in Formedon brought by himself after the Allests alien'd; for this is his own Suit. *Br. Allests per Defcent, pl. 8. cites S. C.—Ibid. pl. 27. cites 15 E. 3. S. P. accordingly.*

The *Reason why an Heir was not chargeable* for the Debtor of the *Ancestor* after *Sale of the Allests* by Defcent was, because he was charged as Tertenant only. *Poph. 153. Hill. 1 Car. in Case of Bowyer v. River*.

3. If the Heir aliens the Allests by Fraud to *outr the Debtor of his Action*, and takes the Profit to the *Value of the Debtor*, this shall be Allests. *48 E. 3. 32. b.*

(D) How...
(D) How the Judgment shall be against him.

1. In an Annuity against an Heir upon the Grant of his Father, if the Defendant pleads that he has nothing by Decent, and it is found that he hath some Land in certain by Decent, but not to the Value, yet he shall be charged for the whole Annuity. 5 R. 2. Annuity 21. adjudged for his Falsity. 19 E. 3. Annuity 26. adjudged.

2. But otherwise if he had pleaded the Certainty, how much he had by Decent et. 5 R. 2. Annuity 21. 19 E. 3. Annuity 26.

(E) Pleading of Assists by Decent.

1. In Debt against an Heir upon the Obligation of his Father, the Defendant ought to be named Heir to the Obligor. Br. Assists per Decent, pl. 10. cites 48 E. 3. 32.

2. Debt upon an Obligation against an Heir. The Defendant pleads, that his Father was feised of Black Acre, and made a Lease for 99 Years, and the Reversion descended to him, and that he had Rious prater. The Plaintiff replies, that he hath Assists descended in London. The Defendant demurs. Resolved, that the Replication was naught, because he does not answer the Defendant's Bar, nor traverse when the Defendant did offer him an iffuable Point; for he should have said that he had Assists besides the Reversion, or else have prayed Judgment, and have had Execution by a Sci. Fa. when Assists should descend. Freeman. Rep. 160. Pach. 1674 Osborne v. Stanhop.

3. Where the Father fatted his Lands to the Use of himself for Life, Remainder to the Heirs Male of his Body, Remainder to his own right Heirs, with Power for the Trustees to make Leases, so that this was a Lease made by them, and if the Reversion should happen before the Estate Tail panted, he had still a Reversion but after an Estate Tail.—3 Mod. 50. S. C. and dated according to 3 Salk. the Plaintiff replied protefhando, that the Settlement is fraudulent, & se Plauto ditct that he has Assists by Decent sufficient to pay him; upon Demurrer by Defendant, the Court held the Prater idle, and the general Replication good; and Judgment was given for the Plaintiff.

4. A Reversion expectant on an Estate Tail is not Assists to charge the Heir upon the General Issue of Rious per Decent; Agreed per ter. Cur. Carth. 126. Pach. 2 W. & M. in B. R. in Case of Kellow v. Rowden, 5. Motion.
Affets.

5. Motion in Arrest of Judgment, because upon the Issue of Riens per Descent the Jury had found that Lands came by Descent sufficient to answer the Debt and Damages, and had not set out the Value of the Lands descend-
ed under the Statute W. 3. The Counsel for the Plaintiff answered, that it was a Replication at Common Law, and not under the Statute, and a Rule made Nil was discharged. Barnes's Notes in C. B. 325. Mich. 12 Geo. 2. Mathews v. Lee

(E) In what Cases Scire facias lies of Affets Quando acciderint.

1. In Formedon, the Defendant pleaded Warranty of the Ancestor with Affets defended in Fee, and the Demandant was an Infant, and the Tenant was compelled to shew where the Affets lay, and for he did Scil. at W. and no Chiefper Finch; for in the Refummons, it Land descends after to the Heir, the Tenant shall allege it, and by him if the Demandant recovers and Land descends after, the Tenant shall have Process to recover it, and this by Scire facias. Br. Affets, per Defects, pl. 7. cites 40 E. 3. 39. and 11 E. 4. 21.

2. By Finch, 40 E. 3. In Formedon Warranty is pleaded, and the Demandant recovers, and Affets defend after, there the Tenant shall have Scire Facias to re-lease his Land; for this Record stands in Force, because the Demandant recovered. Br. Scire Facias, pl. 130.

3. But by 11 H. 4. 21. In Formedon, the Tenant shall have Scire Facias in this Case, to have over in Value as he shall have in Voucher, where the Voucher has nothing at the Time &c. but Affets come after. Br. Scire Facias, pl. 130.

4. In Replevin the Case was, Tenant in Tail of Rent purchased the Land in Fee, and made Feoffment with Warrant and died; and Affets defended, and the Issue in Tail made Avowry for the Rent, and the Plaintiff pleaded in Bar the Feoffment with Warrant, and the Affets &c. and per Vavilior Justice, it is no Plea; for the Rent is not to be recovered in Avowry, but only the Tenant shall have return; and here if Issue arises upon the Affets, and it is found that he had nothing by Defect, yet if Land descends after, he shall not have Scire Facias to have that which is descendent in Value; for no Rent was recovered against him, for the Vavilior is always suppos'd in Poffession. Br. Scire Facias, pl. 142. cites 21 H. 7. 10.

5. But in Cai in Vita Affise of Mordancefor, Formedon &c. and Affets is pleaded, and it is found that he had nothing, and Affets is descendent after, the Tenant shall have Scire Facias against the Heir; for he lost the Land in the first Action, and therefore it is Reason that he should recover in Value, quod nota good Reason. Br. Scire Facias, pl. 142. cites 21 H. 7. 10.

6. In Debr against the Heir upon the Bond of his Ancestor, Judgment was given for the Plaintiff to have a dry Reversion, Quando acciderit. Roll. Rep. 57. pl. 34. Trin. 12 Jac. B. R. Aon.

For more of Affets in General, See Charge, Executor, Heir, Payment, Voucher, (U. b. 3) and proper Titles.
Alignment.

(A) Alignment. What is.

1. If a devisee releases to the devisee, the devisee is an assignee by the release. See Voucher (c) pl. 5. cites 26. Ass. 39.
2. A devise is an assignment, and so a breach of condition not to assign; per Rhodes J. Golsb. 49. pl. 10. cites 31 H. 8.
3. Common recovery is an assignment, per Hobart Ch. J. Hob. 27. Trin. 9 Jac. in the case of Roll v. Osborn.

(B) Of Things not assignable. The effect thereof.

1. Assignment transferring a thing which it cannot transfer, yet it may be good as a covenant; per Hale Ch. J. Mod. 113. pl. 12. Pach. 26 Car. 2. B. R. Deering v. Faringdon.
2. Where a bond is assigned over with a letter of attorney therein to sue, and a covenant not to revoke, but that the money shall come to the use of the assignee, although the obligee be dead, yet the court will not stay proceedings in a suit upon the bond in the obligee's administrator's name, tho' prosecuted without his consent, for that those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all courts, that the grantee hath such an interest, that he may sue in the name of the party, his executors, or administrators. L. F. R. 103. cites Pach. 12 W. 3. B. R. Deering v. Carrington.
3. If one assigns a bond over, tho' it be not in its nature assignable, yet if it is a good agreement, that assignee shall have the money to his own use; per Cur. 12 Mod. 554. Trin. 13 W. 3. in cafe of K. v. the parish of Aicles.
4. An apprentice is not assignable over, yet if the master makes a contract with another, that the other shall have the service of the apprentice, that is good between themselves; and tho' the words are grant, assign, and turn over, which indeed cannot alter the legal interest of the apprentice, yet it amounts to an agreement, that he shall serve the other during the time; per Cur. 12 Mod. 553. Trin. 13 W. 3. in the case of the king and the parish of Aicles.
(C) In what Cases Grantee may assign, in Respect of the Words of the Grant.

WHERE I give Land to a Man, rendering to me and my Heirs certain Rent, with Dis frets for me and my Heirs, and I grant this over, my Assignee may distain, tho' no Assignee is mentioned in the Deed; by the Justices. Br. Deputy, pl. 3. cites 11 H. 4. 65.

(D) Assignable; what.

1. If a Man has an Annuity to him and his Heirs, he * may make an * S.P per Assignement over of it; per Thorpe. But Belk. contra, for it is only a Choice in Aion as Debt. Br. Deputy, pl. 2. cites 41 E. 3. 27.

Quere, if it be not but a Choice in Action.) Br. Deputy, pl. 6. cites 19 H. 6. 42.—S. P. Br. Ibid, pl. 15. cites 21 E. 4. 20. by the best Opinion.

2. If one assigns over his Debt to another, and the Debtor agrees to it, yet the Assignee shall not have Action, nor the Debtor is not discharged against the Assignor; per Cur. Quod nota. Br. Dette, pl. 177. cites 11 H. 6. 7. & 16.

3. The Office of a Parker or Steward cannot be assigned without special Words of Assignees. Arg. 4 Le. 244. in Case of the Earl of Rutland v. Spencer, cites 21 E. 4. 20.

4. An Authority is not assignable; As he that has Letter of Attorney to S. P. by make Livery cannot grant it to another. Arg. 2 Roll Rep. 6. cites 9 Ch. J. Stid. 7. in pl. 2.

5. A Choice in Action may be assigned over for lawful Cause, as a just Debt, but not for Maintenance. Br. Chose in Action, pl. 3. cites 15 H. 7. 2.

Assignement of any Choice in Action, unless in Satisfaction of some Debt due to the Assignee; but not when the Debtor or Chose in Action is assigned to one to whom the Assignee owes nothing precedent, so that the Assignement is voluntary, or for Money then given. 2 Freem. 145. pl. 185.

6. But a Choice in Action Real as Entry, he cannot grant over; and it is Br. Patents, not like to an Chose in Action Personal or Mixt, as Debt, Ward &c. pl. 93. cites See Br. Chose en Action, pl. 14. cites 33 H. 8.

7. The judicial Office is granted to A. and his Assigns, yet A. cannot But an Office of Trust granted to A. and his Assigns gives Power to grant it over; per Hobart Ch. J. Hob. 173.

8. An Husband possiss'd of a Lease for Years assigns it to B. in Trust for himself and his Wife. The Husband cannot assign this Trust; for a Trust is nothing in Law, and Uses being abolished and joined to the Possessions, this Trust cannot be said to be an Use; for if so, the 27 H. 8. of transferring Uses into Possession, would be to no Purpose; for this Statute requires a Seizin to the Use; but there is only a Possession in a Lease for Years. Assignement of Trusts begets Strife and Maintenance, and
Ailignment.

and are void in Law; by the Judges of both Benches. Jenk. 244.
pl. 30.

Noy 52. S.P. 9. A Bond cannot be assigned to a Subject, unless for a Debt due by an
Harvey v. Ailignor to Ailignee; for otherwise it is Maintenance; per Cur. 3 Le.

Debs, tho' not assign- 10. There cannot by Law be any Ailignment made by any common
able in Law, Person of his Debt; per Cur. Cro. 180. pl. 18. Trin. 5 Jac. in Seacc.
are on good in Case of the King v. Twine.
Confidera-
tion assignible in Equity. Arg. 2 Chan. Cases, 7. and ibid. 36. Trin. 52 Car. 2. decreed accordingly in
the Cafe of Fashion v. Atwood.

By the Law of Merchants a Merchant may assign Debts. Arg. 2 Chan. Cases, 37. admitted.

A Debt on 11. A Debt recover'd in a Court of Record cannot be assign'd over; per a
sign'd; but whether a Debt decreed in Chancery may, was not resolved. Arg. Litt. Rep. 116. cites Sir
Miles Fleetwood's Cafe; but says, that this being a Debt in Conscience only, and not on a Judgment in
the Cafe, whereof the Law in ordinary Proceedings takes Conuance, it was not transferrable.

12. Contingent Benefits, which are annex'd to an Estate, and to an Interests,
may well be assign'd over. Agreed per Cur. 3 Bullit. 254. Mich. 14 Jac.
in Cafe of Havergill v. Hare.

that he may 23 Car. B. R. The King v. Holland.
take it with-

N. Chan. 14. Aifignment of a Deere is void in Law, and being so ought not to
Rep. 15. be mentioned against the Rule of Law in a Court of Equity; no Confide-
7 Car. 1. neration appearing to support the fame, which should make it better in
Verbiss- Equity than at Law. 3 Chan. Rep. 90. 17 Car. The Earl of Suffolk v.
2 Freem. Greenville.

Rep. 146.

15. Lands were fettled to raife Money for Daughters Portions. One
pl. 191. 7 Car. 1. S. C. and seems to be taken from one of the Reports abovementioned.
of them married J. S. and died before her Portion paid. J. S. took Adm-

J. S. and, and assigned all his Interests to W. his Son by a for-
mer Venter. J. S. died, and W. sued in Equity for the Money. It was
infilled, that tho' Chofes en Action might on a Confideration be assign'd
here by the Party that had the Interests, and the Ailignee might recover
them, and that the Ailignor's Release afterwards, unless without Notice,
and on Confideration paid to the Releifee, would not hurt the Ailignee,
yet the Ailignment being by an Administrator, and not by him that had
it in his own Right, this had never been good; for there might be a
Creditor to satisfy the Intertate &c. [or, a Creditor of the Intertate's to
satisfy &c.] Ld. Keeper thought there was a considerable Difference
between an Ailignment of the Party and of the Administrator, where the
Administrator was a Stranger, and had no precedent Right, and no Co-
colour of Right, but merely by the Administration; but that here the Ad-
ministration was pro Forma only; for here J. S. had a Right to the Mo-
ney, as a Portion or Provision for his Wife, and every Man has not
ready Money to give his Daughters, but their Portions are to be pro-
vided for by this Means, and therefore it is reasonable to advance or
promote the Establishing of them, so as they may be disposeable by the
Husband,
Aflignment.

Husband, (who settles a Jointure) as Money itself may be; and so decreed for the Plaintiff. Chan. Cases, 170. Trin. 22 Car. 2. Hurst v. Goddard.

16. An Interest in a Trust is in Equity assignable or devisable; per Wyld Tenant for J. Chan. Cases, 211. Trin. 23 Car. 2. in Case of Cornbury v. Midlands.

per Ann. in Consideration of Marriage and 10,000 l. covenants to make such Jointure, but dies without doing it. It was held that the Articles are a Lien on the Estate, and that by the Execution of them the Covenantor became a Trustee for the Feme, and that such Trust is devisable and assignable in Equity. 9 Mod. 19. Lady Coventry v. Id. Coventry.

17. Bonds are assignable in Holland, and therefore an Assignment of Bonds there, according to their Custom, are allowable here; by the Ld. Keeper. Chan. Cases 232. Trin. 26 Car. 2. Alcock's Cafe.

18. One was to receive a Proportion of Damage from the Town of Mod. 113. Hamborough, and it was stipulated, that the Town should pay so much as pl. 12. Patch, in the Parishes that had suffered; one whereof assigned his Part or Proportio of the Reaporal to another, notwithstanding which, he after received the Money to his own Use; whereupon the Assignee brought Covenant against him, and the Words of the Deed were only Aflignavit ac Transpofitum; and tho' the Thing in its Nature was not assignable, yet it was enough to bind the Assignor to suffer the Assignee to enjoy it. 12 Mod. 534 per Cur. cites the Case of the King v. Farrington.

19. A bare Power is not assignable, but where it is coupled with an 2 Jo. 205. Interest it may be assigned; agreed per Cur. As where a Lease was made with Power for Leffor, his Heirs and Affigns, to cut down, grub up, and fell Trees; and Leffor granted some of the Trees to J. S. who, with his Servants entered and cut them down; and it was objected, that this was a Power annexed to the Reversion only, and not assignable; and that he might have justified under the Leffor, but not in his own Right. But the Court held that an Action from there in this Cafe, both against the Leffor and his Assignee acting under his Power, and agreed that here was an Interest annexed to the Power, for the Leffor might sever the Trees from the Reversion; wherein Judgment was given for the Defendant. 2 Mod. 317, 318. Trin. 30 Car. 2. B. R. Anon. (In the Cafe in Jo. above, no mention is of Heirs or Affigns, and it seems that Affigns were not mentioned in the Liberty referred, because it was objected for the Plaintiff that the Liberty to sell &c. was annexed to the Reversion, and not granted to the Defendant, who was Vendee of the Trees only; but non allocatur, for the Liberty was annexed to the Trees, and as incident to them, assignable with them.)


21. After an Eentment brought by Commons of a Statute, and a Liberale return'd, the Lands arepot assignable before Entry; by the Opinion of Holt Ch. J. Dolbin and Eyre J. as it seems; and Holt said he had known this before Justice Ellis in the Circuit, and held not assignable for want of an actual Entry and Possession. Show. 290. Mich. 5 W. & M. Hannam v. Stephens.

22. It has often been doubted as a Lease for Years before Entry and Possession be assignable; per Dolben J. Show. 291. Mich. 3 W. & M. in Cafe of Hanham v. Stephens.

23. The Lord Montjoy feized of the Manor of Canford in Fee did, And where by Deed indentent and inrolled, bargain and sell the same to Brown in Fee, in which Indenture this Clauze was contained, provided always, and the said Brown did Covenant, and grant to and with the said Lord Montjoy his Heirs and Affigns, that the Lord Montjoy, his and Affigns might dig for Ore in the Lands (which were great Waste) Parcel of N. the 2nd of the said Manor, and to dig Turf also for the making of Allum. Resolved, that
Aflation.

24. J. G. being possessed of a Term of 2000 Years, devised the Estate to M. his Wife for 50 Years if she live long like, and from and after her decease to B. his Son for 50 Years, if he should live, and from and after his decease, to C. and D. his two Grand Children, for and during the Residue and Remainder of the said Term. C. affirms his Interest in the Life Time of M. and B. and the Question was, whether this was such an Interest vested in the Life Time of M. and B. as was affailable in their Life Time; it was argued that it was a contingent Interest, till after the Decease of M. and B. and if so, altho' it be such an Interest vested as cannot be defeated by the first Devisees, and such as may be released in their Life Time, yet it cannot be affailable over; and seems to be the same Case to this Purpoze, as Matthew Manning's Case and Lampett's Case; on the other Side it was insisted that here is but one Part of the Term carved out, viz. 50 Years and 50 Years, and the Remainder of the Term refted in the Deviseor, which he had Power to devise as he thought fit, and the Devisee might affailable over; and in Manning and Lampett's Cases, the whole Term was devised to the Party for Life, and was in him during his Life, and nothing but a Possibility in the Executory Devisee. And the Matter of the Rolls was of that Opinion, that this was an affailable Interest, and that the Moietis pass'd by the Aflation, and decreed accordingly. 2 Freem. Rep. 238, 239. pl. 309. Trin. 1706. Kinglader v. Courtney.

25. A Man by his Will gives a Legacy of 300l. to a Feme Covert, without creating any separate Truf't of it, for her Benefit, and this Legacy was made payable out of a Reversion of Land expectant on an Estate for Life; the Husband of the Legatee, some Time after, makes an Aflation of this Legacy to Truftees in Truf't, and for the Benefit of his Children, and after by his Will takes Notice again of the fame Legacy, and devises it in like Manner for the Benefit of his Children, and makes his Wife, to whom the Legacy was originally given, his Executrix, and dies; the Estate for Life drops, and the Widow applied to the Executor of the first Testator for the 300l. Legacy. The Court decreed, that for as much as the Husband who had a Power to extinguish or release this Legacy, had made a good Aflation thereof in Equity, and having again by his Will confirmed that Aflation, and given it again in the fame Manner, bound his Wife the Legatee. Gilb. Equ. Rep. 88. Mich. 1 Geo. 1. Atkins v. Dawberry.

26. J. S. the Cefty que Truf't of a Term, upon his Wife's joining in a Sale of Part of her Jointure, by Deed directs and appoints, that his Truftees after his and his Wife's Decease, should affign the Residue of the Term to his Wife's Daughter (under whom the Plaintiff claimed) when she shall attain the Age of 21 or be married, after the Decease of her Father and Mother. The Daughter being married, she and her Husband in the Life Time of her Father and Mother, affigned the Term to the Plaintiff; the Question was if such a Possibility could be affailable, and Plaintiff well intitled in Equity. Ld Keeper said, Equitas tequitur Legem, and that which is the Rule of Law, must be the Rule here. It is a Notion that has obtained at Law, that a Possibility is not affailable, but no Reason for it, if Res integra; but the Law is not so unreasonable, but to allow
that it may be released. The Law holds it to be unreasonable that there should be an Incumbrance on a Man's Estate, that can no Way be discharged, and therefore doth allow that a Possibility may be released, and dismissed the Plaintiff's Bill, but without Costs. 2 Vern. 563, 564. pl. 511. Mich. 1706. Thomas v. Freeman.

27. A Guardianship is not assignable; per Lords Commissioners. 2 Wins's. Rep. 121. Hill. 1722. in Cafe of Eyre v. Lady Shatsbury.

28. The late Duke Hamilton being bound to pay Sir James Grey a Sum of Money in a Year after his Death, gave a Note, by Way of collateral Security, that the Money should be paid out of such Arrears of Rent as should be due at his Death; the Benefit whereof Plaintiff now prayed by her Bill. But the Matter of the Rolls said, this Assignment or Agreement is utterly void, for it cannot create any specific Lien, because the Thing itself (viz.) the Arrears, was not then in being, nor is it to take Effect till the Death of the Duke; and then it is too late, for the Arrears then become Part of his Affairs liable to his Debts generally; and this differs from the Cafe of Off-Reckoning or of Pay due or to become due &c. (which Cafes were objected) because in those Cafes the Thing assigned is certain, and the Assignee has a certain Interest; but notwithstanding the Assignment or Agreement, he (the said Duke) had it still in his Power to receive all the Arrears, and to defeat his own Assignment &c. wherefore &c. and he said that future Contingent Interests are no more assignable in Equity than at Law. M S. Rep. 546. Mich. 1730.

Lady Gray v. Dutchess of Hamilton.

29. 3000 l. was to be raised by a Trust Term in a Marriage Settlement, for Portions of Daughters as should be living, and not advanced by the Father at his Death. There being several Daughters, B. one of them, after the came of Age, in the Life Time of her Father, and whilst she was unmarried, releases all her Share in the 3000 l. to the Owner of the Inheritance. B. marries, the Father dies, and Bill is now brought by her as in her Right to have her Share &c. Defendant pleads the Release in Bar, and it was in- Fits for the Defendant, that this Share of B. tho' a Possibility only at the Time of the Release, was assignable in Equity, tho' not at Law, and by the same Reason might be released in Equity, and that Possibilities are assignable in Equity, and cited Digden and Watkinson, Gibbons and Dunlay Cafes in Parliament, 16th March 1729. Lord Chancellor said that Choses in Action, and Possibilities are assignable in Equity, if made upon a Consideration, but here no Consideration appears; and at Law a Possibility may be released, but this is a Demand in Equity under a Trust, and therefore shall be supported by a Consideration; and ordered the Plea to stand for an Answer. M S. Rep. Hill. 1734. Robinson v. Bavor.

(C) In what Cases it must be made on the Land.

1. If a Lessee be oufled of Possession, he cannot assign his Interest over, while the tortious Occupier continues his Possession, unless the Deed of Assignment be sealed and delivered upon the Land. Dal. 81. pl. 20. 14 Eliz.

2. It was held upon Evidence, that if the Lessee for Years of the Queen be oufled by a Stranger, yet altho' he be out of Possession, he may assign over his Term; for the Reversion being in the Queen, he cannot be out of Possession, but at his Pleasure. Cro. E. 275. pl. 5. Hill. 34 & 35 Eliz. C. B. Wingate v. Marke.

(D) Aff.
(D) Assignee. Who.

1. Condition in a Lease was, that neither he nor his Assigns should alien without Licence. The Lessee died intestate. The Administrator was bound by this Condition; cited per Walmley J. to have been so adjudged. Cro. E. 757. pl. 24. Pash. 42 Eliz. C. B. cites D. 132.

2. The Law will never hunt for an Assignee in Law where there is an Assignee in Deed; Per Coke Ch. J. 3 Bult. 169. Pash. 14 Jac. in Cafe of Allen v. Wedgewood.

3. Upon a Fine the Use of Lands was limited to A. for 80 Years, with a Power to A. and his Assigns to make Leases for three Lives, to commence after the Determination of the said Term. A. assigns over to B. B. dies, and makes C. his Executor, who assigns over to D. who made the Lease for Life, which was the Estate in Question. And the Question was, whether or no D. was such an Assignee of A. as had Power to make this Lease? Or whether it should extend only to the immediate Assignees of A.? And the Doubt in this Case was the greater, because here was a Defect upon an Executor, who made the Estate over to him, who makes the Lease, and the Case in Hob. 11. Deale v. Styleman, was cited where an Executor or an Administrator in some Cases shall not be said to be a special Assignee; but all the Court seemed to incline to the contrary; and that D. shall be said an Assignee well enough to this Purpose, and so shall any Person that comes to the Estate under the first Lessee, tho' there be 20 meane Assignments; and afterwards, in Mich. following, Judgment was given accordingly. Freem. Rep. 476. pl. 654. Trin. 1679. How v. Whitebanck.


5. Where a Power is coupled with an Interest an Assignee of an Executor of an Assignee may take as Assignee. 2 Show. 57. pl. 43. Pash. 31 Car. 2. B. R. Whitefield v. How.

6. Lease to A. and B. for 99 Years, if &c. rendering a Heriot. A. takes Husband and dies; agreed per three Justices that the Husband is Assignee within the Word (Assigns) in the Lease. 2 Laww. 1367. Trin. 2 Jac. 2. Osborn v. Sture.

7. A. covenants for himself, his Executors, Administrators and Assigns, to permit and suffer a Thing to be done; this cannot extend but only to Assignees after the Covenant entred into. 2 Vent. 278. Hill. 2 W. & M. in C. B. Target v. Loyd.

(E) Assignee. What Actions and Advantages he may have.

1. ASSIGNEE of a Reversion shall have Writ of Writ of Entry in Confinami Casu upon the Alienation of the Tenant for Life, or Formedon in Reverter as the Donor shall have after the Tail determined. Br. Deputy, pl. 17. cites 7 E. 3. 54 and Fitzh. Bril 947.

2. The
2. The Assignee of the Conveyance after Execution had upon Statute Merchant shall have Scire Facias to re-have the Land. Br. Deputy, pl. 18. cites 32 E. 3. and Fitzh. Scire Facias 101.

4. Assignee of an Annuity granted in Fee was admitted to maintain Writ of Annuity. Thel. Dig. 18. lib. 1. cap. 21. S. 1. cites Mich. 41 E. 3. 27. and says fee 21 E. 4. 83.

4. And Ibid. S. 2. says, so is the Opinion of Hill. 9 H. 7. 16. where the Prior of St. John’s who had an Annuity by reason of a Commandry by Prescription, leaved the said Commandry to one for Years, and the Leesee had Writ of Annuity.

5. Where the Leesor for Years ouitd his Leesee and incoffed a Stranger, and after the Leesee re-enters, there the Feoffee shall not have Action of Debt for the Rent Arrear against the Leesee. Thel. Dig. 18. lib. 1. cap. 21. S. 5. cites Trin. 9 H. 6. 16. and says fee 2 H. 6. 4. and Hill. 5 H. 5. 12. and adds Quære.

6. The King being as Assignee in Law shall have Action of Debt upon Se Prerogative Obligation made to an Outlaw. Thel. Dig. 19. lib. 1. cap. 21. S. 10. 3tive (M. b. 8) cites Mich. 19 H. 6. 47.

7. Tho’ to whom the King grants any Sum of Money to be paid by Teller, Custoner, or such Receivers and Keepers of his Money upon Tally to them delivered shall have Action of Debt; and also tho’ to whom his Majesty grants a Choafe en Action upon Liberate. Thel. Dig. 19. lib. 1. cap. 21. S. 11. cites Mich. 21 H. 6. Det. 43. 27 [H.] 6. 9. Hill. 37 H. 6. 9. Hill. 37 H. 6. 17. 1 H. 7. 4. and 8. and 2 H. 7. 8.

8. The Grantee of the King brought Writ of Ravishment of Ward where the Ravishment and Marriage was before the Grant; and so it is agreed by the Court, that the King may grant a Choafe en Action, and that the Grantee upon this may maintain Action. Thel. Dig. 19. lib. 1. cap. 21. S. 12. cites 5 E. 4. 8.

9. The King had granted to the Countefs of Richmond his Mother an Advowson and Avoidance. when the Church was void; and upon this Grant for this Prefentment brought Quære Impedit; and adjudged that the Countefs should have Writ to the Bishop. Thel. Dig. 19. lib. 1. cap. 21. S. 13. cites Pazch. 16 H. 7. 7. and says fee 9 E. 3. 466. and 18 E. 3. 22. that such Grant of Avoidance by the King is good.

10. A fraudulent Bond, which is naught as to the Obligee, will not be. Vetus. 764. made good by Assignment as to the Assignee, but will remain liable to S. C. the same Equity as before; and the Assignee is to have all equitable Advantages which the Assignor could have had; per Parker C. 10 Mod. 456. Mich. 6 Geo. 1. in Canc. Turton v. Benfon.

(F) Take. In what Cases an Assignee may take a particular Estate, tho’ there is no Word of Afligns in the Grant made to his Grantor.

1. A Grant of the next Presentation or Vacation is good, and the Grantee may grant it over, tho’ no Assignee be in the Deed, where the Grantor had Fee in the Patronage. Br. Grants, pl. 112. cites 7 H. 4. 2.
(G) The Difference between an Assignee and Deputy, both with respect to themselves and their Principals.

1. THE Marshal of Fee in B. R., may grant and assign it to J. B. for Life, and a Grantee or Assignee is seised to his own Use, and may have Affise; but a Deputy occupies to the Use of the Officer, and his Forfeiture or Misdemeanor shall make the Officer lose the Office; but Misdemeanor of the Grantee for Life shall make nothing to be forfeited but his own Estate for Life, and not the Inheritance of the Grantor who has the Reversion; quod nota. And there by all the Justices, where the Duke of N. had granted the Office to J. B. for Life, and he is thereof seised, the Duke cannot grant to him to make a Deputy. Brooke says the Reason seems to be, because by the first Grant the Grantee is Officer for Term of Life; and therefore if it be not granted to him in the first Patent to occupy and exercise by himself, or by his sufficient Deputy, he cannot grant after to make a Deputy; for it was admitted that the Duke himself might make a Deputy before his Grant, if he himself had exercised the Office, and so it is done at this Day. Br. Deputy, pl. 7. cites 39 H. 6. 35.

(H) Pleadings.

1. IT was said that if a Man pleads Deed in Bar as Assignee, and the Plaintiff says that he has nothing of the Assignment &c. which is found against him, this is peremptory to the Demandant; quod nota. Br. Peremptory, pl. 30. cites 20 Afl. 4.

2. In Affise the Tenant pleaded Forfeiture with Warranty made by the Ancestor of the Plaintiff to W. his Heirs and Assigns, and the Tenant is Assignee of the Assignee, and yet this is well pleaded; quod nota. Br. Deputy, pl. 5. cites 38 E. 3. 21.

3. Feoffment by the Earl of Gloucester for Fine for Alienation made by one of his Tenants. The Plaintiff in the Replevin pleaded Deed that G. C. who was &c. was seised, and gave to R. and his Heirs to hold by such Services only, for all Services and Demands, that he has; and it was awarded that the Tenant may plead the Deed well enough, as here by way of Rebutter, to say he be Assignee, and no Assignee is express'd in the Deed; but he cannot urge nor have contra formam Feoffamenti &c. which founds in Action, where no Assignee is in the Deed. Br. Deputy, pl. 4. cites 14 H. 4. 5.

4. And hence it seems, that if Assignee was in the Deed, that the Assignee shall have Action which runs with the Land, and the Thing which is in Lieu of Action, as Foncher; for Land is a Thing which may be assigned over. But quære of Annuity; for this is a Thing of such a Nature that cannot be granted over. Br. Deputy, pl. 4. cites 14 H. 4. 5.

5. In Entry in Confiniili Cafu, Lease was made for Term of Life, the Remainder in Tail to the Father of the Demandant. The Tenant for Life alien'd in Fee to the Tenant, and the Writ was that the Tenant had not Entry but by A. B. who held for Term of Life ex Affiliation of the Lessee, which cannot be assigned but by Grant of the Reversion; but
it is by Remainder, as here, it shall be ex Dimission &c. and because not, therefore the Writ was abated. Br. Brief, pl. 248. cites 38 H. 6. 30.

6. In Debt for Rent by Assignee of Reversion, he ought to be named Assignee in the Writ. In a Nota of the Reporter, and says that fodd are all the Precedents. Latw. 481. Trin. 3 Jac. 2. Nichols v. Tymms.

7. Where the Party pleading derives an Estate to himself, he muft set Skin. 303. forth all the moft Assignments of the Lease for Years (or Grant for Years Pl. 7. S.C, by Letters Patron) in the Pleadings; but where he derives an Estate to his Adversary, under which he does not claim any Thing, in such Case general Pleading of Per diversas medias Assignmentes decemit &c. is sufficient, because he has no Means to know another Man's Title. Carth. 209. Hill. 3 W. & M. in B. R. Tucker v. Hodges.

8. In Covenant against J. S. as Assignee of W. R. the Declaration only set forth that the Tenements came to the Defendant by Assignments, Virtute quarum &c. and therefore held ill; for it should have been set forth that the Defendant was Assignee of the Term of J. S. For else it might be an Assignment of another Estate than this Term of J. S. and the Words (Virtute quarum &c.) will not help it; for those are only by way of Inference, and not transferable, and such a Conclusion which is not warranted by the Premisses. Carth. 236. Mich. 4 W. & M. in B. R. Huckle v. Wye.

9. Assignment over of a Lease may be pleaded without Notice. See the Case of Tovey v. Pitcher, 4 W. & M. in B. R.

10. There is a Difference between doing a Thing by a Man and his Assigns, and to them. If a Thing be done by a Man and his Assigns, you must there allege in the Disjunctive, that it was neither done by him nor his Assigns; but if a Thing be done to a Man and his Assigns, you need not mention his Assigns; for if he has assign'd it over, it must be shew'd on the other Side; per Cur. 12 Mod. 86. Mich. 7 W. 3. Smith v. Sharp.

a Judgment in C. B. was affirmed in B. R.

11. The ancient Method of pleasing Assignments was Virtute ejus the Assignee enter'd, and was poss'd; but that is diffused now; for the Assignee has the Estate in him before Entry, tho' not to bring Treipas; per Holt Ch. J. Ld. Raym. Rep. 367. Mich. 10 W. 3. in Case of Cook v. Harris.

12. Tenant for Years cannot assign over his Term without Writing, but the Assignment may be pleaded without saying it was by Deed; per Cur. 12 Mod. 540. Trin. 13 W. 3. Birch v. Bellamy.

For more of Assignment in General, See Conditions, Covenants, Estate, Grants, Possibility, Rent, Warranty, Waste, and other proper Titles.
Affise.

(A) Of what Things it lies.

1. It lies not of Homage. 1 H. 4. 1. b.
2. It lies not of an Annuity. 1 H. 4. 2.
3. It lies not of a Pension due out an Abby or Priory. 14 H.

Where a Man is seized of Parcel of a Corody, and dispossessed of the rest, he shall not have Affise of the Corody. Br. Affise, pl. 308. cites 30 Aff. 4.

Though the Statute Westm. 2. cap. 27. S. 3. speaks of a Corody, yet an Affise shall be maintained of part of a Corody. 2 Inst. 411. — 8 Rep. 45. a such Parts as belong to Victuals and Cloathing.

4. But it lies of a Corody due out of an Abby or Priory. * 14 H.


(338) cites S. C.— Br. Chimin, pl. 8. cites S. C. — Fitzh. Affise, pl. 317. cites S. C. — S. P. but Quere if it had been a Way appaundant, for it seems to be in Gros.

S. P. and so of a Passage Ultra aquam; for it is no Frankenement nor Profit Apprander. Br. Affise, pl. 422. cites 31 E. 1. and Fitzh. Affise, 440 — But other wife of a Way appaundant, as appears elsewhere. Ibid. — S. P. 8 Rep. 46. b. accordingly, because there is Nullum Provincia Capidendum as the Statute mentions — Affise lies for stopping a Way which a Man has to his House or Land. F. N. B. 183. (N) so that it ought to be a Way appaundant, for of a Way in Gros he shall only have Action on his Cafe. F. N. B. 183. (N) in the new Notes there (a) cites 11 H. 4. 26. per Car. And so of a Way to a Church, because he has no Freehold in the Church, cites 4 E. 1. Nullaice 8, but contra it seems as to a Way to a Church which one has Raitone Tenure. Quere if not an Action on the Cafe, or a Writ of Affise at his Election. Ibid. — Jenk. 17. pl. 50. S. P. for a Way ought to have a Terminus a Quo ad Quem, and to be of some Benefit to intitle a Man to have an Affise, and therefore if it be only in Gros an Affise lies not for the stopping it; for such Granee has no Freehold.

5. In Affise does not lie of a Way over certain Land, but a Quod permittat, for it is but an Election. 34 Aff. 113. vol. 13. adjudged. [It seems that the (113. vel) should be let out.]


7. In Affise, Plain of a Croft was made, but afterwards amended by the Plaintiff de gree. Thel. Dig. 66. lib. 8. cap. 3. S. 3. cites Pauch. 15 E. 2. Plain 25. but says a Man shall never have Precipe quod reddat de uno Crofto, cites 14 Aff. 13. and says, that so it was laid by Babington loco praedicto.

S. P. accordingly, by the Opinion of the Court.


Affise lies of a Croft, because it is put in View to the Recognitors; Per Roll Ch. J. Sty. 50. Trin. 25 Car.

S. Where
8. Where Rent is granted, and out of no Land, but the Grant said fur-
then, that if the Rent shall be arrear the Grantee may distrain in D. Afs-
life lies of this Rent, because Land is charged to the Diftrefs; Quod

Afsife pl. 110. cites 3 Afs. 7.

9. In Afsife, a Plaintiff was made of 4 Acres of Saucey, and held good S.P. by
Thel. Dig. 66. lib. 8. cap. 4. S. 1. cites 11 Afs. 13. TheAllo fays, he
thinks that it is Salicetum in Latin, viz a Place where the Willow
grow, and cites 7 Afs. 18.

10. Thel. Dig. 66. lib. 8. cap. 4. S. 2. fays, Quære of Purze but in di-
verse Write, and a Precipe quod reddat of so many Acres of Turchary,
was held good, cites Paflch. 8 E. 3. 387. But fays it was faid there,
that it should be demanded by Nome of a Moor.

11. In Afsife a Plaintiff was made of two Parts of the Boilowry of two S. P. by
Leads of Salt Water &c. in the County of Lancaster, which Plaintiff was
9 E. 3. 466. But fays, A Precipe quod reddat was brought of two Salt-pits
in pl. Hill. 9 E. 3. 443. and that fo is the common Form and Courfe at this
10. fays, that
Afsife lies de
Bullaria Salt-
ina &c,

12. A Man shall not have Afsife of the Farm of a Fair, for it is not in
Loco certo capiendo, as in the Statute, and yet the Feme thereof en-

13. Plaintiff was made and admitted of two Shops in Afsife. Thel. Dig. *Cro. C. 555,
66. lib. 8. cap. 3. S. 5. cites 14 Afs. 11. and Paflch. 24 E. 3. 16. and 43
C. cited, and S. P. ad-
Aff. 2. Hill. * 48 E. 3. 4. and fays, fce in the Regifter, Fol. 2. a Preci-
pecio quod reddat de duabus Shopsis.

Crooke and Barkley as to a Shop.

14. In Afsife the Plaintiff was made of a Cellar &c. Thel. Dig. 66. lib. S. P. ad-
mitted by


15. Afsife of 10l. Rent iffuing out of the Hundred of B. The Defendant fays, where a
faid that there are several Vills, viz. A. and B. in the Hundred, which are
not named in the Writ; Judgment of the Writ, and if &c. Per Shard, a
Man gives
Adrow-
Hundred is a Thing not manurabil, which cannot be put in View, and
therefore the Afsife does not lie; for it is not a certain Place. Br. Afsife,
pl. 309. cites 30 Afs. 5.

of the Rent, and alfo thu Plea ought to be given by Tenant, and not by Defendant; by which the
Afsife was awarded. Ibid.

16. It is a good Plea to the Jurisdiction, that the Land is his Church-
yard. Br. Jurisdiction, pl. 120. cites 44 E. 3.

17. In Dower it was faid by Babington, that Precipe quod reddat S.P. as to
does not lie of a Cottage; but Plaintiff in Afsife of a Cottage is good. Thel. Afsife, per
Dig. 66. lib. 8. cap. 3. S. 2. cites Mich. 8 H. 6. 3.

18. Upon denying Rent-charge or Rent-seck, Afsife lies; but not of Rent-
service without Rescous; and it was adjuoned into the Exchequer-Cham-
ber for Difficulty of the Verdick. And if Rent issues out of Land guid-
able, and of Land in ancient Demifne, Afsife of the imite Rent lies at
Common Law. Br. Afsife, pl. 69. cites 8 H. 6. 11.
19. If a Man is seised of a Ferry which extends into 2 Counties, and is
disseised, he shall not have Affise; per Portington. Br. Affise, pl. 76.
cites 22 H. 6. 9. 10.

20. Needham J. said, that if one was disseised of the Annuity which
pertains to his Office of Justice, he shall have Affise of his Office, which
was affirmed by all the Justices except Yelverton. Quere, for it seems
that a Justice has no Office but at Will. Br. Affise, pl. 389. cites 5 E.
4. 10.

21. Rede said, that a Man shall have Precipe quod rediat of a High
Chamber in a House. Thel. Dig. 66 lib. 8. cap. 3. S. 6. cites Mich. 5 H.
7. 9. But says it is reported there that the contrary is held 21 H. 6.
because it is not Franktenement; for it cannot have Continuance perpet-
ually, because if the Foundation periles the Chamber is gone; and
that fo it is affirmed Patch. 3 H. 6. Plaintiff I. where Babington said that
a House is not Franktenement, if it does not touch the Land. And all
the Justices agreed, that such a House which is upon another House can-
not be put in a Plaintiff nor in a Writ; but an Exchange was pleaded of
Land for a Chamber. Thel. Dig. 66. lib. 8. cap. 3. S. 6. cites Mich. 9
E. 4. 40.

22. Plaintiff in Affise lies of a Garden or Toft, but not Precipe quod red-

S. C. and that by Hufey Ch. J. that one shall not have a Precipe quod rediat of a Garden only, but
that he may have Plaintiff in Affise of a Garden, and of a Toft.——S. P. by the Opinion of the Court.
Br. Dower, pl. 92. cites 8 H. 6. 3.

23. If one has Common of Eftovers in the Wood of another, and the
Tenant and Owner cuts down all the Wood, the Commoner shall have
an Affise of his Eftovers. F. N. B. 58, 59. (1)

24. An Affise was brought of the Office of Saddler to the Queen, granted
to the Demandant by the King; but was held void by the whole Court,
because the King could not make an Officer to the Queen, and no Place
was mentioned where he should exercise and enjoy this Office, and take the
Profits, and therefore the Jury could not have the View, and so Affise
cannot be taken. So if the King grant the Office of Uber to the Prince of
Wales, an Affise will not lie. 1 Brownl. 28. Patch. 6 Jac. Anon.

An Affise
was brought of the Office of Clock-
keeper to the
Prince by
Grant of the
King, during
his own Life,
with a Sala-
ry &c. but the Patent purported the Grant only without Words of Creation, As Constitutam Officium &c.
no could the Plaintiff prove that it was an ancient Office, and therefore nonfulit, tho' the Tenant
but S. C. says the Plaintiff shew'd a Grant of the same Office in E. 6. Time; but that was held no an-
cient Time.

D. 83. &c. pl. 77. &c.
Patch. 1 E.
The Dean and
Chapter of
Brisfhol
v. Clarke.

25. Affise cannot be brought of Rent issuing out of a bare Rent of Tithes
only, tho' it may be de Portione Decimarum, as is clear by Ld. Dyer,
7 E. 6. and the Difference rightly itated; per Vaughan Ch. J. Vaugh.

204. Hill. 19 & 20 Car. 2.
By the Statute of Westminster 2.

Par. 3. And granteth that for Eftovers of Wood, Profit to be taken in * The Words by gathering of Acorµ's &c. for a Corody, for Delivery of Corn, and other Privileges and Necessaries to be received yearly * in a Place certain Toll, Tronage, Pailage, Pannage, and such like, to be to Eftovers, taken in Places certain, keeping of Parks, Woods, Forests, Chaces, Warren, Gates, and other Bailiwicks and Offices in Fees, from henceforth an Affife of Novel Diſtelfin shall be.

Offices; but yet the Offices must be in cerro Loco, which is to be so understood as that the Office be held in Loco, yet it must be in cerro Loco when the Affife is brought. 2 Inf. 412.

In Affife of the Office of Clerk of the Crown in Chancery, it was alleged that Affife does not lie but in Loco certo Capitands, and the Chancery is moveable, and not certain, and therefore no Affife; & non allocatur. Br. Affife, pl. 95. cites 9 E. 4. 6.

Affife does not lie in an Office, unless it be of an Eftate of Fee, as it seems by the Statute of Weffin. 2. cap. 25. Br. Affife, pl. 15. cites 53 H. 6. 6. & 7.


Affife was brought of the Office of the Keeper of the Forest of P. and Affife of Lordship of the Bawseyrick of the Forest of P. Br. Affife, pl. 122. cites Trin. 2 E. 5. in B.R.—And Affife was brought of the Office of Usher of the Exchequer. Ibid. cites 8 E. 3. 7.

And tho' the Words are general, yet this Act is to be intended of Offices of Profit only, and not of Charges of Office and no Profit; but it extends as well to Offices in the Admiralty Court, Ecclesiasticat Court, or any other Court, what either the Civil or Ecclesiasticat Law, or any other Law than the Common Law &c. of England doth rule, as to Offices in Temporal Courts which are governed by the Common Law &c. as by the Authorities aforesaid, and John Webb's Case appeared. 2 Inf. 412. — 2 Inf. 47. b. 49. b. S. P. accordingly.

If a Man be dìfflfeft of the whole Office, he shall have an Affife de Officio cum pertinen; & albeit the Statute spakeft de Officios, yet it be dìfflfeft of Parcel of the Profits, he may have an Affife of that Parcel; but therein also are Diversities, as you may read in John Webb's Case. 2 Inf. 412. — 8 Rep. 49. b. S. P. accordingly.
Aflife.

Par. 4. And in all the Cases afore rehearsed, according to the accustomed
rules of Law, the Writ shall be de Libero Tenemento
and Fid in

Writ of Aflife of Common shall be of Common of Pasture, and not de Libero Tenemento; and if it be

Par. 5. And as before times it hath lain and holden Place in Common of
Pasture, so shall it from henceforth hold Place in Common of Turf, Land, Fishing, and such like Commons which any Man hath appendant to Freehold, or without Freehold by Special Deed, at the least for Term of Life.

This is an
Aflime of the Com-
on Law; to the Feoffee, the Remedy shall be by a Writ of Novel Diffidium, and as
for the Free-
well the Feoeffor as the Feoffee shall be bad for Diffidors, so that during
hold being
in the Leffor
or in the Heir, the Livery being made by the Leffor for Years, or Guardian, doth work a Diffi-
dium, because by this tortious Livery he difiideth the Leffor, for which they may have an Aflise of Novel Diffidium at the Common Law, and both the Feoeffor for making, and the Feoffor for taking a tortious Livery were both Diffidors; and so it is if Tenant at Will or Tenant at Suiterence make a Leafe for Years, and the Leffor enter, this is a Diffidium to the Leffor at the Common Law. 2
Inf. 412, 413.

This Act speaks first of a Tenant for Year, and yet a Tenant by Elegen Statute Merchant, or the
Shall, are within this Law; and is it of a Tenant at Will, or a Tenant at Sufferance, for all their
have a Possession, but otherwise it is of a Blitiff, for he hath no Possession at all. 2dly, Of Guardi-
which extended not only to Guardian in Chivalry, but to Guardian in Seaco, &c. by Caufe of Nurturer. 3dly, Of an Alienation in Fee, and yet an Alienation in Title or for Life, is within this Act, because they are within the same Mischief. 4thly, If Tenant for Years, or a Guardian make a Leafe for Life, the Remainder for Life, the Remainder in Fee, and Tenant for Life enters, he is a Diffi-
dor, because he taketh the first Livery; and so it is of him in the Remainder for Life, or in Fee, if he enter. 2
Inf. 413.

S. P. as to Tenant by Elegen, his Executor, or Alligee, by the Equity of the Statute. Br. Parliament, pl. 104. cites 22 Afl. 45.

Par. 6. In Case also when any holdeth for Term of Years, or in Ward, Alieneeth the same in Fee, and by such Alienation the Freehold is transferred to the Feoffee, the Remedy shall be by a Writ of Novel Diffidium, and as
for the Free-
well the Feoeffor as the Feoffee shall be bad for Diffidors, so that during
hold being
in the Leffor
or in the Heir, the Livery being made by the Leffor for Years, or Guardian, doth work a Diffi-
dium, because by this tortious Livery he difiideth the Leffor, for which they may have an Aflise of Novel Diffidium at the Common Law, and both the Feoeffor for making, and the Feoffor for taking a tortious Livery were both Diffidors; and so it is if Tenant at Will or Tenant at Suiterence make a Leafe for Years, and the Leffor enter, this is a Diffidium to the Leffor at the Common Law. 2
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dor, because he taketh the first Livery; and so it is of him in the Remainder for Life, or in Fee, if he enter. 2
Inf. 413.

Par. 8. And albeit, that above mention is made of some Cases, wherein a
Writ of Novel Diffidium hold no Place before, let no Man think therefore that this Writ lieth now where it hath lain before.

These
Words are to be intended,
when one claims
Common in
the several lands of another, and puts in his Cattle to use the same; the Owner of the Soil hath two
Ways to help himself, either to wave the Possession, and then to bring his Aflise as one out of Possession,
as in the common Cafe of a Diffidium, and then he shall have Judgment to recover the Land and Dam-
ages; or else he may keep his Possession, and bring his general Writ of Aflise of Novel Diffidium, and if the Tenant pleads to the Aflise, that the Plaintiff was Tenant of Land the Day of the Writ
purchased, and yet is; the Plaintiff may maintain his Writ, and say, that the Land was, and is his
Several, and the Defendant did feed his Several with his Cattle, and according to this branch of this
Act he prayeth the Aflise; and in this Case if it be found for the Plaintiff, he shall have Judgment to
hold the Land as his Several, and Damages. 2
Inf. 413.

A Feme Co-
vert and an
Infant is
not within
this Statute,
to have Cor-
poral Pun-
ishment by
Imprison-
ment by
Par. 10. And let them which be named Diffidors beware from henceforth,
that they allege not false Exceptions, whereby the taking of the Aflise may be deferred, saying that another Time an Aflise of the same Land passed between the same Parties, or saying, and falsely, that a Writ of more high
Nature bargeth between the Parties for the same Land; and upon these
and like Matters do vouch Rolls or Records to Warrant, to the End that by
the same Vouching they may take away the Vouche, and receive the Rents
and other Profits, to the great Damage of the Plaintiff.

Par. 7. And if by the Death of the Parties, Remedy happen to fail by
that Writ, then Remedy shall be obtained by a Writ of Entry.

Par. 9. And tho' some have doubted whether a Remedy be had by this
Writ, in Case where one feedeth in the Several of another, let it be had
for certain, that a good and a fair Remedy is given in that Cafe by the
said Writ.
In a Formedon or any other Real Action, if the Tenant plead a Record, and fail thereof at the Day, the Demandant shall not have Seisin of the Land, but only a Petit Care; for this Statute extendeth only to the Affize of Novel Diminution; and in Case of the Affize, if the Tenant before this Statute had pleaded a Record, and failed thereof, yet the Affize should have been taken, as appear by this Act, 2 Inst. 414.


In Affize, if the Defendant pleads that Not attached by 15 Days which is found against him by Examination of the Bailiff, this is not peremptory. Br. Peremptory, pl. 66. cites 6 R. 2. and Fitzc. Affize 462, and 21 Aff. 19. accordingly. —— It is no Plea in Affize in B. R. Br. Affize, pl. 95. cites 9 E. 4. 55.

Contr. He is not found against him by the Affize. Ibid.

But it is not usual to try it by Affize at this Day, but to make the Tenant answer over, if the Bailiff be not present to be examined. Ibid.

Par. 13. And if that Exception be alleged by a Bailiff, the taking of the Affize shall not be delayed therefore, nor the Judgment upon the Restitution of the Lands and Damages.

In an Affize, the Bailiff cannot plead any Matter of Record, either in Bar or to the Writ; for the Bailiff cannot plead any Matter, or any Plea out of the Point of the Affize, nor any Thing that is not triable by the Affize, nor any Plea which he cannot conclude, Et si founde ne faire, Nul Tort, Nul Diffidion; and if therefore the Bailiff do plead any Matter of Record, yet the Jusrices shall proceed &c. and give Judgment; but then the Defendant named in the Affize, may come unto the Jusrices, and verify that there was such a Matter of Record &c. and he shall have a Certificate of Affize by Force of this Act. 2 Inst. 414.

Par. 14. Yet nevertheless, that if the Matter of such a Bailiff that was absent, come after before the Jusrices that took the Affize, and offer to prove by Record or Rolls, that at another Time an Affize passed between the same Parties of the same Land, or that the Plaintiff at another Time did withdraw his suit in a like Writ, or that a Plea was given by a Writ of a more high Nature, a Writ of Venire Farcum shall be granted unto them, to cause the same Record to be brought, and when he hath the same, and the Jusrices do perceive that the Record so fetched by him, would have been so suitable before the Judgment, that the Plaintiff by Force of the same should have been barred of his Affize; the Jusrices shall presently cause the Party to be warned that first recovered, that he appear at a certain Day, at the which the Defendant shall have again his Seisin and Damages (if before paid any by the first Judgment given) yet shall all be restored to him to the double, as before is said.

Par. 15. And also be that first recovered shall be punished by Imprisonment, according to the Direction of the Jusrices.

Par. 16. In the same Manner, if the Defendant, against whom the Affize of such a Bailiff was pleaded in his Abstinence, shew any Deeds or Relics, upon the making whereof the Jury were not examined, nor could be examined, because there was no mention made of them in Pleading, and by Probability might be ignorant of the making of those Writings; the Jusrices upon the Sight of those Writ-
Ailife.

Par. 17. And if he shall verify those Writings to be true, by the Verdict of the Jurors, or by Involuntary, be that purchased the Ailffe contrary to his own Deed, shall be punished by the Pain aforesaid.

Tenant shall not only have a Certificate of an Ailffe by the former Branch upon Matter of Record, but also by this Branch upon Deed, and quiet Claims, and the Reason whereof is, for that the Bailiff could not plead the same. And it is to be observed, that after the Bailiff hath pleaded to the Ailffe, the Tenant may come before the Ailffe taken, tho' it be after the Ailffe awarded, and plead any Deed, quiet Claim, or other Matter of Certificate, and shall not be driven after the Ailffe taken &c, to sue his Certificate upon this Act, to trouble the Tenant and the Recognitors of the Ailffe; Quia frutrum fit per prum, quod fieri potest per Pauciora. 2 Inf. 415.

* Upon this Branch it hath been conceived, that the former of the former Recognitors be dead, it shall be tried by the former, and others; for tho' this Act doth ordain, that a Venue shall be awarded to the Jurors of the same Ailffe, yet the subsequent Words be, Et si per Vereditum Juratorem, and thus not Pradictorum; and so as upon this Act an Addition may be made. 2 Inf. 415.

In an Ailffe the Plaintiff made Title to 10 Marks Rent by Specialty of the Grant of the Tenant, and the Ailffe was taken by Default, and after the Ailffe upon shewing of a Deed of Defeasance of the same Rent, upon certain Conditions to be performed on the Plaintiff Part, or otherwise the Rent to cease, which he avowed to be broken, which Deed of Defeasance did bear Date in a foreign County, viz. in London; whereupon a Certificate upon this Statute was prayed before the Justices of Ailffe, who adjourned the same in Bank to be resolved, whether a Certificate did lie upon this foreign Defeasance; where it was awarded, that the Certificate was maintainable, and that the Deed of Defeasance being denied, should be tried in London, where it was found for the Tenant; whereupon the Certificate was remanded to be taken in the County where the Ailffe was brought. Out of this Record three Things are to be observed. 1st. That a Certificate doth lie upon a Defeasance bearing Date in a foreign Country (as well as upon a Charter or Acquittance) which was tried by Jurors of that foreign County, and by none of the Recognitors of the Ailffe. 2dly, That a Certificate lieth by this Act, upon a Recovery by Default, as well as where the Tenant pleads by Bailiff to the Ailffe. 3dly, That the Certificate must be sued and adjudged in the County where the Ailffe was sued. 2 Inf. 415, 416.

This Ox was not any Reward for doing his Office, for that was prohibited by the Statute of W. 1. cap. 26, but this was a Duty due by ancient Custom after the Cause ended, but where it was due only from the Diffeisor, the Sheriff before this Act did also incroach the like upon the Diffeisor, which is restrained by this Act, and to be taken only of the wrong Doer, and neither of the Diffeisor, nor of the Tenant that is no Diffeisor. 2 Inf. 416.

This Branch * And if there be many Diffeisors named in one Writ, yet shall be be con-

The taking of 3d. of A. for a Capias against B. is a sufficient Seisin of the Office of Pilizer, de Banco. D. 2, 3. Pl.

114. 63.

2. In Ailffe of the Office of Register of the Admiralty the Demandant laid a Prescription to it, viz. Quod quilibet hujusmodi Perfona, which should be named by the Admirals, should be Register of the Admiralty for Life. D. 149. a. pl. 81. and 152. b. 153. a. pl. 9. &c. Mich. 4 & 5 P. & M. Hunt v. Elfordon and Allen.

3. In Ailffe of the Office of Serjeant at Mace to the House of Commons, the Defendant being put to prove Seisin proved only that he went to the House of Commons, and demanded his Place, but never received any Fees, but that in an Action on the Case brought by him for disturbing him he recovered 300 l. Damages. Some of the Judges thought this

(B) Of what Seisin for an Office.
Aflife. 167

this a sufficient Seifin, the Damages being recovered in Satisfaction of Fees, he being kept out of the Possession of his Office; but others held in re tributory, and this was intended to be found specially, but the Demandant chose rather to be Nonuit. 2 Lev. 108. Trin. 26 Car. 2. B. R. Cragg v. Norfolk.

pounded with the Plaintiff for the Fees, and gave him 20s. and this (notwithstanding that the Defendant was in Possession long before and after) was held a good Seifin; for the Plaintiff cannot be dispossessed of the Office but at his Election. And it was also proved in Evidence, that the Plaintiff being in the Lobby of the House of Commons, near the Door of the House, laid his Hands upon the Mace, then being in the Hands of the Defendant, and would have taken it, but the Defendant hindered him, and this was held good Evidence of Seifin and Disseisin, and the Recognitors gave their Verdict for the Demandant. 2 Lev 120. Hil. 25 & 26 Car. 2. B. R. Cragg v. Norfolk. — Mod. 122, 123. pl. 28. Anon. but S. C. it was objected, that the Plaintiff was never invested into the Office, but Hale Ch. J. said, that an Investiture does not make an Officer when he is created by Patent, as in this Case, but he is an Officer presently; but if he was created Herald at Arms (as in Segar’s Case) he must be invested before he can be an Officer; and a Person is an Officer before he is sworn.

4. A Man cannot have an Aflife upon a bare Election and Constitution Where a Recorder is at Wilt, they may remove him at Pleasure, as it is in Bagnal’s Case, and several other Cases, and the constituting another under the Common Seal is a Removal. Vint. 342. Trin. 31 Car. 2. B. R. Pepis’s Cafe.

(C) Abridgment in an Aflife.

1. The Demandant in an Aflife may abridge his Plaint at any Time after the Jury are charged, and after they are in the Hotel, in Communication of the Matter, and before Verdict. 33 D. 6. 18. b. adjudged.

it, and after took the Verdict of the ref, and took Day by Adjournment for their Judgment at Westminster, and then the next Term they gave Judgment for the Plaintiff of the ref by Advice of the other Justices — Jenk. 111. pl. 15 8. P. as to abridging the Plaintiff; but says, that after Verdict given and entered the Plaintiff cannot be abridged.

The Plaintiff can not abridge his Plaintiff after Verdict. Br. Abridgment, pl. 15. cites H 25 E. 2 — Kelw. 116 b. pl. 36. says, Nota it was said, that a Man may abridge his Plaint whenever he will before Judgment, but says, Vide the contrary by Vavlor 6 H. 7. 38 (but misprinted, there not being so many Folio’s.)

No Abridgment can be of a Plaintiff after Judgment. 2 Brownl. 277 by Williams J. — After Appearance of the Jury, and before Verdict, the Plaintiff was abridged. D. 132 a. pl. 76. Mich. 2 & 3 P. & M. Grenfield v. Strech.

2. In Aflife, at the first Day the Plaint was made of an Office and of a Corody, and at the 2d. Day of the Corody only, and admitted. Thel. Dig. 76. lb. 8. cap. 28. S. 1. cites Mich. 18 E. 2. Aflife 377.

3. In Aflife, if Dower be brought in one Vill, and the Demand is of a Manor which extends into this Vill, and into another Vill, there by Abridgment of the Demand all may be made good, as appears P. 13 E. 4. 3. in Dower, and to fee that the Exception upon the Abridgment shall extend to another Vill than is named in the Writ. Br. Abridgment, pl. 13. cites 7 Afl. 20.

Note,
Note, that a Man may abridge his Demand in Dowar after the View, but shall not change his Demand after the View. Br. Abridgment, pl. 19. cites 7 E. 3. and Fitzh. Dowar 108.

Fitzh. Brief 4. In Affise de libero Tenemento in Pontfre, the Plaintiff was of a House, 699. S. C. is, and of a Corody, vix. of so many Leaves, &c. and of 3 Loads of Hay in B. It was held, that the Writ should abate, because the Plaintiff was of Hay to be taken in a different Vill from Pontfre, and not so named in the Writ &c. and therefore he was nonasiti; but Fitzherbert says, he thinks that he could not abridge his Plaintiff, because it is all one Frankenement by Specialty.

Br. Abridgment 5. In Affise the Plaintiff was of Land and Rent, the Defendant pleaded in Bar of the Rent; the Plaintiff may abridge his Plaintiff of all the Rent; Quod nota bene by Award; Coram Shard. Br. Abridgment, pl. 14. Abridgment 6. Affise of Land in 2 Wapentakes, and the Panel returned all of one, and none of the other, by which the Array was challenged and found, and therefore it was quashed. And after the Plaintiff would have abridged his Plaintiff of Land in the one out of which no Juror was returned, and was not received because of the Challenge of the Party. Br. Abridgment, pl. 15. cites 28 Aff. 38. —— Brooke makes a Quære, for it was contra in C. B. Hill. 25. E. 3.

Thel. Dig. 76. lib. 8. cap. 28. S. 8. cites S. C. and Fitzh. and tho' he pleaded that the Moiety was fevered by Metes and Bounds &c. yet he could not abridge his Plaintiff for this Moiety. —— Affise of a Manor, the Tenant pleaded in Bar to Parcel, and other Matter to the rest, and the Plaintiff said, that the Parcel in the Bar is the 3d Part of the Manor, and abridged his Plaintiff of it, and was suffered, for it was not pleaded to the 3d Part of the Manor, but to other Quantity, as Acres &c. Br. Abridgment, pl. 16. cites 29 Aff. 4. —— Thel. Dig. 76. lib. 8. cap. 285. S. 12. cites S. C. —— Kelw. 116. b pl. 56.

8. Affise of Common, the Plaintiff made Plaint, and before Challenge be amended it, the Tenant said, that he shall not be received; But per Gren, he may abridge his Plaintiff and enlarge it before Challenge, by which the Tenant pleaded over in Bar. Br. Affise, pl. 331. cites 32 Aff. 5.

9. In Affise, Tenant for Life of two Parts of certain Land, the 3d to him in the Reversion of the two Parts, the Tenant for Life charged the two Parts with Rent of 10 s. and he in the Reversion of two Parts, who had also the 3d Part in Demenef, confirmed this Grant, and by a Clause of Preterea granted other Rent of 10 s. out of his 3d Part, and the Grantee brought Affise of the Rents, and the Tenant pleaded Jointenancy of the 3d Part with a Stranger, by which the Plaintiff abridged his Plaintiff of this Rent issuing out of this, and well; Quod Nota Br. Abridgment, pl. 31. cites 45 Aff. 13.


11. In Affise, the Tenant pleaded Jointenancy for Part, and another Bar for the rest, and as to that to which the Tenant pleaded Jointenancy, the Plaintiff abridged his Plaintiff, and admitted good; Quod Nota. Br. Abridgment, pl. 5. cites 2 H. 4. 20.

13. In
13. In Affise the Plaintiff was of the Moiety &c. and as to Parcel a Re-if Deman-
doevery was pleaded in Bar, and another Bar for the Refidue. The Plaintiff
had his Plain of all that to which the Recovery was pleaded &c.
4. 20.

abridge the Moiety of 5 Acres, because the Acres of which he hath made his Plain of a Moiety, are
several, and not intire. Kelw. 116. b. pl. 36. S. C.

But it was said that if a Man makes his Plain of 10 Acres, and the Tenant pleads in Bar, and severs
the Acres by Moeties, the Demandant cannot abridge his Plain in the Moiety of any of the Acres, be-
cause he made no such Plain by the Name of a Moiety, but his Plain was by Name of Acres, and
therefore he cannot abridge his Plain in the Moiety, but in the Acre he may. Kelw. 116. b. pl. 36.

14. In Affise the Tenant pleaded a Bar to the Moiety, and another Plea
to the other Moiety, and the Plaintiff made several Titles, and were
adjourned upon one Title; and at the Day of Adjournment, after Argument,
the Plaintiff abridged his Plain of it. Quod nota. Br. Abridgment, pl.
cites 10 H. 6. 22.

15. In Affise one Bar was pleaded as to one Moiety, and another Bar for
the other Moiety &c. and the Plaintiff was received to abridge his Plain

16. If a Man makes his Plain of a Manor, he cannot abridge it; for
a Manor is intire, and if he should abridge 5 Acres thereof, then he has
no such a Manor of which he hath made his Plain. Kelw. 116. b. pl.
56. Catus incerti temporis.

17. 21 H. 8. cap. 3. Enacts, That the Plaintiff in Affise may abridge his 1st
Plain of any Part whereunto a Bar is pleaded, in such Manner as he or they
night do in Cafe the Pleas in Bar had been made and divided to any Certainty
or Number of Acres in the Plain; and that the Plain, for the Refidue of
the Part or Parts of the Lands not abridged, shall stand good.

Plaint by the Statute of 21 H. 8. cap. 3. But Abridgment in Dower, nor in any other Action, but in Affise
only, is not remedied by this Statute. Quod nota. Br. Abridgment, pl. 2. per Brooke.

18. In Affise the Plaintiff was of 53 s. Rent, and afterwards 25 s. there-
of was abridged. After Judgment this was assigned for Error among
others; and it was admitted per Cur. to be Error, because the Rent is
a Thing intire, and cannot be abridged as Land and such Things may.
D. 65. a. b. pl. 5. Mich. 3 E. 6. Arundel (Earl) v. Windlor (Lord.)

(D) Of what Possession an Affise lies. [And of the
Ouster of what Tenant.]

1. *2 Ed. 4. 5. b. e Conceal. to Litt. if the Guardian be ousted, * Br. Co-
the Heir may have an Affise, and with this agrees Co. 6. Bred.-
man 57. b.

20 cites S.C.—Kelw. 110. a in pl. 31. Catus incerti Temporis, S. P. For he cannot come to have
Possession in Demeine without doing Prejudice to the Guardian.—2 Infr. 154. cites S. C.

2. 1 D. 7. 18. b. per Riche, the King seiied of a Ward by Office,
of this Possession the Heir may have an Action. 45 E. 3. 26. 3 D.
6. 33. b. 21 Ed. 3. 34. 9 Ed. 4. 33. per Enemy, and Co. 6. Bred-
diman
Aflife.

* See pl. 10. diman 57. b. * Leffee for Years is oulted, the Lessor may have an Amifie.

* Br Colour, pl. 47. cites S. C. and the Court held that it was good.


* Br. Ref- ceipt, pl. 1. cites S. C. & S. P. by Fitzherbert, that the Recoveror shall have Affife.

4. * 27 D. 3. 7. A Reversion of a Leafe for Years is recovered, and before Execution (for the Execution shall cease during the Term) the Leffe is oulted, the Recoveror [Recoveror] shall have an Amifie. But quere this; for Ed. 1. *Sibby 156. b. by all the Judges, if Tenant in Tail in Reversion upon a Leafe for Years sufferers a common Recovery, the Reversion is not in the Recoverors by the Judgment.

5. 9 D. 7. 24. per Curtam. If Ceify que Vie dies, or a Leafe for Years is determined, the Lessor or his Heir shall not have an Amifie against the Occupiers of the Land, without an Entry in Fact, after the Determination of the Term.

6. Tenant at Will grants the Possession to another, who enters, the Leffer may have an Amifie. 22 Ed. 4. 6.

7. If Tenant by Elegit or Statute Merchant he oulted, he in the Reversion may have an Amifie. 3 D. 6. 33. b.

8. [So] If Tenant at Will be oulted, the Lessor may have an Amifie. 21 Ed. 3. 34.

Br. Trefpaß, pl. 365. cites 22 E. 4. 13. S. C. & S. P. accordingly by Fairfax. — Kelw. 110. b. 110. a. S. P. accordingly, because he might have enter'd, and have had Possession without doing Wrong to any, but did not, and it was his own Act and folly.

D. 354. b. 10. If Leffee for Years be oulted, the Lessor may have an Amifie. pl. 35. Parsh. 21 E. 3. 34.


If a Man leaves for Years, the Remainder over in Fee, and after the Tenant for Years was oulted of his Term, it was held that he in the Remainder may have an Amifie, because the Freehold was in him at the Time of the Diffeisn, and he cannot come to the Possession during the Term; for then he should pre-judge the Tenant for Years. Kelw. 109. b. pl. 51. Causi incerti temporis.


11. If Tenant for Years of a Common be oulted, the Lessor may have an Amifie. 21 Ed. 3. 34. * 22 Mil. 84. † 45 Ed. 3. 26.

Fitzh. Affife, pl. 223. cites S. C. — Fitzh. Affiff, pl. 61. cites S. C.

† Br. Affife, pl. 31. cites S. C. — Fitzh. Affife, pl. 61. cites S. C.

12. The same Law, if Leffee at Will of a Common be oulted, the Lessor may have an Amifie. 21 E. 3. 34.

And so it is of an Abbot and other religious regular Persons; for they are dead Persons in Law, and have Capacity to have Lands and Goods only for the Use and Benefit of the House, and cannot make any Testament, and therefore the Church or Religious House is holden always one (and the same,) in respect whereof the succeeding Abbot shall have an Amifie for a Diffeisn done in the

13. Note that if a Pro or be feised of a Rent, and dies, and his Successor disfrais, and Resistis is made, he shall have Affife of the Seifin of his Predecessor, tho' he himself was not feised, because he found his Church feised, and he has nothing but in Right of his Church. Quod nota. Br. Affife, pl. 109. cites 3 Mil. 5.
14. And where a Feme is seized of Rent, and takes Baron who
distains, and Resons is made, they shall have Affise. Quod nota.
Ibid.

15. Executor of Tenant by Elegit brought Affise of the Land deliver'd it
seems that
by Elegit, and made general Plaint, and well. Brooke says the Reason
appears, as it seems to him, Tit. Title, inasmuch as it is of Land of which
Affise lies at Common Law, tho' those Tenants cannot have Affise at Com-
mon Law, but by Statute. Br. Plaint, pl. 15. cites 22 Aff. 45.

Frodmisent; but by Statute, Tenant by Statute Merchant and Elegit may have Affise.
Br. Darrel.

16. If a Man recovers Land erroneously, and has Execution, and after
injoys A. and the Tenant who left brings Writ of Error against him who
recovers, and Scire Facias against him, and recovers the first Judgment
and enters, A. shall have Affise; quod nota; because Scire Facias ought
to have issued against A. The Reason seems to be, because he might have a
Release to plead, or such like. Br. Affise, pl. 283. cites 29 Aff. 21.

17. If a Man recovers in Affise of Rent or Common &c. and the Sheriff
puts him in Possession, and after at another Time he is distur'd to take
the Rent or Common, he shall have Affise or Re-disseffin upon the first put-
ing in Seisin; for the Law adjudges him in Possession by the first Seisin
per Thorpe. Quod non negatur; but quare. Br. Affise, pl. 31. cites
42 E. 3. 25.

18. If a Master of an Hospital is deprived of his Office by a Lay-Patron D. 209. a
without Caufe, he may have an Affise, because he hath no other Re-
pl. 20. Mich;
medy; but if such a Master is Ecclesiastical, and deprived by the Ordi-
nary without Caufe, he shall not have an Affise, because he may appeal
to the Visitor. 11 Rep. 99. b. in James Bagg's Cafe.

(E) Of what Possession an Affise lies. And what not. See Tit. Parceners
[Joint Possession or Estate.]

I If Baron and Feme purchase Lands in Fee jointly, and after the S.P. and be
Baron is attainted of Felony, upon which the King seizes the
Land, and after the Lord of whom the Land is holden comes into
Chancery, and upon his Suggestion has it delivered to him as his Elecure.
Because the Feme had a Joint Estate with her Baron, and the Lands
were delivered out of the Hands of the King by a false Suggestion,
this is a Distain to the Feme, and she may have an Affise. (It is
intended that the Baron was dead before the Delivery out of the
Hands of the King.) 4 Aff. 4. adjudged.

jured whether the Baron be alive or not. And Brooke says, that therefore it seems that the King
granted it for the Year, Day, and Walle only, and then the Entry of the Lord by the Livery obtained
by
(E. 2) In what Cases it lies.

1. **A Feme endow'd of the 3d Part of a Mill,** if the Heir takes the entire Toll, the shall have Affife; for they are not Tenants in Common; for the Feme shall have every third Toll-Dish by itself. Br. Affife, pl. 440. cites 23 H. 3.

2. **If Land be recovered in a false Court,** which does not lie within the Jurisdiction, he may have Affife; but if be brings Writ of False Judgment thereof, he shall not have Affife; for this affirms that it lies within the Jurisdiction. Br. Affife, pl. 159. cites 10 Aff. 25.

3. **If a Man charges Land with Rent in divers Counties,** he may distrain, but Affise does not lie; for by Writ in one County he cannot recover Frank-tenement in another County. Br. Affise, pl. 218. cites 18 Aff. 1.

4. **If there is no Tenant or Diffieror named in the Affise,** the Writ does not lie. Br. Brief, pl. 279. [283] cites 22 Aff. 8.

5. **A. and B. are condemned in Damages,** and an Elegit issue of their Lands, and the Sheriff puts the Land of A. in Execution by the Elegit, by Name of the Land of B. *Quaere* therefore if A. shall have Affise thereof, for it is doubted. Br. Affise, pl. 328. cites 31 Aff. 28.

6. **A Man shall have Affise upon a Claim without Entry where he dares not enter.** Br. Affise, pl. 350. cites 38 Aff. 23.

7. **If a Man recovers by Verdict,** and before Judgment the Tenant gets a Lease of the Plaintiff, he cannot plead it, but if he be oufled he shall have Affise, per Tank, to which it was not answered. Br. Affise, pl. 366. cites 43 Aff. 19.

8. **Dum sult infra etatem, per Belke,** if a Man be sole feised of an Acre of Land in D. and jointly feised of another Acre there with his Feme, and Precipe is brought against him [the Baron] of one Acre, there if the Demandant recovers and enters into the Acre of which the Feme is Joynement, the Baron and Feme shall have Affise; For the Recovery shall be intended of the Acre of which he was sole feised, because the Feme is not named. *Quaere.* Br. Affise, pl. 37. cites *48 E. 3. 31.

9. **Where a Man by Colour of one kind of Office oufs another who has another Kind of Office,** he shall have Affise, and not Scire Facias, unless they are all one and the same Office, and not divers. Br. Affise, pl. 390. cites 6 E. 4. 2.

10. **In an Affise of Novel Diffidin the Demandant counted,** that the Tenant did diffide him de uno Muio Lapideo, and had built an House in the Place thereof to his Nuisance. The Court said, that he ought to have brought an Affise of Nuisance, and to a Judgment was reversed. Sty. 195. Hill. 1649. Colton v. Ree.
(E. 3) In what Cases it lies. Against whom. And who shall be said Difeifeor.

1. ASISSE does not lie of the Ward of the great Part of the Mansion of the Palace of the Bishop of Canterbury against the Disturber alone without naming the Bishop who is Tenant of the Frankentenement, no more than the Aisle of a Rent-chargé against Pernor without the Tertenant; QUOD NOTA. Br. Aisle, pl. 444. cites 4 E. 2. and Fitzh. Aisle 449.

2. If my Tenant attorns to a Stranger without Authority, I shall have Aisle against both. Br. Aisle, 466. cites 3 E. 3.

3. Aisle against A. and B. the Aisle said that B. dispossessed Plaintiff and intitled A. and that A. did not disposses the Plaintiff, and therefore the Plaintiff recovered, and was amerced against A. for the false Plaintiff, and yet he could not do otherwise, but bring the Aisle against Disturber and Tenant; QUOD NOTA. Br. Aisle, pl. 123. cites 7 Afl. 14.

4. W. recovered against one who had nothing, and intitled B. and one C. delivered Seisin to B. and the very Tenant brought Aisle against B. and C. and omitted W. and yet well, for B. who delivered Seisin is Disturber. Br. Aisle, pl. 157. cites to Afl. 22.

5. A Man leas'd Land for Life, rendring Rent, and went beyond Sea, the Tenant for Life died, and T. N. counsell'd H. W. the Heir of the Leisuer to enter, who entered and intitled P. and the Leisuer came and should have entered, and P. disturbed him, and he brought Aisle against P. and the Counselor omitting him who entered, and the Plaintif recover'd, for the Confiel is Disturber, and so sufficient if Disturber be named in the Writ; QUOD NOTA. Br. Aisle, pl. 193. cites 14 Afl. 12.

6. Aisle, Lord and Tenant, the Lord grants the Rents and Services to F. N. in Fee upon Condition of Payment, and Non-payment ex parte the Grantor [viz. by way of Mortgage] and be tender'd [the Money] at the Day &c. The Grantee refused, and after the Tertenant [who had attorned to the Grantee] paid the Grantee, and the Grantor distrainted, and Reposs was made, and the Grantor brought Aisle against the Tertenant; and the Opinion of the Court was, that the Grantee is Tenant of the Rent, and therefore the Plaintiff was nonsuit'd; QUOD NOTA; for the Aisle ought to have been brought against the Grantee. Br. Aisle, pl. 290. (199.) cites 15 Afl. 12.

7. If a Man leses my Rent of my Tenants by Concoion, Aisle lies against him only, but where the Tenants pay him of their own Will, the Aisle shall be against him and the Tenants. Br. Aisle, pl. 297. cites 16 Afl. 15.

8. Aisle of Rent Service may be brought against the Meine who is Per-nor and Tenant of the Rent, and against the Disturber who makes Reposs without naming the Tertenants. Br. Aisle, pl. 330. cites 31 Afl. 31.

9. But it was said, that in Aisle of Rent-chargé or Rent-fell all the Tertenants ought to be named, but in Aisle of Rent-service, if he has Tenant of the Rent and Disturber it suffices without naming the Tertenants; and in Aisle of Rent-fell all the Tertenants shall be named in Pain of abating the Aisle in Affe for Writ in toto, notwithstanding that it was once a Rent-service. Ibid. a Ren-chargé of 30l. a Year the Title was, that J. V. and A. his Wife were leased of two Manors, and by Fine convey'd the same (inter altera) to one W. by the Name of two Manors &c. who by the same Fine rendred the same Rent of so l. to them, and to the Heirs of A. and also rendred the said two Manors to them for their Lives, the Remainder to F. their Son in Tail, Remainder to the Heirs of A. — J. V. and A. died, the Rent defend'd to the Plaintif's Son and Heir of A. and F. entered as in his Remainder, and thereof intitled G. who was the Tenant in the Aisle, and on Null Disturber &c. the Plaintif had Judgment in the Aisle, upon which a Writ of Error was brought, and affirmed that the Fine was of two Manors (inter alia) which Words import, that other Lands besides the Manors did pass; if so, the Aisle brought against him
that was only Tenant of the Manors is not good, because all the Tenants of the Lands comprised in the Fine ought to be named, and Gawdy and Clench held it to be Error; & adjournatur; and afterwards was discontinued by the Death of the Defendant. Cro. E. 226. pl. 11. Paish. 53 Eliz. B. R. Garnons v. Welton.

10. A Vicar shall have Affise against the Parson. Thel. Dig. 47. lib. 5. cap. 9. S. 2. cites Trin. 40 E. 3. 28.

11. By a Diffieifin made to the Use of an Infant, he is not Diffieifor nor Tenant without actual Entry. Br. Affise, pl. 46. cites 3 H. 4. 16.


13. A Diffieifor made a Leafe for Years, and being about to leave the Realm, he ordered the Leefe to keep the Possession against the Diffieifor till he returned, and that if the Diffieifor should enter upon him, that Leefe should re-ouft him, which he did, and paid the Rent to the Use of the Diffieifor; Saunders Ch. J. held, that without express Agreement after the Diffieifin, the Frank Tenement is not veited In Cesty que ufe; but the others held e Contra, and thereupon the Plaintiff was non-suited. D. 141. pl. 47. Paish. 3 & 4 P. & M. Cutts v. Well.

14. If two Coparceners commit a Nufance, and one of them dies, the Affise or Quod permittat must be brought against the surviving Aunt, and the Heir of the other. 12 Mod. 637. Hill. 13 W. 3. In Case of Roswell v. cites Prior. 2 Inf. 406.

15. A Quod permittat must be brought against the Allience, because in its Nature it must be brought against him that is Tenant of the Freehold; per Cur. 12 Mod. 639. In Case of Roswell v. Prior.

16. So an Affise of Nusance must be against the Alienor and Allience; but if the Allience dies, the Party must have a Writ of Entry in the Per, and not an Affise; per Cur. 12 Mod. 639. In Case of Roswell v. Prior.

17. A Monk may be a Diffieifor, as appears by many Authorities, and particularly by this, viz. That a Writ of Affise lies against him, the Judgment in which Writ is Quod recuperet Seilinam, which supposes a Monk to have a Freehold. To Mod. 125. Arg. in Case of Thornby v. Fleetwood.

(E. 4) In what Cases Affise lies not, but other Action, as Scire Facias, Error &c.

1. A Man recovered by Judgment against E. who died pending the Writ, his Heir entered, and he who recovered oufted him; the Heir shall not have Affise, but Writ of Error, for the Judgment is not void, but Error. Br. Affise, pl. 282. cites 23 Aff. 17.

2. Scire Facias by the Earl of S. against M. where he was restored by A&S of Parliament, to the Land forfeited by his Father, and was seised till oufted by Office, which found for the King, and the Land is now come to the Seifin of M. and because it appeared that he himself was seised after the A&S, and so the A&S executed, therefore his Writ was abated, and he put to the Affise, or to the other Remedy, Quod Nota. Br. Scire Facias, pl. 64. cites 7 H. 4. 6. and 8 H. 4. 14.

3. Where the King has a Manor in Ward, which is known by the Name of the Manor of B. and of the Manor of S. if he grants the Custody of the Manor of B. to one, and after grants the Custody of the Manor of S. to another, and he ousts the first Grantee, and he brings Scire Facias to repeal the Patent, he ought to surmise that the Manor of S. B. are all

one
(Affise. 175

one &c. so that it may appear, that the Patents are of one and the same Thing; for it they are of diverse Things, Affisse lies, and not Scire Facias. Br. Patents, pl. 63. cites 8 E. 4. 6.

(F) In what Cases it shall be awarded at large. [Upon * Pl. 1, 82. * Demurrer.] [† In Respect of Damages.] [Not † of the Seisin nor Disseisin.]

1. If the Tenant pleads in Bar, and after demurs upon another Thing out of the Point of the Affise, and after this it is adjudged for the Demandant, the Affise shall not be awarded at large, but the Demandant shall have Judgment prestintly. 17 Ed. 3. 42. b. for the Land 17 Aff. 2.


2. As in Affise, if the Tenant pleads the Release of the Demandant, S. C. & S. P. and the Demandant says, that it was upon Condition, and shews how he hath performed it, upon which the Tenant demurs, and this is adjudged for the Demandant; he shall have Judgment prestintly without awarding the Affise at large, because the Demurrer is upon a Matter out of the Point of the Affise. 17 Ed. 3. 42. b. Adjudged 17 Aff. 2.

Accordingly.— S. C. cited 2 Roll. Rep. 22. in S. C.—See (O) pl. 9.—Br. Affise, pl. 208, (207) cites S. C.

3. In an Affise if the if the Tenant makes Tittle as Heir to J. S. Br. Eltoppel, and pleads an Ettoppel upon Record against the Plaintiff, to ettop him to claim as Heir to J. S. upon which the Plaintiff demurs, and this is adjudged no Ettoppel; the Affise shall not be awarded at large. 30 S. P. but because the Tenant was an Infant, and therefore Thorpe Ex Affensis Sociorum awarded the Affise at large; and Brooke says, he vide, that if the Tenant had not been an Infant, the Demurrer had been peremptory against him, and the Demandant had recovered upon the Demurrer.——Br. Mordancetor, pl. 52. cites 30 Aff. pl. 46. S. P.

4. In an Affise, if the Tenant pleads as Daughter and to J. S. and that the Plaintiff is a Baffard, and do not Heir, upon which they are at Affise, and he is certified a Muller; the Affise shall not be awarded at large, but only in Right of the Damages. 43 Aff. 11. 43. adjudged.

5. In an Affise, if the Tenant says that the Plaintiff is a Nun professed, * Br. Ref. and it is certified by the Ordinary that she is no Nun, the Affise shall be awarded at large, and not only in Right of the Damages, although the Plea was tried against him. 21 Ed. 3. 38. b. 59. b. * 21 Aff. pl. 29. adjudged, but Matter. 1 Ed. 3. 9. b.

6. In an Affise, if the Tenant pleads in Bar an Excent, and the Plaintiff avoids it, because the Comfor was Tenant in Tail of whom he is the Affise, and so he enter'd after his Death, upon which the Tenant demurs, whether the Plaintiff can avoid the Extent made upon his Ginal & is Father...
Father by Entry, without an Audita Quercia, and this is adjudged against the Tenant, the Affife shall not be awarded at large, but only in the Right of the Damages. Dhabitatur 38. 3. 5.

7. In an Affife, if the Tenant says that the Plaintiff acknowledged a Statute to J. who thereupon extended this Land Que Estate he has, and the Plaintiff says that he himself was seised till dispossessed by the Tenant, abique hoc that the Tenant has the Estate of J. upon which the Tenant demurs, and this is adjudged against him, the Affife shall not be awarded at large, but only in the Right of Damages; for the Possession is acknowledged without Title. Contra * 30. 3. 43. adjudged.

Monies are not yet levied, and thereupon the Affife was awarded against him.

8. In a Mortdancer as Heir to J. if the Tenant says that H. was seised in Fee, and devised to J. in Tail, and that if he died without Affile his Executor might fell, and that after the Death of J. without Affile the Executor sold to him; to which the Demandant says that J. was seised in Fee, abique hoc that he had any Thing by the Devise; upon which the Parties demur whether this be a good Replication, without shewing How he came to the Fee, and this is adjudged for the Demandant, the Affife shall be awarded at large; for no Fee is acknowledged in J. Contra 25. 3. 1.

9. If in an Affife the Tenant pleads a Recovery against the Plaintiff in another Affife by Default, and the Plaintiff says that he was then within Age, upon which the Defendant demurs, and it is adjudged against him, yet the Affife shall not be awarded in Right of the Damages, but at large, because the Tenant has not acknowledged any Outier. 26. 3. 6.

10. In an Affife, if the Tenant pleads a Plea in Bar, and acknowledges an Outier, and the Plaintiff makes Title, upon which the Parties demur, and this is adjudged against the Tenant, the Affife shall not be awarded at large, but in right of the Damages, because he has acknowledged an Outier by his Plea. 28. 3. 21. adjudged.

11. In an Affise, if the Tenant pleads an ill Bar, and acknowledges an Outier, and the Plaintiff makes Title to himself, and this is found against the Defendant, it shall not be inquired of the Seilin and Diffelin, as well as [as it should be] if he had pleaded a good Bar. 6. 3. 7. 2.

12. So if the Tenant says let the Affise come upon the Title, and this is found against the Defendant, there shall be no Inquiry of the Seilin and Diffelin. 6. 3. 7. 2.

13. So in an Affise, if the Tenant pleads an ill Bar, the Plaintiff is not bound to answer it, but may make a Title at large, and pray the Affise. If the Title be found, it shall not be inquired of the Seilin and Diffelin. 6. 3. 7. 2.

The Bar is insufficient it has not the Force of the Title, whether it be good or ill; for if the Seilin and Diffelin be found, the Plaintiff shall have Advantage of what else is found, and therefore it is Policy and necessary for the Tenant to make a good Bar, and then if the Title be not good the Plaintiff shall not have Judgment to recover, notwithstanding the Seilin and Diffelin be found; and therefore in the principal Case

Fitzh. Affife, pl. 283. cites S. C.

Fitzh. Affise, pl. 268. cites S. C.

Fitzh. Affife, pl. 379. cites S. C.

Fitzh. Affise, pl. 36. cites S. C.

Fitzh. Affise, pl. 56. cites S. C.

Fitzh. Affise, pl. 56. cites S. C. — if the Tenant pleads a Bar at large, and the Plaintiff makes his Title at large, and the Tenant lays Veniat Affise, in this Case the Jury shall not intermeddle with any other Title, nor shall the Plaintiff take Advantage of any other. Kelw. 170. b. pl. 3. Mich. 6 H 8. per Pigot, says it was ruled so in Affise brought at Warwick.
14. In Affise the Tenant pleaded a Foreign Release, upon which they are adjourned, and at the Day the Tenant made Default. The Affise shall be taken at large; for by the Default the Plea is waived. But per Shard, if they had appeared, and the Release had been found against the Defendant, if the Plaintiff will release his Damages he shall recover immediately; for the Affise is to inquire of the Damages only; for the Release confesses the Difference, so that the Seisin and Difference shall not be inquired. Quod nona Diversity. Br. Affise, pl. 417. [416] cites 22 E. 3. 4. and Fitzh. Affise, 125.

15. In Affise the Tenant pleaded in Bar, and the Plaintiff made Title, and the Defendant did not answer to the Title. The Affise shall be awarded at large by some, and by some in Right of the Damages, therefore quære. Br. Affise, pl. 30. cites 45 E. 3. 24.

(G) In what Cases it shall be taken at large. [Or only* See (F)]

1. If in a Mortdanceftor the Tenant pleads a Plea in Bar of the Br. Mortdanceftor, the Plaintiff, and this is found against him, the Affise shall not be taken at large to inquire of the Points of the Writ. 39 Ml. 13. Edw.

2. In an Affise of Mortdanceftor, if the Tenant alleges Bastardy in the Defendant, and he is certified by the Bishop to be a Muller, the Affise shall not be taken at large, but only in the Right of Damages. 30 C. 3. 8. b.

3. In a Mortdanceftor, if the Tenant pleads the Release of the Defendant in Bar, which is denied, and found against the Tenant, the Affise shall not inquire of the Points of the Writ, because the Plea was in Bar. 39 Ml. 13. adjudged.

4. In Mortdanceftor of the Seisin of his Father, if the Tenant pleads in Bar an Attainder of Felony of the elder Brother of the Plaintiff, who survived their Father, and the Plaintiff takes Issue that he did not survive their Father, and the Defendant has a Day to have the Record of the Attainer, and after the Defendant makes Default, by which he fails of the Record, yet the Affise shall be taken at large for all the Points of the Writ except whether the Plaintiff be next Heir. 29 Ml. 11. adjudged. But quære, (for it seems not to be Law;) for the Plea was in Bar.

5. But in this Case it shall not be inquired whether the Plaintiff was next Heir or not; but it is acknowledged by the Plea that he is next Heir, but for the Record of which he has failed. 29 Ml. 11. adjudged.

Fol. 275.

Br. Mortdanceftor, pl. 36. cites S. C.—Fitzh. Mortdanceftor, pl. 28. cites S. C.
In an Assise, if the Tenant says the Plaintiff is his Villein &c., and this is found against him, yet it shall be inquired at large of the Points of the Writ, because this Plea was but to the Person, and not to the Freehold. 31d. 12. adjudged.

That he was Frank, but that he was not seised, and it was awarded that the Plaintiff take Nothing &c. and yet they were at Issue out of the Point of the Assise; Br. says Quere; for miratur ibidem—Fitzh. Assise, pl. 305. cites S. C. and that it was awarded accordingly.


(H). In what Cases it shall be inquired at large.

1. In an Assise, if in the Pleading an Outer be not acknowledged, the Seilin and Disselin shall be inquired. 37d. 14.

2. In an Assise of a Rent, if the Tenant says, Hors de son Fee, and the other says within his Fee, if it be found within his Fee, it shall be inquired further of the Seilin and Disselin. 37d. 14.

3. If in a Mordanceflor the Tenant pleads a Plea that goes in Bar, yet if the Plea be one of the Points in the Writ, the Assise shall be taken at large.

4. As in a Mordanceflor, if the Tenant says the Plaintiff is not the next Heir, and this is found against him, yet the Points of the Writ shall be inquired. 40d. 6.

5. And in this Case the Assise may find, that altho' the Plaintiff is the next Heir, yet that he is not the next Heir as to this Land, for it seems that this Inquery is in regard of their Inquery at large, for the Issue will not warrant it. 40d. 6. adjudged.

6. In an Assise of Mordanceflor, if the Tenant says, that the Plaintiff has an elder Brother living, and after makes Default, the Assise shall be taken at large. 29d. 11.

7. Assise
7. An Assize against an Infant, he was received to plead a Release of the
Plaintiff in Bar, who said that Not his Dedit, and so see that an Infant
Defendant may plead in Bar, and no Circumstances shall be inquired for
and to see him as it seems; Contra an Infant Plaintiff. Br. Affise, pl. 149. cites that the
Assize shall not be at large for an Infant Defendant.

8. In no Case where the Tenant gives Title to the Plaintiff, and this is
implied by Matter of Record or Matter in Fact, can the Plaintiff make his
Title at large. Br. Affise, pl. 377. cites 5 H. 7. 29. per Brian Ch. J.

(1) In what Cases it shall be taken at large.

1. In an Assize or Mortdancseor, if a Plea be pleaded in Abatement Br. Mort-
dance, of the Writ, and this is found against the Tenant, yet the Points
of the Writ shall be inquired. 39 Aff. 13. Curia.
dance, pl. 32. cites S. C.—See (G) pl. 1. S. C.

2. In an Assize by a Woman, if the Tenant says the Plaintiff is Co-
vert Baron which is found against him, yet it shall be inquired over of
the Points of the Writ. 1 Ch. 3. 9 b.
a. or 9 b. but it seems to intend what is said, Arg. 1 E. 3. 8 b. at the End of pl. 12.

3. In a Mortdancer, if the Tenant vouches, and the Demand-
ant counterpleads, upon which they are at Issue, and it is found a-
gainst the Tenant, yet the Points of the Writ shall be inquired. * Br. Mort-
dancer, pl. 32. cites S. C. & S. P. obiter, and cites also 57 H. 6.
dancer, pl. 37. cites S. C.

4. In an Assize, if the Tenant and Demendant go to Issue upon Br. Affise, pl.
a Matter out of the Point of the Affise, and this is found against the (568) 569.
Tenant, the Affise shall not inquire of the Points of the Writ, but only
in Right of the Damages. 44 Aff. 6. adjudged.

5. As in an Assize, if the Tenant pleads an Entry for the Alienation
of his Lejsee to the Plaintiff, and the Parties go to Issue whether the
Alienor had a Fee, and it is found against the Tenant, the Affise shall
not inquire of the Points of the Writ, but only in Right of the
Damages. 44 Aff. 6. adjudged.

6. In an Assize, if the Deed of the Ancestor of the Plaintiff be plead-
ed in Bar, and this is denied, and found for the Demandant, it shall
be inquired of the Damages only. 17 Aff. 13. adjudged.

7. In an Assize, if the Plaintiff pleads the Feoffment of the Ances-
tor of the Plaintiff in Bar, to which the Plaintiff says, that the same
Ancestor died feised, and that he entered as Son and Heir, and the
Title is taken upon the dying feised, and this is found for the Plaintiff,
Willowby charged them only upon the Title.
it shall not be inquired at large of the Points of the Writ. 17
Afs. 18. adjudged.

The Affife found that J. S. was seised of the Land, and acknowledged a Statute to him, by which he extended it and the Plaintiff takes Issue, that J. S. was not seised of the Land at the Time of the Statute acknowledged, and this is found for him, and against the Tenant; it shall not be inquired of the Points of the Writ, but of the Damages only, for the Seisin is acknowledged. 24 Aff. 2. adjudged.

(5) "If the Plaintiff took nothing by his Writ; but the finding of the Seisin and Diffisifn was held void, for Seisin was seised before. And to see that where Officer is confessed, as appears here, that it was by the Bar, there the Seisin and Diffisifn shall not be inquired, and if it be inquired all is void, as appears here. Br. Affife, pl. 256. (533) cites S. C.

9. In an Affife, if the Defendant says, that there is not any Tenant of the Freehold named in the Writ, and the Plaintiff lays, that he hath made a Feoffment to Perfons unknown, and he himself hath continually taken the Profits, and they are at ISSUE upon the taking the Profits; if this be found against the Defendant, it shall not be inquired of the Points of the Affife, because the Diffisifn is acknowledged. 30 H. 6. 1. b. Curia.

Fitch. Affife, pl. 15. cites S. C.

Br. Affife, pl. 259. (393) cites S. C. Fitch. Affife, pl. 15. cites S. C.

10. So it is if a Traverse be taken of the Esplees, for by this the Diffisifn is acknowledged. 30 H. 6. 1. b. Curia.

11. A Deed of Confirmation, which made the Estate of the Plaintiff, may be found by Verdict at large, tho' the Deed was not pleaded, but given in Evidence. Contra of a Deed which does not make the Estate, and is not pleaded, and the Plaintiff recovered Damages taxed by the Jury, and Damages taxed pending the Writ. Br. Affife, pl. 219. cites 18 Aff. 3.

12. In Affife, the Tenant pleaded a Lease for Life to the Plaintiff by his Father, whose Heir he is, rendering certain Rent with Clause of Re-entry, and for the Rent Arrear &c. he re-entered, Judgment of Affife, and pleaded all in certain; the Plaintiff laid, that before the Re-entry the Tenant disstrained for the Rent, and was seised of the Diffisifn, the Day of the Entry, and prayed the Affife, and the other e contra; the Affife found that he had it disstrained, and further they inquired of the Damages, and not of the Seisin and Diffisifn, and well, for the Tenant confessed it by the Lease and the Re-entry, by which the Plaintiff recovered the Land and Damages, and the Defendant to Prison for the outher confessed. Br. Affife, pl. 192. cites 14 Aff. 11.

13. In Affife the Tenant vouched Record and failed at the Day, he is a Diffisifor by the Statute; but the Damages did not appear, therefore the Affife shall be awarded of the Damages, unless the Plaintiff releases his Damages. But held by some the fame Year p. 15. that the Plaintiff shall not be suffered to release Damages for the Advantage of the King, but it shall be inquired, by Reason that the Diffisifn may be by Force; but the Law seems to be otherwise, for the Diffisifn shall not be inquired as here. Br. Affife, pl. 202. cites 15 Aff. 16.

14. Affise against two, the one pleaded to the Affise by Bailiff, and the other in Person took the Tenancy, and pleaded in Bar a Release of the Plaintiff, and found against the Defendant, and therefore the Affise was of the Damages, for the Release implies Confession of an Officer; but against him who pleaded by Bailiff, it shall be inquired of the Seisin and Diffisifn, and of the Force. Br. Affise, pl. 233. cites 23 Aff. 11.

15. In
16. In Affile, the Plaintiff made Title, the Tenant Counter-pleaded the Title, and so to Issue, there if the Title be found for the Plaintiff, the Affile shall inquire over of the Damagers, and not of the Seisin and Diffisius, as was touched by the Courts; for by the Counter-plea, the Tenant shall be adjudged Diffisius, and the Title was found, and the Plaintiff recovered. Br. Affile, pl. 276, cites 27 Aff. 65.

17. In Affile the Tenant pleads Fine of the Ancestor in Bar, it is a good Title, that after the Fine the Commiss injustice the Ancestor of the Plaintiff in Fee, and died seized, and be is Heir. Br. Title, pl. 29, cites 26 Aff. 6.

(K) In what Cases it shall be awarded at large.

1. If the Title be traversed, the Affile shall not be awarded at * Br. Affile, large, but upon the Title, and the Seisin and Diffisius upon the Title. 28 Aff. 23, 17.

2. In an Affile of a Rent by an Abbot, if the Plaintiff makes a Birth, Title by Prescription in him and his Predecessors, upon which the pl. 19, cites Parties demur, whether this be a good Title without Speciality, and this is adjudged for the Plaintiff, the Affile shall be awarded upon the Title. 18 Aff. 17 adjudged.

3. In an Affile, if the Tenant pleads in Bar, and the Plaintiff makes * S.P. for the Title, and the Tenant does not answer nor traverse the Title, the Affile shall be awarded at large, and not upon the Title, in as much as this is not put in Affile, and if any other Title is found for the Plaintiff he shall recover; * 28 Aff. 17, per Curiam adjudged. 28 for of the Aff. 23. 48 per Curiam. 22 Ed. 3. 99. per Shard. Contet. 18 Ed. 3. 13. b. 17 Aff. 18.

the Title, or upon other Matter, for there the Affile shall give Verdict upon the Issue only. Br. Affile, pl. 282, cites 28 Aff. 17. Br. Affile, pl. 282. cites S. C. & S. P. by Thorpe.


Br. Title, pl. 29, cites S. C.

4. In an Affile in Pais, if the Release of the Plaintiff be pleaded by Birth. Affile, in a foreign County, and denied, upon which it is adjudged in Banco; cites S. C., at which Day the Tenant makes Default; there the Affile shall be awarded at large. * 22 Ed. 3. 4. b. adjudged. 30 Ed. 3. 12. adjudged. 31 b. ed. 17 Aff. 31. adjudged. 11 R. 2. Affile 72. adjudged, because no Deed re-delivered to him, and could not have it, for all shall be remanded as it is come here. Br. Affile, pl. 217. (216) cites 17 Aff. 51. — S. P. ibid. pl. 264. cites 56 Aff. 29.

5. In an Affile, if the Tenant pleads the Release of the Plaintiff in Bar, and after makes Default, the Affile shall be awarded at large. 26 Aff. 6. 30. adjudged.

6. So if the Tenant pleads in Bar, and the Plaintiff makes Title by Matter in Law, upon which they are adjourned in Bank, and there this depends till the End of the Term, and then the Tenant makes Default, the Affile shall be awarded at large; for the Pleading of the Title and Demurrer waves the Bar. 3 H. 6. Affile 3. Otherwise of a Rent.
7. If in an Assise the Title be traversed, and this is found for the Plaintiff by verdict, the Assise shall be awarded in Right of the Damages only, and not at large. 29 Aff. 1.

8. In an Assise, if the Tenant pleads in Bar, and the Plaintiff makes a Title, which he is ready to aver &c. and the Plaintiff similiter, as the Entry, yet this is not any Travers of the Title, and therefore the Assise ought to be awarded at large, and not upon the Title. 28 Aff. 17. per Curiam. Contra 32 Ed. 3. Assise 99. per Sherard.

9. In an Assise, if the Tenant pleads a Fine and Execution in Bar, and the Exstate of the Plaintiff menfe &c. if the Plaintiff destroys this Bar by a Fine with Warranty, and to satisfy the Execution, and the Tenant pleads to this Nullieli Record, and after the Record is shewn forth, the Assise shall be awarded only in Right of the Damages; for this Assise was upon the Title, and this is found against the Tenant. 29 Aff. 1. adjudged.

10. The Court ex Officio ought to award the Assise at large, where Bar is pleaded against an Infant Plaintiff in Assise; per Hank. quod non contradicetur. Br. Office del &c. pl. 3. cites 12 H. 4. 22.

(L) In what Cases it shall be awarded at large, in respect of the Person. [Infant, Baron and Feme.]

1. If an Infant of the Age of 15 brings an Assise of Sable-kind Land, where by the Tenant such Infant has Power to alien as well as a Man of full age, and the Tenant pleads in Bar, the Assise shall be awarded at large. 32 Ed. 4. adjudged.

2. In an Assise by 2, of whom one is within Age, the Assise shall be awarded at large. 26 Aff. 14. Contra * 26 Aff. 65. adjudged. Contra * 28 Aff. 22.

3. In an Assise by Baron and Feme of full Age, the Assise shall not be awarded at large for the Coberture of the Woman. 26 Aff. 14. 28 Aff. 22.

(M) Upon
(M) Upon what Plea.

1. In an Assize by an Infant, if a Matter which is not of Record is pleaded in Bar, the Infant shall not be put to Answer thereto, but the Assize ought to be awarded at large.

2. In an Assize by an Infant, if the Tenant pleads a Partition by Co.-parencers or, in Bar, yet the Assize shall be awarded at large, without having Respect to the Bar. 30 Ass. 7.

3. So if a Pecuniary with the Warranty of the Ancestor of the Plain-Cite, pleading in Bar, the Assize shall be awarded at large. 30 Ass. cites 35 Ass. the Deed having Necess. — S. P. that the Assize shall be awarded of all the Circumstances of the Deed, and if it be found good, yet it shall be inquired if the Infant was misled. Br. Alife, pl. 204, cites 16 Ass. 9. — S. P. but if he makes Title, and it be found against him, it shall be inquired if he has other Title. Br. Alife, pl. 59, cites 12 H. 4. 19. 20. per Hanke. — But where the Infant is Defendant in Alife, and pleads a Bar which is found against him, no other Title nor Circumstance shall be inquired. Ibid. — The Court ex Officio ought to award the Alife at large, where Bar is pleaded against the Infant Plaintiff in Alise; per Hanke, quod non contradicitur. Br. Office del Corte, pl. 5. cites 12 H. 4. 22. Fizh. Alise, pl. 50. cites 12 H. 4. 20. S. P.


5. In Alise, the Tenant pleaded a Bar, the Plaintiff made Title by Lease of the Tenant to the Plaintiff for Life, to which the Tenant did not answer, by which the Alise is taken at large as it ought, which found that the Tenant leased to the Plaintiff for Life, rendering Rent, with Canone of re-entry, and for the Rent arrear entered, and by all the Justices, where Alise is awarded at large, as here, because the Title is not answered, the Plaintiff and Defendant shall have Advantage of all that is found, to be it be not pleaded; and if other Title, than the Plaintiff made, be found, it is good, and so here the Tenant shall have Advantage of the Condition not pleaded, and so he had. Br. Alise, pl. 292. cites 29 Ass. 39. — S. P. Ibid. pl. 411. cites P. 32 E. 5. for it is no otherwise now but as if Nul tort had been pleaded.

6. So if a Divorce for a Pre-contract between the Father and the Mother of the Plaintiff be pleaded in an Alise, he being an Infant, and to the Plaintiff a Bastard, the Alise shall be awarded at large. 30 Ass. 45. adjudged.

7. In an Alise by an Infant, if the Tenant pleads in Bar the De-otherwise wis of his Ancestor according to the Custom of a Will, with Proclama-tions, the Infant shall not be put to answer this, but the Assize shall be awarded at large. 37 Ass. 5. adjudged.

8. In an Alise by an Infant, if the Tenant pleads in Bar the De-otherwise wis of his Ancestor according to the Custom of a Will, with Proclama-tions, the Infant shall not be put to answer this, but the Assize shall be awarded at large. 37 Ass. 5. adjudged.
Ailfe.

7. In an Ailfe against an Infant, if the Tenant pleads in Bar a Matter of Estoppel of Record to stop the Plaintiff to claim as Heir, upon which the Plaintiff demures, and this is adjudged against the Infant, yet the Ailfe shall be awarded at large for the Infantry. 30 Aff. 46. 51. adjudged.

8. In an Ailfe by an Infant, if the Tenant pleads in Bar, and the Plaintiff replies, and the Tenant rejoins, yet the Ailfe shall be awarded at large, because the Plaintiff is an Infant, for that is alleged by the Tenant shall not be held Not dened by him. 31 Aff. 15. Dubitatur.

9. In an Ailfe by an Infant of Gavelkind Lands, if the Tenant says that the Custom there is, that an Infant of the Age of 15 may alien, and that he was of the Age of 15, and alien’d to him, yet the Ailfe shall be awarded at large, tho’ he be of full Age to alien. 32 Aff. 4. adjudged.

10. In an Ailfe by an Infant, if the Tenant pleads in Bar a Matter of Record against the Infant, the Ailfe shall not be awarded at large, but the Infant shall be put to answer the Record. 12 P. 4. 22. B. 

11. As if a Fine be pleaded in Bar against him, he ought to answer it, and the Ailfe shall not be taken at large. 37 Aff. 5. per Chart. The same Law if a Recovery be pleaded in Bar. 26 Aff. 6.

12. But in an Ailfe by an Infant, if the Tenant pleads a Matter of Record as a Fine of his Ancestor, or such like sc. tho’ the Infant ought to answer this, and make a Title, yet the Tenant shall not be received to traverse the Title, but the Ailfe shall be awarded at large, because if the Infant hath other Title found he shall have Judgment. 29 Aff. 6. per Curtiam adjudged.

13. In an Ailfe by two, of whom one is within Age, and the Deed of their Ancestor is pleaded against them, the Ailfe shall be awarded at large, because he that is within Age cannot try the Deed. 26 Aff. 14.

14. But in an Ailfe by Baron and Feme, if the Release of the Baron be pleaded in Bar, the Ailfe shall not be awarded at large. 26 Aff. 14. * 28 Aff. 22.

15. In an Ailfe by two, of whom one is within Age, if the Tenant pl. 269. cites S. C. but I do not observe S. P.

Firth. Ailfe, 15. In an Ailfe by two, of whom one is within Age, if the Tenant pl. 269. cites S. C. & S. P. says that he himself was seized &. and leased for Life to the Ancestor of the Plaintiffs, who died, and the Plaintiffs abated claiming his Estale
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As the Affise shall not be awarded at large as to him who is of full age, but he ought to answer the Deed. 20 Aff. 22. adjudged.

16. In an Affise of a Rent against an Infant, if the Parties join Issue upon a Matter out of the Point of the Affise, and this is tried against the Infant, yet the Affise shall be awarded at large, because the Infant by his Acknowledgment or Intent desire shall not be adjudged a Defendant. 28 Aff. 51. 52. adjudged.

In Bar, and joined Issue out of the Point of Affise, but if he had pleaded to the Affise the Circumstances should have been inquired; Contra nota; for no Default in the Party. Br. Affise, pl. 432. cites 6 E. 3. 1. and Fitzh. Affise, 168.

18. Affise against two, the one pleaded a Release of the Plaintiff of all Actions, and of all the Right, and the Affise was prayed because he who pleaded did not take the Tenancy upon him, for if he does not do it the Affise shall be awarded, and after the other took the Tenancy, and pleaded in Bar the same Deed as Affises of the first who pleaded &c. and the Deed was denied &c. and if the Plaintiff had confessed the Deed in the Hands of him who first pleaded, the Writ had abated against all. Br. Affise, pl. 166. cites 11 Aff. 9.

(N) In what Cases it shall be inquired of the Circumstances. In respect of the Person of the Plaintiff [Infant, or Feme Covert.]

1. In an Affise, if the Plaintiff be an Infant, the Court Ex officio &c. Br Office ought to inquire of the Circumstances. * 12 H. 4. 22. b. 21. del Court. 56. C. &

C. 3. 21. 38 Aff. 2. & 31 Aff. 17. 24 Aff. 6. 56. C. &

† Fitzh. Condition, pl. 15.

S. P. accord-


2. So in an Affise, if there are two Plaintiffs, and one is an Infant. * Fitzh. Affise, pl. 50. cites S. C. —

It ought to be inquired of the Circumstances. * 12 H. 4. 22. b. 31. Aff. 17. 32 C. 3. Affise 96. Contra || 26 Aff. 65. adjudged. || Br Aff. pl. 570. (269) cites S. C. and for the third within Age it was awarded to inquire of the Circumstances. ——See (L) pl. 2. 5. C.

3. In an Affise against an Infant it shall be inquired of the Circumstances. 36 Aff. 14. admitted.

4. In an Affise against Baron and Feme, the Baron being of full Age, and the Feme within Age, it shall be inquired of the Circumstances. 39 Aff. 14. 16.

Fitzh. Affise, pl. 337. cites S. C.
5. The same Law in an Assize against Baron and Feme, if the Feme
be received upon the Default of the Husband, tho' he be of full Age,
because she is a Feme Covert. 39 Alb. 16. adjudged.

Fitzh. &fide, pl. 337.

6. If an Infant brings an Assize of Gavel-kind Land, being above the
Age of 15, where the Custuml is, that he may alien the Land at that
Age, as well as a Han at full Age, and the Tenant pleads in Bar,
upon which the Assize is awarded; it shall be inquired of the Bar,
and if this be found against the Infant, it shall be inquired whether
he hath other Title, altho' he was of full Age to alien. 32 Alb. 4.

Fol. 277.

6. Where an Infant is put to answer a Plea in Bar, there it shall
never be inquired of the Circumstances of the Bar. 22 P. 6. 51. b.
Ctiria.

Br. Assize, pl. 80. cites S. C.—Fitzh. Assize, pl. 12 cites S. C.

S. P. And

8. In an Assize by an Infant, if the Defendant pleads a Release of
the Ancestor of the Plaintiff by Fine with Warranty, the Assize shall
not be taken to inquire of the Circumstances, because this is a Mat-
er of Record, to which the Infant of Necessity ought to answer.

S. P. And

9. In an Assize by an Infant, if the Deed of his Ancestor with War-
ranly be pleaded in Bar, the Assize shall be awarded to inquire of the
Circumstances. 32 Ed. 3. Assize 98.

S. P. And

10. Assize of Rent by an Infant, the Tenant said, that the Plaintiff him-
self is seized of the Land, out of which the Rent arises, Judgment of the Writ;
and because the Plaintiff was an Infant, he was not compelled to an-
swer to it, but the Assize awarded of the Circumstances notwithstanding
it is only to the Writ. Br. Assize, pl. 164. cites 11 Alb. 6.

11. Assize against an Infant, who pleaded a Release in Bar, and it was
denied, and the Issue was taken without having Regard to the Infant; and
so it seems that the Assize shall not be taken at large, but for an Infant
Plaintiff only, and not for an Infant Defendant. Br. Assize, pl. 412. cites

(O) Upon what Issue.

See (M) pl. 1. I f an Infant brings an Assize, and a Bar is pleaded against him,
it shall be inquired at large. 12 P. 4. 22. b. 38 Alb. 2. adjudg-
co. 29 Alb. 68. 18 Alb. 11.

Assize shall
be at large,
as well when the Defendant is an Infant, as when the Plaintiff is an Infant. Br. Assize, pl. 21. cites
44 E. 5. 10.
2. So if a Record be pleaded in Bar against an Infant, and the Infant makes Title against it as he ought, yet it shall be inquired whether he hath other Title. 12 H. 4. 22. b. 38 [18] Art. 6. Curia. See (M) pl. 3 and the Notes there. * See (M) pl. 8 and the Notes there.

3. So if the Warranty of the Ancestor be pleaded in Bar against an Infant, because the Infant cannot answer the Deed, it shall be inquired of the Bar, and if the Bar be found, it shall be inquired of all Things which may avoid or destroy the Warranty, or if he hath other Title. 12 H. 4. 22. 31. Art. 17. adjudged.

4. So if the Devise of the Ancestor of the Infant be pleaded in Bar. This Point is not at 39 Aff. pl. 2. but

5. In an Affise by an Infant, and Man of full Age, if the Deed of their Ancestor be pleaded Bar, yet it shall be inquired of the Circumstances. 31. Art. 17.

6. But if an Infant brings an Affise, and upon Null Tort, Null Dilectin pleaded, it is found against the Plaintiff; this by Intendment is an Inquiry of the Circumstances, for upon this Issue they may inquire of any Right. 12 H. 4. 22. b.

7. In an Affise by an Infant, if a Record be pleaded in Bar, and the Defendant has Day to bring in the Record, and this is brought accordingly at the Day, yet the Affise shall be taken for the Infant; (it seems it is intended at large, to inquire whether he hath other Title.) 29 Art. 11 but Quere.

8. So if an Infant and a Man of full Age are Plaintiffs in the Case aforesaid, the Affise shall be taken for the Infant. 29 Art. 11. but Quere.

9. In an Affise by an Infant in B. R. if the Tenant pleads a Matter of Record in Bar, severer, a Recovery by him against the Plaintiff in another Affise brought by him in the Common Pleas, to which the Plaintiff replies, that he is yet within Age, and that this Right was purchased, and bore Date before the Right brought in Barco, upon which the Tenant demurs, and this is adjudged a good Replication, the Affise shall be taken only in Right of theDamages, for by the Demurer the Outter and Dilectin of the Plaintiff is contested. P. 16 Jac. B. R. between Holsoard and Plate adjudged, and in taken by the Judges, and adjudged for the Plaintiff, against the Opinion of Haughton J., and the Affise was taken in Right of Damages.

10. If an Infant be Defendant in an Affise, and pleads in Bar, and a Title is made against him, to which the Tenant and takes Affise out of the Point of the Affise, and it is found against him, it shall not be inquired of the Circumstances for the Tort supposed in the Infant. * 12 H. 4. 22. b. 28 Art. 50. adjudged. See pl. 19. infra, and (M) pl. 16.

* See pl. 19. infra, and (M) pl. 16.

† Br. Affise. pl. 292. (291). S. P. cites 28 Aff. 51. S. P. And it seems that Roll is misprinted, (50) for (51).
In an Assise, against Baron and Feme, the Feme being within Age, if the Defendants by way of Bar plead that J. was feised, and the Feme is Heir to him, if the Plaintiff lays that the Feme is a Bastard, this shall not be tried by the Ordinary, but by the Assise, because the Circumstances are to be inquired, and because the Feme is not compellable to take Iffue upon a certain Point. 39. 14

In an Assise, by an Infant, if the Deed of the Ancestor of the Infant with Warranty, bearing Date in another County, he pleaded against him, the Assise shall be adjourned in Bank, and there it shall be inquired of the Deed, and if it be found his Deed, the Assise shall be re-attached, and there shall be an Inquiry whether he has any other Title than by Defent of the Inheritance. 39. 14. per Chorp. [Obiter.]

In an Assise, if the Feme be received upon the Default of the Husband, and pleas in Bar the Deed of the Ancestor of the Plaintiff with Warranty, and the other lays Nothing passed by the Deed, upon which they are at Assise, which is found against the Feme, yet because it is a Feme Covert it shall be inquired of the Seisin and Disseisin, for the shall not be adjudged a Disseisores by this without a Finding of it. 39. 16. adjudged.

The same Law, altho' the Feme acknowledges an Outier by her Plea. 44. 31.

In an Assise against an Infant, if he pleads the Release of the Ancestor of the Plaintiff with Warranty, to which the Plaintiff lays, that the said Ancestor was Tenant for Life, the Remainder in Tail to the Plaintiff, the Remainder to the right Heirs of the Ancestor, and granted over his Estate to him to whom the Release was made, and after released with Warranty to him, upon which Plea the Parties bemoor, and after the Assise is awarded, the Assise shall inquire whether he, to whom the Release was made, was sealed in Fee at the Time of the Release, because nothing shall be taken Not denied by the Infant. 44. 28.

In an Assise of a Rent against an Infant, if the Infant lays Not charged by the Deed, and this is found against him, yet it shall be inquired of the Seisin and Disseisin. 26. 3. dubitatur.

In an Assise against an Infant, if he pleads a Record, and fails thereof, yet he may plead to the Assise afterwards, for he shall not be concluded by his Plea. 26. 3.

In an Assise of a Rent-charge against an Infant, if Iffue be joined upon a Matter out of the Point of the Assise, and this is found against the Infant, yet it shall be inquired of the Circumstances for the Benefit of the Infant. 23. 51. agreed, 52 adjudged, because the Infant by his Contumacy or Silent Device cannot be adjudged a Disseisor.

Affise against an Infant who pleaded a Release in Bar, and it was denied, and the Iffue was taken

59 Aff. 6
S. P. [but seems misprinted for 39 Aff. 16]
Fifth Affise, pl. 337.
Br. Affise, pl. 256.
(249) cites S. C. and Fifth held, that where the Defendant pleads Iffue, tho' it be found against him, the Seisin and Disseisin shall not be inquired. But Brooke says, Quære inde, because where no Outier is contended in Pleading, nor does the Plea imply in itself an Outier, as Release, and the like it seems that it shall be inquired.
Affife.

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19. So in an Affife against Baron and Feme, if the Feme being received upon the Default of her Husband joins Issue upon a Matter out of the Point of the Affife, and this is found against her, yet it shall be inquired at large. 28 Att. 52. per Fich.

(P) How the Inquiry shall be.

1. In an Affife by an Infant, if the Tenant pleads a Matter in Bar, * And because they took the Affife and the Affife is awarded at large to inquire of the Circumstances because the Plaintiff is an Infant, yet the Affife ought to inquire of the Matter alleged in the Bar by the Tenant, or otherwise it is erroneous. * 31 Att. 22. adjudged. 32 Att. 4. 18 Att. 11.

2. And they ought first to inquire of the Bar. 32 Att. 4. 18.

3. In an Affise by an Infant, if the Tenant pleads in Bar, upon which the Affife is awarded to inquire of the Circumstances, the Affife ought to inquire for the Advantage of the Tenant as well as for the (324) cites Plaintiff, of more than he has comprehended within his Bar, if it be S. C. Br. Error, pl. 126, cites S. C.

4. But it seems that the Jury is not bound to inquire of such a Thing, which the Tenant could not have pleaded in his Rejoinder pl. 22. without a Departure.

5. If a Bar is pleaded in an Affise by an Infant, and the Affise is awarded at large to inquire of the Circumstances; when the Affise hath inquired of the Bar, if they find this against the Plaintiff, they ought to inquire whether he hath other Title. 32 Att. 4.

6. In an Affise by an Infant, if the Tenant pleads a Fine of the An- cestor of the Plaintiff, or other Matter of Record, and the Plain- tiff makes Answer as he ought, this being a Matter of Record, and upon this the Affise is awarded at large, because the Plaintiff is an Infant, the Affise ought to inquire of the Title first. 28 Att. 6.

7. And if they find the Title against the Infant, they shall inquire whether he hath other Title. 28 Att. 6. Cura.

8. In Affise, the Tenant by Bailiff pleaded in Abatement of the Writ by Misprision of the Writ, and over to the Affise, which remained for Default of jurors, and now the Tenant made Default, and the Affise was taken by Default without inquiring of the 1st Exception, Quod Nata bene. Br. Affise, pl. 160. cites 19 Att. 30.

9. Affise of Rent against 2, the one pleaded never seised &c. and the other Hors de Sau Fee, the Plaintiff shewed a Deed of the Rent, the Defendant denied it, the Deed shall be first tried, Quod Mirum, for the other Illuse goes to the Writ. Br. Affise, pl. 222. cites 19 Att. 7.

10. In
10. In Affîse, the Tenant pleaded a Release, the Plaintiff denied it, and
Process was made against the Witnesses, and at the Day the Defendant
made Default, and therefore Continuance was not made, but the Affîse
awarded in Point of Affîse, and not upon the Bar, for this is waived by

11. In Affîse by Executors, they were in a Manner compelled to pay
Caufe, scilicet, Title in the Plainâ, and so they did, scilicet, that the Ten-
ant was bound in a Statute Merchant to the Testator, and the Executors
lodged Execution for Non-payment, and were seised and dispossessed by the
Tenant; the Tenant said that he paid the Money to the Testator, and showed
Acquittance thereof, & non allocatur, but the Affîse awarded if Execution
was made or not, without inquiring of the Payment or Acquittance, for if it
be so, then he shall have Audîta Querela. Br. Affîse, pl. 279. cites
28 Aff. 7.

12. In Affîse against an Infant and two others each took the entire Tenancy
upon him severally, and pleaded in Bar; and the Plaintiff chose the Infant
for Tenant, and said, that the others had nothing, and made Title, upon
which they were at Affîse, and the Affîse awarded, to inquire first who was
Tenant, and if they found the Infant Tenant, then to inquire of the Title;
which found the Infant Tenant the Day of the Writ purchased, and
found the Title for the Plaintiff, and after inquired of the Diffeifor,
who said that the two dispossessed the Plaintiff to the Use of the Infant,
and that the Infant at the Time of the Diffeifon was of the Age of one Year
and a half, upon which it was awarded that the Plaintiff shall recover, and
after Error was brought, because upon this Dispossession the Infant is not
Tenant, but the two Diffeifors, by Reasone of the Nonage of the In-
fant; and that they ought to award the Plaintiff to be barred for Mis-
electing of his Tenant, which Markham agreed. And the just Opini-
on there was, that by Disconfin to the Use of the Infant, the Infant is not
Dispossessed nor Tenant without actual Entry; for Agreement of an Infant
to a Tort, does not make him a Tortfeasor, & adjournatur, as appears
in the written Book, and not in the printed Book; and it was admitted
clearly upon this Matter, that the Infant was not Tenant. Br. Affîse,
pl. 46. cites 3 H. 4. 16.

13. In Affîse, if the Tenant pleads in Bar, and confesses no Oyster,
and the Bar is found for the Plaintiff, yet the Seisin and Dispossession
shall be inquired; contra in Attaint taken upon Affîse. Br. Affîse, pl. 52. cites
8 H. 4. 23.

(Q) Proceedings.

1. W H E N an Affîse is arraigned, 'tis not enough to demand the
Recognitors, and to read the Writ and the Count in French, but
the Clerk ought to read the Count in Latin as 'tis entered on Record, for till
then the Court is not poffessed of it, and if it is not read in Latin, it
was doubted per Cur. If it may be read and entered in another Term,
they Counting again at the Bar, or if the Affîse be discontinued, not-
withstanding the Recognitors were adjourned the last Term; but in this
Case they proceeded. Sid. 73. pl. 3. Pasch. 14 Car. 2. B. R. Winden-
banke v. Beere.

2. The Plaintiff arraigned the Affîse the first Day of Term, when the
Defendant being demanded, made Default, Ideo capitatur Affîsa per Defal-
tam; then the Demandant counted and showed his Patent from the King
of the Office, and it was read, and the Jury not being sworn, Day was
given
given till Wednesday next, and then the Defendant (as the Court said) may give what Evidence he can, but not plead either in Abatement or Bar of the Affsise, nor can he then challenge. 2 Lev. 120. Hill. 25 & 26 Car. 2. B. R. in Case of Cragg v. Norfolk.

3. A Juror cannot be withdrawn in an Affsise, for then the Affsise would be depending; per Cur. Mod. 123. pl. 28. Patch. 26 Car. 2. B. R. [in Case of Cragg v. Norfolk.]

4. Affsise was brought of the Office of Marshalsea; Per Holt Ch. J. the Jury must first appear, and be called and sworn; then the Writ is to be delivered into Court, and the Court ought to be in Parchment, and annexed to the Writ, and if the Writ be returnable on a Return Day, then is the Affsise to be arraigned upon the Quarto Die post, but if returnable on a common Day as this was, then if the Affsise be not arraigned upon that Day, it is ill. In this Case the Jury appeared and were sworn, and the Writ was delivered into Court, and the Affsise was arraigned in French, and the Tenant demanded; but the Court not being in Court, the Counsel for the Tenant informed upon it, that the Tenant could not be demanded (which was allowed by the Court) and that therefore the Demandant should be non-suitied; but the Court said they were sufficiently possesed of the Cause by the Writ being returned into Court, and upon that gave Day to the Demandant, till the Day following, and adjourned the Jury to the same Day; upon which Day I was informed, after the Jury sworn, and the Plaintiff read, the Counsel for the Tenant demanded Oyer of the Writ, which being read, and the Demandant having still neglected to bring his Count into Court (as he was directed by the Court to do) the Tenant could not be demanded, and the Court then refusing the Favour of further Day, the Demandant was Non-suitied. Comb. 173. Mich. 1 W. & M. B. R. Saviere v. Lenthal, and all'.

(R) Adjournment. Proceedings upon Adjournment.

1. In Morstock of Rent, the Defendant pleaded Hors de Son Fee in Pais, and after they were adjourned into Bank, if be hold forow Deed or not? and at the Day in Bank be would have sworn Deed, and could not, for they were adjourned upon a certain Point. Br. Adjournment, pl. 14. cites 17 Aff. 17.

2. Fece Court was received after Adjournment in Affsise, where she and her Baron had pleaded to a Point certain. Br. Adjournment, pl. 15. cites 16 Aff. 16.

was not admitted after Adjournment to change his Plea, and plead another at the Day. Br. Adjournment, pl. 15. cites 15 Aff. 7.


4. Affsise in Pais, the Tenant pleaded by Bailiff which passed for the Plaintiff, and it was adjourned into Bank for the Difficulty of the Verdict, and there Judgment was given for the Plaintiff, and after the Defendant swore Matter to have Certification, and prayed Certificate, and was compelled to sue to remove the Record against the Justices of Affsise, and then he shall have it there, but not in Bank, notwithstanding that the Judgment
Judgment was given in Bank; and to see Adjournment in Bank, and after that Judgment was given there the Record remained there till it was removed again; Quod Nota. Br. Adjournment, pl. 5. cites 21 E. 3. 3.

5. In Afllfe, the Tenant pleaded a foreign Release, and upon this adjourned into Bank, and thence sent into the foreign County by nisi prius to be tried there; Quod Nota; that the foreign Issue in Afllfe shall be tried by nisi prius; and at the nisi prius the Defendant made Default, by which the Afllfe at the Day in Bank was remanded in Pais to be taken, and Re-attachment sued against the others; and so it seems, that in Afllfe against several, the one pleads a foreign Deed, the others shall not have Day in Court till this Issue be tried. Br. Afllfe, pl. 234. cites 22 Afl. 11.

6. The Defendant may relinquish his Plea at the Day of Adjournment where the Afllfe was adjourned upon the Plea of the other. Br. Adjournment, pl. 17. cites 23 Afl. 4.

In Afllfe, if the Tenant had demur'd upon Point certain, the Tenant at the Day of the Adjournment cannot raise the Demurrer and tender an Issue, because it is contra to the Demurrer upon which they were adjourned. Br. Adjournment, pl. 22. cites 39 E. 3. 6.—S. P. Br. Afllfe, pl. 353. cites 39 Afl. 8. (pl. 10.)

7. In Afllfe, they were adjourned out of the Country to Westminster, and there the Defendant demanded Judgment, because the Plaintiff had not Patent of Afllfe; Per Thorp, it is not material, for we are out of the Country upon Demurrer, so that if he had Patent in Pais upon the taking of Affife it suffices; Quod Nota. Br. Afllfe, pl. 296. cites 29 Afl. 21.

Br. Ettoppel, pl 140. cites S. C.

8. The Plaintiff was admitted to make a new Title after they were adjourned upon an Ettoppel pleaded. Br. Adjournment, pl. 20. cites 32 Afl. 9.

9. Afllfe upon Issue of Bastardy, they wrote to the Bishop of the Diocess where the Land is, and not to the Bishop of the Diocess where the Birth is alleged, and they were in Doubt, whether they should put the Parol without Day or not, and at last, by great Deliberation, they adjourned the Parties to their next Sessions, and that in the mean time they should see a Writ to the Bishop, to certify &c. at which Day the Bishop did not return any Writ, by which Sicut alius was awarded, and a Day given over to the next Sessions. Br. Afllfe, pl. 353. cites 38 Afl. 30.

10. In Afllfe against two where each takes the entire Tenancy and pleads in Bar, and the Plaintiff chuses his Tenant, and answers to his Bar, and for Difficulty the Afllfe was adjourned to Westminster. The Justices said, that they ought to have inquired in Pais who was Tenant before the Adjournment; and if any other be inquired before it be inquired who is Tenant, it is erroneous. Thel. Dig. 150. lib. 11. cap. 37. S. 5. cites 35 Afl. 2, 3. and Patch. 11 H. 4. 67.

11. Certificate of Afllfe; the Justices of Afllfe adjourned the Parties before themselves in C.B. as Westminster for Difficulty, [and this was] by Hank and his Companion Justices of Afllfe in the County of T. for him, tho' the Statute does not speak of Adjournment upon Certificate, it intends that it lies as well as upon Afllfe itself, and upon this they hear the Matter in Bank; Quere if it be not by the Equity if the Statute of Adjournment, Mag. Chart. cap. 12. Br. Adjournment, pl. 3. cites 12 H. 4. 9.

12. Afllfe in Cumberland between S. and Dacres and others, it was adjourned into Bank by Babington and Strange, because the Parties came with a great Rout of People armed; and because it was a great Matter, and for the Disturbance of the Peace, and because the Counsel of the Party was at London, he adjourned the Afllfe. Br. Adjournment, pl. 6. cites 7 H. 6. 9.

13. In General Afllfe, they shall be adjourned by Proclamation till the next Afllfe, and Afllfe purchased in the mean time shall be served by the first Precept, But in special Afllfe they shall have Day certain, and Precept made in the mean time is void. Br. Afllfe, pl. 401. cites 32 H. 6. 10.

14. It
14. It seems that the Justices may adjourn the Affife upon every Dis- marrer, and upon every dubious Plea or Verdict, and upon every foreign Plea, and to what Place they will, and Adjournment may be upon Certi- fication of Affife as well as upon Affife. B. Adjournment, pl. 29.

(S) Taken. Where to be brought and taken.

1. 9 H. 3. cap. 12. A S S I S E S of Novel Diffizifn and Mortdiance after shall be B. R. was taken in their proper Shires in this Manner: The King or (in his Absence out of the Realm) the Chief Justices shall once a Year send the other Justices throu' every County, to take together with the three, and Knights of the Shire such Affises in those Counties, and such Things, as cannot be there determined, shall be ended elsewhere in their Circuits; also difficult Matters shall be referred to the Justices of the Bench to be there determined. And it was taken in the Affise in B. R. but it was taken in the County by Nifi Prius by reason of this Statute.

2. If a Man be accused sitting an Eyre in the same County, he shall have Affise there without Writ out of Chancery; and upon Affize Verdict there, he shall have Attaint there in the same Manner; for he need not have Patent of Affize in Eyre, nor before Justices at Westminister, for they have Commission which serves; and for it seems that the Commission in Eyre ought to be also special. Br. Affize, pl. 496. cites 6 E. 2. it. Cane.


4. In Affise in the County of E. a Recovery in the County of W. is no Plea, by the debt Opinion; and yet he showed that at another Time the Plaintiff upon a Recovery in the County of W. of these Lands against him, sued to reverse it in B. R. and bad Restitution there, and so affirmed the Tenements to be in the County of W. Br. Affize, pl. 139. cites to Aff. 25.

5. Affise in B. R. in Suffolk, and pending this the Bank is removed to 2 Inf. 25. Westminister, yet they proceeded and tried the Affise by Nifi Prius; and says that the Justices of Affise in the County of Suffolk, and after Complaint was made to the King that this Award was contrary to Justice, because by the Removal of the Bank the Original was determined; & non allocate, but the first Award was confirmed. Quod non nota. Br. Affize, pl. 222. cites * 16 Aff. 4.

the Nifi Prius into Suffolk was by the Advice of all the Judges, and says it is a Case worthy of Observation how by this Expidion both the Party's Suit was preferred, and the Parview of the Statute observed.

* This should be 19, and so are the other Editions.

6. In Affise where Lord and Tenant are of Land in K. held by 105. per Ann. to be paid at K. the Tenant by Fine in Writ of Cautious and Services, acknowledged the Land to be held by the said Rent, which he used to pay at K. but that now he should pay it at H. and the Affise of the Rent was brought in B. H. and Exception taken, and not allow'd, and therefore the Judgment was reversed by Error; for the Affise shall be brought in K. For nothing is changed by the Fine, but the Place of Payment. Br. Affize, pl. 224. cites 20 Aff. 1.
Allife.

7. Allife of Rent was brought in the proper County, as it ought by the Statute of Magna Charta, viz. in the County of York in B. R. and the Parties pleaded, and for Difficulty had Day in tres sept. Faecb. and at the Day the Baron made Default, and the Fame was received and pleaded, and Day given to Offab. Trim. and at the Day the Parcel was fine Die by not coming of the Judges, and Re-attachment was sued Die Jovis in 15 Hilarii Ubicunque &c. viz. in B. R. and good, notwithstanding the Statute; for it was first commenced in the proper County. Br. Allife, pl. 82. cites 24 E. 3. 23.

8. Allife is not a common Plea, and therefore see that Allise lies not in C. B. which holds Common Pleas, unleas the Land be in the same County where the Bank fits; for Allise shall be taken in its County by the Statute of Magna Charta, cap. 12. Br. Conunance, pl. 40. cites 26 Alf. 4.

9. If a Conody, of which Rent is Parcel, be granted Percepient in D. in the County of E. and if it be arrear, that he shall disstrain in C. in the County of H. the Allise may be brought in the County of E. where D. is; for per Thorpe, it is illusing out of the Land in D. and the subjecting it to the Dilrate in C. is only for greater Surety; but if both had been in one and the same County, all had been put in View; by the Reporter. Quare. Br. Allise, pl. 327. cites 21 Alf. 27.

Thel. Dig. 59. lib. 7. cap. 5. S. 1. says it appears in E. 2. Allise 380. and Mich. 18 E. 3. 32. and 18 Alf. 1. and 7 H. 4. 28. that by the Common Law a Man could not have Allise of Rent illusing out of Lands in divers Counties, for which Cause a Statute was made Anno 7 R. 2. cap. 10.

If a Man has Rent in 3 or 4 Counties, it seems that he that is disinfed may have several Allises to be taken in Confinio Comitatus; for the Letter of the Statute of 7 R. 2. is general of Rent due of Tenements in divers Counties, and tho' it has a Reference to the Case of Common of Pasture &c. yet inasmuch as in the Case of Common of Pasture, if the Land in which &c. lies in several Counties, and the Land to which lies in another County, there shall be so many Writs as Counties; whence it follows that he that has Rent illusing out of Lands in several Counties, shall have such Remedy; and the Case of Common was put Exempli gratia only, and by way of Similitude; and the Stat. 7 R. was made to satisfy a Doubt on Magna Charta, cap. 12. that Allises of Novel Disseisin and Mortdanceftor shall be taken only in their proper Counties; and some held that this was not observed when the Justices sat in Confinio Comitatus, and particularly when there are 20 Counties meting between the 2 Counties, as the Book is in 5 E. 3. 2. 6.

But this Doubt might be conceived also upon the said Allise of Common, when the Land in which &c. is in one County, and the Land to which &c. is in another County, which Cause without Quidion is not restrained by the said Statute; for Allise of Common of Pasture lay at Common Law, as appears by Stat. of Weitf. 2. cap. 29. [23] 7 Rep. 3. b. 4. a. Mich. 26 & 27. Eliz. in Bulwer's Cafe.

11. Thel. Dig. 60. lib. 7. cap. 3. S. 2. says see in the Register, Fol. 197. and 198. and in the new Nat. Brev. Fol. 180. and 183. the Form of Writs of Allise of Common of Pasture, and of Nuinance to be brought in Confinio Comitatus where the Common in one County is appellant to the Land in another, and the Nuinance is done in one County to the Franktenement in another County.

12. Where the Franktenement is in one County, and the Way appendant in another, Allise of Nuinance shall be in Confinio Comitatus; and so of Common, and the View shall be made of the one Land and the other. Br. Nuinance, pl. 9. cites 11 H. 4. 25.

Where it is granted in 2 Counties which do not join, there Allise does not lie; for it is not in Confinio Comitatus. Ibid.

13. If Office is granted in 2 Counties, and he is disinfed in the one, Allise shall be in Confinio Comitatus; per Pole. Br. Allise, pl. 76. cites 22 H. 6. 9. 10.

14. If a Man grants 201. Rent in all his Land, and the Party brings Allise in Middlesex, and furnishes that the Grantor had Land in the Coun-
Affe. 195

cites of Middlesex, Kent, and Sussex, the Writ shall abate; per Cur. Br. 2 Counties, he shall have 2 Ass.
Affe, pl. 96. cites 22 H. 6. 9. 10.

Cites, in each County one, and one joint Patent, and the Assizes may sit between the 2 Counties, the there are 10 Counties between them. Br. Affe, pl. 389. cites 5 E. 4. 2. Co. Litt. 154. a. cites S.C.
Thel. Dig. 60. lib. 7. cap. 3. S. 5. cites S.C.

15. In Affe in Confinio Comitatibus, the Writ shall make mention that S. P. and the Land stretch'd into both Counties; per Moyle. Br. Count, pl. 20. cites and How they are adjoining. Thel. Dig. 60. lib. 7. cap. 3 S. 4. cites S.C.

16. Note, that all Assizes of Novel Disseisin and of Mortdancetor, which are in the County where the Common Bank is, shall be returned in the same Common Bank, and where B. R. is in another County than C. B. is, then all the Assizes of Novel Disseisin and Mortdancetor, which shall be taken of Land in those Counties, shall be taken in the same Bank, [returnable into B. R.]
Br. Affe, pl. 496. cites the Register, 196.

17. Affe must be brought in the County where the Land lies, and not Mo. 90. pl. elsewhere; and being brought in a Foreign County, the by the Agent of the Parties, it is erroneous. D. 283. b. 284. a. pl. 32. Patch. 11 Eliz. Butler v. Crouch.

Bend. 180, pl. 229. S.C.—— Kelw. 212. pl. 22. S. C. and tho' the Issue was found for the Plaintiff, and the Matter of Law was with him, yet because the Issue was tried by a Foreign County, where it ought to be tried per Patriam, it was not good, nor remedied by any Statute of Jeosails, and the Court would not give Judgment.

(T) One or several Assizes. In what Cases.

1. ASSISE de Libero Tenemento, and the Plant of Estovers Appren-S. P. Ibid. to 100 Acres of Wood, for Burning, Building, and Inclosure to 2 Houses, and for Inclosure to 2 Oxanges of Land, without View of the Forester, and Ablest' Blefts in 1000 Acres of Moore to cover the House, and for burning in the same House; and the Plant was challenged, because he made Plant of 2 several Estovers in divers Places, and that Blefter Blefts cannot be said Estovers, but Common of Turbar, Judgment of the Plant. Herle awarded the Plant good. Br. Affe, pl. 127. cites 7 Aff. * 18.

2. And said that Affe lies well of 100 Acres of Land, and of a Coron-

3. And Affe lies of 4 Acres of Willows and reasonable Estovers, and Yet one is by the Common Law, and the other by the Statute. Ibid. cites 10 E. 3.

4. And one Affe lies of two Rents, and one Plaintiff. Ibid. cites M. 11 E. 3.

5. Affe was of 42s. Rent, where the Tenant said, that 40s. issue out of 30 Acres in C. and 2s. Rent is issuing out of 4 Acres of Meadow in C. and each by itself in Grobs, Judgment of the Plant, and the Plant awarded good; and as to the 40s. the Tenant said, that the Plaintiff is feated at his Will, and as to the 2s. he said, that the 4 Acres of Meadow is surrounded by the Waters of Trent, and so he is the Tenant &c. Br. Affe, pl. 168. cites 11 Aff. 13.

6. In one and the same Plant may be divers Frank Tenements. Br. Affe, pl. 173 cites 11 Aff. 22.

7. If a Man grants 20s. Rent out of his Manor, scilicet 10s. by the Hands of J. and 10s. by the Hands of W. yet one and the same Affe lies,

8. If two Tenants in Common are difficied, each shall have a several Affise for his moiety &c, because they are feized by several Titles; but if 20 Jointenants are difficied, they shall have but one Affise in all their Names, because they have but one joint Title; so if there are 3 Jointenants, and one of them relieves all his Right to one of his Companions, and then the other 2 are difficied of the Whole, they shall have but one Affise in both their Names for the 2 Parts, because they held jointly at the Time of the Difficition; and as to the 3d Part, he to whom the Release was given, shall have an Affise in his own Name, because of that Part he is Tenant in Common. Litt. S. 311, 312.

(U) Attachment in Affise.

1. Not attached by 15 Days is no Plea in Affise in B. R. without answering over; contra before Justices assignd. Br. Attachment, pl. 5. cites 11 Aff. 30, and 12 Aff. 4.

2. In ancient Affise, which at no Time before was attached, the Defendant said, that Not attached by 15 Days, and non allocutur, but the Affise was taken because it was an ancient Affise, Quod Nota. Br. Attachment, pl. 8. cites 28 Aff. 43.

3. If Not attached by 15 Days be found against the Tenant, by Examination of the Bailiff, it is not peremptory; contra it it be found against him by the Affise, Quod Nota, Diversity. Br. Affise, pl. 463. cites 6 R. 2. and Fitzh. Affise, 462.

4. In Affise, the Tenant pleaded Not attached by 15 Days, and gave in Evidence that it was made by J. B. who had no Warrant from the Sheriff, nor from his Ministers to do it, for it is void without Warrant; but it seems that Warrant by Parol is sufficient. Br. Attachment, pl. 15. cites 8 H. 4. 7.

5. Affise against Baron and Feme, the Sheriff returned that the Baron is attached by 100 Eves, and that the Feme Nihil habet in Balliva mea per quod &c. Nee eff Inventa in eadem, and by the best Opinion the Return is not good; for a Feme shall be attached by Goods of the Baron; for the Writ willed that he attach the Feme, which the Law will not command, if it be imposible; but it is possible, for the may be attached by the Goods of the Baron, for the is amenable by him. Br. Attachment, pl. 4. cites 7 H. 6. 9.

6. In Affise, the Tenant pleaded Not attached by 15 Days, the Plaintiff said, that his Servant made the Attachment, who is not there; by which new Attachment was awarded, without taking the Affise to inquire of it, for it was the Folly of the Plaintiff who had not brought his Servant. But e contra if the Bailiff Errant had done it, and absent himself, there the Affise shall inquire of it; but if the Servant had been present, he shall be examined whether he had Warrant from the Sheriff or not; Quod Nota Diversity of the Trial of it. Br. Affise, pl. 462. cites 26 H. 6. and Fitzh. Affise 461.

7. Attachment in Affise shall be made 15 Days before the Day of Affise, and after the Day of Affise; and shall not be by a Glebe of Land, but by an Ox or by Pledges, and because not, therefore ill, per Cur. for the Tenant said Not attached &c. Br. Affise, pl. 398. cites 27 H. 6. 2. and Fitzh. Affise 14.
Land in Plaint, which Matter was recorded; and it seems that it is no good Attachment, for the Tenant cannot forfeit the Beasts of his Farmer. And Attachment ought to be made of such Things as the Tenant may forfeit by Outlawry; Nota between Dudley and Levelon, for the Manor of Parton in the County of Stafford. Br. Affife, pl. 430. cites 31 H.8.

(W) Return in Affife by the Sheriff. How.

1. In Affise, the Sheriff returned at the first Day that the Jury were put to Mainprife, and because they were not summoned at the 1st Day, Herle would not take the Affise, for they ought to be summoned at the 1st Day, and not to be put to the Mainprife the first Day, Note a Diversity. Br. Affise, pl. 124. cites 7 Aff. 15.

2. In Affise, the Sheriff returned Quod defendens non est inventus & nihil habet unde &c. the Affise shall be taken; Quod Nota, per Cur. Br. Affise, pl. 422. cites 7 E. 3. 57. and Fitzh. Affise, 135.

(X) Abatement of the Writ. By what.

1. Where the entire Rent-service is 10 s. and the Lord is paid 8 s. and dissised of 2 s. he shall not have Affise of the 2 s. but of the whole. Thel. Dig. 148. lib. 11. cap. 35. S. 7. cites 8 E. 2. It. Canc. Affise, 397.

2. If the Heir brings Affise, and pending the Writ, a nearer Heir is born, the Affise shall abate; Quod Nota. Br. Affise, pl. 164. cites 15 E. 2.

3. Affise of a Rent-charge against Roger D. and the Manor of D. was put in View, and Deed Sceau, by which P. Father of Roger, had granted 20 s. Rent extra unam Bosvatam Terr. e, to be taken by the Hands of the Tenant of the same Land; and that if it happened that the Land was alien'd, fold, or come to the Lord by Ejectment, or by any other way the Rent shall be stop'd, that he may distrain in the Manor of D. and that the Oxgange of Land was alien'd, and the Rent arrear, and yet the Writ was abated, because the Tenant of the Oxgange of Land charged was not named. Br. Affise, pl. 105. cites 1 Aff. 10.

4. The Verdict shall abate the Writ if the Plea of the Tenant be found that the Land is in another Vill. Br. Affise, pl. 107. cites 1 Aff. 17.

5. Coparceners of a Meadow, one cuts the Grass and carries away 4 Parts in 5 of the Hay, leaving the 5th Part, the other Coparcener refused to meddle with the 5th Part, but let it remain on the Land, and brought Affise, and it was held, that this taking more of the Profits than belonged to the one Coparcener was a Difference of the other; but if the other Coparcener had taken the 5th Part, it had abated her Writ. Br. Affise, pl. 121. cites 7 Aff. 10. per Herle.

6. Affise of the Manor of T. except 100 s. Rent, and the Writ was de liber tenemento in T. and one as Tenant of Parcel said, that the Manor extended into T. and C. Judgment of the Writ, and if &c. Nul tort, and the Plaintiff said, that this which was in C. was the 100 s. Rent in the Exception, and upon this the Writ awarded good, and yer by fome the Exception cannot extend but to the Vill in the Writ, which Bacon denied. Br. Affise, pl. 128. cites 7 Aff. 20.

7. Where a Female was dissised, and took Baron, and brought Affise, and
and the Writ was Quod


1. Affise of Rent by Baron and Feme, Quod

differens eum, and the Refus was found before the Covertce, and therefore the Writ good, but if it had been after, then it ought to be Quod

differens eum, altho' the Baron had not been siefiled, for Seisin of the Feme is Seisin for him, and his Feme to have Affise. Br. Affise, pl. 131. cites 8. Aff. 4.

9. If the Affise finds Estate made to the Plaintiff upon a Condition, that if the Plaintiff did not give such Land to the Defendant, or such like &c. that he may re-enter, yet the Writ shall abate, and good reason, for this is an Entry pending the Writ. Br. Affise, pl. 158. cites 10. Aff. 24.

10. Affise against two, the one pleaded a Release of the Plaintiff of all Actions, and of all the Right, and the Affise was prayed, because he who pleaded did not take the Tenancy upon him, for if he does not do it the Affise shall be awarded, and after the other took the Tenancy, and pleaded in Bar the same Deed as Affissee of the first who pleaded &c. and the Deed was denied &c. and if the Plaintiff had confessed the Deed in the Hands of him who first pleaded, the Writ had abated against all. Br. Affise, pl. 166. cites 11. Aff. 9.

11. If the Plaintiff had confessed that any named in the Writ is not Differis,
or that it may be found by Record that any named in the Writ was at another time acquitted, a Differis may plead such Matter, and the Tenant shall answer also, and if they are all Affise, the Pla of the Differis shall be first tried, and if it be found, it shall abate all the Writ. Br. Affise, pl. 166. cites 11. Aff. 9.

12. Affise against the Baron and Feme and others, the Sheriff returned that the Baron is dead, and per Cur. the Writ shall not abate but against the Feme, and shall be good against the others if they are Differis, and the Tenant named in the Writ; but it seems, if the Baron had been dead before the Writ purchased, then the Writ shall abate in all. Br. Affise, pl. 170. cites 11. Aff. 15.

13. Where a Manor extends into two Vills, and Affise of Rent out of the Manor is brought in the one Vill, it is a good Plea to the Writ that the Manor extends into the other Vill, and it is a good Replication that this which is in the other Vill is not but Services; for the Demenes only shall be charged with the Rent-charge; Quod Nota. Br. Affise, pl. 184. cites 12. Aff. 40.

14. In Affise, the Tenant pleaded Null tort, and the Seisin and Differis

is found by Verdict, and that the Plaintiff brought his Writ as Prebendary not named Prebendary, by which the Writ was abated by Award. Br. Affise, pl. 472. cites 13. E. 3. and Fitch. Brief 675.


16. In Affise the Tenant pleaded Jointenancy to Parcel, and the Plaintiff confess'd it, by which it was abated of this Parcel. Per Perwick, if there be no other Differis than him, all the Writ shall abate. Br. Affise, pl. 191. cites 14. Aff. 8.

In Affise the

Tenant pleaded a Bar to Part, and Jointenancy by Deed with

a Stranger of the reft, and the Plaintiff confess'd for the Jointenancy, and prayed to have the Affise of the reft, and had it, and so the Affise abated in Part, and awarded for the reft; and this he did, because the Affise shall not be laid by the Jointenancy; for Affise shall not be taken by Parcels. Br. Affise, pl. 223. cites 19. Aff. 14. and 21. Aff. 21. and 22. Aff. 6. accordingly.

18. In Affife of Common of Pasture the Plaintiff was of a Common in Grofs in such Place, with all the Beasts, at all Times of the Year, and the Specialty which was shown forth proved it rather Common Appendant, by which the Writ abated by Award. Br. Affife, pl. 199. cites 15 Afl. 5.

19. Jointenancy by Deed was pleaded with a Stranger. The Plaintiff would have confessed, and avoided it by Releasement of his Vilein, and that he enter'd and was feised until &c. and was not suffer'd in the Absence of the other Jointenant, by which the Writ was abated. Br. Affife, pl. 201. cites 15 Afl. 13.—Ibid. cites 32 E. 3. contra.

20. Affife between 2 Ablots, and found for the Plaintiff, and therefore it was inquired of the Right, by reason of the Collusion for Mortmain, and they found therein Matter which goes to the Abatement of the Writ, and yet the Writ did not abate, because this is not but Inquest of Office in this Matter, and therefore the Plaintiff recovered. Br. Affife, pl. 203. cites 16 Afl. 1.

21. A Diffeisor shall not plead a Recovery in Abatement of the Writ, neither by Conclusion nor Misquiter, nor otherwise, without proving the Record immediately; for he cannot lose the Land by Failure of Record, as the Tenant may, therefore the Affife was awarded immediately. Quod noxa. Br. Affife, pl. 413. cites Pach. 20 E. 3. and Fitzh. Affife, 120.

22. In Affife a Chanse was in the Original, which was not in the Patent, and several were named in the Original which were not in the Patent, and therefore the Writ was abated. Br. Afl. pl. 238. cites 22 Afl. 20.

23. Affife de Libero Tenemento in Villa de Wofin. was held good, notwithstanding that it was said that Villa ought to be omitted. Thel. Dig. 96. lib. 10. cap. 7. S. 8. cites 24 Afl. 2.

24. Writ of Affife against Ro. and Cath. his Feme, and Will. B. was Pone per Vdd. &c. predel? Ro. Cath. & Will. without putting any (&c) between Rob. and Cath. and yet adjudged good. Thel. Dig. 90. lib. 10. cap. 6. S. 32. cites Trin. 26 E. 3. 61. and 23 Afl. 18.

25. In Affife the Defendant pleaded to the Affife, which said that the Plaintiff was seised and disseised, but no Diffeisor was named in the Writ, and therefore it was awarded that the Writ shall abate; and yet the Affife was against Baron and Feme, who pleaded a Record, and fail'd of it at the Day; and the Feme was received, and pleaded Null tort, and the Verdict found ut supra, by which Failure the Baron is a Diffeisor by the Statute, and yet Judgment ut supra; and therefore it seems that the Receipt of the Feme saved the Baron; Quære the Reason; and so Writ abated by Verdiel of a Thing not pleaded. Br. Affife, pl. 266. cites 26 Afl. 35.

26. If a Man brings Affife in Confinuo Comitatis, the Writ shall make mention that the Land extended into both Counties, and how they are adjoining. Br. Affife, pl. 15. cites 35 H. 6. 30. per Mole.

27. Affife against A. and 3 others, and A. said that the 3 were dead before the Writ purchased, and found accordingly, and that A. disseised the Plaintiff, and that A. was Tenant, and therefore the Plaintiff recover'd by Award; quod mirum, upon a false Writ. Br. Affife, pl. 269. cites 26 Afl. 63.

28. In Affise against 2 Jointenants, the one dies pending the Writ, the Writ shall abate. Br. Affise, pl. 273. cites 27 Afl. 45.

29. But if one Diffeisor dies, and another is named Tenant, all the And if the Writ shall abate. Br. Affise, pl. 273. cites 27 Afl. 45. Tenant in- the Diffeisors, and dies pending the Writ, yet the Writ is good; per Wilby. Quære. Ibid.

30. Affise against the Baron and Feme as Diffeisors, and the 3d as Ten-ant, the Baron died, the Writ shall abate. Br. Affise, pl. 474. cites 27 Afl. 45. and Fitzh. Brief; 883.

seems to him, that the Abatement shall be in to the Feme.——— Affise against the Baron and Feme,
31. The Lord disfavored for Rent, pending Affife of the same Rent, the Affife shall abate, Quod nota; for Diftrefs is in Law as an Entry into the Rent, as it seems. Br. Affife, pl. 302, cites 29 Aff. 52.

32. Affife by Agnes D. the Defendant said that 7. her Baron is alive, Judgment &c. [it being] brought by the Feme without her Baron, and the Affife was awarded, therefore it seems that this Exception goes to the Writ, so that he shall plead over &c. Br. Affife, pl. 312. cites 30 Aff. 26.

33. Affife of Common of Paffure in Grofs; P. answered as Tenant, and demanded what he has of the Common, the Plaintiff prescribed in him and his Predecessors Time out of Mind. Persey said, Never seised of the Common as in Grofs, and if &c. seised as Appendant at Will &c. Another Defendant said, that the Plaintiff had used the Common pendant the Writ; per Birton, if his Beasts go thither by * Escape, and not of his own Will, the Writ shall not abate; wherefore the Affife was taken. Br. Affife, pl. 334. cites 33 Aff. 9.

34. In Affife, the Tenant pleaded Null Tort, and the Seifin and Diffeifin was found, and that the Tenant held jointly with A. who is alive not named, by which the Writ was abated by Award, Quod nota, and yet contra Anno 9. And per Priftor, Anno 33 H. 6. 30. Br. Affife, pl. 446. cites 33 E. 5. and Fizth. Affife, 457.

35. Affife by a Chaplain of a Chantery of Rent, the Tenant pleaded Hors de Son Ec, the Plaintiff said that he and his Predecessors Chaplains &c. were seised Time out of Mind, and he was seised and dixseised &c. and the other traversed the Prescription, and the Affife found for the Plaintiff, and that he disinherited, and Recous was made, and that the Plaintiff had no other Seifin than the Diftrefs, and prayed the Difcretion of the Judges, and the Plaintiff recovered by Award; because by the Seifin the Predecessor of the Chantery was seised, and not out of Possession, and also by the Counter Plea of the Tenant it is a Diffeifin, and therefore the Plaintiff recovered his Damages. It was said that if the Defendant had pleaded to the Affife, the Writ had been abated by this Verdict; because there was no Diffeifor to the Plaintiff. Br. Affife, pl. 335. cites 34 Aff. 3.

36. Affife against A. it is found that A. and E. his Feme (which Feme is not named in the Writ) entered in Jure Uxoris, and found that the Feme had nothing, nor any Interest in it, and yet the Writ was abated by not naming of the Feme; the Reason seems to be in as much as the Feme cannot wave her Interest gained by the Diffeifion during the Life of the Baron. Br. Affife, pl. 346. cites 35 Aff. 3.

37. In Affife, it was found by Verdict that 2 Coparceners of a Moore made Purparty, and one leased his Part to A. B. for Life, who leased his Part to 3 at Will, who passed the Soil of the other Coparcener, and out Wood, and mowed Ruffien, and the other Partener voided the Possession, and brought Affife against Leafe for Life, and against 2 Tenants at Will;
one of the Tenants at Will is not named, who by his Act is a Distressor and Tenant with the others, therefore by Award the Plaintiff took nothing by his Writ. Br. Ailife, pl. 343. cites 37 Aff. 8.

38. If it be alleged in Ailife that the Tenements are in the Hands of the King, the Escheator shall be thereof examined if he be present, and if not the Ailife shall inquire it, per Finch; and if the Tenant enjoys the King pending the Writ, yet the Writ is good. Br. Ailife, pl. 349. cites 38 Aff. 18.

39. Ailife against Several, it was found that one named in the Writ was Tenant, but that that there was not any Distressor named in the Writ, by which the Writ was abated, and therefore Quere, if it be a good Plea that there is no Distressor named in the Writ; and if &c. Nul Tort &c. Br. Ailife, pl. 375. cites 46 Aff. 19.

40. If Ailife is brought of Land, Part in Guildable and Part in Fran- chie, which has Convaince of Pleas, the Writ shall abate; per Ga- coign and Hull. Br. Convenance, pl. 15. cites 8 H. 4. 7.

41. In Ailife against divers where 2 take the entire Tenancy, and plead to the Writ, if the Plaintiff finds that one of them is Tenant and that the other has nothing, he who is Tenant shall not plead De Novo as folc Tenant. Thel. Dig. 90 Lib. 10. cap. 1. S. 34. cites 21 H. 6. 63.

42. In Ailife the Writ was Et interim fac. 12 &c. videre Tenementa illi Br. Brief, & Sum' es quod fort coram prefat' Jufliciar' &c. Et pone per Vat' & fal' pleg' praedictum W. vel Ballivium iium &c. fi &c. Quod fit ibi audiend' &c. because it ought to be Lined tune fit ibi, and this 90 Lib. 10. Word (tune) was wanting, the Ailife was adjourned, and they were clear in Opinion to abate the Writ, and the Plaintiff was non-listed; Quere it shall not be amended; for it is said there, that it has been used to amend such Writs, and so they did before Sir R. Newton. Br. Ailife, pl. 4. cites 27 H. 6. 2.

43. A Plaintiff was brought in D. only, whereas there were 2 D's in the same County, and none without Addition, yet the Ailife and Plaintiff is good enough; because (as the Reporter apprehends) the Judgment in Ailife differs from other Writs; for he recovers Seilin of the Thing put in Plaintiff, per Vifum Recognitorum, and if the Thing in the Plaintiff be'to be /tain and Plain, that the Recognitors may put the Plaintiff in Possession, it is sufficient. D. 84. b. pl. 84. Patch. 7 E. 6.

44. In an Ailife for a Cellar, the Tenant pleaded in Abatement, that the Demandant had entered at the last Continuance; the Jury found, that the Demandant entered at the Requête of the Tenant, and only to View the Antiquity thereof, and not for any other Purpose. The Court held this no Entry to abate the Writ and Judgment for the Plaintiff. Pl. C. 91. b. Trin. 3 Mar. Panel v. Moore and the Mersors Company.

45. There were 8 in an Ailife, the Defendant as to 7 of them pleads Non differtvrt; the Recognitors as to those 7 found that there was no Distress, but found a Distress in as to the 8th; the Writ shall abate; for the Plaintiff has joined those as Plaintiffs in the Ailife who ought not to be joined. Jenk. 42. pl. 79.

46. Error of a Judgment in Ailife; Ailife was brought against A. and B. of a Portion of Tithes arising out of 300 Acres of Land in S. A. pleads no Tenant of the Freehold named in the Writ, and if &c. Nul Tort; B. pleaded Nul tort; all the Court held, that of Necessity there ought for the Jury to be a Tenant named, and the Jury finding that none was named, the Writ ought to abate, and therefore the Judgment was reversed. Cro. E. 559. pl. 16. Patch. 39 Eliz. B. R. Cadogan v. Powell. The Reporter makes a Quere how this can be, if he was cited till by B. dist- felled, which is the same, the remainder.
remained always Tenant of them to every Action, and could not dispose of it as he might of the Land itself. But that notwithstanding, for this Cause Judgment was reversed.

47. Where an Assise is brought for a Mill it shall be De Molendino generally, without expressing certainly the Nature of the Mill, as Grist-Mill, Fulling-Mill &c. because the Mill is the Substance, and the Thing to be demanded, and the other are but Additions to shew the Quality of the Mill. 4 Rep. 57. a. Pach. 43 Eliz. B. R. in Lutherel's Cafe.

48. The Office of a Park-keeper was granted in Reversion to A. the Demandant, and afterwards the Park itself was granted to B. who entered and kept out A. after the Death of the Tenant for Life. A. brought an Assise, and had a Verdict, but before Judgment entered into the Park, and there did hunt and kill a Deer, and took a Shoulder of it for his Fee, and this Entry was assigned for Error, for that it had abated the Writ, and made the Judgment erroneous; but the Court held it no Abatement. Built. 4. Hill. 7 Jac. B. R. Shrewsbury (Earl) v. Rutland (Earl)

Writ it being to another Purpose, viz. to hunt, whereas it should have been alleged that he entered to keep; for in every Entry the Intent of the Entry is to be regarded, and Fleming Ch. J. accordingly, and that as to the taking a Shoulder for his Fee it is not material, for he shewed no warrant he had to kill the Buck; besides, the taking of the Fee is no entering into the Office, but the exercising of it, and the whole Court held this no Abatement.—8 Rep. 35 S. C. but I do not observe S. P. there.

49. In Assise, if the Tenant pleads in Abatement he must likewise plead over in Bar at the same Time, and no Imparlance shall be allowed without some good Cause, because it is Fettinum Remedium, and it there are several Tenants, and any of them do not appear on the first Day, the Assise shall be taken by Default against them. 1 Salk. 83. pl. 2. Pach. 5 W. 3. B. R. Saveris v. Briggs.

(Y) Election of Tenant. Where several Defendants take the Tenancy on themselves.

1. ASSISE against two, each took the Tenancy and pleaded. The Opinion of some is, that the Plaintiff in this Case shall choose his Tenant as his own Peril, and this shall be first inquired, and if he be Tenant he shall have his Plea, and if not the Writ shall abate; and by others, tho' he choses his Tenant, and another is found Tenant, yet the Writ is good, which does not seem to be Law, for the Election of the Tenant is material. Br. Assise, pl. 129. cites 8 Aff. 1.

2. In Assise against several of Rent-service, one pleaded to the Assise, some of the others pleaded Jointtenancy in the Land out of which &c. and other Pleas &c. The Plaintiff chose him, who pleaded to the Assise, for his Tenant, and that he held all the Land of the Plaintiff by the Rent &c. and found for the Plaintiff by which he recovered. Thel. Dig. 149. lib. 11. cap. 37. S. 2. cites 17 E. 3. 46. 68. 17 Aff. 12. 21. and 24 E. 3. 16. 26.

3. Where they take the Tenancy severally, each of the whole, the Plaintiff may choose his Tenant by Pernancy as well as if they had pleaded Non-tenure or Jointtenancy; but where no sole Tenancy is pleaded, nor Non-tenure, nor Jointtenancy, but a Bar, or to the Assise, there it seems that the Plaintiff cannot nor need not to take him a Tenant by Pernancy; Quod Nota Divertit. Br. Assise, pl. 423. cites 1 H. 5. 4.

4. Note,
(Z) Election of Tenant. At what Time it may be.

1. In Affise against two, who severally pleaded as sole Tenants of the whole, and the Plaintiff replied to their Pleas without chusing his Tenant, upon which the Affise was adjourned to Westminster, and the Plaintiff was received to chuse his Tenant after the Adjournment. Thel. Dig. 150. lib. 11. cap. 37. S. 4. cites Patch. 22 E. 3. 5.

2. Affise against several, the one took the entire Tenancy, and pleaded a Recovery in Bar, and another said he is Tenant by the Feoffment of the first, and pleaded the same Recovery in Bar, and the Plaintiff without chusing his Tenant said, that the Land recovered lies in another Vill, and upon this the Parties were adjourned to Westminster before the same Justices, and there the Plaintiff elected the last, who pleaded, for Tenant, and said, that the others are only Dictators, and answered to him, and prayed to be dischared of the Plea of the others; Per Greene, you cannot do so, for we are adiourned upon another Point, and because they were adjourned before the same Justices in the same Plight as they were in Paris, therefore * Thorp awarded that he might now chuse his Tenant, and ad- journed the Affise in Paris to be taken; Quod Nota. Br. Affise, pl. 255. be Shard. cites 23 Afl. 16.

(A. a) In what Cases the Plaintiff is compellable to chuse his Tenant; and the Effect of mis-electing him.

1. Brings an Affise against two, one pleads the Release of the Plaintiff of all Actions Personal, the other pleads Jointenancy with C. who is in full Life at Dale not named in the Writ; in this Case the Plaintiff ought to elect his Tenant, and if he misse his Tenant in the Election the Writ shall abate. Jenk. 16. pl. 21. cites 17 Afl. 25.

2. In Affise against two, the one pleaded to the Affise by Bailiff; and the other said, that he was Tenant of the Moiety, and pleaded in Bar, the Plaintiff said, that he who pleaded to the Affise was Tenant of the whole, and that the other was not Tenant &c. and it was found that he who took the Tenancy of the Moiety was Tenant of the Moiety, and it was found for the Plaintiff as to Selin and Difficlin of the other Moiety, upon which he had
had his Judgment of this Moiety; but for the other Mottery it seems by the Argument of the Book that the Writ shall not abate, but that the Plaintiff shall plead to the Bar of him who was found Tenant &c. yet the Plaintiff was non-suited for fear of being barr'd. Thel. Dig. 150. lib. 11. cap. 37. S. 3. cites 20 Aff. 4.

3. Affile against two, each pleaded in Bar taking the intire Tenancy, the Plaintiff mis-cites his Tenant, which is so found against him, this is per-curatory, and he shall be barr'd by the Opinion of the Court; Quære thereof, and see 8 Aff. 1. that it does not go but in Abatement of the Writ. Br. Affile, pl. 225. cites 20 Aff. 4.

4. In Affile against A. B. and C.—A. pleaded Jointenancy with one not named &c. The Plaintiff said that B. was Tenant, abjures hoc that A. any thing bad &c. and it was found that A and B. had nothing, but C. was Tenant, and the Seilin and Diffelain found, upon which the Plaintiff had Judgment to recover, in as much as there was Tenant and Diffelain named. Thel. Dig. 150. lib. 11. cap. 37. S. 6. cites 42 Aff. 1. and 33 H. 6. 36. and 37.

5. In Affile against 2, the one pleaded in Bar, and the other pleaded to the Affile by Bailiff, and the Plaintiff said that he who pleaded in Bar was not Tenant, and he, who had pleaded by Bailiff, came in proper Person, and was ready to plead in Bar; upon which the Affile was taken, and found that he who had pleaded to the Affile was Tenant, and further the Seilin and Diffelain, upon which the Plaintiff recover'd, without admitting him who was found Tenant to plead in Bar. Thel. Dig. 150. lib. 11. cap. 37. S. 8. cites Hill. 48 E. 5. [7] Aff. 64.

6. In Affile against Infant and another, each took the intire Tenancy, and pleaded in Bar, and the Plaintiff chose the Infant for his Tenant, and made Title to his Bar, and Affile was taken upon the Title, and the Affile charg'd first found that the Infant was Tenant, and found the Title of the Plaintiff, and the Seilin and Diffelain, and that the other had disjus the Plaintiff to the Use of the Infant when the Infant was of the Age of a Year and a half &c. upon which the Plaintiff had Judgment to recover; but Writ of Error was sued. Quære. Thel. Dig. 150. lib. 11. cap. 37. S. 9. cites Hill. 3 H. 4. 16.

7. It was said that in Affile against 6, if 2 take the intire Tenancy and plead in Bar, and the others do in the same manner severally, and the Plaintiff choose one of them to be his Tenant, and it be found that all the 6 are Jointenants &c. the Plaintiff shall be barr'd by the Mis-election of the Tenant. Thel. Dig. 150. lib. 11. cap. 37. S. 9. cites Hill. 3 H. 4. 16. and says see 33 H. 6. 36.

8. In Affile against 3, the one pleaded to the Affile, and the other 2 a Re-lease of Actions Personal in Bar. The Plaintiff said that he was seised, and disjus by these 3, to the Use of him who pleaded to the Affile, and if any Fragment be, it is to deprive him of his Tenant, and that the first who pleaded took the Profits on the Day &c. and the 2 demur'd, by which the Writ abated by Judgment; quot nota; and yet the Statute extends as well to Jointenancy as to Non-tenure by the Equity, which is intended to maintain the Writ against a Pernor, where the Tenant of the Frankenement is not named; but where the Tenant of the Frankenement is named, and will plead, the Plaintiff shall answer to him, for he has a Tenant of the Frankenement, and is out of the Cafe of the Jurate; quod
quod nota, nevertheless it seems that the Reason is, because a Diffeifor or Pernor may well plead a Release of Adfious Perfonal, as appears in 35 H. 6. and allo the Plaintiff was not compelled to chufe any ior his Tenant, Caufa qua supra. Br. Aflife, pl. 403. cites 1 H. 5. 4.

9. For it is not like to the Cafe in 21 H. 6. viz. Aflife against 3, the one took the Tenancy and pleaded in Bar, and the other 2 took the Tenancy, abfina be that the first who pleaded had any Thing, and pleaded Ancient De- 

mefne. The Plaintiff said that he was feized still by all 3 diffeifed to the Use of one of the 2, who pleaded Ancient Demeffe, who has made a Feoffment to Per- 

fons unknown, and took the Profits; and to the Plea of the other, and the 

first, No Law &c. by which the Pernor would have taken the Tenancy alone, and pleaded Ancient Demeffe at supra, and was oufet by Award, and the Aflife awarded; for here he was compell’d to chufe his Tenant; but con- 

tra supra in the firft Cafe. And to see that where they take the Tenan-

cy severally, each of the inteire, the Plaintiff may chufe his Tenant by Per- 

nancy as well as if they had pleaded Non-tenure or Jointenancy. But 

where no fele Tenancy is pleaded, nor Non-tenure, nor jointenancy, but a 

Bar, or to the Aflife, as in the firft Cafe, there it seems that the Plaintiff 

cannot, nor need be to take him a Tenant by Pernance. Quod nota Diver-

sity. Br. Aflife, pl. 403. cites 1 H. 5. 4.

10. In Aflife against 2, the one pleaded in Bar a Tenant, and the other pleaded No Tenant of the Franktenent named in the Writ &c. and the Plaintiff made Title to the Bar, and thereupon to Ilfile, and it was found for the Plaintiff, and that both were Jointenants the Day of the Writ &c. upon which the Plaintiff had Judgment to recover, notwithstanding that he had made Title to the Bar, as accepting him who had pleaded in Bar to be fele Tenant of the Whole. Thel. Dig. 150. lib. 11. cap. 35. S. 11. 

cites Mich. 33 H. 6. 35. inasmuch as the Aflife was not charged to in- 

quire of the Jointenancy.

11. And it was said there, that if the Aflife had found that he who pleaded in Bar was not Tenant, but the other, yet the Writ had been good if there had been Tenant and Diffeifor named. Thel. Dig. 150. lib. 11. cap 35. S. 11. cites Mich. 33 H. 6. 35. and says it was held there, Fol. 36. that if one be compell’d to chufe his Tenant, and it be found that he has miftook his Tenant, and that he had not made Title to bar him who is found Tenant &c. it shall be a Bar against him. But where the Diffeifor pleads, and the Tenant to the Aflife and the Plaintiff make Title against the Diffeifor, this is only Surerpofe, and shall not grieve, because he was not compell’d to take him for his Tenant; for a Man shall not be 

compell’d to chufe his Tenant, but where the Tenants severally take the inteire 

Tenancy, and plead in Bar, or to the Writ, or such like &c.

12. If it be found that the Plaintiff mis-deifs his Tenant, the Writ shall abate, but he shall not be barr’d. Br. Aflife, pl. 384. cites 9 E. 6.

(B. a) Declaration. In General.

IN Aflife the Plaint shall not abate for want of Form, as Writ shall do; but it suffices if it has Matter sufficient. Quod nota. Br. Plaint. 

pl. 4. cites 22 H. 6. 10. per tot. Cur.

* An Aflife as in other Writs of Precipe quod reddit. D. 84. b. pl. 83. Paftch. E. 6. says that this is common Learning in the Book of Aflises in divers Places; and that in 8 Aff. rafs was put before Pafture in

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2. A Plaintiff was maintained for Profit apprendre for the Exercise of the Office only. Thel. Dig. 67. lib. 8. cap. 5. S. 5. cites 3 E. 3. Itin. North. Affise 175. and 12 Aff. 23. of Eatables and Drinkables, as pertaining to an Office.

3. Affise by Master of an Hospital of 14 Houses, and the one was the Hospital; and it was said that he cannot have other Plaintiff of a Hospital, nor of a Chappel, but by Name of a Messuage. Br. Plaintiff, pl. 20. cites 8 Aff. 29.

And if a Man be disfèled of all his Office, he shall make all the Office; but if he be disfèled only of Parcel of the Profits, the Plaintiff shall be of this Parcel of the Profits taken for the Execution of such an Office. Thel. Dig. 67. lib. 8.cap. 5. S. 4. cites Hill. 8 E. 3. 384. 8 his Plaintiff of Aff. 7.

4. In Affise of an Office the Plaintiff was of the Serjeanty of the Common Bench only, which was Parcel of the Ufbery of the Exchequer, and not of all the Office &c. because every Parcel of an Office may be Franktence. Thel. Dig. 67. lib. 8. cap. 5. S. 4. cites Hill. 8 E. 3. 13. Plaintiff 23. and cites 22 H. 6. 11. agreeing. But cites 1 E. 2. Aff. 387. contra, where it is said that a Man shall not have Affise of the Appendant, if he be not fèled of the Principal; and the Plaintiff of an Office with the Appertenances was adjudged, without making mention of the Profits to be taken for Execution &c. 30 Aff. 4. and that so agrees Mich. 8 E. 4. 23. and Brief. 5 E. 4. 7, but says that the Plaintiff was made of the Office, and of the Exercise and of the Profits of the Office. Hill. 16 E. 2. Affise 370.

5. In Affise by J. against R. and made the Plaintiff of 100 s. Rent by the Year, and of the Rent of a Robe by the Year or 30 s. and of the Rent of a Seal by the Year or 13 s. and it was challenged, because it was not certain of the one or of the other, as in Præcie quod reddat, or in Writ of Annuity, as appears Anno 11 E. 3. and the Plaintiff was awarded good for it agrees with the Deed upon which it is founded. Br. Plaintiff, pl. 12. cites 11 Aff. 8.

In Affise the Plaintiff was of 4 Acres of Willows, and did not say of Land nor Meadow, and well. Br. Plaintiff, pl. 29. cites 11 Aff. 13.

6. Affise, quod eum diseivit of certain Acres, the Plaintiff was abated, because it was not in Demesne. Br. Plaintiff, pl. 30. cites * 14 Aff. 16. where it is cited in a Nota at the End of the pl. as Mich. 14 E. 3. Bayliff 6.

8. In Affise of Rent it was said, that the Plaintiff is not good if it be of Rent-Service if he does not say cum pertinentiis; Quod Nota; by which he said of 8 s. Rent cum Pertinentiis. Br. Plaintiff, pl. 13. cites 8 Mark Rent cum Pertinentiis, and so fee that he shall say cum Pertinentiis as well of Rent-charge as of Rent-Service. Br. Plaintiff, pl. 3. cites 8 H. 6. 11.—Br. Affise, pl. 69. cites S. C.

9. It is said, that in London it is usual to say what Year and Day the Disseisin was done; contra in other Affise; for in mixed Actions or real Actions
Affise.

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Actions the Year and Day is not used to be put. Contra in Personal Actions. Br. Affise, pl. 228. cites 20 Aff. 16.

10. In Affise the Plaintiff was of a Mill, and did not say a Wind-mill or Water-mill, and yet well; Quod Nata ibidem. Br. Plaint, pl. 14. cites 21 Aff. 23.

11. Affise of Rent, the Plaintiff must shew the Court what Rent it is be-s. P. Br. Af- for the Affise shall be awarded, be it upon Plea of the Tenant or by De- life, pl. 108. fault, or by Bailiff, or otherwise, by reason that the Affise shall inquire cites 2 Aff. of the Caule of the Diffilin, which cannot be if they do not know what Rent is put in Plain. Br. Affise, pl. 261. cites 26 Aff. 6.

12. Affise of Plaint of the Office of Mower of the Manor of P. cum Pertin. Br. Affise, nuntiius, and the Specialty was, that the Office of Mower was granted pl. 308. for Term of Life, taking so many Quarters of Corn &c. Fisher demanded S. C. but Judgment of the Plain, for Mower is the Charge, and the Grain is the mentions it Profits, and to the Plain ought to have been of the Profits, and not of the Charge, and yet the Plaintiff awarded good; Quod Nata. Br. Plaint, pl. 16. cites 30 Aff. 4.

49. b. and says, Shad took a Divarty between an ancient Office and a new Office, and that in the left Case the Plaintiff must shew what Fee or Profit is granted for the Exercise thereof; because this cannot have Fee or Profit appurtenant to it as an ancient Office may; but otherwise of an ancient Office.

13. In Affise, the Plaintiff is good of a Corody by Name of so many Loaves, so much Ale, and so much Fleés, and 6 d. a Week, and shall not be put to Affise of Rent of the 6 d. for it may be Part of the Corody. Br. Plaint, pl. 18. cites 40 Aff. 12.

of the intire Corody, but of this Parcel only, and not by Name of a Corody, but of so much Beer &c. Br: Affise, pl. 508. cites 50 Aff. 4.

Diffilin of Parcel is not Diffilin of the whole, as of Corody, where the Diffilin is of the Bread, or of the Beor, or of the Chamber &c. he may have Affise of this Parcel without bringing it of the whole Corody. Br Affise, pl. 76. cites 21 H. 6. 9. 10. per Newton, Patton and Ashton. — S.P. and if he brings Affise of the whole his Wit shall abide; but if the Corody be of 4 Loves, and he is diffilin of two only, he shall plead of all the 4 Loves. 8 Rep. 50. a cites 3 E. 3 Affise 175. by Scroope, and 22 H. 6. 9.

14. In Affise, the Plaintiff made his Plaint of the Moiety of a Piece of Land, containing so much in Length, and so much in Breadth; Tirwit said, where you make Plaint of the Moiety of a Piece of Land, you shall not say the Length and Breadth, by which he amended his Plaint and made it of a Piece of Land intire. Br. Plaint, pl. 2. cites 9 H. 4. 3.

15. In Affise of Office he need not express the Profits of the Office. The same Law in Affise of a Corody or Stewardship he need not express them certainly, but generally Quod distant eum of the Stewardship, or of the Office of holding Court. Br. Affise, pl. 388. cites 5 E. 4. 2.

16. In Affise of an Office, the Plaintiff shall not be of the Office and of the S.C. cited Fees and Wages, for this is of one Thing twice in Plaint, but shall say per Cur. 8 of an Office cum Pertinens, and shall not say that the Office voided by S. P. Br. Reification, and he was admitted, but shall say that it voided and he plain, pl. was admitted, and if he shews Causé of the Voidance, it seems that he 32. cites 5 E. shall say that it was by Death or Surrender. Br. Plaint, pl. 19. cites 8 4. 2.

E. 4. 22.

17. In Affise of the Office of one of the Clerks of the Crown in Chancery, the Plaintiff had a Verdict, and it was moved in Arreis of Judgment for that no Title is found, because he did not shew that there was such an Office at the time of the Grant; fed non allocatur; and also that he did not shew what he ought to do, nor what he should take for his Labour, and yet it was held good, and it was an Office of one of the Clerks of the Crown granted to 2, and yet held good. Br. Affise, pl. 95. cites 9 E. 4. 6.

12. In
18. In Affife of Office of Parkerhip, Stewarship &c. he need not shew how the Office commenced; but content of Rent-charge, Rent-lick, and Common in Groot; for these are against common Right, which Offices are not. Br. Affife, pl. 95. cites 9 E. 4. 6. Bagges's Cafes, pere Brian.

19. In Affife the Plaintiff was De Officio Magistrí Ludorum Pilarum Palmarum, Anglice, the Office of the Master of the Tennis Plays by Grant of the King for Life, by Force whereof he was seised of the said Office with the Appurtenances for his Life, and the Profits thereof had taken and received to his own Use till by the Defendants diffiefed. The whole Court held, that where the Grant was in English, viz. of the Office of the King's Tennis Plays &c. it shall have a reasoneable Senfe, viz. the Tennis Plays for the King's Household, and not only when the King himselfe plays in his royal Person. 8 Rep. 45. b. Mich. 6 Jac. C. B.

(D. a) Declaration and Plaint in Affise. Title therein.

1. In Affise the Tenant pleaded Bar by his Ancestor; the Plaintiff replied, that if his Father was seised in Fee, and the Land was seised into the Hands of the King in the Time of E. 2 because his Father was of the Quarrel of T. Earl of Lancater, and his Father died, and this Plaintiff as Heir died to the King, and obtained the Land by Livery, and fo was he seised till by the Defendant diffiefed, and this admitted a good Title without shewing how his Father came [to it, and] without [shewing any] Title of Right; Quod Nora, by Award, Br. Titles, pl. 15. cites 2 Aff. 9.

2. In Affise, the Plaintiff made Title to a Reversion by Grant of the Defendant, and did not shew Deed, and therefore it was held no Title, Quod nota bene. Br. Title, pl. 17. cites 8 Aff. 11.

3. In Affise the Tenant pleaded Leave by R. his Ancestor whose Heir &e. to K. for Term of Life, who aliened in Fee, by which he entered for the Forfeiture as Heir of his Ancestor, and the Plaintiff claiming as Heir of A. where he was a Bastard, entered &e. the Plaintiff said, Protestando, that he is not a Bastard, &c. pro Placito, that he brought Affise against the Leissee and Allience and recovered, at which Time this now Tenant had nothing nor ever before, and because the Judgment was against a Stranger which shall not bind this Tenant, nor is there suppos'd to be Elder Title, of which the Estate of the Ancestor of the Tenant shall be Mefne &e. therefore per Cur. this is no Title. Br. Titles, pl. 45. cites 10 Aff. 20.

4. In Affise of Common, the Plaintiff shall not have Affise without shewing the Title, and this in his Plain, Quod nota bene. Br. Affise, pl. 199. cites 15 Aff. 5.

5. Affise, Forndem, the Tenant pleaded Acknowledgment of Right by Fine without Warranty to one A. One Estate he had, and the Demandant said that the same Ancestor had only for Term of Life, the Reversion to him, and aliened in Fee &c. and be within Age by 6 Years entered, and so was he seised &c. and it was held a good Title, without shewing How the Reversion was to him, for the same Cause the other took, he took for his Title. Br. Titles, pl. 16. cites 16 Aff. 1.

6. In
6. In Affife the Tenant pleaded Bar by Escheat of his Tenant, and gave colour to the Plaintiff; and well; The Plaintiff said, that I was seised and infessed him, and so was he seised till disinfessed, and no Title, per Cur. for he has not traversed the Bar nor confessed and avoided it, and so it seems that it is no Bar at large, Quære inde. Br. Titles. pl. 46. cites 27 Aff. 7.

7. Affise by Executors, and they were in a Manner compelled to shew Cause, feized, Title in the Plain, and so they did, feized, that the Tenant was bound in a Statute Merchant to the Testator, and the Executors sued Execution for Non-payment, and was seised and disinfessed by the Tenant; the Plaintiff said that he paid the Money to the Testator, and seised thereof Acquisition, & not allocatur, but the Affise awarded whether Execution was made or not, without inquiring of the Payment or Acquisition; for if it be so, then he shall have Audita Querela. Br. Affise. pl. 279. cites 28 Aff. 7.

8. In Affise the Tenant pleaded Bar, and the Plaintiff said that the Tenant himself was seised, and infrusted him, and so was he seised till disinfessed &c. and good Title by Feoffment of the Tenant himself, Quod nota; and if it be found for the Plaintiff, the Defendant shall go to Prison for the Entry against his own Feoffment. Br. Titles. pl. 47. cites 28 Aff. 8.

8. In Affise the Tenant pleaded a Recovery against the Ancestor of the Plaintiff, he said that his Ancestor died seised after, this is no Title without shewing how he came by it after the Recovery, Quod nota. Br. Affise. pl. 411. cites P. 32 E. 3.

9. So if the Title had been found by Verdict [to be] after the Recovery, Quod nota. Ibid.

10. Affise of Common in Piscary in T. from such a Place to such a Place, Br. Plaintiff, and because it was of Profit Apprenite in alieno Solo, he was compelled to shew Title, Quod nota. Title in the Plain, by which he shewed that A. was seised of the Manor of B. with the Piscary Apprenite, and granted the Manor with the Piscary &c. Br. Affise. pl. 337. cites 34 Aff. 11.

II. Of a Thing which bears Countenance to be against Common Right, the Plaintiff shall make Title in his Plain, As of Office, Common &c. Concern of a Rent, th' it be Rent-charge or Rent-fock; for it may be intended Rent Service till Title be made, Quod nota. Br. Plaintiff. pl. 1. cites 32. H. 6. 7. Rent Sack, but the first Possession without any other Title serves in an Affise of Land. Jenk. 42.

In Affise for the Office of one of the Clerks of the Privy Signet, it was ruled that where 'tis brought for a Thing against Common Right, the Demandant ought to make Title in his Count specially; but where it is brought for Lands &c. there it is de Liberis Tenementis generally. Sid. 75. pl. 5. Paish. 14 Car. 2.


12. A Man shall make good Title in Affise, by saying that 7. N. was seised in Fee to the Use of W. P. which W. P. infessed the Plaintiff, who was seised and disinfessed &c. without shewing what Person made the Feoffment to the Use of W. P. or How the Use commenced. Br. Titles. pl. 61. cites 36 H. 8.

13. In Affise of a Portion of Zetbes, Exception was taken that the Title was double, because the Demandant prescrib'd in the Prior of S. &c. but held contra; for the Sellin of the Portion only does not make good Title in the Prior of S. no more than of a Rent or of any other Thing or Profit in the Soil, or Fee of another, which commenced against Common Right; because in all other Cases, the Commencement thereof must necessarily be alledged by him, who is to make Title thereon, whether he be Privy thereto or a Stranger; for it is against Reason to charge the Inheritance or Frankenement of another, without shewing a Substantial Foundation thereof. D. 83. a. b. pl. 77. 85. b. pl. 90. Paish. 7 E. 6. Britfot (Dean and Chapter) v. Clerke.
14. An Affûse of Land does not comprehend a Title; it is founded only upon the Seilin and Difféin. Jenk. 42. in pl. 79.

(E. a) Declaration, and Plaint in Affûse. By what Name.

1. In Affûse of Eftovers, Title shall be made in the Plaint, &c., de Libero Tenemento suo in Dale, and shall make his Plaint of reasonable Eftovers appender &c., feilicet, Houfe-boot, Hay-boot, to build a new Houfe, and to repair the old; and to inclofe, and to burn in his Chamber, Hall, and to wath, brew, and bake from Year to Year, in 20 Acres of Wood, by View of the Foreter, or without View &c. Apparant to his Houfe in Dale. Br. Plaint, pl. 33. cites 4 E 2. and Fitzh. Affûse 451.

2. Where a Man is oufled of his Guardianfhip of a Chapel &c. by one who has Colour, as by an undue Deprivation of the Ordinary, he ought to sue to be restored to the Name, before he brings Suit by this Name, but if be oufled by him who has no Colour, there he shall bring Affûse by Name of Guardian, Quod nota Differentiam bene. Br. Affûse, pl. 187. cites 13 Aff. 2.

(F. a) Plea in Bar. Good.

1. In Affûse the Tenant feعرو’d that he himself was feised, and leased to A. upon Condition &c. for Life, who leaped his Eftate to the Plaintiff, who broke the Condition, and feoured How, and by which he entered without doing Wrong, Judgment &c. and the Affûse found accordingly, by which the Plaintiff took nothing by his Writ. Quod nota. Br. Affûse, pl. 153. cites 10 Aff. 9.

2. In Affûse the Tenant said that A. leased to the Plaintiff for Life, who surrendered his Eftate to his Leffor, whose Eftate the Tenant has, Judgment if Affûse; and because he was a Stranger &c. the Affûse was adjudged; for by this he shall answer to the Oufter made by his Leffor, and not to the Oufter which is supposed to be made by himself. Br. Affûse, pl. 161. cites 11 Aff. 1.

3. In Affûse Purparty was pleaded in Bar between Parceners, and the Plea good, without saying that the Plaintiff was seised of his Part, and the Plaintiff said that they held in Common, abfique hoc that Purparty was ever made &c. and the Affûse awarded. Br. Affûse, pl. 176. cites 11 Aff. 29.

4. In Affûse 2 put them in Arbitrement, of whom the one has no Title, and Award is made between them that they shall hold in Common, it is a good Bar in Affûse, tho’ the Award be not in Writing. Quære tamen. Br. Affûse, pl. 182. cites 12 Aff. 25.

5. In Affûse of a Rent-charge againf a Feme and others, the Feme pleaded that she was endow’d before the Charge commenced, and the Plaintiff compelled to answer to it. Br. Affûse, pl. 184. cites 12 Aff. 49.

6. In Affûse Utrary in Trefpafs was pleaded in Bar, and the Plaintiff showed thereof Charter of Pardon, and had Affûse, notwithstanding that he
he did not shew Title after the Uttering. Brooke says miror, that Outlawry in Trespass shall be a Bar. Br. Aflife, pl. 189. cites 13 Alf. 5.

7. In Aflife it is a good Plea that the Land was given to the Plaintiff and this Defendant, and to the Heirs of the Defendant, and that the Plaintiff alien'd in Fee, by which the Defendant enter'd for Alienation to his Difinheritance, and a good Bar; but it seems that of the one Moiety this was Difein in to the Plaintiff, and of the other Moiety Alienation to his Difinheritance. Br. Aflife, pl. 205. cites 16 Alf. 11.

8. In Aflife the Tenant said that his Father was seised in Fee, and died seised, and M. Mother of the Tenant (who then was an Infant) seised for Cause of Nuture, and married the Plaintiff who alien'd in Fee, and retook to him, and the Defendant freely at full Age entered; and admitted for a good Bar. Quod nota. Br. Aflife, pl. 206. cites 16 Alf. 12.

9. In Aflife the Tenant said that the Land defended to the Plaintiff, and to one W. who made Purparty, so that the Moiety was allotted to the Plaintiff, whereof he is now seised at his Will, and the rest to the other, who seised the Tenant; Judgment if Aflife, and a good Bar. Br. Aflife, pl. 245. cites 22 Alf. 29.

10. In Aflife the Tenant pleaded Jointenancy by Fine with a Stranger not named, and the Plaintiff replied Nient comprise. Per Cur. He shall not have the Plea, nor foie Tenant the Day of the Writ purchased; for Jointenancy is at the Common Law, to which he shall have no Answer; but if it was by Deed, the Writ shall abate by the Common Law, and Fine is at the Common Law, so that he shall not have the Plea, that Sole Tenant the Day of the Writ purchased, as by Statute. Br. Aflife, pl. 92. cites 24 E. 3. 36. 78.

11. Tenant of the Franktenement, as the Writ supposed, is no Plea in Aflife; for the Writ of Aflife supposes no Tenancy in the one no more than in the other. Br. Aflife, pl. 92. cites 24 E. 3. 36. 78.

12. In Aflife the Tenant seised Custome in the Fee of S. of which he is Lord, and that the Fene should have the Land during her Life, if she held herself a Widow; and that if she married, that the Lord should have it for her Life, and that she hung at such Widow held, and after married, and he as Lord enter'd &c. Et miror, that he did not aver that she is yet alive, and the Plaintiff not confessing the Custome said, that long Time before that she took the first Baron, she herself was seised &c. and the Opinion of the Court was, that it is a good Title of her own Seisin without making other Title; Quod nota, and quere Legem inde. Br. Aflife, pl. 258. cites 25 Alf. 11.

13. In Aflife the Tenant intituled himself by Fine, and the Estate of the S.P. and by Plaintiff meane between the Fine and the Execution thereof fixed; and it was awarded a good Bar. Br. Barre, pl. 61. cites 29 Alf. 1.

Br. Barre, pl. 26. cites 21 H. 6. 17. and says it is said there, that the Diversity between this and the Plea of a Recovery against a Stranger, and the Estate of the Plaintiff in meane, is in Hill. 8 E. 3.

14. In Aflife in O. the Defendant said that the Tenements are in B. and not in O. Judgment of the Writ, and if &c. [Then he pleads] Jointenancy by Charter with N. &c. Fith said you have pleaded to the Aflife, and because you have pleaded Mifnower of the Vill as sole Party, you have lost the Advantage of the Jointenancy; and so was the Opinion of the Court. Br. Aflife, pl. 397. cites 30 Alf. 2.

15. In Aflife several Tenancy is no Plea, nor in Attaint founded upon it; for in Aflife, if the one be Tenant and the other has nothing, it is sufficient. Quod nota bene. Br. Aflife, pl. 311. cites 30 Alf. 24.

16. In Aflife it is admitted a good Bar, that the Defendant recovered Damages in Trespass in Oyer and Terminer against the Plaintiff, and had this Land in Execution, which Monies are not yet levied, Judgment if Aflife. Br. Aflife, pl. 336. cites 34 Alf. 8.

17. And
17. And by some it is a good Bar in Ailife that you ousted me, upon which I freely re-enter'd &c. Br. Ailife, pl. 30. cites 43 E. 3. 24.

18. Ailife against Tenant by the Curtesy and the Heir, and pending the Writ the Tenant by the Curtesy surrender'd and died, and the Heir pleaded the Defect pending the Writ to the Writ, and yet the Heir was awarded to answer, and the Writ did not abate; for tho' he shall be now in by Defect, yet at first he came to the Land by his own Act who made the Surrender. Quære if he may plead such Defect in Bar. It seems that he shall not; for it was pending the Writ; but Rolf made his Challenge to be entered. Br. Ailife, pl. 101. cites i H. 6. 1.

19. In Entry in Nature of Ailife, there the Tenant said that his Brother was seised in Fee, and died seised, and be enter'd as Heir, and was seised till by the Demanant dispossessed, upon which he enter'd, Judgment &c. and no Plea per Cur. by which he paid suit supra, abique hoc that he dispossessed him, Prist, and the other e contra. Martin order'd the Clerk to enter no more but whether he dispossessed him or not, quod nona. Br. Ailife, pl. 68. cites 8 H. 6. 2.


21. The Tenant pleaded that E. was seised, and leased to B. for Life, and afterwards E. granted the Reversion to the now Tenant in Fee, and the Tenant attorned, and afterwards alien'd to F. in Fee, upon whom he enter'd for the Disinheritance, and the Title of the Demanant mesne between the Alienation and the Entry, and no Plea per Newton, for it may be true that the Estate of the Tenant is mesne &c. and yet it may be that the Father of the Demanant dispossessed the Alienor, and died seised, and this Demanant in by Defect; in which Case the Entry of the Tenant is not lawful; but Aucoc, Porting, and Martin held it a good Bar, because it is good to a common Intent, and if there is such Special Matter, the Demanant may shew it. Br. Barre, pl. 26. cites 21 H. 6. 17.

22. In Ailife the Tenant pleaded that he was seised till by N. dispossessed, upon whom he enter'd, and the Estate of the Plaintiff mesne between the Dispossessed and the Re-entry. Per Newton, This is no Bar; but Fulk. Aucoc, Yelverton, Porting, and Markham e contra, held it a good Bar. Br. Barre, pl. 26. cites 21 H. 6. 17.

23. But that otherwise it is where the Tenant pleads that he is seised in Fee upon Consideration, and that he enter'd for the Consideration broken, and that the Estate of the Plaintiff is mesne, this is a good Plea, because he may enter upon any Defect. Kelw. 103. b. pl. 8.

24. So if he alleges that his Tenant who holds of him aliened in Mortmain, and be within the Year entered, and the Estate of the Plaintiff mesne between the Alienation in Mortmain and his Entry, this is a good Plea, because in these Cases the Entry of the Tenant is not roll'd by any Defect. Kelw. 103. b. pl. 8.

25. In Ailise of of 2 Houses it is a good Plea that they are Yts, and not Houses, Judgment of the Writ. Br. Ailife, pl. 397. cites 26 H. 6.
Aftile.

26. Lease for Years is no Bar in an Aftile, but shall say Null tort, and give the Matter in Evidence. Br. Barre, pl. 84. cites 5 E. 4. 3.

27. In Aftile if the Plaintiff is of an Acre of Land, the Tenant may say that it is an acre of Wood &c. to compel the Plaintiff to shew Title &c. Br. Aftile, pl. 149. cites 2 H. 7. 4.

28. In Entry in Nature of Aftile, the Tenant said that f. S. was seized till by D. Disseised, upon whom he re-entered, Que Estatis the Tenant has, and no Plea, because his Bar does not comprise Title; for it is not in Effect, but that J. S. was seised, Que Estatis he has, which is no Plea; but if he says that f. S. was seised in Fee, and inseed him, and gives Colony, this is a good Bar; for there is Title; and also it is not good because he does not confess an Entry by himself but by f. S. and in this agrees 5 H. 7. 11.

29. A Man may plead a Feoffment in Aftile made to the Plaintiff by the Defendant by Deed indented, by which the Defendant inseed the Plaintiff upon Condition, and that he entered for the Condition broken; for there he bound the Plaintiff. Br. Aftile, pl. 483. cites Littleton, lib. 3. Tit. Estates upon Condition.


1. In Aftile the Tenant pleaded a Deed of the Ancestor with Warranty in Bar, and the Plaintiff denied the Deed, and Proceeds was made against the Witnesses against the next Sessions; and so see that Deed of the Ancestor with Warranty is admitted to be a good Plea in Bar in Aftile of Novel Differences. Quod nota. Br. Aftile, pl. 18. cites 44 E. 3. 5.

2. In Aftile, the Tenant pleaded a Feoffment of the Brother of the Plaintiff, rendering Rent, and a Release after of the same Brother with Warranty, and relied upon the Warranty, and admitted. Br. Aftile, pl. 140. cites 8 Aft. 4.

3. Against the Baron and Feme, who said, that the Feme and her first Baron leased the Tenements to the Plaintiff for Years, the Baron died, the Term expired, and this Baron and the Feme entered; Judgment in Aftile; and held a good Bar, and the Defendant waived the Plea and pleaded to the Aftile; Quere of the Bar at this Day. Br. Aftile, pl. 64. cites 21 E. 3. 13.

4. Aftile of Common, a Deed of Release, and Confirmation of the Father of the Plaintiff was pleaded in Bar, made of the Soil to the Tenant to hold in Security with Warranty, and because the Deed and Warranty goes to the Land, and the Common only is in Plain, therefore no Plea, but the Aftile awarded, for this does not extend to the Common. Br. Aftile, pl. 246. cites 22 Aft. 38.

5. In Aftile, the Tenant pleaded the Feoffment of the Plaintiff as Aftise in Bar, & non allocatur, Per Thorp Ch. J. and Brooke says it seems to be good Law; otherwise it seems of a Feoffment with Warranty, relying upon the Warranty. Br. Aftile, pl. 298. cites 29 Aft. 24.

6. In Aftile, the Tenant said that the Plaintiff inseed him in Exchange for other Land in D. whereof the Plaintiff is yet seised, and held a good Bar, for it is not simply a Feoffment, but upon the Matter the Plaintiff has Quid pro quo, and to fee Feoffment is no Bar. Br. Aftile, pl. 314. cites 30 Aft. 40. 

7. In
7. In Affife, the Tenant pleaded a Devise in Bar according to the Custom of the Vill of N. and J., your Father devised the Land &c. Judgment if Affife. Persey said, he does not plead Warranty against us, nor any thing to which we are bound to answer; but the Opinion of the Court was, that it is a good Bar: 'tis he did not allege the Devise to be executed; for the Law intends it, if the contrary be not shewn, by which the Plaintiff traversed the Devise. Br. Affife, pl. 320. (319) cites 31 Aff. 8.

8. A Lease by the Plaintiff to the Tenant for Life, or a Fee, is no Bar in Affife, for these amount to Nul Tort, and shall be given in Evidence. Br. Affife, pl. 352. cites 38 Aff. 26.

S. P. as to the Fee, ment, but contra of a Lease for Life, if he relies upon the Reversion by a Warranty; Quod Nota. Br. Affife, pl. 380. cites 6 H. 7. 14.

9. Trespass in Affife, the Defendant pleaded the Fee in the Plaintiff's name, this is no Plea, for it does not amount but to Nul Tort, 29 per Pat. ton, which was an Estate be bas, this is a good Plea, without giving Colour, per Pisa Martin J. a got; Quod nullus negat. Br. Affife, pl. 81. cites 15 E. 4. 31.

+ S. P. ibid. pl. 152. cites 10 Aff. 5. and the Plaintiff was compelled to answer to his own Deed. Quod Nota.

Thel. Dig. 215. Lib. 15. cap. 4. S. 2. cites 8. C. & S. P. accordingly; and 52 Aff. 6. as to the Term for Years, tho' this Plea amounts only to No Tenant of the Fee in Affife named &c. —— [The Yeare Book says, that Littleton shewed to Vavifor, coming from Welminfier, that these Points were so held by all the Justices of England.] —— Jenk. 142. pl. 92. cites 8. C. that all these are good. But the Leafe for Years cannot plea Affife Non, because that is the Form of the Plea in Bar for the Tenant of the Freehold, the Leafe for Life or the Feeoffice; but it ought to plead the said special Matter, viz. his Leafe for Years, the Reversion to the Plaintiff, and that he is in Possifion, and so in without wrong. D. 246. b. pl. 71. 72. Hill. 8 Eliz. Carew v. March. S. P. as to the Affife Non. —— Leafe for Years cannot plea in Bar of Affife, no more than Defeifor or Bailiff &c. for his Plea should be No Tenant of the Freehold named in the Affife. D. 207. a. pl. 13. Mich. 3 & 4. Eliz. —— Co. Litt. 229. a. S. P. —— Jenk. 224. in pl. 85. S. P. and may add, and if not so found, then No wrong, No Defeifion.

* In Affife, a Leafe for Life and Rent reserved, the Reversion to the Plaintiff is pleaded by the Tenant, with a Reliance on the Rent reserved is a good Plea, and not otherwife; and so of a Fee by the Plaintiff, with Warranty, it is not a Plea without relying on the Warranty, for it amounts to the general Leafe, and is double. Rent and Reversion make a Warranty, A Warranty to Leafe for Years is more than a Covenant, and is not a Warranty to vouch. Jenk. 224. pl. 85.

In Affife, the Tenant pleaded that he held the Rent for Term of Years, of the Grantor of the Ance- cessor in the Plaintiff, and so is the Feeoffice in the Plaintiff, Judgment if during the Term he ought to have Affife &c. Thel. Dig. 215. Lib. 15. cap. 4. S. 2. cites 44 Aff. 1. and says that of such Form are divers Bares pleaded in the Book of Affife by Guardians in Chivalry, Tenants by Statute Merchant, and by Elegit, and cites 58 Aff. 4. 4 H. 6. 37.

10. Note, per Littleton and Vavifor, that it was held by all the Justices of England, that a Leafe for Years, the Reversion to the Plaintiff, was a good Bar in Affife. Br. Affife, pl. 391. cites 13 E. 4. 10.

11. So for Term of Life, the Reversion to the Plaintiff &c. Ibid. ibid. 12. So of a Fee in Fee with Warranty, and relying upon the War- ranty, and so it seemed to them. Ibid.

13. In an Affife, if the Tenant pleads that he leased the Land to the Demandant for Years, this is no good Plea, because the Complaint is of the Defeifion of a Freehold, and by this Plea the Tenant gives the Demand- ant no Colour to have an Affife. Kelw. 103. b. pl. 6. Catus incerti temporis.

But if the Tenant will say that the Plaintiff leased to him the Land for a Term of Years, which is yet continuing, this is a good Plea, because he has confessed a Feeoffice in the Plaintiff, and also this Reversion implies in itself a Warranty, to which the Plaintiff shall be compelled to answer. Kelw. 103. b. pl. 6. Catus incerti temporis.

14. Every Man shall plead what is apt and pertinent to his Cafe, and therefore a Defeifor that is not Tenant of the Land shall not plead any thing that concerns the Tenancy of the Land, As a Release of Actions Real,
Aflife. 215

Real, but he shall plead a Release of Actions Personal, or any other
Plea that excuses him of Damages. 2 Init. 414.
15. A Defendant cannot plead that he is not Tenant, for this is the Form
of a Bar, which Bar no body can plead but the Tenant of the Freehold.
Jenk. 224. pl. 83.

(H. a) What is a good Plea in Bar. Recovery.

1. IN Aflife, the Tenant pleaded in Bar that he himself recovered the same
Tenements by Aflife against A. and B. then Tenants, and the Estate
that the Plaintiff had was by Acquittance upon J. pending the Writ &c.
Judgment &c. and it was held a good Bar. Br. Aflife, pl. 143. cites 9
Aff. 10.
2. In Aflife the Tenant pleaded a Recovery of the same Tenements be-
fore the same Justices in Aflife against the Plaintiff. The Plaintiff said
that it was of other Tenements taken by the first Jurors and others, and
the other e contra, and Process made against the first Jurors, and by them
and others it was supposed they were the same Tenements or not, and did
not pay that Not comprised; for this shall be tried immediately, because
Judgment in Aflife is Quod recuperet per Vifum Jur. and not to go other
Cases. Br. Aflife, pl. 236. cites 22 Aff. 16.
3. In Aflife of Tenements in B. the Tenant pleaded a Recovery in Aflife
against the Plaintiff himself of the same Tenements in S. and the same Te-
Tenements put in View, and he recovered it; Judgment if Aflife &c. and the
cites 44 E. 3. Plea awarded good against Curiam, by which the Demendant said that Not
put in View, and so Not comprised, and the other e contra. Br. Aflife, con-
tra. Br. Aflife, pl. 28. cites 44 E. 3. 4. and 18 Aff. 16. 19 E. 3. Fitzh. Aff. 77. and
23 Aff. 16.
4. If the Tenant makes a Bar at large, the Plaintiff makes Title by Re-
covery, and the Tenant destroys the Recovery by proving it to be void, it is pl. 13. cites
no Plea without making to himself Title; for if the Plaintiff was in by
void Recovery, it is no Refort to the Tenant; for it is not lawful for the
Tenant to enter upon him, if he has not Title; and so see that the
Tenant shall not avoid the Title of the Plaintiff without making Title
to himself. Br. Aflife, pl. 103. cites 36 H. 6. 33. 34.
5. If a Man brings a Writ of Forcible Entry against me, and my Entry
is found lawful, and after he brings Aflife, this Recovery shall be a Bar
of the Aflife, if the Aflife be of the same Entry, but not otherwise; per
Brian, and affirmed by all the Justices. 11 H. 7. 16. a. pl. 12.

(I. a) What is a good Plea in Bar. Seifin in the
Plaintiff.

1. IN Aflife of Rent it is a good Plea to the Aflife, that the Rent is Thel. Dig.
issuing out of 20 Acres of Land, of which the Plaintiff himself is seised

Rent-charge it was pleaded, that the Plaintiff was seised of the Fraktenement of the Land, not of which
&c. the Day of the Writ purchased &c. upon which the Aflife was taken, and furnished the Plaintiff
continually.
2. In Aflife the Tenant pleaded to the Aflife by Bailiff, which remained for Default of Juwers, and at another Day the Tenant came in proper Person, and said that the Plaintiff had recover'd of him the said Tenements pending the Writ, and after leaing to him again for Years, so is the Plaintiff seized of the Franktenement ; Judgment of the Writ, and had it, notwithstanding that Certification does not lie of it. The Reason was inamuch as this comes of later Time, by which the Plaintiff said that the Defendant has continued his Estate by Diffefin, absique hoc that he took any Estate of him, and they were at Issue upon this, and the Aflife charged over of the Seisin and Diffesin. Br. Aflife, pl. 158. cites 10 Atif. 24.

3. In Aflife against 2, the one said that the Plaintiff was seized the Day of the Writ purchased &c. and because the other pleaded as Tenant, he was outof this Plea; therefore it seems none shall have this Plea but the Tenant, and not Diffesior. Br. Aflife, pl. 268. cites 26 Atif. 49.

4. In Aflife the Tenant said that N. was seized in Fee, and died seized, and the Land descended to 2 Daughters, who entered and made Purparty, and conveyed by Descent from the one to himself, and from the other to the Plaintiff, and that of the Moiety the Plaintiff is seized at Will; and the Plaintiff said that the one Daughter was sole seized, and died seized, and conveyed to himself, and the other maintained his Bar, and traversed the sole Dying seized. Br. Aflife, pl. 285. cites 28 Atif. 30.

5. In Aflife the Tenant said that A. was seized in Fee, and died seized, and the Land descended to the Plaintiff, and to B. and C. which Estate of B. and C. the Tenant bar, and the Plaintiff is seized of the 3d Part at Will; Judgment if Aflife of 2 Parts &c. and a good Bar. Br. Aflife, pl. 297. cites 29 Atif. 22.

6. In Aflife of Rent, the Tenant pleaded Hors de son Fee, and the Plaintiff showed Deed of Rents-charge, upon which the Tenant rejoined, that the Plaintiff by Force of a Recovery had upon false Title, is seized of Parcel of the Land charged &c. And held per Cur. that the Tenant shall not have this Plea alter Hors de son Fee pleaded; yet the Aflife was charged, and found that the Plaintiff was seised of Parcel &c. yet the Plaintiff recovered, and the Rent was apportioned, because the Tenant did not say any thing to the contrary, but it was said that the Rent should be extinct for all. Thel. Dig 149. Lib. 11. cap. 35. S. 10. cites 30 Atif. 12. And that so it is agreed, if the Plaintiff comes to Parcel by Purchafe, but otherwise it is if he comes to Parcel by Descent; cites 34 Atif. 15.

1. In Aflife the Defendant pleaded Misnofer, and if &c. Hors de son Fee. There Hors de son Fee is void; for it is a Bar, and the Conclusion of the first Plea; and if it be not found, Null tort &c. it is the General Aflife, and then the Bar comes too late, as the General Aflife is gone before. Br. Aflife, pl. 433. cites 3 E. 3. 15. and Fitzh. Aflife 172.

2. It was held that Tenant in Aflife, who pleads Misnofer of himself, shall not say Est si trove soit &c. Thel. Dig. 123. lib. 11. cap. 5. S. 4. cites Mich. 5 E. 3. 224.

(K. a) What is a good Plea in Bar. Misnofer. Want of Addition.
3. Thel. Dig. 123. lib. 11. cap. 5. S. 5. says that Mich. 5 E. 3. 237, Misprison an Opinion is, that the Different shall not plead Misprison of his Name, and that in Affife of Rent the Misprison of Tenant of Parcel of the Tenements, of which &c. shall not abate the Writ but only for himself. the Tenant be well named. Thel. Dig. 123. lib. 11. cap. 5. (bis) cites Palch. 10 E. 3. 501.

4. None shall plead Misprison of the Vill but the Tenent. Br. Affife, pl. 197. cites 14 Aff. 16.

5. Affise in D. it is no Plea that there are 2 D.'s, and none without Addition, for the Plaintiff shall recover by View of the Jurors. Br. Affife, pl. 304. cites 29 Aff. 53.

6. In Affise, the Tenant said the Land is in another Vill, and if &c. No Fizh. Brief, Tenant of the Franktenement named, and if &c. Null Tort, and per Cur. 417. the first Plea destroys the 2d, for None shall say that the Land is in another Vill but the Tenent, and therefore by this he has taken the Tenancy; so that he cannot say No Tenant of the Franktenement named &c. Quod nota. Br. Affise, pl. 339. cites 30 H. 6. 1.

7. In Affise by a Corporation, to plead that there is not any such Corporation goes in Bar, and not to the Writ of Affise, by which the Tenant pleaded, that the Corporation was incorporated by another Name &c. Et si trove foit &c. Thel. Dig. 124. Lib. 11. cap. 5. S. 22. cites Mich. 2 E. 4. 33.

(L. a) What is a good Plea in Bar. Nontenure.

1. Assise of a Thing which the Plaintiff claims by Reason of an Office, as the Warden of the Fleet &c. it is a good Plea, that the Plaintiff has nothing in the Office. Br. Affise, pl. 495. cites 6 E. 2. 1st Canc.

2. Affise against 2, the one said that he had nothing &c. and the other said that he was the Vilein of W. and held the Land of him in Villenage &c. Judgment of Writ &c. and the Writ was abated by Award; but at this Day it is no Plea in Affise to say that he had nothing, for this is Nontenure, and Nontenure is no Plea in Affise, for no Land is in Demand in the Writ; but shall say No Tenant of the Franktenement named in the Writ, and if &c. Null Tort &c. Br. Affise, pl. 132. cites 8. Aff. 14.

3. In Affise against 3, he who is not Tenant shall not say that the Plaintiff never had any Thing, and if &c. Null Tort, Quod nota, per Cur. Br. Affise, pl. 276. cites 27 Aff. 65.

(M. a) Plea good. Other Affise or Actions brought at other Time.

1. Assise of a Piece of Land, containing 40 Foot in Length and 12 in Breadth, the Defendant said, that the Plaintiff brought Affise of the same Land, and made bis Plant, and pending this, has brought this Affise of the fame Land, and the Quantities do not agree, and yet because he did not deny but that it was of the fame Land, the K k K Writ
Writ was abated, and it seems otherwise, if the Plaintiff had not appeared to the first Affife, which he did as appears by his Plea therein made.

2. In Affife, it is no Plea that the Plaintiff has other Affise pending of the same Land, which was either on this Affise &c. if the Plaintiff was not made, for a Man cannot know of what Thing he will make his Plea [in the first Writ] Contra in Dower, 11 E. 3. Br. Aff., pl. 129. cites 14 Aff. 7.

3. A Retraxit is a Bar in Law in Affise &c. and therefore in another Affise the Retraxit in the first Affise was pleaded in Bar; contra of Nonuit. Br. Barre, pl. 93. cites 15 E. 3. and Fitzh. Affise, 96.

5. In Affise, the Tenant pleaded that the Plaintiff had brought Writ of Entry in the Poit of the same Tenements, against the Tenant in which he had the View, which is yet pending; Judgment of the Writ of a more base Nature, and they were at the Affise, if it was Parcel of the Tenements comprised in the Writ of Entry or not, and per Lod. it is a good Plea, for the Plaintiff that before the bringing of the Writ, he was seized till by the Defendant dispossessed, and that after the bringing of the Writ of Entry be re-entered, and was seized till by the Defendant dispossessed, and in his own Possession he cannot make Title at this Day. Br. Affise, pl. 198. cites 15 Aff. 3.

6. Affise by a Feme, the Tenant laid, that at another Time the Feme brought Cui in Vita against N. whose Estate he had, to which Writ the Plaintiff is an adverse party; Judgment for the Plaintiff that the same Writ brought in a more base Nature, and held a good Plea. Fifth laid, in this Suit N. appeared and disclaimed, by which the Plaintiff entered, and was seised and dispossessed, and a good Plea, and the Affise was awarded, Quod nota. Br. Affise, pl. 333. cites 32 Aff. 5.

(N. a) Pleas good. Where several Defendants plead several Pleas.

1. Affise against 2, the one took the intire Tenancy of Parcel, and pleaded to the Affise, the other took the Tenancy of the Residue, and pleaded Maintenancy by Deed with a Stranger, by which the Affise was not taken against the first, for it cannot be taken by Parcels, but Proceeds was made by the Statute de Conjunctim Fosflatis to maintain the Affise, and ideim Dies to the other. Br. Aff. pl. 436. cites 19 E. 2.

2. Affise against 2, each took the intire Tenancy severally, and pleaded severally in Bar Matter of Difficulty, by which the Plaintiff elected the one for Tenants as he ought, and demurred upon the other, there if the Justices will adjourn the Parties for Difficulty of the Bar, yet they ought first to inquire of the Tenancy, and because they did not, but adjourned in Bank, therefore it was remanded from the Bank to inquire of the Tenancy; and to fee in this Case Affise by Parcels; and it seems that in this Affise, Affise may be twice taken. And in the next Affise there against the name Record,
Record, and failed at the Day, this Failure does not prejudice him, but they shall inquire of the Tenancy; and upon this he was found Tenant, and had a new Day to have the Record certified. Quod nota Parties, it is agreed that the Court shall not suffer any Issue when the Tenancy is in Debate, till the Tenancy be inquired; and because they suffered the one to be at Issue whom the Plaintiff elected Tenant, and vouched bene, Quære if this be usual at this Day. Br. Affise, pl. 339. cites 35 Aff. 2. 3.

(O. a) Pleas good. Where several Defendants plead several Pleas in Affise of Rent.

1. IN Affise of Rent against several, the one answered as Tenant with 3 Br. Affise, of the others, and as to any Rent issuing out of the Tenements which belonged to him, be pleaded in Bar, and another answered as Tenant with the other 3, and as to any Rent issuing out of that which belonged to him of the Tenements pleaded other Matter, and so the 3d, and every one who takes the Tenancy ought to say, that there is not any Possion of the Rent named in the Writ, and so they did. Br. Pleadings, pl. 39. cites Book of Entries.

(P. a) What Pleas Disifeisor may plead.

1. Disifeisor who comes in Person may plead to the Writ, as it is said, the Re- But the Year-Book porter says Quære tamen; for he doubts of it.


3. Disifeisor shall not plead any Record to delay the Affise. Thel. Dig. 194. Lib. 13. S. 2. cites it as said 19 Aff. 10.

4. In Affise by A. and B. his Feme, one who was not Tenant pleaded to the Writ that the Feme Plaintiff, as Feme to one W. by Fine lewed between W. and B. his Feme, and a Stranger, rendered the Land to the same Stranger, Que F/estate be has &c. which W. is yet in full Life &c. Judgment of the Writ, supposing B. to be the Feme of A. and held no Plea in the Mouth of the Disiseisor. Thel. Dig. 194. Lib. 13. cap. 2. S. 2. cites 19 Aff. 10.


6. It is said by Shard, that in Affise brought by a Feme sole a Disiseisor cannot plead that she is Covert with such a one &c. Quære. Thel. Dig. 194. Lib. 13. cap. 2. S. 9. cites Pasch. 20 E. 3. Affise 120, and 19 Aff. 10.


8. Dis-
8. Diffeifor shall not plead that there are two Dales and none without Addition. Thel Dig. 194. lib. 13, cap. 2. S. 5. cites 28 Aff. 38.
9. Diffeifor shall not plead that one named in the Writ died before the Writ purchased. Thel. Dig. 194. lib. 13, cap. 2. S. 6. cites 29 Aff. 79.
10. Diffeifor shall not say that Parcel is in another Vill not named. Thel. Dig. 194. lib. 13, cap. 2. S. 7. cites 30 Aff. 5.

11. In Aflife, the Tenant pleaded, that in Writ of Casnage brought by the same Tenant against the Plaintiff of the same Land, the Plaintiff had vouched as Tenant after the Date of the Writ of Aflife &c. Judgment of the Writ &c. and held no Plea to be pleaded by Diffeifor who is not Tenant. Quære. Thel. Dig. 149. lib. 11. cap. 35. S. 14. cites 43 Aff. 7.
12. Diffeifor shall not plead that the Plaintiff himself is seized of the Tenements by saying that he himself has Writ pending against the Plaintiff of the same Tenements, to which Writ the Plaintiff appeared as Tenant, and vouched to Warrant after the Date of the Aflife &c. Thel. Dig. 194. lib. 13. cap. 2. S. 8. cites 43 Aff. 17.
14. Diffeifor may plead any Plea which goes in Bar, and not in Extinguishment of Right, as a Release of all Actions Personall and it was clearly admitted, that a Release of all Actions Personall is a good Bar in Aflife; but he can not plead a Release of all the Right. Br. Aflife, pl. 14. cites 35 H. 6. 13.
15. Diffeifor may plead that the Plaintiff has entered into Parcel after the last Continuance &c. Thel. Dig. 194. lib. 13. cap. 2. S. 11. cites 35 H. 6. 13. agreed by Privot.
16. So that there is no Tenant of the Franktenement named in the Writ. Ibid. cites it as agreed by Privot in the S.C.
17. So he may plead jounteny of the Part of the Plaintiff. Ibid. per Privot.
18. And he may plead the bringing an Action of an higher Nature. Ibid. cites it as agreed by Privot. But cites 37 H. 6. 3. 'contra by Choke.' Quære.


1. A Pernor cannot plead Ancient Demesne after he is aver'ed Pernor, and the Reason seems to be, because none shall have it but Tertennant, and no Pernor nor Diffeifor. Br. Aflife, pl. 403. cites 1 H. 5. 4.
2. And if it seems that one who is aver'd Pernor shall plead no Plea after, but traverse the Diffeifor, or the Pernancy of the Profits; but he may plead a Release of Actions at first; but if he pleads another Plea at first, and the Plaintiff avers him Pernor, now he cannot plead a Release; for it is a Departure now, and if he pleads this at first, the Plaintiff cannot aver him Pernor, for it is in vain; for a Pernor shall have this Plea. Ibid.
3. And so Care ought to be taken in Aflife, that Pernor pleads such Plea at first as Pernor might have in Cases where the Plaintiff may aver Pernancy; for if he pleads otherwise, and is aver'ed Pernor, he shall lose his Plea; for he cannot plead a Fine, Recovery, Release of the Right, nor other Matter by a Sue Estate, nor such like; for this is only for the Tertennant, if it be confes'd and traversed. Ibid. and cites Fitzh. Aflife, 141.

5. Diffei-
Q. a) Plea good. By Bailiff.

1. It was said that a Bailiff cannot *delay the Affise* by his Plea. Br. S. P. and Aid del Roy, pl. 69. cites 1 All. 1. for that Reason he shall not have Aid of the King. Br. Affise, pl. 11. cites S. C.

2. In Affise of 10 s. Rent the Tenant pleaded *Hors de son Fee by Bailiff*, S. P. but Judgment it without Specialty &c. and was received, notwithstanding it was by Bailiff; but the Law is contra now, as it is said there. Br. Affise, pl. 108. cites 2 Aff. 4. clearly a Bailiff shall not have any Plea but where he may conclude over, and if &c. No Tort, No Diffesin. Br. Bailiff, pl. 12. cites S. C—— Br. Bailiff, pl. 22. cites 25 All. 6. that the Tenant by Bailiff pleaded *Hors de son Fee*, and the other en contra, and the Affise charged thereupon the Plea of the Bailiff.——Ibid. pl. 56. cites S. C accordingly; but Brooke says Quod mirum.

3. In Affise against Tenant in Dover, she cannot plead by Bailiff that S. P. Br. Nul Tort &c. but that she is in Dover ready to be Attendant to whom the Court shall award. Br. Bailiff, pl. 33. cites 2 Aff. 12. but the may plead so in proper Person, or by Attorney.

4. In Affise the Bailiff *cannot plead to the Writ that it was pur chased Thel. Dig.* pending another Writ, and that the Plaintiff has taken Continuance; for he shall not plead but that which excludes the Tort of his Master; and it is said that a Diffeior who comes in Perfon may plead to the Writ. Br. S. P. and it seems that Bailiff cannot have Plea but where he may conclude over Nul Tort, and this he cannot upon this Plea, because it is *triable by Record*, and not by Affise. Br. Bailiff, pl. 13. cites S. C—— Br. Bailiff, pl. 45. cites S. E. 3: 8. P—— Br. Affise, pl. 425. (bis) cites 8 E. 5. S. P.

5. In Affise the Defendant said by Bailiff that the Tenements are *Parcel of the Manor of D. which is Ancient Demesne*; Judgment of the Writ, and it &c. He has nothing but for Years, and if &c. Nul Tort. Per the Affise, it you have nothing in the Franktenement, you cannot plead Ancient Demesne. Quere if Bailiff may plead Ancient Demesne? It seems that he cannot; for it is not *triable by Affise*. Br. Bailiff, pl. 14. cites 9 All. 2.


6. In Affise the Tenant said by Bailiff, that pending the Writ, and the Day of the Writ purchased, the Plaintiff was seized by Diffesin made to the Defendant; Judgment of the Writ, and if &c. Nul Tort, and the Affise awarded upon it. Br. Bailiff, pl. 15. cites 9 All. 4.


15. cites 9 Aff. 4.

9. And in Aife the Tenant pleaded by Bailiff that he is Parson of 
such a Church, and found his Church feited & c. Judgment of the Writ, 
in as much as he is not named Parson, and it found & c. and allowed a 

In Aife a- 
9. And in Aife the Tenant pleaded by 
against an In- 
fant, he 
pleaded by 
Bailiff that 
the Plaintiff was his Villein. And it was held, that he shall not have this Plea by Bailiff, but because 
cites Tempore E. 1. Villeinage 35. and says it is held in Replevin, Mich. 20 E. 5. Villeinage 10. 
that such Exception does not lie in the Mouth of Bailiff: 
Bailiff in Aife shall not plead that the Plaintiff is Villein to his Master; Quod Nota. Br. Baillie, pl. 
44. cites 20 E. 3. time of E. 1. and Fitch. Villeinage 10. and 33.

11. In Aife, the Tenant pleaded by Bailiff to the Aife he that he had 
recovered the same Land against A. and pleaded to the Aife, which found 
accordingly, but the Plaintiff recovered. But fee at this Day Bailiff shall 
not plead such Plea, nor can Verdict find Matter of Record. Br. Baillie, 
pl. 19. cites 14 Aff. 9.

12. In Aife of Rent the Bailiff of the Defendant pleaded Misappropri- 
ation of the Vill, and if & c. that J. N. is Perior of the Rent Not named & c. 
and was permitted to have both. Br. Baillie, pl. 42. cites 15 E. 3. 
Contra 14 E. 3. and fee M. 30 H. 6. 1. that None shall say that the Land is 
in another Vill in Aife but the Tenant. Ibid. cites Fitch. Aife, 45.

13. In Aife of Nuance it was pleaded by Bailiff, that the Place in 
View, and in which & c. extended itself into another Vill which is not 

14. Aife in A and B. one by Bailiff said, that A. is no Vill nor Hamlet, 
but a House in the Vill of N. not named, and it & c. Nul tort, and they 
were in Judgment whether he shall have the Plea; it seems that he shall. 
Br. Baillie, pl. 20. cites 21 Aff. 27.

15. In Aife, one was permitted to plead by Bailiff that the Land is 
seized into the Hands of the King for Alienation without Licence, and so Nul 

16. Bailiff in Aife cannot confess the Differsin, nor can the Court take 
it of him. Br. Baillie, pl. 35. cites 22 Aff. 35.

17. In Aife, the Bailiff pleaded that No Tenant of the Franktenement 
named in the Writ; Judgment of the Writ, and if & c. Nul tort, and so 
it seems that the Bailiff may plead this Plea where his Conclusion shall 
be over Nul Tort; but no Plea which meddles with the Tenancy. Br. Bail- 
life, pl. 40. cites 14 E. 3. 31.

18. In Aife, Bailiff of Differsin shall not say that the Plaintiff had no- 
thing & c. and if & c. for his Master shall not say to, by the Opinion of 
the Court; for he has nothing in the Franktenement. Br. Baillie, pl. 

19. In Aife, the Tenant came in Person and pleaded in Bar, and the 
Plaintiff confessed and avoided the Bar; the Defendant imparied, and the 
next Day came by Bailiff, and pleaded to the Aife, and was well receiv- 
ed. B. Aife, pl. 322. cites 32 Aff. 7.

20. Aife against two, the one took the Tenancy and pleaded in Bar, and 
the other to the Aife by Bailiff, and the Plaintiff chose him who 
pleaded to the Aife for Tenant, by which came he who pleaded to 
the Aife by Bailiff, and would have pleaded in Bar, and was not re- 
ceived, but the Aife awarded to inquire of the Tenancy, and who is 
Tenant, and of the Seisin and Dukellin, and found, that he who 
pleaded
pleaded to the Afflié was Tenant, and that the Plaintiff was seised and disfranchised, and they were adjourned, and at the Day in Bank, because the
judges had taken the Afflié of the Tenancy, and of the Seisin and Disfranchisement, and all found for the Plaintiff; therefore it was awarded that the Defendant was to be adjudged in Bar, and therefore the Plaintiff recover; Quod Nulla; as it is said there 20 E. 3. and here appears Argued in Debit. Br. Afflié, pl. 33. cites 48 E. 3. 7.
21. Feoffment with Warranty cannot be pleaded by Bailliff. See Br. Certification of Afflié, pl. 3. cites 7 H. 4. 45.
22. It is said, that Bailliff may plead all Pleas of which he may conclude, and if &c. Nul Tort to the Afflié, but not Ancient Demesne, Fine &c. which are Bars. Br. Baillie, pl. 32. cites 8 H. 6. 9.

24. Bailliff may plead the Death of one of the Plaintiffs in Afflié. Br. Baillie, pl. 7. cites 21 H. 6. 58. per Alcuie.
25. But he shall not plead that there is No such Vill in the same County, which has been adjudged. Ibid.
26. It is determined that Bailliff nor Disfranchisement can not plead that there is in the same County 2 Vills of the same Name, and none without Addition. Ibid. cites 25 Aff.
27. Afflié of 10 Acres of Land, and two Acres of Wood, the Tenant paid by Bailliff that as to 5 Acres No Tenant of the Franktenement named in the Writ, and if &c. Nul Tort, and as to two Acres of Wood, it is Parcel of the 5 Acres, and he demanded one Thing twice; Judgment of the Writ, and if it be not found [then] Nul Tort, Nul Disfranchisement; Browne said, this Plea doth not lie in the Mouth of the Bailliff, for it relates to the Tenancy which Bailliff cannot plead. Br. Baillie, pl. 3. cites 22 H. 6. 44.
28. But he may plead Nontenure, for this is as much as to say that No Tenant of the Franktenement is named in the Writ, and it amounts to No Tenancy. Br. Baillie, pl. 8. cites 22 H. 6. 44.

29. And Bailliff may plead Mifnomer of the Plaintiff, but not of his Master, therefore it is good that the Tenant be advised, for by him he shall not afterwards plead other Plea in Person, nor by Attorney, but that Bailliff those which lie in Certificate, Quod Nemo deditix. Br. Baillie, pl. 8. cites 22 H. 6. 44.
30. It was said by Brown, that Bailliff shall not plead that the same Thing is twice put in Plaintiff. Thel. Dig. Lib. 13. cap. 17. S. 13. cites Hill. 22 H. 6. 50.

31. BAI-

31. Bailiff shall not say that the Tenements are in another Vill, and if
cites 9 H. 7. 24.


33. Ba
cites S. C. and 11 H. 7. 11.

34. Bailiff in Affife shall have all Challenges to the Array, and the

cites 9 H. 7. 24.

36. In Affife, the Tenant made Default, and Bailiff appeared for him,
and Count taken by the Words, Dies datus eft Partibus præd., and did
not say Ac etiam Ballivo Prædicio, and yet good; for the Party may
come after, and plead that which lies in Certificate, and allo Judgment
shall be given against the Party, and not against the Bailiff, and 30 Prece-
dents and more were shewn accordingly, that Day was given to both;
but per Cur. when Day is given to the Parties, it serves for the
Parties, their Attorneys, Guardians, Bailiffs &c. Er. Continuance, pl.
cites 11 H. 7. 10.

37. In Affise if a Man appears as Bailiff of the Defendant, the Plain-
tiff shall not have Travers, that he is not his Bailiff. Br. Travers &c.
cites 15 H. 7. 17. per Townend.

38. Any Plea upon which Certificate of Affise lies, Bailiff cannot plead.
Br. Bailiff, pl. 5.

39. In all Cales where the Plea of the Bailiff is only dilatory, he shall
conclude, And if it be found, Nul Tort, Nul Dilectum; as if he pleads,
that the Lands are in another Vill, or Misnominator of the Plaintiff, or Jou-
tenancy without Deed, he shall conclude, And if it be found &c. But
otherwife if he brings Matter which founds in Bar; for then his Conclu-
sion shall be, And so my Mafter is in without Tort done; as if he pleads
a Feofment of the Plaintiff to a Stranger, Quæ Estat his Mafter bast, or
if he shews that his Mafter recovered against the Plaintiff. Kelw. 117.
b. pl. 59. Caflus Incerti Temporis.

40. The Bailiff may plead an Assignment of the Land to his Mistris, in
Name of her Dower, or that his Mafter had it by Exchange, because in
those Cases, tho' the Assignment or Exchange lies not in his Conuance,
yet the Entry by Force thereof may be known en Pais. Kelw. 117. b.
pl. 59. Caflus Incerti Temporis.

41. A Bailiff shall plead no Plea in Delay of the Affife to lay it, and
therefore he cannot plead Jointenancy by Deed, for in such Case Proceed
shall be made against the Witness, nor shall he plead that the Lands are
Ancient Demesne, because it is not triable by the Affife, but by the
Book of Doomflay; but such Pleas as are triable by the Affise be shall
plead as well thole which go in Bar, as thole that are dilatory. Kelw.
117. b. pl. 59. Caflus incerti temporis.

42. As he may plead Feofment of the Plaintiff to a Stranger Quæ Estat
bis Mafter bast, because of this he may have Notice by the Livery
made at the Time; for Feofment is a Thing lying in Notice of the Country,
and so the Bailiff may have Conuance of it. Kelw. 117. b.
pl. 59.

43. But he cannot plead a Release of the Plaintiff to his Mafter, this
being a Thing not lying in Notice of the Country, and so by no common
Presumption lies in his Notice; and so of a Warranty in a Feofment.
Kelw. 117. b. pl. 59.
44. The Words of the Writ are Atchias cuum vel Ballivum suum &c. The Bailiff pleaded in his own Name thus, viz. *f. de C. tanguan Ballivus A. de B. dictis; and not A. de B. per Ballivum suum. 2 Init. 415.

45. In an Affise the Bailiff cannot plead any Matter of Record, either in Bar or to the Writ; for the Bailiff cannot plead any Matter or any Plea out of the Point of the Affise, nor any Thing that is not triable by the Affise, nor any Plea which he cannot conclude, Et si trove ne soit, Nul Tort, Nul Difficuit. And if therefore the Bailiff does plead any Matter of Record, yet the Justices shall proceed &c. and give Judgment; but then the Defendant named in the Affise may come into the Justices, and verify that there was such a Matter of Record &c. and he shall have a Certificate of Affise by Force of this Act; and the Writ that is given in this Case is after Judgment, but the Certificate of Affise that was at the Common Law was after Verdict, and before or after Judgment, when the Verdict was not well examined by the Justices &c. the Justices ex Officio might examine it. 2 Init. 414 & 415.


(R. a) What may be pleaded after Plea pleaded by Bailiff.

1. An Affise against C. and another, who pleaded to the Affise by Bailiff, which remained for Default of the Jurors, and came C. in proper Person, and as Tenant was received to plead in Bar, by the Release with Warranty of the Ancestor of the Plaintiff, for by this Release he may have Certificate, and this to avoid Circuity, for Frusto fit per plurum quod fieri potest per Pauca. And itinere Bedd, the Tenant did it at the same Day &c. by which the Plaintiff said that C. who pleaded had nothing, but R. was Tenant; and at this Day all made Default except C. and C. said that R. held for Life, the Reversion to him, and prayed to be received, and was received, because the Plaintiff refused him to be Tenant, to which C. now agreed by this Plea; and now C. pleaded in Bar as Assignee of R. by Charter of Feoffment with Warranty of J. of H. Ancestor of the Plaintiff, and was received to do it notwithstanding his first Plea by the Release in his Selin, for here is other Tenancy by the Receil and Concord. P. 14 E. 2. Where a Man pleaded to the Affise, and after was referred to Warranty, and pleaded in Bar as Tenant by the Warranty, and was received, Quod nota bene. Br. Affise, pl. 163. cites 11 Aff. 3.

2. Note per Green in Affise against 2, the one pleaded Nul Tort by Bai- * S.P. pl. liff, the other pleaded a Fine in Bar, the * Defendant who pleaded by Bailiff came in Person the same Day, and pleaded in Bar, and well admitted at York, for the Inconvenience of Circuity of Action; for otherwise he shall have Certificate of Affise after, Quod non negatur. Br. Affise, pl. 226. cites 22 Aff. 6.

3. Affise against 2, the one pleaded that he is Villein of T. N. and the other by Bailiff pleaded to the Affise, the Plaintiff chose him who pleaded by Bailiff for Tenant, and prayed the Affise, by which he came and pleaded in Bar, and was suffered the same Day. Br. Affise, pl. 232. cites 22 Aff. 7.

4. In Affise one was permitted to plead by Bailiff, that the Land was seized into the Hands of the King for Alienation without Licence, and so &c. Nul Tort, Quod Nota. The Plea not acknowledging the Bailiff shall M. M. M. not
not grieve the Tenant; but that he may say the contrary when he comes, as 'tis said. Br. Bailiff, pl. 21. (bis) cites 22 Aff. 5.

5. Afiife against 2, the one pleaded a Recovery as Tenant, which was denied, and failed at the Day, and the other pleaded to the Afiife by Bailiff, and the Afiife was awarded of the Right of Damages, and remained to be taken in Paris, and the Afiife charged of the Force and Arms for the King; and then came the other in Person, who had pleaded by Bailiff, and pleaded Record in Bar, taking the Tenancy, and then the Plaintiff offered to release his Damages, and prayed Seizin of the Land, but had it not, but the Afiife was awarded in Right of the Damages, and the other was ousted of his Plea, and by the Reporter it shall be inquired of the Seizin with Force, which was the Cause that the Plaintiff had not his Prayer. Br. Afiife, pl. 249. cites 23 Aff. 3.

6. In Afiife, the Tenant pleaded to the Afiife by Bailiff, and diverse were sworn, and the Tenant came in Person, and tendered to plead in Bar by Release, and was not suffered, and the same Law where the Afiife is awarded, 'tis no J urors are sworn. Br. Afiife, pl. 295. cites 26 Aff. 18. (but should be) 29 Aff. 18.

7. Afiife against 3, 2 appeared, and the 3d made Default, but one appeared for him as Bailiff, and came the Party himself, and said that he is the same Person, and disavowed him for his Bailiff, and said that it was not his Will, that he nor any other should answer for him in this Afiife, neither would he himself appear nor answer &c. And it was admitted by all that he may disavow the Bailiff well enough, Quod nota. Br. Baillie, pl. 6. cites 8 H. 6. 7.


Affife against
9. And if Afiife be taken by Default which remains till another Day, if it be not entered of Record that the Tenant said nothing in Arrest of the Afiife, then at the Day the Tenant may plead in Bar at large; Quære &c.

Affise against 9. And if Afiife be taken by Default which remains till another Day, if it be not entered of Record that the Tenant said nothing in Arrest of the Afiife, then at the Day the Tenant may plead in Bar at large; Quære &c.


Affife against 10. If two Affises were pleaded to the Afiife by Bailiff, which remained, and at the Day the two came in Person, and would have seised H. who was ready to enter, but not received; the Reason seems to be, as much as the answer is not a Thing of which he may have Certificate as Recovery, Fine, Release &c. Br. Affife, pl. 426. cites 8 H. 7. 39.

For he shall not have other Matter in * Person after he has pleaded by Bailiff, but only that of which Certificate lies, by which they pleaded a Release; Quod Non. Ibid. * Nor by Attorney, but only that which lies in Certificate, per Brown, Quod nemo decidit. Br. Baillie, pl. 8. cites 22 H. 6. 44.

(S. a) How to be pleaded.

In Afiife, the Tenant in Dower pleaded in Bar by Fine levied by the Aeseeor whole Heir &c. to the Baron of the Fine, or whose Dowment &c. and seised part of the Fine, and held a good Bar, and the Plaintiff averred that the Defendant feited him, absque hoc that he had any thing in Dower; and it was said, that he shall not have the Afiife without answering to the Fine. Quære. Br. Afiife, pl. 162. cites 11 Aff. 2.

2. In
2. In Affife of Reuf, per Cur. Plaint of Rent-ervices {hall be cum Per-
tinentis, and contra it feems of other Rents; and if the Defendant makes
Default, the Plaintiff {hall shew what Rent he demands. Br. Affife, pl.
189. cites 12 Aff. 41. and fo he did Anno 15 Aff. 4. Quod nota bene.
3. In Affife, the Deal of the Son of the Cousin of the Plaintiff of the part
of his Mother was pleaded in Bar, and he was Cousin, viz. Son of A Son of
j. Brother to the Mother of the Plaintiff, and by common Opinion it was
a good Bar; Quod Nota. Br. Affife, pl. 265. cites 26 Aff. 34.
4. In Affife it is a good Bar for the Tenant to convey himself to be Te-
nant by the Count, the Reversion to the Plaintiff as Heir of the Feme of the
Defendant who is dead, by whom he had Affife. Br. Affife, pl. 272.
cites 27 Aff. 31.
5. If the Tenant pleads Recovery against the Father of the Plaintiff, and
he makes Title that his Father was cited, this is not good; for he does
not shew what Time, and then it shall be intended that it was pending
the Writ, or before Execution, which is no Matter. Br. Affife, pl. 282.
cites 28 Aff. 17.
6. In Affife, the Tenant made Bar, and the Plaintiff made Title, to which
the Tenant said nothing: and the Conclusion of the Title was, Et hoc po-
tit quod Inquiratur per Affilem, and the Tenant the like, and therefore ill;
For the Tenant ought to have maintained his Bar, and have traversed or
confess'd, and avoided the Title. Ibid.
7. In Affife, the Defendant said, that he had nothing but in Right of his
Wife not named &c. and if &c. Nul tort, and the Jury found Verdict at
large; and the Opinion of the Court was against the Plaintiff, but ad-
8. In Affife, the Tenant said, that at another Time he recovered the same
Land against J. N. by Writ of Dower by Petit Cape by Default of the Ten-
ant after Appearance, and the Effeate of the Plaintiff meehe between the
Date of the Writ and his Recovery, Judgment if Affife, and a good Plea,
but the was compelled to shew the Date of the Writ, and fo the did;
for by Finch, if the mistakes the Date, the Plaintiff may say Nul titl
Record; Quod Nota; and the Plaintiff said, that Nient Comprize, Prift, and
so to Affife, and Proces was made against the Summoners in the first
Original, and the Vioirs in the Writ of View, and the Summoners in the
Petit Cape, without mention of any Pernors; For it is said there by all the
 Clerks, and per Cur. that Pernors shall be in the Grand Cape, but not in
the Petit Cape, and the Affife was demanded, and yet this Affife shall
not be tried by them, but it is to the Intent to amerce them if they will
not come, Per the Reporter; and the same Law where the Parties plead
to Demurrer, and the Affife is adjourned, yet the Affife shall be demanded;
and the same Law at every Day of Adjournment, and yet if they appear
they shall not be taken; Quod Nota. Br. Affife, pl. 34. cites 43 E. 3. 11.
9. Affife by 2 against 3, the one took the Tenancy; as to the Moity of the
Manor which belonged to T. the one of the Plaintiffs pleaded a Fine of the
Mother of the Plaintiff with Warranty to W. whose Effate he had, and
 demanded Judgment for the Moity, and yet the Fine was of the whole,
and of lhe other Moity pleaded a Release of the Father of the same Plaintiff with
Warranty to W. in Fee, whose Effate he had, and demanded Judgment of
this other Moity if Affise, and the Release was of the whole, and to the
one and the other a Bar of the Intire, and yet it is pleaded and concluded
but to the Moity, and well, and not double, by all the Juflices except
Prior, by which the Plaintiff imparled, and after made Title to the Bars
as they were; Quod Nota; and per Moile, where one pleads in Bar in
Affife, and do not take the Tenancy upon him, the Plaintiff may pray the
Affife for Nihil dicir, and this it seems where a Number as 2 or 3 De-
fendants are named in the Affife; contrary it seems in Affife against one,
for there no other Tenant can be but him, but in the other Case some
may be Differors and some Tenants. Br. Affife, pl. 99. cites 37 H. 6.
23, 24.

(T. a)
(T. a) Pleadings. Where there is an Alteration of the Tenancy, pending the Writ.

1. In Ailife, the Tenant pleaded Jointenancy to the Writ, and the Plaintiff confessed and avoided it, for it was made pending the Writ, and there is said, that Proceeds upon the Statute shall not be, but where the Deed is denied, and not where it is confessed and avoided. Br. Ailife, pl. 128. cites 7 Aff. 20.

2. Note, that one Defendant who was Tenant dismiffed himself to the other pending the Writ, which Matter was pleaded by the Plaintiff, and the Ailife prayed; & non allocatur; for Herle said, that he would hold the Tenement to be in the same Plight that it was when he pleaded; but Wilby did contrary at Nott. &c vide inde, and Brooke says he thinks, that if the Tenant dismiffes pending the Writ, and before Plea by him pleaded, that yet be ought to answer as Defendant, and so it appears here ante. Br. Ailife, pl. 144. cites 9 Aff. 11.

3. In Ailife, if the Tenant aliens pending the Writ, yet he may plead Jointenancy with another, for he remains Tenant to the Ailife, notwithstanding his Alienation. Br. Briel, pl. 450. cites 12 Aff. 41.

4. In Ailife, he who had aliened, pending the Writ, pleaded in Bar, and this was challenged, but because he was Tenant in Law, the Plaintiff was compelled to answer to him. Br. Ailife, pl. 185. cites 12 Aff. 41. and T. 9 E. 3. accordingly.

5. And he who aliened, pending the Writ, may plead Jointenancy by Deed, and the Plaintiff shall be compelled to answer to it, wherefore he said that he was sole Tenant &c. and Writ infixed upon the Statute of Conjuncti Feoffatis. Ibid. and cites P. 21. and T. 21. E. 3. accordingly.

(U. a) Pleadings. Where several Pleas are pleaded by the same Person, or by several Attorneys, for one and the same Defendant.

1. Assise against A. and B. and A. as Tenant pleaded Release, and B by Attorney pleaded to the Writ, upon which they were adjourned into Bank &c. where B. appear'd by another Attorney, and said that he is ready to bear the Recognizance of Ailife, and the Counsel of B. shewed this Matter to the Court, and pr'y'd his first Plea pleaded in Pais, which is more for the Profit of his Mafter; &c non allocatur; for the Court recorded that he is Attorney, and he does not say any Thing by which the Ailife was awarded, and tho' there be another Attorney, we have no Regard to that; per Shard. And per Thorpe, if the one Attorney renders the Land, and the other makes Delence, or if the one confesses the Release, and the other denies it, you shall take the best Plea for his Master; but per Shard, these are not alike, and the Ailife was remandied of the Whole &c. Br. Office del &c. pl. 24. cites 19 Aff. 10

2. In Ailife the Tenant had 2. Attorneys by several Warrants, the one pleaded in Bar, and the other to the Ailife, and the Plea to the Ailife was accepted, and the other refused; for where the Tenant himself pleads Bar, and also General Assise, the Bar is waived by the General Assise, and those Attorneys are as the Party himself. Br. Barre, pl. 94. cites 29 E. 3. and Fitzh. Ailife, 129.
What shall be said Pleas to the Affise.

1. ASSISE of Rent, 'tis found that all the Tertenants are not named, this is not material, if it be not pleaded by the Defendant; for otherwise it cannot be found, and the Tertenant may plead it; but a Per-

2. Where Affise is brought against Tertenant in Faiz, who says that No 
Tenant of the Franktenement named, this is to the Affise, and the Plaintiff 

3. Contra where the Affise is brought against Perior of the Profits, and 
he says that No Tenant of the Franktenement named, there the Plaintiff 
must maintain his Writ. Quod nota Diversity. Ibid. and cites Fitzh. 
Affise, 15.

(X. a) Where the Plea is waved.

1. A Man pleads to the Affise, and after was vouch'd to Warranty, and 
pleaded in Bar as Tenant by the Warranty, and was received. Quod 

2. In Affise of Novel Diffeiin the Tenant pleaded Deed of the Anciort And note 
of the Plaintiff with Warranty in Bar, and the Plaintiff made Title, and 
that in all Cases where 
the Tenant waved the Bar, and said that the Ternenents are in another 
Vill, and was not received, but the Affise was awarded. Br. Affise, pl. 
107. cites 1 Aff. 17. 

after waves it, Parne said that he ought to take the Affise in Right of Damages, as if the Bar had been 
traverfed and found false; but it was said that the Verdict shall abate the Writ, if the Plea of the 'Te-
nant be found that the Land is in another Vill; but at this Day a Man may * wave his Bar, and plead 
the General Issue, but not plead to the Writ after Bar, ut supra. Br. Affise, pl. 107. cites 1 Aff. 17. 

* Br. Affise, pl. 368. cites 44 Aff. 1.

3. An Infant in Affise pleaded Outlawry of Fehny in Bar, and at another 
Day was suffered to plead the Release of the Plaintiff. Br. Affise, pl. 
196. cites 14 Aff. 15.

4. In Affise of Rent against 2, the one pleaded to the Affise, and the other 
pleaded a Recovery in Affise of other Lands and Damages, and that he had 
Execution by Elegit of the Land put in View for the Damages, and so an-
swered as Tenant of this Eftate, and pleaded Hors de fon Fee. The Plain-
tiff elected the other for Tenant, and demurred upon him who pleaded the 
Record, and well, by the Opinion of the Court; and at another Day he 
who pleaded the Recovery said, that the Plaintiff himself was feil'd of the 
Franktenement the Day of the Writ purchased, and yet is; upon 
which the Affise was taken, and to fee that Difleitor shall have this Plea. 
Br. Affise, pl. 288. cites 28 Aff. 41.

5. In Affise by 2 Coparceners, the one of full Age, the other an Infant, 
against the 3d Coparcener, who pleaded Partition in Bar against the one of 
full Age, and to the Affise against the other within Age; and because he 
pleased in Bar against the one, and to the Affise against the other, by 
this he has waved his Bar; quod nota, wherefore he pleaded the Partition 
in Bar against both, and the others made Title, and traverfed the 

6. Affise
7. In Afsife the Tenant pleaded a Lease for Life made by G. to his Father, whose Heir &c. which G. after released with Warranty to the Father and his Heirs, and gave Colour to the Plaintiff, the Plaintiff claiming by Feoffment of the Heir of G. after, and because the Tenant claimed by the Heir of G. who made the Lease and Release, the Plaintiff said that the Father of the Tenant had nothing but for Life; & non allocatur, by which he said that he had nothing but for Life, abique hoc that he released &c. & non allocatur, by which he said that G. did not release by the Deed, Prift, and the other e contra. Br. Afsife, pl. 347. cites 37 Aff. 16.

8. In Afsife of Rent the Defendant pleaded Grant of Rent to bruises for ten Years with Warranty by A. Uncle of the Plaintiff, whose Heir he is, and so the Frankentenement in the Plaintiff; Judgment if he ought to have Afsife during the Term. Perrey said he never had such Uncle, by which the Defendant waved his Plea, and pleaded Nul Tort; and so it is used at this Day that the Defendant may *wave his Bar, and take the General Issue. Br. Afsife, pl. 368. cites 44 Aff. 1.
9. In Afsife against divers, where 2 take the Intire Tenancy, and plead to the Writ, if the Plaintiff replies that one of them is Tenant, and that the other has nothing, he who is Tenant shall not plead de Novo as sole Tenant. Thel. Dig. 90. lib. 10. cap. 1. S. 34. cites 21 H. 6. 63.
10. In Afsife-the Tenant said that the Land is in another Vill, and if &c. No Tenant of the Frankentenement named, and if &c. Nul Tort And per Cur. the first Plea destroys the 2d; for none shall say that the Land is in another Vill but the Tenant, and therefore by this he has taken the Tenancy, so that he cannot say No Tenant of the Frankentenement named &c. For this quod nota, by which he said that No Tenant of the Frankentenement is named &c. and relinquished the first Plea. Br. Afsife, pl. 399. cites 30 H. 6. 1.
11. In Afsife, the Defendant had pleaded in Bar which remained for want of View, and after the View was made, and he came and waived his Plea, and pleaded to the Afsife, and it was accepted and entered; Quod Nota. Br. Afsife, pl. 402. cites 34 H. 6. 10. and Fitzh. Afsife, 20.

(Y. a) Replication.

1. A **sise of Tenements in D. the Tenant said, that he brought Afsise of the same Tenements in R. against the Plaintiff, and this Land put in View &c. and be recovered; Judgment &c. the Plaintiff said, that this is no Plea, because the Tenements are in divers Vills, and prayed Afsise, &c. non allocatur, in as much as he says that these Tenements were put in View, by which the Plaintiff said, that they are not the same Tenements &c. per Cur. this amounts to Nient Comprised, by which the Tenant said, that Comprised, Priæ, and the others e contra, and the Entry was Not in View, and so Not comprised, and the others that Put in View, and so comprised. Br. Trials, pl. 123. cites * 4 Aff. 19.
2. In Afsife, the Tenant pleaded a Feoffment of the Grandfather of the Plaintiff whose Heir he is with Warranty; the Plaintiff said, that the Grandfather was seised, and died seised, and be entered and was seised and disfeised, and well, without knowing how he came by it after; Quod Nota, per Cur. Br. Afsife, pl. 430. cites 9 E. 3. and Fitzh. Afsife, 155.
3. In Afsife against several, one pleaded as Tenant, and said, that the Plaintiff had a Writ of Entry Ad terminum quit proterit pending against him of
of the same Land &c. to which the Plaintiff replied, that he who pleaded
the Plea was not Tenant, but another who had pleaded to the Affife &c.
And it was held a good Replication, because the Writ of Entry was
of elder Date than the Writ of Affife. But otherwise it should be it it
was of later Date. Thel. Dig. 194. lib. 13. cap. 2. S. 4. cites 23 Aff. 

4. Affife against three, the one pleaded that there was no such in Rerum
Natura as another named in the Writ, and pleaded over to the Affife &c.
and therefore the Court did not compel the Plaintiff to reply, because the
Defendant pleaded over to the Affife, and therefore need not reply to it,
and after the Court discharged the Affife, of this Plea no such in Rerum
Natura; for it cannot be tried; for to say that there is such a one is
two good. Br. Affife, pl. 399. cites 30 Aff. 5.

6. Affife by Baron and Feme against S. of 40 l. Rent, the Tenant said,
that the Land was Out of their Fee; Judgment it without Specialty Affife,
and was compelled to shew the Quantity of the Land, and said, that it was
the 3d Part of the Moiety of the Manor of D. The Plaintiff said, that N.
was seized in Fee, and opposed the Feme Plaintiff, and died, and the
Tenant as Heir to him endowed the Plaintiff of the 3d part, and after
the Plaintiff to the Defendant for the Life of the Plaintiff, rendring 40 l. for
the first Year, and 10 l. for the rest, and sewed Deed, and prayed
the Affife. The Defendant said, that part of the Land was in another
County; Judgment of the Writ, and upon this at Affife whether it was in
two Counties or in one. Br. Affife, pl. 47. cites 7 H. 4. 29. 30.
7. Affife of Rent, the Tenant said, that the Land put in View is an Acre
&c. the Plaintiff may say that it is a House. Br. Affife, pl. 497. cites 2 H. 7. 4.
8. If a Man appears as Bailiff in Affife, the Plaintiff shall not have any
thing to say that he is not Bailiff of the Defendant, per Townshend; quod
9. In Affife, if the Tenant pleads Bar and gives Title to the Plaintiff, as
where and defends the same Title, there it suffices for the Plaintiff to maintain the
same Title without more. Br. Titles, pl. 38. cites 3 E. 4. 18.
So if the Defendant pleads Recovery against a Stranger, and the Title of the Plaintiff manifests it, it suffices for the Plaintiff to say that Not til Record. Ibid.
So it seems upon Estates upon Condition &c. Ibid.
But if the Defendant makes Bar, and gives Colour to the Plaintiff, and Title in Fact, there by several the Plaintiff ought to make Title; for he cannot traverse the Bar without making Title, but by several he may say that Pains by the Deed; but in this Case 9 E. 4. Some were contrary to the other of the
Justices. Ibid.

10. If in an Affife against two each takes the entire Tenancy and pleads in
Bar, and the Demandant shews how they are Jointtenants &c. yet the
Opinion of Keeble was, that he must answer to the Bars, because it ap-
pears to the Court, that each of them is Tenant of a Moiety, for which
he may well answer, and then when he has pleaded for the whole his
Bar shall not be taken to be void as to the whole, but for his own
Moiety good, and for the other void. Kelw. 117. a. pl. 58. Caius incer-
certis temporis.

(Z. a)
(Z. a) Replication. Title therein.

1. ASSISE against two, the one pleaded to the Affise, and the other in Bar by Deed of Feoffment of the Grandfather of the Plaintiff, with Warranty, as Aassignee, and shewed both Deeds; the Plaintiff said, not confessing the Deed, that his Grandfather was seised of Fee and Right, and died seised, and he entered as Heir &c. and a good Title without shewing how he came to it after &c. Br. Affise, pl. 144. cites 9 Aff. 11.

2. Affise against two, the one pleaded a Release of all Actions personal, without taking the Tenancy, and the other pleaded Jointtenancy with a Stranger not named to the Writ, and the Plaintiff chose him who pleaded the Release for his Tenant, by which the Affise was awarded to inquire of the Tenancy, and found that he who pleaded Jointtenancy had nothing, and that he who pleaded the Release was Tenant, and upon this he pleaded the Release at Fupra without taking the Tenancy, and found for the Plaintiff, and he recovered; and so fee the Affise once awarded upon the Tenancy, and after upon the Matter; and if the Plaintiff replies to the Release that after this he was seised and dispossessed, and found for him, he shall recover without making Title; and because he who pleaded the Release did not take the Tenancy, nor plead any thing to the Right but a Release of Actions Personal, therefore the Judgment was affirmed in a Writ of Error. 19 E. 3. 3. and to fee that the Plaintiff did not reply here till the Tenancy was inquired; Quod Nota. Br. Affise, pl. 215. cites 17 Aff. 25.

3. If I bring Affise, and the Tenant pleads in Bar, and I make Title that it was found by Office that my Father was seised and died, and held of the King, and I sued Livery and entered; Judgment &c. and pray the Affise, the Title is not good, because he does not allege Seisin in Faé; for where he claims by his Ancestor, he alleges Seisin in Faé, for the Office is only for the King, and shall not serve the Plaintiff for Title; for it may be that the Office is false; but contra where a Man claims by the King as in Mortdancy; it suffices to say that it was found by Office that the Ancestor held of the King, and died seised, the Heir within Age, by which the King granted the Ward to the Defendant; Judgment &c. for there he claims by the King, and the Office suffices for the King; contra where he claims by the Party. Br. Titles, pl. 39. cites 5 E. 4. 3.

4. In Affise by Dean and Chapter of Rent issuing out of 3 Acres, the Defendant answered as Tenant of the Franktenement of 2 Acres, and as to any Rent issuing out of one Acre he pleaded Jointtenancy of 7 N. of the Feoffment of W. P. and if &c. Null tort &c. and to another Acre that he had nothing in it the Day of the Writ purchased, nor ever after, and if found that it be not &c. Null tort &c. and to the 3rd Acre that the Predecessor of the Plaintiff was dispossessed, and none was seized after &c. & non allocatur; For Dean and Chapter shall have Affise of Disseisin done to the Predecessor &c. and to the first Plea the Plaintiff maintained his Writ that foil Tenant &c. and to the other that Tenant as the Writ supposeth &c. and for fee where he shall maintain his Writ &c. and fee that he pleaded in a Manner Nontenure to the one Acre, which is no Plea in Affise, as it is said often elsewhere, but shall say that No Tenant of the Franktenement named in the Writ. Br. Affise, pl. 490. cites 1 E. 5. 4.

5. If in Affise the Tenant pleads in Bar that his Father was seised, and died, and that be as Son and Heir entered, and gives Colour to the Demandant, he may reply that he himself was seised, till by the Father of the Tenant dispossessed, and that he made continual Claims, and after the Death of

So if the Demandant replies that he was seised still by a
Aiffle.

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the Father enter'd, and was seised till &c. and yet he founds his Title Stranger eip-
upon his own Poitellion. Kelw. 103. a. pl. 5. Cafus incerti Temporis.

6. In Aiffle the Tenant pleaded the Feoffment of the Demandant with

Warranty, and the Demandant replie that after this Feoffment a Stranger

was seised in Fee, and seised the Demandant in Fee, and so he was seised

till by the Tenant seised. Keble argued that this is no good Replica-

tion, without shewing how the Stranger came to this Land; for it stands in

different to the Court, whether the Stranger came to the Land by Title

or Diffeisn, and then it must be intended most strongly against him that

pleads it; for when a Man is in by Right, as it is confes'd the Tenant

was, it shall not be intended that the Land is rightfully out of him, 

without shewing How, and the Demandant cannot make his Title at

large, because the Tenant in his Bar has convey'd the Land to him; so

by the Demandant, and to this Intent the Title is not good. Kelw.

112. a. b. pl. 41. Cafus incerti Temporis.

material whether he that died seised came to the Land by Diffeisn or otherways, because by the Dying

seised the Entry of every Man is roll'd; per Keble, Arg. ibid. —— The Demandant replie that

the King was intitled by Office, and seised the Lands to him; for every one is bound by the Office; per

Keble, Arg. ibid. But the Reporter cites 38 H. 6. 2. in the End of the Plea, and 28 H. 6. 5. in the End of the Plea,

and 28 H. 6. 5. in the End of the Plea, and 9 H. 6. 4. S.P. contra.

(A. b) Recovery upon other Title than set forth in the

Count &c.

1. IN Aiffle of Rent the Tenant made Defaulf, and it was demanded what

Rent it is, who said Rent-service. The Aiffle said that the Land

was out of the Fee and Scigniory of the Plaintiff, but he and those whose

Estate he has, have had Rent out of that Land Time out of Mind, and the

Plaintiff in Aid of it seised forth a Deed, by which he purchas'd the Rent,

but no Deed of Commencement of it, and the Plaintiff recover'd by Award,

quod nota, notwithstanding that he said that he demanded Rent-service &

(B. b) Judgment. And what recover'd.

1. ASSISE by M. of the intire Land, and because upon the Pleading

and Demurrer upon it, it appear'd that the Plaintiff had Title

but to the Moiety, and the Tenant having Title to the other Moiety, it was

awarded that the Plaintiff shall recover but the Moiety; quod nota. Br.

Aiffle, pl. 493. cites 8 All. 33.

2. Aiffle of 20 l. Rent, and the Tenant seised Deed, by which the Plain-

tiff had teaded to him by Deed for Life, rending the Rent, and as to 42 s.

seised a Release of the Plaintiff, which was confessed, and yet the Plain-

tiff shall not abate; for this does not go to Bar, as it seems, for this Part;

otherwise it seems of Receipt of Part pending the Write, and to the rest.
be said that he himself, viz. the Tenant for Life, had brought Affisse against the Plaintiff for Diffeifin done by him of the Land now put in View, whereof &c. against the Plaintiff his Lesfor, where it was found that the Plaintiff his Lesfor had disseifed him, by which it was awarded that the Lesfor recover Seifin &c. and the Jury gave the lesis in Damages by reason of the Rent referved upon the Leaf, and recouped the Damages for the Time that the Lesfor was Tenant by Diffeifin, and for his Time he is served of his Rent, and demanded Judgment as to this Parcel &c. and for the Rent due after the Recovery, he said that he had been at all Times ready to pay, and yet is, and tender'd the Money in Court; and the other aver'd that he had not been at all Times ready &c. Per Herle, This is no Plea, by which he awarded the Affise, which says that the Rent of one Term was arrear before the Disfeifin of the Land, and another Term was arrear after the Recovery in the Affise, and the Lesor distrained, and the Lessee made Restons, and would not pay without Acquittance to the Damage &c. and they were compell'd to tender the Damages from the Rent arrear before the Recovery, and from the Rent arrear after the Recovery, and it was awarded that he recover the Rent of 2 Terms, and Damages 106s. and so note that the Rent due before the Disfeifin was not loit by the Disfeifin. Br. Affise, pl. 141. cites 8 Aff. 37. and Trin. 4 E. 3. accordingly.

3. Affise against A. and others, and it was found that the Baron was seized in Fee, and infeifed the Plaintiff after that he had married A. the Defendant, and the Guardian assigned her Dower, who was ready to be Attendat to whom the Court should award, and the Affise is brought against the Heir and A. Feme of the Father, and it was awarded that the Plaintiff recover 2 Parts, and the Feme retained the 3d Part in Dower; for the was no Party to the Disfeifin, and the 3d Part of the Damages was recouped; quod nota. And it is said there in the End, that if Addor or Disfeifor assigns Dower, the Feme shall plead in Bar against the Heir, if no Crown was in her. Br. Affise, pl. 181. cites 12 Aff. 20.

4. In Affise of the Chappel of B. the Plain was of a House and 3 Acres, with the Appurtenances, and the Cafe was, the Plaintiff was in of the Collation of J. N. who Right bad, and the Defendant made Suggestio to the King that it was of his Patronage, and gained Collation of it, and offered the Plaintiff, and he brought Affise and recover'd, and the Value of a Year also, which was paid after Verdict; but Trin. 15. such Judgment was reversed, because it was of Damages after Verdict; and allo the Plaintiff in his Title made himself Guardian, and not in the Original. Br. Affise, pl. 187. cites 13 Aff. 2.

5. Affise of a Place containing in Length 40 Foot, and in Breadth 20 Foot, and found for the Plaintiff, by which the Plaintiff recover'd, and found no Damages; for the Place was amended by Building, and well, and so no Damages awarded. Br. Affise, pl. 194. cites 14 Aff. 13.

6. A Deed of Confirmation which makes the Estate of the Plaintiff, may be found by Verdict at large, tho' the Deed was not pleated but given in Evidence. Contro of a Deed which does not make the Estate, and is not pleated, and the Plaintiff recover'd, and Damages tax'd by the Jury, and Damages taxed pending the Wait. Br. Affise, pl. 219. cites 18 Aff. 3.

7. In Affise the Tenant pleaded Release, bearing Date in a Foreign Country, and the Plaintiff denied it, and thereupon were adjourned into Bank, and at the Day the Tenant made Default, whereupon the Affise was awarded at large. Per Shard, if the Deed had been found false, then the Plaintiff by releasing his Damages might have Judgment of the Land, and the Entry in the Roll shall be Quod petens petit, quod non inquiratur de Dam- nis, and not that he had releasted his Damages &c. Fitzh. Affise, pl. 125. cites 22 E. 3. 4.
8. In Affise a Prior Plaintiff shall recover the Arrears of his own Time, and of the Time of his Predecessor, and of a Term after the Adjournment of the Affise; for it was in Affise of Rent. Br. Affise, pl. 304. cites 29 Aff. 59.

The Plaintiff recover'd Damages for a Quarter, incurred after the Adjournment of the Affise, viz. the Rent of this Quarter with his Damages. Br. Affise, pl. 350. cites 31 Aff. 51.

It was said for Law, that in Affise of Rent the Plaintiff may recover all the Damages against the Tenant, tho' he has not been Tenant but one Month, and the Arrears by 20 Years by the Statute. Quere by what Statute. It seems to be by the Statute of Gloucester, 101. Br. Affise, pl. 10. cites 53 H. 6. 46. * S. P. Br. Affise, pl. 445.

9. By Affise of Office cum Pertinentiis, he shall recover all that is appendant to it. Per Shard, this is true upon Ancient Title only, and not upon a new Grant. Br. Affise, pl. 308. cites 30 Aff. 4.


11. In Trespass, if the Termor for Years is ousted, the Lessee shall have Affise, but not recover Damages; for the Termor has the Possession, and only he is damnified; per Brian J. Quod non negatur. Br. Affise, pl. 83. cites 15 H. 7. 4.

12. The Judgment is Quod recuperet Seilnun. Arg. 10 Mod. 125.

(C. b) Damages. Charged with Damages who, where there are several Occupiers &c.

A Slife against several, it was found that the Plaintiff was dispossessed by one named &c. Parle said, that the Distisor is not sufficient, and therefore prayed that the Tenant answer the Damages. Perley said this is no Reason but for his own Time, for it may be that the Plaintiff has omitted others; but because the Distisor was not sufficient, therefore the Plaintiff shall have Judgment to recover the entire Damages against the Tenant; and 'tis said, that Greene awarded in Kent, that where several were named who had the Occupation, and none was sufficient but the Tenant, therefore the Tenant was charged of all the Damages. Br. Affise, pl. 318. cites 31 Aff. 5.

For more of Affise in General, See Dilletin, Entry, Mortdaessor, Montenure, Presentation, and other proper Titles.
Attachment.

(A) How considered.

1. An Attachment is a Non Omittas in itself, and therefore the Sheriff may break his House to take him; per Coke Ch. J. Roll. Rep. 336. Hill. 13 Jac. B. R. Briggs's Case.


3. Upon a Motion for an Attachment for not returning a Mandamus, Holt Ch. J. said, that an Attachment in Chancery on an Alias and Pluries is returnable in this Court, and is not merely for Contempt, but is really an Action whereon the Plaintiff shall recover Damages for the Delay in not executing the Writ; and we have without Reason gone on in Imitation of Chancery. It is a Contempt not to return the first Mandamus; therefore let a Return be made within a Week. 12 Mod. 164. Hill. 9 W. 3. Anon.

and that there are two Sorts of Attachments upon a Mandatory Writ, the one entitles the Party to his Action for Damages, and that must be on the Pluries; and the other punishes the Contempt, which may be on an Alias. 12 Mod. 348. Patch. 12 W. 3.

4. Upon an Attachment, the Party is only to answer Interrogatories, and if he can swear off the Contempt, he is discharged; and Ignorance of the Law cannot be pleaded in Justification of an Act against Law, but may be offered in Mitigation, per Holt Ch. J. 12 Mod. 348. Patch. 12 W. 3.

(B) Of what Things.

1. In Debt, Trespass &c. a Man ought not to attach the Defendant by the Horse upon which he rides, where he has other Goods by which he may make the Attachment, and therefore it seems that if there be no other Goods, that then the Officer may attach him by the same Horse on which he rides. Br. Attachment, pl. 23. cites F. N. B. 93. (H) (J.)

It cannot be of Corn out of Sacks, but if it might, 'tis to be kept by the Bailiff, and he ought not to deliver them out of his Hand to the Plaintiff. Cro. E. 230. pl. 20. Patch. 33. Eliz. 3. B. R. Mead v. Bigott—5 Le. 236. S. C.

2. A single Thing only ought to be attached; Per Powell J. And per Treby Ch. J. it ought to be a reasonable Distress to compell the Defendant to appear. 2 Lutw. 1457. Hill. 9 W. 3. Hardgrave v. Ward.


(C) Forfeiture
(C) Forfeiture of the Goods &c. attached. In what Cases.

1. The Defendant justified, because the Plaintiff was attached by Writ, upon Plaint in Court Baron, and made Default at the Day, by which the Attachment is forfeited, Quære, for it is not adjudged. Br. Attachment, pl. 2, cites 28 H. 6. 9.

2. If Defendant is returned attached in Trespaß by 20 Sheep, or such like Pretul &c. he is effoigned at the Day, as he well may; and at the Day makes Default, he shall forfeit the Attachment. Br. Forfeiture de Terres, pl. 3, cites 34 H. 6. 9.

3. So if he had made Default at the Day of the Return of the Attachment, and had not been Effoigned, Quod nota; and per Ashton, if he appears at the Day of the Attachment, or at the Day of Effoign returned, he shall have the Attachment, otherwise not. Br. Forfeiture de Terres, pl. 3, cites 34 H. 6. 9. But nota, there the Cafe in the Margin is vain, because by the Effoign the Goods were faved; therefore per Cur. Writ, if the Defendant does not appear, the Attachment is forfeited to the Lord of the Manor. Br. Attachment, pl. 19, cites 34 H. 6. 9. But it is said there, that T. 57 H. 6. it was held by Ashton, Danby, Moyle, Davers, and Choke, that no Goods attached shall be forfeited but in Courts of Record, and not upon Juries in the County; but contra inde M. 32 H. 6. But this Matter is not reported in 37 H. 6. and in the Cafe of the Prior of Rumney, there it was taken that the Attachment in Court Baron shall be forfeited; for it is in vain to make an Attachment, si nihil inde evenit. Br. Forfeiture de Terres, pl. 4, cites the same Cases accordingly, and that by 32 H. 6. the Attachment is forfeited before the Sheriff or in Juries; and says, that from hence it seems that it is forfeited, for the Court of the Sheriff is only a Court Baron.

4. Where the Defendant is returned attached by such Chattels upon Writ of Attachment, in Debtor &c. and at the Day he is effoigned, Quod nota. S. C. 153, ed, and at the Day of Effoign adjourned the Defendant makes Default, yet the Goods attached are faved, notwithstanding the Default after; per Cur. and yet if he had made Default at the Day of the Attachment returned, the Goods had been clearly forfeited, Quod nota. Br. Attachment, pl. 11, cites 21 E. 4. 78.

5. In Trespaß, if the Sheriff attaches a Cow, the Property is not out of the Defendant till he has made Default, and if the Sheriff attaches the Cow, and leaves the Cow with the Defendant, yet if he makes Default at the Day, the Cow is forfeited, and the Sheriff may take it, and might have taken the Cow with him at first if he would. Br. Trespaß, pl. 28, cites S. C & S. P. Quod nota, per Cur. Br. Attachment, pl. 10, cites 9 H. 7. 6. accordingly; but where he attaches it, and leaves the Goods with the Defendant, there he hath nothing to do with the Goods attached, till Default be made at the Day.

For more of Attachment in General, See Mise (U), Contempt, Summons, and other proper Titles.

Attachment.
Attainder.

(A) In what Cases.

A Man attainted of Land had Issue 2 Sons, the eldest had Issue a Daughter, and did Felony, and was taken and imprisoned, and became Appellant, and after he prayed his Clergy, and was retaken to Prison, and there died; the Father died, the Daughter entered, and the youngest Son who was Uncle to the Daughter caster her, and the brought Affile, and recovered by Judgment; and so it seems that a Man is not attainted by Verdict nor Confession without Judgment; for there was a Confession, but Judgment wanting. Br. Affile, pl. 439. cites 8 E. 1. and Fitzh. Affile 421.

An Attaint is Conviction of a Person whereof he was not convicted before, for he cannot be twice attaint. Arg. Pl. C. 397. Earl of Leicester v. Heydon. An Indictment of Treason is only an Accusation, but an Attaint is Proof. Jenk. 244. pl. 28.

Every Man attainted is convicted, but every Man convicted is not attainted, for he that is adjudged is convicted and more, & ex Vi Terminii, this extends to him that is condemned. 11 Rep. 60. In Dr. Polster's Case. — They are frequently used as synonymous &c. 2 Show. 382.

The Difference between a Man attainted and convicted is, that a Man is said Convict before he has Judgment, as if a Man be convicted by Confession, Verdict, or Recreancy; and when he has his Judgment upon the Verdict, Confession, or Recreancy, or upon the Outlawry or Abjuration, then is he said to be attaint. Co. Litt. 390 b.

(B) Attainted Person. What he is capable of, and How protected and consider'd in Law.

1. A Man attainted cannot vouch; if he should be allowed to vouch, he would be admitted to be a Plaintiff or Actor, whereas he is disabled to sue. Jenk. 209. pl. 43. cites 4 E. 4. 9. 6 E. 4. 4. and 8 E. 2. Fitzh. Voucher. 237.

It is Murder to kill an attainted Person.

Hawk. Pl. C. 80. cap. 31. S. 15. says it is agreed.


Eliz. Bynitter v. Trufel, S. C. where Debt was brought on a Bond, and the Defendant pleaded that he was attainted; but
Attainder.

but by 3 J. contra Walmley, it was adjudged that he should answer.—2 And. 3s. pl. 25. S. C. and he was awarded to answer.—3 Inst. 215. S. P.—S. P. per Cur. Sid. 160. in pl. 13. Mich. 15 Car. 2. B. R.

4. If any Personal Wrong be done him during his Attainder, when he is pardoned he may have Action for it; per Anderson and 2 Justices. Cro. E. 316. Mich. 38 & 39 Eliz. C. B. in Case of Banister v. Truscull.

5. A Person attainted may purchase, but it shall be to the King's Use. S. P. admit.

There can be no Restitution of Blood without Act of Parliament, but a red, Arg. 2 Pardon enables a Man to purchase; and the Son who is begotten after, i.e. 124. in the th'o' an Elder be living, shall inherit those Lands. Bacon's Use of the Law, 42.

Mod. 121. 359. in Case of Thornby and Fleetwood.

6. Land was devised to A. the Remainder to him that is next of Blood, per Doderidge and Houghton J. The attainted Person may take by this Devise. 2 Roll Rep. 256. 257. Mich. 20 Jac. B. R. in the Case of Perin v. Pearle.

7. An attainted Person, tho' pardoned, cannot take by Descent; per If a Person attainted be beaten or mained, or a Woman be ravished, and are afterwards pardoned, they shall have Action of Battery, Appeal of Mayhem, or Rape. 3 Inst. 215. cites Litt. Intrat. Co. 247, 248.—Arg. 10 Mod. 116. 361.

8. A Person attainted may be challenged as a Juror. Co. Litt. 158.

9. A Person attainted of Treason or Felony cannot be an Approver. 2 Jenk. 84. pl. 63. S. P. according—


8. A Person attainted of Treason or Felony cannot bring Appeal of Death while the Attainder is in Force, tho' afterwards he may. 2 Hawk. Pl. C. 193. cap. 23. S. 128.

(C) Forfeited by Attainder. What.

1. WHHERE the King is intituled by Office that H. S. was seised in Fee, Br. Office and leased for Life to J. H. and after H. S. was attainted of Treason, and that J. H. is dead, and that M. is enter'd, by which Seire Facias is awarded against M. if he comes and says that J. H. was seised in Fee, and died seised, and be is Heir, this is no Plea without intitling himself before the Forfeiture, or flowing How H. S. dismis'd himself, notwithstanding he traverses that H. S. had nothing at the Time of the Forfeiture. Br. Seire Facias, pl. 158. cites 40 All. 24.

2. If a Man be attainted of Felony, and it is found by the same Inqwest Contra if it that he has Goods in the Custody of W. N. Seire Facias shall not issue. Br. be found by Inqwest of Office; per Fortescue Ch. J.

Ch. J. Note the Difference. Brooke says the Reason seems to be, inasmuch as it is not Part of the one Inqwest, in whoseforver Custody they are. Contra of the other Inqwest. Br. Seire Facias, pl. 139. cites 36 H. 6. 26. Per Fortescue Ch. J.

3. If
The King 

3. If a Bishop be attainted of Treason, the Attainer does not make the See void without Deprivation. Jenk. 207. in pl. 37. 

for and 4 Mod. ^, V this Mod. See 5. Th. but '• Jenk. Notes forfeited all the Comb. S. Against againf, Cate, in, by King Common, againf, Cate, but agreed. when he was spoken with the King; for it is a dangerous Thing, and if this Course should be allowed of, all Attainers might be secured into by Writs of Error, which is not to be fuller'd; and so per tot. Cur, the Motion was denied, which was to have a Copy of the Attainer of his Ancestor; per Coke Ch. J. 3 Built. 71. Trin. 13 Jac. The King v. Arden. 

Godb. 380. 

3. An Executor being injured by an erroneous Attainer, whether of Jones J. said, 'Treason or Felony, may bring a Writ of Error ; tho' by some it is necessary that March's Cafe, 8 Rep. to have a Personal Estate, for otherwise he is no ways damnified, where- 111 was no. as an Heir is, tho' there is nothing defended to him because of the Cor- ver adjudged. * 1 Salk. 295. pl. 1. 

S. C. held accordingly by three Justices, but Holt Ch. J. doubted. ——- 3 Mod. 72. S. C. but S. P. does not appear. ——-Comb. 114. S. C. and the Outlawry was reversed at the Suit of the Executor against the Opinion of Holt; Ch. J. ——See Tit. Utlawry (F. b) pl. 1. and the Notes there. 

Comb. 369. 

4. Attainer of Treafon was reversed for want of the Words Infio Vi- vente, or in conspeBu iipsus as to the Interiorea communter. 12 Mod. 95. Trin. 8 W. 3. the King v. Walcot. 

See Tit. Utlawry, S. b) pl. 12. and the Notes there.
Attaint.

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and ibid. 402. says the Judgment was reversed, and the Reversal affirmed in the House of Lords, and cites Show. Parl. Cases 129. — 1 Salk. 632. pl. 4. S. C. and Judgment reversed unanimously upon solemn Arguments.

For more of Attainder in General, See Blood corrupted, Forfeiture, Attain, and other proper Titles.

Attaint.

(A) Upon what Inquest it lies. No Attaint lies upon an Inquest of Office.

1. In an Action against Tenant in Tail, if he makes Default, and he in the Reversion prays to be received, supposing him to be Tenant for Life, which is counterpleaded, upon which they are at Issue, and it is found against him in the Reversion, and the same Inquest taxes the Damages against the Life, no Attaint lies upon this Verdict, because the Judgment against the Life is given on the Default, and so this is but an Inquest of Office for Damages. Contra 39 C. 3. 8. b.

2. An Attaint lies upon a Verdict before the Sheriff in a Writ of * Br. Quod Inquiry of Wafe. * 41 C. 3. 8, because by the Statute the Sheriff is Judge in this. t 48 C. 3. 19. || 2 H. 4. 3. b. 7 H. 4. 38. b. Contra * 3 H. 6. 29. Que-e inde, for it was adjourned.

† Br. Attaint, pl. 21. cites S. C. and Withing held that Defendant should have Attaint, quod fuit negotium. || Br. Enquefth, pl. 9. cites S. C. as to the first Point, but mentions not the Reason.

In Wafe it was said, that upon Writ of Inquiry of Wafe, if the Defendant lores the Land wafed, he may have Quod ei defoceat, per Hand. Ad quod non fuit reprounum ; but Brooks says, the Law is contrary ; for there it was agreed per tot. Cur. that Attaint lies, and the Party may challenge, and therefore this is a Recovery by Verdict, and not by Default, and then Quod ei deforcet doth not lie. Br. Quod ei defoceat, pl. 7. cites 2 H. 4. 2. But the Challenge was denied 21 H. 6. But per Newton and Patifon Justices there, and Markham and Portington Sergeant, Attaint lies. — Br. Attaint, pl. 21. cites 2 H. 4. 2. S. P. accordingly. — Fitz. Attaint, pl. 15. cites S. C. and per tot. Cur. Attaint lies, because the Sheriff is Judge by Commilion.

‡ Br. Attaint, pl. 105. cites S. C. that Martin held Attaint lies upon Inquiry by Default in Writ of Wafe, because it is not Inquest of Office: — Fitz. Attaint, pl. 63. cites S. C. that Attaint lies ; for it is more strong than an Inquest of Office; for if the Inquest had found No Wafe the Plaintiff should be barr'd, and so the Judgment is given upon the Verdict. — F. N. B. 107. (C) in the new Notes there (c) says, that it was so agreed by Martyn, contra Babington, for by him it is more than an Inquest of Office, for that the Judges are bound to render Judgment according to the finding of the Inquest, as in this Case of Wafe ; but on an Inquest to procure of Damages, there it is only for Information, and the Court may increase or diminish the Damages, and cites 2 H. 4. 51. 48 E. 5. 10. Contra * H. 4. 58.

Where Writ of Inquiry of Wafe is awarded by Default of the Defendant, a Man shall not have his Challenges to the Puts, and yet Attaint lies ; Quod Nota. Br. Attaint, pl. 59. cites 21 H. 6. 56. per Newton and Paffon Justices, and Martin and Portington Sergeant.

3. [So] an Attaint lies upon an Inquest before the Sheriff in a Re- Br. Enqueft, difficult ; for the Sheriff is Judge in this. * P. 4. 3. b. Dubitat.. — Br. Ar- taint, pl. 22.

cites 2 H. 4. 2. S. P. accordingly. \[\text{Q} \text{Q}\]
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Attaint.

Opinion was, that it is only an Inquest of Office, and that Attaint doth not lie.—Br. Reddilsham, pl. 5. cites S. C. & S. P. accordingly.—Br. Attaint, pl. 1. cites 28 H. 8. 1. and says Nora, that it was admitted in a Writ of Reddilsham Anno 18 H. 8. that Attaint lies upon a Reddilsham, but says, Quære inde, if it be more than an Inquest of Office.—The Court doubted if it lay; and Anderson seemed that it did not; and yet the Registar, fol. 308 b. where such Attaint was ordered, which Book harbited some of the Justices, and some doubted.—An Attaint will not lie upon a Verdict in Reddilsham. Jenk. 181. pl. 67.

4. So [if] an Issue of Nient Comprise be tried by the first Jurors an Attaint lies thereupon. 4 H. 6. 28. b.

* Br. En-

queft, pl. 9. † 3 H. 6. 29. b. ‡ 19 H. 6. 8. 10. b. 21 C. 3. 57. ¶ 43 All. 23.

5. But no Attaint lies upon an Inquest of Office. * 2 H. 4. 2. b. cites S. C. which is it lies not where it is to inquire for Damages; of it is an Inquest of Office; and so of Inquiry before the Elcheator. † See the Notes at pl. 3. ‡ See pl. 2. and the Notes.


Br. Attaint, pl. 26 cites S. C. & S. P.

6. No Attaint lies upon a Verdict given by 24 Jurors as it does not lie upon a Verdict in an Attaint. 8 H. 4. 23. b.

7. It does not lie upon a Verdict given in an Attaint for the Thing of which the Jury is attainted. 12 H. 6. 6.

8. But if they find any collateral Matter besides the Attaint, it lies thereupon, and they shall be attainted by 43. 12. H. 6. 6.

9. In Writ of Right, if the Grand Affile be taken upon the mere Right no Attaint lies thereupon. 12 H. 6. 6.

Where a Jury finds a Thing which is out of the Issue, there the Verdict for so much is void, because they are sworn to try the Issue between the Parties, so that whatsoever they try besides the Issue is per non Jurats, and therefore if that Matter so tried is false, an Attaint does not lie against them, for no Party is grieved. Hob. 55. Trin 15 Jac. C. B. in the Cafe of Fosterv. Jackson.

Br. Attaint, pl. 27 cites S. P. by Cal. pepper. — Firth. Attaint, pl. 15. cites S. C.

11. In an Affile, if they are at Issue upon the Plea in Bar, and that is found for the Plaintiff, and it is inquired over of the Seilin and Disseilin, if the Disseilin be found by a fals Verdict an Attaint lies thereupon. 11 H. 4. 27.

Br. Attaint, pl. 126. cites S. C. and by Hank. & non negatur, 80. b.

12. If a Recovery be in a Quare Impedit by Default, and a Writ issues to the Sheriff to inquire of the Damages and Plenary, no Attaint lies upon this Inquest; for it is but an Inquest of Office. 11 H. 4.

that if the Verdict does not find who presented last, or if they omit any other of the 4 Points of the Writ, they may be inquired by other Writ of Office, and Attaint does not lie thereof.—Br. Enquet, pl. 44 cites S. C.

13. But it seems it is otherwise if the Inquiry be by the same Inquest that inquired of the Issue in the Quare Impedit. (for as it seems this is all one with the Inquiry in an Affile.) Contra. Co. 10. Ch. 119.

* Br. At-

taint, pl. 67. cites S. C. but where

14. If a Deed with Witenes be pleaded, and the Inquett passes in the Affirmative, no Attaint lies thereof. 12 H. 6. 6. because the Witenesses have adjudged this to be true. * 23 All. 11. per Charpe
Attaint.

11 C. 3. Attaint 26. Per Shard 3 C. 3. Itinere North, 56. per the Wit-
nesses and the Inquest
cannot agree in Verdict, the Verdict of the Inquest only shall be taken, and there Attaint lies. —
2 Inf. 662. S. P. accordingly. — F. N. B. 106 (H) S. P. accordingly.

15. But otherwise it is if it passes in the Negative and Disaffirm.* Br. Ar-
manee of the Deed, 40 Att. 23. per Fitzjohn; for the Witnesses taint, pl. 67.
ought to testify nothing but what they know certainly, silecrce, what
they saw and heard. * 23 Att. 11. per Thorpe. Contra 11 C. 3.
Attaint 26. per Shard.

F. N. B. 106 (H) For the Witnesses cannot prove a Negative; but of the Affirmative they may have
Notice whether it be his Deed or not, — 2 Inf. 662. S. P. accordingly, and cites 11 Att. 19. 22 Att.
15. 23 Att. 11. 40 Att. 23. 11 H. 6. 6. and F. N. B. 106 (H) # See Page 9. of this Volume.

16. If a Man be indicted of Trepass, and found Guilty by another
Inquest, he shall not have an Attaint, nor Version in Nature of an
Attaint, because he is in a manner found Guilty by 24. 10 H. 4.
Attaint 60. 64.

17. But if he be acquitted, the King shall have an Attaint. 10 H.
Vaugh. 196.
Attaint 60. 64.

Vaughan Ch. J. cites S. C. and says that there is no Case in all the Law of such an Attaint, nor
any Opinion but that of Thringes: in this Case, for which there is no Warrant in Law, and thinks
the Law clear that an Attaint did not lie. — 2 Jo. 16. S. C. & S. P. by Vaughan Ch. J. in delivering
the Judgment of the Court.

18. If a Man be indicted and found guilty of Felony, and the Exec-
ution reprieved for a certain Cause, or he is delivered to the Ordinary,
he shall not have any Attaint, because it is found by 24, Contra
10 H. 4. Attaint 60. 64.

19. It was said that Attaint does not lie upon Affise for Default: for it * S. P. Br.
is only Inquest of Office where the Disaffirm never appears. Quere inde:
for the Book here vouched is not to this Purpose, but is where an * Ab-
bot recovered in Affise against another, and the same Inquest incurred of Col-
lusion, and found a Thing false in Law, and contrary in itself, yet Judg-
ment was given, because this was not but Inquest of Office. Br. Attaint,
pl. 112. cites 16 Att. 1.

20. In Affise, if Issue be joined upon a Release, and a mediate Oyster con-
sider'd, there if the Issue be found for the Plaintiff, yet the Jury shall in-
guar the Seisin and Disaffirm, being the Point of the Action, and there-
fore on an Attaint lies. 10 Rep. 118. Mich. 10 Jac. per Cur. in Cheyney's Cafe,
cites 11 H. 4. 27. 34 H. 6. 32. b. 16 Att. pl. 1. 16 E. 3. Attaint
pl. 41.

21. In Praecipe quod reddat by a Prior, if the Issue is found for the Plaintiff,
and the Collusion found by the same Inquest, as it ought &c. Attaint
does not lie of the Verdict of the Collusion; for of this it is only Inquest

22. In a Writ de Valore Maritatis Issue was joined upon the Tenure, S. P. admit-
and found for the Plaintiff, and Damages to 20s. and Costs to 20s. butted, Godd.
the Jury did not find the Value of the Marriage, which they ought to have done. It was resolved, that if they had found an excessive Value, or Jac. C. B.
excessive Damages, an Attaint lies. 10 Rep. 118. Mich. 10 Jac. Chey-
ney's Cafe.

(A. 2)
(A. 2) In what Cases or Actions.

1. 5. E. 3. cap. 7. Enact, That Writs of Attaint shall be granted as well upon Pleas of Trespass moved without Writ, as by Writ, before Justices of Record, if the Damages adjudged do exceed 40s.

2. In Attaint the Tenant of the Land would have rendered to the Plaintiff, and the Court would not accept the Render for the Advantage of the King, but took the Jury; and also Land is not bare in Demand. Br. Attaint, pl. 50. cites 6 Aff. 2. 6 E. 3 12.

3. In Affire it was said that if Witnesses are joined to the Inquest, and agree with them in Verdict, Attaint does not lie; for the 12 cannot be attainted, if the Witnesses are not also attainted, and they shall not be attainted. Quære if this be the Reason, or because now the Verdict is by more than 12. Br. Attaint, pl. 57. cites 11 Aff. 19.

Br. Attaint, pl. 29. cites S. C. Where Inquest is attended by Default after Issue joined, the Party shall have Attaint. Contro upon Inquest of Office; for there Issue never was joined. Br. Attaint, pl. 9. cites 34 H. 6 12.

4. Attaint lies upon Recovery by Default in Affire; and therefore it seems that Quod ei defordecat does not lie upon such Recovery by Default; for it is by Jury, and not properly by Default. Br. Quod ei defordeat, pl. 14. cites 17. E. 3. Fitzh. Tit. Attaint 69. and 21 H. 6 61.

Br. Attaint, pl. 113. cites S. C for the Councell of Pleas are the King's Justices afo. and Attaint lies. D. 201. 3.

Marg. pl. 65. says, that Attaint does not lie upon Suit by Bill, and cites Trin. 5. E. 3. Rot. 90. Ex Libro Magnifi Noy, and 44 E. 3. 2. b. by Knivet.

Br. Attaint, pl. 118. cites 4 H. 6 63.

8. Trespass in B. in the County of C. of trampling his Grafs, where in Truth the Trespass was done in P. in the County of S. it the Defendant pleads Not Guilty (as he may) and the Jury find him guilty in the County of S. the Verdict is void, but if they say guilty Generally, then Attaint lies; for this shall be intended in the County of C. where the Action is brought, and this was in Trespass local of Grafs trampled, Quod nota. Br. Attaint, pl. 108. cites 4 H. 6 63.

9. In Detinue, if the Plaintiff and the Garnishee are at Issue, and at the Nisi Prius the Garnishee makes Default, Judgment shall be given by his Default, Per Marten and to. Cur. and the Inquest shall not be taken upon the Issue, for by the Default the Issue is waived; and the Inquest shall inquire of the Damages, and the Garnishee shall not have Attaint. Br. Inquest, pl. 57. cites 8 H. 6 5.

10. If a Man recovers by false Verdict, and a Stranger oufa the Tenant, he shall not have Attaint, unless he be ousted by the Demandant who recovered, or his Heir. Br. Attaint, pl. 38. cites 21 H. 6 55.

11. And
Attaint.

11. And it was said there, that Attaint lies in Personal Actions before Execution sued. Br. Attaint, pl. 9, cites 34 H. 6. 12.

12. Attaint does not lie upon Appeal of Malum, nor upon any other Attaint was Appeal, notwithstanding the Statute of 34 Eliz. 3. 7. for it is there recited, brought up that it was agreed, Hill. 42 Eliz. 3. in B. R. that Attaint does not lie upon a Verdict in Appeal of Malum, and that Attaint does not lie upon any Appeal, for it is not Property within the Words of the Statute. Br. Attaint, pl. 101, cites the Register, tol. 122.

13. Note for Law, where Trespafs of Battery, Goods carried away, or Writing down, be done in one County, yet Action may be brought in another County, for those are not local; but contrary to Trespafs of Trees cut, that this or Grade's triumph, those are local, and shall be brought in the proper County of those in the other Caves, the Jury of another County may take Brooke was Conunence thereof, but are not bound to it, but if they take Conunence Attaint does not lie. Br. Attaint, pl. 104, cites M. 2. M. 1. and P. 18. E. 4. pl. 5. tol. 1. is to the same Intent.

14. Of a Jury which is more than 12, Attaint does not lie. Br. Attaint, pl. 50.

15. In Affi/e, the Disjufn is found to the Damage of 9l. and the Dif- S. P. Br. fessor wins the Land to the Value of 10l. and yet the Affi/e gives Damage of 9l. Attaint lies per Cur. because the Damages were not reconputed in the 6. Verdict for the Sowing. Br. Attaint, pl. 125.


17. It lies in an Affi/e of fresh Force brought in London. Goldsb. 42. pl. 18. in Cafe of Dickley v. Spencer cites 44 Eliz. 3. 32.


(A. 3) By Common Law or Statute.

1. E S T M. 1. Cap. 38. 3 E. 1. Enacts that Attaints shall be grant- The Mil- ed Ex Officio upon Inquests in Plea of Land, or of any Thing, chief before this Statute touching Freedom, when it shall seem necessary.

common Opinion is, an Attaint did lie upon a false Verdict given in Plea of Land, yet it King many Times could not grant it, without Suit made to him; which turned the Party grieved not only to great Delay, but to extreme Trouble, Attendance and Charges; and the Reason that made the Difference between the Plea Real and Plea Personal was, that in the Plea Personal the Party grieved had no other Remedy but the Attaint; but in the Plea Real, he had other Remedy in an Action of higher Nature, and for that Cause was not granted without Difficulty; and some Judges held, that in a Plea Real an Attaint did not lie, and therefore this Act provided, that the King shall grant it Ex Officio, that is, Ex Merito Juittitce; and this Act is holden to be in Affirmance of the Common Law, and this is the common Opinion, agreeable with our old Books. 2 Inf. 25.

2. The Defendant shall not have Attaint in Appeal of Malum, no more than in Appeal of Felony; for the Statute does not give it but in Writ and Trespafs, per Thorp, J. but see 34 Eliz. 3. cap. 7. Br. Attaint, pl. 66, cites 22 Aff. 82.

R. F R
Attaint.

3. Attaint was never taken by Equity upon any of the Statutes which give Attaint; for first by Wifum. 1. cap. 37. it was given in Plea Real, and there Plea Personal was not taken by the Equity, and after it was given in Plea Personal, and this was taken of the Principal and not of Damages. Br. Attaint, pl. 42. cites 14 H. 7. 13. per Brian and Fineux, the two Ch. Juftices, and Hody Ch. Baron.

4. And after 1 E. 3. cap. 7. was given as well of the Damages as of the Principal. Ibid.

5. And where Attaint by the Statute fails, as in a Cafe arifing in Lincoln; there he may have Attaint by the like form as was at Common Law. Ibid. per Brian and Fineux.

6. So it feems that Attaint was at Common Law, and this feems to be to reversion by first Record; for the Statute of Wifum. 1. cap. 37. 11. that the King of his Office will give Attaints in Plea of Land or Franktenement, or Thing which touches Franktenement, and no Penalty is there exprifed which shall be forfeited by them. Ibid.

7. And it feems that Attaint was at Common Law in Plea Personal except Trefpafs; for divers Statutes give it in Trefpafs, and the Statute of 34 E. 3. 7. gives Attaint as well in Plea Real as Personal, so it feems that it was in Plea Personal before, for Wifum. 1. cap. 37. gives it in Plea of Land as above, so it feems that there was none in this before, but it was in some Plea before, for the Penalty of the Forfeiture of the Petit Jurors was at Common Law, as it feems; for no Statute makes mention of it, so Attaint was at Common Law in some Actions, and this feems to be in Debt, Detinue, Covenant &c. and not in Trefpafs, for it is given by Statute in Trefpafs; the Reafon feems to be, that it does not lie in Trefpafs at Common Law, because if the Recovery should be reversed, the King shall lose his Fine, and the Reafon that it does not lie in Plea of Land at Common Law feems to be, because if he lofes he may have Writ of Right, and if he lofes in Writ of Right, Attaint does not lie by the Common Law, nor at this Day, because it poftes by Grand Asife, which is more than by 12. for of a Jury which is more than of 12 Attaint does not lie, as appears elsewhere. Br. Attaint, pl. 42. cites 14 H. 7. 13. by the 2 Ch. Juftices and Ch. Baron.

* Jenk. 89, pl. 73.

8. 13 R. 2. cap. 18. Enacted, that of false Verdicts taken before the Mayor and Bailiffs of Lincoln, if Attaint be sained it shall be tried by tho' of the County of L. and not by tho' of the Vill of L.

After which Statute Lincoln was made a County in itself, and where they were Mayor and Bailiffs, were made Mayor and Sheriffs.

And thereupon 3 H. 5. cap. 5. enacted, that the Statute made 13 R. 2. should hold Place as well as where they were Mayor and Bailiffs.

Br. Parliament, pl. 20. cites 14 H. 7. 13.——Jenk. 186. pl. 82. cites S.C.

(B) For
Attaint. 247

(B) For what Cause.

1. A Party does not lie for not finding a Divorce, because that he takes another Baron, and she dies, in Affidavit between her Heir and the Heir of the second Baron, they find Verdict at large, and find the first Affidavit in the Affidavit; by which the Plaintiff in the County, the Jury.

2. No Attaint lies for Costs. 12 C. 4. 5 b.

3. In Debt upon a Contract in one County, where the Contract was made in another, if the Jury do not find this, but [find] against the Plaintiff, no Attaint lies. 4 H. 6. 2 b.

4. In an Affidavit, if the Tenant pleads Null Tort &c., if a Release, which passes the Estate, be shewn in Evidence by the Plaintiff, and the Jury does not find it, tho' it was not pleaded, yet an Attaint lies. 6 Attaint, pl. 24. cites 7 H. 4. 23.

5. In Trespass of Battery in the County of S. per Prism, if the Battery was in the County of N. and the Jury upon Not Guilty pleaded find the Trespass, and the Defendant Guilty, Attaint lies, for they cannot take Consequence out of the County; but Ashton Julifce contra, for the Verdict is true, and they may take Consequence if they will, but they are not bound to find it if it was in a foreign County. Br. Attaint, pl. 46. cites 19 H. 6. 8.

6. And where they find a Deed which was before time of Memory, this is good, and yet they are bound to do it. Ibid.

7. The Plaintiff cannot have Attaint for too little Damages. Br. Attaint, pl. 86. cites 6 E. 4. 5.

8. Debt against Executors upon Issue of Nonque, Executor, and the Defendant gave in Evidence Gift of the Testator of his Goods in a foreign County, and that he left them in his Custody till he died, and after he took them, abique hoc that he administered other Goods &c. The Jury is bound to find his Gift upon Pain of Attaint. Br. Attaint, pl. 111. cites 9 E. 4. 40. per tot. Cur.

9. The Attaint is not only to punish the Jury, but to answer the Party his Damages. Br. Attaint, pl. 41. cites 14 H. 7. 5. per Cur.

(C) In
(C) In what Court it lies.

1. If a Man recovers in an Assize in Oxford, and after the Record is removed in Bank, the Attaint ought to be brought there, and in no other Place, because the Record is there. 21 E. 3. 10. b.

2. The Record of an Assize of Fresh Force, and the Record was made to come there; and so see that Attaint shall be brought only where the Record is. Br. Attaint, pl. 16. cites 44. 42. 43.

(D) For what Causes it lies.

1. If a Jury find a Special Matter, which is not Part of their Charge, nor pertinent to the Issue, no Attaint lies for this. Co. 11. Priddle and Napper. 13.

2. An Attaint does not lie for a Thing which is but Surplusage. 40 E. 3. 38. b. & S. P. accordingly, by Caund. —— Caeveatur in every Action triable by Jury of the Quantity of the Land,
3. In an *Affise of Mordanceto*, if the *Defendant* pleads a *Feoffment in Fee* to him and the *Ancelor of the* Demandant, and that he survived the *Ancelor* & the Demandant pleads that his *Ancelor* died folfe fued, and translates the *Feoffment* *Bodo & Forma*, and the *Inquest finds* that the *Feoffment* was made to them in Fee, tho' *the joint Estate is sufficient to abate the Writ*, without saying it was in Fee, yet he is put to his *Attaint*, and in this Case he may have an *Attaint*; for this will entice him to pay the *Survivor* had but for *Life*. 49 E. 3. 8. *F. Estoppel 199.* *per Curiam.*

4. An *Attaint does not lie* for that which was not given in Evidence. *Br. Attaint*, pl. 82. cites *S. C.*

*Br. Verdict*, pl. 51. cites *S. C.* — See (B) pl. 1 and the Note there.

5. In an *Affise*, if the *Jury* find a *Feoffment of Land*, if this was *Br. Verdict*, *upon Condition*, they ought to find the *Condition*, otherwise an *Attaint* lies; tho' it was not pleaded; for *this is Incident upon the General Issue*, if it was given in Evidence; but otherwise it is if the *if a Man* makes *Feoffment in Fee*.

when *Condition without Deed*, and enters for the *Condition broken*, he shall not plead it without Deed, but he may *give it in Evidence*, and the *Jury* is bound to find it in *Pain of Attaint*, and this if *Affise be thereof* brought, and *Nul Tort pleaded*. *Br. Attaint*, pl. 119. cites 15 *E. 4. 12.* *per Genney.* *Quod non negotur.*

6. If the *Dispossessor* enters upon the *Dispossessor*, and inflicts the *Disposi-Br. Verdict*, *for*, and after brings an *Affise against the Dispossessor*, if the *Feoffment* has not been pleaded, or given in *Evidence*, and the *Jury does not find* 11, yet no *Attaint lies*. *Contra* 43 *Att. 41* because they ought to take Notice of the *Livery*.

the *Feoffment* was not pleaded, but given in Evidence, and that *Attaint lies*; for the *Jury* ought to take *Conspicuous of the Livery of Seisin.* — *Br. Attaint*, pl. 82. cites *S. C.* and states it of the *Feoffment* being given in Evidence, but not pleaded; and the *Opinion* there accordingly.

7. [So] In an *Affise against a Dispossessor*, who hath a *Release of the Disposi-Br. Verdict*, *plead it*, he cannot give it in Evidence, and the *Jury* cannot take *Cognizance* of it, and therefore *Attaint does not lie* in such Case. — *Br. Attaint*, pl. 82. cites *S. C.* & *S. P.* accordingly; for of Release not pleaded, lies Certification of *Affise*, and not *Attaint*; for *Release* cannot be given in Evidence as a *Feoffment* may.

8. Where a *Man* has *Common appendant*, and makes *Title as Appar-Br. Attaint, pl. 89. cites 10 *E. 4. 49 H. 6. 17.* *per Pigot.*

9. And where a *Man* has *Fee as Forester*, and prescribes it in *without* *where* saying as *Forester*, and it is found for him, *Attaint* lies, and yet the *Matter* is true, but has not expressed all; for he has no such *Rent, Common*, or *Fee* as he alleges. *Ibid.*

and he had *Amnity by Prescription in Right of his Parish*, and he as Abbot, without naming him- *Abbot was self Parson*, brought *Writ of Amnity*, and counted upon *Prescription in him and his Predecessors A- toddlers, and the *Prescription was traveled*, and found with the *Plaintiff*, there every Word of the *Verdict* is true, and yet *Attaint Lies*; for he claiming not as Parson, they ought not to have found the *Suits* with him. *Pl. C. 291.* *292. cites 49 *H. 6.* and *M. 10 E. 4. 16.*

8 ff 10. Where
10. So where they 

11. In Debt on Bond for Performance of Covenants, one of which was, that in Consideration the Plaintiff would build a new Mill upon the Lands demised to him by the Defendant, and bring a Water-course to it, he the said Defendant leaded the said Land to the Plaintiff, and the Plaintiff aligned the Breach in stopping the Water-course; upon which they were at Issue, and found for the Plaintiff. The Defendant brought an Attaint, and the false Oath was found. It was moved in Arrest of Judgment that here was no Issue, and consequently no Verdict, and so no false Oath, and then no Cause of Attaint; for the Issue was upon the stopping the Water-course, which is no Cause of Action upon the Party's own Shewing; for there was no express Covenant that the Plaintiff should enjoy the Water-course; besides the Defendant in the Action might have alleged this Matter in Arrest of Judgment, and so he shall not be helped by an Attaint, neither does it appear that Execution was taken out, and this Attaint being brought upon the Statute 23 H. 8. cap. 3. which gives this Remedy to the Party grieved, and because before Execution the Defendant is not a Party grieved, it doth not lie. But as to these Objections the Court said nothing; but the Reporter adds a Quere if the Plaintiff be not Pars gravata, because he is subject to the Judgment, and so liable to the Execution. Le. 278. pl. 377. Hill. 28 Eliz. B. R. Huddy v. Fisher.

12. Where the Evidence given to the Jury is false in Part, tho' it be in a Point not material, yet this is sufficient Excuse for their not giving him Credit in any other Part of his Evidence, and so had no Cause to find their Verdict upon this Oath against the Party against whom it was given. Cro. E. 309. 310. pl. 18. Mich. 35 & 36 Eliz. B. R. The Queen v. Ingerfall.


14. The Jury may be attained 2 Ways; 1st, where they find contrary to Evidence; 2dly, Where they find out of the Compass of the Allegata. But to attain them for finding contrary to Evidence is not easy, because they may have Evidence of their own Consequence of the Matter by them, or they may find upon Diltruit of the Witnesses, or their own proper Knowledge; but if they find upon Evidence that does not prove the Allegata, there it is easy to subject them to an Attaint, because it is manifest that what is so found is an Evidence not corresponding to their Issue, and this was the only Curb they had over the Jurors; for the Judge being bet Master of the Allegata, if they did not follow his Direction touching the Proof, they were then liable to Danger of an Attaint; and therefore since the Judges, from the Difficulty of attainting the Jury have granted new Trials, whereby Jurors have been freed from the fear of Attaint, they have taken greater Liberty in giving Verdicts; but since the Attaint is only disfused, and not taken away, 'tis necessary that a certain Matter should be brought before them; and therefore in Trespass, the Quantity and Value of the Thing demanded must be so convenient-ly described, that if the Jury find Damages beyond such Quantities and Value, it may be apparently excessive, and they subject to the Attaint; and so on special Contrasts, they must be set forth so precisely, that if Evidence be given of another Contrast, and not in the Allegations, and yet the Jury find for the Plaintiff, they may be subject to an Attaint; and were it otherwise, if the Plaintiff had a Jury to his Turn, and the Judge should direct that the Plaintiff be Nonuit, yet if the Plaintiff would stand the Trial, the Judge must give positive Directions to find for the Defendant, there would be no Means of compelling the Jury to find ac-cordin
Attaint.

According to the direction of the Judge, if they were not under the terror of an Attaint, if they did otherwise; so this is the only curb that the law has put in the hands of the Judges to restrain jurors from giving corrupt verdicts. G. Hift. of C. B. 102, 103, 104.

(E) The Default of the Court.

1. If in an Affile, if the Jury find a special verdict, and refer it to the Court, whether upon the matter the tenant be a defendant, and upon the matter the Court adjudge him to be a defendant, the defendant, tho’ in law he be no defendant, yet no tenant lies against the jury, because it is not their fault, but the fault of the Court.

43 Att. 41.

Quod nota. Br. Verdict, pl. 51. cites S. C—Br. Attaint, pl. 82. cites S. C. and S. P. accordingly.—S. C. cited by Holt Ch. J. Ld. Raym. Rep. 415. Falch. 11 W. 5.—S. P. per Car. Cro. £. 309. pl. 18. Mich. 38 & 56 Eliz. B. R. But following the decision of the Court barely, will not bar an Attaint; but in some cases the Judge being demanded, and declaring to the Court what the law is, they declare it erroneously, and they find accordingly, this may excuse the jury from the forfeitures; for tho’ their verdict be false, yet it is not corrupt, but the judgment is to be reversed however upon the Attaint, for a man lost not his right by the Judges mistake of the law; Per Vaughan Ch. J. Vaugh. 145. in delivering the opinion of the Court in Bushell’s Case. (But I do not remember to have found it anywhere suggested, that any thing ever so positively laid down for law, or ever so artfully &c. intimated by gentlemen at the bar, can excuse the jury from being subject to an Attaint; and therefore those gentlemen would do well to consider what apology they can make, should they by such means mislead an ignorant jury, and thereby occasion the ruin of their families. In such cases, those gentlemen, whether considered as Christians, or as honest men, ought to make the sufferers equivalent amend, and at the same time to redress to the adverse party whatever he has lost, by such irregular proceedings. The liberty of the bar, when abused, is forfeited, and, like the cities of refuge, was never intended to be a protection to malicious offenders. If an attorney be directed by his client to plead what is false, he may plead that non veraciter sum informatus; and Judge Jenkins says, that it is an honest plea, and I cannot see why others of a superior rank should not follow so good an example.)

2. But if the material matter which they found, upon which they referred the matter of law to the Court be false, an Attaint lies thereupon.

43 Att. 41.

the circumstance of the verdict be true, Attaint lies not of it.—Br. Attaint, pl. 82. cites S. C. and S. P. items to be admitted.

(F) At what time it lies.

1. An Attaint lies before execution sued, for the danger of the death of the Petit Jury in the meantime. Contra, 12 H. 6-6. Admitted by Illes.

2. As if a man recovers land against another, he shall have an attaint before execution sued, for the danger of the death of the Petit Jury. 41 Att. Attaint, 27. per Wch.

this the party is not grievous, cites 35 H. 6. 39. 26 H. 8. 2. per Wangford.—S. P. by Prilott. Br. Nontenure, pl. 6. cites 35 H. 6. 44.

Attaint by him who lost in Affile, against the Plaintiff in the Affile, and the Petit Jury, upon false verdict in the Affile; the tenant appeared and six of the Petit Jury, and the others made default, and against them
3. The Vouchee shall have an Attaint before Execution in Value sued for him, for the Cause aforesaid. 41 Attaint 27.

4. So if in a Precipice against a Lettice, the Lettice vouches B. in the Reversion, who enters, and vouches C. and the Demandant counterpleads that C. nor any of his Ancestors neither. and this is found for the Demandant; B. shall have an Attaint before Execution in Value sued against him. 41 Attaint 27.

After the Death of any of the Petir 12, no Attaint lies. Contra pl. 25. cites 2 D. 4. 18.

Attaint was maintained in B. R. the many of the Petir Jury were dead; Quod nota, tho’ the contrary was held 6 R. 2. per Belknap.—It lies as long as any of the PetirJurors are living. Br. Attaint, pl. 50. cites 12 H. 4. 10. And pl. 109. cites S. C. per Skrene, that it lies as long as 2 of them are living, for they are Jurors Pluraliter. pl. 176. cites 34 Aff. 6. —S. P. Ibid. pl. 68. cites 26 Aff. 12 for they are not named in the Writ, which is Quod diligenter inquiras qui fuerunt juris’ prime Inquisitionis, Quod nota. Brooke says, that it seems to be Law.

6. If one Man recovers against another in Trepass, the Defendant shall have an Attaint before Execution sued. 41 Attaint 27. Tempore C. 1. Attaint 70. adjudged. pl. 9. cites 35 H. 6.

7. If a Deed be pleaded in Barr, in which there are Witnesses, and this is tried to be his Deed, and after the Witnesses die who were joined to the Inquest, the Party shall not have an Attaint after. 26 H. 6. Attaint 3. per Curiam.

Audita Querela pass’d for the Plaintiff, and therefore the Defendant who was Comittee in the Statute Merchant brought Attaint; Thorp answered, that it did not appear that the Plaintiff in the Attaint ever had Execution of any Land delivered to him, and so cannot have Attaint; but the Court was against him, and that he shall have Attaint as well as if he had Execution in Fact. Br. Attaint, pl. 64. cites 21 Aff. 16.

9. The Death of none of the Defendants in the Attaint shall abate the Writ, but the Death of the Tenant; Per French, Quod non negatur. Br. Attaint, pl. 68. cites 26 Aff. 12.

(G) Who shall have it, and who not.

The King shall have an Attaint upon a False Verdict in a

Quare Impedit. 42 El. 3. 26. b.

Pithth. Attaint, pl. 18. cites S. C. & S. P. accordingly, tho’ it was objected that such Attaint had never been known to be for the King before.—P. N. B. 105 (D) S. P. accordingly.

The Vouchee may have an Attaint. 8 H. 4. 4. b.

S. C. —— F. N. B. 166. (E) S. P. and the Writ shall make mention of the Voucher; and in the new Notes there (e) cites 9 H. 6. 38. 11 H. 4. 5. 4 Aff. 71. and 4 E 9.
3. The Pouicser shall have an Attaint upon a false Verdict given between him and the Tenant upon the Deed of Lien denied. 22 E. s.c. 580. cites S. C.

4. In Affise the Tenant pleaded Jointenancy with his Feme and Son, who came and maintained the Exception, and the Tenant was found Sol Ten- ant, and he awarded to Prison; and per Thorp Ch. J. if the other Ten- ant eftifped, he shall have Affise, and not Attaint, because he is not Party to the Original. Br. Affise, pl. 321. cites 17 F. 11.

It was said for Law, that where the Jointenancy is pleaded shall have Affise, and not Attaint, because he is not Party to the Original. Br. Affise, pl. 36 cites 48 E. 5. 16. at the End.

5. If Affise is brought against Tenant by Statute Merchant, Termor, or the like, and him in Reversion, who is Tenant of the Franktenement, and the Affise acquits the Tenant by Statute Merchant, and attains the other of Diffeffors, and they so joine in Attaint, Quære whether he who is acquitted shall have Attaint, by reason that he is acquitted, and yet by the Affise and Verdict he loses his Interest? Per Tank clearly, the Ten- ant by Statute Merchant shall not have Attaint, nor the Lord where the Land is recovered against him and the Heir, where he has the Heir in Ward, nor the Tenant where Land is recovered against him and his Lessee, because he did not lose any Franktenement; but the best Opinion here was, that such Persons shall have Attaint, for they cannot have Affise nor Quære eject infra terminum, nor other Rents. But per Whorwood (the King's At- torney in the time of H. 8.) they shall not have Attaint. But Brooke says, this is not reasonable where they are named and lose their Inter- est; but he says, it seems that he who is acquitted shall not have Attaint, but if they are found Diffeffors, it seems to him that they shall have Attaint; Quære, for it was adjourned. Br. Affise, pl. 82. cites 43 Ass. 41.

6. Where Fespafls is brought against Baron and Feme, and the Plaintiff recovers, the Baron a lone shall not have Attaint, for it shall be brought according to the Record. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.

7. Succeed of a Person shall have Error or Attaint of Judgment against his Predecessor. Br. Attaint, pl. 110. cites 8 H. 6. 25. and 19 H. 6. 39. accordingly; Quod Nota bene.

8. If a Man has Affise a Son by one Yenter, and a Daughter by another, and intails the Land to him and his second Feme, and the Heirs of their two Bodies, and Recovery is had against them by false Oath, the Attaint is given to the Son and not to the Daughter, per Fortescue. Br. Attaint, pl. 40. cites 22 H. 6. 29.

9. So, per Fortescue, where a Man has two Sons in Bnrgh Englishe, and loses by false Verdict and dies, the Attaint is given to the elder Son, and the younger Son shall falsify the Recovery by him, which Yelverton utterly denied. Ibid.

10. If a Man brings Bill quod reddet T. 401. quos Domino Regi & pre- dictos T. delet upon the Statute 23 H. 6 cap. 10. and the Jury puts against the Defendant falsity, Attaint lies for the Defendant; For the King is not merely Party; For the Party may discontinue or release without the King, notwithstanding that the King shall recover the Moveye, and therefore the Attaint was demanded; Quod Nota; And so it is admitted, that if the King was merely Party Attaint does not lie. Br. Attaint, pl. 132. cites 20 H. 7. 5.

12. It was said, that upon Information made by the King, which paffes upon Issue tried, the King nor the Informer shall not have Attaint; for the Informer is not fully Party, and when the Defendant has anfwered, the Attorney of the King replies for the King, and no further Mention is after made of the Informer and therefore the one nor the other shall not have Attaint, but was awarded to answer to the Points of the Writ, and could not have Day of Continuance without Issue. Br. Attaint, pl. 127. cites 4 M. 1.


(G. 2) Who shall have Attaint jointly or severally.

1. IN Precipe quod reddat, if the Tenant pleads Joint tenancy with a Stranger not named, and Issue is therupon joined, and it is found against the Tenant by Verdict, it was held that the Tenant alone, without the Stranger, shall have Attaint. Thel Dig. 32. lib. 2. cap. 14. S. 1. cites Trin. 3 E. 3. 89.

2. It was objected that another Diffeisor was found by the Affife who did not join in the Attaint; but it was said, that it may be that this Plaintiff paid all the Damages, and so shall have the Attaint alone; and that in Affife brought against several other Tenants who lease, they all may have one Suit to reverse this Judgment, and if it be reversed, every one shall receive according to that which he lost; Quod Nota. Br. Attaint, pl. 53. cites 8 Aff. 30. and 3 E. 3. 71.

3. Where Affise paffed against several, one of the Diffeisors was receiv'd to maintain Attaint alone, and to affign the falo Oath in the Principal, and in Right of Damages entirely without the others. Thel. Dig. 33. lib. 2. cap. 14. S. 3. cites Mich. 8 E. 3. 439.

4. In one Writ, if there are 20 Precipes, yet it is but one jurt as to three by seve- ral Precies, and the Roll makes mention but of Jurat and the De- mandant shall have but one Attaint, but the Tenants shall have several At- taints. Br. Attaints, pl. 59. cites 14 Aff. 2.

5. In a Writ of Forndon by one Precipe againft a Baron and his Fame of 2 Parts of a Manor, and by another Precipe againft another Stranger for
Attaint.

the 3d Part, which stranger vouch'd to Warranty the Baron who travers'd the Grift in both the Precipics, and found against the Demandant; upon which he was received to maintain one Writ of Attaint upon the Verdict in both the Precipics; but if the Tenants were to bring Writ of Attaint, they ought &c. Thel. Dig. 32. lib. 2 cap. 14. S. 2. cites Hill. 14 E. 3. Attaint 41.

6. In Precipic quod reddat against Baron and Feme, he made Default, so in Affs., and [the Feme] was received, and pleaded to the Illne and left, and the Baron and Feme brought Attaint, and well, tho' he was not Party to the Illne. Quod nota. Br. Attaint, pl. 61. cites 16 Aff. 5. 2. cap. 14. S. 16. cites Pach. 16 E. 3. Attaint 25.

7. But it was adjudged that one Plaintiff shall not have one Writ of Attaint against two several Inquests, who pass'd against him in 2 several Writ or Bills. Thel. Dig. 33. lib. 2. cap. 14. S. 3. cites Pach. 25 E. 3. 42. It was adjudged that where in Affs. one who has taken the intire sole Tenancy loses by false Verdict, tho' he alone shall have a Writ of Attaint without the others named in the Affs. notwithstanding that the Defendant in the Attaint said, that he had nothing in the Franktenement, but only in common with others named in the Affs. and now not named &c. Thel. Dig. 33. lib. 2. cap. 14. S. 10. cites 27 Aff. 61.

9. But in Affs. of Mortdacefor brought against several, some of them in Affs. pleaded Several Tenancies, others disclaimed, and others said nothing, and it gained 3 Siffers was found the Tenancy in Common as was supposed by the Writ, and further the Points of the Writ were found &c. upon which all named in the Writ adjudged brought one Writ of Attaint in Common, where the several Tenants affign the Plaintiff, the false Oath severally as to the Tenancy in Common found &c. and as and that the 3d did nothing, and all 3 brought Attaint, and the 3d who did nothing made Default, and was sever'd, and the Defendant pleaded to the Writ, because the who was acquitted had joind with the other 2, and therefore the Writ was abated. Quod nota. Br. Attaint, pl. 71. cites 29 Aff. 14.—Br. Attaint, pl. 123. cites S. C. For the 3d was not proved, and therefore the shall not have Attaint.—Thel. Dig. 53. lib. 2. cap. 14. S. 8. cites S. C.—S. C. cited Arg. Le. 517. in pl. 445.

10. It was held where the Tenant of the Franktenement and the Tenant by Statute Merchant looses by false Verdict in Affs., that they may join in Writ of Attaint, notwithstanding that the Tenant by Statute Merchant was acquitted of the Diffidil. Thel. Dig. 33. lib. 2. cap. 14. S. 9. cites 43 Aff. 41.


12. In Affs. against 2, who take severally the intire Tenancy, if it be found by Verdict against them, yet they may join in Attaint. Thel. Dig. 33. lib. 2. cap. 14. S. 15. cites Hill 3 H. 4. 50.

13. Trespafs against two, who pleaded Not guilty, and were found Br. Abridged Guilty to the Damage of 10 l. and the one alone had Attaint, and affign'd the false Oath in all which they had said against him, which goes as well to the Damages as to the Principal, and it was agreed that the Principal he shall have Attaint alone, because their Plea is severall in Law, but not of the Damages; for they are intire. Br. Attaint. pl. 9. cites 34 H. 6. 12. Where
Where several were found Guilty by Verdict in Trespass, one Writ of Attaint brought by them in common was adjudged good. Thel. Dig. 33. lib. 2. cap. 14. S. 4. cites Trin. 18 E. 5. 25. and 17 Aff. 22. and that so agrees Trin. 50 E. 3. 2. and 30 Aff. 49. and that it was said there for Law, that they may have severall Writs of Attaint, and says like 46 E. 3. 31. 47 E. 3. 10. 48 E. 3. 14. and 34 H. 6. 11. 30. — And so it was held there for Law, that if in Afficide or Trespasses some are found several, or Trespassors, the Damages shall be severally assessed, and then they shall sever in Writs of Attaint. Thel. Dig. 33. lib. 2. cap. 14. S. 5. — And it was said that if several Tenants life in Afficide, they ought to have several Attaints; but if the Damages are thereunto tax'd too high, they may join in Attaint in Right of Damages. Thel. Dig. 33. lib. 2. cap. 14. S. 6. cites Trin. 30 E. 3. 2.

Where the Plaintiff in the first Action brought Conspiracy against 2, and the one pleaded Not Guilty, and the other pleaded Justification, abufe hoc that he was guilty after such a Day, and so to Issue, and all found for the Plaintiff, and one of the Defendants brought Attaint alone. Upon long Argument it was awarded that the Attaint lies of the Principal, and the Plaintiff was compell'd to abridge his Demand of the Damager; quod nota. Br. Attaint, pl. 9. cites 35 H. 6. 19.

Br. Joinder 14. But where they plead Release, or such like joint Plea, there they in Action, cannot fever in Attaint. Br. Attaint, pl. 9. cites 34 H. 6. 12. S. C. — But if the Issue be found against them by False Verdict upon Acquittance or Arbitrement, or other Matter jointly pleaded by them in Bar, they ought to join in Attaint. Thel. Dig. 33. lib. 2. cap. 14 S. 12. cites S. C.

15. Where Conspiracy was brought against 2, and the one pleaded Not Guilty, and the other pleaded a Bar &c. and both the Issues found by Verdict against the Defendants, the one of them was alone received to maintain Writ of Attaint for the False Oath in the Principal, but not in Right of Damages; per Judicium. Thel. Dig. 33. lib. 2. cap. 14. S. 13. cites 34 H. 6. 30. and Mich. 35 H. 6. 19.

16. If a Man vouches 2, and recovers in Value, and has Execution against the one alone, yet both shall join in Attaint. Br. Attaint, pl. 9. cites 35 H. 6. 19. per Forte civic.

And quære where the one of the Defendants has Attaint of the Principal as above, and attaints the Petit Jury, if the other may have Attaint also, and attaint him again. It seems that he may; for the one is a Stranger to the other Issue upon Several Pleas, tho' it be pleaded jointly and at one and the same Time. Ibid.

And if the one be not satisfied, Sear-

17. It seems that in Affi tion Real or Personal Ex Parte potenti s, all ought to join in Attaint. Br. Attaint, pl. 9. cites 35 H. 6. 19.

18. And Ex parte Defendentis, or Tenentis, they may sever in Attaint upon Plea Several in Action Real or Personal. Br. Attaint, pl. 9. cites 35 H. 6. 19.

19. It was held that where 2 bring Formedon against other 2, and one of the Tenants pleads the Release of one of the Demandants, and the other Tenant the Release of the other Demandant, and both the Releases are found against the Demandants, yet the Demandants shall join in Writ of Attaint, notwithstanding that each be a Stranger to the others Issue. Thel. Dig. 33. lib. 2. cap. 14. S. 14. cites 35 H. 6. 22.

(H) In
Attain't.

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(II) In respect of the Estate. [Not Party to the Writ or Illue.]

1. In a Quare Impedit against 2, they make several Titles, and it is
found for one Defendant, and the other disturbed him, the other
may have an Attaint upon this; for by this he loses the Presentation.

Br. Quare
Impedit, pl. 5. cites
S. C. & S. P.
by Finch.


2. He who is Party to the Recovery shall have an Attaint, altho'
he was not Tenant at the Time of the first Writ brought, nor when
the Judgment was given. 41 E. 3. 19.

Br. Attaint, pl. 20. cites
S. C. accordin-
gly.

Fol. 283.

3. In an Action, if Jointenancy be pleaded with a Stranger, and
the Stranger joins with the Tenant in the Maintenance thereof, and this
is found against them, yet the Stranger shall not have any Attaint,
because he is not Party to the Writ. 43 E. 3. 17. b.

S. C. that if the Party to the Writ pleads Jointenancy with a Stranger, and the Verdict
he shall not have Attaint; but Jones J. said, that he might have Attaint.—Roll Rep. 243.
Arg. cites 31. Aff. 11. 31 E. 3. Attaint 35. S. P. exactly, and seems admitted by Coke Ch. J. who said,
that so it is of Praye in Aid.

4. In an Action against A. and B. it is found against them upon se-
veral Illues, A. shall not have an Attaint upon a false Verdict against
B. because he was not Party to this Illue. 11 P. 4. 27.

Br. Attaint, pl. 27. cites
S. P. —

Fitz. Attaint, pl. 15. cites S. C.

5. In Trespas against 2, if one pleads a Release, upon which they
are at Illue, and the other pleads the same Plea as Servant to him, or it
be found against the Master, the Servant shall not have an Attaint
by Hall.

Fitz. Trial, pl. 37. cites
S. C. & S. P.

11 P. 4. 30. b.

6. In Waite against 2, if one makes Default, and the other pleads
and it is found against him, the other, who made Default, shall not
have an Attaint thereupon, because he is not Party to the Illue. 12
P. 4. 5. b.

7. If the Vilein be found free in Homine Replegiando against the
Lord, and after the Lord dies, the Heir shall have an Attaint. 19
P. 6. 18. b.

Fitz. Trial, pl. 6. cites 19
S. C. & S. P.

H. 6. 17.

8. If the Vilein be found free by a false Verdict in an Action of Tres-
pas brought by him against the Lord, and after the Lord dies, his
Heir shall have an Attaint, tho' the Verdict was in a Personal Action
for Damages only, because this takes away his Inheritance in the

9. But he shall not have an Attaint for the Damages.

10. But in this Case the Executors of the Lord shall have an At-
taint for the Damages, because they belong to them. Contra 19 P. 6. 18. b.

S. C.

11. The Illue in Tally shall not be bar'd by Release of his Father of all
Actions, or of all the Right found against his Father by Verdict, but the
Illue may have Attaint. Br. Tall & Dones &c. pl. 42. cites F. N. B. 108.

12. Attaint by J. against E. who said that he himself leased to the
Plaintiff for Years, so that he lost nothing but a Term by the first Ver-
dict, and demanded Judgment of the Writ, & non allocatut; and so
see that Termor shall have Attaint of his Term. Br. Attaint, pl. 32. cites
21 E. 3. 47.

U n u

13. Falso
Attaint.

13. False Imprisonment against 2, the one came and pleaded, and the Issue is found against him to the Damage &c. and after the other came and pleaded Villegiance in the Plaintiff's, which is found against him at the same time, in another Action between them, and therefore he was eopp'd to plead it, by which Judgment was against both of the Damages where the Second was not Party to the Issue which found the Damages, and yet well, for he was Party to the Original, and therefore shall have Attaint, tho' he was not Party to the Issue; Quod Nova, per Thorp clearly, & nullus dedzit, and upon this Reason Judgment was given immediately; Quare. Br. Attaint, pl. 17. cites 44 E. 3. 6.

14. Baron and Feme lost by false Oath in Quare Impedit brought by them, and the Damages were levied upon the Baron, and be died, and the Feme took another Baron who brought Attaint, and recovered, and were restored to the Damages lost by the first Baron, and recovered the Advowson in Jure Uxoris, and 100 l. in Damages by the Attaint, and it was brought by him who first recovered, and another who was not named in the first Record, and so they recovered the first Damages lost by the first Action, against him who first recovered only, and the Damages given in the Attaint against both, and the Feme was restored to the first Damages because she was Party to the first Judgment, and if they had not been levied upon the Baron in his Life they would have been recovered against the Feme. Br. Attaint, pl. 114. cites 46 Alif. 8.

15. Attaint was brought by Baron and Feme of false Oath given against the Feme and her first Baron in Quare Impedit, and awarded good. Br. Attaint, pl. 18. cites 46 E. 3. 23.

16. And so the Feme had the Attaint, and not the Executors of the Baron who loft. Ibid.

At Common

17. 9 R. 2. cap. 3. Enact. That he in Reversion shall have Attaint upon Law the a false Verdict found against the particular Tenant.

Reversioner might have had Attaint of a False Verdict against Tenant for Life after the Death of the Tenant for Life; but now by this Statute he may have it in the Tenant's Life-time. D. 1. a. b. pl. 5.

Tho' this Statute speaks only of Reversions, yet it was rescinded that Remainders are also within the Purview thereof; but that Reversion or Remainder expeczant on Estate Tail is neither within the Words or Intention of this Act; for since the Makers of the Act have by Special Words provided Remedy for those in Reversion expectant on Estate for Life, in Dower, by the Curtesy, or in Tail after Possibility of Issue extinct, by this precise Enumeration their Intent appears to exclude Reversions and Remainders expectant on Estates Tail. 3 Rep. 4. a. b. Trin. 5 Eliz. in the Marquis of Winchester's Cafe.

18. In Affize against Disseisin and Tenant, if the Tenant is acquitted of the Disseisin, and the Disseisin thereof attainted, the Tenant shall have Attaint of the Oath against the other, because his Title is lost by this Caue. Br. Attaint, pl. 28. cites 11 H. 4. 50.
Attaint. 259

19. In Scire Facias upon an Annuity the Parson prayed And of the Pa-
tron and Ordinary, and they join, and the Issue passeth against them, yet the
Patron and Ordinary shall not have Attaint. For Newton Ch. 1. and so
it seems that none shall have Attaint but he who is Party to the Original,
and not he who comes in a later. Br. Attaint, pl. 36. cites 19 H. 8 C. and
22 H. 6. 23.

20. If a Man has Issue a Son, and takes a second Feme, and Land is
given to him and his second Feme in Tail, and after they lose by False Verdict,
and die, leaving Issue another Son by the second Feme, the Issue in Tail shall
fail; for he cannot have Attaint, because it is only for the Heir, who is
the eldest Son, and he cannot have it as here; for he is not Heir to the
21. So in Burg-w-English, where a Man has Issue two Sons, and loses
by False Oath, and dies. Ibid.
22. The Tattator enter'd into Religion, and was deuain'd. Quare if Att-
taint lies against the Heir or Executor; or if the Executive brings Att-
taint, if the Tattator shall be restored; As if the Son is barr'd in a Mort-
danceor, the Daughter shall have an Attaint, and there the Judgment
was against his Brother of the half Blood only. F. N. B. 105. (O) 106.
in the new Notes there (a) cites Kelw. 199. So a Special Heir shall have
Attaint. 22 H. 6. 28.

(H. 2) Against whom.

1. A TTAINT against him who recovered and 2 others Qui terram
illam Tenent, and for the 2 it was pleaded that the one bad nothing,
Judgment of the Writ, & non allocatur, and the other took the Tenancy
upon him and vouch'd, and was ousted of the Voucher, because this Suit
is to restore the Plaintiff to his first Possession, of which no meane Time
is adjudged in the Law; quod nota; and there it was said that this
Reason may be Made in Quod ei detoecet, and yet a Man shall vouch
there; but there he shall vouch by the Statute of Weitum. 2. cap. 4. Br.
Attaint, pl. 55. cites 10 Aff. 8. 10 E. 3. 21.
2. Attaint was brought against another who did not recover, nor his Heir,
Br. Non-
and awarded good; for it is a Summons, and shall abate by Nontenure. Br.
Attaint, pl. 59. cites 14 Aff. 2.
3. Attaint lies for the Tenant against the Voucher. F. N. B. 106. (D)
in the new Notes there (b) cites 22 E. 3. 11.
4. The Attaint shall be against the Tertenant. Br. Attaint, pl. 26. If a Man
cites 8 H. 4. 23.

Attaint, and he who loses brings Attaint, it shall be brought against the Tertenant, and not against him who

5. If Action of Trespass is brought against the Ancestor in Tail and B. 2 Sid. 94.
and C. and passeth against them, and the Ancestor dies, the Attaint is
Catesby. Quere.

were Tenants for Life, with Remainder to A. in Tail; and the Quere is, if after the Death of A, his
Issue may have Attaint, and he holds that he may, notwithstanding it is there doubted; for he cites it
as agreed D. 201. pl. 69, that the Action of Attaint ariseth for the Thing which was lost against him
who has it, into whose Hands forever it shall come.

6. 23
An Attaint was brought upon this Statute against the Executors of J. B. and the Tertennants, and held well brought by the Equity of this Statute, tho' the Words of the Statute are, that the Attaint shall be between the Parties; and says that so it may be against the Heir, as it is there held. Mo. 17. pl. 60 Pach. 3 Eliz. Auffin v. Baker.——Bodl. 87. pl. 132. S. C. accordingly.— And 24. pl. 52. S. C. accordingly, and says it was so done in one Cigre's Case, 6 July, 6 E. 6.——D. 201. pl. 65. a. b. S. C. held accordingly; for this Statute was made in Favorum Subditorum to qualify the Rigour of the Common Law, and the Words (against the Party that hath Judgment to recover) are superfluous, and not Words of Substance, inasmuch as the Action of the Attaint is for the Thing left, against him who has it, be he who he will.

The Plaintiff in Attaint assigned the False Oath in Omnibus que dixerunt, but did not shew the Value of the Thing render'd by the Verdict; but it was held that the Assignment was good, because the Certainty of the Value appears in the first Records, so that the Justices may well enough know what it is. Besides, tho' the Words are, viz. "Where the Thing in Demand; and Verdict thereon given, extends to 40l." yet in the principal Case, which was an Avowry for a Grant out of the Manor of S. whereof the Place where is Parcel, and Issue was that it was not Parcel, and found for the Plaintiff, and Damage to 10l. in which Case the Verdict was given upon a Collateral Matter, and not upon the Thing demanded, the Attaint shall be maintain'd by the Statute; and the Value shall not be accounted of the Collateral Thing whereof the Issue was taken and the Verdict given, but of the Damages which were demanded. Dal. 32. pl. 16. 3 Eliz. Anon.—Kelw. 205. b. pl. 4. S. C. in totidem Verbis.

7. 23 H. 8. cap. 3. Enacts, That if the Petty Jury are found to have given an untrue Verdict, they shall each of them for 26l. to be divided between the King and the Plaintiff, and incur severally Fines at the Discretion of the Justices, and be for ever after disabled to give Testimony in any Court.

(1) In what Things it [the False Oath] may be assign'd.

A Man can not assign such Thing for a False Oath which was admitted true by him in the first Action. 11 P. 4. 27.

Br. Attaint, pl. 27. cites S. C.

Fitzh. Attaint, pl. 15. cites S. C.

2. [As] In an Affile against 2, if one pleads the Release of the Plaintiff in Bar, by which he admits the Plaintiff to be well named, if the other pleads a Mifnomer of the Plaintiff, and all is found for the Plaintiff, if he who pleaded the Release brings an Attaint only, he can not assign the False Oath in the Mifnomer; but otherwise if both had assigned it, and brought the Action. 11 P. 4. 27.

3. So it shall be, if one Defendant had said that the Plaintiff was Feme Covert, and the other as above. 11 P. 4. 27.

Fitzh. Attaint, pl. 15. cites S. C.

4. So if onepleads a Release, and accepts the Tenancy of the whole, and the other says that his Ancestor died feised, and they in Sans Tor; in an Attaint by him who pleaded the Release, he cannot assign that the Ancestor of the other died feised, and [that] he [viz. the other] Tenant against his own Acceptance. 11 P. 4. 27.

5. In Trespafs, if the Defendant pleads a Mifnomer of the Vill upon which they are at Issue, and the Jury finds this for the Plaintiff, and that the Defendant is guilty of the Trespafs, and assails Damages, the Defendant cannot assign the False Oath, in that he was not guilty
Attaint.

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guilty of the Trespass, for this was admitted by his Plea. 41 E.
3. Attaint 23. adjudged, and not Part of their Charge.
6. Mortmain for against 3, the one pleaded several Tenancy to the Wit,
which was found, and the Points of the Wit also, and the other brought
Attaint, and assigned the false Oath, as well in the Plea to the Wit, as in
the principal Issue of the Points, and well per Fish; & adjournment into
7. In Attaint founded upon Ablife the Record was, that the Parties in the
Ablife recovered the Tenemants put in View, and the Plaintiff in the At-
taint, assigned the false Oath in Rent, Judgment &c. & non allocatur. Br.
Attaint, pl. 72. cites 30 Aff. 24.
8. When the Tenant in Ablife pleads Bar to the Issue, which is found
against them, and the Seisin and Diffeisin also, by false Oath, the Party
shall have Attaint of the Seisin and Diffeisin without assigning the false Oath
upon the Bar, and yet the Seisin and Diffeisin was never in Issue; but it
ought to be inquired of Necessity. Br. Attaint, pl. 27. cites II H. 4.
26. per Culpeper.
9. A Man shall not assign false Oath in Attaint in the Plea of his Com-
panion, who is not Party to the Attaint, where they sever in Pleas in the
10. In Ejsusment, the Plaintiff counted of excessive Damages; the Jury
found the Title for the Plaintiff, and asailed Damages, which the Plaintiff
had declared in his Count, but no Evidence was given concerning
them, nor did the Jury take any Regard to them. The Defendant
brought Attaint, and assigned the false Oath in omnibus que dixerant; the
Court affirmed the Verdict as to the Title, and as to the Damages,
would not charge them of any voluntary Perjury, for the Reason afo-

(K) How the false Oath is to be assigned.

1. In an Ablife, if the Verdict passes against the Plaintiff he may
have an Attaint, and assign the false Oath for not finding a
Release, or other special Matter, which proves that he had Title to
the Land, and to the Tenant a Diffeisin, without assigning the false
Oath in the principal, assiet, the Diffeisin; tho' all the Matter amounts
to this, that he was dixified, for he may assign it in the particu-
2. In an Ablife, if the Inquest find a special Verdict, and refer it to
Br. Amaet, the Court, and upon the Matter found, the Court gave Judgment
against the Tenant, and he brings an Attaint, he may assign the false
Oath severally in every or any Point of the special Verdict, without
aligning it in the principal, assiet, the Diffeisin; for by the Verdict it is not plainly found that the Tenant dixified the Plaintiff,
but the Justices adjudged it a Diffeisin, so that the Diffeisin which
is adjudged is the Act of the Judges, and the Matter found is the Act
of the Jury, so that it is more natural to assign it in that which was
done by the Jury than in that which is done by the Justices. 27
Aff. 61. per Curiam adjudged.
3. Where Ablife is only upon the Seisin and Diffeisin, the Wit of Attaint b. s. and j.
shall be special upon this Point; but where Seisin in the Ablife is joined up
on another Point, and also upon the Seisin and Diffeisin, there general Wit
of Attaint shall serve bett. Br. Attaint, pl. 27. cites II H. 4. 26. per
Hill and Wakefield.

\textit{vel Diffeisin, and the Wit will'd Part}\ Sacrament recognoscerat si prestìt \& J. X x x
\textit{& dixi Injuflie}
dilectiverant
Attaint.

difficultarum predict' N. E. de Libris Tenemento suo in Salop unde idem B. & J. queruntur, quod
fale unde in Affinis falsum recensum Sacramentum; et in the Affinis, the Baron and Feme pleaded Record,
and failed at the Day, and B. made Default, and J. by Feme was received, and pleaded diverse Pleas out
of the Point of Affinis, and all found for N. E. and the Seisin and Diffisifin; and now the Plaintiff in the At-
taint, who made Default in the Affinis, brought the Attaint, and affirmed the falsa Oath, in all Points found
by the Affinis; and the Defendant took Exception to it, because the Writ did not make mention but only of
the Seisin and Diffisifin, and therefore shall not affirm the falsa Oath in other Points. But Case, held con-
tro, and that by Writ General, the falsa Oath shall be affirmed in every Point Special, and as is that
the Writ of Affinis is Quod Ineute & fine Judicio difficilis sunt de Libris Tenemento suo &c, and
and the Affinis shall require of all other Points pleaded out of the Point of Affinis, and so here; and
He to the same Purpose, for the Writ is true in all Points; for the Affinis was confirmed, and taken
between the Baron and Feme and the Plaintiff; and after Gutoeign and He held the general Writ good,
and the Plaintiff affirmed the falsa Oath in all Points, and the Points of the falsa Oath were found,
and some were affirmed in the Pleas of others who were not Plaintiffs in this Writ, and of these the De-
fendant was discharged, and maintained the Oath good of the rest, and after the Parties agreed. Br.
Attaint, pl. 28. cites 11 H. 4. 59. — Thel. Dig. 102. Lib. 10 cap. 10. 5. 19. cites S. C. and that the
Word (unde) shall be referred to all the Affinis, and not to the Words of the Diffisifin only, and that
the Plaintiff upon such Writ may affirm the falsa Oath upon other Points besides the Diffisifin.

(L) How it [the falsa Oath] may be [affigned.]

1. If a Verdict be found that he Non dedit, and an Attaint is brought
thereupon, the Plaintiff may affirm the falsa Oath in omnibus
que verius ipsum dixerunt, without affirming it in Special, as to
lay in hoc & hoc qt. for the Particulars appear by the Record. 6 E.
4. 5. b. adjudged, Attaint 7.

2. In an Attaint, if the Plaintiff affirms the falsa Oath in exclu-
sive Damages, he ought to affirm it in this Manner, viz., That
the Goods for which the Damages were given were but of the Value
of 40 s. and that in the Damages given over this Sum, they made a falsa
nomic Sacramentum in omnibus que verius ipsum dixerunt; contrary to it is where the
Writ is Quod falsum fecerunt Sacramentum in such a Point special. Br.
Attaint, pl. 11. Oath. 12 E. 4. 5. b.

3. In Affinis the Plaintiff recovered upon Verdict, and the Writ
brought Attaint, where there was another Writor named in the Affinis,
and he affirmed the falsa Oath in that which was found, that he commanded
Writ. to make the Records where he did not command, and also that they
taxed Damages to 40 Marks, where they were not to 10 l., and to falsa Oath, and it was challenged,
because the first Writ be supposos no Damages nor Diffisifin, and by the other be supposos contrary,
& non allocatur; for if he was acquainted of the Diffisifin, no more shall be inquired, and if e con-
tra, the Damages shall be inquired. Br. Attaint, pl. 53. cites 8 Ass. 30.
and 8 E. 3. 71.

4. In General Writ of Attaint the Plaintiff has Liberty to affirm
the falsa Oath in any Point, viz. where the Writ is Quod falsum fecerunt Sac-
ramentum in omnibus que verius ipsum dixerunt; contrary to it is where the
Writ is Quod falsum fecerunt Sacramentum in such a Point special. Br.
Attaint, pl. 27. cites 11 H. 4. 26.

It was agreed, that by the Death of the Defen-
dant after Garnifilem, the Writ shall abate, and Feme to the Writing he is not to be retorted to
Party.}

Ibid.
any; so because Attaint is to restore the Party be need not make any Mention of it, and Strange and Cott. agreed, because all the Words of the Writ are true; but Patten contra; for this Word Logneta shall be intended Writ original, and not the Spec Facias; and Newton, Roll, and Patten held clearly that the Writ shall abate. Br. Attaint, pl. 4. cites H. 6. 33.

6. It is agreed, that in Attaint after Voucher or Recipt Mention shall be made of the Tenant; for if the first Record be reverted he shall be reholo. Ibid.

7. So upon Aid Prayer, there Mention shall be made of both in the Attaint. Ibid.

(M) What subsequent Act will take away an Attaint.

1. If a Jury give excessive Damages, and the Court abridges them and makes them reasonable, no Attaint lies against the Jury, tho' they have made false Dates; for such Abridgment is made upon the Prayer of the Party. Ergo, he shall not have an Attaint also, and now also he is not at any Prejudice thereby. 9 H. 6. 2 b.

2. So if the Court increases the Damages and makes them reasonable, whereas before they were very small, no Attaint lies for the Smallness before the Increase, for the Cause abated. 9 H. 6. 2 b.

Court increases the Damages the Plaintiff shall not have Attaint for too small Damages, because he allents to those Damages whereof he has Judgment.

3. So if the Jury gives excessive Damages, and after the Plaintiff* Br. Attaint, in pl. 90 cites S. C. H. 6. that it was a good Bar in Attaint that all the Damages were released. Ibid. Attaint, pl. 11. cites S. C. pl. 41. cites S. C. for the Attaint is not only to punish the Jury, but to assurn the Party his Damages, per Cur. But per Fineux, where the Attaint is brought of the Principal, Release of the Damages is no Plea, for it may be that the Party shall be imprisoned, or shall make Fine for the Trespass, which is Matter beyond the Damages; Quod nota bene. Ibid.

4. If a Manor be given to 2, and to the Heirs of the Body of the one, to which Manor a Villain is regardant, and after the Villein is found Frank against them, the Tenant in Tail has Issue and dies; and after the other dies, the Issue in Tail shall not have Attaint nor falsify, because the Attaint was once given to the Survivor, and did not delend immediately; Quo 2; for the Manor defended. Br. Attaint, pl. 117. cites 13 E. 4. 2.

5. In Attaint by several Plaintiffs against several Defendants the Jury passed for the Plaintiffs; and they prayed the Judgment, because if any of the Plaintiffs die the Action is lost; but Fineux said, that the Term continues yet these three Weeks, and tho' one of the Plaintiffs should die during the Term, you are not Milchif; but the Book says he did not shew the Reason why &c. Kelw. 61. b. pl. 1. Trin. 20 H. 7. Gainsford v. Gullford.

6. If a Man brings Attaint upon a Verdict in Writ of Trespass, one of Carrar it the seems if it
Attaint.

The Petit Jury may plead Release of all Actions and Demands, and this shall be a Bar against all in the Attaint. Br. Attaint, pl. 3. cites 6 H. 8. 4.

(M. 2) Writ and Abatement.

1. In Writ of Entry in Sussex, Foreign Plea was pleaded, which was tried in London, upon which the Attaint was brought in London. The Defendant pleaded that the Plaintiff brought Attaint against him of the same Verdict in Sussex, and the Sheriff returned that those of the Petit Jury were not within his Bailiwick, by which the Defendant went quit &c. Judgment &c. and it was held no Plea, by which he answered over. Thel. Dig. 151. lib. 11. cap. 38. S. 8. cites Mich. 18 E. 2. Brev. 827.

2. Attaint upon a Verdict which passed before Justices of Oyer and Terminer, the Writ will'd that the Verdict passed before 4 Justices, and the Record proved that before 2; Herle saith, we have no Warrant to take the Attaint, to which Hyll. agreed; Quod Nota; and fo the Attaint shall not be taken. Br. Attaint, pl. 47. cites 2 Aff. 5. 2 E. 3. 8.

3. In Attaint brought by John, Parson of the Church of T. where in the first Record he was named John Chaplain, Parson of the Church of T. Thel. Dig. 77. lib. 9. cap. 1. S. 2. cites 2 E. 3. 57. and * 3 Aff. 17.

4. In Writ of Entry he in Reversion was received by Default of the Tenant for Life, and pleaded Release of the Demandant, which was found false, and he brought Attaint, and the Writ did not make mention if the Tenant for Life was dead or not, and yet the Writ awarded good, and yet it was said that the Judgment differs in this Case; for if he be alive the Judgment shall be to restore him, as it seems, and if not, then to restore the Plaintiff. Br. Attaint, pl. 49. cites 4 Aff. 7. 4 E. 3. 54.

5. Attaint by P. against S. because P. brought Writ of Entry against S. who answered as Tenant, and were at Illue, and passed for S. and fo P. brought the Attaint, and because S. was not Tenant the Day of the Attain'd purchased, nor ever after, the Writ was abated, and yet the Attaint was freshly taken within half a Year after the Judgment in the first Writ, but Writ of Error lies well against him who was Party at the Time of the Judgment, albeit he had nothing in the Franktenement at the Time of the Writ &c. Br. Attaint, pl. 51. cites 6 Aff. 6. 6 E. 3. 32.

6. In Attaint the first Record was of 2 Parts of a House, and of certain Land, and the Writ of Attaint was Summoneas J. S. qui Terram ilam tenet, without making mention of the 2 Parts, and therefore was abated by Judgment, Quod nota. Br. Variance, pl. 92. cites 7 Aff. 5.

7. If Attaint bears Date before the 4th Day of the Judgment in the first Action, it shall abate, Quod nota bene. Br. Attaint, pl. 54. cites * 9 Aff. 21. 9 E. 3. 28.

The Court to hear their Judgment upon Verdict, the Judgment shall not be given till the 4th Day, Quod nota.—Br. Judgment, pl. 57. cites S. C. & S. P. accordingly.

8. In
Attaint.

8. In Attaint, the Original is good if it agrees with the first Record up to the end of the first Record, and not with the first Original. Br. Attaint, pl. 58. cites 12 Aff. 2.

9. In Attaint, the first Original was of the Manor of Andover, and the Adjudget was of the Manor of Amity, and yet because the Attaint and first Record agreed it suffices; and to it was said there, that the Attaint is founded upon the first Record, and not upon the first Original, and so good, tho' the Original and the Record of it vary. Br. Variance, pl. 99. on the Record, which is not defeated by Error; but for this Variance between the first Original and the Record, all the first Record is irreverible. Thel. Dig. 77. Lib. 9 cap. 1. S. 3. cites S. C.

10. Attaint, because P. brought Writ of Entry against S., who answered Contrary to the Law; and yet the Writ was purchased, nor ever after, therefore the Writ was abated by Award. Br. Nontenure, pl. 28. cites 6 Aff. 6.

11. Attaint was brought in Bank upon Affise of fresh Force, the Defendant pleaded that he had nothing in the Land, but one B. Judgment of the Writ, and yet the Party to the Affise of fresh Force, and a good Plea, and the Plaintiff compelled to maintain the Writ, because it may well be brought against the Party to the first Inquest, and against the Tenant. Br. Attaint, pl. 32. cites 21 E. 3. 10.

12. Attaint, N. recovered in Precipe quod reddat, and aliened to J. and K. who left brought Attaint against both, and the Writ was Summunus N. & J. qui Terram iliam teneas; Skip. demanded Judgment of the Writ, for it should be Tenant, and because N. was Party to the first Judgment and J. was sole Tenant, the Writ was awarded good; for Tenet has Relation to J. and not to both. Br. Faux Latin, pl. 28. cites 21 E. 3. 43.

13. In Attaint by Tenant by his Warranty against an Inquest, which passed between the Demandant and the Vouchee, whom the Tenant vouch'd to Warranty upon a Deed, Quod quidem factum idem Voce-tus ad War. placando protulit &c. the Writ was abated, because it was not expressly expressed by the Writ, that the Vouchee had warranted to the Tenant, for it was not maintainable by Intendment. Thel. Dig. 94. Lib. 10. cap. 6. S. 8. cites Hill. 22 E. 3. 4.

14. Where the false Oath passes against the Demandant and the Tenant by his Warranty, the Writ of Attaint may be brought against the Tenant of the Land, and the Tenant by his Warranty jointly, by the Demandant. Thel. Dig. 49. Lib. 5. cap. 22. S. 1. cites Mich. 22 E. 3. 11.

15. In Attaint brought by the Tenant against the Vouchee, Exception was taken, that he did not mention the Vouchee; and so allocatur. F. N. B. 166. (D) in the Notes there (b) cites 22 E. 3. 11.

16. A Man shall not have one Writ of Attaint against two several Inquests. Thel. Dig. 106. Lib. 10. cap. 15. S. 1. cites Patch. 25 E. 3. 42.

17. The Death of one or more of the Defendants in the Attaint shall abate the Br Brief, pl. 28. cites Law; for the Death of one or more of the Petits Jury shall not abate the Writ, for they are not named in the Writ. Br. 65. cites 26 Aff. 12.
Attaint.

in the Writ; for the Writ is no more but diligent inquiras qui fuerint Juratores prima Inquisitio &c.

But where Attaint was brought against the Defendant, upon a false Verdict in an Affize, who died pending the Writ; the Attaint does not abate by his Death, by Reason of the Statute of 23 H. 8. cap. 5. on which the Attaint was brought. D. 129. b. Paeh. 2 & S. P. & M. Heydon v. Ibgrave.

18. In Affize, the Plaintiff was named Jo. de Stokes, and in the Writ of Attaint brought upon Verdict pailid in this Affize, he was named Jo. Stokes without (de) by which the Writ of Attaint was abated. Thel. Dig. 77. Lib. 9. cap. 1. S. 6. cites 26 Alf. 31. found against him, brought an Attaint by the Name of J. S. Kot, and notwithstanding the Variance the Writ was held good, because it is a new Original, and not founded merely upon any Record. D. 25. pl. 161. Hill. 28 H. 8. Anon.

19. Where the first Record was of Tenements in 4 Vills, and the Writ of Attaint of Tenements in 3 Vills, leaving out one, yet it was adjudged good. Thel. Dig. 77. Lib. 9. cap. 1. S. 7. cites Mich. 32 E. 3. Variance 72. Because the Tenant in the first Record had said, that all the Tenements demanded were in the 3 Vills &c. which was accepted by the Demandant without maintaining his Writ &c.

20. Attaint that they made false Oath in Nifi Prius taken before B. & R. Justices, where the first Record said, that it was taken before B. assenting to him a Companion who was R. and therefore well, for it was taken before both, Quod nota; and this Case is not in the printed Book. Br. Variance, pl. 96. cites 39 E. 3.

21. Attaint in Affize, in which A. B. pleaded to the Affize by Bailiff that he was not Tenant &c. and after he brought Attaint as Tenant, and well, tho' the one be contrary to the other; for the bringing of the Attaint affirms him Tenant in the first Writ. Br. Attaint, pl. 78. cites 40 Aff. 20.

22. In Attaint the Sheriff return'd 11 Names of the Petit Jury, and another who was not of them, viz. R. B. where R. P. was the 12th of the Petit Jury, and the Defendant pleaded it to the Writ, &c. non allocatur. Br. Attaint, pl. 19. cites 48 E. 3. 15.

23. In Attaint against Baron and Feme, upon Verdict pass'd in Affize, in which Affize the Baron made Default, and the Feme was received, the Attaint did not make mention of this Default and Receipt, and yet adjudged good. Thel. Dig. 96. lib. 10. cap. 6. S. 41. cites Hill. 11 H. 4. 50. and lays sec 9 H. 6. 38.

24. In Detinue of a Writing by A. against B. who pray'd Garnishment against C. and afterwards an Affize was found for C. against A. &c. and A. brought Writ of Attaint against C. without making mention of B. in his Writ, and yet held a good Writ. Thel. Dig. 77. lib. 9. cap. 1. S. 13. cites Mich. 9 H. 6. 38.

25. In Attaint of Verdict pass'd in Affize the Plaintiff may chuse to make his Writ de libero Tenement be, as in the Writ of Affize, or of so much Land as in the Plain. Thel. Dig. 78. lib. 9. cap. 2. S. 5. cites Mich. 11 H. 6. 15.

26. If a Man recovers by false Verdict, and dies, and Attaint is brought against the Heir, if he be not named Heir in the Writ, the Writ shall abate. Br. Attaint, pl. 97. cites 31 H. 6. 10.

27.
Attaint.

27. But he need not to say in the Writ "Qua terram illum tenet"; for this S. P. For shall be intended where the Writ is brought against the Party, or against his Her; and hence it seems that it is contrary where it is brought against a Stranger. Br. Attaint, pl. 97. cites 31 H. 6. 10.

Thel. Dig. 100. lib. 10. cap. 9. S. 25. cites Mich. 3 H. 6. 11. [But it seems misprinted, and that it should be 31 H. 6. 10. according to Brooke, and in the Year-Book is 10 a. b. pl. 3] —Pitch. Brief, pl. 941. cites Mich. 31 H. 6. 10. S. C.

28. Attaint upon Assise de libero Tenemento in B. and S. the Attaint upon this may be general according to the Assise, or may be of Tenements, Mes- singages, 100 Acres of Land, 40 Acres of Meadow, 140 Acres of Pasture &c. and both Forms are good. Quod nota. Br. Attaint, pl. 98. cites 31 H. 6. 12.


30. Altho' the Original Writ or Suit comprised many Points, yet the Writ of Attaint shall mention only the Point on which the False Oath was given. F. N. B. 105. (H) in the new Notes there (c) cites D. 141. [a. pl. 45. Pach. 3 & 4 P. & M. Cawilton's Cafe.]

(M. 3) Pleas in Abatement by the Petit Jury:

1. A Petit Juror cannot plead to the Writ, because he is not summor'd, but is brought in by Attachment. Thel. Dig. 196. lib. 13. cap. 7.

S. 1. cites 12 E. 1. Attaint 71.


3. The Jurors may plead a Thing which excuses the False Oath, as A Petit Ju- Release of Actions Personal. F. N. B. 105. (H) in the new Notes there (d) for pleaded cites 21 E. 3. 16. by Thorpe. Or a Release or Award between the Plaintiff and Defendant. 13 E. 3. 1. 5. 35 H. 6. 30. 18 H. 8. 1. So a Release or Award between the Plaintiff and themselves. 13 E. 4. 1. per Sulliard.

4. The Petit Jurors cannot plead any Plea only to excuse them of the False Oath, if the Writ be affirmed good against the Tenant. Thel. Dig. 196. lib. 13. cap. 7. S. 3. cites Pach. 21 E. 3. 16. and 19 Aff. 15.

But Wilby sild they should have Advantage of Challenge to all Points, as the Party Tenant. Thel. Dig. 196. lib. 13. cap. 7. S. 5. cites 22 Aff. 31.

5. They cannot plead that the Writ was purchased pending another Properly the Writ. Ibid. but cites 12 H. 6. Attaint 65. contra.

and therefore where the Defendant admits the Writ to be good, or is es庖'd to say it is not good, the Petit 12 shall not plead in Abatement, tho' the Writ was purchased pending another. F. N. B. 105. (H) in the new Notes there (d) cites 21 E. 3. 16.

6. The
6. The Jurors may plead a Plea which proves the Writ abated in falsum, as Death of the Plaintiff or Defendant. F. N. B. 105. (H) in the new Notes there (d) cites 18 H. 6. 5.

7. Rolfe being with the Demandant in Attaint accepted Plea pleaded by a Petit Juror, that the Demandant was seized after the Writ of Attaint purchased &c. but several held that the Plea did not lie in his Mouth. Thel. Dig. 196. lib. 13. cap. 7. S. 4. cites Mich. 12 H. 6. 6.

8. It was held, that Petit Juror should not have any Plea to the Land, or which arises from the Land as Jointancy, Nontenure &c. Thel. Dig. 196. lib. 13. cap. 7. S. 4. cites Mich. 12 H. 6. 6.

9. But Pleas which go to the Person, he shall have, As Coverture &c. that one of the Plaintiffs was outlawed in Alien Personal. Sed non adjudicatur. Thel. Dig. 196. lib. 13. cap. 7. S. 7. cites Mich. 2 H. 7. 7. Quere.

10. One of the Petit Jury cannot say that the Sheriff has returned one to be of the Petit Jury who was not one of the Petit Jury. Thel. Dig. 196. lib. 13. cap. 7. S. 8. cites Mich. 18 H. 8. 2.
Attaint.

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Force till it be revered, and the Defendant had Execution there, which Cause a
was awarded, and no Day given to the Parties, and when the Inquest was taken it was not supposed that the Parties were present; fed non allocatur; because for anything that appears the Defendant had Judgment and execution upon the first Record.

4. In an Attaint brought by the Issue in Tail upon a Verdict in a S. P. Br. Re-
Formacion against his Ancestor, the Release of the Ancestor is not any
Bar, for the Attaint is intailed as well as the Land itself. 14 E. 3, B. 168 and
Attaint 41. adjudged.

rele\'ed all its Rights; Quod Nota; and from hence it appears that sub Release of Tenant in Fee simple
cites S.C.

5. Attaint against him who recovered and 2 others who hold that Land; In Attaint, the 2 said that they had nothing; & non allocatur; and therefore it feems that Nontenure is no Plea in Attaint, and yet sometimes it is su\'ered.

Br. Nontenure, pl. 31. cites 10 All. 8.

it be not So. that they made a good and lawful Oath &c. and admitted without Challenge. Br. Nontenure, pl. 35. cites 16 All. 5.

Nontenure in Attaint is a good Plea, for the Action does not lie till he who recovers takes Execu-
\'tion; for before this the Party is not grieved. Br. Attaint, pl. 13. cites 41 H. 6. 39. 26 H. 8. 2. per
Wangf. — Br. Attaint, pl. 68, cites 41 H. 6. 12. contra that Nontenure pleaded by the first Party who recovered in the Attaint is no Plea; for it shall be intailed that he remained Tenant.

But it feems, that where a Man is ban'd by false Verdict, and brings Attaint, there Nontenure is no Plea between Priests; Contra between Strangers, as where the Tenant incepts a Stranger. Br. Attaint, pl. 13, cites 41 H. 6. 29. 26 H. 8. 2. per Wangf.

He that pleads Nontenure shall have an Attaint. 40 All. 23. 27. per Finch. and therefore where the Party himself pleaded Nontenure of Parcel the Plaintiff was driven to maintain his Writ. 21 E. 10. See in an Attaint brought against him who recovered Nontenure held no Plea 8 E. 4. 19. viz. if he has once Execution, per Prifon; 55 H. 6. 44. See to All. S. 51 H. 6. 12. 26 H. 8. 2. yet fee in an Attaint by him who was Plaintiff against him who was Tenant in the Original, Nontenure held a good Plea, except the Plaintiff had freely sued. 6 B. 3, 52. 21 H. 6. 95. per A\'\'cuse &c. but it is there agreed, that Nontenure is a good Plea against him who recovers. F. N. B. 107. (I) in the new Notes there (c)
and (K) in the new Notes there (d) Attaint by T. against R. because R. had recovered against him in Affisse by false Verdict, and took Execution, and the Defendant pleaded Nontenure, and admitted a good Plea, and the Plaintiff maintained his Writ by Permanency of the Profits; and so fee that Nontenure in Attaint is a good Plea. Br. Nontenure, pl. 32, cites 21 H. 6. 55.

6. In Attaint, the Tenant shall not have Advan\'age to say that one of the Petit Jury is left out in the Suit before the Grand Dy\'\'res, for the Attaint against them was awarded by their Default before. Br. Attaint, pl. 59. 
cites 14 All. 2.

7. The Defendant said, that where R. brought the Attaint, he had nothing at the time of the Affisse brought but in Con\'\'en with B. and D. who are alive not named in the Attaint; Judgment of the Writ, and it
\'ound that it be not, then they have made good Oath; Quod Nota; that he pleaded over to the Jury as above by Award of the Court. Br. Attaint, pl. 69, cites 27 All. 61.

8. In Affisse, Several Tenancy is no Plea, nor in Attaint founded upon it; for in Affisse, if the one be Tenant and the other had nothing this falsifies; Quod nota bene. Br. All. 311, cites 39 All. 24.

9. If the one of the Defendants attains the Petit Jury, they shall not be Antejoits Attaint; for their Land shall be waited and extirpated by the first Judgment; Per Moyle; Quere. Br. Attaint, pl. 9. cites 34 H. 6. 12.

10. In Attaint, the Defendant who first recovered said, that a long time, but it is a
before the same Recovery this same Plaintiff infess'd "f. N. Que Estate be good Plea
but that the
Plaintiff after the Recovery intitled.

J. N. Quo Estate he has. Ibid.

11. Where J. N. intitled W. who intitled D. who is dispossessed by this same J. N. again, and a stranger recovers against J. N. and D. entries, as he well may, upon ioint Recovery, and J. N. brings Attaint, it is a good Plea to plead this Matter, and the Recovery made between the Difjunct made to D. and his Re-entry. Br. Attaint, pl. 11. cites 34 H. 6. 43.

12. If the Tenant pleads Release the Attaint shall not be taken; per Priot; for it seems that it shall be tried by the Petit Jury. Br. Attaint, pl. 13. cites 35 H. 6. 39. 26 H. 8. 2. per Wagnit.

13. It is no Plea to say that the Plaintiff in the Attaint has entered after the left Continuance in Attaint. Br. Nontenure, pl. 22. cites 20 H. 8.

(O) What Pleas the Petit Jury may plead.

See Tit. Accord (B)

S. P. that he can plead no other Plea, unless it be Release was Tenant after the Attaint purchased. 12 H. 6. 6.

2. The Petit Jury can not plead that the Plaintiff in the Attaint of Action, or the like; but cannot plead any Plea to the Writ as Jointenancy, or that the Reme Plaintiff had taken Baron pending the Writ, or e contra, and the like. Br. Attaint, pl. 53. cites 21 E. 3. 5.

* Fitzh. Attaint, pl. 61 & 65. cites 12 H. 6. 5. S. C. but I do not observe the Point of either of these two Pleas there.

3. Attaint was brought upon Appeal of Maihem. The Defendant pleaded Release of Execution mesne between Judgment and Execution, and one of the Petit Jury pleaded Arbitrement by Submission made between the Plaintiff and Defendant, and a good Plea; per Danby; for he may plead Release made by the Plaintiff to the Defendant, and all Pleas which go in Excusis of the False Oath, and the Punitiment ordained for it; and so fee that it is admitted there that Attaint lies upon Appeal of Maihem, and fee now the new Statute 23 H. 8. 3. of Attaints; and fee if this Statute does not serve to have Appeal of Maihem upon, tho' the Law was otherwise before. Br. Attaint, pl. 12. cites 35 H. 6. 30.

4. In Attaint one of the Petit Jury pleaded Accord made between the Plaintiff and the Defendant, with a Satisfaction, and by some it is no Plea; for it is Matter in False pleaded against Matter of Record; and by some e contra; for the Action is not founded only upon Matter of Record, but upon Matter in False and Matter of Record, viz. the Recordt and the False Oath. And where if the Petit Jury may plead that which is between the
Attain.
the Plaintiff and the Defendant; and by the best Opinion he shall have Lason, and the Plea. Quære. Br. Attaint, pl 91. cites 13 E. 4. 1. yet they are in a manner Strangers: and it seems a good Plea, tho' it be Matter in Fact, and the Attaint is founded upon Matter of Record; for the Cause, viz. the Falfe Oath, is Matter in Fact; for it is not of Record if the Oath be Falfe, or not till it be try'd; and in Trespafo, Conspiraqy, &c. Contra. Formam Quliatim, there is Privity; for the one shall plead Release made to his Companion; contra in Appeal and Pramunire.—Br. Accord, pl. 9. cites S. C.—S. C. cited per Cur. 4 Rep. 44. t. Mich. 5 Jac. C. B. in Blake's Cafe.

5. In Attaint the Petit Jury cannot assign Error in the Original; for it is not Party to the Record, but ought to answer to the Falfe Oath. Br. Attaint, pl. 93. cites 18. E. 4. 9.
6. Attaint by two upon Affidavit against them, and one of the Petit Jury pleaded Outlawry in one of the Plaintiffs before the Date of the Affidavit, and held that he cannot have it; for he cannot have Plea but in Maintenance of his Verdict, or in Bar, and not Plea to the Writ, as to say that the Writ is brought pending another Writ of Attaint of the same Matter, or that the Feme Plaintiff was Covert Baron, her Baron not named &c. Br. Attaint, pl. 85. cites 2. H. 7. 7.
7. In Attaint at the Disirings one of the Petit Jury said that the Defendant is dead, and a good Plea for him, per Cur. For now the Plaintiff cannot have Judgment against him, nor be restored. Br. Attaint, pl. 2. cites 18. H. 8. 5.
8. In Attaint upon a Writ of Trespass, one of the Petit Jury pleaded a Concord between the Plaintiff in the Attaint and the Defendant, and this was held a good Plea in 13 E. 4. by the better Opinion; and in all Actions founded upon a Tort, As Trespass, Conspiraqy, Maintenance &c. where nothing certain is demanded, nor to be recovered, besides Damage, Concord is a good Plea. D. 75. b. pl. 27. Mich. 6. E. 6.

(O. 2) Proceedings, and Return of Sheriff.


2. In Attaint the Tenant would have rendered the Action, and the Court would not receive it without taking the Jury for the Advantage of the King, and also Land, is not in Demand by this Writ. Br. Surrender, pl. 30. cites 6 Aff. 2.
3. In Attaint it was said by the Clerks, that at every Day in Attaint and Affidavit the Entry is Quod Ideo Vicemens babeat Corpora &c. and yet Differs shall issue against the Jurors by their Default, and because Judgment shall not be given till the 4th Day, therefore if the Attaint bears Date before the 4th Day of the Judgment in the first Action, it shall abate; quod notra bene. Br. Attaint, pl. 54. cites 9 Aff. 21. 9. E. 3. 28.
4. Affidavit was arraigned before T. and after before F. and B. by new Commission, and the Party brought Attaint, and the Original and the Patent, and all except the new Commission was there, and for want of this, Exchequer, Scot advaire vult in the Taking of the Attaint; and so see that all the the Parties Records ought to be there. Br. Attaint, pl. 62. cites 17 Aff. 23. 18. E. were at fine Quod bonum fecerunt Sa-
cramentum. At the Day of Trial the Grand Jury appear'd, but the Record was not removed either. The Court
5. In Attaint, the Defendant was returned Nihil, and the Plaintiff prayed the Jury, and could have only Re-summons, and if he be returned summoned upon the Original, and makes Default, yet the Plaintiff shall have only Re-summons; and the Opinion there was, that he ought to be summoned, by which the Plaintiff said that he had Land in another County, scilicet, T. and prayed to summon him there, and had it. Br. Procefs, pl. 95. cites 21 Aff. 5.

6. In Attaint, the Sheriff returned the Defendant Nihil, the Plaintiff prayed the Attaint, but the Court said, you cannot before Re-summons, [but the Counsel of the Plaintiff replied that] he could not have it served, for he is returned Nihil, so the Court bid them take Process upon Testatum in another County, by which he said that he had sufficient in another County [to be summoned by] and prayed Process there, and had it; Quere if he may not be summoned in the Land demanded? but this Attaint was not of Land, but upon Action of Quare Incumbavit; and 21 Aff. 5, the Opinion is, that the Defendant ought to be summoned; but Quere, if he has nothing in any Place. Br. Attaint, pl. 34. cites 21 E. 3. 18.

7. In Attaint the Tenant and 8 of the Petit Jury came, and maintained the first Oath, and upon this the Jury awarded, and it was awarded by Default against 4 of the Petit Jury who did not come, and by this they have left their Challenge to the 24. Br. Attaint, pl 65. cites 22 Aff. 31.

8. In Attaint the Writ is Et diligenter inquiras qui fuerunt Jurats' prime Inquisitionis, and the Sheriff returned their Names, and that 10 are dead, and 2 are alive Qui Nibil habent; and in the first Pannel was M. B. Knight, and he returned M. B. dead, without mentioning Knight; Knivet said, therefore it might be taken for another Perion, and because it shall be intended the name M. B. who was of the first Jury, therefore the Return was awarded good. Br. Attaint, pl. 76. cites 34 Aff. 6.

9. Attaint was brought upon a Verdict in Formedon, the Record was removed, and the Original, the Record and the Mittimus were examined, and Knivet took Exception, because Writ ought to have been awarded to the Clerk for the Venire Facias, and the Panel, for this remains with him, and not with the Justices, therefore it is not sufficient to write to the Justices for the Record, and if it be here it is without Warrant; Per Thorp, the Writ is Mittimus sub his Recordum & Processum cum omnibus ea Tangentibus, and this is sufficient for us, and therefore ordered him to answer, Quod nosta. Br. Caufe, pl. 23. cites 34 Aff. 6.

10. In Attaint the Tenant made Default, Finch prayed Pone per Vadios against him, and Summons against the Jury, and could not have but only Re-summons as in Mortdancefor. Br. Attaint, pl. 77. cites 37 Aff. 3.

In Attaint at the Summons returned, the Tenant was convicted, and made Default at the Day, by which the Attaint was awarded by Default; for he shall not have Re-summons but immediately upon the Return of the Summons. Br. Attaint, pl. 92. cites 18 E. 4. 8, and P. 4 H. 6. 25. Fitzh. Mortdancefor.———Br. Procefs, pl. 119. cites S. C.

Br. Procefs, pl. 104. cites T. now Defendant in Praecept quod reddat; after the Petit Cape T. alleged Imprisonment at Welfington, and the Attaint was brought in Middlesex, and the Sheriff returned that the Defendant had nothing whereby he might be summoned; Chuir. prayed the Jury by Default, and could not have
have it, but Writ of Summons was awarded to the Sheriff of the County of Wiltz, where the first Land was in Demand, against the said T. Br. Attaint, pl. 81. cites 42 All. 14.

12. In Attaint, the Sheriff returned 11 of the Names of the Petit Jury, and another who was not of them, sicilicet, R. B. where R. P. was the 12th of the Petit Jury, and the Defendant pleaded it to the Writ, & pl. 115. cites non allocatur, nor the Sheriff shall nor be amerced; but Process shall be served at the Prayer of the Party against him who is admitted, and the Writ shall stand against the others by the belit Opinion; for the Words of the Writ are no more, but that you diligently inquire who were Jurors of the first Inquisition. Br. Attaint, pl. 19. cites 48 E. 3. 15.

13. In Attaint the Jury demanded if they might give the Verdict at large, as in Allifce, and the Jutlices said No. Br. Attaint, pl. 87. cites 7 H. 4. 29.

14. And there it is said, that where Action is brought against two, and the one is summoned and severd, and the other sans forth, and after Writ of Error is brought, not making mention of him who was summoned and severd, the Writ shall abate, Quod non negatur. Br. Error, pl. 7. cites 9 H. 6. 38.

which it is founded; so that if Summons and Sevrance lies in the first Action, it shall do so likewise in the Attaint. 6 Rep. 25. a. Trin. 41 Eliz. B. R. in Ruddocks Cafe, cites 34 H. 6. 42.


16. In Writ of Error sued, the Plaintiff shall have Supersedes to surcease Examination, and in Attaint not; for it shall be intended that the Verdict of the 12 Jurors is true, till the contrary be thewn. Br. Attaint, pl. 122. cites 5 H. 7. 22.

17. In Attaint the Grand Jury and Petit Jury made Default in the End of the Term, and the Defendant could have imparred, and was not suffered, but was awarded to answer to the Points of the Writ, and could not have Day of Continuance without Issue. Br. Attaint, pl. 129. cites 10 H. 7. 22.

18. In Attaint the Sheriff cannot return the Defendant dead, for there Br. Return, are no Words of the Garnishment in the Writ. Br. Attaint, pl. 2. de Brief, pl. cites 18 H. 8. 5.

19. The Jurors who are attainted, may remove the Record into B. R. Br. Attaint, pl. 100. cites F. N. B. 109, 110.

20. In an Attaint it is a principal Challenge that one of the Petit Jury is a Tenant to one of the Grand Jury, for if the Petit Jury be convicted in the Attaint, it will be a great Prejudice to the Seignior; for his Houlfe shall be pull’d down, and his Meadows plough’d. In other Actions a Challenge that the Juror is Lord to the Party, is only a Challenge to the Favour. Jenk. 141. pl. 88.


1. ATTAIN'T was brought in Bank upon Allifce of Free’d Force, and s. P. Br. Attain't because they were at Issue here upon the Tenancy, and out of the Suits, pl. 58. Point of Attaint, therefore it shall be try’d by 12, and not by 24. Br. cites 21 H. Attaint, pl. 32. cites 21 E. 3. 10.

4 A

2. In
Attaint.

2. In Attaint against the Tenant and the Petit Jury the Writ was return'd against the Tenant, that he was war'd, and that those of the Petit Jury were attach'd. The Tenant was esjoy'd, and the others made Default. Markham pray'd the Grand Jury for Default of the Petit Jury, as in Ailiff or Juris Utrum, which was denied him, and Process made against them, because this Esjoy'd is given by the Statute of Westminster. 2 cap. 27. Br. Attaint, pl. 37. cites 21 H. 6. 42.

(P) Evidence.

S. P. as a Release, which was not pleaded nor given in Evidence, shall not be given in Evidence to the Grand Jury. Br. Attaint, pl. 68. cites 26 Aff 12.

Br. Attaint, pl. 57. cites S. C. & S. P.

In an Attaint, the Plaintiff cannot give in Evidence a Record which was not given to the Petit Jury; for they were not bound to find it, if it was not shown to them. 7 E. 4. 29. b. per Litt. 8 E. 4. Attaint 9.

And if the Defendant in Attaint gives new Matter in Evidence to enforce the first Verdict, the Plaintiff in Attaint may make Answer thereto, and disprove it if he can; but shall not give other Evidence, or enforce the Evidence first given, with Matter not given or disallowed before. Agreed for Law. Dy. 212. a. pl. 34. Patch, 4 Eliz. Pirman's Cafe.


The Court said that they always examine the Witnesses upon their Oath, whether they gave the same Evidence on the first Trial or not, [as they give now on the Attaint.] And per Shelley, if the first Jury had full Evidence to prove the Matter, tho' it were false in Fact, yet the Grand Jury in the Attaint ought not to regard that, but in Conscience ought to wave it, as they would have done upon such good Evidence as the first Jury did. D. 53. b. pl. 15. Trin. 54 H. 8. in Cafe of Rolle v. Hampden.

D. 125. b. Patents or not, which by the Common Law were not contained, tho' by the Statute of 4 [35] H. 8. they were contained. The Justice of Attaint would not suffer that Statute, it not being pleaded, to be given in Evidence to the Jury; whereupon they found that the Land was not contained. Hereupon an Attaint was brought, and the Court would not suffer that Statute to be given in Evidence to the Grand Jury which was not given in Evidence to the Petit Jury. Hob. 227. cited by Hobart Ch. J. as D. 129. 2 & 3 P. & M. Ibrgrave v. Heydon.

4. In Ailiff Issue was taken whether Lands were contained in Letters Patents or not, which by the Common Law were not contained, tho' by the Statute of 4 [35] H. 8. they were contained. The Justice of Attaint would not suffer that Statute, it not being pleaded, to be given in Evidence to the Jury; whereupon they found that the Land was not contained. Hereupon an Attaint was brought, and the Court would not suffer that Statute to be given in Evidence to the Grand Jury which was not given in Evidence to the Petit Jury. Hob. 227. cited by Hobart Ch. J. as D. 129. 2 & 3 P. & M. Ibrgrave v. Heydon.

5. The
5. The Judgment was so severe that they allowed all manner of Evidence in Support of their Verdict; but against the Verdict they admitted none that was not given at the former Trial, because the Jury might give in their Verdict not only on the Evidence given in Court, but on their own Knowledge, and therefore whatever otherways they came to the Knowledge of [as to] the Fact, they might give in Evidence for the Support of their Verdict; but the Evidence not offered on the Trial can never be brought against them, because such Evidence might have altered their Judgment, had it been given; and the Want of that Light, which the Party neglected to offer, cannot convict them of a Fallacy, which, if it had been offered, might have founded a different Verdict. G. Hist. of C. B. 57.

(Q) Judgment.

1. If the Petit Jury be convicted in an Attaint, the Judgment shall be that they be out of the Law and Taintimony, and their Goods and Chattels forfeited, and their Wives and Children thrown out of their Houeses, and their Lands and Tenements wafted and destroy'd, and their Land fell into the King's Hand. 20 D. 7. 4. * 8 D. 4. 23. b. * 42 but Gadson said that the Jurors might make Fine, and five

† Br. Attaint, pl. 14. cites b. C. and that the Jurors shall be imprisoned.— Fitch. Judgment, pl. 92. cites S. C. & S. P.
‡ Br. Attaint, pl. 18. cites S. C. & S. P.
¶ Br. Attaint, pl. 86. cites 6 E. 4. 5. S. P. and is the S. C.
§ Br. Attaint, pl. 43. cites S. C. but I do not observe S. P. there.— S. P. pl. 52. cites 6 Aff. 7. and pl. 72. cites 50 Aff. 24. and pl. 78. cites 42 Aff. 20. as to the Jurors that are alive; and pl. 80 cites 41 Aff. 18. that their Haufes shall be pull'd down.

Jenk. 125. pl. 54. recites the same Punishments to be inflicted by Judgment at Common Law; but says that if an Attaint be brought upon the Statutes of 25 H. 8. cap. 5. the Punishment is not so grievous.

If the Petit Jury in Attaint are attainted, they shall forfeit all their Goods and Chattels which they had at the Day of the Verit purchased, and all their Goods which they alien'd pending the Attaint, for fear of the Attaint. Br. Forfeiture de Terres, pl. 111. cites 3 E. 2. and Fitch. Affile, 396. per Hervey J. ——

Br. Expulsion, pl. 43. cites S. C.

It is questioned if the Jurors alien their Lands pending the Attaint, if they shall be feited into the Hands of the King, and if the Jurors may not make Fine with the King, and re-have their Land &c. Br. Attaint, pl. 19. cites 42 E. 5. 26.

In Attaint upon Affile upon False Oath, the Plaintiff recovered the Land and his Damages. Br. Damages, pl. 48. cites S. H. 4. 21. 23. and in the Writsca Book which is better, Fol. 12.


3. If a Man recovers in an Attaint, he shall be restored to all that S. P. but of he lost by the Verdict.

if the Verdict pull'd against him in the first Action, and for him in the Attaint, the Judgment shall only be to restore him to his Action; per Danby and Coke. Quere inde. Br. Attaint, pl. 58. cites 3 E. 4. 9.— By Writ of Error the Party may be restored to his Original; but in Attaint he shall be always restored to his Action only. Br. Attaint, pl. 3. cites 9 H. 6. 58. per Bab.

If Judgment be given for the Plaintiffs, they shall be restored to all that they lost; and if shall be as it ought to be originally. Jenk. 125. pl. 54.

4. [As]
4. [As] If a Man recovers in an Attaint upon a Verdict, in which he lost Land, he shall be restored to the Land again. * 50 Aff. 4. † 41 Aff. 18.


5. [So] If a Man recovers in an Attaint upon a Verdict, in which he lost Damages, he shall be restored to them.

Br. Attaint, pl. 84 cite 50 Aff. 4.

S. P. — Br. Attaint, pl. 32. cites 50 Aff. 24. S. P.

N. B. There is no pl. 6. in Roll.

6. If a Man recover in an Attaint upon a Verdict, in which he lost Land, he shall be restored to the mean Profits. 50 Aff. 4.


7. If a Man recovers in an Attaint upon a Verdict, in which he lost Land, he shall be restored to the mean Profits. 50 Aff. 4.

Br. Attaint, pl. 84 cite 50 Aff. 4.


8. If a Man brings a Formedon, and the Tenant pleads a Release, and it is found for the Defendant, for which the Demandant brings an Attaint, and the false Death is found, he shall have Judgment to recover the Land. 8 C. 4. Attaint 8.

Br. Attaint, pl. 83. cites S. C. & S. P.

9. So if a Man brings Debt and is barred, and he brings an Attaint, and it is found for him, he shall recover his Debt. 8 C. 4.

Br. Attaint, pl. 80. cites S. C. & S. P.

10. If the Issue in Tail recovers the Land in an Attaint upon a Recovery against his Ancestor, he shall recover the Issues of the Land from the Death of the Ancestor. 41 Aff. 18.

11. Attaint passed for the Plaintiff, and Judgment was, that the Plaintiff re-have his Land, and Damages taxed by the Attaint to 1000 Marks, and that the 12 &c. Br. Attaint, pl. 43. cites 4 Aff. 2. 4 E. 3. 34.

12. In Writ of Entry he in Reversion was recover'd by Default of the Tenant for Life, and pleaded Release of the Demandant, which was found false, and he brought Attaint, and the Writ did not mention if the Tenant for Life was dead or not; and yet the Writ was awarded good, and yet it was said, that the Judgment differs in this Case; for if he be alive the Judgment shall be to restore him, as it seems, and if not, then to restore the Plaintiff. Br. Attaint, pl. 49. cites 4 Aff. 7. and 4 E. 3. 54.

13. Attaint was adjourned by Nisi Prims before S. and T. to Canterbury, and found against the Petit Jury, and it was awarded that W. who lost re-have his Land, and Damages taxed to 1000 Marks, and that they lose their Frank Law &c. Br. Attaint, pl. 52. cites 6 Aff. 7.

14. In this Action a Man shall not have Seisin of the Land against the Tenant upon his Plea, but the Attaint shall be awarded at large, and if the Attaint passes for the Plaintiff he shall recover Seisin, and his Damages and the Issues of the Land after the Death of his Ancestor. Br. Attaint, pl. 59. cites 14 Aff. 2.

15. In Attaint all of the first Inquest appeared, and the Plaintiff was nonsuited, by which it was awarded that they go Sine Die, and the Plaintiff Capiatur, and the Pledges annexed; and per Pole, now the Party shall be discharged for ever, and so peremptory. Br. Attaint, pl. 63. cites 19 Aff. 13.

And so it seems, that in Attaint such Judgment shall be given as ought to have been given, in Case the first Jury had given Execution of any Land delivered to him, so cannot have Attaint, and the Court contra to him, and that he shall have Attaint as well as if he had had Execution in Fact, and that if the Attaint now passes for the Plaintiff, then he shall have Execution Now, and therefore the Grand Jury was adjudged by Award; and so see, that if the Plaintiff has had Execution
Attaint.

ecution before, then the Judgment in the Attaint shall be that he have Restitution of that which he lost; but now the Judgment shall be that he have Execution. Br. Attaint, pl. 64. cites 21 Afl. 16.

17. In Attaint, if the Plaintiff be nonjudiuit or barr'd, he shall be fined and imprisoned. 8 Rep. 60. per Cur. cites 32 Afl. pl. 9. 42 E. 3. 26. b.

18. So if the Attaint paffes against the Defendant, he shall be fined and imprisoned if he was Party to the first Record; but if he was not Party to the first Record, as it was Tenant by Refect, or other Tenant, he shall not be fined. 8 Rep. 60. a. cites 14 Afl. 2. 42 E. 3. 26. b. 9 E. 4. 43.

6. Mich. 6 & 7 Eliz. S.P. accordingly.—But where the Defendant in the Attaint is not Party to the original Writ in the Cause in which the False Verdict was given, he shall only be amerced. Jenk. 229. p. 96.

19. Upon finding the false Oath in Attaint the Tenant was amerced, but was not awarded to Prison, because it was not this Person who recovered by the first Verdict, but he who recovers by false Verdict, and comes and maintains the false Oath shall be awarded to Prison &c. Br. Attaint, pl. 80. cites 41 Afl. 18.

20. Attaint was brought against Tenant in Dower, who prayed Aid of the Heir, and bad it, and the Attaint passed against the Defendant, and it was found that 12 Years are passed after the Death of the Baron of this Feme, who Auditor was recovered in Aflse, and during 6 Years after his the Damages Death the Land was in the Hands of the King for Nonage of the Heir, who joined in Aid, by which Judgment was given that the Plaintiff recover the Land, and the Flues of the Land from the Time that the Land came out of the Feme now in the Hands of the King to 201. and the Damages after this time 10l. and Defendant recovered in the Aflse, and they would not speak, and that the Feme and the Prayee in Aid shall be amerced, and that the Jury shall lose their Frank Law &c. Br. Attaint, pl. 14. cites 42 E. 3. 26.

21. In Attaint the Grand Jury gave Verdict Quod bonum & legale secundum Sacramentum, by which it was awarded that the Plaintiff take nothing by his Writ, and that he be in Mifericordia & quod Capitatur &c. Br. Attaint, pl. 83. cites 43 Afl. 46.

22. Attaint was brought by Baron and Feme, of false Oath given against the Feme and her first Baron in Quare Impedit, and awarded good, and the Plaintiff recovered the Adjudication in Right of the Feme, and Damages to 24 Marks recovered in the first Writ against him, who first recovered the Presentation alone, and 26 Marks for Damages in this Action against him who first recovered, and another who pleaded Nonuture of the Adjudication, which was found against him, and these 26 Marks were recovered against them in Common, and that those of the Petit Jury lose their Frank Law &c. Br. Attaint, pl. 18. cites 46 E. 3. 23.

23. The Vouchs shall have Attaint, and by this the Tenant shall be restored; Quod nota, for he is as one and the same Tenant. Br. Attaint; pl. 25. cites 8 H. 4. 4.

24. Attaint shall not enue the Nature of the Action upon which it is brought, for they shall not inquire but their Issue only, by which it was awarded (because the false Oath is found) that the Plaintiff recover Seisin of the Land and Damages, &c.; the Issue of the Land from the Time of the Seisin till now, and his Gifts, as well in the Aflse as in this Writ, the which, because they were taxed too little, were increased by the Court, and the Jurors in Aflse lost their Chattles &c. But this now Tenant was not taken because he was a Stranger to the Aflse; for it was against Tenant, and the others as it ought, for the Attaint shall be against Tenant. Br. Attaint, pl. 26. cites 8 H. 4. 23.

25. By
25. By the Attainter of the Petit Jury, the King shall not have the Forfeiture of the Land to him in Fee simple, if it may cleave to the Lord after, (as by the principal Case it appears it may) but shall have it for Life of the Juror, as it seems, and then the Heir shall have it, and shall hold Seisin Pruns, or the Juror may make Fine and re-have his Land. Br. Attaint, pl. 95. cites * 22 E. 4. 1.

26. Quere if a Stranger be Tenant if he shall be ousted without Seize Facias. Br. Attaint, pl. 98.

27. The Jury when impanelled judged under the Penalty of an Attaint in the old Law, as appears by Glanville; if a false Judgment was given in the Court below, and they were arraigned for this false Judgment in the King's Court, they were obliged to wage the Battle, not by an extraneous Person, but by one of themselves; and if they proved recreant, the Lord lost his Court, and the whole Court was in Mifericordia. Gl. lib. B. c. 9. fo. 66. Instead of this, came the Norman Way by a grand Jury of 24; but the Persons if convicted were under the same Disabilities with a Champion recreant in such Case, for they lost Liberam legem, and they received the villainous Judgment which every Champion received, that maintaining another’s Right by Battle failed; for their Verdict was the afflicting of the Right of the Person, for whom it was given. G. Hist. of B. 56, 57.

For more of Attaint in General, See other proper Titles.

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**Attorney or Guardian.**

(A) What Persons ought to make a Guardian. [Or what Actions must be prosecuted by Guardian, or may be done by Attorney.] [Infant or Feme Covert.]

1. In an Action Real and mixt against an Infant, he ought to appear by Guardian, and not by Attorney. 39 Car. B. R. between Lewis and Johns adjudged per Curiam in a Writ of Error, and the Judgment in an Execution Feme in Banco against the Infant Defendant upon a Verdict had against him, reversed for this Cause. Intreaty B. 13 Car. B. R. Rot. 266.

2. So in an Action Personal against an Infant, he ought to appear by Guardian, and not by Attorney; because he hath no Knowledge of his Matter, or Understanding to chuse a Man to plead well for him, and therefore the Court shall elect for him, and also because the Infant shall have an * Action against his Guardian, if he be by Mistaking, 69 Id. B. R. between * Wesson and Cotone adjudged, and a Judgment reversed for this Cause. Co. 8. Boccher 56. b. Co. 9. Ab. Strata Part. 30. || 1 H. 5. 6. 22 H. 6. 31. b. Co. 39 El. B. R. between * Syburye and Raunt adjudged in a Writ of Error upon a Judgment in an Action of Debt upon an Obligation.

Attorney [or Guardian.]

was within Age at the Time of the Judgment given, tho' he was not so at the Time the Error brought, it is reversible, and is triable per Pains, and not like an Error upon a Fine, or a Statute acknowledged by one within Age, for they are not reversible but by Inspection.

If Guardian pleads an ill Plea where he might have pleaded a good one, and the Infant has not been ill Plea, he shall have Writ of Decrees at his full Age, and recover all Damages against the Guardian; and therefore the Court ought not to accept any for Guardian, but who is sufficient to render the Infant Damages at his full Age; and so when Guardian sues ill he shall render Damages to the Infant. Br. Droit de Reçto, pl. 15. cites 9 E. 4. 56.

3. If an Infant brings any Action, Real or Personal, he ought to appear by Guardian, and not by Attorney. P. 39 El. V. R. 26. between Barton and Dutton, adjudged in a Writ of Error upon a Judgment, in an Action of false Imputation, brought by the Infant; and the Judgment reverted accordingly. P. 1 El. V. R. adjudged upon a Writ of Error in a Judgment, in an Ejection Suit. In which the Infant recovered, for which Reason the Court upon the first Motion held, that it being for his Benefit, and his appearing by Attorney no Prejudice to him, held that it should not be allowed for Error; but they would advise, and afterwards Patch. 39 Eliz. being moved, it was held to be clearly Error, and Judgment reverted for that Cause. S. C. cited by Bridgman, Bridgman 77. S. C. cited Cro. J. 441: in pl. 14. S. cited Arg. View. 233. 2 Saund. 235. S. C. cited by the Reporter.

4. In an Action brought against Baron and Feme, the Feme being within Age, the Feme ought to appear by Guardian, 26 Am. 40. So done, 24 El. 1. Rotulo clausurum Personam 6. in Doro. The Tenant in a Writ of Power had a Guardian assigned by the King, and so signified to the Justices, de Banco. It was assigned for Error, that the Feme was within Age, and appeared by Attorney, whereas the ought to have been by Guardian. Hale Ch. J. and Twidew held it to be Error. 2 Lev. 38. Hill. 25 & 24 Car. 2. B. R. Boddington v. Freeman —— Vent. 185. Freeman v. Boddington S. C. and the Judgment was reversed; and Hale said, that the Baron could not defend the Guardian made by the Court for his Feme. —— In Debt against Baron and Feme they appeared by Attorney; this is not Error, tho' the Feme be under Age, be sure the Husband may by Law make an Attorney, and appear both for himself and Wife. Show. 15. Patch. 1 W. & M. of House v. Vaughan.

5. Waste was brought by an Infant within Age against his Guardian. Br. Age, pl. 10. cites S. and the Infant was by Attorney, and the Defendant thwarted this Matter. C. —— Br. Finch, the Defendant may take the Age by Protestation, and plead over. 49. cites S. C. for the Action lies as well within Age, as at full Age; and if any Thing comes in Protestation of the Age of the Defendant, may the Court (well enough for the Time) disallow the Warrant, and suffer the Defendant to take Advantage of the Age. Br. Attorney, pl. 22. cites 49 El. 3. 10.

6. And if Perly, if the Infant brings Action Ancestral, and makes Attorney; if the Infant alleges he is within Age, the Attorney shall make him come to be served by the Court, and if he be within Age, the Warrant shall be disallowed, and the Parol put Sine Die, notwithstanding that it was received by the Court; Quod Finch conciliat. Ibid.

7. Where an Infant is permitted to make Attorney which is recorded, Br. Attorney there is no Matter to plead in Arrest of Judgment by this, but the Party is put to Writ of Error. Br. Couverture, pl. 27. cites 22 H. 6. 31. S. C. —— S. C. if the Infant levies a Fine which is recorded Br. Couverture, pl. 27. cites S. C.

8. An Ideot shall not be received to plead by Guardian or Prochein S. P. per Cur. Amy, but ought to be always in proper Person in every Action brought against him, and that he will plead the best Plea for him shall be admitted. Br. Ideot, pl. 1. cites 33. H. 6. 18. by Fortescue J.

he shall appear by Guardian, if he be within Age, and by Attorney if he be of full Age. —— See Tit Lusarius (C 2)

9. In-
9. Infant who brought Appeal of Murder, brought it by Guardian and not by Attorney; Quod nota, and it was said there, that it is the Common Court that it shall be by Guardian. Br. Attorney, pl. 1. cites 27 H. 8. 11.

10. If a Writ of Dower be brought by an Infant, who loses by Default at the Grand Cape, he may reverse the same by a Writ of Error; but where an Infant appeareth by a Guardian, and afterwards loses by Default, there he shall never avoid it; for if any Default be in the Guardian, the Infant shall recover against him in a Writ of Disceit, and afterwards the Judgment in the first Cape was reversed. 2 Lec. 59. pl. 85. Mich. 32 Eliz. C. B. Anon.

S. C. cited Arg. Palm. 229.—— But an Infant may appear by Guardian, and when he comes to full Age in the same Suit he may make Attorney, and no Error; but not e contra. Mo. 665. pl. 908. cites 48 E. 3. 10. and Trin. 43 Eliz. Rot. 578. B. R.


13. Tenant in Dower was an Infant, and no Warrant was alleged of the Admission of any Guardian that it might appear to be the Act of the Court. After Judgment this was assigned for Error; and also for that the Appearance was by the Guardian in his own Name; sed adjornatur. 3 Mod. 236. Trin. 4 Jac. 2. B. R. Fitzgerald v. Villiers.

(not Appearance was in his own Name, viz. Quod ipsa non potest dedicere &c. and as to the first it was answered, that the Entry of the Special Admission on the Plea Roll was not necessary, though it is necessary that there should be an Admission, and cited 2 Saund. 94. The Court inclined that it was ill for the 2d Exception, but adjornatur.


14. An Infant brings a Writ of Right by his Guardian, pending the Suit he comes to full Age, and being of full Age, he does not make an Attorney; the Infant has a Verdict, and Judgment affirmed in Error; for it does not appear of Record when he came of full Age, and it ought to be pleaded before Verdict in the first Action, and the Omission of it is fatal to the Tenant, because the Writ does not abate, but is abatible only. The Statute of 21 Jac. of Jeoffails helps after Verdict where the Plaintiff is within Age and sues by Attorney, but not where he is Defendant. Jenk. 301. pl. 68.

15. 21 Jac. cap. 13. S. 2. Enactts, that after Verdict in any Court of Record the Judgment thereupon shall not be stayed or reversed, by reason that the Plaintiff in Ejdefunt, or in any Personal Action, being an Infant, did appear by Attorney and the Verdict pafs for him.

16. If an Infant be sued he cannot appear or plead by Guardian without Admission, and if he do it is a Misdemeanor in the Attorney, for which the Court may punish him if they please. Pach. 21 Car. 1. Per Magistrum Livefay & alios Clericos. L. P. R. 93.

17. Where Baron and Feme sue an Action, they sue by Attorney, but Feme Covert cannot make Attorney, and therefore the Baron makes an Attorney for them both; Per Cur. obiter. 2 Saund. 213. Mich. 22 Car. 2.

18. The
18. The Plaintiff recovered against the Defendant in an Action for scandalous words; and upon discovering that the Defendant was an Infant, and that the Defendant's Attorney knew it, and had appeared for her as Attorney, the Court was moved that the Attorney should enter the Appearance by Guardian, and that the Defendant's Plea upon the Roll should be amended; the Attorney upon his own Cause deposited, that he did not know of the Infancy until the Time of Trial, but seeing he knew it then the Court granted the Motion. MS. Rep. Mich. 5 Geo. B. R. Stretton v. Burgess.

(B) In what Actions and Cases it ought to be by Guardian.

1. If a Judgment be against an Infant, and the Infant brings a Writ of Error to restore the Judgment, he ought to align the Error by Guardian, and not by Attorney. New Entries 289. Where the Writ of Error is adjudged to be discontinued.


(C) What Person for a collateral respect may make an Attorney.

1. If an Action of Debt be brought against an Infant Executor, he cannot appear by Attorney, but ought to appear by Guardian. Else it is Error, because otherwise he may be at great Prejudice for Mists may be found in his Hands, and to Judgment shall be given to recover the Debt, Damages, and Costs against him de bonis Texitatoris, &c. If non, the Damages and Costs de bonis Proprietis, (as it is done in this Case) and perhaps the Infant had a Redress or Acquittance to plead, and so he shall be charged de bonis Proprietis by his (*) till pleading, without any Remedy against the Attorney, but if a Guardian mispleads, and lose thereby, an Action lies against him, and therefore his being Executor cannot make him as a Man of full Age. V. 15 Ja. B. R. between Wescott and Cotton adjudged and reversed per Curiam.


2. If an Infant Administrator brings an Action of Debt, he may make an Attorney, and this shall not be Error if the Judgment passes against him, for there he is not prejudiced by this, but only he is bare of the Debt of the Texitator. Tr. 38 El. 1 Bate and Starkes, where it is evident that the Infant is to be amerced, &c pro fallo clamore, and so it is prejudicial to him. Mich. 15 Ja. B. R. between Wescott and Cotton, agreed per Curiam.
3. Attorneys

Cro. E. 47. pl. 28. S. C. and Ibid. 578. S. P. in a Note at the End of the Case, because they are all but one Person, and it is not reasonable that one or two should sue by Attorney, and a third by Guardian or Prochein Ami. — Mo. 266. pl. 416. S. C. but S. P. does not appear. — Owe. 156. S. C. but not S. P. — S. C. cited by Chamberlaine J. Palm. 145. as adjudged and affirmed in Error. — S. C. cited and agreed by Rainsford J. Mod. 296. and ruled accordingly by 2. Jullices, contra Twiden J. and Judgment accordingly. — Trin 29 Car. 2. B. R. Foxwift v. Tremain, — Ibid. 47. pl. 102. and 72. pl. 21. Fox v. the Executors of Pincent. Hill. 211. and Mich. 222. Car. 2. but adjourned. — Lev. 299. S. C. adjudged by two, contra Twiden J. Mod. 198. 199. S. C. adjudged accordingly. — Std. 499. pl. 17. S. C. adjudged accordingly, per Car. prior. Twiden. — Sound. 212. S. C. and Judgment of Respondent Osler was awarded with the Affirm of Twiden, tho' he was of a contrary Opinion. — Vent. 102. S. C. the Ch. J. was absent, being sick, and Judgment was by two Jullices for the Plaintiff. — S. C. cited Show. 168.

But where Case was brought against two Executors, one of whom was within Age, and appeared and pleaded by Attorney, Roll Ch. J. denied the Difference as to the appearing in his own or another's Right, and said, that perhaps the Executor might be charged De bonis Propris, as in a Devallavit, and there is no Reason but he should plead by Guardian, and he is not within the 21 Jac. for that Statute was made for the Plaintiff, and Judgment reversed Nifi &c. Sty. 518. Hill. 1651. Weld v. Rumney. — S. C. cited Arg. Show. 167.

4. If a common Recovery be differed, and the Baron and Feme in the Right of the Feme (the Feme being within Age) are vouched, and they appear by Attorney and vouch over, and fo a Common Recovery is had, this is Error; for tho' the Baron be of full Age, yet the Feme being within Age, the ought to have appeared by Guardian. — D. 13. A. B. R. Dubitat, between Holland and Lee.
Attorney [or Guardian].

5. Precipe quod reddat against Baron and Feme, the Feme prayed to be received by Default of the Baron, and said, that the Demandant had entered pending the Writ; Judgment of the Writ; the Demandant demurred upon it; the Feme prayed to be by Attorney, and was admitted by Attorney; Quod Nota. Br. Attorney, pl. 45. cites 21 H. 6. 48.

6. In Effregment against a Lord of the Parliament, if he will render the Arrears it ought to be in proper Person, and not by Attorney. Br. Attorney, pl. 48. cites 15 H. 7. 9.

7. In Debt the Baron and Feme continue till Exigent. The Baron appeared, but would not fuller his Feme to appear. It was ruled per Cur. that the Feme may make Attorney to prevent her being seared. D. 271. b. pl. 27. Marg.

(D) The Power of the Guardians over the Infant. [As to Actions &c. brought by the Infant.]

1. In an Appeal by an Infant of the Death of his Father, if the Plaintiff hath Guardians aligned him, and after the Infant by the Devolution of his Friends compounds with the Defendant for 1500 l., and thereupon the Infant comes into Court, and says he will relinquish the Suit against the Defendant, and yet notwithstanding the Guardians will prosecute the Suit, the Court in their discretion may discharge the Guardians, and the Suit shall be discontinued for it is no Reason that the Infant should be bound to continue such a Suit against his Will, which Suit demands but Revenge, and will be chargeable to him, and perhaps he will leave the Revenge to God. Cr. 43 El. 3. R. between Stanyng and Fitts, adjudged per Curtin, and there the Case of one Sacheverell and Blackwell was dordered, which was where an Appeal was prosecuted in such a manner by an Infant, and was discontinued against the Wills of the Guardians. he shall answer for it; per Doderidge J. Palm. 252. Mich. 19 Jac. B. R.—See Tit. Appeal, (C) pl. 6. Toler's Café.

2. Effregment against J. B. of K. the Younger, where he had appeared to this before by Guardian, where it was founded upon Writ of Entry at the Common Law, in which the Defendant was named J. B. of K. only, without more, and he would have pleaded in proper Person in Abatement of the Writ that he was of H. and not of K. and also a Variance between this Action and the first, because the first Writ varied as above &c. And there it was agreed, that because the Admission by Guardian is the Act of the Court, that therefore the Party in proper Person may plead a Plea which is contrary to the Warranty of the Guardian. Contrary where he appears by Attorney; for the making of an Attorney is his own Act, and the Admission by Guardian is the Act of the Court. Note the Diversity; but in the Case above he was not suffer'd to have the Plea, because Proces of Outlawry does not lie in this Action, and therefore no Mitchief. Quod nota. Br. Attorney, pl. 4. cites 3 H. 6. 16.

(E) In
(E) In what Cases an Answer ought to be by Bailiff, and in what by Attorney.

1. At the Common Law in an Affife neither the Tenant nor Defeifor could have answered by Attorney, but ought to have answered by Bailiff. 21 C. 3. 25. b.

2. By the Statute of the 12 E. 2. it is ordained that he who is Tenant may make an Attorney. 21 C. 3. 25. b.

This is call'd the Statute of York, and Enacts that Tenants in Affise of Novel Defeifor may make Attorneys, and may also plead by Bailiff, as they used to do.

3. But the Defeifor in an Affife is not within the Statute, because he is not Tenant as the Statute speaks, and therefore he ought to answer by Bailiff. 21 C. 3. 25. b. adjudged.

4. Affise against 2, and the one, viz. he who had nothing, pleaded by Bailiff to the Affise; and so it seems that Defeifor may plead by Bailiff. Br. Baillie, pl. 17. cites 9 Aff. 11.

5. As in Affise against A. and B. which B. made Default, and A. as Bailiff to him pleaded to the Affise, and for himself he pleaded in Bar, and took the Tenancy upon himself, and so it seems that the other is a Defeifor, and that Defeifor may plead by Bailiff. Br. Baillie, pl. 18. cites 11 Aff. 23.

6. The Tenant in Affise may be by Bailiff against the Plaintiff, but not against the Bailiff of a Franchise who demands Coniance of Plea, where they are at Affise that the Land does not lie in the Franchise. Br. Baillie, pl. 23. cites 28 Aff. 13.

(F) In what Actions an Attorney may be made. [And at what Time.]

1. In a Quid Juris clamat the Defendant shall not make an Attorney before any Plea pleaded, because he ought to attorn in Person. 15 R. 2. Attorney 59.

See Tit. Appeal (O) and (A. a) See Tit. Ut. lawry (C. b) Fol. 289.

In a Quid Juris clamat the Defendant, upon a Suggestion that the was to old and weak that the could not go to the Bank without the utmost Danger, had a Deditus directed to Sanders J. to go to her to make an Attorney, and accordingly the Appearance by Attorney was allow'd. D. 155. b. pl. 15. 16, Mich. S & 4 P. & M. Turton's Café. The same Law of a Feme envoit. Ibid. And says the same was granted in Chancery, Mich. S & 4 Eliz. in Quid Juris clamat brought by Flowerdew v. Cooke & Ux. directed to the Chief Justice, and return'd served; & Curia adiuvat vult.

2. In a Quid Juris clamat, if the Tenant says he had nothing in the Land the Day of the Note levied, nor ever after, and thereupon they are at Affise, the Tenant shall be receiv'd to make an Attorney. 22 C. 3. 9.

Fitzh. Attorney, pl. 36. cites 21 E. 3. 48.

So cited S. C. ——

If the Parties are to Affise the Tenant may make Attorney; per Hill; but by him in ancient Time it was used by Writ. Br. Attorney, pl. 25. cites 48. E. 5. 24 —— So after Release pleaded, the
3. In an Indictment of Trespass the Defendant may make an Attorney. Note that in an Indictment of Trespass in B. R. the Defendant pleaded Not Guilty, and after made Attorney; quod nota bene after the Plea was entered. Br. Attorney, pl. 101. cites 6 E. 4. 4.

A Man was arraigned upon Indictment of Extortion, and pleaded Not Guilty, and made Attorney; quod nota bene, but if it had been Felony he could not have been permitted to make Attorney. Br. Attorney, pl. 62. cites 24 Aff. 17. Br. Attorney, pl. 101. cites S. C. and 9 E. 4. 4. S. P. R. was indicted for offering Money to J. S. to kill C. The Defendant pleaded by Attorney, which the Court said he might do Ex Gratia Curiae, but not Ex Rigore Jures Lev. 146 Mich. 16 Car. 2. B. R. Bacon's Cafe.

4. In Affise against two, the one made Default, and the other pray'd to be Tenanted by received by his Default, because he is his Tenant for Life, the Recoverion to Receipt, after him, and the Receipt was counterpleaded, and he was received upon Affise to make Attorney by Writ. Br. Attorney, pl. 61. cites 16 of the Receipt, made an Attorney. Br. Attorney, pl. 50. cites 7 H. 4. 19. Br. Garrantis do Attorney, pl. 8. cites S. C. Br. Attorney, pl. 54. cites S. C.

5. Appeal of Murder, Robbery, nor Malice cannot be sued by Attorney. A Woman but in proper Perfon, and likewise Judgment and Execution shall be in the Perfon, and not by Attorney; and in this Cafe Hufey C. J. was against the Cafe of 40 Aff. 17. supra. Br. Attorney, pl. 78. cites 21 E. 4. 73. Judgment. She cannot have Execution of this Judgment, if she does not pray it in Person. She was great with Child, and a Judge went to her to know whether she would have Execution; she said yes. 'The Appellee was hanged.' Jenk. 177. pl. 82.

6. In Entry the Tenant made Default after Default, and he in Reversion In Formaten pray'd to be received &c. and the other counterpleaded, upon which they the Tenant were at Affise, and upon this the Tenant by Receipt made Attorney; quod nota bene upon the Affise, and before Trial upon this Affise. Br. Attorney, pl. 50. cites 24 E. 3. 51.

and counterpleaded the Receipt, inasmuch as he had nothing in Reversion the Day of the Writ purchased, which is found for him, and the rest in Advancement, inasmuch as the Plea ought to have been, that he had nothing in Reversion the Day of the Writ purchased, nor ever after, and in the first pray'd to be received by Attorney; and per Newton and Palm J. he may make Attorney; for if the Prior demand in Judgment, he may make Attorney; and it was said that if the Reversion had been counterpleaded generally, he might make Attorney, if Affise be taken upon it. Br. Attorney, pl. 49. cites 21 H. 6. 13.

7. In per quæ Servititia, after the Parties were at Affise, the Tenant it was said made Attorney, Quod nota. Br. Attorney, pl. 55. cites 39 E. 3. 26. in per quæ Servititia by Wiching, that after temporary Affise joined in this Action, the Tenant may make Attorney; for after the Affise passed against him, he shall be distrained without other Atternment. Br. Attorney, pl. 25. cites 48 E. 3. 24. S. P. Br. Attorney, pl. 97. cites 7 H. 4. 2.

8. In Appeal of Robbery, the Defendant pleaded Not Guilty, and was Br. Attorney, found guilty, and after Verdict said that he is Clerk, and the Plaintiff said, that Begunius, which shall be certified by the Ordinary, fo the Plaintiff was by Attorney to make Attorney, and it was granted; and so it seems that the Defendant, the Plaintiff shall not make Attorney in Appeal, unless in special Cafe, medidnly, for here the Verdict found for the Plaintiff, Quod nota. Br. Attorney, pl. 64. cites 40 Aff. 17.

9. In Deti, the Exigent was not served, and the Defendant coveed out of Ward and pleaded, and after Plea prayed that he might make Attorney, and could not. Br. Attorney, pl. 16 cites 41 E. 3. 29.

10. In
10. In Trespass, Capias issued, and the Defendant came before his Day and found Mainprize, and had special fees, and at the Day he came and prayed to make Attorney, and it was granted. Br. Attorney, pl. 17. cites 42 E. 3. 1.

Br. Ald. pl. 65. cites S. C._

11. The Prayers in Aid in Writ of Error came, and joined to the Defendant, and made their Attorney, Quod nota bene. Br. Attorney, pl. 95. cites 42 Aff. 22.

Br. Attorney, pl. 18. cites S. C._


13. One who came by Superfideas upon Exigent, would have made Attorney after Plea pleaded, and could not; otherwise it is after Pleading, if he comes by Superfideos upon Capias. Br. Attorney, pl. 24. cites 2 H. 4. 27.

14. In Affis v. Cose was received in Default of the Baron, and would have made Attorney, and was not suffered; for the Receipt is given by Statute for the Cose, which is intended for her in proper Perfon. Br. Attorney, pl. 96. cites 3 H. 4. * 8.

15. In Quid Juris clamat, if the Defendant pleads in Bar, he shall be suffered to make Attorney; for the Plea which is in Bar is peremptory, and countervariats Attonment. Br. Attorney, pl. 97. cites 7 H. 4. 2.

16. Detinue of a Cheif of Charters inclofed, against one who came by Exigent, and the Plaintiff declared of a Charter Special, and to the Rest the Defendant waged his Law, and made it immediately, and to the special Charter pleaded that Non Detine, and prayed to make Attorney, the Plaintiff said No; for you come by Exigent, and per tot. Cur. now he may make Attorney; for by the Law Gager, the Caufe, for which the Exigent issued, is determined, Quod nota bene. Br. Attorney, pl. 57. cites 24 H. 6. 1.

17. Writ of Error shall be sued in proper Perfon, and not by Attorney,

Husband and


A and M.

18. Audita Querela shall be sued in proper Perfon, and not by Attorney,

Venire Fa-

clias was awarded out of C. B. against the Defendants as Repondendum, and upon the same being serv-

19. If Rescues is returned upon the Defendant, Capias shall issue, and he ought to appear in Perfon, and not by Attorney; for this is a Con-

tempt, Quod nota, and yet by Privy Seal he made Attorney, Quod nota,
and yet if the Court admits such a Man, or he who comes by Exigent or Capias appears by Attorney, this is not Error. Br. Attorney, pl. 56.

20. In B. R. upon Indictment in Trepass, the Defendant pleaded Not Guilty, and after he made Attorney, Quod nota. Br. Attorney, pl. 54.

cites 9 E. 4. 4.

21. In Quem reddidit reddid, the Defendant would have appeared and Br Quem reddidit, the Defendant would have appeared and Br Quem
pleaded by Attorney, and Brain and Casesby would not suffer it, and they agreed after they agreed that he should make Attorney Ex Aflenu Partium. Br. Attorney, pl. 68. cites 1 H. 7. 27.

reppidit reddid be brought against a sick Person, Recluse or Abbott, a Deanimus Potellatum lies, and the Defendants may make Attorney; cites 32 H. 6. 22. S. P. in a Quod Juris clamat. D. 152. b. pl. 15, 16 Mich 5 & 4 P. & M. Turton's Cafe.

In Quem reddidit reddid, the Defendant was admitted by Attorney, per Cur. for it is not like to a per qua Servititia, for there the Defendant shall do Justice, and peradventure Homage, which cannot be but in proper Person, but in this Action nothing is to be done but only to attorn, which may be by Pay- ment of 1 d. by the Attorney of the Defendant, Quod nota, per Cur. Br. Attorney, pl. 87. cites 52 H. 6. 22.

22. In Account the Defendant may appear by Attorney, and yet he shall account in Person; and in Ditf he may wage his Law by Attorney, and yet he shall make the Law in Person; per Townf. Br. Attorney, pl. 68. cites 1 H. 7. 27.

23. And in Quod Juris clamat, if the Defendant claims Fee, he may S.C. cited make Attorney; per Brain & Casesby. Br. Attorney, pl. 68. cites 1 H. Le. 290. in 7. 27.


& Caworth's Cafe, which

Cafe Ed Coke says is uncertainly reported; for it appears not whether it be meant of the Plaintiff or Defendant; but of the Defendant it cannot be intended, for that should be against our Books, the true Interpreters of this Act. And of the Plaintiff (it feemeth it was intended) he cannot be by Attorney, and that was Caworth's Cafe, mentioned in the Report of 21 H. 7. the Record whereof being found out is against the Report thereof; which very Point came in Question in my Time in 5. R. in an Appeal of Mayhem brought by David H. Marwood, Mich. 25 & 26 Eliz. B. R. The Plaintiff appeared by Attorney, and declared against the Defendant. The Defendant pray'd that the Plaintiff might be demanded; for that he could not appear by Attorney, and if the Plaintiff appear'd not, that he might be non-suited; against which the Counsel of the Plaintiff objected, That the Plaintiff in an Appeal of Maim might appear by Attorney; for that it might be that he was so wounded that he could not appear, and for Authority cited the Same Book in 21 H. 7. Whereunto Answer was made by the Counsel of the De- fendant, and resolved by the whole Court, That the Plaintiff could not appear by Attorney; for the

Defendant may demand Oyer of the Mayhem &c. which shall be peremptory to him, being a Trial of the Mayhem, which is a Trial the Law gives him. And albeit it may be hard and difficult in some particular Cafe, in respect of the Grievousness of the Mayhem, for the Plaintiff to appear in Person, as it was in 16 H. 4. where the Mayhem was heinous and horrible, the Legs of the Plaintiff being broken over a Threshold, yet that might not change the Law, nor take from the Defendant his full Defence and Trial; for so upon the like Surmise the Defendant may be ban'd thereof in all Cases. And Way Ch. J. said that the Record of Caworth's Cafe had been seen, and that the Record thereof was against the Report, and thereupon the Plaintiff was called, and by the Rule of the Court was nonsuit'd, and I was of Counsel in this Cafe, which I have the rather reported more at large, for that no Man should be deceived by the said Report of 21 H. 7.

26. In these Cases a Man shall not make Attorney, unless in Special * S. P. Br.

Cafe, viz. in * Attaint, 1 Premunire, 1 Appeal, Per qua Servititia, Quod Juris clamat, Quem reddidit reddid, nor in Assignment of Error, nor of the Places in Cafe of Contempt, nor the Tenant in ** Caworth upon Tender of Arrears, nor the Prayee to be received in Precipce quod reddid, in De-

fault of Tenant for Term of Life which makes Default. Br. Attorney, pl. 82.

pl. 191. cites 13 El. 5. Fitzh. Attorney, pl. 17.

27. By
27. By the Policy of the Common Law, that Suits might not increase and multiply, both Plaintiff and Defendant, Demandant and Tenant, in all Actions Real, Personal, and Mixt did appear in Person, as well in Courts of Record as not of Record, because the Writs do command the Tenant or Defendant to appear, which was always taken in proper Person; and the Entry in every Action for the Demandant or Plaintiff is, Et practicis petens, or queros obulit te, 40 die, which was understood in proper Person. 2init. 249.

28. One that had incurred a Process was allow'd to plead his Parton without appearing in Person. Roll 190. pl. 28. Nash. 13 Jac. B. R. The King v. Milliman.

29. Administrator of one outlaw'd for Murder brought Error to reverse the Oulttery, and pray'd to appear by Attorney. Brampton Ch. J. and Mallet only in Court, agreed that he might; for the Reason why the Party himself must appear in proper Person is, that he may stand Reichus in Curia, and that he may answer to the Matter in Fact, which Reason fails here, and therefore Administrator may appear by Attorney. Mar. 113. pl. 190. Mich. 17 Car. Anon.

30. It was moved that certain Persons, bound in a Recognizance to appear in B. R. for a Riot, might appear by Attorney, and not in Person, being poor People; but the Motion was denied; for it is the constant Practice to appear in Person. 11 Mod. 253. pl. 5. Mich. 8 Ann. B. R. Anon.

(G) In what Cases. [And upon what Return.]

1. Upon a Capias in Proces upon a Statute Merchant, if the Sheriff returns Quod non est inventus, the Party cannot answer by Attorney. 26 C. 3. 76.

2. [But] In Trespafs or Account, if the Sheriff returns Quod non est inventus, the Party may appear by Attorney. 26 C. 3. 76.

3. A Man who came by Redditt is upon an Exigent, was suffered to make an Attorney; for Pinnys Capias iffued where Alias Capias ought to have iffued, and so it shall be as if he had appear'd gratis at the Capias. Br. Attorney, pl. 95. cites 3 H. 4. 5.

4. In Trespafs at the Capias the Defendant delivered to the Sheriff a Superedeas, and yet he returned him Capit Corpus; and for this the Defendant pray'd to be by Attorney; and per Hanz. lo he shall; for if the Sheriff upon Exigent returns the Party outlawed where he has Superedeas, there the Superedeas shall force him to reverse the Oulttery, though he did not deliver it to the Sheriff, because it is of Record. Br. Attorney, pl. 25. cites 3 H. 4. 5.

5. And
5 And in the same Term a Man was returned outlawed, and he came not make
falsely that Capias was omitted, and pray'd that the Process be annulled, for there he
and to be admitted by Attorney, and so it was; and the Reason is, shall be
that if he had come at the first Capias it had been by Attorney, and now every Day
he is in the same Plight as if he had come at the first Capias. Quod by Main.
nota. Ibid.

6. In Detinue it appears that he who comes by Capias return'd Capi But if the
Corpus shall not make Attorney. Br. Attorney, pl. 27. cites 7 H. 4. 2. Plaintiff
counts of a
Box of Charters, now it appears that Capias only be not have issued, because it touches Ridley, and there-
fore now he shall make Attorney. Br. Attorney, pl. 27. cites 7 H. 4. 2.

7. A Man cannot appear by Attorney, unless he has Day in Court by S. P. For a
Process, quod nota; per Cur. Br. Attorney, pl. 59. cites 1 H. 6. 4. the Reproof
upon whom Avarry is made, nor the Prayer in Aid, nor the Voucher cannot appear by Attorney, when
the Aid is prov'd, or when he is vouch'd; but upon Process awarded, they may appear by Attorney; quod
nota per Cur. but those may appear in proper Persons at the first Day; quod nota. Br. Bailiff, pl. 54.
cites 8 C.

8. He who comes upon Exigent shall not make Attorney when the Exigent has well; but contro Exigent in Detinue of Charters; for such
Process does not lie in this Action. Br. Attorney, pl. 100. cites 8 H. 6. 29.

9. If the Demandant in Court Baron makes Attorney by Writ of the Chancery, it is not good, because the King does not intermeddle to make Attorney,
unless in his own Court, or in his County; quod nota. And it was laid that the Parties may make Attorney in any Suit, unless in Case where the
Defendant shall be imprisoned; and he shall not make Attorney in Affairs, nor in Attachment, nor contro Fines Levatum in Curia Regis, nor in Appeals; but by some, general Attorneys made in Chancery shall be admitted in every Court whatsoever. Quare. Br. Attorney,
pl. 84. cites the Register, Pol. 9.

10. Capias issued to take the Defendant in Debt, and he sued Super-
Fees. The Sheriff return'd the Capias Quod Capi Corpus &c. and Liberty &c. and the Defendant came and pleaded, and pray'd to be by Attor-
ney, and so he was; for it shall be intended that the Superfees was
purchased before his Arrest. Br. Attorney, pl. 55. cites 1 H. 6. 32.

11. In Trespass a Man was taken by Capias, and after Superfees came
to the Sheriff, and he return'd Capi Corpus quem habebo ad Diem paratum
&c. and that after Writ of Superfees was deliver'd to me, and pray'd that
he may make Attorney, and was not fuller'd, quod nota, inasmuch as he came by Return of Capi Corpus, and it was his Folly that he had
not delivered the Superfees before that he was taken; for after that he is taken, the Sheriff cannot let him go. Br. Attorney, pl. 38. cites 19
H. 6. 43.

12. In Debt if Capias issue, and the Defendant has Superfees, there if he renders himself to the Sheriff before the Taking, he shall be received,
by the Day in Bank upon all this Matter returned, to make Attorney, and shall not be committed to the Fleet, nor pay any Fees, and the Return was
Quod talis Die Capi Corpus &c. and that such a Day after he deliver'd to him a Superfees, and that such a Day before the Taking he render'd himself &c. And so note that if he had been taken before he had render'd himself or shew'd the Superfees, there he should be committed to the Fleet, and pay Fees. Br. Attorney, pl. 41. cites 21 H. 6. 29.
13. In Trespasses, if the Defendant at the Capias renders himself to the Sheriff who imprisons him, and he purchases Superfedeas, and by this the Sheriff permits him to go free, and returns the Capias and Superfedeas, the Defendant shall make Attorney upon his Appearance, and shall not be committed to the Fleet. Contra where the Sheriff takes him before any Render, and alter Superfedeas comes, and all this is returned, he shall not make Attorney, and if the Sheriff returns no Render, but Superfedeas as above, there it shall be intended that he rendered himself, and after purchased Superfedeas, and so there he shall make Attorney. 
Br. Attorney, pl. 47. cites 22 H. 6. 46.

14. In Debt and the like, if the Defendant is returned Capi Corpus upon Capias, and the Plaintiff is demanded, and does not come, and the Judges will not record the Nonuit, because it being the first Day of the Term the Defendant shall be admitted by Attorney. 
Br. Attorney, pl. 8. cites 33 H. 6. 28.

15. And where the Sheriffs return that before the Arrival of the Writ of Capias the Defendant was committed to them by the Council of the King, for Matters touching the King, and that Corpus paratum balent, it shall be by Attorney; for he was not taken by this Capias, but upon another Cause. 
Quod nota. Ibid.

Br. Charters de Pardon, pl. 4. cites S. C——
Br. Garrant de Attorney, pl. 5. cites S. C——But where he shall only be answer'd, he shall plead Pardon by a new Attorney by a new Warrant. 
Br. Attorney, pl. 11. cites 34 H. 6. 31.

17. In Error, if the Defendant be not in Ward, he may appear by Attorney; but if he be in Ward he shall find Surety, and shall make Recognizance. 
Br. Attorney, pl. 73. cites 5 E. 4. 6

18. In Appeal the Defendant was acquitted, and the Plaintiff found insufficient to render Damages, and that two were Abettors, and they pleaded that they did not aber, and the Defendant prays'd that he might make Attorney against the Abettors, and so he did. 
Br. Attorney, pl. 74. cites 8 E. 4. 3.

19. He who comes by Capi Corpus upon Capias in Action of the Party, may appear always by Attorney by Affent of the Parties, and well, tho' the Affent be not of Record; for it shall be so intended when Record is by Attorney. 
Br. Attorney, pl. 79. cites 21 E. 4. 77.

20. In every Case where the Party is to excuse himself of a Contempt, he ought to come in proper Person; quod nota, by all the Justices. 
Br. Attorney, pl. 81. cites 22 E. 4. 34.

21. If a Man outlaw'd in Appeal brings Scire Facias upon Charter of Pardon, which is returned served, in such Scire Facias the Appellant shall not make Attorney, as he might upon Issue of Bigamis. 
Scire Facias, pl. 236. cites 2 R. 3. 8.

22. In Trespasses, if the Defendant comes by Capi Corpus, and the Plaintiff is not in Court in proper Person, nor by Attorney, having Warrant of Attorney,
Attorney, there the Defendant shall go by Attorney without Mainprife. Quod nota. Br. Attorney, pl. 89. cites 2 R. 3. 15.


24. A Man was outlawed and misnamed, sicilice, T. Walter for T. Br. Attorney, and taken by Capias Ultratum, and was not suffered to be by Attorney, and was Mainprize Body for Body; for it was only Surnise till it was tried. Br. Garrantie de Attorney, pl. 40. cites 7 H. 8. 11.

25. The Plaintiff has a Verdict in Debt against Defendant; afterwards Cro. J. 211. and Lieutenant Plaintiff Not a Uterius prosequi, and it is entered in that, and 5. Beecher. Manrier, and Judgment is given for the Defendant; this is Error, for it is not a Retraction, for a Retraction must always be by the Plaintif in proper Person. Such Contention is stronger than a Verdict. Jenk. 233. pl. ming and Coke.——

8 Rep. 68. a

b. Mich. 6 Jac. S. C. resolved.——Roll Rep. 396. Coke Ch. J. said, it had been ruled by all the Justices in the Exchequer, that a Retraction cannot be entered by Attorney, but it must be by the Party in Person, because it will bar him.

26. By the Stat. 4 W. & M. cap. 18. any Person outlawed for any Caufe, except Treason and Felony, may appear by Attorney and reverse the same. See Tit. Utlawry.

27. In an Attachment of Privilege by the Marshall, he shall have no Attorney, he being present in Court. 6 Mod. 16. Mich. 2. Annæ B. R. Anon.

(G. 2) Warrant of Attorney, necessary in what Cases.

Guardian who is admitted for an Infant needs no Warrant. By Br. Garrant, he is admitted by the Court. Br. Attorney, pl. 62. cites S. C. and that also.

he be Tenant, and will plead in Bar, he needs no Warrant. Guardian shall have Warrant, but Prochein Any Not, Quod nota; and yet it appears that the Guardian shall be admitted by the Court, and the Prochein Any not. But by 19 Att. 10. the Guardian shall not have Warrant as Attorney shall have, because he is admitted by the Court, and this is the best Law. Br. Garrant de Attorney, pl. 47. cites 34 Att. 5.

2. A Corporation aggregate cannot appear in Person, but by Attorney. 10 Rep. 32. b. in the Case of Sutton's Hospital.

3. An Attorney appeared without any Warrant, and Judgment was had against the Client; the Question was, if the Court could set aside the Judgment; and per Cur. the Judgment shall stand, if the Attorney is responsible, because it is regular, and there is no Default in the Plaintiff; but and seem to be S. C. if the Attorney is not responsible, or suspicious it shall be set aside, because otherwise the Defendant has no Remedy, and any one may be undone by that Means. 1 Salk. 88. pl. 7. Trin. 2 Ann B. R. Anon.
(H) What shall be made a good Warrant of Attorney.

Executor of C, brings Debt against B, and the Record is
that B. po. lo. suo J. verius A. in Placito Debiti, and does not
name A. Executor in the Warrant, this is no good Warrant. 99.
4. In *between Hillard and Redman, dubitat. 

This was the Cafe of Ter-

2. In an Action of Wffe, Querens obtulit fe 40 Die per Attornatum 
    suum, and does not shew his Name, but after in the Alignment 
    of Wffe the Name of the Attorney is expressed, and after Judgment 
    is given for the Plaintiff, yet this is erroneous. D. 1. 93. 

* Cro. E. 
    155. pl. 32. 
    Hill. Rains-
    ford and 
    Tempett v. 
    Mallet, S. C. 
    held accord-

† 5 Bull. 202. Howson v. Fountain, S. C. held accordingly by Coke and Doddridge, but if it had been once right with his Christian Name, and afterwards the Name omitted, it might be amended, there being then a good Warrant in the Record for doing it.—Roll Ren. 351. pl. 1. &C. 

3. If a Man appears per ... Higgins, Attornatum suum, without 
    putting his Christian Name, this is not good, but as if he had no 
    Attorney named. 99. 31. 32. El. B. R. between * Mallet and Tem-
    am Howson's Cafe, per Coke, and 99. 14. No. B. R. the same Cafe. 

4. In an Action of Wffe, if the Plaintiff obtulit fe against the De-
    fendant, per Attornatum suum, and after declares per Attornatum suum, 
    and the Defendant does never appear, but a Diritflagas ifiuies according 
    to the Statute, and Judgment by Default is had against him, with-
    out naming the Attorney, yet this is no Error, because it is not the 
    Use of the Phillips in Banco to enter the Name of the Attorney before 
    the Appearance of the Defendant. Mich. 10. Car. B. R. between At-
    tkins and Higgs per Curiam, adjudged upon the Name of the Phi-
    lizers in Banco, and the Judgment given in Banco affirmed accordingly, 

5. In a common Recovery suffered in a Writ of Entry brought 
    against Eliz. P. the Warrant of Attorney for the Defendant is Alicia 
    Find. po. lo. suo A. B. &c. against N. putting Alicita for Elizabeth; 
    this is not good, for here is no Warrant of Attorney entered for 
    Elizabeth. D. 1. 2. Mar. 105. 16. but there Diuete whether it shall 
    be amended. 

6. The Writ was brought against the Abbess de Pount Ebroid, who 
    appeared by her Attorney General by the Warrant of the Chaucery of 
    Fonte Ebroid, and yet held good in as much as it was General, notwithstanding 
    that the Warrant was purchased after the Writ purchased; for it may 
    be that other Writs of elder date were pending against her by such Name. 
    Thel. Dig. 87. Lib. 9. cap. 8. 3. 1. cites Pach. 8. E. 388. 

7. But in Account by H. de Bert' he counted by Attorney, and his 
    Warrant was for H. Bert' without de, by which the Defendant went 
    fine Die. Thel. Dig. 87. Lib. 9. cap. 8. 3. 2. cites Mich. 12 E. 3. Var-
    iance 79. 

8. In Attaint one was received and made such Warrant of Attorney, 
    R. W. qui admissus est ad Defensionem jure suo defend.' &c. viz. de quo 
    posuit Loco suo F. T. verius &c. de placito juratis. 24. Militum ad convincend'
9. In Scire facias for a Prior, in the Writ he was named Successor, but
in the Warrant of Attorney not, and yet held good. Thel. Dig. 67. 9.
10. In P应收 qud reddat the Demandant appeared by Attorney, and
because there was a Variance between the Writ and the Warrant of Attorney,
a Nonuit was awarded. Br. Attorney, pl. 20. cites 45. E. 3. 24.
11. If Feme Covert prays to be restored by special Writ of the Chancery by
 Attorney, there the Warrant of Attorney of the Chancery ought not to
vary from the Record, but it is not to the Purpose. Br. Variance, pl.
106. cites 7. H. 4. 2.
12. In P应收 qud reddat at the Nisi Prius Attorney appeared for the
Vouchee, and prayed the Judge to record it, who said, that he had not spoke
with his Master, and said, that if the Brother of his Master would record
it, he should be Attorney, and thereupon the Inquest was taken, and polled
for the Demandant, and after came the Brother, and recorded that the
Vouchee would have the Attorney for his Attorney, and at the Day in
Bank the Demandant prayed Judgment, and the other said that he shall
have only Petit Cape, for the Default of an Attorney is a Default, and
yet the Demandant recovered, per Judicium; for it seems, that these
conditional Words never came in the Record; for it was adjudged, that
in as much as it appears of Record that he made Attorney, therefore
13. Three Things are requisite to the making of an Attorney, 1st. The
Agreement of the Attorney to be Attorney for the Party. 2dly, The A-
greement of the Party to have him for his Attorney. 3dly, That the
Justices will record it; and the one without the others is not sufficient;
Per Brian. Mich. 7 H. 4. 4. a. pl. 22.
14. Debt by Alice Baff; the Defendant demanded Judgment of the Writ,
for ffe, before the Writ purchased, married J. Baff, who dy'd, and ffe mar-
ried J. Coff. before the Writ purchased, and after J. Coff. died, and there-
fore ffe ought to be named Alice Coff, and not Alice Baff; and special Warr-
anted was recorded by Choke J. for the Defendant for Attorney, that the
Defendant put his Loco suo A. F. against Alice Coff, who has brought Writ of
Debt against the Defendant by Name of Alice Baff, and to a special Warr-
ant, and therefore would have pleaded the Milnifter of the Plaintiff
by Attorney, and because it was a strange Warrant, and contrary to the
common Course, 4 Justices said that they would be advised; but it is
said there in the Margin, that such Warrant may be suffered for a Feme
pregnant, or a Corporation, who cannot appear in Person; but contra here
where no such Milchief is shewn. Br. Garrant de Attorney, pl. 27.
cites 3 E. 4. 10.
15. Warrant of Attorney by Mayor and Commonalty shall be general
according to his Writ, and because it is that the Mayor and Citizens po-
suit Loco suo, he shall not plead Milnifter; per Brian Ch. J. and
therefore he shall have in such Case special Warrant of Attorney by their
every Names of Incorporation, and then the Attorney shall plead Milnifter,
cites 21 E. 4. 13.
16. The Warrant of Attorney of the Vouchee shall be such, that A. B. the
Vouchee Pofuit Loco suo J. B. verius potest in Placito Terre, Per the
Prothonotary; and by the Justices this Warrant shall serve him against
the Tenant, if the Vouchee counterpleads the Lien with the Tenant.

12. In
17. In a Bill of Intrusion it was assigned for Error, that the Record is entered inter f. C. praesentem hic in Curia by f. S. Attornatum suum, and that cannot be, for it is Oppositum in Objetto, that one can be present in Court, and also by Attorney, simul & femel; for the Attorney is to supply the Default of the Personal Presence; to which it was said by Wray, Anderfon, and Periam, that the Matter assigned was no Error; for there are many Precedents in the Exchequer of such Entries, which were openly shewed in Court, as 48 E. 3. 10 R. 2. 20 H. 7. 29 H. 8. and by Manwood Ch. B. it is not so absurd an Entry as it has been objected, for if one has an Attorney of Record in B. R. and be himself is in the Marshalsea, and there is an Action against him, he is present as Prisoner, and also by Attorney; and by them, notwithstanding that here appears a Contrariety, for such Entry properly is (Praesentem hic in Curia pro pria Perfona sua) yet because many Precedents are accordingly, it is the more safe Course to follow them, for if this Judgment be reversed for this Cause, many Records should also be reversed, which should be perilous. Le. 9. pl. 12. Mich. 25 & 26 Eliz. Cater's Cafe.

18. Error to reverse a common Recovery in Writ of Right Patent in the City of Worcester, for that such a one Pon Loco suo W. H. and did not write the Name at length, but it was at length in the Plea Roll; it was insisted, that all the Records of the City are of the same Form. Suit and Clench J. held it not good, for they ought to follow the Course of the Common Law; and the reason why his Name ought to be put in, because if he appear as my Attorney without my Authority, I may have an Action on the Cafe against him, which I cannot have against W. H. Adornatur. Godb. 73. pl. 90. Mich. 28 & 29 Eliz. B. R. Bilford v. Doddington.

19. Error was, that the Entry of the Warrant of Attorney of the Defendant was Ponit Loco, but says not (sic) but the Entry being that the Plaintiff Ponit Loco suo, and that the Defendant Ponit Loco similius, it is good enough, and the Judgment was affirmed. Cro. E. 201. pl. 29. Mich. 32 & 33 Eliz. B. R. Yeoman v. Stenlack.


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(H. 2) Warrant of Attorney to confess Judgment; good.

1. If Warrant of Attorney be given after the Continuance-Day to enter up a Judgment as of the Term preceding, this may be well enough, if it be dated within the Term; but it cannot be so if such a Warrant be given to confess a Judgment generally, and dated after the Term. Vent. 11. Pach. 23 Car. 2. B. R. Anon.

2. By the Practice a Warrant of Attorney before the Essoign-Day to enter up Judgment as of the preceding Term, is good; per Holt Ch. J. Cumb. 212. Trin. 5 W. & M. in B. R. Anon.

3. If one under Arrest gives a Warrant of Attorney to confess a Judgment to the Plaintiff, no Attorney being by, we generally vacate it; but if the Judgment were to another Person, as to his Bail &c. it seems to be out of the Rule; per Holt Ch. J. Cumb. 224. Mich. 5 W. & M. in B. R. Anon.

(I) At
At what Time a Warrant of Attorney may be entered.

1. The Warrant of Attorney may be entered at any Time before Judgment. 41 C. 3. 1. b.


3. So after Judgment and a Writ of Error brought returnable in Debt, or in Michaelmas Term, and nothing done thereupon, not prosecuted, and therefore in Easter-Term after a Warrant of Attorney may be entered, no Warrant of Attorney was entered in such a Term. Per Williams J. This is a clear Error; and Rule was made by the Judges reversely; but this not being entered of Record, a Certiorari was granted to inform the Court whether any Warrant of Attorney was entered, and when, because it might be entered in another Term, and good, and it was the Neglect of the Plaintiff himself in the Writ of Error that the Judgment for Reversal was not entered. 3 Buft. 21. Patch. 9 Jac. in B. R. Smith v. Skipwith. 46. Cro. J. 277. pl. 7. Patch. 9 Jac. H. R. the S. C. and it was held by all the Court, that it is not material in what Term it is entered, so it is entered at all, and therefore it was ordered that the Reversal of the Judgment be stayed.

4. So after Judgment in Banco, if the Defendant against whom the Judgment is given, brings a Writ of Error returnable the first Day of Trinity Term; but the Writ 18 not delivered to the Clerk of the Treasury till 6 Days after the Day of the Return; in this Case the Defendant in the Writ of Error may put in a Warrant of Attorney for the Plaintiff in the Writ of Error by Leave of the Court, and this shall be entered accordingly. D. 2 Eliz. 190. 49. in Debt, or in Michaelmas Term, and nothing done thereupon, not prosecuted, and therefore in Easter-Term after a Warrant of Attorney may be entered, no Warrant of Attorney was entered in such a Term. Per Williams J. This is a clear Error; and Rule was made by the Judges reversely; but this not being entered of Record, a Certiorari was granted to inform the Court whether any Warrant of Attorney was entered, and when, because it might be entered in another Term, and good, and it was the Neglect of the Plaintiff himself in the Writ of Error that the Judgment for Reversal was not entered. 3 Buft. 21. Patch. 9 Jac. in B. R. Smith v. Skipwith. 46. Cro. J. 277. pl. 7. Patch. 9 Jac. H. R. the S. C. and it was held by all the Court, that it is not material in what Term it is entered, so it is entered at all, and therefore it was ordered that the Reversal of the Judgment be stayed.

5. If a Man recovers by Judgment against J. S. who brings a Writ of Error the same Term the Judgment was given, tho' the latter Term the Record is in the Bequest of the Judges, per the Plaintiff shall not be received until to put in a Warrant of Attorney for himself. D. 7 Eliz. 230. 58. adjudged.

6. In a common Recovery, if the Original be returnable Octabii Michaelis, which is the 9 October, and the Dedimus potestatem for the Defendant, de Attornato Faciendo, bears Date 11 October, and the Militimis thereof in Banco bears Date the 20th of October, which is after the Relation of the Judgment, which is Octabii Michaelis, and so the Warrant was dated after the Judgment given, contrary to the Supposal of the Writ of Dedimus potestatem, which is enim breue nullium pendere coronam se. and this does not depend after Judgment. D. 5 Eliz. 220. 13. per Curiam. Error.

7. The Attorney of the Plaintiff who had Judgment to recover in Debt was commanded to the File, because he had not put in Warrant of Attorney before Verdict, and after was released, because a Bill of it was found in the Court, which was not inrolled, and the Plaintiff recovered. Br. of Attorney, pl. 14. cites 41 E. 3. 1. cites S. C. that it was left in the Remembrance, and neglected to be entered. —— Fifth. Judgment, pl. 86. cites S. C.

8. Per
8. Per Hult, it is only a new use to reverse a Judgment for not entering of the Warrant of Attorney; for if a Man has Warrant of Attorney by Patent which is of Record, and brings it in his Pocket, Process shall not be reversed by this, tho' it be not entered. Br. Garrant de Attorney, pl. 9. cites 8 H. 4. 3.

9. 18 H. 6. cap. 9. Every Attorney who hath not his Warrant entered upon Record, in all Suits wherein Process of Capias and Exigent are awarded, the same Term in which the Exigent is awarded or before, and is therefore attained by like Examination, for every time he offends he shall forfeit 40 s.

10. If Warrant of Attorney be put in at the Disturbing's Journies, and was not put at the Term of the Issues joined, yet it suffices if a Justice records it. Br. Garrant de Attorney, pl. 29. cites E. 4. 13. per Choke J.

11. And Warrant of Attorney shall be put in in the Term in which the Exigent issued upon certain Pain. Ibid.

12. 32 H. 8. cap. 30. S. 2. Enacts, that every Attorney for any Demandant or Plaintiff, Tenant or Defendant in any Actions in the King's said Courts, shall deliver his Warrant of Attorney to be entered of Record in the same Term when the Issue is entered of Record, or before, upon Pain of forfeiting to the King 10 l. and further, to suffer such Imprisonment as by the Court shall be thought convenient.


14. 18 Eliz. cap. 14. S. 3. Enacts, that all Attorneys in any Court of Record shall deliver in the Warrant of Attorney to be entered or filed as heretofore, upon Pain to forfeit 10 l. the one Moiety to the Queen, and the other Moiety to such Officer to whom the Warrant should be delivered, and to suffer Imprisonment by the DIRECTION of the Court.

15. After a Writ of Error brought, and Error assign'd, it was moved to file a Warrant of Attorney, and granted. Brownl. 46. Trin. 11


17. In Error upon a Recovery in C. B. it was alligned, that there was no Warrant of Attorney, whereupon a Warrant of Attorney upon Award of the Exigent was certified; The Court held that this Warrant is sufficient, and all the Prothonotaries of C. B. certified accordingly, and so Judgment was affirmed. Jo. 201. pl. 1. Hill. 4 Car. B. R. Sir Robert Howard's Cafe.

18. If a Warrant of Attorney be to enter up a Judgment as of this Term or any other time after, the Attorney may enter Judgment at any Time during his Life, but otherwise if the Words (at any time after) are wanting. Mod. 1. Mich. 21 Car. 2. B. R. Myon's Cafe.

19. A Man gives a Warrant of Attorney to confess a Judgment, and dies before Judgment is confessed, this is a Countermand. Vent. 310.

It is determinable by the Party's Death, but if the Party dies in the Vacation, the Attorney may enter up the Judgment that Vacation as of the precedent Term, and it is a Judgment at the Common Law as of the precedent Term, tho' it be not so upon the Statute of Frauds in respect of Purchasors but from the Signing it; so that this Judgment being a Judgment at Common Law as of Hillary Term, if the Roll had been brought in before the 15th Day of Easter Term, it would then have been a Judgment entered when the Party was alive, and therefore good without Question, per Holt Ch. J. but because of the Mischief to Purchasors by frustrating the statute
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Attorney.

ture of Frauds, and the Act for dooquetting of Judgments, the Court would not allow the filing it after the Eligoan Day of Easter Term. 1 Salk. 87. pl. 6. Hill. 1 Ann. B. R. Oakes v. Woodward.—3 Salk. 116 S.C.—If a Man gives a Warrant of Attorney to confess a Judgment the 18. Day of the Term, and dies, it may well be entered any time that Term, according to Shelly's Cafe, and the Dean of Salisbury's Cafe; Per Cur. 6 Mod. 86 Mich. 2 Ann. B. R. Anon.

20. By the Course of the Court, Judgment cannot regularly be entered on a Warrant of Attorney after the Year without Motion; Resolved. Cumb. 226. Mich. 5 W. & M. in B. R. Anon.

the Defendant or the Confor, as also that the Debt is not satisfied, and thereupon the Rule accordingly. 2 Show. 252. pl. 259. Mich. 54 Car. 2. B. R. Pagran's Cafe.

21. 4 & 5 Anne, cap. 16. § 3. Enacts, that the Attorney for the Plaintiff or Demandant shall file his Warrant of Attorney the same Term be or demand, and the Attorney for the Defendant or Tenant shall file his Warrant of Attorney the same Term he appears, under the Penalties inflicted by any former Law for Default of filing their Warrant of Attorney. S. P. And

22. It is time enough to file Warrants of Attorney any time before final Judgment, per Car. and they said, that the Plea is depending till Judgment final is given, and the Warrant is to be intended previous to the Appearance, tho' not filed. Gibb. 191. pl. 4. Hill. 4 Geo. 2. B. R. Brook v. Manning.

(K) For whom he may be Attorney. [Or who may be Attorney for whom.]

1. An Action by the Commonalty of a Town, one of the Commu-
nity cannot appear as Attorney for the Commonalty; for he is Party to the Action. 3 P. 6. 43.

was taken, sad adjournatur. But Brooke says, it seems clearly that he may well be; for (he says) it appears elsewhere, that one of the Commonalty may infer the Manor and Commonalty. —Br. At-
torney, pl. 5. cites S. C. & adjournatur; and Brooke says, See Tit. Corporations, several Cases will prove that it may well be.


1. An Attorney be a Solicitor for his Clients in other Courts as well as S. C., in the Court where he is an Attorney, and a Promise to pay him, for it is lawful, per tot. Cur. Cro. C. 159. pl. 8. Patch. 5 Car. B. R. Thusby v. Warren.


2. The Steward of an inferior Court refusing to let an Attorney of B. R. ap-
pear for the Defendant, in an Action in that Court, he moved that the At-
tornies in the Courts at Westminster might practice in any inferior Court, and that they had not a Prescription or Charter for any certain Number of
to practice in or of Attorneys of their own, and to exclude others; but because it was the general Usage of those Courts to suffer no Attorneys but their own to practice there, tho' the Court seemed to incline that they ought not by Law to refuse others, yet the Court would advise. 1 Vent. 11. Hill.

20 & 21 Car. 2. B. R. Gilman v. Wright.

(K. 3) Privilege in Actions, and as to Offices.

1. THE Court (ablente Morton, & Dubitante Rainsford) granted a Writ of Privilege to an Attorney, tho' he was obliged by his Tenure to be Lord's Receiv; for the Privilege is premised more ancient than the Creation of the Tenure, or at least shall be preferred, in as much as it concerns the Administration of Justice. Vent. 29. Pauch. 21 Car. 2. B. R. Stone's Cafe.

2. And per Kelynge, an Attorney cannot be amerced for not doing Suit to his Lord's Court at such time as his Attendance is required at Wiltminter. Vent. 29. per Kelynge. Pauch. 21 Car. 2. B. R.


But if he sitts by Ori-


5. Attachment of Privilege is but as a Latitat, not as an Original; per Holt Ch. J. Show. 376. Trin. 4 W. & M. Rudd v. Berkenhead.

6. Filing Bail by Attorney Defendant does not ouft him of his Privilege, and tho' it gives others an Opportunity to deliver Declaration against him by the by, according to the Course of B. R. yet that Practice extends not to exclude such Defendant from any Advantage by Pleading to the Jurisdiction of the Court, or otherwise; but per Cur. If the Defendant had waived his Privilege by Pleading in chief to the first Action, and the Plaintiff in an after Action had shown that Waiver in his Replication, then the Defendant would have been ouitted of his Privilege in such 2d Action, because a Waiver of Privilege in a prior Action depending in B. R. is a Waiver in all other Actions commenced in that Term. Carth. 377. Pauch. 8 W. 3. B. R. Bands v. Bodinner.

7. If an Attorney of C. B. is in actual Custody of the Marshal of B. R. by Proceeds there he cannot plead his Privilege in any Action on any Bill filed against him, for if he should there would be a failure of Justice, per Cur. Carth. 378. Pauch. 8 W. 3. B. R. Bands v. Bodinner.

8. If
8. If Attorney of C. B. is brought into B. R. at the Suit of an Attorney there, which is an Estoppel to the Defendant's Privilege, even in such Case the Defendant shall be ousted of his Privilege in all other Actions commenced against him in B. R. in the same Term, because the Jurisdiction of B. R. is attached upon him by the first Action. Carth. 378. Paich. 8 W. 3. B. R. Bands v. Bodinner.


10. Bill cannot be filed against an Attorney in Vacation, for you must declare against him as present in Court, to which the Court agreed; and Mr. Ashton and Sir Samuel Athersbee certified the Practice to be so, and Blackerby that it was never used to file a Bill in Vacation; nor to be a Bill of a subsequent Term, the Bill must be filed Sedante Curia the last Day of the Term. 12 Mod. 163. Hill. 9 W. 3. Broadwine v. Blackerby and Perkins.

11. Bill against an Attorney must be filed in full Term, and it is not enough that it should be on any of the Elfeigh Days. 6 Mod. 106. Hill. filed any Day within the Term, and if there are 4 Days of the Term to come, one may serve Rules upon it that Term, but if the Declaration be in Elfer Vacation, which is indeed a Declaration of Estier Term, the Defendant shall have 4 Days in Trinity Term to plead, and one is not confined to 4 Days to plead in Attorney, but he has the whole Term of which the Declaration is delivered; but if he has 4 Days in the Term of which the Declaration is delivered, he shall not plead in Abatement the next Term; per Car. 6 Mod. 175. Trin. 3 Ann. B. R. Anon.

12. If an Attorney is responsible, and justifies, and a Housekeeper, then he is good Bail tho' he is an Attorney; but the Meaning of the Rule was that he should not be taken as good Bail merely by his being an Attorney. 8 Mod. 388. Mich. 11 Geo. Brown v. Combs.

(L) What shall be said to be a Removal in Law.

1. If the Tenant makes an Attorney in Banco, and after Consulane of this Plea, is demanded by a Franchise, and granted, the Attorney shall continue Attorney for him in the Franchise also, without other making, and he is his Attorney there in fact before other Removal, if the Consulane is granted to hold Plea as the Judges ought, if this had not been granted. * 21 Ed. 3. 45. b. 61. 21 Att. pl. 17. adjudged.

Br. Attorney, pl. 64 citas S. C. & S. P. accordingly; nor is he bound to go with him to the Nis Prior on Pain, nor does Action of Difcit lie against him for any such Absence.—Firth. Receipts pl. 153. S. C. Br. Consulane, pl. 25. cites S. C. & S. P. awarded accordingly: Quod non, that this is of Record in the Franchise, and yet the Warrant was not sent to the Franchise, nor it was not comprized in the Record which was sent to the Franchise that he is Attorney there, and yet Judgment as above.

2. So if after the Consulane granted, a Re-summons be lied for the Faller of Right there in the Court where this was granted, he continues Attorney for him there also upon the first Retainer. 21 Att. pl. 17. 21 Ed. 3. 61. b.

3. If Judgment be given in Banco against the Demandant, and Firth. Re- this is reversed in B. R. for Error in the Process; the Attorney which cites 21 F. 5 45. S. P.
which the Tenant had in the first Place shall continue his Attorney now in B. R. to answer to the Original. 21 All. pl. 17. 21 Ed. 3. 61. b.

4. In Debinne, the Plaintiff made Attorney and counted, and the Defendant alledged Livery to him by the Plaintiff and J. N. and prayed Garnish-ment, and had it, and he appeared, and the Plaintiff would have counted against him by the same Attorney, and he said that the Warrant of Attorney shall not serve against him; and per rot. Cur. the Warrant shall serve well, Quod nota. Br. Garrant de Attorney, pl. 6. cites 7 H. 4. 3.

5. And per Brench in Writ of Ward the Plaintiff made Attorney, the Defendant prayed Enterpleader, because J. N. had brought such a Writ of the same Ward, the Warrant shall serve against the other Plaintiff upon Enterp-leader; but Rickhill contra; but per Skrene, where the Defendant in Replevin makes Attorney against the Plaintiff, and avows upon a Stranger, the Warrant shall serve, and so it seems to be Law, that a Warrant of Attorney against the Tenant shall serve against the Vouchee or Prayee in Aid, for there is Privy. Ibid.

6. Where a Man makes Attorney, and after the Parol is put without Day by Presentation, by which Re-summons is fixed, the Tenant at the Day cannot be elloigned, for he has Attorney in Court, and so fee that he remains notwithstanding the Parol be without Day; for the Re-summons is to renew the first Record, in which he is Attorney. Br. Attorney, pl. 39. cites 19 H. 6. 37.

7. A Warrant of Attorney made by a Feme sole to confess a Judgment, is revoked by Marriage; but otherwife of a Warrant made to her. Salk. 117. pl. 9. Hill. 1 Annæ B. R. Anon.

(M) What shall be said an Expiration, or Determination of the Letter.

1. If Debt, if the Defendant wages his Law by Attorney, at the Day that he hath to make his Law the Attorney may plead the Release of the Plaintiff after the last Continuance. 22 Ed. 3. Attorney 92. For his Warrant was not determined, tho' his Action ought to make his Law in Person.

In Debt the Defendant made his Law, by which the Plaintiff recovered his Debt, and his Damages as he had counted; but the Attorney released his Damages to 100s. Quod nota. Br. Attorney, pl. 21. cites 46 E. 4. 16—— Br. Attorney, pl. 31. cites S. C. * Roll Ch. J. conceived the Warrant of Attorney not determined by Judgment given in the Suit in which he was retained; for the Suit is not determined, because the Attorney after the Judgment is to be called to say why Execution should not be made against his Client, and he is trusted to defend his Client as far as he can from the Execution. Sy. 426. Mich. 1654. Lawrence v. Harrison.

By the Judgment against the Defendant the

3. If a Man recovers Damages in Trespases, and the Defendant comes upon the Exigent, and says he hath agreed with the Plaintiff, the Attorney of the Plaintiff shall not be received to acknowledge this, be-
cause his Power is ended by the Judgment given. 34 Ed. 3. A. Attorney is determined; for thereby his Power is ended by the Judgment (which is the Fruit of the Judgment) within the Year; and if he be not executed within the Year, he may proceed to the same after the Year, but if he does not execute the Judgment within the Year, then, after the Year is ended, after judgment his Warrant of Attorney is determined. 2 Inst. 578. — S. P. Arg. and agreed by Coke 17. J. Roll Rep. 366.

4. But if the Attorney, after Judgment given for his Faller, receives the Money levied upon the Execution, he may acknowledge Satisfaction. 14 Jac. 2 B. R. per Coke.

or the Goods taken in Execution to the Plaintiff; for the Receipt of the Attorney is in Law his own Receipt: Godb. 217. Pl. 811. Mich. 11 Jac. C. B. in Case of Strowbridge v. Archer —— S. P. and this without any new Warrant, because it is for the Plaintiff's Benefit; but otherwise it is if he acknowledges Satisfaction without such Receipt, Arg. Quod futit concessum, per Coke Ch. J. Roll Rep. 366 Patch. 14 Jac. 3 B. R. — See Tit. Actions (T) pl. 1. —— After Judgment the Attorney on Record may receive and acknowledge Satisfaction by Virtue of his former Warrant; per Cur. 12 Mod. 440. Hill. 12 W. & M. Anon.

5. So after Judgment the Attorney of the Plaintiff may acknowledge Satisfaction, upon the Receipt of the Clerks, that it is the common Course. 14 Jac. 2 B. R. said by the Clerks that it is the common Course.

acknowledge Satisfaction by Virtue of his former Warrant. 12 Mod. 440. —— S. P. accordingly by the Clerks, and Doodridge agreed that it might well be, but Coke seemed to contra. Ibid. 567. pl. 19. Patch. 14 Jac. 2 B. R. in Case of Payne v. Chute. —— See Tit. Actions (T) pl. 1.

6. If one Man makes another his general Attorney in all Pleas, * The Course of B. R. is, that if an Attorney enters a Cause no other can intervene without the Consent of the other, or his Death. 2 Roll Rep. 456. Trin. 2 Jac. 2 B. R.

7. A Man recover'd Damages, and had Capias ad Satisfac. against the Defendant for Malice, where the Defendant tender'd the Money in Court, and upon this Summire the Attorney of the Defendant was compell'd to receive the Money, and Superfied that the Warrant of Attorney of the Plaintiff is not expired by the Judgment. Contr. of the Warrant of Attorney of the Defendant, as it is said. Br. Gaunt de Attorney, pl. 48. cites 22 E. 3. Fitzh. Suggetion, 19.

8. In Scire Facias upon a Fine the Tenant made Default, and two Barns and their Fames pray'd to be received in Pyre Uxorum, and the Receipt was refused, and found Surety of Illus, and at the Venire Facias the Processe appeared by Attorney, and the Plaintiff alleged that the one Baron was dead, and demanded Execution of the Money, and the Feame was demanded, and did not come; and it was held clearly that the Warrant of Attorney is expired, and after Writ of the Chancery was flown, rehearsing that they were answered, and that the Baron was dead, and the Feame sick, and commanded them to receive them by Attorney, and because the Writ released the Receipt where the Receipt was refused, therefore it was hold a void Warrant, by which he vouch'd another Warrant in the Chancery, and pending this in Debate the Feame came the next Day, and pray'd to be received, and was received; and the Opinion of the first Warrant's being void was changed, and that it is good for the Feame; as in Quare Impedit by Baron and Feame, who are by Attorney, if the Baron dies the Warrant remains;
mains; and that upon Receipt shall be new Plea, new Issue, and new Process, and that the Preyce cannot sever in Answer. Br. Receipt, pl. 34. cites 7 H. 4. 19.

The Warrant of the Plaintiff's Attorney remains to sue Execution by Fieri Facias or Scire Facias in lieu of No Expedition for Execution, and the Time of Execution to be within the Year, and not after the Year. Br. Attorney, pl. 11. cites 34 H. 6. 31. — Br. Garrant of Attorney, pl. 5. cites 33 H. 6. 49. Br. Charter de Pardon, pl. 11. cites S. C.

And by the Reporter the first Warrant shall not serve to sue Scire facias after the Year. Br. Garrant of Attorney, pl. 2. cites 33 H. 6. 49.

10. And by the Reporter the first Warrant shall not serve to sue Scire facias after the Year. Br. Garrant de Attorney, pl. 2. cites 33 H. 6. 49.

11. Where the Defendant is condemned in Debt at the Suit of the King, and gets Release or Pardon, the Warrant of Attorney is expired to plead. Br. Attorney, pl. 11. cites 34 H. 6. 31.

12. In Precipe quod reddit the Tenant and his Attorney made Default at the Nisi Prius in Paper, and excused it by Increase of Water at the Day in Bank, so that he or his Attorney could not come without Danger of Life; and it was held by some, that this Plea cannot be pleaded by Attorney; for his Warrant is expired by his Default at the Day of Nisi Prius, and therefore cannot be pleaded, but in Person. Quere inde. Br. Garrant de Attorney, pl. 20. cites 38 H. 6. 31.

13. The Plaintiff's Attorney, after Judgment in Debt, cannot acknowledge Satisfaction within the Year; for as to that, his Warrant expires by the Judgment; but his Warrant continues as to bring Execution within the Year, but the Defendant's Warrant utterly expires when Judgment is given. Jenk. 53. pl. 100.

14. Defendant at 8 o'Clock in the Morning gave a Warrant of Attorney to confess Judgment in Debt to the Plaintiff, and at 10 o'Clock, before Judgment sign'd, died; but resolved it was well obtained, it being for a good Debt. Raym. 18. Trin. 13 Car. 2. B. R. Andrews v. Showell.

15. A Warrant of Attorney to confess a Judgment is not revocable, and the Court will give Leave to enter up the Judgment, tho' the Party does revoke it; Per Holt Ch. J. 1 Salk. 87. pl. 6. Hill. 1 Ann. B. R. Oades v. Woodward.


17. A Warrant of Attorney to appear for the Plaintiff in an Action against the Principal was granted to J. S. and the Plaintiff had Judgment, and upon Return of the Sci. Fa. against the Bail appeared by J. S. his old Attorney, who acted as such thro' the whole without having any New Warrant; and upon Execution awarded against the Bail, and Error brought, Holt Ch. J. said, that any one might sue out the Sci. Fa. and therefore J. S. might do it, but that when the Scire Facias is returned, then the Plea began, and a new Warrant of Attorney ought to have been entered, Quod quercns ponit Loco suo &c. for the Warrant to appear in the principal Action is no Warrant to appear in the Sci. Facias against the Bail, because it is a new Cause and a different Record. Judgment was reversed. 1 Salk. 39. pl. 11. Par. 5 Ann. B. R. Burv. Atwood.

(N) What
(N) What shall be said to be a Removal in Fact.

If the Court records that the Attorney is removed, this is insufficient. Fitch, Attorney, pl. 79. cites S. C. and therefore there is no Order of the Removal it was denied him. --- When an Attorney of Record is changed, the Record ought to mention specially that it was by Consent of the Court. 12 Mod. 440. Hill. 12 W. 3. Anon.

2. Where a Man has an Attorney he cannot disavow, him, because he has Warrant of Record, but shall have his Writ de Attornato removendo, or Writ of Disavow if he pleads other Plea than his Master will, or faintly in Disadvantage of his Master, per Alston, Apprentice; but this was clearly denied, and that before Plea pleaded, he may well disavow him to proceed further, and if the Plea be pleaded faintly to have his Writ of Disavow; and to it seems, that after the Plea pleaded, and entered, and recorded, it shall remain, clearly; Quod Nota; and good Reason. Br. Attorney, pl. 37. cites 8 H. 6. 8.

(O) Who may remove him.

1. In a Writ of Ward brought by Baron and Feme by Attorney, the Feme may remove the Attorney without the Consent of the Husband. 21 Ed. 3. 12. adjudged.

because the Feme was nonsuitedit, it was adjudged the Non suit of the Baron and Feme. --- Fitch. Attorney, pl. 91. cites S. C.

Trespass by Baron and Feme, the Defendant appeared in proper Person, and the Plaintiffs appeared by Attorney and counted, and the Defendant summoned to another Term, at which Day the Feme came, and would have disavowed the Attorney; and per Motu the may; for the Feme was Executrix of the first Baron with another who refused, and this Action is brought to make him take the Administration upon him, which is not Reason; but per Prior, the Feme cannot disavow the Attorney put in by her Baron, and it is her Polly, as where she has Leave for Life, and takes Baron, who does Wake &c. & adjournatur, and by him if the Baron pleads, and she comes and pleads another Plea, the Plea of Feme shall be taken. Br. Attorney, pl. 9. cites 53 H. 6. 31.

2. No Man can change his Attorney without Leave of the Court. 12 S. P. accordingly, if the Attorney be on Record. 12 Mod. 440. per Cur. Hill. 12 W. 3. Anon.

3. Plaintiff proceeded against the Principal and Bail, and the Principal ordered an Attorney to appear for them both, and tho' the Bail complained against this, yet the Court would not relieve him, but bid him proceed against the Principal, especially the Attorney being able to answer Damages. 12 Mod. 579. Mich. 13. W. 3. Anon.

(P) The
(P) The Power of an Attorney.

1. If A. acknowledges a Recognizance to B. of 100 l. to be paid at a certain Day, at which Day A. comes and professes the Money in Court, and because B. was in the King's Service, C. his General Attorney comes ready to receive the Money, and swears his Warrant to the Court, which was, that he should be his Attorney in Pleas and Quarrels, and this Recognizance is a Thing determined, which is no Pecul nor Quarrel, therefore his Warrant does not extend to it. 18 Ed. 2. Execution 245. adjudged.

2. And upon such a Recognizance within the Year, such General Attorney shall not have any Fieri Facias against the Constructor, but only a Seire Facias, in which the Defendant may have his Pecul. 18 Ed. 2. Execution 245.

3. Affix against Baron and Feme, who appeared by Attorney, and pleaded in Bar, and at another Day the Baron came in Person, and pleaded Release of the Plaintiff, and was not suffered, because he had made Attorney without the Affent of the Attorney, by which the Attorney assented. Br. Attorney, pl. 103. cites 26 Aff. 44.

4. If an Attorney confesses the Letters Patents to be the Letters of his Master, this shall bind him as well as Confession of Action by Attorney. Br. Attorney, pl. 65. cites 39 H. 6. 32. per Cur.

5. The Attorney's Authority is twofold, viz. expressed in the Warrant, or implied in Law. Co. Litt. 52.

6. The Act of the Attorney shall prejudice his Master in the principal Matter; for if he confesses the Action without the Consent and Will of the Master, this shall bind his Master, but otherwise it is in Collateral Matters; per Mountague and Haughton J. And per Doderidge J. the Act of my Attorney is my own Act. 2 Roll Rep. 63. Mich. 16 Jac. B. R. in Cafe of Gray v. Gray.

7. If the Plaintiff's and Defendant's Attorney do agree to Things in order to the Proceedings in their Client's Cause, which are not manifestly prejudicial, tho' the Clients do afterwards refuse to consent to their Agreement, yet the Court will compel the Performance of it; for as they are Attorneys, the Law allows them to make such Agreement, and if the Clients should avoid them afterwards, it would be mischievous in Delay of Justice; per Roll Ch. J. L. P. R. 49.

8. After Verdict in Trespa in C. B. for the Plaintiff, his Attorney enter'd a Remittit Donna as to Part. It was held that by his being constituted Attorney he has Authority to remit Damages, and that a Re-mittitur need not be by the Plaintiff in propria Person, as a * Retractat must. 1 Salk. 89. pl. 9. Hill. 2 Ann. B. R. Lamb v. Williams.

6 Mod. 82.
S. C. and in Error in
B. R. held accordingly, and the same
Diversity.


( Q ) Punish-
(Q) Punishable for Misdemeanors.

1. A N Attorney was imprisoned, because he appear’d and obtain’d Judgment in a Quare Impediment, without Warrant put in. Br. Attorney, pl. 53. cites 38 E. 2. 8.

2. In Quare Impediment, Attorney appeared for the Defendant, and demand’d the Plaintiff; and non-suited him, and obtained Writ to the Bishop against him, and after because it appeared that he had no Warrant he was committed to Prison. Br. Garrant de Attorney, pl. 12. cites 38 E. 3. 10.

3. The Attorney of the Plaintiff who recovered in Debt, was committed to the Fleet, because he had not put in his Warrant of Attorney before pl. 5. Mich. 15 W. B. 4. R. per Holt to the Fleet, as it he takes a Reward to raise a Record, or cause another Attorney to appear to the other side, and confes the Action &c. per Hobart Ch. J. Hob. 9. pl. 18. Mich. 11 Jac. C. B. in Case of Yardley v. Ellis. Cumb. 2. Mich. 1 Jac. 2. B. R.

4. An Attorney may receive a Bribe of his own Client, when the Reward exceeds Measure, and the End of the Cause of Reward is against Justice, as it he takes a Reward to raze a Record, or cause another Attorney to appear to the other side, and confe the Action &c. per Hobart Ch. J. Hob. 9. pl. 18. Mich. 11 Jac. C. B. in Case of Yardley v. Ellis.

5. Attorney gave a Sheriff’s Directions in Writing what Persons to return on a Jury, and what not, for this Offence he was picked over the Bar. Mo. 882. pl. 1237. Pauch. 13 Jac. Hanfon’s Café.

6. Attorney procures erroneous Judgment for his Client, or cannot have Action on the Café against him for it, unless he has procured it by Practice; Per 2 Jutl. Roff. R. 403. pl. 48. Trin. 16 Jac. B. R. in Case of Gibfon v. Mudford.

7. In Trespaft after Issue joined the Plaintiff did not proceed, but retained another Attorney, who altered the Paper Book, by putting in a new Plea for the Plaintiff and also for the Defendant, by adding &c. in Practice Defenders timbiter, without Motion, or the Defendant’s consenting, and so made the Issue different from what it was. The Court were minded to strike the Attorney out of the Roll, for thus altering the Plea after Nifi Prius, and Notice given for the Trial, for tho’ it may be altered before it be entered, yet the Court is to be moved, and the Defendant to have Coils. 2 Roll Rep. 439. Mich. 22 Jac. B. R. Sulliard’s Café.

8. The Statute of Merston, cap. 10. gave Power to make Attorneys in any Court; cites Com. 236. but the Attorney must look at his Peril that that to be doth be a lawful Act. Godb. 387. Arg. Pauch. 3 Car. B. R.

9. An Attorney prosecuted three several Actions of Debt, every one of which being above 45l. and so fisible to the King, and procured Judgments to be entered on all of them, no Original being sued forth, but the Attorney had received the Charges, as if they had been sued forth, and also the Fines due to the King; it was ordered that this being done voluntary, and against his Oath, which is, that he shall not Practice any Deceit, he should be put out of the Roll, and cast over the Bar, and commit- red to the Fleet, but he was not fined, being poor. Cro. Car. 74. Trin. 3 Car. C. B. Jeron’s Café.

cov. 20. says that to sue out a Capis without an Original is a Collusion in Deceit of the Court mentioned in that Statute, and cites 26 H. 6. 57.

4 I 11. C.
12. C. was in Execution on a Judgment; the Plaintiff's Attorney without Consent of his Client, acknowledged Satisfaction on this Judgment; afterwards the Defendant's Attorney without Consent of his Client, acknowledged another Judgment for the same Debt. The Parties were left to their Remedies against each other, but both the Attorneys were committed for false Practice. Sty. 129. Mich. 24 Car. R. R. Cage's Case.


15. Attorney is not compellable to appear for any one, unless he takes his Fee, or backs the Warrant, and then the Court will compel him; per Cur. 1 Salk. 87. pl. 4. Trin. 11 W. 3. B. R. Anon.

16. H. an Attorney of the Court, informed his Client that he had entered up Judgment two Years before, but could not sue Execution, by Reason of a Writ of Error pending, when in Truth there was no Judgment entered, and for this notorious Practice was ordered to answer Interrogatories; and here it was agreed, that if Interrogatories be not exhibited in a Week, the Recognizance entered into for answering them is discharged of Costs. It was likewise agreed by Court, and Sir Samuel Alytree, Master of Crown Office, that in all Cases the Party has 4 juridical Days to answer the Interrogatories, tho' they be exhibited in Vacation; but if it does not answer in that Time, he is to be committed upon Motion. 12 Mod. 110. Mich. 11 W. 3. Holland's Case.

16. It is a great Misdemeanour in an Attorney to take a Warrant of Attorney to enter Judgment on a Bond without a Defeance; and none but a sworn Attorney can take such a Warrant, per Holt. 12 Mod. 598: Pech. 12 W. 3. Anon.

17. If one Attorney gives Leave to another to practice in his Name, he shall answer for all the Villanies and Practices as he shall act in his Name; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. Anon.

18. Motion for an Attachment against an Attorney, for procuring a Tenant to be turn'd out of Possession, by getting another to perfonate him on whom he delivered a Declaration in Ejectment. See 6 Mod. 16. Mich. 2 Ann. B. R. Holderstaff v. Saunders.

19. If there are 2 Defendants and 2 Attorneys, and one Attorney assigns Error &c. without Authority from both, the Court cannot help him; but he must take his Remedy against the Attorney. 6 Mod. 40. Mich. 2 Ann. B. R. Shepherd v. Orchard.

20. Attorney was ordered to answer Interrogatories for foul Practice, for oppressing the Defendant by threatening to take him by a Warrant from the Chief Justice, and by Colour thereof getting Money from him, and a Note under his Hand to pay more for not sending him to Newgate, for a Trespass pretended to be done to his Wife. 8 Mod. 109. Mich. 9 Geo. 1. Wright v. Mafon.

21. Plaintiff's Attorney, after Writ of Error brought, artfully delaying signing his final Judgment till the Writ of Error was spent, and then brought an Action of Debt upon the Judgment. The Court ordered Proceedings in the Action upon the Judgment to be stay'd, and a new Writ of Error to be brought at the Plaintiff's Attorney's Expence. Barnes's Notes in C. B. 175, 176. East. 8 Geo. 2. Arden v. Lamley.

22. 12 Geo. 1. cap. 29. S. 4. If any Person convicted of Forgery, or of wilful and corrupt Perjury, shall practice as an Attorney, Solicitor, or Agent, in any Suit or Action in any Court of Law or Equity within England, the Judges of the Courts where such Suit or Action is brought, shall, on Complaint or Information thereof, examine the Matter in a Summary Way in open Court;
Attorney.

Court; and if it shall appear to the Satisfaction of such Judges that the Person complained of hath offended, contrary to this Act, the Judges shall cause such Offender to be transported for 7 Years to one of his Majesty's Plantations in America, in such manner and under such Penalties as Felons are by Law to be transported.

(R) Actions by him for his Fees.

1. Bill of Privilege is brought by Attorney of Debt due by his Client. He shall be named Attorney in the Bill. 'Contrary to this Act.' Br. Bille, pl. 29, cites 3 E. 4. 26.

2. 3 Jac. 1. cap. 7. No Attorney or Solicitor shall be allowed any Fee given As to the to a Serjeant or Counselor, or Money given to the Clerks in any of the Courts having a Ticket of Charges, this Statute does not extend to a Special Action upon a Promissory Note.

Defendant pleaded the Stat. 5 Jac. 5, against an Action brought by an Attorney, That he had not given a Bill of Charges; and asked him to work his own Gain, or demand by his Bill any Sum be hath not laid out, the Party greved shall have his Action against him, and recover his Costs and treble Damages; and such Attorney or Solicitor shall be discharged from practising any more.

The Statute may as well be pleaded to an Indebitatus Assumpsit as to an Action of Debt, unless a Special Promissory Note be laid; but to a Special Promissory, or an Infinitum Computaffet it is no Plea; per Cur. 1 Salk. 86. pl. 1. Hill. 2 W. & M. B. R. Berkerhead v. Panthaw.—Show. 66. S. C.

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3. An Attorney brought an Action of Debt upon 8 several Retainers. An Attorney in all of which, except 3, the Defendant had retained him to be Attorney for another. Quondam Placernet the Plaintiff and Defendant capiendo his Fees and Expenses of Suit of the Defendant, and the other 3 Retainers were in the Defendant's own Actions. After Judgment for the Plaintiff, he undertook to prosecute a Suit for another, and promised to pay his Fees, and was overruled upon reading the Record that the Defendant retained him Capiendo of him the Fees, which made it a good Contrat, and therefore the Action well lies. The Judgment was affirmed.

brought all house.

the Court

held, that Debt lies not here but Cafe only, for the Retainer being for another Man who agreed there-
to, there is no Cause of Debt between him who retained and the Attorney, and no Contraft or Con-

erufion to ground this Action, but he may well have Debt againft him for whom he was retained; and

to Judgment was reversed. Cro. Car. 195. pl. 4. Trin. 6 Car. B. R. Sands v. Trevilian.——This

Cafe was denied to be Law; for the cafe of N. N's Cafe will not raise a Controft from J. S.
yet an express Promife from J. S. to pay the Solicitation of J. N's Cafe will make it a Debt, and

the Ch. J. said, he thought Roll's Argument in the Cafe of Sands v. Trevilian not to be answered.

2 Show 421. pl. 5. Hill. 35 & 37 Car. 2. B. R. in Cafe of Anibroth v. Roe, where it was held

that an Indebitatus lay. ——Skin. 217. S. C. accordingly. ——An Indebitatus Affirmpt will not

lie for being an Attorney to a 3d. Perfon, because in that Cafe his being Attorney on Record is what in-
titles him to Debt; and therefore if another promises to pay, yet he for whom he is Attorney on Re-
cord is not discharged, and therefore the other cannot in that Cafe be liable to an Indebitatus; Per

Holt Ch. J. 7 Mod. 139. Hill. 1 Ann. B. R.

4. Attorney brought an Indebitatus Affirmpt for Fees, and says not in what Court the Fees were, and yet it was held good; for pro Opere & Labore hath been allowed. Cumb. 337. Trin. 7 W. 3. B. R. Anon.

5. No Rule ought to be made for referring an Attorney's Bill delivered to his Client, unlefs there be an Action pending thereon. 1 Salk. 332. pl. 8. Paflch. 9 W. 3. B. R. Springate v. Springate.

6. An Attorney of B. R. fined in the Sheriff's Court for his Fees, and

upon Motion he was allowed to refer it to the Matter; for that his Perfon is under the Power of the Court. 12 Mod. 251. Mich. 10 W. 3. Beal's Cafe

7. Executor of an Attorney brought an Action for Fees, and Law-

Bulfines done by his Tettator. The Defendant moved to have the Plain-
tiff's Demand referr'd to the Matter; but denied, because all the Buff-

ines was done in another Court; otherwife had it been done in this Court,
or partly in this; besides the Plaintiff was Executor. 1 Salk. 59. pl. 10.

Paflch. 5 Ann. B. R. Gregg's Cafe.

8. Attorney encourages A. to sue B. and tells him if he will let him pro-

cede B. it shall not cost him a Farthing, yct after Bulfines done Action

lies for the Attorney againft A. Per Lyre Ch. J. in C. B. 1726.

9. 2 Geo. 2. cap. 23. S. 22. Enacts, That no Attorney or Solicitor of any

of the said Courts shall commence or maintain any Action for Fees, Dis-

bursements at Law or in Equity, till the Expiration of one Month after he

shall have delivered to the Party, or let for him at his Dwelling-

House, or last Place of Abode, a Bill of such Fees &c. written in a com-

mon Hand, and in English, (except Law Terms and Names of Writs) and in

Words at Length, (except Times and Sums) which Bill shall be subsi-

dered with the proper Hand of such Attorney or Solicitor; and upon Application of the Party chargeable by such Bill, or of any other Person in that Behalf au-

thorized, to the Lord Chancellor or the Master of the Rolls, or any of the

Courts aforesaid, or to a Judge or Baron of any of the said Courts, in which

the Bulfines contained in such Bill, or the greatest Part thereof in Value shall

have been tranfacted; and upon the Submiufion of said Party, or such other

Person authorized to pay the Sum that upon Taxation shall appear to be due,

it shall be lawful for the Lord Chancellor &c. to refer the said Bill (to be

no Action or Suit shall be then depending in such Court touching the same,) to be

taxed by the proper Officer, without any Money being brought into Court; and

if the Attorney or Solicitor, or the Party chargeable by such Bill, having due

Notice, neglect to attend such Taxation, the Officer may proceed to tax the Bill

Ex parte, (pending which Reference and Taxation no Action shall be pro-

ceded touching the said Demand) and upon Taxation of such Bill the Party

shall pay to the Attorney or Solicitor, or to any Perfon by him authorized, that

shall have been present at the Taxation, or as the Court shall direct, the Sum

which shall be found due, which Payment shall be a Discharge of the Bill,

and in Default thereof the Party shall be liable to an Attachment or Proceeds of
What Pleas the Defendant may plead after his making an Attorney.

1. In Replevin of Beasts, notwithstanding that the Defendant has made Attorney against the Plaintiff, yet he may say after, that the Plaintiff is his Vilein. Thel. Dig. 207. lib. 14. cap. 6. S. 1. cites 3 E. 3. 69. 101. and Pack. 29 E. 3. 34.

2. In Writ against the Warden of an Hospital and two Freres, the Freres after they had made Attorney were received in proper Person to plead to the Writ, because they were not named Confreres to any. Thel. Dig. 207. lib. 14. cap. 6. S. 2. cites Mich. 6 E. 3. 278.

3. And in Dower against a Guardian, after that he has made Attorney, he may say in proper Person that he is not Guardian. Thel. Dig. 207. lib. 14. cap. 6. S. 3. cites Hill. 8 E. 3. 383.

4. And so may he do in Affile of Mortdancescor. Thel. Dig. 207. lib. 14. cap. 6. S. 1. cites 22 All. 4.

5. After making an Attorney in a Personal Action, the Defendant cannot say that there are two others of the same Name within the County as he is, and demand Judgment of the Writ, because the Plaintiff has not given a Diversity of Names. Thel. Dig. 207. lib. 14. cap. 6. S. 4. cites Pack. 28 E. 3. 94.

6. It is held for Law, that after making an Attorney, the Defendant in proper Person cannot plead Misthink or himself; but otherwise it is if be within Age at the Time that he made Attorney. Thel. Dig. 207. lib. 14. cap. 6. S. 5. cites Mich 3 H. 6. 16. 32 H. 6. 36. and 19 H. 6. 2.

7. Where a Man appears as Attorney for a Corporation which is misnamed, and impares, they shall not plead Misthink in Abatement of the Writ after, notwithstanding that he has not put in his Warrant; for the Court compelled him to have Warrant, and if the Party comes and tenders to disallow him, this shall not be admitted, but he shall have Action upon the Cause against the Attorney, and the Corporation was not suffered to put Warrant in according to their true Name; Quod Nota. Br. Garrant de Attorneys, pl. 15. cites 15 H. 7. 14.

8. Action against the Dean and Chanoons of the Chapter of St. S. in Walthamstow, they appeared by Attorney and impared, and after came and said, that they were founded &c. [by the Name of] St. Mary and St. Stephen &c.
Judgment of the Writ; and by all the Justices he shall not have the Plea, and theo' there be no Warrant in, the Court shall compel the Attorney to put in Warrant. Br. Attorney, pl. 49. cites 15 H. 7. 14.

(T) Pleadings. What Pleas Attorney may plead. And what shall be said contrary to his Warrant.

Where one is made General Attorney, according to the Name and Surname of his Master, he may plead Misnomer of his Master. Thel. Dig. 200. lib. 15. cap. 15. S. 3. cites Mich. 6 E. 3. 278. Quære.

1. In Dover against a Guardian of the Land and Heir &c. the Tenant by Attorney cannot plead that he has nothing but only for Term of Years the Lease of such a one who is Guardian &c. Judgment of the Writ &c. Thel. Dig. 200. lib. 13. cap. 15. S. 2. cites Hill. 8 E. 3. 383. per Opinioinem.

2. In Formidon against A. and Jo. one Ro. answered as Guardian for A. and as Attorney for Jo. and took the entire Tenancy severally for each of them, abique hoc that the other any thing had &c. and it was said that he may well do so, notwithstanding that he be the same Person. Thel. Dig. 200. lib. 13. cap. 15. S. 4. cites Hill. 12 E. 3. Attorney 71.

3. In Trefpals against Jo. Bereforde, and Jo. the Son of Adam Bereforde. Jo. Bereforde by Attorney was received to say, that he and Jo. the Son of Adam was the same Person, and Jo twice named &c. but otherwise it should be if the Attorney had his Warrant of Attorney for Jo. Son of Adam Bereforde also &c. Thel. Dig. 201. lib. 13. cap. 15. S. 5. cites Patch. 17 E. 3. 24.

4. In Writ against the Prior of Wigorn' it was pleaded by Attorney, that there was the Prior de Freres Preachours, and there the Prior de Notre Dame in Wigorn' Judgment of the Writ for Non-certainty &c. and it was held good, per Cur. Thel. Dig. 201. lib. 13. cap. 15. S. 8. cites Mich. 25 E. 3. 48.

5. Affise against a Feme, and her Attorney pleaded, that she was Covert Baron, her Baron not named; Judgment of the Writ &c. and same said, that the Attorney shall not have the Plea, but the Affise was awarded thereupon; Quod Nota; and fo he had the Plea. Br. Garrant de Attorney, pl. 23. cites 26 Aff. 18.

6. The Defendant by Attorney pleaded that the Plaintiff is Villain regardant to his Manor &c. and held good, but it seems that he was his General Attorney in all Pleas, who might well plead such Plea. Thel. Dig. 201. lib. 13. cap. 15. S. 10. cites Trin. 31 E. 3. Attorney 68. and fays, it is a good Plea by Attorney. 39 E. 3. 47. 22 Aff. 4.

7. In
8. In Precipce quod reddat, per Finch & Monbr. a Man shall not say by Attorney that he is a Villein, and holds in Villeinage of f. not named, for Attorney; contra in Person. Br. Attorney, pl. 15. cites 41 E. 3. 8.

9. But in Trespafs the Defendant was permitted to confess that he is Trespassor, the Plaintiff, by Attorney, Quod mirum. Br. Attorney, pl. 19. 201. Lib. 13. cites 44 E. 3. 2.

10. A Prior by Attorney was received to plead that his Master was Trespassory Commissary to such an Abbot, removable at Will, who has no Covert, nor an Abbey and College, nor common Seal &c. Thel. Dig. 201. Lib. 13. cap. 15. S. 12. cites Mitch. 44 E. 3. 32.

11. In Merridance for, the Defendant by Attorney may say that the Demandant is a Bostard. Thel. Dig. 261. Lib. 13. cap. 15. S. 13. cites Patch. 9 H. 5. 6.

12. Where the Defendant is supposed to be of one Vill, he cannot say by Attorney that he was never abiding at this Vill, but at another Vill. Thel. Dig. 201. lib. 13. cap. 15. S. 13. cites Patch. 9 H. 5. 7. and 8 H. 6. 9. 19 H. 6. 1. 9 E. 4. 30. 48. and 3 H. 6. 16.

13. Attorney may plead all that enlarges the Name of his Master, and as in Writ that stands with the Record, but nothing that is contravert to it. Br. Garratt de Attorney, pl. 41. cites 2 H. 6. 11.

14. And may say that his Master is a Knight, not named Knight, Judgment of the Writ. Br. Garrant de Attorney, pl. 41. cites 2 H. 6. 11.

15. But Attorney cannot plead which diminishes the Name of his Master. Br. Attorney, pl. 3. cites 2 H. 6. 11.
16. Guardian of an Infant may plead that which is contrary to the Record or Name, for he is admitted Guardian by the Court: Contra of Attorney, for he is made Attorney by the Party. Br. Garrant de Attorney, pl. 50. cites 3 H. 6.

17. In Debt, it was agreed per Cur. that the Attorney of the Defendant shall not plead Misdemeanor of the Plaintiff, no more than Misdemeanor of his Master, for the Name of the one and the other is comprised in his Warrant, sicilecit, A. B. posit Loco suo J. S. against M. P. Br. Misdemeanor, pl. 5. cites 3 H. 6. 55.

F. N. B. 27. (A) cites Patch. 41 E. 3. and Mich. 45 E. 2. Pitch, Attorney, 52. The Defendant should not plead Misdemeanor in Abatement by Attorney, and such Pleas might be refused; but the receiving it is no Cause of Demurrer: per Holt Ch. J. 12 Mod. 275. Hill. 11 W. 3. Cresmor v. Wielker.

18. The Defendant by Attorney cannot plead the Misdemeanor of the Plaintiff; for in Warrant of Attorney is comprised the Name as well of the Plaintiff as of the Defendant, per tot. Cur. Thel. Dig. 201. lib. 13. cap. 15. S. 15. cites 3 H. 6. 56.

19. In Action upon the Statute of Liveries, the Defendant made Attorney, and was named of C. and therefore he could not say after in proper Person that he abode at S. the Day of the Writ purchased, and always after, and not at C. Quod nota. Br. Garrant de Attorney; pl. 13. cites 8 H. 6. 19. per Cur.

After the Statute of Additions where the Defendant is supposed to be of Dale, he may plead by Attorney, that there are two Dates, and not without Addition &c. for this is not repugnant to the Warrant of Attorney. Thel. Dig. 201. lib. 15. cap. 15. S. 12. cites Hill. 8 H. 5. 8. 16 H. 6. 27. 19 H. 6. 56. 35 H. 6. 5. 22 H. 6. 49. 39 H. 6. 49. 18 E. 4. 10. 22 E. 4. 1. per Judicium. 21 E. 4. 57. 61. and 5 E. 4. 47. but contr. it is said, 9 H. 5. 8. and 15 H. 7. 4. and 2 E. 4. 51. and 2 R. 3. Efflopp. 51.

Debt by J. D. of D. He made Attorney, and yet was permitted to plead that there is a Place called D. in the Wills of R. in the County aforesaid, oblige bee that there is any Vill, Hamlet, or Lien comes out of the Vill and Hamlet called D. in the same County, and had the Place; quod mirum, because it forms that it is contrary, and does not stand with. Br. Garrant de Attorney, pl. 14. cites 21 H. 6. 46.

Thel. Dig. 201. lib. 15. cap. 15. S. 17. cites S. C. 35 H. 6. 5. and 15 H. 7. does not stand with, for the one is contrary to the other, for all is his Name. Br. Garrant de Attorney, pl. 42. cites 35 H. 6. 5.

S. P. Br. Attorney, pl. 49. cites 15 H. 7. 14. And in Writ against the Abbey of Sempringham, he shall not say by Attorney that his Name by the Foundation is Abbey of the Abbey beata Marie de Sempringham. Thel. Dig. 201. lib. 15. cap. 15. S. 17. cites Mich. 8 E. 4. 9.

And there 23. Contra of Over D. and Nether D. for this is only Addition and not Parcel of the Name. Br. Garrant de Attorney, pl. 42. cites 35 H. 6. 5. 7. 14. of the College of St. Stephen's of W. Ibid.
24. In Debt against J. W. of London, the Attorney cannot plead that the Defendant abides in the Tower of London, which is not Parcel of London.

25. Trespass against J. B. of &c. and the Warrant was J. B. of Pa.

26. Entry against the Abbot of S. who said by Attorney that it is founded by the Name of Abbatis Beatricis Marie de S. and because this Plea is contrary to his Warrant of Attorney, therefore by all the Justices non allocutur, and the Defendant agreed to answer.

27. But where his Master is named J. S. of D. he may say that there Debt against are two D's, and none without Addition; for this is Addiction, and no J. S. of D.

28. But it was said, that by special Warrant, as W. S. who is here impeached by Name of J. S. Pofuit Loco suo &c. there he may have the Plea; Quære inde of Misprision of a proper Name of Baptism. Br. Garrant de Attorney, pl. 33. cites 8 E. 4. 9.

29. It is laid, that Attorney who has special Warrant shall plead Misnofer of his Master, in such Form, viz. W. S. who is impeached by Warrant of Name of W. B. Po. Lo. suo &c. The Dig. 201. lib. 13. cap. 15. S. 17. cites Mich. 8 E. 4. 9. but says, that such Warrant was not admitted shall be general. Per Cur. Mich. 5 E. 4. 108. but says it was granted per tot. Cur. that such special Warrant is good, and that such Attorney shall plead Mifonfer.

30. In Trespass by an Abbot, if the Defendant by Attorney pleads that the Abbot was deposed after the last Continuance before J. N. this is a good Plea for the Attorney, and not contrary to his Warrant; for his Warrant was good once that the Defendant put in D. C. against the Abbot of 4. 25. S. P. M. Br. Garrant de Attorney, pl. 16. cites 9 E. 4. 29.

31. And he may plead that he is dead. Ibid.

32. Dower against a Guardian who made Attorney the last Term, and pursuant, and at the Day came the Attorney, whose Warrant was Quod fuit concelsum, per tot Cur. Br. Garrant de Attorney, pl. 39. cites 21 E. 4. 15.
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Attorney.

4. 34. 42. S. C. S. C. to forthcoming.
and now the Attorney said that at the Day of the Writ purposed, nor after the Defendant was not
Guardian, Judgment of the Writ, and was oulled of the Plea by Award, because it is contrary to the Warrant. Br. Garrant de Attorney, pl. 17. cites 9 E. 4. 31.

Thel. Dig. 33. And yet it was agreed that by Attorney a Man shall plead in Debt Ne unques Executor, or Ne unques adminis-tered as Executor, insasmuch as the Administration there is only the Effect of the Matter. Ibid.
201. lib. 13. cap. 15. S. 19. cites Mich. 9 E. 4. 32.4. 43. S. C.— Br. Garrant de Attorney, pl. 18. cites 9 E. 4. 42. that he may plead such Plea, because it is in Bar. — Thel. Dig. 201. Lib. 13. cap. 15. S. 22. cites 9 E. 4. 43. S. C.

Thel. Dig. 34. And per Choke, in Debt against J. Filium & Heredem W. B. if he makes Attorney he cannot plead after that he has an elder Brother, or that he is a Bastard. Ibid.
201. lib. 13. cap. 15. S. 19. cites Mich. 9 E. 4. 35. 42. S. C.

Thel. Dig. 35. And in Debt against Administrators, the Attorney cannot say that the Administration was not committed to him. Br. Garrant de Attorney, pl. 17. cites 9 E. 4. 31.
201. lib. 13. cap. 15. S. 19. cites Mich. 9 E. 4. 32.4. 43. S. C.—But in Writ by one as Administrator, the Defendant by Attorney may say, that the Administration was not committed to the Plaintiff. Thel. Dig. 201. lib. 13. cap. 15. S. 13. cites Pasch. 9 H. 5. 6.


37. Debt against Executors who appeared by Attorney, who imparted to another Term, and at the Day came and said, that he died intestate, and the Administration was committed to him by the Ordinary; Judgment of the Writ as Executor, and per tot Cur. he is stopped by the Warrant of Attorney and the Imparlance; for this is in a Manner but Misnomer. Br. Garrant de Attorney, pl. 18. cites 9 E. 4. 40.

38. In Writ against a Prior he shall not say by Attorney that he is despoled, unless it be after the last Continuance. Thel. Dig. 202. lib. 13. cap. 15. S. 23. cites Mich. 18 E. 4. 20.

39. In Quare Impedit against several the Plaintiff counted, and the Defendants imparted by Attorney, and after one said that there is no such R. S. as one of the Defendants the Day of the Writ purchased, nor ever after; and by the Opinion of the Court, if the Warrant was joint, none of them shall have the Plea; but if several Warrants were sent, then every one shall have the Plea, but the Attorney who was not in Este; for it is contrary to his Warrant. Br. Brief, pl. 384. cites 20 E. 4. 1.

40. An Attorney who is informed to plead a Matter which he cannot plead by Conscience, he may plead that Non est verater Informatus &c. and this is sufficient for him in Writ of Difect against [brought by] his Client. Br. Attorney, pl. 76. cites 20 E. 4. 9.

41. Debt against J. W. of C. The Defendant appear'd by Attorney, and impart'd, and at the Day said there is East C. and West C. and none without Addition, Judgment of the Writ; and per tot Cur. he shall have the Plea if it be upon an Obligation, because it stands with the Warrant. Br. Garrant de Attorney, pl. 43. cites 21 E. 4. 1.

42. Contro per tot. Cur. if be be named of C. in the Obligation, and the Reason seems to be, insasmuch as he shall then be eitopp'd to say that there is no C. without Addition. Quod nona. Ibid.

43. In Debt against J. S. of D. the Attorney cannot plead that the Defendant the Day of the Writ purchased was at F. absque hoc that he was ever
(U) Where several Attorneys are for the same Defendant, in what Case they may plead several Pleas.
2. In Formedown by the Ld. Brook against the Ld. Latimer, the Tenant made two several Attorneys, and the one demanded the View, and had it, and at the Day the Tenant and the Attorney who demanded the View made Default, and the other Attorney cast Eiſſign; and per Yaxley, the Eiſſign does not liſt, for the Tenant has an Attorney who is not eiſſign'd. But per Cur. the Eiſſign cast by the one shall excuse the Default of the Tenant, and of the other Attorney; and per Coningsby, he who will have two Attorneys in C. B. ought to put in two Warrants of Attorney; for one Warrant Conſunftim & Diviſimus is not used there. And per Brian, where a Man has two Attorneys, and the one pleads one Plea, and the other another Plea, this shall be taken a Double Plea, and so the Demandant may demur, and after the Tenant dared not demur, but appear'd; and it was said there, that 18 H. 6. 20. and 11 H. 4. 53. and 13 R. 2. the Tenant durst not demur in the like Cafe, but appear'd as here; ſo quære. Br. Attorney, pl. 72. cites 12 H. 7. 8.

(W) What may be done by Attorney.

This Statute extends not to Suit
Real. 2
Inf. 99.
The Solicitor must make a Letter of Attorney under his Seal. 2 Inf. 100.

9 Rep. 76 b. 2. One may do that himſelf which he cannot do by Attorney, as the Lord may beat his Villain, but a Stranger cannot do it for the Lord; and the Lord may diftrain for Rent when it is not behind, and the Tenant shall not have Trefpaſs; but if the Bailiff diftrain when no Rent is due, Trefpaſs lies against him. Arg. Godb. 387. cites 2 H. 4. 4. 23 E. 5. 9 H. 7. 14.

Because it is not a Leafe of the Land, but a Declaration of the Power which is Personal to him. 9 Rep. 76. in Comb's Cafe, cites it as resolved by Wray and Anderſon Ch. J. at Suffolk Aſſizes, 24 Eliz. first Ue, and the Leafe comes in upon original Agreement, upon the first Leafee; per Jones J. Palm. 436. in Cafe of Hardwin v. Warner, cites Comb's Cafe, and 8 Rep. Whitlock's Cafe.

2 Roll Rep. 4. There are some Things Personal, and fo infeperably incident, that they cannot be done by Attorney, as doing of Homage and Fealty. 9 Rep. 76. Trin. 11 Jac. in Comb's Cafe.

5. At Common Law a Man might levy a Fine by Attorney, as well as confefs an Aſſion, and the Attorney himſelf might enter and record it, tho' the Party did not make Conſuſe, and of this great Mischief follow'd, and often times Diſhiron, and therefore it was ordained by the Statute de Finibus & Aſſor. that a Fine shall not be levied before that the Parties went before the Juſtices in proper Perfon, fo that the Juſtices may have Conſuſe of their Age, and other Deſtaits; yet at this Day a Man may take Eſtate by Fine by Attorney, alfo a Man may take a Grant, and render by Fine by Attorney, as in proper Perfon. Denh. R. of Fines 7.

6. And
Attornment.

6. And the Baron and Feme may take Estate by Fine by Attorney made by the Baron; but this shall not bind the Lord to claim other Estate after the Coverture dissolves. Denh. R. of Fines 7.


8. Errors on a Judgment in Ireland, were allowed by the Court to be assigned here by Attorney. 11 Mod. 257. pl. 11. Mich. 8 Ann. B. R. Anon.

Done in the Case of York v. Medley.

Form one of Attorney in General, See Infant, Guardian, Privilege, and other proper Titles.

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Attornment.

This Head of Attornment being now become of very little Use, and a long Title, I have chose to leave out both the Text of Roll and the many Notes thereupon, and shall only add what follows.

1. A ttornment is the Consent of the Tenant to the Grant of the Seigniory or the Reversion, putting him into the Possession of Services due from such Tenant. The Reasons are threefold, 1st, From the ancient Feudal Law, when the Seignories subsisted in their ancient Clans they used to be continually contending with each other, and it was frequent in those Times to make Peace upon amicable Concessions to each other; but if upon such Grants they should have subjected any Feudaries to the other Lord, it might have been to the infinite Prejudice of such Tenants; for tho' such contending Lords might agree, yet the Grudge might continue to the Tenants, and therefore the Policy of that old Law was, that their Fealty was not to be carried over to any other without their Consent, from whom they might expect Oppression rather than Protection. 2dly, That the Tenants might know to whom the Rents and Services were due, and to distinguish the lawful Distresses from the corious Taking of his Cattle; and this Reason was so prevalent, that when the Law gave a free Alienation in respect of the superior Lord, yet the Tenant's Right of Attornment continued unaltered. 3dly, That by the Tenant's lawful Payment to the Grantee of such Seigniory or Reversion, he might be put into Possession of such Seigniory or Reversion; and that by the Payment of such Rents, and doing such Services, which anciently lay in going to the Wars with their Lords, and plowing their Grounds, all Men might know in whom such Rights were vested; and here the most general Rule is, that the Tenant cannot alter the Grant, but only attorn to it, and by such Attornment can make no Variation in the Grant itself; for the Tenant has no Right to the Reversion, and therefore cannot alter the Disposition of it one Way or the other, but he has not Right to the Possession, and therefore can put whom he pleases into that Possession which he has in him. Gilb. Treat. of Ten. 75, 76.

2. 4 Ann. cap. 16. S. 9. All Grants or Conveyances, or otherwise of any Menors or Rents, or of the Reversion or Remainder of any Messuages or Lands, shall be good without Attornment of the Tenants.

3. S. 10. Provided that no such Tenant be damaged by Payment of Rent to any such Grantee or Confer, or by Breach of any Condition for Non-payment of Rent, before Notice given him of such Grant by the Conserver or Grantee.

4 M 4. 11.
4. 11 Geo. 2. cap. 19. S. 11. Attoornent of Tenants to Strangers, claiming Title to the Estate of their Landlords, shall be absolutely Nul and void to all Intents and Purposes whatsoever, and the Possession of their respective Landlord or Landlords, Lesser or Lessors, shall not be deemed or construed to be any wise changed, altered, or affected, by any such Attoornent or Attoornents, provided always that nothing herein contained shall extend to vancate or affect any Attoornent made pursuant to, and in Consequence of some Judgment at Law, or Decree, or Order of a Court of Equity, or made with the Privity and Consent of the Landlord or Landlords, Lesser or Lessors, or to any Mortgagee, after the Mortgage be become forfeited.

* Audita Querela.

(A) In what Cases a Thing may be avoided without an Audita Querela.

1. If a Tenant leaves for Years [to B] reserving a Rent, and after acknowledges one Statute to J. S. and another Statute to J. D. and after J. S. accepts a Lease of Years of the Reversion [and Rent reserved on Lease to B.] of the Conuise, and then J. D. who hath the Vnique Statute extends the Reversion and Rent; and after J. S. extends it also upon his Statute, and for the Rent are brings an Action of Debt against [B] the Lessor; [B] the Lessor without an Audita Querela may avoid his Extent by pleading that his Statute was suspended by Acceptance of the Lease of the Reversion. Patch, 16 Jac. B. R. between Sir F. Harrington and Garwaye, was judged upon a special Verdict.

2. If a Sus=fe[or acknowledges a Statute, and after the Sus=fe enters, and the Conuise extends the Statute, the Sus=fe without an Audita Querela may avoid it, because there is no Right of an Extent. Patch, 16 Jac. B. R. in Sir F. Harrington and Garwaye's Cafe, per Houghcon.

3. If Tenant in Tail acknowledges a Statute and dies, and the Conuise files Execution against the Issue, the Issue may avoid it in an Issue without any Audita Querela. 18 Ed. 3. Issue 77. adjudged.
the Way to do it would be by Audita Querela, because there was no Time to plead it before. — S. Brown, 224. Coke v. Bar. S. C. But S. P. does not exactly appear — S. C. cited Mo. 311. pl. 351. but S. P. does not appear; but says it was adjudged by all the Justices, that Land in ancient Demise is extendable.

6. If a Man sues an Elegit for a Debt recovered, and hath certain Lands in Extent upon the Elegit, and after he suggests that the Recovered had other Lands in the County, and thereupon had a new Elegit, and upon this the other Land is extended; this last Extent, at the most, is but voidable by Error, and not void. Sic. 262. El. R. between Hunger and Frie adjudged, which Intracut Bill. 35 El. Rot. 246.

7. If A. acknowledges a Recognition in Nature of a Statute Saeple to B. and after B. dies, and C. his Executor sues an Extent out of Chancery, and before this is executed C. dies, and after Administration of the Goods of B. not administered by C. is granted to D. and after, and before the Return Day of the Extent of Execution, the Extent is executed, and the Land of A. extended, and filed into the King's Hands, according to the Command of the Writ; and after D. sues a Writ Liberate, and thereupon the Land is delivered to him in Extent, this is all void without having any Audita (*) Querela, for by the Death of C. the Executor, before the Inquisition taken, the Writ of Extent was de facto abated, in as much as it was the Writ of C. the Writ commanding the Sheriff to extend and file into the King's Hands, ut e preato Executores quousque &c. Liberati existat &c., and then which was done upon this Foundation was all void, and the Administrator not being prior thereto, but coming in Part, mount thereto. 31. 11 Car. S. R. between Vere and Cleve, per to- ram Curiam, prater Coke, who seemed c onera, adjudged upon a solemn Argument upon a special Device, Intracut. Car. 11. Rot. 1378.

Plaintiff; and Brampton Ch. J. (then absent) delivered his Opinion to Jones J. to be the Same; but
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Audita Querela.

Crooke J. retained his former Opinion. — Jo. 385. pl. 1. S. C. adjudged accordingly by Jones and Berkley, and that Brampston was of the same Opinion; but Crooke e contra; and says that Saunders, an old Clerk of the Petty Bag, and of great Experience as to Extents; certified his Opinion in Writing, that the Extent made after the Death of the Executor, and the Liberet after to the Administrators were void; and that the Administrator ought to have had an Extent de Novo, and a new Liberet thereupon.

12 Mod. 265. Arg. cites S. C. and says, it must be intended that the Plaintiff had entered by Virtue of the Extent, because it says the Plaintiff's Entry was no Diffusin, and it might be that after actual Entry the Defendant is put to Audita Querela, and that if it had appeared to the Court only by Affidavits that more than a Moiety was extended, it would be hard to relieve even upon an Audita Querela, because of the Danger of avoiding a Record by Affidavits, and that this Case is not found in any other Book; and adjudged ibid. 568. Paich. 12 W. 3; that where on the Return it appears that more than a Moiety is delivered it is absolutely void, and needs no Judgment or Audita Querela to avoid it. Inquisition found 20 Acres where in Truth there were but 10, and the whole 10 were delivered in Extent. The Court said, this could not be tried in Ejectment by a special Issue, but the Party grieved may file a Declaration; and the General Issue shall be taken, and if upon the Evidence it appears that more than a Moiety is delivered, the Extent is void. Sid. 279. pl. 11. Hill. 16 & 17 Car. 2. B. R. Stamford (Earl) v. Hobart. — Ibid. is added a Note, that Hill 23 & 24 Car. 2. B. R. Hale Ch. J. declared his Opinion, that such Extent of more than a Moiety is not void, nor can be avoided after such Extent filed. — 12 Mod. 555. Arg. cites the above Opinion of Hale. * Lev. 160. Hill. 16 & 17 Car. 2. B. R. Stamford (Earl) v. Neadham, S. P. and seems to be S. C. says, that the Court held that it might be avoided in Evidence in Ejectment brought for the Lands.

Cro J. 8. 9. If Tenant in Tail acknowledges a Statute and dies, and the Complainant sues Execution against the Issue, the Issue may have an Issue, and therein abate the Statute, and is not put to his Audita Querela. Dict. 3 Jac. B. R. * 10 between Abburnham and St. John agreed.

Cro J. 85. 10. But in this Case, the Issue at his Election may have an Audita Querela if he will. Dict. 3 Jac. B. R. between Abburnham and St. John adjudged per Admissione.

F. N. B. 104. 11. Upon a Writ of Extent upon a Statute, if the Sheriff delivers in Extent the Land of a Stranger, the Stranger may have an Issue, and is not put to an Audita Querela. 6 R. 2 M. 69. adjudged, and there an Audita Querela brought in this Case was abated by Judgment.

P. N. B. 104. (K) S. P. contra that he may have it after his full Age, because his Nonage ought to be tried by Inspection. Co. Bag.

D. 232. b. 12. If an Inplant acknowledges a Recognizance, Statute Merchant, or Staple, or Recognizance in Nature of a Statute Staple, he cannot avoid this without an Audita Querela brought before his full Age, because his Nonage ought to be tried by Inspection. Co. Bag.

114 Charta 673. pl. 9. Illich. 6 & 7 Eliz. Harrison v. Worley held by divers that it ought to be brought within Age — And. 23. pl. 54. S. C. held accordingly, and says, that in the Register the Form of the Writ is to allege that he is yet within Age, notwithstanding F. N. B. 104 seems to the contrary. — Pend. 80. pl. 123. Paich. 2 Eliz. S. C. according to Dyer and Anderson — Mo 75. pl. 206. Worley's Case, S. C. and it was agreed by all, that the Writ should abate. But Welton said, that the 10 is where he comes to full Age before Inspection, yet if he was once adjudged within Age, then the Statute shall be avoided by it. — 2 And. 159. pl. 57. Arg. S. P. accordingly — S. P. by the Ch. J. Arg. 10 Rep. 43. a. Trin. 11 Jac.

13. But
13. But if an Infant bargains and sells Lands by Deed inrolled according to 27 H. 8. he may avoid it when he will, without an Audita Querela, because this is real. Co. Magna Charta 673.

14. If a Judgment be given in an inferior Court against B. and a Writ of Error is brought thereupon at Westminster, and there the Judgment is reversed for Error, and upon the Record it appears that J. S. was Pledge for B. in the Bate-Court for the Debt, a Special Writ may be awarded to deliver him. 13 S. 7. 12 B.

15. Note a Diversity where the Discharge comes by Determination of the Estate, there the Creditor needs no Audita Querela; for if Tenant in Tail acknowledges a Statute which is extended, and he dies, his Issue may avoid it by Entry. F. N. B. 102. (H) in the new Notes there (a) cites 38 All. 5. 43 Aff. 18.

16. A. entered into a usurious Bond, whereupon Debt being afterwards brought, he made an Attorney and appeared, but was condemned upon a Nihil dictat, and taken in Execution; afterwards he brought Audita Querela, but it was disallowed by the whole Court; for it lies not after Judgment upon a thing he might have pleaded before. Cro. Eliz. 25. pl. 3. Pach. 26 Eliz. B. R. Fisher v. Banks.

17. Debit after Judgment sold the Lands, and being unable to pay the Money, the Judgment Creditor brought a Scire Facias against him, and had Judgment therein by Default, and by an Elegie extended the Lands of the Purchaser; but the whole being not extended, the Purchaser had no Remedy but by an Audita Querela. Brownl. 39. Joults v. Joults.

18. If an Infant makes an Obligation, and being sued an Attorney without Warrant suffers Judgment by Non Sua Informata, this is no Cause to grant an Audita Querela; for he shall have Error if he was within Age, and if not, then shall have Writ of Difcharge against the Attorney. Win. 114. Mich. 21 Jac. C. B. Atkley v. Collins.

19. If there be a Judgment against 3, and one of them is taken in Execution, and afterwards let at large by the Plaintiff's Consent, if any of the other two be afterwards taken in Execution upon the same Judgment, he may have an Audita Querela; but he cannot be relieved on a Motion in Court, tho' grounded on an Affidavit; Per Roll Ch. J. Styr. 387. Mich. 1653. in Case of Price v. Goodrick.

20. Where the Party has a Matter which he might have pleaded to the Scire Facias in his Discharge, and two Nihilts are returned, and Judgment against him, the Court will relieve him upon Motion, without putting him to an Audita Querela; otherwise if a Scire Facias be returned. 1 Salk. 93. pl. 4. Pach. 12 W. 3. B. R. Anon.

(B) At what Time it lies.

1. A Stranger to the Statute, who is a Purchaser of the Land, * First Au. shall not have an Audita Querela before Execution against him. * 17 Ed. 3. 45 contra 20 Ed. 3. 57. per Hill.

Audita Querela.

2. If one man acknowledges a Statute Merchant to another, who after releases it, and the Cononor aliens his Land to a Stranger, the Stranger shall not have an Audita Querela against the Cononor, before he hath sued Execution against him; for perhaps he is not Tenant of the Land, and then he shall hinder Execution against another. 17 Ed. 3. 27. b. adjudged.

3. So the Feoffee of Part of the Land shall not have an Audita Querela before Execution sued against him, though the Cononor hath sued Execution of the Remainder against the Cononor. 17 Ed. 3. 27. b. adjudged.

4. But if he hath sued Execution of Part of the Land in the Hands of the Feoffee, tho' not of all, he shall have an Audita Querela presently. 17 Ed. 3. 28.

5. If the Cononor being Feoffee for Life, upon an Execution awarded against him, be returned dead by the Sheriff, he in the Remainder, who is not subject to the Exact, shall not have an Audita Querela before Execution prayed against him. 18 Ed. 3. 26. b.

6. The Cononor of a Statute shall have an Audita Querela before Execution sued. 17 Ed. 3. 43.

7. So his Heir shall have it before Execution sued. 17 Ed. 3. 43. adjudged.

8. The Cononor or his Heir shall have an Audita Querela before that the Suit upon the Statute is commenced. 17 Ed. 3. 43.

9. If the Cononor of a Statute sues Execution, the Cononor shall have an Audita Querela after the Day of the Return, altho' the Writ be not returned, if he aboves that Execution is done. 39 Ed. 3. 30. b. adjudged.

10. If in Trespass it be found for the Plaintiff by Nisi Prius, and after, before the Day in Bank, he releases to the Defendant, the Defendant before Judgment shall not have an Audita Querela upon this Release; for perhaps he will not have Judgment thereupon. 9 H. 5. 1.

11. A Writ of Execution, with an Extendi Facias, issues upon a Statute Merchant, and the Writ is not returned, the Cononor shall

...
have an Audita Querela, upon a Surmise that the Term is incur'd, notwithstanding the Writ was not return'd. 39 Ed. 3. 30.

that Execution was not made, and prayed Vcn. Fac. upon Audita Querela, and it was granted, notwithstanding the Writ was not returned. Br. Audita Querela, pl. 25. cites 39 E. 3. 30.

*This Word (Nor) is in all the Additions of Br. but it seems it should be omitted, and it is not in the Year Book, and the Words in Roll (that the Term is incurred) intend, that the Execution was made before.

12. A Man condemn'd in 100 l. in Execution, pleaded Acquittance after the last Continuance, and it was said that he shall have Scire Facias in the same Term, and Audita Querela in another Term, and after he found Sentries to go at large. Br. Audita Querela, pl. 28. cites 21 H. 7. 30.

(C) In what Case. At what Time.

1. WHERE the Party might have pleaded the Discharge, and *Br. Audita hath surcease his Time, he shall never be helped by Audita Querela. * 45 Ed. 3. 20. Cr. 3 Ja. B. R. between *Randall and Ogneff, admitted.


2. If upon a Scire Facias upon a Recognizance the Party is return'd *Br. Audita warn'd, and he makes Default, he shall never after avoid it by Audita Querela, because his Recognizance was upon Condition, which he hath perform'd, or for other Matter, because he had Day to answer.

* 48 Ed. 3. 20. 21 Ed. 3. 13. b.

3. But after a Fieri Facias, or Elegit, an Audita Querela lies in the Case aforesaid, because he had no Day to answer. 48 Ed. 3. 20.

S. C. & S. P.——If the Plaintiff takes out a new Scire Facias within the Year, quere if the Defendant shall not have an Audita Querela. Gouldib. 171. pl. 101. Hill. 43 Eliz. in Cafe of Foe v. Batson.

4. If upon a Scire Facias to have Execution of Damages recovered, the Defendant is returned warned, and he does not come, he shall never avoid it by Audita Querela, for that the Plaintiff hath released; and cites 12 H. because if he was warn'd, he hath surcease his Time; and if he was not warn'd, he hath his Remedy against the Sheriffs. 21 Ed. 3. 13. b. accordingly.

Pophart's Reports, Cafe 361. in Hamner and Mof's Cafe. 104 (1) if.

he was warn'd he might have pleaded the Release upon the Return of the Scire Facias——S. P. per Frowilke. Kelw. 27. b. 24. a. Pauch. 12 H. 7.——S. P. ibid. 25. a. per Veniour, in S. C.——S. P. held accordingly per Cur. olther Cro. E. 4. pl. 2. Pauch. 24 Eliz. B. R. in Marshall's Cafe.——A Man recovered in Writ of Annuity, and after releas'd to the Defendant, and then sued Fieri Facias, and the Defendant brought Audita Querela, and had Scire Facias returnable Oubilis Hill. If the Plaintiff in the Audita Querela does not come at the Day, but the other comes, there by some the Party, who was condemn'd, has lost the Advantage of the Deed for ever. Br. Audita Querela, pl. 22. cites 24 E. 5. 24.

5. But in a Scire Facias to have Execution of Damages recovered, or of a Recognizance, if upon a Return of the Sheriff that he hath nothing by which he may be summoned, Execution be granted, yet an Audita Querela lies upon the Release of the Plaintiff accordingly.
6. If the Conserve makes an Agreement with the Conunor, and delivers to him the Statute in lieu of an Acquittance, and after gets the Statute, and extends the (*) Land, and thereupon the Conunor prays a Re-extent, because it is extended too low, and this is granted, and the Land re-extended to deliver to the Conunor, the Conunor shall not have an Audita Querela upon this Matter afterwards, because this is contrary to his Depper before to have it re-extended, by which he admits it extendible. Dubitatite 43 Mist. 18.

7. If Execution be sued upon a Statute-merchant or Staple, an Audita Querela lies upon the Release of the Plaintiff before, because he had no Day in Court before to plead it. 21 Ed. 3. 13. b.

8. In Trespass or other Action, if it be found for the Plaintiff by Nifi Prius, and after, before the Day in Bank, the Plaintiff releases to the Defendant, and after Judgment is given for the Plaintiff, the Defendant shall have an Audita Querela upon this Matter, because he could not plead the Release at the Day in Bank. 6 R. 2. Audita Querela 7.

Note, it is necessary that he bring it ante under Age; but he Matter in Fact. F. N. B. 104. (K).

9. If an Infant binds himself in a Statute-merchant or Staple, he shall have an Audita Querela during his Nonage to avoid it, and afterwards he shall have an Audita Querela after his full Age to avoid it upon that Age; but he Matter in Fact. F. N. B. 104. (D) says it appears in the Register.

10. If there are two Tencantants, and one of them only is warned, if he does not plead that there is another Tencantant who ought also to be charg'd, he never after shall have an Aud. Quer. Per Haughton J. Cro. J. 507. pl. 19. cites 17 Mist. & 17 E. 2. 29.

11. If both Plaintiff and Defendant make Default at the Seire Facias, yet Aud. Quer. lies on a Release made before; contra it the Defendant
Audita Querela.

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dont makes Default, and the Plaintiff appears. F. N. B. (I) in the new Notes there (b) cites 21 E. 3. 48 and 24 E. 3. 24.

12. If a Man be in Execution in C. B. upon a Statute-merchant, and has Audita Querela, and after is in Execution in B. R. upon the same Statute, by which the Record of C. B. is removed there, therefore he shall have a new Audita Querela; for that which was of Record in C. B. is not of Record in B. R. Br. Audita Querela, pl. 42. cites 29 Aff. 41.

13. If at the Pluries in Replein the Sheriff does nothing, by which Proces of Contempt issues against him, and to make Replevin, but not to attack the Defendant, by which he returns Avera Etlongata, whereof Witherum issues, and at the Day the Plaintiff will not make any Plea, the Defendant shall have Audita Querela; for he cannot have Retorno baxendo, because he has no Day in Court; Per Holt. Quere. Br. Audita Querela, pl. 43. cites 44 Aff. 15.

14. A Man bails his Goods to W. N. and a Stranger takes them, every one of them, viz. the Bailiff and the Owner, shall have Trespass or Detinue, and it the one recovers, he shall have Audita Querela against the other who sued before. Br. Audita Querela, pl. 32. cites 5 H. 7. 15.

15. A Man who was in Execution for Damages recovered in Trespass brought Audita Querela upon Release of the Plaintiff, and admitted that it lay well. Br. Audita Querela, pl. 35.

16. If a Man has Arbitrement to plead meane between Verdict at the Nis Priors and the Day in Bank, he cannot plead it; for he has no Day in Court to plead after Verdict, but he shall have Audita Querela; but in the Case of the King he may plead it; for Audita Querela does not lie against the King, nor other Action. Br. Audita Querela, pl. 45. cites 21 H. 7. 23.

17. After Abatement of the Writ by Variance between the Aud. Quer. and the Record, there in a New Aud. Quer. sued according to the Record, he shall have a Superfedeas to lay Execution &c. tho’ he had a Superfedeas before in the other Aud. Quer. which was abated. F. N. B. 104. (R)

18. An Infant acknowledges a Recognizance upon Inspection; Upon an Cro. J. 19. Audita Querela he is judged within Age, and has a Scire Facias against pl. 5 H. Hill the Conulee; and upon a Nihil returned it is judged that the Recognizance shall be discharged, whereas 2 Nihils ought to be returned, or Wale, S. C. a Scire Feci, and therefore this Judgment was reverfed by a Writ of and Judg. Error, and the Infant now is of full Age, and he cannot have a New Audita Querela, yet he shall have a special Writ reciting the whole Matter, and so shall be relieved. Altho’ Judgment be reverfed, the Depositions of the Witnesses remain. Jenk. 322. pl. 30.

and there another Error was afficted, because a Scire Facias was awarded where it ought to have been a Venire Facias, and that for thole Errors Judgement was reverfed; and that upon his bringing a New Audita Querela in B. R. after his coming to full Age, which happened pending the Writ of Error; the Court held, that he could not have an Aud. Quer. again upon the first Inspection; for the Judges ought to judge upon their own Inspection, but at that Time no Judgment was given or entered. Yelv. 88. S. C. adjudged that the 2d Aud. Quer. does not lie; for the Judgment of the Reversal is General, and not for any special Case, but that the Party shall be referred to all that which he left by the first Judgment, and to the Recognizance let on Foot again. Besides, the Judgment of Inspection, tho’ it be only an Award, yet it is of no Force but only in the same Court where the Proof per Testes and the Inspection was; and this does not conclude the Judges of B. R. but that they ought to have a Re-Inspection, which cannot be in this Case, because the Plaintiff is now of full Age; And further, if in this Case the Plaintiff being within Age has brought a New Aud. Quer. in C. B. he ought to have been inspected De Novo, because it is a New Original, and all the former Proceedings are dissolved by the Reversal of the Judgment Quod Nota.

19. In an Audita Querela it was resolved by the Court, that if Debt be brought upon an Obligation, and Issue (upon Nibil debit) is found for the
Audita Querela.

the Plaintiff, now the Defendant shall not have an Audita Querela upon a Surmise that it was a injurious Contract, for he might have pleaded that in the Action of Debt. Nov. 123. Cook v. Wall.

(D) In what Cases it lies.

1. If the Con丘ee of a Statute seizes Execution before the Day given by the Deleaence for the Performance of the Condition, although the Condition be after broken, yet an Audita Querela lies, because he shall avoid it, for he has extended the Land before his time, and do it is a Prejudice to the Con丘ee. 46 Ed. 3. 27. v.

Where Execution is erroneously seized against any Matter of Discharge, the Party may have Audita Querela. Mo. 433. in Case of Hobbs v. Tadcastile.

2. If a Man recovers a Debt, and before Execution releases to the Recoveree, and after seizes such an Execution, in which the Release is not pleaded, an Audita Querela lies. 7 H. 6. 7.

3. But it had been otherwise if the Release had been after Execution. 7 H. 6. 7.

* See Tit. Execution, (U. a) pl. 8. S. C.


Where the Plaintiff contented that the Defendant in Execution should come to him to a Tavern out of the Rules without a Keeper or Rule of Court, in order to come to some Agreement with him, but because no Agreement was made, the Plaintiff took him again on the same Execution, and the Defendant brought an Audita Querela, and adjudged well brought; for the Execution was discharged by the Prisoner's going at large. Sty. 117. Trin. 24 Car. B. R. between Weilly and Andrews, adjudged. Laterat. Trin. 23 Car. Rot. 1706.

5. If a Man in Execution upon a Judgment of Debt or Damages he delivered out of Execution by the Sheriff or Gaoler, who hath him in Execution, with the Assent of him who hath him [or for whom he is] in Execution, and after, by Consent of this Judgment, he takes him again, and puts him in Prison, an Audita Querela lies upon this Matter, and thereupon he shall be delivered. Trin. 24 Car. B. R. between Weilly and Andrews, adjudged. Laterat Trin. 23 Car. Rot. 1706.
Audita Querela.

6. If A. hath a Judgment against B. for Debt or Damages, and after A. extends the Land of B. for his Debt, and after aligns upon the Land extended to C. for all his Estate therein, and after A. releaves to B. the Judgment, in this Case B. upon his Release, shall have an Audita Querela against C. the Alligree, and therein avoid the Execution, because A. notwithstanding the Allignment, continues Privy to the Judgment, and after the Allignment might have acknowledged Satisfaction of the Judgment, and so have defeated the Estate of the *Alligree, and this Release is all one as if he had acknowledged Satisfaction of the Judgment. *-F. N. B. 104.

7. If A. the Conusee of a Statute-book, brings a Detine against B. for the Statute, who prays Garrihment against C. the Conuisor, who comes and pleads, and the Plaintiff recovers by Judgment, and C. the Garnistung brings a Writ of Error, and pending the Writ of Error B. the Defendant, either voluntarily or by Award of the Court, delivers the Statute to A. who sues Execution upon the Statute in Chancery, and the Body of C. is taken in Execution therefore upon, it seems, before the Judgment is reversed upon the Writ of Error, B. upon this Writ cannot have an Audita Querela in Chancery, because the Execution in Chancery is collateral to the Proceedings in Banco, Altogether the Delivery of the Statute to the Plaintiff was Error, if by Award of the Court; and if it was by the voluntary Delivery of the Defendant the Writ of Detine lies against him. *-F. N. B. 104.

8. But in the afo Said Case, if upon the Writ of Error the Judgment in the Detine be reversed, it seems the Conusee shall be added upon an Audita Querela in Chancery upon this Writ, which is the Reversal of the Judgment the Execution is not avoided, being collateral to the first Judgment. *-C. 90. b. held upon the Book of *-F. N. B. 104.

9. But if a Statute be delivered to B. to be kept in an indifferent Place, upon certain Conditions between the Conuisee and Conuisor, it cannot be brought but against him who is Party to the Record, unless it be in special Cases. *-F. N. B. 104.
10. If the Principal be taken in Execution upon a Judgment, and after a Scire Facias return'd, according to the Court, Judgment is given against the Bail, and execution upon him is taken in Execution, and after the Principal is delivered upon an Audita Querela, because the Recoveror hath acknowledged Satisfaction of the Recognizance that was forth'd by the Bail, by not bringing in the Principal at the Time appointed by Law, yet maintained as the Judgment and Execution against the Bail depends upon the Judgment against the Principal, and he was but a Security for the Payment of the Money, of which the Recoveror is satisfied, the Bail shall be discharged by Consequence. *Patch. 15 Car. 2 R.* between Hill and Barnes, adjourned upon a Demurrer. *Intracite. Tin. 15 Car. 2 R.* 

**Audita Querela.**

After Judgment against the Principal, another Judgment upon a Scire Facias was had against the Bail, and upon Error brought the last Judgment was affirmed. The principal Judgment was after-wards revived in Error, and thereupon an Audita Querela was brought by the Bail, and the Court held it well brought; for that the Judgment against the Bail is Legit. depon'd on the first Judgment, which rendered the Bail liable; and that being set aside, the Bail ought to be discharged. *Cra. J. 643.* 8. Mich. 30 Jac. B. R. Appleby v. Ives. — *Palm. 187.* Appleby v. Gene, alias Gene, S. C. adjoignant. *Ibid. 301.* Mich. 20 Jac. S. C. adjourned for the Plaintiff in the Audita Querela. — *Jenk. 319.* pl. 21. S. C. accordingly. — 2 *Roll Rep.* 254. Green v. Legris, S. P. held accordingly, and seems to be S. C. and the Bail were discharged.

11. If A. and B. are bound in an Obligation jointly and severally, and Judgment given against each upon several Actions brought, and both taken in Execution, and after A. escapes, B. shall not be delivered upon an Audita Querela; for tho' the Obligee may have an Action against the Sheriff for the Escapes, yet till he is actually satisfied, the other shall not have an Audita Querela; for perhaps the Sheriff is worth nothing. *Co. 5.* Blomfield, 86. 6.

Hob 2. pl. 3. *Incerti Nominis & Temporis,* but mentions it as cited by Lord Coke, in *B. R.*

Godb. 257. pl. 375.

*Patch. 12.*

Jac. B. R. Cowley v. Legat, S. P. and seems to be S. C. and the Opinion of all the Justices was, that the Audita Querela was well brought, and that because he could not have pleaded the special Matter in Bar. — *Cro. J. 533.* pl. 3. Cawley v. Lidgheat, S. C. adjourn'd per rot. Car, who delivered their Opinions feriatim. — *Roll Rep.* S. pl. 10. Cawley v. Lydias, S. C. and it is said in Marg. that this Judgment was for the Plaintiff. — 2 *Bull.* S. C. adjourn'd accordingly, — 15. 9. 7. 20 Crooke J. it is against whom the first Judgment was given, had reverted it by a Writ of Error, and persever'd the party being taken by Captas, shall have no Benefit by such Aud. Que. but Dodderidge J. contra. 2 *Bull.* 100. in S. C.


A Judgment.
A Judgment-Creditor extended Lands of his Debtor in one County by E legit, which was delivered to him in Execution, and enjoyed by him 6 Years; then he made his Wife Executrix, and died, and the brought a Scire Facias upon the Judgment, directed to the Sheriff of another County, where the Debtor had other Lands; and upon 2 Nihilis returned, the bad Judgment and Execution for the late Debt; whereupon the brought an Audita Querela, and was relieved; for after an E legit, if Lands are thereby found, and the E legit filed, the Party cannot have another E legit. Sy. 454. Trin. 1655. straw v. Keckwith.

13. If A. be Bail for B. in an Action in Banco, or B. R. and after Judgment is given against B. and after a Scire Facias is filed against A. the * Bail, and upon two Nihilis returned in Banco Judgment is given against A. In this Case A. may have an Audita Querela, upon a Sureties that B. died before any Capias ad Satisfaciendum issued out against him, by which he was discharged in Law, and thereupon A. is to be discharged, because the Recognizance of A. (which is, that B. shall render his Body, or pay the Condemnation) is not forfeited till a Capias be returned against the Principal; for he is not bound to render his Body till a Capias be returned, and tho' two Nihilis be return'd, and thereupon Judgment is given against the Bail, so that the Judgment is not erroneous, yet because the Bail had no Summons, he shall be received to alter this in an Audita Querela, he not having any other Remedy. *Pach. 1652. between Tompson and Barcock, Intratrit Dict. 1651. 472.

*Barcock v. Thomp.
Audita Querela.

17. *Affis against Tenant by Statute Staple*, the Plaintiff said, that after the Execution sued, the Plaintiff paid the Money, and the Defendant upon this relaid the Statute to him in Lieu of Auctunance, and after by *Comm. took it*, and sued Execution, Judgment &c. and per Cur. he is put to Audita Querela, and shall not have the *Actum contrary to Matter of Record*. Br. Statute Merchant, pl. 29. cites 43 Aff. 18.

18. *Release of all Actions* is not sufficient to have Audita Querela, for Execution is not releas'd by this. Br. Audita Querela, pl. 37. cites 3 H. 4. & concordant Littleton in his Chapter of Releases, and Tit. Release in Fitzj. 53 for Execution is no *Action*.

Br. Audita Querela, pl. 53. cites 2 E. 4. 22. & so are all the Editions at that Word, but at Tit. Scire Facias, pl. 170. all the Editions are 2 E. 4. 24. and these last seem to be right, the S. P. being at 2 E. 4. 24. a. pl. 22. but S. P. does not appear at pag. 22.

20. *If in Account* a Man recovers, and before Execution brings another Writ of *Account*, or recovers in Debt, Treiptus, and the like, and does not take Execution, but brings another *Action* again, and recovers again, if he takes 2 *Executions*, the Defendant shall have Audita Querela, per Danby and others, *Quod non negatur*. Br. Audita Querela, pl. 25. cites 9 E. 4. 50.

21. *If a Man files Execution upon a Statute Merchant or Statute Staple, as Executive of the Conrlee*, or as Administrator against the Conuror, *where the Conuror himself is alive*, or if the Plaintiff be not Executor or Administrator the Conuror shall have Audita Querela, or *Action of Difceit*. Br. Audita Querela, pl. 38. cites 2 R. 3. 8.

22. *And to Note here and in F. N. B. in the Writ of Audita Querela in the 6th Case*, that Audita Querela *lies as well upon a Statute Staple as a Statute Merchant*, and *lies upon Suremise*, and upon Matter in *Faét* as well as upon Writing. *Ibid.*

23. *If one recovers as Administrator where he is Executor, the Party*, against whom the Recovery is, shall have Aud. Quer. supposing that he has no Right to recover. *Arg. Cro. J. 394* pl. 6. cites 2 K. 3. 8.

24. *Aud. Quer. lies where a Man ought not to be charged, and had Matter to discharge himself by*, but that he had no *Day in Court* [to plead it] and [fo] no Default was in him ; *Per Vavifor*. *Kelw. 25. a. Pa[ch.* 12 H. 7.

25. *A. made a Recognition in a Statute Merchant before the Mayor of Chester to B. where it was supposed that he had no Authority to take it*. A. *incoffed J. S. B. sued Execution, and J. S. brought Aud. Quer. D. 35. a. pl. 27. *Trin. 29 H. 8.*

26. *The Lord of a Copyhold Court by Petition to him reversed a Judgment given there, for certain Errors in the Proceedings*, and thereupon the Defendant maintained Aud. Quer. to be restored to his Damages recovered against him ; *cited by Fenner J. 4 Rep. 39. b. at the End of pl. 22. and said he had seen such Record of Anno 36 H. 8.*


28. *After Recovery in Wafe by Default*, the Defendant sued an *Aud. Quer. to the Justices of C. B. stating that he was not summoned, nor attached, nor disfrrind, for which the Justices granted out of the Rolls in C. B. a *Writ of Difceit* against [the Party, because] the Audita Querela was but a Commandment to the Justices to do Right to the Party.
29. If a Man leaves Land unto A. for Life, and afterwards by Fine See 1 E. 3 grants the Reversion to B. in Fee, and dies, and the Heir of the Recognizer and one L. by Crown betwixt them, sue a Precipe in Capite against the said A. supposing the Land to be helden of the King, whereas it is not helden of the King, but of another Person; and in this Precipe in Capite they cause one F. to appear as Attorney for A. and to join the Wife in the said Writ; and afterwards the Attorney by Crown doth make Default, for which Judgment is given against A. Now upon the same Matter he shall have an Audita Querela directed unto the Justices of C. and B. commanding them to proceed as well for the Requisition of the Land, as upon the Difficte, and to do speedy Justice as of Right, according unto the Custom of the Realm, they ought to do. F. N. B. 103. (A)

30. A. infers B. on Condition to re-enforce A. and C. his Wife for their Lives, Remainder to D. the Daughter (Son) of A. and the Heirs of his Body, and the said B. by Collision between him and E. makes a Reconciliation of 200l. to E. and one F. (after the Re-conciliation as it seems,) A. dies, and C. takes G. to Husband; who on this Matter sues an Audita Querela, and it was resolved, That he need not count upon this Writ; that tho' he may have Remedy by Writ of Deceit, or Conspiracy, yet seeing here is Matter of Record, which is the Ground of the Writ, it is good but for that E. was Party to the Reconciliation, and by the Writ is supposed Party to the Collision, this Suit is to Defeat the Reconciliation, and not to recover Damages the Writ shall abate. 26 E. 3. 73. F. N. B. 104. (U) in the new Notes there (b)

31. Executors had Judgment in Account, and took the Defendant in Execution for the Arrears. The Writ was afterwards set aside, because the Executor was an Idlet, and the Record thereon in the Spiritual Court was removed by Writ into Chancery, and into B. R. where the Action was brought, and thereupon the Defendant brought Aud. Quer. because the Will was dispromised; and resolved in the Exchequer Chamber (as appears by the Record, as the Reporter says he had heard) that the Aud. Quer. well lies. 8 Rep. 144. a. cites D. 3 Eliz. 223.

32. Judgment against the Defendant, who was afterwards taken by Dal. 58. pl. Virtue of a Ca. Sa. and escaped; the Sheriff did not return the Ca. Sa. at the Day, and thereupon an alias Ca. Sa. issued against the Defendant, upon which he was re-taken by the Sheriff, and thereupon the Defendant brought an Audita Querela, and by Dyer and Welton it was held good. No. 57. pl. 162. Palch. 6 Eliz. Anon.

33. At the Exigent after Judgment the Defendant cannot appear Gratis and plead a Release of all Executions to have a Sci. Fa. ad Cognoscendum sed dedecendum Fidium, but there must be a Cept Corpus, or a Reddidit fe Caele of the returned, but being at large he must bring an Aud. Quer. D. 285. b. Year mentioned, but to be a Caele of Hill, 5 H. 8. and the time is in Kelw. 166. b. pl. 5. accordingly ——See Kelw. 5 pl. 5. Mich. 12. H. 7. S. P. admitted.
34. Aud. Quer. lies properly when the Verdict is allowed, and there is some Matter in Equity; Per Shute B. but to have Aud. Quer. upon Matter contrariant to the Verdict, as was moved in the principal Case, he thought was strange. Sav. 69. 70. pl. 144. Mich. 26 Eliz. Borrow v. Lake.

35. Audita Querela lies properly where the Verdict is allowed, and there is some Matter in Equity, but not on Matter contrary to the Verdict; Per Shute J. Savil. 70. pl. 144. Mich. 26 Eliz. in Cafe of Borrow v. Lake.

36. A. was bound to B. by Recognizance of 400 l and B. was bound to A. in a Bond of 100 l. B. by the Custom of London attached the 100 l. due by himself to A. in his own Hands, and sued Execution against A. upon the Recognizance. A. upon the Matter of the Attachment brought Aud. Quer. and after some doubting the Court received the Writ De bene esse, and granted a Superfedeas to stay Execution, and a Scire Facias against B. but ea lege that A. find sufficient Sureties that he would sue with Effect, and to pay the Execution if found against him. Le. 297. pl. 407. Hill. 28 & 29 Eliz. C. B. Wallpool v. King.

37. The Cognizor of a Statute Staple was taken in Execution, and then the Money was brought into Court, and upon an Aud. Quer. moved to be bailed, and the Money to remain in Court till the Aud. Quer. determined; and the Court refused to deliver the Money to the Conunisor, but ordered the Prothonotaries to keep it till the Aud. Quer. was determined, and let the Conunisor to Bail for the Costs of Suit. Le. 141. pl. 196. Hill. 30 Eliz. C. B. Askew v. the Earl of Lincoln.

38. The Conunisor of a Statute Staple was taken and escaped with Con- sent of the Sheriff, no Execution being made of his Lands or Chattels; afterwards the Conunisor sued Execution of his Lands, whereupon he brought Aud. Quer. but adjudged that the Aud. Quer. did not lie. 2 Le. 96. pl. 117. Trin. 31 Eliz. C. B. Linacre v. Rhodes.

39. E. and G. were Bail for K. at the Suit of A. — K. was condemned, and a Ca. Sa. awarded against E. and G. — G. was taken, who suggested to A. that E. was sufficient to satisfy him, but that he himself was not. Whereupon A. contended that G. should go at Liberty so as he would procure E. to be arrested, which he did. E. being arrested sued an Aud. Quer. upon that Escape of G. and they were at liberty upon the Escape. And by Advice of the Court a Juror was withdrawn by Consent, and so the Matter was stay'd. 3 Le. 260. pl. 346. Mich. 32 Eliz. B. R. Evans v. Arnold.

40. A Statute Merchant was acknowledged in Lincoln, which had but one Seal to it, whereas by the Statute 13 E. I. de Mercatoribus, it ought to have two, and Execution being taken upon this Statute, the Cogni- zor brought an Audita Querela; It was objected, that a Writ of Error was the proper Remedy in this Case; but held clearly, that where a Statute is erroneously acknowledged Error lies not, but Aud. Quer. for it is no Record. Cro. E. 233. pl. 4. Pach. 33 Eliz. C. B. Afcue v. Fuliambe.


Godb. 104. pl. 122. Mich. 26 &

41. Administration was granted to J. S. durante Minoritate of A. an Infant Executior. J. S. brought Dict against W. R. for Money due to
Audit Querela.

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the Tenant, and recovered, and had W. R. in Execution, and then to 29 Eliz. A. come of fall Age. The Question was, how W. R. should be dif. C. B. S. P. charged of the Execution, the Administrator's Authority being deter-
in tordem mined fo as he cannot acknowledge Satisfaction? Windham said, that Verbis; and therefore the Tenant W. R. might have an Aud. Quer. 3 Le. 278. pl. 367. in both Books is cited the following Cafe, which Rhodes said he had seen, viz. that A. was bound unto B. in an Obligation of 100l. upon Condition to pay a lesser Sum; the Obligee made an Infant his Executor, and died; Admin-
istration was committed durante minorit. to C. to whom A. paid the Money. It was doubted, if that Payment was rightful, or if the Money ought to have been paid to both. Windham asked, if it appears within the Record that the Infant was made Executor, and that Administration was committed ut lutum; to which it was answered, No. Then Windham said, you may upon this Matter have an Audita Querela.

42. If A. did recover against B. by 2 several Judgments, whereby B. is Nov. 85. in
in Execution; It was adjudged that he shall not have one Aud. Quer. Cafe of
only, but must have tow several Writs. Ow. 107. in a Note cites Palch. Moor cites
the Cafe of B. R. Curtis v. Overcott.

43. An Infant conveyed a Judgment in Debt brought in B. R. against
him. Popham held clearly, that Aud. Quer. during his Nonage does not lie upon Action of Debt in Court as it would upon Recognizance or Statute acknowledged; but the Party might have Error in the Ex-
checker Chamber by the Statute of 27 Eliz. but cannot have it in B. R.

44. A. siezed of Lands in Middlesex and London acknowledged a Statute to C. and afterwards conveyed the Land in Middlesex to J. S. which came to the Plaintiff by Purchase, and the Land in London he conveyed to G. the Defendant; the Administrator of C. sued a Sci. Fa. against A. in Middlesex, who was returned Mortunit, upon which he had a Sci. Fac. to the Tenants in Middlesex generally, and V. the Plaintiff was returned Ter-
tenant, and made Default, upon which Judgment was given for Execution, and
that a Moity of the Land in Middlesex should be extended, upon which he brought a Sci. Fac. in the Nature of an Audita Querela against the Administrator, and G. Tenant of the Lands in London, to show Caufe wherefore the Moity of the Lands in London should not be extended; It was the Opinion of Popham Ch. J. that he might have a Writ, Where-
fore the Lands restitutio non debent, but not an Aud. Quer. But the other Juricises held, that that was the most beneficial way for him who was
grieved by the former Extent, but if he will not pray Restitution of what is paft, but only a Contribution for an equal Extent to satisfy what did remain, they saw no Caufe but that he might have it; for
the Foundation of the Writ is of equal Extent; and it was said, that the Book of 39.F. 3. 7. and 39. was, that it was in Election of the Con-
ifiec to take his Audita Querela for Restitution, or for future Contri-
and Gibbon.

45. M. was bound to W. in a Statute desistanced, that if he and his S. C. cited
Wife should make such good Assurance of a House with such Covenant as W. Arg. No. 350. An Aud. Quer. will not lie upon a Surmise that
W. had not Signified what Assurance he would accept, nor required any, and
yet had sued Execution &c. for the Conisor ought to have devit the
Estate, and procured W. to accept, otherwise he ought to pay the Mo-

46. The Plaintiff was Conizer a Statute, and Sir F. H. was Conizer of an Elder Recognizance, the Conizer had Lands in the Counties of C. and
M. The Plaintiff sued Execution, and had it, of the Lands in C. The D.-
Yelv. 12. Hinde v. Hinde v. in M. The Plaintiff sued Audita Querela, and it was adjudged it lies Dro. Mich
upon 44 & 45 Eliz.
upon this Surmise, for the Recognizee ought to have sued Execution of
the Lands in one County as in the other, whereby the Money would
be levied the sooner, and so the not suing of Execution according to
the Law is a Prejudice to the Plaintiff. Cro. E. 797. pl. 43. Mich. 42

48. In Traver by an Administrator for the Goods of the Intestate; the
Defendant pleaded, that the Letters of Administration were revoked in
the Spiritual Court, per debitam Legum Formam, and granted to another; adjudged
no good Plea, because it is a Matter wherein he can be aided only by an Audita Querela. Yelv. 125. Parch. 6 Jac. r. B. R. Kent v. Life.

49. B. was in Execution upon a Statute Merchant at the Suit of R. he
brought Audita Querela, and stressed Articles between him and K. to dis-
charge him of the Statute, and prayed to main-prited; but the Court de-
ied it, and said that one in Execution ought not to be let to Main-
prise upon a Surmise; but the Parties Remedy is to have his Action of
Covenant upon the Articles against the Party. Cro. J. 218. pl. 7. H.L.

Cra. J. 648. in pl. 8. cites it to have
been allowed after a Judgment on a Scire Facias against
him, and that by the Audita Querela he was discharged—Jenk. 519. pl. 21. S. P. accordingly.

51. If the Party be taken and imprisoned upon a Judgment and Execution
where he has paid the Money, he shall have no other Remedy in Court, but only an Aud. Quer. Per Williams J. and the Court. Bult.
152. Trin. 9 Jac. Anon.

52. If joint Presumors are sued in several Actions, tho' the Plaintiff may
make Choice of the best Damage, yet when he has taken one Satisfaction, he can take no more; and if he requires two, an Aud. Quer. lies. Hob.
66. pl. 69. in Cae of Coke v. Jennor.

53. Two were taken in Execution, and afterwards one escaped; adjudged
Debt lies against the Sheriff for this Escape, and after the Recovery against
him, the other shall be delivered by Aud. Quer. Per Coke Ch. J. Roll.

54. B. brought an Audita Querela, and surmised that A. Administrator
of J. S. brought Debt on a Bond, but that before Judgment the Administra-
tion was revoked, and granted to C. and notwithstanding the Revocation, A. pronounced Judgment, and that C. released; B. brought an Audita Querela upon the Release, but the Court would not grant a Superedes,
because the Revocation was but Matter of Fact; for the Revocation was not under Seal, and so A. might appeal. Brownl. 29. Trin. 13 Jac. Beck's Cafe.

55. D. seised of Land in Fee, acknowledged a Statute Merchant to M.
of 500l. to be paid to the said M. &c. but mentioned no Day of Payment; D. made a Lease of the Land to A. for Years, who grants his Etitle to B. afterwards M. dies intestate, and his Administrator extends the
Land, whereupon B. brings an Audita Querela, and whether it lay or
not was the Question; or that because there was no Day of Payment
the Statute was good or not; adjudged by three Justices contra Hot-
Audita Querela.

56. Scire F actus against Executo rs, the Sheriff return ed Nulla Bona, after ward s, upon a Statutum, that they had wafted the Goods of the Teclator, a new Scire Fac tus with a fieri Fac tus isfi ed against them, upon which there were two Nisi return ed, and therefore Judgment was given against them de bonis Propriis; but because they were never summoned, nor had any Manner of Notice of these Proceedings, they may be reliev ed by an Audita Querela; Per Roll. Ch. J. Style 372. Trin. 1653.

57. A Tenant for Life, Remainder to B. his Son in Teli; A. enters into a Statute and dies, Conuef sp Scire F actus against B. who is returned warned, and has Execution by Default; B. cannot have Audita Querela. Sid. 54. pl. 22. Mich. 13 Car. 2. B. R. Day v. Guildford.

58. D. as Admini strator recover ed Damages against T. the Plaintiff in T raver, and afterwards upon Appear his Admini stration was revoked, and granted to J. T. brought Audita Querela, and declared that D. int ended to take him in Execution for the said Damages &c. It was argued that the Admini stration being repealed, D.'s Title is determined, and that now it belongs to J. S. and that T. could not plead this Matter to the Action brought by D. because it has happened subsequent to that Judgment, and therefore reliev able now by Audita Querela, and be cause it D. should recover and receive them, J. S. would afterwards rec over them again against D. therefore to avoid Circuit of Action, the Plaintiff in the Audita Querela had Judgment, per tot. Car. 2. Saund. 148. Trin. 22 Car. 2. Turner v. Davis.


59. Judgment against 2, who are both in Execution, and the Sheriff suffer s one to escape; the Plaintiff recovers against the Sheriff, and hath Sat isfaction, the other shall be discharged by an Audita Querela. 2 Mod. 179. pl. 8. S. C. but upon the Pleadings the Court was of Opinion against the Plaintiff.

60. Audita Querela is not to be allowed but in open Court, per Cur. 2 Show. 239. Mich. 34 Car. 2. B. R.

61. Audita Querela shall never be had upon any Matter whereof Ad vantage might have been taken by Plea before Judgment; Arg. said to be a Rule, and the Court agreed it to be a true and good Rule. 2 Show. 240. Mich. 34 Car. 2. B. R.

62. There ought to be some Deed under Hand and Seal, as Decease, Release, or the like, to ground the Audita Querela upon; Arg. and agreed by Doblen J. 2 Show. 240. Mich. 34 Car. 2. B. R.

63. If a Release be given after the Nisi Prius, and before the Day in Bank, he cannot plead it; for there is a Verdict already in the Cause, and upon another Plea, and therefore the Cause is determined; so that he is put to his Audita Querela to hinder the Execution of his Judgment.

G. Hill. of C. B. 83.

64. The Merits or Foundation of a Suit are not assignable for Error in the Fact, but must be relieved by Audita Querela. Cumb. 325. Pach. 7. W. 3. B. R. Lampton v. Colingwood.


65. Per Holt Ch. J. in many Cases where a Man may have an Audita Querela, B. R. will relieve upon Motion; but if the Ground of the Au dita
Audita Querela be a Release, or other Matter of Fact, it may be reasonable to put him to his Audita Querela, because the Plaintiff may deny it. Ld. Raym. Rep. 439. Patch. 11 W. 3. B. R. Wicket & Foot v. Cremer.

But if a Man has a Release from the Plaintiff, which he has not an Opportunity of pleading, and brings reasonable Proof of it, the Court will relieve him upon Motion, and award a Superfetanie of the Execution. 12 Mod. 598. Mich. 13 W. 3. ibiter.

66. A Man can have no Audita Querela of a Matter which he has an Opportunity of taking Advantage of before, and had omitted it. Per Holt Ch. J. 12 Mod. 584. Mich. 13 W. 3. ibiter.

67. If an Escape be against a Sheriff, and Judgment thereon, and a Writ of Error is brought, and the first Judgment is reversed, the Party shall have an Audita Querela; per Holt Ch. J. 11 Mod. 70. pl. 8. Hill. 4 Ann. B. R. Anon.

68. A. and B. were Bail for J. S. and W. R. B. was taken in Execution, and afterwards Execution was had against W. R. The Court said that there was a very good Remedy for B. by Audita Querela. Barnard. Rep. in B. R. 141. Hill. 2 Geo. 2. Steers v. Mitchell.

(E) Upon what Thing it lies. Upon a Specialty.

1. If the Party in Execution upon a Judgment shews to the Court a Release or Acquittance, a Scire Facias lies thereupon, because this is grounded upon a Specialty. 13 H. 6. 19. 9 H. 5. 1.

Br. Variance, pl. 42. cites S. C. & S. P. as to Variance in the Names, (and adds) or the like.—Fitzh. Variance, pl. 4. cites S. C. & S. P. as to Names, but mentions not (or the like), and the Year-Book mentions (Names) only. —See (L) pl. 6. the like Point.

* Br. Audita Querela, pl. 3 cites S. C. that the Consoar pray'd a Venire Facias against the Consoar; sed non allocutur, but was put to his Audita Querela ——Fitzh. Audita Querela, pl. 2. cites S. C. & S. P. admitted. —Fitzh. Audita Querela, pl. 14. cites S. C. and because the Writ mentioned that the Consoar had given Acquittance to the Consoar, the Consoar, being a Prison, was discharged. ——Br. Statute Merchant, pl. 9. cites S. C.

Br. Scire Facias, pl. 185. cites S. C. but not expressly S. P. but seems admitted ——The Defences of one shall be a Bar of both. Br. Audita Querela, pl. 11. cites 48 E. 3. 12. ——See (K) pl. 4. S. P.

4. If there be two Consoars of a Statute, and one releases, and after the other fies Execution, an Audita Querela lies thereupon; for the Debt is released. 11 Ed. 4. 8. b.

In Debt upon a single Bill the Defen. 5. A Scire Facias does not lie for a Sum in Execution upon a verbal Suggestion, without shewing a Specialty. 18 H. 6. 19. dunt pleaded Payment, and Verdict, and Judgment for the Plaintiff, and the Defendant in Execution brought an Audita Querela, and upon a single Assessment of Payment of the Money he was laid. Upon a Motion by
Audita Querela.

6. If a Man recovers a Debt or Damages against another, who pays him without other Release or Acquittance, and notwithstanding the Receiver uses Execution, no Audita Querela lies; for a Record cannot be discharged without a Specialty or Record. Diversity of Courts, Title Chancery, no Remedy at Common Law, nor in Chancery.

See (H) pl. 2. — (L) pl. 6. S. P.

7. If A. be bound to B. in a Statute-Merchant, and pays the Money, Br. Con. and after B. uses Execution upon the Statute, A. shall not have an Audita Querela upon this Summite that he has paid the Money, without having an Acquittance, or Specialty, or Release. 22 Ed. accordingly.

45. No Relief at Common Law, nor in Chancery, because it was his Folly to pay it without Matter of Record or Specialty.

See (H) pl. 15. cites S. C. of a Debt recover'd — See pl. 17. contra, and the Notes there.

8. If a Man uses Execution upon a Statute-Merchant, the Conuf. Fitzh. Author shall have Audita Querela upon a Suggestion that he hath agreed dis. Querela, with him, and that the Conuilee delivered to him the Statute in Lieu of an Acquittance, and the Conuellee receivers he may shew the true Statute, and shew that the Statute thrown which was cancel'd was a forged Statute, and thereupon he shall have a writ unto the Justices in the Nature of Audita Querela, commanding them that they may send for the Mayor and the Clerk, and for the Parties, and for to do Right, and the Examination of the Mayor and Clerk shall fly and end the Matter; quad vide M. j. E. — And in such Case Execution shall be awarded, if the Conuorf does not shew the true Statute. P. N. B. 104. (H) in the new Notes there (a) cites 13 Ed. 3. 36. See 17 Ed. 3. 49. 21 Ed. 5. 46. contra.

9. So an Audita Querela lies, altho' the Statute which he shews, which was given in Lieu of an Acquittance, be cancell'd. 18 Ed. 3. 36. Fitzh. Nat. 104. (C.) 15 Ed. 3. Audita Querela 10.

10. But he shall not have an Audita Querela, without shewing the Statute. 18 Ed. 3. 36. adjudged.

11. If the Conuilee delivers the Statute in Lieu of an Acquittance, it was urg. and after retakes it from the Conuoru, and uses Execution, the Co. ed that he shall have an Audita Querela thereupon, because he does not shew the Statute; for notwithstanding the Delivery in Lieu of an Acquittance, it continues his Deed, and is a good Statute; Connu- trea 43 All. 18. by three Justices, and therefore should not have Audita Querela without shewing the Indenture; but the Justices held that the Conuilee may die, and then the Action of Trefpa is determined, and yet his Executors may use Execution upon the Statute, and 10 Michief; and therefore the Audita Querela lies without shewing the Indenture. Br Aud. Quer. pl. 9. cites 4 Ed. 3. 25. But Brooke adds a Querela, for he says, that it is. 15. is contra. —— Ibid pl. 31. cites 43 S. 18. that if Statute Staple be delivered in Lieu of an Acquittance, and Conuilee retakes it by Covin, that by the Redelivery it is in Lieu of an Acquittance, and lores the Force of a Statute, and is not now the Deed of the Conuor.

12. If a Man be taken upon a Capias ad Satisfaciendum, upon Fitzh. Scire a Recovery in Debe upon an Obligation, if the Defendant shews the Obligation, and says that it was delivered in Lieu of an Acquittance, 147. cites S. C. & S. P. he shall have a Scire Facias thereupon, in Nature of an Audita Querela. 13 D. 4. 10.
Audita Querela.

If a Man be bound in a Statute Merchant, and certain In-338
dentures of Defeasance are made of the said Statute, and afterwards the Commisside doth Arrest the Recogni-342
fessor, and imprisons him, and taketh the Defeasance from him, and then saith Execution upon the Statute; the Recognisee shall have an Aud. Quer. against him upon the whole Matter. F. N. B. 103. (C)

So if one makes a Statute Merchant or Staple by Daniel, he shall have an Aud. Quer. to avoid the Statute by his Imprisonment. F. N. B. 104. (L)

See (A) pl. 12. and the Notes there.


Br. Audita Querela, pl. 15. cited S. C.—Fitzl
Audita Querela, pl. 15. cites S. C.

14. An Audita Querela lies upon a Suggestion, that he was within Age at the making of the Statute Merchant, and yet is, for this shall be tried by Inspection. 13 Ed. 3. Audita Querela 28. 27. F. N. 104. R. 15 Ed. 4. 5. b.

15. In Detinue for a Statute, if the Defendant says, that the Conus-390
for delivered it into his own Hands to deliver to the Plaintiff upon Conditions performed, and hath Garnishment against the Conusor, who pleads with the Plaintiff, and pending the Action, the Defendant delivers the Statute to the Plaintiff, who sues Execution; the Car-395
tinis shall have an Audita Querela thereupon, without Deed, for here the Condition is but a Conveyance, which appears also of Record, and the Deceit to the Court, which is also of Record, is the Cause of the Action. 12 E. 4. 6. 15.

16. If the Conusor of a Statute sues Execution, and after the Conusor renders to him the Money, and he refuses it, yet he shall not have an Audita Querela upon this Matter, because this is grounded upon a Matter in fact, and he may render it in Court, and then have a Secre Facias, or Audita Querela; Contra 22 All. 44.

* Cro. E. 634. pl. 31. S. C. and the Opinion of the whole Court was, that an Aud. Quer. well lies upon this Matter of Fact, to discharge the Execution.—Cro. J. 29. pl. 7. S. C. cited, Arg. that it was ruled to be a good Surmise in an Aud. Quer. to avoid Execution of a Judgment, for it is not only a Suit in Law, but in Equity also, and it is a Commission to examine the Cause; for it is not reasonable that if the Money be satisfied, he should lie in Execution; and so held all the Court in the principal Case (besides Popham) that it was a good Surmise in that Case of Ogden v. Radnal, Patch. 2 Jac. B. R. the Point there being the same, and thereupon the Defendant in that Case was let to bail.—S. C. cited Arg. Roll Rep. 384. in pl. 5.

** 2 Mo. Sec. pl. 1108 Motly v. Pierce, S. C the Aud. Quer. was brought by the Bail, who was taken in Execution, and suggested that the Principal had paid the Damages; but the Court would not bail him, because such Suggestion of itself is not sufficient, without an Affidavit that the Money was paid.

—Roll Rep. 385. pl. 5. Morlent v. Morrice, S. C. says, that the Bail was ordered to be committed in Execution to the Marshal, and then it was moved to bail him, upon bringing all the Money into Court; but Coke said No, but that it should be delivered to the Party, and then he should be discharged; but if there be any one who knows that the Money was paid, then perhaps it may remain in Court; but there was no one that could testify it, and thereupon the Plaintiff in the Aud. Quer. declared that the Suggestion was not true, and therefore would not proceed any further in it.

A Man being in Execution was suffered to go at large, and afterwards taken again, and brought Audita Querela, but the Court would not allow it; but it being further alleged that whilst he was at large he paid the Money, and Witnesses sworn to the Truth thereof, the Audita Querela was allowed. Cro E. 44. pl 8. Mich. 27; & 28 Eliz. C. B. Reynolds's Cafes.
Audita Querela.


19. If a Man be bound in a Statute Merchant or Staple unto another the Recognisant, and afterwards the Recognisant makes a Defeasance unto the Recognisant, now if the Recognisant dies Execution upon the Statute against the Form of the Indentures, the Recognisant (or his Executors if he be dead) may have an Audita Querela against the Recognisant. F. N. B. 105. (C.)

he was taken in Execution; but there being a Defeasance on the Statute, which was not performed by the Conunior, thereupon the Cognisor brought an Audita Querela, and was bailed. Brow. 39. Hill. 12 Jac. C. B. Earl of Lincoln v. Wood.

20. After Judgment in Replevin for the Avowants, one of them released, whereupon an Audita Querela was brought, and moved to be allowed, in order to supersede the Execution; the Release was produced, but the Witnesses being in the Country, an Affidavit was offered to prove their Hands, but the Court would not allow the Audita Querela, because no Witnesses were present to prove the Release, and less Regard was had thereto, because it appeared by Affidavits, that he who executed the Release was joined by Practice, without the Consent of the other Avowants. Sid. 351. pl. 2. Hill. 19 & 20 Car. 2. B. R. Nuby v. Jenkins.

(F) Upon a Deed. [But where not without a Deed.]

1. An Audita Querela lies upon the Acquittance of the Cognisor. Firth. An- dita Querela, who had paid Execution upon a Statute Merchant or Staple. 22 Ed. 3. 4. b. 7 26 Ed. 3. 73.

2. If the Cognisor purchases the Lands of the Cognisor in Fee, and Cognisor after aliens it to another, and after pays Execution of the Statute upon this Land, an Audita Querela lies upon this Matter by the Alienor. 20 Ed. 3. Audita Querela 30.

J. S. purchased another Part; the Cognisor extended the Land of J. S. who thereupon brought Audita Querela in C. B. and had a Superfideas upon it, and it was adjudged that it did well lie. Cro. E. 564. pl. 27. Mich. 76 & 3. Eliz. Charnock v. Gerard.

If the Recognisant informs a Stranger of Parcel of the Lands, and afterwards informs the Recognisor of another Parcel of the Lands, and afterwards the Recognisee pays Execution against the Recognisor, and the Feoffee, the Feoffee shall have an Audita Querela against the Recognisee, and discharge his Lands, because that the Recognisee has discharged his Parcel of Land which he purchased by his own Act. F. N. B. 104. (N.)

And another Audita Querela appears in the Register for the Feoffee of Parcel of the Land which belonged to the Recognisee against the Recognisor, because that the Recognisee hath purchased other Parcel of the Lands of the Recognisee &c. F. N. B. 105. (E.)

3. If a Man makes a Feoffment upon Condition to re-infeoff him, and after the Feoffee, to the Intent to deceive him, falsly and by Co...
Noy 41. S. C. & S. P. seems to be admitted, the Doubt there being whether the Agreement was Usurious or not. Cro. J. 25. pl. 2. S. C. & S. P. accordingly. — Roll Rep. 384. pl. 5. Trin. 14 Jac. B. R. Coke Ch. 1. 1. that in the Times of Ed. Dyer and Wray, and in all his own Times, the Party was never bailed on an Audita Querela, where it was grounded on a Matter of Fact, as upon the Statute of Usury and the like; for should he be bailed in that Case, every Man may be defeated of his Execution.

5. If A hath Judgment in Debt against B. in which Action C. was Ball for B. and after B. pays to A. the Money recovered, and after A. sues out a Capias (*) ad Satisfaciendum against B. and after hath Judgment against C. the Bail, C. shall not have an Audita Querela upon this Matter, because this is but a naked Matter of Fact, and C. has no special Relief against B. on the Statute. 17. S. C. in the Notes there.

6. If A be bound to another in a Statute Merchant, and puts it in the Hand of a Stranger upon certain Conditions, to stand to the Award of another, and he awards accordingly, and this is performed, yet an Audita Querela does not lie upon this Matter without a Speciality. 43 Ed. 3. 28.

7. If two are in Execution upon a Judgment, Quod unica est Executio, and one is discharged by Letter of the Deette to the Sheriff, upon which the Sheriff sends to the Bailor by his Warrant to deliver him, upon which he is let at large, the other may have an Audita Querela upon this Matter. 2. 2. B. Harnem's Case, per Curiam.

F N B. 204. (F) says, the Conusor may enter and seize the Conusor with such Suit, and the Margin of the English Editions cites S. C.

8. If A. be in Prison upon an Execution for Damages recovered by B. and after A. purchases a Manor, to which Manor B. is a Villein regardant, A. shall have an Audita Querela upon this Matter in Fact, without a Writing. 41 Ed. 3. Audita Querela 13. per Curiam.

If the Conusor upon a Statute Merchant sues Execution, and dies seized of one Acre, and the Conusor executes Execution, there no Feoffor, nor the Heir by himself shall be charged with the whole Execution, but every one shall be contributory. Br. Audita Querela, pl. 44. cites 43 E. 3. 5.

9. If the Conusor insoffs several Men of several Parts of the Land, and after the Conusor serves Execution of the Statute against one, he shall have an Audita Querela upon this Matter. 33 Ed. 3. Audita Querela 38. Co. 3. Sir William Herbert. 14. B.

But if the Conusor himself had been alive and put in Execution, he should not have made any of the others to be contributory with him, but should suffer the Execution against himself alone; Per Cur. which Case was agreed N. 25 H. 8. and that he who is in Execution alone shall have Audita Querela against the others to have them contributory to him; Quod Natura, and according to Fitzth. Audita Querela 10.

Where the Conusor serves Execution against one of the Feoffors of the Conusor upon a Statute Merchant where there are several, he shall have Audita Querela to compel him to sue Execution equally against all; contra where he sues Execution of all against the Conusor who made the Recognizance; Note the Diversity. Br. Audita Querela, pl. 13. cites 9 H. 4. 4. — Br. Statute Merchant, pl. 11. cites S. C. —

P N B. 153. (B) S. P. accordingly.

If the Conusor makes Feoffment to several Men, and the Conusor serves Execution of the Land of one of them only, he may have Audita Querela against the Conusor to sue Execution against the other Feoffors by Contribution; Quere. Br. Statute Merchant, pl. 29. cites 13 H. 7. 22.

If a Man seized of 25 Acres is bound in a Statute Merchant, and makes Feoffment of 15 to several Persons, and Execution is served against one of the Feoffors, he shall have Audita Querela upon his Satisfaction to have the other Feoffors to be contributory with him, but if Execution be sued against the Conusor himself, he shall not have such Contribution; for this is upon his own Act. Br. Audita Querela, pl. 39. cites 25 H. 8. — S. C. cited Br. N. C. pl. 71. — S. C. cited 2 Buil. 15.
The Commissor of a Statute non seus A. and B. of several Lands; the Land of A. is extended, and he brought an Audit Querela against B. to have Contribution; he pleaded in Abatement the Obfuscation of the Lands in Pollution of C. sed non allocutus; for the Plaintiff is not bound to take Notice of that, but every one grieving may have an Audit Querela. D. 331 b pl. 24. Pach. 16 Eliz. Anon.

When it is said, that if the one Purchasor only is extended for the whole Debt, he shall have Con-tribution, the Meaning is not that others shall give or allow anything to him by way of Contribu-
tion, but that the Party, who alone is extended for the whole, may by Aud. Quer. or Sc. Pa. as the
cause requires, defeat the Execution, and thereby be restored to all the meane Profits, and compel the
Commissor to sue Execution of all the Land, and by this Means every one will be contributory, viz.
the Land of every Tenant will be extended equally. 3 Rep. 14 b. in a Nota of the Reporter in
Sir William Harbert's Cafe --- but this is altered now by the Statute of 16 & 17: Car. 2. cap. 5 and
made perpetual by the 22 & 23 Car. 2 cap. 2. which enacted, That when any Judgment, Statute, or Re-
covery shall be extended, the same shall not be avoided or delayed, for that part of the Lands extendible
are omitted out of such Extent, from always to the Parties whose Lands are extended, their Remedy for
Contribution against such Persons whose Lands shall be omitted. Provided this that all extend to Statutes
for Payment of Monies, and to such Extent as shall be within 20 Years after the Statute, Recognizance,
or Judgment had.

10. If A. and B. commit a Battery upon C. and after C. sues A. in Cro C. 443. Banco, where he hath Judgment for 20l. Damages, and after C. sues B. in B. R. and there has Judgment against him for 100l. Damages, B. R. under the Statute of 16 & 17: Car. 2. cap. 5. and takes B. in Execution, and after acknowledges Satisfaction in Barnes, S. P. Banco to A. of the said Judgment, B. R. may have an Audit Querela thereupon, and discharge himself out of Execution, because this was but a Trepass, and he ought to have Damages but once, as if he had scalped to one, the other should have had Advantage thereof. Hill: 11 Car. B. R. between Bayles & alios, contra D. P. Barnes, adjudged upon a Demurrer; but if Reasons of Trin. 11 Car. R. 359. but after, by Appeal, the Demurrer was waived, and Affair taken whether there was a meane Trepass.


12. Audita Querela upon an Indenture of Defeasance of a Statute Merchant; the Defendant pleaded Variance between the Statute and the De-
faseance, that the Name Rich. T. the Plaintiff, was not well nor plainly wrote, and because there was Indenture enough that it was one and the same Person, and also the Defendant had taken Exception to the Matter before, and this is only to the Form, therefore per Judicium he was put out of the Exception; Quod Nota. Br. Varience, pl. 105. cites 46 E. 3. 33.

13. In Scire Facias upon a Recognizance, the Sheriff returned the Defendant Nibil, and the Plaintiff had Execution at his Peril, and if the Defendant had released, he should have had Audita Querela; Per Hanc. Br. Audita Querela, pl. 14. cites 12 H. 4. 4.

14. A. seized of the Manor of W. acknowledged a Statute Merchant to B. and then sold the Manor to J. S. Afterwards B. released to J. S. all Right, Title, Interest, and Demands &c. and all Actions, Suits, and Exec-
cutions &c. which he, his Heirs &c. then had, or might have against J. S. for or concerning the Premises. An Execution was sued against Aud. Quer. J. S. who brought Aud. Quer. and had Judgment. Cro. E. 40. pl. 2. Trin. 27 Eliz. C. B. Hyde v. Morley.

15. Audita Querela to avoid Execution of a Judgment supposed, that J. T. and the Plaintiff as his Surety, was bound in an Obligation of 200l. for the Payment of 100l. upon which, Dott being brought, and judg-
ment had, J. T. entered into a new Bond for the Payment of 110l. at ano-
ther Day, which was in Satisfaction of the Judgment which the Plaintiff
accepted. Resolved, such a bare Surmise, which is but Matter of Fact, is not sufficient to avoid a Judgment. Cro. J. 579. pl. 8. Trin. 18 Jac.

B. R. Lutterford v. Peter le Mayre.
Audita Querela.

that K. did not sue him and M. that he had no Notice of the 2d Bond that he might have pleaded it, and so pretends that the second Bond should be a Defeasance of the first, and Judgment was given for the Defendant. Brownl. 29. Trin. 13 Jac. Bird v. Kirton.

(G) By what Court it may be granted.

Roll Rep. 1. N D Audita Querela may be granted by the Chancery, unless the Record upon which it is granted be there. By Reports, 14 Jac. Pieris.

Or upon a Judgment in any other Court no Aud. Quer lies; Per Coke Ch. J. Mo. 851, 851. pl. 1158. in Cafe of Mofly v. Pierce, S. C. & S. P. by Coke.

Roll Rep. 385, 384. S. C. & S. P. per Coke Ch. J. — 2 Built. 10. Mich. 10 Jac. Williams I said, that there is no Book in the Law to warrant such Proceedings upon a Judgment given in any of the King's Courts, an Aud. Quer should lie, and a Sei Fait thereupon returnable in Chancery, but only in the same Court where the Judgment was given, they having the best Knowledge of all the Proceedings in the same Case; and to this all the Court agreed clearly. 2 Built. 10. Mich. 10 Jac. in Cafe of Seriven v. Wright.

Roll Rep. 2. As upon a Judgment in B. R. no Audita Querela may be granted. By Reports 14 Jac.

Roll Rep. 3. But if a Statute Merchant or Staple be in Chancery, an Audita Querela may be there granted. By Reports 14 Jac.

S. C. cited accordingly. Le. 141. in pl. 194. Hill 50 Eliz. 1 C. 8. Dudley v. Lacy; but in that Case, tho' the Audita Querela was upon a Statute Merchant, the Court was clear of Opinion that the Party might sue in which of the Courts he would. ——— Le. 503, 504. pl. 421. Trin. 31 Eliz. C. B. Chantil. L. Mallard. Audita Querela upon a Statute Staple by an Infant, was brought in C. B. and it was objected for the Defendant, that C. B. ought not to hold Plea in this Matter, because there was no Record of this Statute in this Court; but on the Side of the Precedents were shewn to the contrary, and thereupon it was adjudged that the Action well lies in this Court. ——— Cr. E 208. pl. 3. Mich. 52 & 53 Eliz. Chavel v. Mallard, S. C. resolved that it lies in C. B. and in B. R. as well as in Chancery, for the Chancery has no more Record of it than those Courts, for the Statute remains with the Parties. ——— And. 227. pl. 244. seems to be S. C. and held accordingly.

Audita Querela, pl. 20. cites 7 H. 6. 19.

4. It was agreed, that in Debt upon Tenor of a Record certified in Chancery by Certiorari, and sent into Bank by Jul Hitheus, where the Plaintiff declares there upon Tenor of the Record, that he may well do it notwithstanding that the Record itself, upon which he declares, be in York where the Recovery was, and no Milichf; for per Miflin, if Execution be sued after at York, the Defendant may plead this Recovery here in Bar, and if Judgment be given here before Execution made at York, the Defendant may have Writ here sent thither comprehending the Matter, commanding them to cease from Execution, and if Execution be made in the mean time, he shall have the Audita Querela. Br. Audita Querela, pl. 20. cites 7 H. 6. 19.

5. Audita Querela upon a Statute Merchant shall be directed to the Justices of C. B. but upon a Statute Staple it shall be to the Chancellor. D. 332. a. S. C. cited accordingly. Le. 141. in pl. 194. Hill 50 Eliz. C. B. Dudley v. Lacy; but in that Case, tho' the Audita Querela was upon a Statute Merchant, the Court was clear of Opinion that the Party might sue in which of the Courts he would. ——— Le. 503, 504. pl. 421. Trin. 31 Eliz. C. B. Chantil. L. Mallard. Audita Querela upon a Statute Staple by an Infant, was brought in C. B. and it was objected for the Defendant, that C. B. ought not to hold Plea in this Matter, because there was no Record of this Statute in this Court; but on the Side of the Precedents were shewn to the contrary, and thereupon it was adjudged that the Action well lies in this Court. ——— Cr. E 208. pl. 3. Mich. 52 & 53 Eliz. Chavel v. Mallard, S. C. resolved that it lies in C. B. and in B. R. as well as in Chancery, for the Chancery has no more Record of it than those Courts, for the Statute remains with the Parties. ——— And. 227. pl. 244. seems to be S. C. and held accordingly.

6. An Audita Querela was brought in this Court, but because the Record was not brought into Court, so as the Party might have Execution, if the Matter was found for him; the Judgment was that Querens Nihil capitae
Audita Querela.

capit per breve. Cro. E. 33. pl. 15. Trin. 26 Eliz. B. R. says, that a ple to G. Precedent was shewn to the Court, which was Mich. 5 H. 5.

7. If a Man fues Execution upon a Statute Merchant, and hath a Ca-
pia returned in C. B. if the Feoffees or Parties will sue an Audita Que-
rela, they ought to fue the fame out of the Chancery, directed unto
the Justices of C. B. F. N. B. 104. (S.)

8. If a Man be bound in a Recognizance in C. B. and afterwards * [These
Words are neither in the Englih Ediiions nor in the
French, but seems necessary, and the Sense not perfect without them]—And so if one recover in
C. B. or B. R. Debt or Damages, and afterwards by his Deed releafe the fame, and afterwards fueth
forth Execution upon the Recovery; the Party to whom he releafe shall have Audita Que-
rela out of C. B. or B. R. where the Record is, and yet he may have an Audita Querela out of the Chancery,
and so it shall be sometimes judicial, and sometimes Original. F. N. B. 105 (B.)

(H) Who shall have it. Against whom. And who not.

1. If an Extent upon a Statute Merchant be sued against one Feoffee, Br. Audita
where the Condition of the Deceafance is not broken, the Feoffee
shall have an Audita Querela. 46 Ed. 3. 27. b. 28.

2. If the Bail in an Action be taken in Execution for the principal See (E) pl.
Debt, where the Principal hath paid the Money between the Verdict
and Judgment, the Bail shall have an Audita Querela. By Reports,

3. If the Land of T. S. one of the Feoffees of T. D. are extended
upon a Statute acknowledged by the said T. D. and not the Lands of
the other Feoffees, so that T. S. hath Title to have an Audita Querela,
and after he levies a Fine of the Land so extended, it seems that
this Conuee of a Fine shall have an Audita Querela to avoid the Ex-
That the Judges did not argue this Cafe, nor delivered any positive Opinion therein, inasmuch as the
Parties had agreed the Matter in Difference between themselves; and so this Cafe was cast out of the
Court, and went fine Die; but by Haughton J. and the rest of the Judges agreeing with him, the Feoff,-
see here did take the Land with the Charge thereon, and therefore he cannot have this Audita Querela,
unless the first Extent was had against him, then he might well have had this Audita Querela for his Remedy herein, and so to have Contribution; but here in this principal Cafe it is not so, be-
cause the first Extent was had against the Conuee before, and therefore the Conuee not to have this
Audita Querela; and so tho' the Opinion of the Court was against the Plaintiff, yet no Judgment was
given herein, because the Matter was ended by Agreement between the Parties. Quod nota.

4. It lies for the Grantee of a Reverson with Attornment &c. and there
he shall have Account ab Initio, cites 6 E. 3. 53. Charleton's Cafe, and
25 E. 3. 53. Venner's Cafe. F. N. B. 104. (G) in the new Notes
there (c).

5. If
5. If Consonor upon a Statute Merchant aliens Part of his Land, and Execution is sued against the Alien, he shall have Audita Querela to make the Consonor to be contributory; but if the Consonor himself was in Execution, he should not have Contribution of the Alienee. Br. Suit, pl. 10. cites 23 El. 3. Fitzh. Tit. Execution 127. and Ibid. 255, 256. and 29 El. 3. 7. and 29 El. 3. 39. accordingly.

6. If one acknowledges a Statute, and afterwards acknowledges a 2d Statute, the 2d Consonee shall have a Scire Facias against the first to receive the Monies which are to be levied, if the Tenant of the Freehold will not sue. F. N. B. 104. (G) in the new Notes there (c), cites 38 El. 3. 12.

7. Note that a Consonor infoffed a Feome of Parcel of his Land, and f. N. of the rest, and the Consonee sued Execution against the Feme, who brought Audita Querela, and bad Writ against the Consonee and f. N. to say why his Land should not be put in Execution, and f. N. showed Contribution of the Consonee, and the Court said they had no Warrant to hold Plea between the Consonee and the said J. N. and this Writ by the Feme ought to have been filed against the Consonee, to say why he should not recover the Land and the Iffues; and also they may grant out of this Audita Querela a Venire Facias, and Execution shall be spared, and then the Consonee shall answer to him who has the Contribution. Quod nota, that he who is in Execution shall have Writ against the other Tertennant to be contributory, and he shall have Writ upon his Acquittance against the Consonee; but it was said P. 36 H. 8. that the Consonor himself shall not have such Contribution. Br. Audita Querela, pl. 2. cites 45 El. 3. 17.

8. If the Consonee upon a Statute Merchant sues Execution, and grants his Estate over, the Audita Querela shall be brought against the Granatee; per Hank. quod Curia concennis. Br. Audita Querela, pl. 15. cites 12 H. 4. 6. & 15.

9. The Heir of the * Recognisar may sue an Audita Querela, if he has Matter in Writing to discharge the Execution. F. N. B. 104. (B)

* [The English Edition are (Recognise,) and therefore wrong.

10. A Stranger, who made not the Recognizance, was Tenant of the Land at the Time of suing forth of the Execution, shall have an Audita Querela, if he have Matter of Discharge in Writing. F. N. B. 104. (G)

11. In Audita Querela the Case was; A. and B. seised of Capite Lands, and C. seised of Succage Lands. They all 3 acknowledged a Statute of 8000 l. to D. A. and B. levied 2 several Fines of their Moieties to V. and W. to the Use of themselves and their Heirs, until Default of Payment was of certain Annuittes, and then to the Use of V. and W. They, after Default of Payment, sold the Lands to H and J. H. released to J, who devised the Land in Tail, and died. The Devisee in Tail did without Issue. The Wives of the Plaintiffs were Heirs to J. to whom the 3d Part of the Capite Lands descended. D. bad extended the Lands upon the Statute, before the Default of Payment of the Annuittes, and before the Bargain and Sale; and altho' he sued the Extent against A. and B. and also C. yet the Sheriff extended the Lands of A. and B and to defeat the Extent, and to have Redistription, because the Land of C. was not also extended, the Audita Querela was brought.
Audita Querela.

The principal Point in this Case was, if the Bargainee and those which claim under him should have an Audita Querela for the Extent made before their Time, or that the Bargainor having the first Cause of Action, had extinguish'd it by the Sale of the Land. Another Point was, if the Coheirs should have an Audita Querela without the Owner of the two Parts, all of them being Tenants in Common, and equally grieved with the Extent. The Case is argued, but not resolved.

12. In what Case a Vouchee in a Precipe quod reddat shall have Audita Querela to be restored to the Land lost. See Jenk. 100. pl. 95.

13. A seised of Bl. Acre and Wh. Acre, acknowledges a Statute, and then makes a Lease for Years of Wh. Acre, the Remainder over in Fee; then the Conveyance purchased Bl. Acre, and extends the Land of Leesee for Years. He in Remainder shall have Audita Querela for the Damnification which came to his Interest; per Barkley J. Mar. 71. Mich. 15 Car.

and that one Jointtenant only shall have it, and not abatable by Death of any other. Mar. 71. pl. 105. Mich. 15 Car. in Case of Leake v. Dawes.

14. Celso que Use before the Statute might have an Audita Querela; per Barkley J. Mar. 71. Mich. 15 Car.

(I) Against whom it lies.

1. If 2 Executors sue Execution for Damages recover'd by the Testa-
tor, where one hath released, an Audita Querela lies against both. 21 Ed. 3. 13 b.

2. Audita Querela does not lie against the King, therefore the Matter shall be pleaded. Br. Audita Querela, pl. 34.

3. Audita Querela lies as well upon Matter in Fals as upon Matter in Writing, and lies where A. and B. came before the Mayor &c. and B. acknowledges himself to be bound in 100 l. to A. in the Name of C. before the Mayor, and affirms his Name is C. and afterwards C. is arrested by Force of this Bond and Statute, and taken in Execution; now C. shall have Audita Querela against A. and B. F. N. B. 102. (H).

4. If the Conveyee [after Execution] has assigned [or leased] but a Part of his Estate, the Scire Facias shall be brought against the Conveyee alone, and not the Leesee [Leesee.] Quere. But if he assigns the Whole, and the Assignee levies the Whole, or the Plaintiff will pay the Residue, the Writ lies against the Assignee alone, and he shall retake (or repay) the Monies; but if he has levied the Whole, and afterwards assigns, the Writ lies against both. F. N. B. 104. (G) in the new Notes there are not to (C) cites 50 E. 3. * 46, or 16. 39 E. 3. 12. 21 E. 3. 1. 46 E. 3. Scire Facias 154. 15 E. 3. Respond. 3. But one of them may answer his Companion, and yet the Conveyee may release, notwithstanding the Assignment. Vide Ibid. See also 17 Aff. 52. 9 E. 4. 13. 12 H. 16. a. pl. 7-8. 8. 18 E. 3. 25. contra. 17 Aff. pl. 24. contra. 25 Aff. 8. 17 E. 3. 43. 4 H. 6. 72. 21 E. 3. 46. contra. See 17 E. 3. 49.

4 T (K) [Against
Audita Querela.

(K) [Against whom] jointly.

1. If a Statute be acknowledged to two, of which one is an Infant, and they make a Defeasance, and after sue Execution contrary to it, an Audita Querela shall be brought against both; for it does not appear within the Deed that he is an Infant. (Also the Deed of the Infant is not void, and peradventure he will affirm it.) 48 Ed. 3. 12. b.

2. If a Statute be made to Baron and Feme, and they make a Defeasance, and after the Execution contrary to it, the Audita Querela shall be brought against both, although the Defeasance be void as to the Wife; for this Action is in Lieu of an Answer of the Execution which is sued by both, and this is all one as if the Baron alone had made the Defeasance, which would have been a sufficient Discharge Contra 48 Ed. 3. 12.

3. Vide 11 Ed. 4. 8. b. An Audita Querela was brought against Baron and Feme and a third Person, upon an Execution upon a Statute by them, and admitted good.

4. If a Statute be acknowledged to two, and one makes a Defeasance, and after both the Execution, it seems the Audita Querela lies against both; for it is a Discharge of the Whole, and this is in Lieu of an Answer to the Execution; (for the Execution cannot be defeated against him who did not make the Defeasance, if he be not joined.) Contra 48 Ed. 3. 12. b.

5. If two Conufees make a Defeasance for them and each of them, the Audita Querela may be brought against one only. 48 Ed. 3. 13. S. C. and S. P. by Finch.

6. If a Statute be acknowledged to one, and a Defeasance made by him, if the Audita Querela be brought against the Conufee and a Stranger, the Writ shall abate. 48 Ed. 3. 13.

7. If a Statute be acknowledged to two, and one releaseth, and after they both the Execution, the Audita Querela may be brought against both. 11 Ed. 4. 8. b.

8. So the Audita Querela may be brought only against him that released. 24 Ed. 3. 27.

9. If a Statute be acknowledged to a Feme sole and J. S. and after the Feme takes Baron, and J. S. releaseth, and after Execution is sued, the Audita Querela may be brought against the Baron and Feme, and J. S. 11 Ed. 4. 8. b.

10. G. acknowledged a Statute Merchant to W. and afterwards interefled W. of Part of his Land, and the Residue be gave to H. his Son, and adjudged.
11. Audita Querela by three Persons to avoid Executions, which were at the Suit of several Persons; adjudged to be vacated, because one Aud. Quer. cannot be for several Suits. Mo. 354. pl. 479. Pach. 36 Eliz. Collins’s Cafe.

12. In Audita Querela to avoid Execution on a Statute, outlay in one of the Plaintiffs was pleaded. The Question on a Demurrer was, if it might be pleaded in that Suit which is only to be discharged, and not to recover any Matter, but was ruled a good Plea; whereupon but D. F., the other Plaintiff prayed Summons and Severance, so that he only might sue; and per omnes J. prater Walmley, he might well have it, because they only sue to be discharged, wherefore the Non Suit of the one shall not Prejudice the other; besides it is to discharge their Land, and it is not reasonable that the Act of one should make the other’s Land to be charged; but Walmley doubting adjournatur. Cro. E. 448. pl. 15. Mich. 37 & 38 Eliz. C. B Worsley v. Charnock.

13. If there are two Consorts, and their several Lands are put in Exec-Oné Jointure; they cannot join (if Cause be) in an Audita Querela, but one may have Aud. wife if they are Jointtenants of Land. D. 194. a. Marg. pl. 32. Pach. 38 Eliz. C. B. Morley v. Charnock.

14. In an Audita Querela the Cafe was thus, The Father and Son were bound in a Statute Merchant to C. who sued out an Execution against them, and their Lands were severally extended; and they supposing the Statue was not good, because it was not sealed with both their Seals, according to the ingly—Statute, they both brought a joint Audita Querela; and whether they could join in this Action or not was the Question; Judgment was given that they ought to have several Writs. Ow. 106. Pach. 38 Eliz. C. B. Worsley v. Charnock.

Wrong done to one by an Execution of his Lands, is not any Tort to the other. Nov. 1. Farmer v. Downs. [And tho’ the Cafe mentions Jointenants yet it plainly intends two Persons jointly bound only.]

15. If 2 are severally bound in 2 several Statutes, and afterwards the Recognize by Deed doth release both the Statutes to one of them, if he sues Execution against them severally, they shall join in Audita Querela upon that Release. F. N. B. 104. (M.)

16. It seems the Tenants in common &c. need not join in an Audita Querela with the Tertenants. 20 E. 3 Quere. F. N. B. 104. (M) in the new Notes there (b.)

17. Audita Querela was brought by A. B. and C. to avoid a Judgment Jo 577. pl. against them in Trespass, where A. only was taken in Execution upon this 9. S. C. held Judgment. B. and C. not being touched. It was objected that A. who was in Execution ought to have brought the Audita Querela alone, and that B. C. who had not been grieved, ought not to join with him, fed non allocatur; for they being Parties to the Judgment, and liable to the Execution, they never had against them, yet for their Indemnity they may well have an Audita Querela, and join with him who is in Execution. Cro. C. 443. pl. 14. Hill. 11 Car. 2. B. R. Corbett v. Barnes.

(£) Bars
Bars of an Audita Querela.

1. If the Conسور hath right to have an Audita Querela against him who hath the Land in Extent, and he enters upon him, and makes a Feoffment to another, whose Estate comes afterwards to the Extendor, the Audita Querela is extinct. 46 Ed. 3. 30. b.

2. So if the Feoffment had been upon Condition to render it up, and he does it accordingly, altho' the Extender does not come to the Land, yet by the Feoffment this Audita Querela is extinct, and not revived: Contra 46 Ed. 3. 30. b. 31. admitted.

3. But there it is admitted 31, that if the Extender had the Estate in the mean Time, between the Feoffment and the rendering up, the Audita Querela had been gone.

* Fitzh. Judgment, pl. 183. cites S. C.

+ Fitzh. Audita Querela, pl. 21. cites S. C. but says that in the second he shall not have Superfedeas to the Sheriff to lay Execution, as he might have in the first.

—— Br. Audita Querela, pl. 22. cites S. C. accordingly, and S. P. as to the Superfedeas, by the Reporter. — F. N. B. 104. (O) S. P. — But if a Man sues an Audita Querela upon a Release, and afterwards is Nonfuit, he shall not have an Audita Querela upon new Matter, ut dictur 43 E. 3. But it feemeth the Law is otherwise, but he shall not delay Execution by a new Audita Querela. F. N. B. 104 (Q).

5. If the Consee of a Statute delivers the Statute to the Conسور in lieu of an Acquittance, and after sues Execution, and the Conسور comes and prays a Re-extent, because the Land is extended too low, and this is done accordingly, he shall never avoid this Extent by an Audita Querela, because when he prayed a Re-extent, he admitted the Statute extendible and executory. 43 Ass. 18. adjudged.

6. If the Acquittance upon which the Audita Querela is grounded does not agree with the Statute which is to be discharged, but is so variant that it cannot be the same, the Audita Querela shall be disallowed. 18 E. 3. 53. b. adjudged.

7. But if the Plaintiff in the Audita Querela grounds his Suit in Chancery upon an Indenture, yet he may in Banco maintain it upon a Payment by Deed. 18 Ed. 3. 53. b.

8. So, altho' the Payment was after the Writ brought. 18 Ed. 3. 53. b.

9. If a Man sues Audita Querela upon an Indenture, and relinquishes it, he shall not have another Audita Querela upon other Matter; for he shall not change his Matter; Per Thorp and others, Quod nullus negavit. Br. Audita Querela, pl. 1. cites 43 E. 3. 7.

10. Audita Querela by the Heir of the Conسور against Tertenant, who said that the Heir himself, now the Plaintiff, after the Death of his Father, infeoffed this Defendant, and so he is in by Feoffment, and not by Statute, and the Plaintiff was compelled to answer to it. Br. Audita Querela, pl. 5. cites 46 E. 3. 30.

See (E) p. 2.

the like Point.
Audita Querela.

11. A. recovered in Debt against B. and after released to B. — A. sued Capias ad Satisfaciendum against B. and pursued the same till B. was outlawed. Anderson Ch. 1. held, that Audita Querela lies notwithstanding this outlawry, and if the Audita Querela pats with B. the outlawry shall be avoided. 2 Le. 175. pl. 215. Mich. 30 Eliz. C. B. Edgar v. Crip.

12. In Audita Querela to avoid Execution upon a Statute it was furnished, that the Consonor's Father was seized of Lands, and levied a Fine of them to the Use of himself for Life, and after of part of them to the Use of the Plaintiff in Fee, and of the Residue to the Convee in Fee. It was adjudged, that this Purchase in this Manner was a sufficient Discharge of the Statute. Cro. E. 756. pl. 22. Pach. 42 Eliz. B. R. Humphrey v. Heneage.

13. If a Writ of Aud. Quer. be brought by the Defendant in the former Action to discharge himself of an Execution, a Release of Actions Personol is a good Bar, because he is to discharge himself of a Personal Execution. Co. Litt. 289. a.

14. In Aud. Quer. the Plaintiff delayed, that he being in Execution upon a Capias Ultagam at the Suit of the now Defendant, the Sheriff suffered him to go at large. The Defendant pleaded, that after the said Escape, and before the Aud. Quer. brought, the said Writ of Capias Ultagam issued, and was returned Novo us inventus, and thereupon the now Plaintiff at the Day of the Return appeared, and upon Oyer of the Exigent reversed the outlawry, because it had an uncertain Return, & sic dicit. Quod non habetur aliquod tale Recordum; and adjudged upon Demurrer that Aud. Quer. does not lie. 8 Rep. 141. b. Pach. 8 Jac. Drury's Case, alias, Bray v. Drury.


Jac. B. R. Griffith v. Middleton. — S. C. cited as adjudged. Palm. 191. — Jenk. 106. pl. 2 S. P. accordingly. — Ibid. 126. pl. 55. S. P. accordingly; for the Aud. Quer. to defeat the Execution, and not to reverse the Judgment. — Mod. 224. pl. 13, R. and Partners to B. B. Higden v. Whitchurch, S. P. for in an Audita you admit the Judgment to be good, but only upon some equitable Matter arising since, you pray that no Execution be made upon it; Arg. and agreed per Cur.

16. Audita Querela is no Superfedeas, and therefore an Execution may be taken out, unless a Superfedeas be sued forth, and if the Audita Querela be founded on a Deed, it must be proved in Court before a Superfedeas shall be granted. 1 Salk. 92. pl. 1. Mich. 3 W. & M. in B. R. Langton v. Grant.

(M) In what Cases a Bar against one shall be against the other.

1. If the Consonor of a Statute aliens part of the Lands after a Release made of the Statute by the Convee, and after the Convee fues Execution against the Consoor, and he fues an Audita Querela, and is Nonfuit therein, this shall not be any Bar of the Audita Querela of the Convee, for he may have one also. 17 Ed. 3. 27. 35. See (H) pl. 3.

2. But if it had been otherwise if the Alienation had been after the First Audita Querela, Nonfuit, for then he comes in under the Charge. 17 Ed. 3. 27. 35.
In what Cases a Discharge for one shall be for the other.

1. If several acknowledge a Statute, and one discharges it against himself by Audita Querela for Infancy, this does not discharge the others also. 18 Ed. 3. 52. b.

(N. 2) Proceedings.

2. Distings upon Audita Querela was abated for false Latin, Quod dictur mirum ibidem, and New Discharges shall issue, and New Venire Facias; for it was alter Issue and Venire Facias returned; Quod Nota. Br. Procefs, pl. 75. cites 24 E. 3. 35.

3. In Audita Querela, the Defendant made Default before Plea pleaded, the Plaintiff shall not go quit of Execution, but shall sue Discharges ad Respondendum; but after that the Parties have pleaded Plea in Judgment, and the Defendant makes Default, then the Defendant shall have Discharges ad auudendum Judicium suum; and per Finch the Plaintiff shall not recover Damages in this Action, but where he is to be ousted of his Land, and as here the Mainprize shall not be discharged, notwithstanding the Default of the Defendant. Br. Audita Querela, pl. 7. cites 47 E. 3. 1.


5. In Audita Querela, where the Defendant was taken by the Execution of the Statute and imprisoned, and the Sheriff returned Petit Issue, and prayed Capias for the Mischief, and could not have it; and the Opinion of the Court was that he may sue jut Plurias, and upon this shall go quit, Quod nota; and the Plaintiff prayed to go by Mainprize, and could not, per Cur. till he had given some Answer. Br. Audita Querela, pl. 10. cites 48 E. 3.

6. 11 H. 6. cap. 10. Enacts that Where Persons taken for Execution of Recognizances of the Staple, come in by Writs de Corpus cum Caena in Chancery, bringing forth divers Indentures, and other Things in Defiance, desiring Writs of Sire Facias to warrant the Parties at whose Suit they be taken, and by Surety found to the King have been delivered, from henceforth such Sureties shall be made severally, as well to the King as to the Parties. Where an Audita Querela is brought by

7. If Execution be not made by a Statute Merchant, the Procefs upon the Audita Querela shall be Venire Facias, but when Execution is made, then the Procefs shall be Sire Facias; for upon the Venire Facias shall Issue...
Audita Querela.

Issue Disrefs infinite, which is a long delay to him who is in Execution; but Scire Facias is more short; Quod nota per Cur. Br. Audita Querela, pl. 21. cites 22 H. 6. 56. and 15 E. 4. 5.

Writ upon some Deed of the other Party, in both these Cases a Scire Facias is the Process, per Cur. Carth. 353. Pach. 6 W. & M. in B. R. Clerk v. Moor.

But where it is writ by a Person at large and upon a bare Supposition of Matter of Fact, there the only Process is a Venire Facias, and upon that a Diffinres infinute, per Cur. Carth. 353. 354. Clerk v. Moore. 1 Salk. 92. pl. 2. S. C. says nothing of the Writ being founded on a Deed, but says that where the Suit is Quia timet, and the Party at large, the proper Process is Venire and Diffinres infinito; but where the Party is in Execution, there he may either have a Scire Facias or a Venire Facias; and that Co. Entries 88. is the only Scire Facias on a Matter en Pals, whereas the Party was not in Execution.

Where an Audita Querela is founded on a Record, or the Party is in Custody, the Process upon it is a Scire Facias; but if founded on a Matter of Fact, or the Party is not in Custody, the Proceeds is a Venire. 1 Salk. 97. Hill. 10 W. 5. B. R. Anon. — Ibid; layer that Trim. 12 W. 5. B. R. it was held to again. — S. P. by Altham, Mo 811. Mich. 5. Jac. in Canc. in Case of Trott v. Sparking.

8. A Man who is condemned in Debt or Damages, and after gets a Release, he shall not have Scire Facias or Cognoscendum Faciam till be taken and imprisoned, but shall have Audita Querela if he be at large, and so was the Opinion of the Court. Br. Audita Querela, pl. 33. cites 2 E. 4. 22.

9. In Audita Querela against two, the Defaut of the one at the Scire Br. Dima-
36. cites 11 E. 4. 8.

10. The Process in Audita Querela is Venire Facias & Diffinres The Diffin-
& Pluries Diffinres, and if he return Null, or Non effe Inventus, he shall have a Copias against the Defendant. T. 81. E. 3. F. N. B. 104. (U.)

had the Day of the Writ purchased. 18 E. 5. 56. 38 E. 3. 51. and before the Diffinres filed the Co.
notice shall not be oulted. F. N. B. 104. (U) in the new Notes there (2) cites 21 H. 6. 56. See 48 E.

11. If a Man be arrested and imprisoned upon a Statute Staple, and In Audita
he hath Auncittance or Release to discharge himself, then if he will sue an
Audita Querela or a Scire Facias to avoid the Execution of that Statute, he shall give to give Security as well to the Party, as unto the King in Chancery, severally in a certain Sum &c. to sue with Effets, and to render by Recogni-
his Body or pay the Money &c. otherwise he shall not be delivered out of
Prison; and the same is by Force of the Statute of 11 H. 6. cap. 10
V. N. B. 105. (F.)

Cafe of Dingley v. Greyton.

12. Upon an Audita, Querela the Plaintiff shall have a Supercedens in
the same Writ to stay Execution, but not in Cafe of a Nonfuit. F. N.
B. 104. (O.)

13. An Infant Bail, if he be an Infant at the Time of the Bail,
shall be discharged by an Audita Querela. Jenk. 319. pl. 21.

14. In Audita Querela it was laid by Broome the Secondary, that Upon an Au-
Bail must be given in Court, and not elsewhere, unless in Cases of great
Necessity, and then it may be put in out of Court before 2 Judges, and
that this is the Courte of the Court. Palm. 422. Pach. 1 Car. B. R.
Anon.

Mod. 598. Mich. 15 W. 3. in a Nota.

15. In Audita Querela the Party appeared upon the Scire Facias and bid 456 pl.
assumed, for that the Scire Facias were Date before the Audita Querela; 16. S. C. ac-
but the Court held that the Fault was cured by the Defendant’s Appear-
ance; for Audita Querela is in Nature of a Meine Proceeds to bring in Querela is
more proper the Defendant to answer, and the Judgment is given upon the Audita Querela, and therefore disallowed the Demurrer. Vent. 7. Hill. 20 &c. to in. 21 Car. 2. B. R. Vaughan v. Leyd.

power the Court to inquire of a Grievance; and if the Party, against whom the Complaint is, be here, we ought to proceed to examine the Matter, without inquiring into the Nature of the Proceed, by which he came in because he might have appear'd without Proceed; but that in Scire Facias on a Judgment it is otherwise.

16. Judgment against H. who render'd himself before the Return of the Ca. Sa. but did not give the Plaintiff Notice of it, nor get the Bail-piece discharged; and the Plaintiff proceeded to Judgment against the Bail up on a Scire Facias, the Court would not relieve them upon a Motion, because no Exoneration was entered, and a Scire Facias returned, but put them to their Audita Querela. i Salk. 101. pl. 14. Trin. 12 W. 3. B. R. Lyell v. Galletly.

(N. 3) Pleadings. The Writ and Declaration.

The Plaintiff 1. A Udita Querela by Conufor upon a Statute Merchant, Super literas Acquitancia, and he swore two Releaves, the one of all Actions, and the other of the Sum in the Statute, and the Party was compelled to hold him to the one Releafe; for each goes to all; by which he held him to the general Releafe; and the other said that this is not Literae Acquitancia, and because they are of one Effect he was compelled to answer, Quod nota; and where the Writ is Literae Acquitancia in the Plural Number, and one Release is the Singular Number, and yet well. Br. Audita Querela, pl. 24. cites 24 E. 3. 27.

2. If A. be bound in a Statute Merchant to B. and delivers into the Hands of J. S. upon Condition, and tho' the Condition be perform'd, yet J. S. delivered it to B. The Plaintiff cannot aver the Conditions against Winch, where the Bailiff makes the Conufor himself who is Party to the Statute; but where it rests in indifferent Hands, there, in Detinue against the Bailiff, the Conufor may aver the Conditions of the Delivery in Advantage of the third Person; but contra against the Conufor himself, where it is in his own Hands who is Party, and sues Execution quod tota Curia concilis; and to the Opinion all the Justices was against the Plaintiff. Br. Audita Querela, pl. 1. cites 43 E. 3. 27.

But in Party, there Writ of Detinue lies against him, and the Conditions shall be aver'd without shewing Writing; to which Belk, who was a Counsel with the Conufor, agreed; for there the Action of Detinue is brought against the Bailiff who is dead; but as long as the Bailiff is alive, so that the Party may have Writ of Detinue against him, the Conufor cannot aver the Conditions against the Conufor without shewing Writing of them, therefore as here the Conufor is at no Mischief; for he may have Detinue against the Bailiff, and recover all in Damages. Ibid.

3. In Audita Querela upon an Indenture of Defeance of a Statute Merchant, the Defendant pleaded Variance between the Statute and the Deffiance, that the Name of R. Ty. the Plaintiff was not well nor fully writ; and because there was enough Intention that he was the same Person, and also the Defendant had taken Exception to the Matter before, and this now is only to the Form, therefore per Judicium he was ouit to of the Exception; quod nota. Br. Variance, pl. 105. cites 46 E. 3. 33.

4. In Audita Querela he shall have Scire Facias to the Party, and Superfedees for himself for the Execution, and shall shew Indenture of Deffiance
5. Release of all Actions is not sufficient to have Audita Querela; for Execution is not released by it. Br. Audita Querela, pl. 8. cites 47 E. 3. 5.

6. P. was bound in a Statute Merchant to W. D. who bair'd the Statute to 7. N. in indifferent Hands, upon certain Conditions perfom'd to deliver it to D. or otherwife to P. and after D. brought Writ of Detinue of it against N. who pray'd Garnishment against P. upon the Matter, who came and pleaded to Illue, and at the Nifi Prius; and pending this, N. by Cown and Procurement of D. and one R. delivered it to the said D. upon which he sued Execution, by which P. was taken and imprisoned, and brought Audita Querela, containing all this Matter against all three; and Norton pray'd Proceeds by Capias upon it, because Deceit is comprifed in the Writ, and could not have it without Venire Facias. And it was in a manner agreed by the Judges, that the Writ of Audita Querela shall comprehend all the Matter above, but yet the Writ is only against the Conufee who sued Execution, and the Venire Facias shall illue against him only, and not against the other two, viz. the Bailiff and the Procuror; but it seems that Action of Deceit lies against them; for the Audita Querela cannot lie but against him who is Party to the Record, unless in Special Cafe. Br. Audita Querela, pl. 15. cites 12 H. 4. 6. & 15.

7. And per Hull, the Defendant never shall make Fine in Audita Querela; and per Hank. if the Conufee upon a Statute Merchant fues Execution, and grants his Efate over, the Audita Querela shall be brought against the Grantee. Quod tota Curia concepit. Ibid.

8. And fo see that the Bailee nor the Procuror shall not be compell'd to anwer in this Action; for the Nature of this Action is no other but to avoid the Execution, and the Bailiff nor the Procuror have no Execution; quod nota. And fo see Audita Querela upon Matter in Factual, and against him who has the Land in Execution, tho' he was not Party to the Record; for this is all to avoid the Execution. Br. Ibid.

9. Audita Querela upon an Indenture, which was Lange White, and the Writ was Lang White, leaving out the lait (a), and it was amended. Quere if it shall abate for the Variance, if it had not been amended, or not; for it seems that it shall, if it had not been amended; for Port. said that now lately an Outlawry was reverfed for this Difference between Dockwra and Dockawre. Br. Variance, pl. 90. cites 21 H. 6. 7.

10. This Writ shall be directed to the Judges of C. B. or B. R. F. N. B. 102. (H).

11. Variance between the Audita Querela and the Record shall abate the Writ. F. N. B. 104. (R.)

12. Lands of the Heir being extended upon a Statute made by his Father, he brought an Audita Querela, suggefting the Lands to be intailed, and fo not extendable. The Defendant pleaded that they defended to him in Fee, and traversed the Tail. It was found that all (except 500 Acres) were in Fee. Adjudged that the Illue ought to be found as the Plaintiff pleaded in every Part, otherwife it is found againat him in all; wherefore it was adjudged that the Plaintiff take nothing by his Writ. Cro. J. 85. pl. 10. Mich. 3 Jac. B. R. Athburnham v. Ed. Sr. John.

13. Audita
13. Audita Querela, to avoid a Statute Merchant, furnishing that the Mayor who took the same had not Authority to take such a Statute, and Quod scriptum Recognitum &c. was not sealed with the Queen's Seal of 2 Pieces provided for the Sealing of Statutes Merchants; it was held by all the Court, that either of these Causes are sufficient to avoid the Statute; but that the Count was not good for the Doublenefs of it; for it ought to comprehend but one Cause, or however ought to rely upon one; for Doublenefs is Uncertainty. Cro. E. 809. pl. 14. Hill. 43 Eliz. C. B. Foreft v. Ballard.

14. In Audita Querela of Land taken in Execution, an Exception was taken to a Declaration for not sitting forth that the Statute had 3 Seals, purfuant to the Statute of 23 H. 8, yet the Writ is good, because tho' the Execution be ill, yet the Audita Querela lies, because it is brought only for the Deliverance of the Party. But otherwise it is if one files an Action upon the Statute; there be ought to fhew the Seals precisely. But it being alleged that the Statute was acknowledged according to the Statute of 23 H. 8, it is intended to have all the Seals. Mo. 811. pl. 1997 Mich. 8 Jac. in the Petry Bagg in Chancery. Trott v. Spurling.

15. A. brought an Audita Querela against B. upon a Recognizance of 4000l. acknowledged to the Use of his Mother, and shew'd that the Conflor had infeffed him and another of the Lands, and that the Conflor had filed Execution against him only; and found for the Plaintiff, and moved in Arreft of Judgment, 1st, because he had not fhewed in this Audita Querela when the Statute was certified, nor yet the Jette, nor yet the Return of the Writ of the Extent. 2dly, The Plaintiff had not fhewed himself the Party grieved, because he had not fhewed an Officer, and before an Officer no Audita Querela lies for the Purchafor; but otherwise for the Heir, as 17 Aff. 24. Hobart and Winch only preftent, the Liberate is an Officer of itself. Winch. 20. Trin. 19 Jac. Sir Edward Grubham v. Sir Edward Cooke.

16. In a Scire Facias, in the Nature of an Audita Querela, the Plaintiff fays that Sir W. B. being feffed in Lands in D. and of other Lands, in 3 Jac. acknowledged a Statute of 400l. and that the Plaintiff had Part of the Land Subject to the Execution, and that other Lands in the Posseffion of the Defendants were likewise Subject, but that only those in the Posseffion of the Plaintiff were taken in Execution; whereupon he brought this Action to be relieved against the Defendants by way of Contribution. After Verdict for the Plaintiff it was moved in Arreft of Judgment, that the Action was brought generally against the Defendants, without alleging that they were Tenants tempore Breois, or that the Plaintiff himself was then Tenant, yet being faid to be to his Prejudice, & minus jusfæ, it fhall be intended that he was then Tenant, and the Defendant not having anwer'd that he was not Tenant, but admitted him as fuch, Judgment was given for the Plaintiff. 3 Bull. 305. Mich. 1 Car. B. R. Blackstone v. Martin.

Lat. 3. S. C. but 8. P. does not appear.—Ibid. 112. S. C. & S. P. and fays that the Defendant pleaded that the Conflor was not feffed of other Lands at the Time of the Confeffion of the Statute, or at any Time after, unless of those of the Plaintiff which were taken in Execution; but it was found for the Plaintiff, and upon the Exception taken the Court held the Exception not good; —Ibid 274. S. C. fays Judgment was given for the Plaintiff.—Jo. 90. pl. 4. Blakefton v. Martyn, S. C. accordingly.—Jo. 82. S. C. but S. P. does not appear.—Palm. 410. S. C. but S. P. does not appear.—S. C. cited accordingly, Mar. 69. pl. 108. Arg.—3 Bull. 509 in the S. C. it is faid that a Precedent was fhewn in 35 Elis. Morley v. Love, where it was fhewn How he was Tenant, and that he was Tenant at the Time of the Liberate; and all this there fhew'd in certain, 41 Elis. Duttrd v. Eopp, in an Audita Querela against an Affignee, fhews the Seifes, & aduceth Seifers existentes; but in modern Times, viz, in the Time of King James, all the Precedents run according to the Precedent of this Case now here in Question before us.

17. A.
Audita Querela.

17. If A. and B. were bound in a Statute to H. and A. was taken in Execution, and afterwards set at large with the Assent of the Plaintiff. They brought Aud. Quer. setting forth as above, and that, notwithstanding the Plaintiff, to see the Defendant by Inquisition before the Sheriff of S. and the Sheriff of H. the Lands in the Inquisition, et idem. H. the Plaintiff delibera
tavit. After Judgment for the Plaintiffs this was moved in Error as insuf
tible that the Plaintiff should deliver to himself, whereas it ought to have been by the two Sheriffs deliberari procuravit; But all the Court con
eived it to be no Error; for the Writ is good enough which shews suf
ficient Cause of Discharge, and it comprehending that he is Minus ju
ele grieved, in delivering their Lands in Execution, it is sufficient with
out either Declaration, and when the Declaration is good in Point of
Discharge, altho' the Matter be ill in Point of Aggravation of Damages,
yet the Writ being good, and if so upon the Cause of Discharge found for him, the Judgment is good; for the Fault in the Declaration is
not material. Judgment was affirmed. Cro. C. 153. pl. 1. Patch. 5

18. In B. R. an Aud. Quer. is like a Sci. Fa. where the Writ is in the Court; Arg. which the Court agreed. Keb. 640. pl. 9. Hill. 15 &

19. G. and M. were jointly bound to T. in a Bond of 700l. T. sued both	and obtained two judgments, and both of them was outlawed, and G. was	taken upon the Capias Utlagatum, and the Sheriff voluntarily suffered him
to escape, whereupon T. brought Debt against the Sheriff for this Escape,
and recovered, and received Satisfiction, and yet he proceeded against M.
who thereupon brought an Audita Querela, setting forth all this Mat	ter; but upon a Demurrer to the Declaration the Opinion of the Court	was against the Plaintiff, because the Time when, and Place where Sat	 satisfication was made by the Sheriff was not specially set forth, which might,
Tatnell.

But the Court said, that if T. had only brought an	Action on the Cae against the Sheriff, and	recovered Damages for the Escape, the he had	hagd the Damages paid, that would
not have been sufficient Ground for the Plaintiff here to bring an Audita Querela, but in this Case he	recovered his original Debt in an Action of Debt grounded upon the Ecape, which is a sufficient	Ground of Action if he had declared well. They gave Day to shew Cause why the Declaration should not be amended, paying Costs. Mod. 173, pl. 8. Mich. 25 Car. 2. C. B. in Cafe of Alford v. Tatnell.

O Judgment.

1. If the Conueree of a Statute Merchand release it, and after	the execution upon the Body of the Conueree, he shall have
e an Audita Querela, and recovers Damages against him. 47 Ed. 3. 1. b.
Br. Audita Querela, pl. 7. cites S. C.
but S. P. does not ap	appear—Pitzh. Audita Querela, pl. 2. cites S. C. but S. P. does not appear. Plaintiff had

2. If the Teftator release his Debt, and makes Executors, and dies,
and they sue Execution upon Statute Staple, there in Audita Querela
by the Conueree he shall not recover Damages; for they cannot take Con

3. He
3. He who had Judgment in the Audita Querela was restored to the

Br. Scire Fa-
cias, pl. 183,
cites S.C.

4. A Man was bound to J. and H. in a Statute Staple to the Use of J.
and after H. released to the Confor. Both sued Execution in Chancery, and
the Confor brought Audita Querela, and had Scire Facias against them,
and the one appeared, and he who released made Default, and because the
Default of one is the Default of both, therefore the Confor was dis-
charged of Execution, and the Plaintiff prayed his Damage; and per Cur. if it was in C.B. where the Proceses is Venire Facias, he should
have Damages only in Chancery upon Scire Facias. Per Choke it shall
by Order of the Scire Facias, which is to recover no Damages. Brooke lays, tamen Quere inde; for by same all is one in this Cause.
Querela, if he shall recover Damages against both, or only against him who
released and made Default. It seems against both; for the one shall take
Notice of the All of his Companion. Br. Damages, pl. 125. cites 11
E. 4. 8.

5. Per Vavifor, where two Debtors are, and the one is required to pay,
and he brings Action against both, he only who was required to pay

6. In Treypafs by C. against D. the Plaintiff had Judgment and Damages
to 141. and Costs to 51. 10 s. and the fame was affirmed on a Writ of
Error, and Costs to 51. 10 s. for Delay of Execution; but before the
judgment affirmed in Error, D. released all Executions and Demands,
and took C. in Execution for Damages and Costs upon both Judgments. C.
brought an Audita Querela, and set forth all this Matter, and Ifue was
taken upon the Release, which was found against D. It was intituled in
Arrest of Judgment, that this Release being before the last Judgment,
and not pleaded, the Execution is now on that Judgment, and so he shall
not have the Benefit of this Release; sed non allocatur; for he had
no time to plead it; besides, this 2d Judgment is only for the Costs in-
creased, and the Execution for the first Costs and Damages is upon the
first Judgment only, and so barr’d by this Release; and tho’ the Execution be intire,
yet that is no Cauté to discharge any more than the
first Damages and Costs on the first Judgment, and therefore adjudged
that he be discharged as to them, but not as to the 2d Costs. Cro. J. 337.

9 Jac Durrant v. Child, S.C. but S. P. does not appear.—Brownl. 221. S.C. but seems only a

7. If after Judgment and Execution awarded an Aud. Quer. be
brought, and by reason thereof the Execution is superseded, here if it be
found against the Plaintiff in the Aud. Quer. the Party shal] have Execution
awarded upon the Judgment in the Aud. Quer. and not upon the first Judg-
B. R. Anon.

In Audita
Querela by
the Courte
of the Court,
the Plaintiff
enters into
Recognition to discharge himself if the Suit go against him, per Twifden; but by Herne Secon-
dary, that is only when Execution is superseded, or the Party taken out of Priorit; but if the M. may be
on the first Judgment paid to the Party, there is no Remedy for it; but if to the Sheriffs, the Court upon the
Aud. Quer. may order it to remain there till the Suit be determined; and if the Plaintiff has Judgment in
Audita
Averment.

Audita Querela, he shall only be discharged of Execution, but shall have no Restitution; wherefore (because the Plaintiff could not have been taken in Execution on the first Judgment, but only upon the Judgment in the Audita Querela) the Court ordered the Money to be brought into Court, and re.

By Windham J. by Judgment in Audita Querela brought before the former Execution made, he shall be restored to whatever he lost by Execution, which the Court agreed, being founded on a Release.

For more of Audita Querela in General, See Conditions, Executions, Mainprize, Statute, Superledeas, and other Proper Titles.

(A) What amounts to, or is a sufficient Averment;
And what is the Use thereof.

THE Word Averment is diversly used in our Law; by some it is Averment is
taken to be, where a Man pleads a Plea in Abatement of the
Writ, or Bar of the Action, which he says he is ready to prove, as the
Court shall award. Others say it is an Offer of the Defendant to make good which is the
or justify an Exception pleaded in Abatement or Bar of the Plaintiff's Ac-
ception; and signifies also the Act, as well as the Offer of Justifying the Ex-
ception. Heath's Max. 34.

Replications and other Pleadings (for Counts or Avowries in Nature of Counts need not be averred)
containing Matter affirmative ought to be averred, & hoc paratus est verificare &c. Particular Aver-
ments are, as when the Life of Tenant for Life, or Tenant in Tail are averred, and there, tho' this Word (Verificare) be not used, but the Matter vouched and affirmed, it is upon the Matter of an Averment; and an Averment contains as well the Matter as the Form thereof. Co. Litt. 562 b.

2. In fato dicit in a Declaration is an Averment, but in all subsi- Averment in
quent Pleas atterius dicit is used. Introduction toVidian's Entries, Marg. Pleading is in this Form
in the End of the Plea after this special Matter last forth to warrant the same, viz. Et hoc paratus est
This Word Pref shall serve for Averment; by all the Justices. Br. Averment, pl 65. cites 1 H
7. 19.

3. A Man pleaded Nulli tiel Record, & hoc paratus est verificare per idem Heath's Max.
Recordum, this is no Plea, nor it is no good Averment. Br. Averment, 36. S. P.
pl 58. cites 9 H. 7. 2.

4. In Ejecution of a Resutory the Plaintiff declared that the aforesaid S C. cited A. B. Resitor of the said Church was, and yet is, seised of and in the Resitory Arg. Mo. aforesaid &c. in his Demesne as of Fee in Jure Ecclesie &c. After Ver-
dict it was moved that the Count was insufficient, because the Life of the

Y
Parson, who was the Leffor, was not averr'd expressly, but by Imputation only; but the Court, prater Saunders Ch. B, held it sufficient, and Judgment accordingly. D. 304. a. pl. 52. Mich. 13 & 14 Eliz. Anon.

5. The proper Use of Averment consists in this, viz. to add Matter to the Plea to make doubtful Things clear, which otherwise shall be intended against the Pledger. Arg. Mo. 376. pl. 506. Mich. 36 & 37 Eliz. in Perrot's Cafe.

The Use of an Averment is to ascertain that to the Court which is generally or doubtfully alleged, so that the Court may not be perplexed of whom, or of what it ought to be understood. Heath's Max. 42. cites Co. Litt. 552. b.

6. Cafe, for that Q. Eliz. was seised in Fee of the Manor of S. and granted to him 30 Acres, Parcel of the said Manor, by Copy of Court-Roll; and that the granted 4 Acres, other Parcel thereof, to the Defendant; and alleged that the Copyholders of the 30 Acres, Time out of Mind, had Common in the 4 Acres for certain Cattle from the 1st Aug. to All-Saints, and that the Defendant 1st of May, in such a Year, inclosed the said 4 Acres with Hedges and Ditches, per quod he could not have his Common. After Verdict for the Plaintiff it was moved, that the Plaintiff's set forth that the Inclosure was made 1st May, but did not aver that it continued till the 1st of Aug. and so no Cause of Action appears. But it was said that if there is any Thing which implies an Averment, it is sufficient; now here the Per quod he could not have Common is a sufficient Averment that the Inclosure continued till the 1st of August and after; for otherwise he could not lose his Common; besides the Jury have found him guilty, which he could not be, unless the Inclosure had continued. But Doderidge J. said that the Per quod is an Inference out of the precedent Declaration, and does not amount to an Averment; but Ley Ch. J. held that it amounted to an Averment; but all the Court agreed that after Verdict for the Plaintiff the Judgment was not to be arrested for the Matter aforesaid. 2 Roll Rep. 379. Mich. 21 Jac. B. R. Colson v. Perry.

7. Error of a Judgment in Assumpsit, in which the Plaintiff declared that in Consideration he would renounce an Administration at the Request of C. and permit the Defendant to administer, that the said Defendant would discharge the Plaintiff of 2 Bonds, and alleged that he did renounce the Administration, and suffer the Defendant to administer, but that the Defendant had not discharged him of the 2 Bonds. It was held by Berkeley J. (the other Judges being absent) to be Error, because he did not aver that he renounced the Administration at the Request of C. For perhaps he might be compell'd to renounce by a Sentence in the Spiritual Court, or of Right the Wife (as the Defendant was) ought to administer. Adjournor. Mar. 55. pl. 86. Mich. 15 Car. Clarke v. Spurden.

8. In False Imprisonment in London, the Defendant pleaded 2 S. sued forth a Latitat the last Day of Trin. Term, directed to the Sheriff of R. by Virtue whereof the Sheriff made his Warrant to the Defendant, who thereupon took the Plaintiff, which is the same Imprisonment, absque hoc that he is guilty, vel alter vel alter modo. The Plaintiff replied that the Writ was truly professed on such a Day after the Imprisonment. Upon Demurrer it was adjudged for the Plaintiff, because though the Tefte of the Writ is upon Record, and the Plaintiff cannot aver against it, yet great Inconveniences will be if the Plaintiff cannot set forth the very Time of purchasing the Writ, and the Relation of the Tefte is only to prevent Fraud, and not jutify a Tort. Raym. 161. Pach. 19 Car. 2. B. R. Bilson v. Johnson.

9. In Replevin the Defendant made Cognisance as Bailiff to Baron and Feme, he being seised in Right of the Feme for Rent in a retro exsifen'. The Plaintiff demurr'd specially; for that the Life of the Wife was not averr'd.
Averment.

10. In Debt on Judgment the Defendant pleaded in Abatement that a Ld. Raym. Writ of Error was sued such a Day upon the Judgment, which Writ of Rep. 411. Error is still depending undetermined &c. The Plaintiff replies that the W. 3. in Original in Debt was sued before the Writ of Error was sued, as appears by Cafe of Beal the Tefe of the Original. The Defendant rejoins that the Original bore v. Simpion, Tefe such a Day, which was before the Writ of Error was sued; but that in Treby Ch. Fall the Original was not sued until such a Day, which was after the Writ of Error was sued. The Plaintiff demurs, supposing that the Defendant was etopp'd by the Tefe of the Original; and of that Opinion it was ever was Treby Ch. J. but Powell J. was of the contrary Opinion, and said resolved that that if a Man is arrested, and afterwards a Writ is sued with a Tefe, it was avera- ble, that a Antedated in false Impri [omitted].

11. Debt was brought upon a Penal Law, which by the Statute ought to be sued within a Year. The Defendant pleaded the Statute, and that one Year was elapsed before the doing the Action &c. The Plaintiff replied that he sued an Original Tefe such a Day, which was within the Year. The Defendant rejoined that the Writ bore Tefe within the Year, yet it was sued after the Year. The Plaintiff demurred; and adjudged by the whole Court, that none shall be admitted to aver that an Original was sued at any Time contrary to the Tefe; per Treby Ch. J. cited as adjudged. Ld. Raym. Rep. 212. Pach. 9 W. 3. in Cafe of Drinkwell v. Fowkes.


13. Indictment was that the Defendant knowing the Will of J. S. to have been proved in the Prerogative Court, cited the Executor before himself, being the Chancellor of D. to prove the Will there, in order to exact Money from the Defendant J. S.'s Executor. Ld. Ch. J. Parker and the Court held, that it being laid ens that J. S. was indi- cated of Forgery, and pretended to keep out of the Way of the Executor, and

J. S. who was a material Witness to prove the Forgery &c. The Court held the Implication as strong as can be; but the Question was if an Indictment can be taken by Implication, Extrajudicature. Gibb. 132. Hill. 3 Geo. 2. B. R. The King v. Lawly — Gibb. 265; Pach. 4 Geo. 2. S. C. The Court held this a proper certain Averment, and that the same Certainty will do in an Indictment as well in a Cause or Replication, and Judgment for the King per tot Cur.

(B) In
In what Cases Averment may or must be.

1. That will take Advantage of any Estate, except that of a Fee, simple, ought to aver the Continuance of such Estate, and that is a certain Rule in Pleading. Arg. Bridg. P. 97. cites 15 E. 3.

2. In Right of trampling his Grass, the Defendant said that if, who had Common there, licenced him to put in his Beasts; and the Plaintiff said that it was his Several Cloze, and was not suffier'd to have such General Averment against the Special Matter, but ought to traverse the Licence, or the Title of Common. Br. Averment, pl. 66. cites 3 H. 4. 6. 8. in the written Book.

3. In Debt of £10. upon an Obligation of £100. and confessed Payment of all but of £10. and the Defendant pleaded Acquittance of £10. in Part of Payment of £100. and the Plaintiff aver'd that the Acquittance was of another £10. Br. Averment, pl. 11. cites 7 H. 6. 34.

4. In Detinue of a single Obligation, the Defendant pray'd Garnishment. The Garnihee may aver that it was delivered upon certain Conditions &c. Br. Averment, pl. 62. cites 8 H. 6. 28.

5. The Defendant cast Superfedefas of Privilege of Chancery, because he was Servant of the Chancellor of England the Day of the Writ purchased, and yet is, and demanded Judgment it the Court will take Conufance; and the Plaintiff said that he was not Servant of the Chancellor the Day of the Writ purchased, nor ever after; by which, because the Defendant refused the Averment, and stood upon the Writ of Superfedefas that it ought to be allowed, by reason of the Words of the King, viz. ut Accipimus, and therefore, for the not defending, it was awarded that the Defendant answer; quod nota. Br. Averment, pl. 15. cites 21 H. 6. 20.

6. It appears in the Books of Entries, That where a Plea is either pleaded to the Jurisdiction, or to the Person, by Matter en tant, as Profession or Villeinage, there be always Averments, which seem to be of Necessity by 37 H. 6. 14. because to thefe, Anfwers may be made; quod nota. Heath's Max. 36.

7. In Precipe quod reddat, the Tenant vouch'd one within Age, and prayed that the Parol demur; and the Demandant tender'd Averment that he was of full Age, and the Tenant that he was within Age, and not of full Age, and the Averment received. Br. Averment, pl. 16. cites 33 H. 6. 48.


9. So where the Sheriff returns petit issues per Billing, he ought to aver the Matter here; for the Prefentment is the Original of the King in this Cafe, and he has no other Original, and the return is the Anfwer of the Abbot, and shall plead for the Matter upon it, therefore he ought to aver the Matter; but Yelverton said No, for they shall not plead till the Attachment; Contra Choke. Ibid.

10. Debt against f. S. of D. Teoman, the Defendant appeared by At-
Averment.

and be who appears to make the Law is the youngell, and by some he shall have this Averment, and Proceed against the eldell; for now it shall be intended that the Attorney appeared for the youngell, who now comes to make his Law; and some e contra, and that it shall be intended that the Attorney appeared for the eldell; for it shall be intended as here that the Suit is against the eldell, because there is no Addition; for the eldell shall not change his Name for the youngell, but the youngell for the eldell, & adjournatur, therefore Quære. Br. Averment, pl. 32. cites Default. L. 5 E. 4. 23.

11. If a Plea wants an Averment, or have not a sufficient Averment, the same is not good; Quod nota. Heath's Max. 36. cites 12 H. 7. 2.

12. Debit upon an Obligation of 20l. the Defendant pleaded Acquittance of the 20l. the Plaintiff said that this 20l. in the Acquittance was for Rent fold, and the Obligation is of 20l. for 4 Acres of Land in D. fold, and a good Plea per tot Cur. and so Matter of Fact averred to the Acquistal; and the other said that the Obligation for the same 20l. now in Demand was for the Land, and not for the Caufe in the Acquittance. Priit, and the other e contra, and a good Issue if the Obligation be of the Matter of which the Acquittance makes mention or not. Br. Averment, pl. 29. cites 3 H. 7. 15.


14. Demandant of Dower before Execution awarded, may aver that her Husband was seized, and fo to have Damages. Godb. 212. pl. 302. Mich. 11 Jac. C. B. and fays therewith agrees Porter's Case 14 H. 8. 25. 22 H. 6. 44. b.

15. A Release or Justification, or any Matter in the Affirmative pleaded without an Averment of the Plea, the same is ill. Heath's Max. 36.

16. There needs no general Averment in Plea, or particular Averment in a Declaration of that which will come in more properly on the other Side. Heath's Max. 37. cites Hob. 78. 124.

17. There will need no Averment in a Declaration where it appears there are reciprocal Remedies. Heath's Max. 37. cites Hob. 88. 106.

18. Excommunication and Outlawry may be pleaded without Averment, because those Pleas require no Replications to them. Brown's Anal. 8.

19. Averment ought to be upon all Pleas in Bar, and to the Writ, in Heath's Max. Replication but not Joiners, tho' it burns not when it is needful but up; on the general Issue, or a Plea in the Negative, or a Plea apparent in the Writ, or upon the Challenge to the Array, no Averment. Brown's Anal. 8.

20. No Averment will lie against a violent Presumption tho' it be false. Heath's Max. 39. disclaims up-

21. Note, per Cur. because the Entry of Challenges to the Array &c. are not that a Man ought to tender Averment, therefore if the Tenant challenges the Array, and does not say, Et lex paratus est Verificare &c. yet the Challenge is good; and so it was adjudged by good Advice, after it had depended two Terms. Br. Averments, pl. 1 cites 27 H. 8. 14.

22. In an Action upon the Statute 32 H. 8. against buying pretended Titles, if the Plaintiff declares, that the Defendant, nor any of his Ancestors, nor any other Person under whom he claims were in Possession of the Land, nor received the Kents &c. by the Space of a Year &c. he need not aver, that it was a pretended Right, because the Statute makes it so; and then to
Averment.

It is a Rule in pleading, that nothing needs be aver'ted that appears sufficiently without it. Arg. 10 Mod. 392.—Averment needs not be of what is apparent, as the Constitution made in London, concerning the Sale of Wares and Merchandizes appearing to be agreeable to and warranted by their Charter, the same needs not be aver'd to be so. Heath's Max. 57, 58. cites 8 Rep. City of London's Cafe, and 9 Rep. 54. And if the Son brings an Affid of Mortmain, he needs not to aver, that it is within the Time of Limitation, for that it appears to be so. Heath's Max. 58.


The Defendant need not to aver his Averment with 303. a, an Hoc paras. et Verificare, because the Defendant in his Averment is Actor, for he shews his Matter which is a Count, and is to have a Return, and therefore as Plaintiff he shall not aver his Averment no more than the Plaintiff shall aver his Count. Pl. G. 342. Hill. 7 Eliz. Brev. v. Rigdon.——S. P. Pl. C. 163. Pach. 3 Mar. agreed, after Search and Report by the Prothonotaries, in Case of Throgmorton v. Tracy.

25. A Man shall never be etopped from making such an Averment to ascertain the Intent of the Parties, if it be not utterly inconsistent with that which is alleged; for an Etoppel being to conclude a Man from speaking that which is Truth, must be certain to every Intent, and shall never be taken by Argument or Inference. Heath's Max. 42, 43. cites Co. Litt. 352. b.

26. Averment is not necessary in Action, Et hoc paras. et Verificare; for it is in lieu of Declaration, and the Avowant is Actor. Br. Averment, pl. 81. cites 3 M. 1.

27. C. fold Lands fowed with Wood, and promised, that if the Vendee should be prohibited by Proclamation, or otherwise, to sow and make Wood, then he would return so much of the Purchase Money. The Vendee brought an Action on the Cafe against the Vendor, and set forth, that a Proclamation was made, that no Man should sow Wood within 4 Miles of any Market or clothing Town &c., and that his Land was within 4 Miles of a Market Town, but because he did not aver that it was a clothing Town also, the Defendant demurr'd; and all the Judges held it a sufficient Cause of Demurrer. Goldsb. 71. pl. 15. Mich. 29 & 30 Eliz. Cogan v. Cogan.

28. If Land be conveyed to A. in Trust, with Power to him in Default of Heir of his Body, to limit the Fee-call to whom he pleases, and in Default of such Issue and Nomination and Limitation to B. in Fee; in this Case, upon a Petition of Right or Formedon brought, if A. dies without Issue it is sufficient for B. or his Heir to mention that A. died without Issue, without making Mention of the said Power; but if he mentions the Power, he ought to aver the Death of A. without Issue, and that A. made no Nomination of, or Limitation to any one. Jenk. 213. pl. 50.

29. Tesserator promised to pay 20 l. at his Death. In Case against the Executor the Plaintiff had a Verdict. It was moved in Arrear of Judgment, that the Plaintiff had not aver'd that the Money was not paid by the Tesserat in his Life-time; but the Court held it well enough, because
Averment.

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the Money was not payable whilst he was living. Hard. 221. Hill. 13 & 14 Car. 2. in Scaccario. Greenway v. Horneblow.

30. Where a justification in Trespass is at the same Time and Place, it is not necessary to aver it to be the same Trespass; Per Cur. Carth. 280. Trin. 5 W. & M. in B. R. King v. Phippard.

31. In Trespass, the Defendant pleaded, that a Levare Facias issued out of the Exchequer, &c. Exception was taken, that it was not said that the Writ was delivered to the Sheriff, or the Warrant to the Bailiff; for non allocatur; for per Cur. tho' it is the Practice to say so, yet it being a Plea in Bar, it shall be good to a common Intent; and if the Cattle were taken before the Delivery of the Writ, the Plaintiff should have shewn it in his Replication; for no special Matter shall be supposed to intervene to make a Man a Trespassor unless it be shewn. Ld. Raym. Rep. 310. Hill. 9 W. 3. in Cafe of Britton v. Cole.

32. If Goods are sold for so much as they are worth, the Value may be ascertained by Averment; Per Powell J. Cumb. 426. Trin. 9 W. 3. B. R. in Cafe of Hayward v. Davenport.

33. 4 & 5 Ann. cap. 16. No Exception or Advantage upon a Demurrer shall be taken for want of Averment of hoc paratus eff Verificare, or hoc paratus eff Verificare per Recordum, or of not alleging print patet per Recordum, except the same shall be specially set down for Cause of Demurrer.

\[(C)\] Of what it may be.

1. LORD and Tenant; the Tenant is outlawed of Felony, and after ret. verses it by Error or reason of Imprisonment at the time &c. The Lord to have the Escheat cannot aver that he was at large at the Time &c. for, as it seems, then the Life of the Tenant shall be in Jeopardy again. Br. Averment, pl. 39. cites 16 E. 3. and Fitzh. Outlawry 48.

Lord shall have not Averment that he was at large &c. Quod Nota. Ibid.

2. If a Man appears as Vouchee, the Tenant may aver that he is not the same Person who was vouched. Br. Averment, pl. 37. cites 20 E. 3. and Fitzh. Voucher 128.

3. If the Tenant vouches A. who enters into the Warranty, and so are vouches B. the Demandant may aver that the first Vouchee is dead, and pray Re-summons against the Tenant; for now the Death of the first Vouchee cannot come in by Return of the Sheriff, per Finch; Quod non negatur. Br. Averment, pl. 59. cites 40 E. 3. 6.

— Br. Counterplea de Voucher, pl. 8. S. P. and cites 40 E. 3. 56. In Precipe quod redact the Tenant vouches, and summons to the Sheriffs &c. Sequenta quid against the Vouchee, and no Writ served, the Tenant would have averred that after the issuing of the Writ of Sequenter, the Vouchee died; and the best Opinion was that he shall have the Averment. Br. Averment, pl. 22. cites 14 H. 6. 7. 19.

4. The Intent of a Man lies in Averment, if he choses his Beasts out of that Land into another Land to the Intent that the Lord shall not disjoin them. Br. Averment, pl. 50. cites 44 E. 3. 20.

5. A Man made Return, and said that he is Under-Sheriff; and the Party averred to the contrary, and had the Averment; but contra against the High-Sheriff, and this upon Examination by the Jujtices. Br. Averment, pl. 52. cites 8 H. 4. 20.

6. In
Averment.

6. In Precipe quod reddeat, it the Sheriff returns Quod MandavitBal-

thy Libertatia de E. qui return quod fumm &c. the Tenant shall not

take the Averment, that the Land is infra Libertates de S. and not infra

Libertates de E. nor shall not take thereout iflue with the Sheriff nor

with the Demandant, for the Tenant is at no Mishief; Quod nota by

Award. Br. Averment, pl. 46. cites 34 H. 6. 3.

7. Where a Man calls Writ of Privilege as Servant of the Chancellor,

Baron of the Exchequer or the like, the Plaintiff may aver that the

Defendant is not Servant to him, andc. nor was not at the Day of the


and often elsewhere &c.

8. A Man may aver by special Plea that another of the same Name was

outlawed or excommunicated, or appeared to the Action in a Recovery,

and not this now Party, or may say that the Plaintiff was excommunicat-

d before the last Continuance, and absolved, and was not excommunicated

after the last Continuance. Br. Averment, pl. 24. cites 36 H. 6. 17. per

Priior and Wangt.

9. Accesary who is outlawed of Felony may aver that the Principal was

dead before the Outlawry, and if it be found for him he shall be restored.

Br. Averment, pl. 61. cites 21 H. 7. 31.

As where a

Court of Ad-

miration for a

Thing done

upon the Land; the Defendant may aver that it was done infra Corpus Comitis. Ibid.

(D) Averments as to Deeds

1. O

N E cannot avoid a Statute Merchant, Obligation, Relief &c.

against the Party himself named in it, by averring a Delivery

thereof upon Condition, unless he fhev a Writing of the Condition. Br.

Faits, pl. 10. cites 43 E. 3. 27.

2. But 'tis otherwise in Dehence against a Stranger, where the Thing

is bailed into an indifferent Hand; nota the Diversity; for there it is

averrable, contrary against the Party himself. Br. Faits, pl. 10. cites

43 E. 3. 27.

Br. Noline,

pl. 63 cites

4; E. 5. 17.

S. C. & S. P.

Br.

Finge, pl. 28.


68. b. S. C. cited per Cur.

As where a

4. A Man shall avoid Specialty in several Cases by a naked Averment,

Man is oblig-
ed in 100 l

to a Fine sole, and after six marries him, or where a Man is obliged to a Villetein Regardant, and after pur-

chases the Manor to which the Villette is Regardant, or if 3 are obliged to me, and I break one of the

Seals, or if the Obliger enters into Religion, and after brings Action of Debt; Per Keeble and others,


5. Against a Consideration allledged in a Deed, or an Use declared, no

Averment to the contrary can be received; fo of Indentures upon Fines

and

6. An Affiance was made to a Woman to the Intent it should be for And Ibid her Jointure, but it was not fo expreffed in the Deed; Per Cur. it may be averred that it was for a Jointure, and fuch Averment is not transferable. Owen. 33. Trin. 9 Eliz. Anon.

7. No Averment dehors can make that good which is apparent, on mont. Consideration of the Deed, to be void, as Peffment to A. and his Heirs. No Averment can be that it was the Intention of the Parties, that the Fe-office should not have Estate but to him, and the Heirs of his Body. 8 Rep. 155. Mich. 5 Jac. in Altham's Case.

8. Buying of Debts is Maintenance at Common Law, and punifhable by Where there is Utity, or Indiament or Information; but it is not pleadable in Bar of this Obligation; for the Condition of the Obligation was to pay a Sum of Money not for Debts bought, and this Buying is collateral to the Condition. So may be a Bond for Payment of a Sum of Money upon Condition, in the Cafe of aver'd to Simony, the Simony may be pleaded againft such Bond by Virtue of the 31 Eliz. cap. 1. So for Utity, 13 Eliz. cap. 8. So againft a Bond given to the Sheriff or Gaoler, contrary to the Statute of 23 H. 6. cap. 10. These Statutes gives Averment in fuch Cases, but there is no Statute which gives fuch Averment in the Cafe of Maintenance. Jenk. 168. pl. 9. The Obliger in an abs-

9. When a Deed is perfected and delivered as his Deed, no verbal Agreement afterwards may be pleaded in Defraction of the Deed; but when the Agreement is Parcel of the original Contratt, it may be pleaded; but if it had been expres'd within the Deed that the Bargaine should have the Profits, and it was deliver'd accordingly, no Agreement or Affignment of the Profits can now avoid it, or make the Contratt not be usurious, which was fo otherwife, and Judgment accordingly. Brownl. 191. Burglacy v. Ellington.

10. It was agreed that if a Cafe be within the Statute of Gaming, the Defendant may aver againft his own Deed. Cumb. 328. Trin. 7 W. 3. B. R. St. Leger v. Pope.

11. Two Manors were known by the Name of W. and sometimes diftinguifh'd with an Alias. An Annuity of 200 l. per Ann. is grented out of the Manor of W. One of them is but 80 l. per Ann. and the other of more than the Annuity. It is a good Averment in Law that the greater Manor should be liable to the Rent-charge. Chan. Rep. 138. 15 Car. Harding v. the Earl of Suffolk.


13. 4 & 5 Ann. 16. In Debt on single Bill, Debt, or Scire Facias upon a Judgment, the Defendant may plead Payment in Bar. In Debt upon Bond, if the Defendant before Action brought both paid the Principal and Interett, due by the Defense or Condition, he may plead Payment in Bar.

14. Bill to have the Benefit of a Marriage-Settlement, and Covenants therein contain'd &c. The Cafe was; Rocks upon his first Marriage set-
Averment

1. Brought a Formedon against Husband and Wife, the Wife was received for the Default of her Husband, and vouch'd her Husband by a strange Name, and upon the hewing of the Demandant that the Vouchee was the Husband of the Woman (the Tenant) Caufe was shewn (as it ought to be) and it was shewn, that the Husband levied a Fine to one T. for Conuance de droit come cee, and that T. by the same Fine rendered the said Land to the Husband and Wife, and the Heirs of the Husband, and that the Husband had before enteoffed T. of the said Land, with Warranty to him, his Heirs and Assigns, and that the is the Assignee of T. The Averment of the Demandant in this Case against this Fine, that the Husband never had any thing in the Land, was received by Judgment in Parliament; for the Demandant is a Stranger to the Fine, and where the Cause of Voucher is shewn the Caufe is Irreverable. Jenk. 12. pl. 20.

2. A Man had Averment against an Execution upon a Statute Merchant, that the Party is at large, for it may be that he escap'd after. Br. Averment, pl. 38. cites 18 E. 3. and Fitzh. Utlawry 47.

3. In Trespass, if the Defendant pleads that the Plaintiff at another Time recovered for the same Trespass, which Record is certified to be at another Day than that which the Plaintiff counts of, the Defendant may aver that all is one and the same Trespass. Br. Averment, pl. 41. cites 38 E. 3. 17.

4. Averment may be had that the Testator died intestate, and that the Administration was committed to him, tho' the otherhe's Testament proved before the Ordinary; for Record there is not of Record in Curta Regis. Br. Averment, pl. 48. cites 44 E. 3. 16.

5. In Scire Facias against a Parson, upon Recovery of an Annuity against his Predecessor to have Execution of the Arrears, the Defendant shall not have Averment that Rents Arrear without Acquittance, nor that the Plaintiff had Execution, without shewing thereof Record or Specialty, because the Action is founded upon Record. Br. Averment, pl 49. cites 44 E. 3. 18.
6. In *Audita Querela* upon Indenture of Defeasance, a Man may aver the Payment to be made, tho' the Statute be Matter of Record; for the Indenture is Matter in Fact; but contra of such Averment without Indenture. Br. Averment, pl. 51. cites 46 El. 3. 33.

7. Where it appears of Record, that the Feme Defendant in Writ of Maintenance appeared in proper Person at Nisi Prius, and after it was found by Verdict in Writ of Error that she died 4 Days before the Day of Nisi Prius; and by all the Justices, the taking of this second Verdict of the Death of the Feme is Jeofail, and nothing to the Purpoe, because it appears by the first Record that the Feme was alive at this Time, and Matter in Fact expressly contrary to the Record cannot be taken; for Matter of Record does not lie in Averment to be try'd per Paix, but shall be try'd by the Record itself; for Verdict cannot defeat a Record. Br. Repleader, pl. 61. cites II H. 4. 52.

8. A: upon 11 of May, the 2 Car. 1. makes a Feoffment of his Land to B. and committed Felony on the 3d of May, 2 Car. 1. and the Indictment of this Felony committed by him is the 1 May, 2 Car. 1. A. is arraigned upon it, and confesses the Indictment, and is banded, this does not destroy the Estate of B. It would be otherwife if he were convicted by Verdict, because of the Negligence of B. that he did not inform the Judges and the Jury of the Truth of the Matter. Jenk. 128. in pl. 59. and cites Fitzh Averment, 46.

9. If a Man is bound by Recognizance with Condition to cause J. N. to appear in the Court of Chancery such a Day, he cannot aver that he appeared that Day, unless his Appearance be not of Record; Per Babb. Cott. June and Fray; the Reason seems to be, that the Recognizance is Matter of Record, but Quere the Reason of the Condition. Br. Averment, pl. 10. cites 7 H. 6. 26.

10. Where Protection is cast, the Plaintiff cannot take Averment that he is not dwelling prout &c. or is not about to go prout &c. but shall be put to sue a Repulse &c. but by the Statute of Wefmu. 1. cap. 43. Averment may be taken against an Essign de ultra Mare, but no Averment shall be taken against an Essign de Servic. Regis nor Protection; Quod Nota. Br. Averment, pl. 14. cites 21 H. 6. 20.

11. If Protection is cast, the Plaintiff shall not have the Averment immediately that the Defendant is Infra quatuor Maria at D. in the County of C. out of the Service of the King, but this shall be entered immediately, and he shall aver it upon the Re-summons, which Matter found shall turn the Defendant in a Default by the Statute, if it be in Precipe quod reddat; Quere. Br. Averment, pl. 25. cites 28 H. 6. 3.

12. Where a Recovery is removed out of a Court Baron, the Party may aver that the Record is otherwise by the Statute of 1 El. 1. Quod Nota, Alteration of Record in a base Court. Br. Averment, pl. 3. cites 34 H. 6. 53.

13. An Averment may be had against any part of the Rolls or Records of County Courts, Hundred Courts, Courts Baron, or other Courts belonging to Lords of Manors. Heath's Max. 39. cites 34 H. 6. 42. and 9 Ed. 4. 4.

14. At the Nisi Prius, Protection quia moratur was shewn; Although said, Averment may be taken contrary to the Protection; But Patton and Falth. e contra, and that he shall sue Repeal, and yet by the Statute Wefmu. 2. cap. 42. Averment is given against an Elloign Quia ultra Mare, but Averment does not lie against an Elloign de Servic. Regis. Br. Averment, pl. 31. cites L. 5 E. 4. 3.

15. A Man makes a Leave for Years the 10th of May, and then the Lef for bargains and sells this to another by Deed involwed, bearing Date the 10th of April, and it was entered to be conveyed the 10th of April before, but in Truth it was delivered, and acknowledged, and involwed afterwards; and it was held, that the Bargaine, [Leoffice] was without Remedy at the Common
Common Law, for he cannot plead that it was acknowledged or delivered after the Date of the Day of acknowledging, and so was the Opinion of Rhodes; Periam, Windham, and Anderson being absente; for he cannot aver that it was inrolled or acknowledged at another Day than it is recorded, because it is contrary to the Record, for it is entered that it was acknowledged the 10th of April, and then if such a Plea should be admitted, it would shake most of the Affurances in England. Ow. 138. Hill. 30 Eliz. Sir Tho. Howard's Case.

16. Upon the Statute of 13 Eliz. against Jury, and 27 Eliz. against Frauds, alias Fines be levied; yet where there is Usury, or Fraud, or Covin, they may be averred to to be against any Act whatsoever. Jenk. 254. in pl. 45.

17. Where D. has appeared as an Attorney for A. in an Action brought by A. against B. it cannot be assigned for Error that D. was not an Attorney, or that there is no such Person in Rerum Natura; for it is against the Record; and the Admittance of him for an Attorney by the Court, makes him an Attorney, if he was not an Attorney before this Admittance. In a Writ of Error brought in this Suit, and Error assigned of Supra, the Defendant in the Writ of Error in this Case pleads in nullo eit Erratum; this does not confess that he was not an Attorney, but this Plea eft quasi a Demurrer, that this is not an Error at all. Judged and affirmed in Error. Jenk. 332. pl. 66.

16. In Scire Facias against C. to repeal a Special Livery granted to him upon his coming of Age. Upon Demurrer the Question was, whether the Attorney-General could aver against an Inquisition returned into the Petit Beg, tho' not taken before the Escheator, but put in by another; and it was resolved that he could not, for this cannot be tried by a Jury, but upon an Examination in Court, and there to be redressed. Jo. 389. pl. 9. Patch. 12 Car. B. R. The King v. Cage.

17. Where a Statute is recited, there one may not aver that there is no such Record; for generally an Averment, as this is, doth not lie against a Record; for a Record is a Thing of solemn and high Nature, but an Averment is but the Allegation of the Party, (21 Car. B. R.) and not so much Credit in Law to be given unto. L. P. R. 155.

18. If a Justice of Peace records a Force on View, you shall not aver against it. 12 Mod. 44. Trin. 5 W. & M. Anon.


20. Whether the Bail shall be admitted to aver against the Record in the original Action, viz. that Defendant was not in Custodia Mar. in Hill. Term, Anno 7 W. 3. as the Declaration set forth; now if he was not in Custody in that Term, as Defendants in their Plea have aver'd, then this Bail cannot be taken to be in the same Action. The Court inclin'd against the Plea; but the Scire Facias was quashed for other Matter, and to the Point in Law was not determined. Carth. 403. Patch. 9 W. 3. B. R. Whaley v. Reynolds.


22. Master in Chancery certified that Writings were not delivered in, but the Clerk [in Court] offered to prove that they were delivered in; but the Court would not suffer an Averment against the Master's Certificate. Sel. Ch. Cafes, in Ld. Keeper's Time, 5. Mich. 11 Geo. Liman v. . . . .

(F) Of
Averment.

(F) Of the Life of a Person.

1. He that claims Estate from Tenant for Life, or in Tail, or from Person, of a Church, ought to aver his Life. Br. Eiiate, pl. 18. cites 19 H. 6. 73; 74. and 22 H. 6. 17.

the Grantor in making the Title ought to aver the Life of the Tenant in Tail, because the Grant is determined. Arg. Bridge 97. cites 15 E. 3. and D. 73. 19 H. 6. 73. 5 H. 7. 59. and 15 E. 4. 6. — Lat. 257; Arg. cites 9 E. 4. 16. S. P.

Where Tenant in Tail is of Rent, which had no Life before the Grant made in Tail, and he grants it over, the Grantee who avows or justifies ought to aver the Life of Tenant in Tail; so by several, where he suffers a Recovery of the Rent. Quare; for by some there is Fere-simple for the Time. Br. Taile & Dones &c. pl. 15. cites 15 E. 4. 6. 8

2. In a Quare Impedit the Plaintiff declared that W. was seized of the Le. 280. pl. Adwson in Grols, and granted it to the Plaintiff and others to the

of the Grantor for Life, and afterwards to the Use of R. his Son in Tail; Provfo that if the Grantor died, R. being within the Age of 23 Years, that to decide Ver-

then the Grantor and their Heirs should be seized to themselves and their

Heirs, until R. should arrive to that Age. The Grantor died, R. being then 14 Years old, and no more, fo that the Grantees were possess'd of the said Adwson &c. and afterwards the Church became void, and so but S. P.

it belonged to them to preent. Exception was taken against this Declaration does not ap-

pearance, because the Plaintiff had not aver'd the Life of R. upon whose Life, was seized. his Interest did depend; but it was answer'd per Pickering Serj. that the Declaration is good enough; for tho' the Life of R. is not expressly aver'd, yet an Averment is strongly implied, for the Plaintiff sets forth that the Father died, his Son being of the Age of 14 Years and no more, by Force whereof he was possess'd of the Adwson, and being fo possess'd the Church became void; now he could not have been possess'd, if R. had not been then alive, and that is as strong as an Averment. And the Court disallow'd the Exception; for Seisin shall be intended to continue till the contrary appears. 2 Le. 50. pl. 61. Mich. 29 Eliz. C. B. Baskerville v. the Bishop of Hereford.

3. In Dower or Appeal the Life of the Husband, or of the Party kill'd, may be aver'd in any Place, per to. Cur. Bullt. 43. Mich. 8 Jac. in Case of Luther v. Saunders.

4. Leafe for Years of Tenant for Life declares in Ejectment Firms, that

he being possess'd of this Lease for Years made to him by Tenant for Life, was thence ejected. This Word (poss'd) is a sufficient Averment of the Life of the Leifor. Adjudged for the Plaintiff, and affirmed in Error, and cites Dyer 304. It is all one in such Case, if the Count be of an Ejec-—C. B and af-


5. In Ejectment the Plaintiff declared that M. being Tenant for Life, Palm 267.

made a Lease to him for 3 Years, if she should so long live, corurte cujus be entered and was possess'd, until the Defendant ejected him Termino suo nondum finito. After Verdict for the Plaintiff it was moved that the Decla-

ration was ill, because the Plaintiff did not aver the Life of M. at the 327. Mead Time of the Action brought. But 9 Justices contra Chamberlaine, held it S. C. and adjudged accordingly.

well enough; for shewing that the Defendant ejected him a Termino suo nondum finito, implies that M. is yet alive; for otherwise the Term is affirmed by determined, and Judgment for the Plaintiff; and affirmed in Error in Cam. Seacc. Cro. J. 622. pl. 13. Mich. 19 Jac. Arundel v. Mead, in


5 B

(G) Gene-
(G) General. Where the Matter is Special.

1. IN Cosmage the Tenant pleaded that R. his Father was born within Efpoufals between the Demandant's Grand-father and M. and was older than the Father of the Demandant, by whom the Demandant conveyed. The Demandant replied that his Grand-father had no such Son as R. Father of the Tenant, but was Son of one T. P. and was not received to this General Averment contra the Special Matter, by which the Issue was taken that the Grand-father had Issue the Father of the Demandant, abique hoc that he had such Issue as the Father of the Tenant, born and begotten within the Efpoufals, Priif. The Tenant rejoined that the Grand-father espoused M. during which Efpoufals they had Issue R. Father of the Tenant, and so is R. Son of the Grand-father, Priif; and the others e contra. Br. Averment, pl. 71. cites 21 E. 3. 39. and 39 All. 10.

2. In Falsi Imprisonment the Defendant justified for Arrest of the Plainfiff by the Command of his Master, as his Villein regardant to his Manor of D. The Plaintiff replied that He was born before Efpoufals, which is Special Bastardy; and the Defendant rejoined that he is Villein, Priif. But Knivet and Thorp held that he shall not have such General Averment against Matter Special, by which he said that he was born before Efpoufals, Priif. Br. Averment, pl. 70. cites 35 E. 3. 34.


4. In Trefpafs of a Boat taken and carried away, the Defendant pleaded that the Plaintiff by this Deed &c. gave to the Plaintiff all his Goods, at which Time the Boat was the Plaintiff's, whereupon he took it, Judgment &c. The Plaintiff replied that he carried away His Boat, Priif. It non allocatur contra this Special Matter, because the Deed binds him. Br. Averment, pl. 75. cites 42 E. 3. 2.

5. Whereupon he said that it was His Boat at the Time of the Taking, & non allocatur, without saying How he came to it after. Quod nona per Judicium. Br. Averment, pl. 75. cites 42 E. 3. 2.

6. Whereupon he said that he took the Boat, abique hoc that the Boat was the Plainfiff's at the Time of the Gift, & non allocatur. Br. Averment, pl. 75. cites 42 E. 3. 2.

7. Whereupon he said that at the Time of the Gift the Boat was one Alice 73, and so he carried away the Boat of the Plaintiff; & non allocatur, without showing How it came from Alice, per Judicium. Br. Averment, pl. 75. cites 42 E. 3. 2.

8. Whereupon he said that Alice sold the Boat to him after the Gift, and so he carried it away, and the Defendant said that it was the Boat of the Plaintiff at the Time of the Gift, Priif &c. Br. Averment, pl. 75. cites 42 E. 3. 2.

9. In Trefpafs the Defendant pleaded that the Plaintiff was his Villein. The Plaintiff replied that his Grand-father was frank and adventitious, and his Father also, Judgment &c. The Defendant said that his Villein, Priif; and no Plea contra the Special Matter; by which he said that his Villein, Priif, and Not adventitious. Br. Averment, pl. 74. cites 43 E. 3. 4.

10. In Trefpafs the Defendant preferred for Common in the Place where &c. the Plaintiff replied that he had deposited in his Several, Priif &c. and no Plea contra this Special Matter; whereupon he said that it was His Several abique hoc, that he had Common there, and the others e contra. Br. Averment, pl. 70. cites 49 E. 3. 19.
Avowry.

11. In Trespas the Defendant said that the Place where was his several Seizure, by which he took them Damage tenant; the Plaintiff replied that the Defendant and j. N were Tenants in Common, pro Individuo and leased his Part to the Plaintiff for 10 Years, by which he entered, and the Defendant rejoined that it was his several Seize, Prift, & non allocatur, without answering to the special Matter, by which he said that the Plaintiff had nothing of the Lease of the said j. N. and the first general Averment refuted, 3 H. 4. in the written Book. Br. Averment, p. 5. cites 3 H. 4. 8.

12. Efratch after the Death of A. his Tenant without Heir; the Te-use was in any thing that A. had use j. by E. his Feme at D. Que Estate he had, the taken that A. had no such Daughter as j. who for that shall say j. is not Heir to A. or that A. had no such Daughter as j. vied him, because the Birth of j. is alleged, Quære. Br. Averment, p. 67. cites 11 H. 4. 11. b. pl. 23.

13. In Dover the Tenant pleaded that the Baron had nothing but jointly with j. N. who survived and is yet alive; the Feme may reply that Seise que Dover the may have contra this special Matter, because the Survivor had released to her Baron in his Life time, which Release the Feme cannot plead. Br. Averment, pl. 68. cites 11 H. 4. 83.

14. In Formodon the Tenant said that he leased to the Donor for Life, who gave and he entered for the Forfeiture; the Demandant replied, that the Donor was deceased after this, and gave, & non allocatur, without shewing how he came to it after, by which he said that he was deceased after, and insulted the Donor, who gave. Br. Averment, pl. 78. cites 3 H. 4. 17.

15. In Dover the Tenant pleaded that the Land was given to the Baron and his first Feme in special Tail; the Feme replied that Seise que Dover &c. & non allocatur; whereupon he said that the Baron was deceased in Fee absolute hoc, that the Donor gave. Br. Averment, pl. 77. cites 2 H. 5. 4.

16. In Maintenance the whole Court held, that where the Plaintiff alleges special Maintenance, as by giving Money to the Sheriff to arrest the Plaintiff in a Suit between him and j. N. he shall not say that he did not maintaine de Modo & Forma contrary to such special Maintenance; but in general Declaration of Maintenance, Ne Maintainis, Prift &c. is a good Plea. Br. Averment, pl. 73. cites 12 E. 4. 14.

For more of Averment in General, See Amendment and Joinsills. Conclusions of Pleas, Declarations, Devils, Fines (1. b. 2) to the End of (1. b. 6) Per Homen, Records, Return, Trespas, Mugs, and other proper Titles.

Avowry.

(A) Where Seisin is necessary to avow.

1. If a Man makes a Gift in Tail, rendering Rent, he may avow Br. Avowry, without laying any Seisin, because the Reversion gives him a pl. 52. cites sufficient Privity, and he shall count upon the Reversion. 8 12. b. C. & S. P. 6. 18.
Avowry.


And. 57. 18, pl. 133. Par-ker v. Fran-
cis, S. C. ad-
judged ac-
cordingly for the Avowant.

(A. 2) What an Avowry is, and the several Sorts thereof.

HE Matter of Avowry does not arise out of the Right or Interest which a Man has in the Land, but out of the Privy; as when the Tenant makes a Feeblement, he has neither Right nor Interest in the Land, yet the Lord is not compellable to avow upon the Alliance before Notice. In a Præcipue quod reddat, the Tenant alieneth, yet he remains Tenant as to the Plaintiff, and yet he has not either Right or Estate as to the Alliance. Arg. Godb. 502. cites 5 E. 4. 3. a. 48 E. 3. 8. b. 20 H. 9. 9. 14 H. 4. 38. b.

1. Avowry is in lieu of Action, if the Defendant prays return, Contra if he does not pray return; for then it is a Bar only. Br. Pleadings, pl. 97. cites 6 E. 4. 11.

2. There are 4 Sorts of Avowries; 1st. By Reason of a Tenure when the Lord hath Fee in his Seigniory, and the Tenant hath Fee in the Tenancy, ut super verum Tenement faum informa Prædicta. 2. Upon one as his very Tenant by the Manner, ut super verum Tenement faum in Forma Prædicta, viz. When the Tenant makes a Lease for Life, or a Gift in

3. Upon one as his Tenant by the Manner, omitting this Word (very) and that is when the Lord hath a particular Estate in the Seigniory, as an Estate in Tail, for Life, or

4. Upon the Matter in the Land as within bis Fee and Seigniory; as where the Tenant by Chivalry makes a Lease for Life, rendering Rent and dies, his Heir within Age, the Guardian shall to avow upon the Leesey, super Materiam Prædictam in Terris Prædictis ut infra Feodum faum. Co. Litt. 269. a. b.

5. Avowry is in Nature of a Declaration, if that be vicius No Judgment can be given for the Avowant. Brownl. 183. Dary v. Langton.

(B) What
(B) What shall be a good Seifin.

1. An Attornment in a Court of Record in a Per quæ Servitia is a good Seifin to abow, because this is with the doing of Fealty. 8 P. 6. 17. b.

good Seifin to make Avowry for other Services; but Brooke says, it seems that he shall allege Seifin in the Comitor or his Ancillors &c. — Br. Seifin, pl. 35. cites S. C. and by Marten Seifin of Fealty by Attornment is sufficient.

2. If the Tenant which owes Suit of Court be amerced for the not doing thereof, and he pays the Amercement to the Lord, this is a good Seifin of the Suit. 12 H. 7. Kell. 3. b. per Curiam. 13 H. 7. 16.

3. [So] if the Tenant makes * Fine with the Lord for his Suit, in the Court of the Lord, this is a good Seifin of the Suit. 13 H. 7. 16.

Where a Man makes Avowry upon one who holds to be atten-
dant to his Lord, and makes Suit, and alleges Seifin of 20 d. for the Suit, this was held no Seifin of the Suit. Br. Avowry, pl. 90. cites 12 H. 7. 15.

* [Or pays him a Sum of Money by way of Agreement to release him of his Suit.]

4. So if the Tenant delivers a Horfe to the Lord for his Rent due, and the Lord agrees thereto, this is a good Seifin of the Rent. 12 H. 7. 3. b. Kell.

5. In an Avowry for Suit, if the Lord recovers Damages for the Suit, this is a sufficient Seifin of the Suit. Co. 4. Brev. 9. b.

6. A Man held of the King and of another Lord, and died, by which both the Lands came into the Hands of the King by Primer Seifin, and before Livery the Lord got Seifin by the Hands of the Heir, and had no other Seifin, and this Seifin was held sufficient Seifin to make Avowry by Keble, Vavifor, and Brian, but Frowike contra. Br. Seifin, pl. 51. cites 13 H. 7. 15.

(C) [Seifin] By whom in respect of the Estate it shall be good. Homage.

1. If Homage be due in the Right of the Feme, and the Baron does Homage before Illue had, this is no good Seifin against the Feme and her Heirs to have an Avowry. 11 H. 4. 29.

Plea says, It seems that Seifin of Homage by the Baron only is not good, unless it be after that he has Illue by his Feme. — Fitzh. Avowry, pl. 34. cites S. C.

Avowry.


(D) [Seisin of] other Services. [By whom in respect of Estate.]

Br. Avowry, 1. Seisin of Services by the Hands of a Leefee at Will is not good to bind the Tenant. 8 P. 6. 1. 7. 32. S.P. — Fitzh. Avowry, pl. 8. cites 8 H. 6. 16. S.P. 2. Seisin of Services by the Hands of a Leefee for Years shall not bind the Lessee. 2 P. 6. 2. b. Br. Avowry, 3. If the Tenant pays the Services to the Lord paramount, this Seisin by his hands shall bind the Mefne. 8 P. 6. 17. S.C. & S.P. per Cott. Quod non negatur; but says Quae inde. — Fitzh. Avowry, pl. 8. cites S.C. Br. Avowry, 4. Seisin by the Hands of a Dielleior is a good Seisin, and shall bind the Dielleior, altho' he re-enters for the Services due. Dubitatatur by Strange, that if the Lord gets Seisin by the Hands of the Dielleior of that which of Right he ought to have, and the Dielleior re-enters, the Lord shall make Avowry for this Seisin, but as to any Surplusage he shall avoid it. — Fitzh. Avowry, pl. 8. cites S.C. & S.P. by Strange accordingly. — Br. Seisin, pl. 12. cites S.C. & S.P. accordingly, by Strange.

Br. Avowry, 5. If the Discontinuee gives Seisin of the Services, this will bind the issue, tho' he recovers in a Formedon. 8 P. 6. 19. S.C. & S.P. by Strange. — Br. Seisin, pl. 12. cites S.C. & S.P. by Strange And per Cott. the Donor there may make Avowry without any Seisin before, by reason that the Reversion is in him. Br. Seisin, pl. 12. cites 8 H. 6. 18. per Strange. So in other Cases of Reversion. Ibid.

6. If the Baron, Tenant in the Right of his Feme, gives Seisin of the Services during the Coverture, this will bind the Feme and her Heirs. 12 Ed. 3. Avowry 104.

7. So if the Tenant by the Curtesy gives a Seisin of the Services, this will bind the Heir. 12 Ed. 3. Avowry 104.

Kelw. 84 a. pl. 8. Patch. 21 H. 7. by Kingmilk, contra; and so of any such particular Tenant for Life, because after their Death none can have their Estate.

(E) By
Avowry.

(E) By whose Hands. Tenant in Right.

1. Seisin of Services by the hands of a Tenant in Right, is a good Seisin to avow; as by the hands of a Diffeeree. 8 H. 6. 17. and this will bind the Diffeeree.

2. If the Tenant aliens, a Seisin by his Hands after is good before Notice of the Alienation. 8 H. 6. 17. For he is Tenant in Right before Notice, and this will bind the Alienation.

3. If an Alienation be by Fine of a Seigniory, and after the Tenant aliens, yet a Seisin by his Hands in Court after is good, because he that was Tenant at the Note levied ought to attorn. 8 H. 6. 17. b.

(F) Seisin by whom, shall serve for others to avow.

1. Seisin by Tenant in Tail is not sufficient for the Remainder in Fee of the Seigniory. 45 Ed. 3. 28.

2. If a Fine be levied to one for Life, the Remainder to another in Tail of a Doman, if the Tenant for Life takes Seisin of the Services, this will be a good Seisin for him in the Remainder in Tail to avow. 20 H. 6. 7. Citra.

3. So a Fortiori, if the Conveyance was by Deed. 20 H. 6. 7. Fitzh. A. Avowry, pl. 11. cites S. C.

4. The Seisin of Services by an Abbot shall be sufficient for his Successor to avow. 34 H. 6. 46. per Curiam.


Seisin for Relief after the Death of an Abbot was awarded good; for it was by Prescription. Quere by the Common Law; for there is Succession, and no Defect. Br. Avowry, pl. 128. cites 3 H. 4. 2.

5. If a Feme Seigniories hath Seisin of the Services due at one Time, and after takes Husband, and hath Issue, and dies before other Seisin, the Seisin of the Feme before Coverterure is not sufficient for the Baron, Tenant by the Curettee, after the Death of the Fee Feme, to avow. Quere. 1 Ed. 3. 6. b.

(G) In what Cases Seisin of one Thing shall serve for another to avow. Homage.

1. Seisin of Ecuage is sufficient to avow for Relief. 4 Ed. 2. Avowry 200. per Scoope.

2. [See] Seisin of Homage is sufficient to avow for Relief. * 12 * Br. Tenua, pl. 75. cite. 13 H.

Avowry.

3. [So] Seisin of Homage is sufficient to allow for Esceage. * 13

4. Seisin of Rent is sufficient to allow for Relief. 4 Ed. 2. Avowry 209, per Sercope.

5. Seisin of Esceage is a sufficient Seisin of Homage, because Esceage draws to it Homage. 21 Ed. 3. 52. 3 Ed. 2. Avowry 187, adjudged, 5 Ed. 2. Avowry 209. Adjudged 19 Ed. 2. Avowry 224, Dubitant 13 Ed. 3. Avowry 103.

6. Seisin of Rent shall be a Seisin of Fealty. 29 Ed. 3. 24, adjudged.

7. Seisin of Fealty suffices to make Avowry for all other Services. Br. Seisin, pl. 4. cites 44 Ed. 3. and Fitch. Avowry 71.

8. Seisin of a Superior Service is Seisin of all inferior Services which are incident thereto. As Seisin of Esceage is Seisin of Homage and Fealty, and Seisin of Homage is Seisin of Fealty, and * Seisin of the Rent is Seisin of Fealty where the Seigniory is by Fealty and Rent. Resolv'd 4 Rep. 8. b. in Bevil's Cafe.

9. It was resolved, that doing of Homage is Seisin for all Services, as well inferior as superior; because in doing of Homage he takes upon himself to do all the Services. 4 Rep. 8. b. in Bevil's Cafe, and that with this agrees 13 H. 4. 5. that Seisin of Homage is Seisin of Esceage which is superior, and of Relief which is inferior.

10. Seisin of Rent or Suit, or other Service which is annual, is sufficient Seisin of Esceage, Homage, Ward, Relief, Heriot Service, Service of covering the Hall of the Chief Manor House, or of impaling the Lord's Park, or such casual Services which perhaps might not happen in 40 or 70 Years. 4 Rep. 8. b. 9. a. in Bevil's Cafe, and cites 20 E. 3. Tit. Avowry, 131.

11. But it was said, that Seisin of one annual Service is not Seisin of another annual Service; As if Lord and Tenant by Fealty, Rent of 10 s. and 3 Work-Days in a Year, Seisin of the Work-Days, nor Seisin of Rent is not Seisin of Suit of Court which is annual; for it shall be reckoned the Lord's Folly that he did not get Seisin of what was due Annually, and it will be mischievous to the Tenant, because peradventure the Work-Days were long since discharged, but now cannot be known, whereupon Suits and Troubles may ensue. 4 Rep. 9. a. in Bevil's Cafe.

12. If a Man recovers Rent of 20 d. per Ann. and the Sheriff puts him in Poffiilion by 2 d. of the Money of the Plaintiff, yet at the Rent-Day the Recoveror may allow for the whole 20 d. and not only for 18 d. Per Da-
vers and Danby, The Reason seems to be inasmuch as he cannot expound the 2d. to be Parcel of the Rent; for the Rent is not due till the Day, and yet this is good Seilin, tho' it be only a Sum paid in Name of Seilin of the Rent. Br. Seilin, pl. 15. cites 37 H. 6. 38.

13. In Avowry for Rent, alleging the Seigniory to be Fealty and the Rent, the Lord shall not give in Evidence upon Hors de fon Fee pleaded that he has been seised of the Rent; for Seilin of the Rent is no Seilin in the Seigniory, of or other Services; Per Fitzherbert and Shelley. Br. of the Rent is Seilin of the Fealty. Br. Seilin, pl. 1. cites 27 H. 8. 21.

In as much as the Rent draws the Fealty to him. Br. Seilin, pl. 49. cites 13 E. 3. and Fitzh. Avowry, 107; and concordat 29 E. 3. and Fitzh. Avowry 250. and 5 E. 2. Fitzh. Avowry, 188. and good Reason; for by Grant or Recovery of the Rent the Fealty shall pass. And Seilin of the Rent is Seilin of the House. Ibid. cites 21 E. 3. and Fitzh. Avowry 115, and 209. But if the Seigniory was by Homage, Fealty, and Rent, it seems that the Seilin of the Rent is not Seilin of Homage. Br. Seilin, pl 49. — Br. Seilin, pl 41. cites S. C.

14. In Replevin, the Defendant made Confinace as Bailiff to B. who Hutt. 50 was seised of the Manor of C. and the Plaintiff was seised of the Locus in quo &c. and held the same as his Manor of C. by Efficace, Homage, Fealty, and Rent, and alleged Seilin of the Rent 20 Jac. S. C. by the Hands of the Plaintiff, and so avowed for Homage not done, the and Judge Plaintiff demurred, because he did not shew of what Rent he was seised ment for the Bailiff by the Hands of the Tenant, and that he should have said, of what Services he was seised; but Judgment was given for Defendant, and that 51. Palfch. Judgment affirmed, and Difference was taken where he alleges Seilin of the Rent by the Hands of his Ancestor, there he shall except of what Services, but where he alleges Seilin by his own Hands, the last Pleading is good. 2 Roll Rep. 392. Mich. 21. Jac. B R. Whiteguilt v. Hilderhampe.

the Avowant said, that till the Resolution in Seilin's Case, it was a great Question, whether the Seilin of the Rent was the Seilin of the Homage; & adjournatur; but afterwards Judgment was given for the Avowant.

(H) Who may change the Avowry.

1. A Bailiff who hath Power to collect Rents cannot change the Avowry of his Lord, as by the Acceptance of Rent. 41 Ed. 3. 26. B. for he cannot prejudice his Lord. Br. Avowry, pl. 19. cites 41 E. 3. 25. S. P. by Finch and Thorne — Fitzh. Avowry, pl. 19. cites S. C. & S. P. — Br. Baille, pl. 3. cites S. C. & S. P. by Thorne and Finch; for he has Power to receive his Master's Rents, but not to change his Tenant; Quære, for it is not adjudged. — He may receive Rents of old Tenants, but he cannot accept New upon Change of Tenants; Per Hobart Ch. J. Hob. 154 at the Bottom of the Page. — He cannot change the Avowry of his Master; Resolved. 5 Rep. 79. a. Palfch. 45 Eliz. B. R. Pilkington's Case.


3. An Infant Lord cannot, during his Nonage, change his Avowry by his Agent. 48 Ed. 3. 10. Fitzh. Avowry, pl. 83. cites S. C.
Avowry.

(I) Upon whom it may be. Baron and Feme.


2. And after Issue the Avowry shall be made upon Baron and Feme for Services due in the Right of the Feme, other than Homage, to before Abatement of any Manors, or of any Part thereof, when Baron and Feme are settled in Jure Uxoris, the Lord, after Issue, may make his Avowry upon the Baron only if he will. S. P. agreed, that it may be upon the Baron only. Br. Avowry, pl. 22. cites 43 Ed. 3. 13.

3. So after Issue the Avowry shall be made upon the Baron only for Homage due in the Right of the Feme, because of his Title to be Tenant by the Curtesy. 10 Ed. 6. 24. b. Curia, 13 Ed. 6. Avowry 21. Curia. 18 Ed. 3. 7.

4. But an Avowry for Homage after Issue may be made upon the Baron and Feme also. 43 Ed. 3. 13.

In Record, the Defendant avowed upon the Baron in 21. Curia. 48 Ed. 3. 13.

Given in Tail, rendering 20 l. Rent, and conveyed the Land to A. Feme of the Plaintiff, and for the Rent avowed upon the Baron only, and he prayed Aid of his Feme and had it, and they came and pleaded in Abatement of the Avowry, because it was not made upon the Feme, because he had Aid of her before, therefore he was oulted of it, and the Feme was also outed, tho' she did not come till now, Quod not; Quod miror; for it seems that the Avowry is erroneous by Matter apparent, which is Caufe to replead and to have Writ of Error at this Day. Br. Avowry, pl. 74. cites 59 Ed. 3. 15. *Br. Avowry, pl. 22. S. P. cites 43 Ed. 3. 13, but it lies not against the Baron alone till he has Issue. P. but this need not be alleged in the Avowry; but if they have no Issue, the Baron and Feme may allege it. Br. Avowry, pl. 27. cites 44 Ed. 3. 41. —Hutt. 50. S. C. cited accordingly.

(K) Who may compel the Lord to avow upon him.


Fitzh. Avowry, pl. 12. cites S. C. — And Roll seems to be misprinted (19).

2. The very Lord shall not be forced to change his Avowry where he abides upon his Very Tenant by the Manner, or his Tenant by the Manner, unless the Tenancy comes lawfully out of the Perfon of his Tenant. 20 Ed. 6. 9. b.

* Fitzh. Avowry, pl. 67. cites S. C. — Br. Avowry, pl. 40 Ed. 3. 9. b. 41 Ed. 3. 9. b.

3. If there be Tenant in Tail, the Remainder in Fee, and the Tenant in Tail make a Feoffment, the Feoffee shall not compel the Lord to avow upon him. * 41 Ed. 3. 26. b. II 48 Ed. 3. 9. b. 14 Ed. 4.

4. If Tenant in Tail makes a Feoffment in Fee, the Feoffee cannot compel the Lord to avow upon him, because he is not Tenant in Tail. 18 Ed. 3. 7.

** Br. Avowry, pl. 52. cites S. C. — Fitzh. Avowry, pl. 83. cites S. C. — In Replevin one as Guardian of
5. If a Man recover against Tenant in Tail, he may compel the Lord to abow upon him. 41 Ed. 3. 26. b.

6. If a Man recovering against my very Tenant by Default, be may compel me to abow upon him, tho' he recovers without Title. 48 Ed. 3. 9.

7. If there be Tenant for Life, the Remainder in Fee, Tenant for Br. Cealwe, Life may compel the Lord to abow upon him. 45 Ed. 3. 27. b.

9. If my very Tenant be diseised, and I accept the Services from the Diffler, yet the Diffler may compel me to abow upon him. 48 Ed. 3. 9.

10. If my very Tenant be diseised, and dies, his Heir may compel me to abow upon him. 2 Ed. 4. 6.
11. If the Tenant makes a Feoffment, the Feoffee cannot compel the Lord to abow upon him before Notice. 4 D. 6. 20. * 8 Ed. 4. 12. but if after Notice he may compel the Lord to abow upon him. 4 D. 6. 20.

—Fitzh. Avowry, pl. 35. cites S. C. & S. P. accordingly, by Markham and Yelverton.—Br. Avowry, pl. 96. cites 7 E. 4. 27. S. P.

Where Notice is necessary it shall be made upon the Land, and he, that gives it, ought at the same Time to tender the Arrears. Br. Avowry, pl. 111. cites 29 H. 8.

12. So if the Feoffee dies before Notice, his Heir may compel the Lord to abow upon him, for there the Law changes the Avowry. 4 D. 6. 22. 1. 2 Ed. 4. 6. per Curiam!!

Br. Avowry, pl. 95. cites 2 E. 4. 5. S. C. & S. P. For a Right descended to him, and the Lord is not bound to take Notice of the Deficient, tho' it is a Tort; per Darby Ch. J.—Br. Avowry, pl. 15. cites 54 H. 6. 40. S. P. by Prior; for Deficient is a Title in him in Law.

Br. Avowry, 13. If the Tenant aliens Parcel of the Land, yet the Lord shall not be forced to change his Avowry without Notice, tho' the Statute be, that the Aliene of Parcel attendat Capitali Domino pro Particulari illa. 8 Ed. 4. 12.

—Fitzh. Avowry, pl. 35. cites S. C. & S. P.

14. If the Tenant aliens in Fee, and dies before Notice, the Alience may after compel the Lord to abow upon him. Co. 3. Pen- nant 66. 29 D. 8. 108. * 2 Ed. 4. 6. per Curiam; for he cannot abow upon the Heir of the first Tenant, because nothing is descended to him.

S. C. & S. P.—But during the Life of the Feoffor the Feoffee cannot compel the Lord to avow upon him without Notice. Br. Avowry, pl. 15. cites 54 H. 6. 46. And after the Death of the Feoffor the Lord may avow upon the Feoffor's Heir till Notice. Ibid. per Moyle. Ad quod non fuit responsum.

15. If Tenant in Dower grants over her Estate, yet the Reversioner ought to abow upon her. 11 D. 4. 19.

S. P. Br. Avowry, pl. 97. cites 31. cites 2 E. 4. 56. But Brooke says this seems to be where Feoffment is made of the entire Land, and where it is held by Rent which is favorable. But contra where the Feoffment is of Parcel, and the Rent not favorable.

* S. P. So if the Lord accepts the Service of the Alience before the Arrears paid, he will lose his Arrears. Br. Avowry, pl. 111. cites 29 H. 8.

17. If the Tenant in Chivalry dies, his Heir of full Age, by which Relief is due, and the Alience gives Notice thereof to the Lord, yet he cannot compel the Lord to abow upon him before the Relief paid, because then the Lord would lose the Relief. 4 Ed. 3. 2. Avowry 163. per Willy.

18. If the Mefne grants his Mesnalty by Fine, tho' there is no At- torsment of the Tenant, yet the Lord Paramount might avow upon the Grantee, because he was his Tenant in Fact, yet he was compellable to abow upon him. Lit. Attornment 131.

19. But
Avowry.

19. But in this Case, if the Grantor dies without Heir in the Life of the Grantee, the Grantee may compel the Lord to avow upon him.

Lit. Attraction, 131. b.


(demurrant,) but it seems it should be (ie morant.)


22. If Lord and Tenant arc, and the Tenant gives in Tail, Remainder over in Fee, the Avowry shall be upon the Tenant in Tail, as upon his very Tenant by the Manner; but where the Donor avows upon the Donee in Tail, he shall conclude upon his Tenant by the Manner. Br. Avowry, pl. 10. cites 20 H. 6. 9.

23. If a Man gives Land in Tail rendring Rent, and the Tenant in Tail aliens, and the Alienee dies, and his Issue enters, the Donor shall make Avowry upon the Tenant in Tail, and not upon the Issue of the Alienee; but Haiden contra, and that the Avowry shall be upon the issue of the Alienee; for otherwise if the Donor avows for more Services than are due, the issue has no Remedy. Br. Avowry, pl. 94. cites 5 E. 4. 3.

24. So if the Tenant in Tail has Issue, and dies. Quere; for it seems that the Donor may avow upon the Issue in Tail, if he will. Ibid.

25. In Avowry Coparceners made Partition, and agreed that the one should pay the Rent to the Lord for all, and the Lord after avo'd upon him alone, and alleged Sen's by his Hands only, where he ought to avow upon all. Per Brian, The Plaintiff shall have the Special Matter enter'd, but should be filed of this Portion in other Manner. Br. Avowry, pl. 149. cites to H. 7. 29.


26. If a Man sells his Land by Deed, indented and involv'd within the Br. Avowry; half Year, according to the Statute of 27 H. 8. the Avowry is not chang'd S. C.


(L) In what Cases the Lord hath Election upon whom he will avow.

1. If the Mefne releases to the Tenant, yet the Lord may avow upon 45 Ed. 3. 10. b. the Mefne. 2. The Lord may avow upon the Diffessor. 2 H. 6. 9. b. But the very Lord shall not be compl't'd to change his Avowry, unleas the Tenancy comes lawfully out of the Portion, his Tenant; per Norton. Fitzh. Avowry, pl. 12. cites 20 H. 6. 9. If the Heir of the Diffessor be Party, he shall abate the Avowry, and compel the Lord to avow upon him; [for the Heir of the Diffessor is Tenant in Right, tho' the Defendant be Tenant in Possession, and the Avowry is in the Right.] Br. Avowry, pl. 31. cites 45 E. 3. 8. per Fitzh.

3. If the Tenant in Tail aliens in Fee, yet the Donor may avow * Fitzh. upon him. 19 H. 6. 61. * 20 H. 6. 9. b. 15 Ed. 3. 7. + 7 Ed. 4. 28. by Darby and Choke; for the Tenant in Tail is Tenant in Fact. —

Fitzh.
Avowry.

Firzh. Avowry, pl. 56. cites S. C. and by Littleton and Danby, tho' Donne in Tail aliens in Fee, yet he shall do Homage to the Donor; for he remains always Tenant to him.

Notwithstanding such Discontinuance, yet the Donor shall avow upon him, and afterwards upon his Issue; Per Hanke. Br. Avowry, pl. 46. cites 14 H. 7. 57. 58.

4. [Bar] if the Donne in Tail aliens in Fee, the Lord can not avow upon the Feeoffee, for then he will abate his own Avowry, in as much as he alleges a Gift. * 43 Ed. 3. 5 b. Treby's Avowry 14. 149. 4. 37. b. Contra 120 D. 6. 9. b.

† Br. Avowry, pl. 48. cites S. C. 12. cites S. C.


6. If the Tenant makes a Feoffment in Fee, the Lord may avow upon him before Notice. * 149. 4. 35. 4 D. 6. 20. † 8 D. 6. 17.


7. If the Tenant aliens in Fee, the Lord can not avow upon the ancient Tenant for Homage, Fealty, Suit, or other corporal Service to have a Return for it; tho' he had no Notice of the Alienation, because he shall not have these Services of him. 7 Ed. 4. 28.

8. If the Tenant aliens, the Lord may avow upon the Alience before any Notice given him, if he will. 7 Ed. 3. 33. Avowry 147. per Hecce.

S. P. accordingly by Keble, because the Charge of the Rent goes with the Land; and he was likewise of Opinion, that if the Tenant when the Rent is arrear makes a Feoffment of one Moiety to A and of the other Moiety to B and afterwards the Tenant dies without Heir, the Lord may avow upon which of the Feoffees he pleases, because each of them is charged with the entire Rent &c. Kelw. 115. pl. 43. Catus incerti temporis. — See Litt. 5 457. and Ld. Coke's Commentaries upon it.

9. Where two Coparceners of Land held by Suit of Court make Partition, and the one aliens to one his Part, and the other aliens to another his Part, the Lord may distrain which he pleases, and avow upon him only; for upon several Tenants a Man shall not make Joint Avowry, and if the one makes the Suit it discharges the other, and he may plead it; Per Skip. Quod nemo negat. Br. Avowry, pl. 69. cites 24 E. 3. 34.

10. Where there are Lord, Mefnie and Tenant, the Lord may avow upon the Mefnie for Homage; for he is Tenant in Bail. Br. Avowry, pl. 96. cites 7 E. 4. 27.

(L. 2) Who may avow.

1. If a Man leases in Furo Usoris leases for Years, rendring Rent, and the Feone dies without Issue, by which he is not Tenant by the Custom, yet he shall avow for the Rent till the Heir has entered; Per Opinionem. Br. Avowry, pl. 123. cites 9 H. 6. 43.

2. If
Avowry.

2. If Rent is reserved upon Equality of Partition, and the Parceener grants it over, the Grantee may distrain and make Avowry for the Rent as well as the Parceener himself; for it is a Rent-charge of Common Right. Br. Avowry, pl. 133. cites 21 H. 6. 10.

3. If the Tenant of the King dies seized, his Heir may distrain and make Avowry, and take the Profits till Office be found; Quod non negatur. Br. Avowry, pl. 141. cites 3 H. 7. 3.

4. In Trefpafs the Defendant justified for Damage seafant; the Defendant said, that the Plaintiff had nothing in the Land, unless by Sufferance of J. S. and the Opinion of Keble was, that he may justify for Damage seafant, but Vavilor contra. Br. Avowry, pl. 86. cites 4 H. 7. 3.

5. If a Chaple and Manor is united to the College, there ought to be Arrangement before the College can make Avowry for the Services due to the Manor. Br. Avowry, pl. 150. cites 11 H. 7. 8.


7. But where the King has the Profits of any Land by reason of outlawry in Action Personal, he may justify for Action Personal, and have Trefpafs for he has Interest in the Land; Quod Nota. Ibid.

8. In Avowry by the Heir in Tail the Cafe was, that Tenant in Tail of a Seigniory had purchased Land, and made Feoffment with Warranty of the Land, and had Issue, and died, and Estates descended, and the Issue diertrain'd and made Avowry, and well per Brian and Keble; for the Seigniory was only subsisted by the Unity of Possession, and the Discontinuance and Warranty did not go but to the Land. Br. Garranties, pl. 82. cites 16 H. 7. 40.

(M) Upon whom, and for what Thing it may be made.

1. If the Tenant infests another, the Lord ought to avow upon the Br. Avowry, Feoffor for the Arrearages before the Feoffment, and not upon the Feoffor. 47 Ed. 3. 4 b. appear.—Firth: Avowry, pl. 82. cites S. C. & S. P. accordingly.—So for Suit due before the Feoffment; per Mayle; for the Feoffee may tender Amends; for the Suit cannot be made after the Court ended. Br. Avowry, pl. 99. cites 7 E. 4. 27.

But after Feoffment, and no Notice made, the Lord may distrain for Homage, and avow upon the Feoffor for the Homage; but upon the Matter of the Feoffment shown, the Lord shall not have Homage of him, nor the Lord shall not render Damages, and he shall not have Fealty, nor other Corporal Service of the Feoffor; for he cannot swear to do the Services for the Land which he has nor; but the Avowry for the Rent apear is good upon the Feoffor without Notice. Ibid.

2. [So] If the Tenant infests another without Notice, the Lord may avow upon the Feoffor for the Arrearages after the Feoffment till Notice. Dubitatir 47 Ed. 3. 4 b. Notice he shall avow upon the Feoffee, if he renders the Arrearages, but not otherwise.—Firth: Avowry, pl. 82. cites S. C. & S. P. accordingly.


4 The
4. The Lord shall distrain and avow, because the Tenant holds of him to find him a House, and to find his Court, and did not do it, and a good Avowry and Tenure, and was not put to the Quod permittat. Quod nota bene. Br. Tenures, pl. 83. cites Fitzh. Avowry 167. Tempore E. 1.


6. For some Things the Avowry shall be upon the Discontinue, As for Relief for the Alienation; for this is chiefly upon the Alieeni, and the Alienor shall not pay it; per Perley. Br. Avowry, pl. 31. cites 48 E. 3. 8.

7. If Lord and Tenant are, and the Rent is arrear, and the Tenant makes Feoffment, and the Feejee leaves to the Feoffee for Years or for Life, and the Feejee gives Notice, and after the Beafis of the Feoffee come upon the Land by Escape, the Lord may distrain them for the Arrears due before the Feoffment, notwithstanding the Notice by some, quare. Br. Avowry, pl. 127. cites 48 E. 3. 34.

8. Avowry was made by Leffor upon Tenant for Life, for Rent reserved upon the Lease as upon his very Tenant. Hank laid the Avowry shall not be upon him, but as upon his very Tenant by the Manner; for it shall not be upon him as upon his very Tenant, but where he is Tenant in Fee Simple or Fee Tail. But it seems that where the Remainder in Fee is over, that it is otherwise. Br. Avowry, pl. 36. cites 2 H. 4. 24.

9. Avowry for Relief after the Death of an Abbot was awarded good; for it was by Prescription. Quare by Common Law; for there is Succession, and no Defect. Br. Avowry, pl. 128. cites 3 H. 4. 2.

(N) In the Name of whom, [or by what Name] it shall be made.

1. If a Baron he seised of a Seigniory in the Right of his Feme, the Consonance ought not to be made for Rent as Bailiff to the Baron only, but as Bailiff to both. 12 R. 2. Avowry 88. Contra 13 H. 4. Avowry 198.

2. If there be Leffee for Years rendering Rent, and the Reversion depends upon a Feme Covert, and after the Rent is arrear, and the Baron distrains, and the Leffee brings a Replevin, the Baron ought to avow in the Name of himself and his Wife, and not in the Name of himself only; for the Avowry is to be made according to the Reversion, which is in the Feme. Rich. 15 Jac. B. R. between Wife and Bonet, per Curiam; but they adjudged this good, because that he said that he distrained for Rent due in the Right of the Feme; (but quare how this could make it good.)

3. In an Affile of sevarent Distrefes against the Baron, who is seised of a Seigniory in the Right of his Feme, the Baron may justify the taking of the Distrefe for Fealty and Suit of Court in his own Name, tho'

Br. Avowry, pl. 85. cites S. C. and that in such
Avowry.

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tho' he hath had no Issue by his Feme. 27 Ann. 51. The same Law for Rent.


5. If by the Custom of a Court-Baron the Homage of the Court hath used, Time out of Mind, to elect a Supervisor of the Common belonging to the Tenants of the Manor, and a Supervisor is elected, who takes the Castle of one of the Tenants, and impounds them by the same Custom, because he hath surcharged it; in Replevin against him he cannot avow the Taking as Supervisor in his own Name upon this Matter, because he does not claim any Interest, but only as Supervisor. With, 15 Jac. B. R. between Stevens and Kelbleywait, and adjudged upon a Denier, which intrahir Post. 14 Jac. Rot. 206.

and of some Commoner, but not in his own Right, and that so ought the Common Pounder: but per adventure that cannot be any good Cause of Justification to make an Avowry to have Return, wherefore it was adjudged accordingly.

6. An Avowry is not good in the Right of one Executor, where there is another Executor not named. 12 R. 2. Avowry 88.

7. Lord and Tenant by Claim, the Tenant bailed for Life and died, the Heir within Age, the Lord sais the Word, the Lord may distrain and make Avowry in his own Name for the Rent reserved upon the Leafe. Br. Avowry, pl. 137. cites 11 Ann. 6.

(O) In what Cases it is to be made upon some Person in certain. And in what not.

1. If an Avowry be for Homage, Rent, or other Service, it ought to be made to some Person in certain. 14 Post. 4. 3.

—Fitzh. Avowry, pl. 65. cites S. C. & S. P.

—Br. Avowry, pl. 46. cites S. C. & S. P.

2. If an Avowry be made for Relief, it ought to be made upon the Heir of him upon whose Death the Relief is claimed. 34 Ed. 1. Avowry 233. Unjudged.

3. But if an Avowry be for a Fine for Alienation upon a Custom that every Tenant ought to pay a Fine for every Alienation, this shall not be made upon any Person in certain, but upon the Custom. 14 Post. 4. 3.

—Fitzh. Avowry pl. 60. cites S. C. & S. P.

—Br. Avowry, pl. 46. cites S. C. & S. P.

4. So if an Avowry be for a Rent-charge, it shall not be upon any Person. 14 Post. 4. 3.

—Fitzh. Avowry, pl. 65. cites S. C. & S. P.

5. 21 H. 8. cap. 19. S. 3. Upon a Replevin sued, an Avowry may be made by the Lord, or Conscience and Justification by his Bailiff or Servant, upon the

Though the Overview of this Act is
Avowry.

General, yet the Land holden of the said Lord, without naming any Person certain to be all necessary Tenant thereof. The like Law also upon every Writ sciet of second Deliverance, and therefore the Avowant must allege Seisin by the Hands of somebody. § Rep. 36. a. in Bucknall's Case, by the Reporter, and cites 27 H. 8. 4. b. accordingly, but says, that the ancient Form of alleging Seisin shall not be altered, and therefore the Avowry shall be made Generally since the Statute of 32 H. 8. cap. 2. as it was used to be before; but the Plaintiff in Bar of the Avowry may plead No usques Seisin within 40 Years &c. and with this according 1 Mar. Br. [Avowry,] pl. 107. and D. 15 Eliz. 525. [515. b. pl. 107.] And if the Lord by the 21 H. 8. alleges Seisin in his Avowry, and avows the Diffrets as within his Fee and Seigniory, and not upon any Person certain, in such Avowry, every Plaintiff in the Replevin, be he Termor or otherwise, may have every Answer to the Avowry which is sufficient, and likewise shall have Aid, and all other Advantages in the Law; and it is no Exception Now, that he is a Stranger to the Avowry, for being made on no certain Person, either Nobody or every Body is a Stranger, and with this according 34 H. S. Tit. Avowry. Br. 115. 27 H. 8. 4. b. and 26 b.

Upon this Statute these 4 Points are observed; I. That the Lord has still Election, either to avow according to the Common Law, or by Force of the Statute, by reason of the Word (May) zdly. Albeit the Purview of the Act be general, yet all necessary Incidents are to be supplied, and the Scope and End of the Act to be taken, and therefore, tho' he need not make his Avowry upon any Person certain, yet he must allege Seisin by the Hands of some Tenant in certain within 40 Years 3dly. If the Avowry be made according to the Statue, every Plaintiff in the Replevin, or 2d. Deliverance, be he Termor or other, may have every Answer to the Avowry that is sufficient, and also have Aid, and every other Advantage in Law, (Disclaimers only except) for disclaimer he cannot, because in that Case the Avowry is made upon no certain Person. 4thly. Where the Words of the Statute be (If the Lord avows upon the Lands and Tenements holden) yet if the Lord comes to disavow, and the Tenant chases his Fees, which were within the View, out of the Lord holden, and there the Lord disavows, albeit the Diffrets be taken out of his Fee and Seigniory in that Case, yet it is within the said Statute; For in Judgment of Law the Diffrets is lawful, and as taken within his Fee and Seigniory, and this Statute being made to suppress Fraud is to be taken by Equity. Co. Litt. 68 b.

(F) Justification [In what Cases. And in what Cases Avowry. And by whom. And what shall be recovered.]

1. If the Avowant ought to have the Thing for which he took the Title, 6. cit. S. & C. 

—Br. Avowry, pl. 43. cites S. & C. & S. P. accordingly. — Firth. Avowry, pl. 10. cites S. C. & S. P. accordingly. — S. C. cited Arg. Mar. 1904. in pl. 178. Trin. 17. Car. in Case of Lawton v. Coke, which Case was, Grantee of a Rent-charge in Fee deditus for Arrears, and then grants the same over, Query if he may avow? On the one side it was argued, that the Avowry depends on the Inheritance which is gone by the Grant, and that he ought to have justified to exclude himself of Damages, and took a Difference between the Act of God and of the Party, as well as other others, the Arrears are not lost, but otherwise in the Case of a Grant, as here. But it was laid on the other side, that where there is a Duty at the time of the Diffrets he shall avow, and not justify, and at least it turns the Avowry into a Justification in this Case so you shall not make Trepassors of us, but that we may well justify to save our Damages, and cited 22 E. 4. 36. The Court all agreed, that at least the Avowry is turned into a Justification; fed adjourned. Mar. 103. pl. 178. Trin. 17. Car. Lawton v. Cook — Note, that it was said, that if any one deditus for Rent, and before the Avowry the Estate upon which it is referred determines, the Avowry shall be as if the Estate had continued; for the Avowry is to have the Rent for inholding. But if the Diffrets were for a Perfect Service, then the Defendant must have a special Justification; for he cannot have that Service in Specie when the Estate is determined. Vent. 250. Mich. 25 Car. 2. B. R. in Case of Wildman v. Norton.

2. As if a Man takes a Diffrets for Rent referred upon a Lease for Years, and after accepts a Surrender of the Land, yet he may avow, because he is to have the Rent, notwithstanding the Surrender. 19 D. 6. 41. Cina.

So if it be upon a Lease for Life, or on the Condition of anything, the same Decision lies. Br. Justification, pl. 6. cites S. C. per tot Car except Alce. — Br. Avowry, pl. 53. cites S. C. & S. P. accordingly. — Firth. Avowry, pl. 10. cites S. C. and held accordingly, per tot Car. 3. So
Avowry.

3. So if the Rent be reserved upon a Lease Per Auvr Vie, and after the Rent incurred, Cetry que Vie dies, he in the Reversion may abouf, tho' the Estate be determin'd because he is to have the Rent. 19 Bl. 6. 41.


4. But if the Distrefs was lawful, but by a Matter Ex post facto he Br. Avowry, is not to have the Thing for the Distress was made, there he shall not abow, but may justify. 19 Bl. 6. 41.


5. As if the Lord disfroins for Homage, and after he, that ought to do Br. Jusfification, dies, and his Executor sues a Replevin, the Lord ought to justify, because the Homage is gone by his Death. 19 Bl. 6. 41.


6. But if the Lord disfroins for Homage, and after the Tenant infefts a Stranger of the Land, yet the Lord may abow, and shal not justify; for he shall recover his Homage against him. 41 Ed. 3. Avowry 79.

7. If the Tenant makes a Feoffment, and after, before Notice, the Br. Avowry, Lord disfroins for Homage, yet he shall not abow upon the first Time, but shall justify, for he shall not recover the Homage against him, because he was not his Tenant de facto at the Time. 41 Ed. 3.

Avowry 79. 2 R. 2. Avowry 83. 7 Ed. 4. 28.


8. But in this Case, if the Lord avows for Homage before he hath Br. Avowry, Notice of the Feoffment, yet this will excuse him of Damages, but he shall not have a Return. 7 Ed. 4. 29.


9. If Suit of Court be arrear, and after the Tenant aliens in Fee, Br. Avowry, yet the Lord may abow for the Suit, to have Amends for it. 7 Ed. 4. 28. per Moyle.


10. If by the Custom of a Court-Baron the Homage hath used to elect a Supervisor of the Common of the Tenants, which hath used by the Custom to take the Cattle which surcharge the Common, and imprison them; in a Replevin against the Supervisor he cannot by this Custom abow, as Supervisor, the taking the Cattle which surcharge the Common, but ought to justify, because he claims no Intereft to him-fell. Mich. 15 Jac. B. R. between Stevens and Kebblitbwaite, adjudged upon a Demurrer, which murder Hul. 14 Jac. Bot. 266.

11. In a Reception the Defendant shall not make an Avowry, as Note the Defence, etc. Deten- in a Replevin, but shall justify the Taking &c. as in Trefpafs; for fent Fit Van & In a Reception the Plaintiff shall only recover Damages for the Con- temtp, which the Defendant hath done contrary to Law, and not for the taking of the Cattle, nor for the Detaining of them. Fid. P. 72. (53) Note the Temptum Domini Regis, & ejus Mandatum. F. N. B. 72. (B) in the new Notes there (b) cites 33 & 53.
Avowry.

Br. Trespals, pl. 174. cites S. C. & S. P. — Br. Commoner, pl. 49. cites S. C. & S. P. — Br. Avowry, pl. 86. cites 4 H. 7. 3, that it was agreed by the Justices, if a Man has Common in certain Land he cannot take the Bealls of a Stranger Damage feant.


In Avowry for Damage feant the Plaintiff claimed Common appendent; the Defendant allowed Unity of Possession in the one Land, and the other, after Time of Memory, and a good Plea per Cur. Br. Avowry, pl. 65. cites 24 E. 3. 25. 55.

Jo. 252. pl. 4. Hill. 7 Car. 2. B. R. Anon. seems to be S. C. and Noy moved that it was not good, because it was not in the Reality as for Rent, in which Case an Avowry may be in the Name of one Tenant in Common alone & separatim, but this is only in the Personality for Damage feant, and Damages only to be recovered, and return of the Dilettis, and the other Tenant has Interest in it as well as the Avowant, and so the Avowry ought to be in his Name, and to make Coynance as Bailiff to the other Tenant in Common, and of this Opinion was all the Court, abfente Richardson, and judgment nifi Sec.

But where Defendant made Conuance for Damage feant, as Bailiff to A. who was Devizee of Captive Land, and fo Tenant in Common with the Heir of the Devizor, Walmley J. held that the Conuance ought to be in both the Names, for the Damages are to both, but Anderson and Beaumont c contra; for a Tenant in Common may solely defend, and he only may take a Dereft, and altho his Avowry is by Way of Action, yet he may justify it; but because he should not in the Conuance what Eftate the Devizor had at the Time of the Devizor, but only that he was filled of the Land, it was held to be ill, and therefore adjudged for the Plaintiff. Gro. E. 555. pl. 60. Mich. 38 & 39 Eliz. C. B. Willis v. Fletcher.

15. In Replevin against 2, the one avow'd for himself, and justify'd for his Companion, and the Plaintiff pray'd Proces against the other who did not appear, and the Court deny'd it; for he is out of Court, by reason that the other has justified for him; quod nota per Cur. Br. Avowry, pl. 33. cites 49 E. 3. 24.

16. In Avowry the Plaintiff may disclaim; but if the Defendant makes Justification, and not Avowry, there the Plaintiff cannot disclaim. Br. Justification, pl. 10. cites 9 E. 4. 28.

17. In Replevin the Plaintiff counted that the Defendant, such a Day &c. took his Horse in Cambridge, in a Place call'd the Market-place &c. The Defendant avow'd, because W. C. was seized of three Acres in Fee, and held them of J. B. Grand-father of the Defendant, by Homage, Fealty, and Sefuage, and a Hawk by the Year &c. and conveyed the Seignory to the Defendant, and that the Plaintiff has the Eftate of the said W. C. in half an Acre, Parcel of the three Acres, and that the Hawk was during after the Death of the Grand-father by 20 Years, by which he disavow'd for the 20 Hawks, and as he was chasing the Horse to the Pound he escaped into the Market-place, which is the same Taking of which the Action is brought, and avow'd upon the Plaintiff; as upon his very Tenant, and a good Avowry by all the Justices, and shall not be put to a Justification; for they were always in his Possession after the first Taking, notwithstanding the Escape, and it is good for all the 20 Hawks; for every Parcel of the
the three Acres is charged with the whole Service. And per Catesby J. the Tenant shall be now charged of one Hawk for the half Acre, for a Hawk cannot be severed, and therefore every Parcel shall be charged of the Whole. Quod non negatur. Br. Avowry, pl. 110. cites 22 E. 4. 36.

(Q) Upon what Plea. [And tho' he shall not have Return.

1. In Replevin against A. and B. if A. pleads Non cept, yet B. may make Conunance in the Right of A. and avow for himself: for B. shall not, by the Plea of A. be ousted of his Advantages. 14 Ed. 3. Avowry 118.

2. [So] In a Replevin against A. and B. If A. pleads Non cept, yet B. may make Conunance in the Right of A. and C. For B. shall not be ousted of his Advantages by the Plea of A. 14 Ed. 3. Avowry 118. adjudged.

3. [So] In a Replevin against the Lord and his Bailiff, if the Lord pleads Non cept, the Bailiff may avow for Rent in the Right of the Lord, tho' he shall not have a Return. 17 Ed. 3. 72. b. adjudged. 15 Ed. 3. Avowry 107. adjudged. D. 8 Eliz. 246. 70. admitted for Damage tenant. 18 Ed. 3. 53. adjudged. Contra 14 Ed. 3. Avowry 118.

4. But in this Case he may justify without Doubt. 17 Ed. 3. * In Replevin against A, the one pleaded that Ne pritt pas, and the other justified in Right of him who pleaded Ne pritt pas, and it was held clearly that if the Justification be found for him, yet he shall not have Return, because he in whole Right &c. pleaded Ne pritt &c. Br. Replevin, pl. 26. cites 22 H. 6. 52. — Fitz. Replevin, pl. 8. cites 5. C. & S. P. accordingly.

5. In a Replevin, if the Defendant says that he took it in another Place, and that this is Ancient Demenfe, he may avow the Taking there, altho' he shall not have a Return if it be found for him, because the Court hath no Jurisdiction. 21 Ed. 3. 7. 51. Contra 21 Ed. 3. 51.

(R) Pleadings in Avowry.

1. In Replevin the Defendant made Comnance as Bailiff of the Lord for it is (Car) Services arear. The Plaintiff said that before the Taking the Lord for (For) in 17 Ed. 3. 72. b. * 22 H. 6. 52. b. 53. he made himself in the Seignory to J. N. for 3 Years, which yet continues; Judgment was therein given in all the Edicts &c. and a good Plea. * Quære if he ought not to say before those Services due &c. and also that the Tenant d to the Lee. Br. Avowry, pl. 119. cites 54. a. 6. 45.

2. In Replevin the Defendant pleaded to the Writ, and to have Return In Replevine, and so it appears often elsewhere, and that the Issue shall come upon the Plea to the Writ. Br. Avowry, pl. 119. cites 11 H. 6. 31. was in another Place, and traversed the Place where &c. Per Cur. this is not enough, for he must go on and
Avowry.

make an Avowry to have a Return, tho' such Avowry is only a Suggestion to bring him within the Statue of H. 8. for Damages. 1 Salk. 94. pl. 4. Hill. 8. W. 5. Anon.

3. In Avowry, because A. was seized and granted to him a Rent-charges or lease and avowed for Rent reserved, it is a good Plea that at the Time of the Lease or Grant the Leffer or Grantor had nothing in the Land; Quod Nota; Per Rede Ch. J. Br. Avowry, pl. 82. cites 21 H. 7. 25.

(S) Pleadings in Avowry for Damage seafant.

1. In Avowry for Damage seafant, if Amends be offered upon the Taking or after the Return awarded, the Sufficiency of it shall be tried per Pairs, and this seems to be in Action of Detinue after Return awarded, and in the same Avowry where the Tender was offered upon the taking of the Beasts; and to fee that he who has Return has not gained Property, but only a Pledge. Br. Avowry, pl. 46. cites 14 H. 4. 2.

2. In Replevin, the Defendant said, that the Place at the Time &c. was the Franktenement of J. N. who seised to him at Will, and he disfained for Damage seafant, and the Plaintiff said, that it was his Franktenement, and not the Franktenement of J. N. and the Defendant had Aid after the same joined, and not before. And to fee His Franktenement pleaded in Avowry &c. Br. Avowry, pl. 117. cites 10 H. 6. 26.

3. In Replevin, the Defendant said, that he was seised of a Close called B. Unde Locus in quo &c. in his Demesne as of Fee, and took the Beasts Damage seafant, and this awarded good, notwithstanding that he did not pursue the ancient Form, viz. that the Place is His Franktenement &c. for Moyle said, this is the best Form; for Franktenement reis in three Sorts, and therefore more uncertain. Br. Avowry, pl. 72. cites 9 E. 4. 28.

4. In Replevin by A. the Defendant said, that the Place where &c. is, and Time out of Mind was, 4 Acres of Land which were His Franktenement, and he found the Beasts there Damage seafant, and took them, and admitted for a good Avowry as well as if he had said that he was seised in Fee, and disfained for Damage seafant. Br. Avowry, pl. 105. cites 21 E. 4.

5. And the same agreed in the Case of Winblith in the time of H. 8. well argued, and 21 H. 7. 12. and M. 4 E. 6. Quod Nota.

6. In Avowry, the Plaintiff said, that the Land adjoined to the Highway, and was open for want of Inclosure of the Tenant, and that he chased his Beasts in the Highway, and they escaped in, and the Defendant took them, and the Plaintiff freely pursued, and did not allege Prescription that the Tenant ought to make the Hedge, and yet well. The Defendant said, that they were there by two Nights, and no Plea without traversing the Escape or the free Suit; for the one of them ought to be traversed. Br. Avowry, pl. 135. cites 15 H. 7. 17.

6. Avowry for Damage seafant in his Common, but alleged no Damage to himself, this is naught; because he cannot distrain a Stranger's Cattle without alleging a particular Damage to himself. 3 Lev. 104. Pach. 35 Car. 2. C. B. Woolton v. Salter.
Avowry.

(1) Pleadings in Avowry for Homage, Fealty, Rent, Suit of Court, and other Casual Services.

1. If an Avowry be made for Rent, and it appears by the Party's own St. C. & S. P. shewing that Part of it is not yet due, yet the Avowry is good for cited Arg. the Refidue, and shall not abate in toto. 11 Rep. 45. b. in a Nota by the Reporter in Godfrey's Cafe.
   Replevin (M) pl. 6. and the Notes there.


3. A. feited in Fee granted a Rent-charge to B. and afterwards aliened the Lands to J. S.—B. in Replevin avowed for the Rent. The Alienee replied, that Nothing passed by the Grant. It was held per cur. to be no plea, nor can any L(ieu be joined upon it; but he should have said, that Ne Granta Pas by the Deed; for the Rent was not then in being, because it was created by the Grant, and it cannot properly be said, that nothing passed by the Deed, the Thing not being then in Eile. 2 Le. 13. pl. 21. 19 Eliz. C. B. Steward's Cafe.

4. Exception was taken to a Conuance for Rent, because the Clause of Entry and Distrefs in the Deed, upon Oyer of it, differs from the Clause of Entry and Distrefs alleged in the Conuance; for in the Conuance it is said, it should be lawful to enter and distrain if the Rent were unpaid and behind after any of the Feasts whereon it was due, that is, at any Feast that should first happen after the Death of C. and D. for the Rent did not commence before. But by the Deed, if the Rent were behind at any of the Feasts, the Entry and Distress is made to be lawful for it during the joint Lives of C. and D. and during their joint Lives it could not be behind, for it commenced not till one of them were dead; so as the Senfe must run, that if the Rent were behind, it should be lawful to distrain during the joint Lives of C. and D. which was before it could be behind; for it could not be behind till the Death of one of them; therefore those Words (during their joint natural Lives) being insensible ought to be rejected; for Words of known Signification, but so placed in the Context of the Deed, that they make it repugnant and senseless, are to be rejected equally with Words of no known Signification. Vaugh. 173. Hill. 23 & 24. Car. 2. C. B. Crowley v. Swindle.

5. An Avowry was for a Relief upon the Tenure for Fealty, Rent, and Suit of Court, and good without Mention of the Relief, because it is not Parcel of the Tenure, but a Flower incident to every Tenure in Socage, yet one need not plead it specially, and set forth a Title to it; for tho' perhaps it might have been released, or there might have been a special Reservation without Relief, this shall not be intended unlef thew of the other Side, because it is incident of Common Right; Per Cur. 3 Lev. 145. Mich. 35. Car. 2. C. B. Freeman v. Booth.


(U) Plead-
Avowry.

(U) Pleadings. Avowry. In what Cases there must be an Averment.

1. IN Avowry for Rent granted by Tenant in Tail, the Defendant ought to aver the Life of the Tenant in Tail. Br. Avowry, pl. 134. cites 15 E. 4. 8.

Jointenants in Fee of a Manor inter-married, and levied a Fine thereof to a Stranger, who rendered it back again to them in Tail; they had Issue three Daughters, the Husband died, and the Widow married a second Husband, and he and his Wife levied a Fine, and took back the Manor in special Tail; then the second Husband made a Lease for Years of the Manor, and the Lefsee distrained a Copyholder for Rent, who brought a Replevin, and the Defendant avowed the taking, but did not aver the Life of the Lefsee, and for that Reason it was held ill. Cro. Eliz. 524. Mich. 38 & 39 Eliz. B. R. Laughter v. Humfries.

2. Replevin of taking in D. the Defendant avowed, because the Plaintiff held by Homage 10 s. Rent, and to find a Man one Day to reap his Corn, when he shall be required, and for the Rent Arrear and the not finding of the Man upon Request, be averred; and note that he ought to say that such a Day before Harvest he requested him, and the Plaintiff did not come, and for Suit of Court that such a Day before the Court he was summoned to come to the Court, and did not come. Br. Avowry, pl. 89. cites 9 H 7. 22.

3. The Executor of a Grantee of a Rent or Reversion expellant upon an Estate for Life may not avow his Distress without an Averment, that the Arrearages incurred after the Death of the Tenant for Life, adjudged. Heath’s Max. 37.

(W) Where there must be a Profess or Monstrans of Deeds.

1. IN Avowry, the Defendant shewed that the Services of one Tenant were granted to J. N. by Fine in Tail, the Remainder to him, and that the Tenant in Tail was seiz’d of the Services, and died without Issue, and after he was seiz’d of Fealty, and for the Services Arrear be avered; Belk said he did not shew any thing of the Remainder, nor Possession of the Services, except the Fealty, where he ought to shew it of the Remainder, as in Formedon; but Per Thorp, he has shewed Seisin of the Fealty, which is Seisin of all the Services, by which they were at issue upon another Matter; and so Brooke says it seems here that in Avowry a Man shall shew Deed or the like of Remainder, unless he has been in Possession, Quod nota. Br. Avowry, pl. 24. cites 44 E. 3. 11.

Br. Seisin, pl. 4. cites S. C.—Br. Monstrans, pl. 18. cites S. C.—9 where be in Remainder made Avowry for the Rent without shewing any Thing of the Reversion, the Avowry was awarded good, Quod nota; notwithstanding that he ought to shew Deed in Formedon in Remainder. Br. Monstrans, pl. 22. cites 45 E. 5. 25.

2. In Avowry the Defendant shewed how he recovered Damages, and had the Land in Execution by Fugit, and so posses’d demised to the Plaintiff for Years rendering 10 l. Rent, and for so much Arrear he avered, and the Plaintiff prayed that he might shew the Record; and the best Opinion was that he need not shew it, for the Estate is the Lease, and to this
this the Plaintiff shall answer, and not to the Record, and therefore it is in vain to make him shew it; and the other shall answer to the Lease, but he need not shew the Record. Br. Monitranse, pl. 10. cites 34 H. 6. 48.

3. Where one of a Corporation disfains to answer a writ of Conaunce as Bailliiff without Writing. Br. Avowry, pl. 3. cites 26 H. 8. 8. per Car.

Bailliiff or not, if he for whom he disfains agrees to it. Quod nota. Ibid.

4. If a Man in an Avowry conveys a good Estate to 2, and one releases to the other, it is not good without shewing of a Deed in that Cafe. Winch. 72. Wharton v. Hide.

5. In Replevin the Defendant avowed for Rent granted 12 F. 2. but S. C. cited did not shew the Deed, upon which it was demurred, and held that the not pleading the Deed of Rent here shewn in Court, or Hic in Curia profect, is Matter of Subsistence, and not aided by the 27 Eliz. No. 885. pl. 1243. Trin. 13 Jac. Heurd v. Baskerville.

6. In second Deliverance, the Defendants made Conaunce as Bailliiff to the Master and Governors of Christ's Hospital &c. for that they are a Corporation, and seized in Fee of the Place where, in the Right of the Hospital; upon Demurrer it was objected that the Conaunce was ill, because it did not set forth how incorporated, nor say per eorum Preceptum, nor shew any Writing; but adjudged that this Avowry is good, because the Incorporation is but an Inducement to the alleging the Seizin in them, therefore need not be shewn, nor need he allege any Precept in Writing. 3 Lev. 107. Mich. 34 Car. 2. C. B. Manby v. Long.

(W) Pleadings. The Form of an Avowry at Common Law.

OMB RAY avowed the taking good &c. in the Place &c. because he had a House and a Cave of Land in W. to which he has Common Appendant in the Place &c. and because he found the Benefits of the Plaintiff there, which were leasen and conveyed in P. which Vill does not inter-common there, nor asbee nor re-asbee, but were feeding and trampling his Common; he avowed &c. for Damage seain in his Common, and it was not denied but that the Avowry is good. Br. Avowry, pl. 64. cites 24 E. 3. 42.

2. Where there are 2 Distresses, and the one avows for Rent due to him, and the other for Rent due to him, there both Avowries shall abate, because both cannot have return. Br. Retorne de Avers, pl. 1. cites 2 H. 6. 1.

3. In Avowry the Defendant alleged Seizin by the Hands of J. N. But he can Que Estate the Plaintiff has in the Tenancy, and well per Judicium. Br. not allege Seizin by such a one in the Seizin. Que Estate he has in the Seisin; for this is his Title, and the Tenancy is the Title of the Plaintiff by 34 H. 8. Note the Diversify. Ibid.

4. In Recordarii the Defendant avowed, because the King is seised of S. C. cited 6 the the Castle of C. in Right of His Dutchy of Cornwall, to which he has 22 S. Rent out of the Vill of D. to be paid Yearly at Michaelmas, of man's Cafe. 5 H.
which Rent the King and all the Dukes of Cornwall have been seised 
Time out of Mind, by the Hands of the Inhabitants and Residents of the same 
Vill, and that they have used to disavow for the Arrears of 11 Time out of 
Mind, by which for the Rent arrear &c. The Defendant as Bailiff of 
the King confessed the taking &c. and prayed Aid of the King, and 
there it was agreed that in Avowry, Conspicile &c. Seisin shall be al-
ledged by the Hands of some Person certain, but as here because it was by 
the Hands of the Inhabitants, and the Seisin by the Hands of the one is 
Seisin of all, and Commonally cannot be named, therefore by Advice of 
all the Court the Conspicile was awarded good, and the Aid granted. 
Br. Avowry, pl. 71. cites 4 H. 6. 29.

5. Where the Lord avows upon the Heir, he need not to shew if the 
Rent was Arrear in the Time of the Ancestor or in the Time of the Heir ; 
for the Lord may avow and charge the Land, tho' it was in the Time 
of the Ancestor. Br. Avowry, pl. 15. cites 34 H. 6. 46.

Ibid.

7. If a Man disavows 20 Beasts, and the Plaintiff sues Replevin but of 
10, yet the Defendant shall make Avowry for 20, otherwise he cannot 
have return of all; Nota per Prift. Br. Avowry, pl. 16. cites 35 
H. 6. 40.

8. In Replevin by one, the Lord by Grant for Yore avowed upon the 
Plaintiff and another for certain Services, as upon his Tenant by the Man-
ner, and admitted, and well, as it seems. Br. Avowry, pl. 98. cites 12 
E. 4. 2.

9. A Man may avow, as much as the Plaintiff held of him 20 Acres 
of Land, wereof &c. by Homage, Fealty, and Escrow &c. and allege 
Seisin of the Service &c. and well, notwithstanding that he did not say 
that he held of him as of his Manor &c. Br. Tenures, pl. 41. cites 19 
E. 4. 9. per Cur.

10. The Defendant avowed for that he was seised of the Place where, 
and so justified the taking Damage teafant; and upon Demurrer this 
Avowry was held ill by all the Court; for he ought to have set forth of 
what Estate he was seised; and Powell J. said it would have been ill on 
Huffey.

(X) Surpluage in Avowry.

One Avow-
ry for Rent-
service and 
Rent-charge 
is not good, 
because one 
may be due 
and not the other; but he may avow for taking so many Beasts for Rent-service, and so many for Rent-

If an Avowry be made for Rent, and it appears by the Party's own shewing that Part of it is not yet 
due, yet the Avowry is good for the rest, and shall not abate wholly. 11 Rep. 45. b. in Godfrey's 
Cafe.—S. C. & S. P. cited Saund. 255.—But if one avows for 2 Things, and it appears by his own 
shewing that he hath Right but to one, the Avowry shall abate for the Whole. Roll Rep. 53. 34. Arg. 
But Coke Ch. J. held that if a Man has brought Action for 2 Things, and it appears that he has no 
Caufe of Action for Part, nor ever can have, there the Avowry shall not abate but for Part only; but 
if he may have Action of another Nature for Part, or may have Remedy hereafter for Part, there the 
Whole shall abate; and that there is another Diversity, viz. where the Party confesses that he has no 
Caufe of Action for Part, there the Whole shall abate; but where it is found by Verdict, it shall not. 
Ibid. 77. in Case of Bullen v. Godfrey, S. C.
Avowry.

In Avowry for Rent, after Judgment for the Avowant, Error was brought, for that Part of the Rent became due after the Distress taken, it being made 5 Days before Michaelmas, and the Defendant avowed for that Michaelmas Rent. Per Cor. This is sought, because the Judgment in Replevin is to have a Return irrepeleible, (1.) that he shall have the Distress as a Pledge till all the Rent is paid, and that was more than was due at the Time of the Distress taken, and therefore the Avowant ought to have abated his Avowry quod Michaelmas Rent, and taken Judgment for the rest. 2 Salk. 350. pl. 2. Mich. 9 W. 3. B. R. Richards v. Comforth. —— s Mod. 563; S. C. and Judgment reversed, Nisf.—But the Defendant getting his Avowry amended in C. B. the Roll was amended here in B. R. and to the Error was cured. 2 Salk. 350.

2. A. seised in Fee, granted a Rent-charge to M. his Daughter. The Bult. 135. Rent being arrear, M. married P. and afterwards P. disfraight and avow'd for the Rent so arrear, supposing in the Avowry that the same was arrear, to J. the and not paid to the said P. and his Wife. It was moved that it was ill, Rent, by the because it appears that it cannot be due to P. but only to M. dum sola fuit, but held to be only Matter of Form and Surplufage, and thro' he does not say Advow a retro exifitis, it is well enough in Substance; and to them Judgment affirm'd. Cro. J. 282. pl. 3. Trin. 9 Jac. B. R. Bowles v. Poor. clearly agree, and adjudged the Avowry well made, and Judgment in C. B. affirmed.

3. A Rent-charge was granted to R. and M. his Wife for Life. The Hob. 262. Rent being arrear, R. died, and the Defendant made Conjuince as Bailiff to M. as Administratrix to R. for Rent arrear in the Life of R. and Excep't being taken thereon, because M. by the Survivorship was intitled to C. adjudged accordingly, the Rent in her own Right, and not as Administratrix; and it was held to be superfluous, and Judgment for the Avowant. Brownl. 171. Hill. adjudged accordingly; but only there the Word (Debt) is put instead of the Word (Avowry.)

(Y) The Form upon the Statutes of H. 8.

1. A Vowry upon the new Statute of 21 H. 8. upon the Land, and upon no Person the Avowant ought to allege Seisin by the Hands of some one, notwithstanding that he does not make Avowry upon any Person certain, and so he did, and the Plaintiff alleged that a Stranger was seised &c. without making Privy from him by whom Seisin was alleged, that he lead him for Years, and prayed Aid, and had it; quod nota. Br. Avowry, pl. 4. cites 27 H. 8. 4.

2. Avowry, because the Land was held of him by Fealty and Rent, and alleged Seisin &c. and for the Rent arrear he avow'd upon the Land by the Statute of 21 H. 8. but he did not make mention of the Statute; quod nota; and so well, as it seems, because it is a general Statute. Br. Avowry, pl. 5. cites 27 H. 8. 20.

3. He who avows upon the Land, as within his Fee or Seigniory, by the Statute 21 H. 8. shall allege Seisin as in another Avowry, and then shall conclude his Avowry upon the Land as within his Fee and Seigniory; and in such Avowry every Plaintiff in the Replevin, to be Tenor or other, may have every one an Answer to the Avowry, as to traverse the Seisin, the Tenure, and the like, which are good Answers in Avowry, or plead Release, or the like, as Tenant of the Franktennent shall do, tho' he be a Stranger to the Avowry; for such Avowry is not made upon any Person certain, therefore every one is a Stranger to this Avowry, and to the Plaintiff.
may have any Answer that is sufficient. Br. Avowry, pl. 113. cites 34 H. 8.

4. It was agreed that at this Day, by the Limitation of 32 H. 8. the
Avowry shall be made generally, as was 'uulually done before; and it he
does not make Seisin after this Limitation, then the Plaintiff in Bar of
the Avowry may allege it, and transfer the Seisin after the Limitation.
Quod nota. Br. Avowry, pl. 107. cites 1 M. i.

5. In Replevin the Defendant made Conuance that one L was seised of
the Land in Fee in which the Distrefs was taken, and held the same of A.
as of his Manor of E. by Fealty and other Services, and for the Rent
arrear the Defendant made Cognizance as Bailiff to the said A. It was
objected that the Cognizance was not good, because the Defendant
having alleged that L held the Lands, he afterwards avers as on the Sta-
tute, which is not good; for when he meddles with the Name, and so
takes Conuance of him, he ought to avow upon him by the Common
Law, and not upon the Land, by the Statute: but the Court held that it
was well enough. Cro. Eliz. 146. pl. 7. Mich. 31 & 32 Eliz. B. R.
Lucy v. Fisher.

6. A. having a Reversion in Fee after an Estate for Life, devised a Rent
of 4l. to B. for Life. A. died, 7 Years incurre’d, and B. died. B. ’s Execu-
tors avowed for the Rent. On Demurrer Exception was taken, that it
was not aver’d that the Land remained in the Seisin of the Tenant who
ought to pay it, or of some other who claims from him by Purchase or De-
scendant, according to the Stat. 32 H. 8. cap. 37. And Anderson and Walm-
ley held it material; but in shewing it generally according to the Words
of the Statute is sufficient, without shewing How he was seised, he being a Stranger. Cro. E. 547. pl. 20. Hill. 39 Eliz. C. B. Myles v. Willoughby.

(Z) Where but one, and where several Avowries.

1. It is said that in Replevin against several, if some aver for themselves
and the others, those others cannot plead to the Writ. Thel. Dig. 104. lib. 13. cap. 1. S. 10. cites 17 Eliz. 3. 36.

2. Where two Coparceners of Land, held by Suit of Court, make Partition,
and the one aiiens his Part to one, and the other alien his Part to another,
the Lord may distrain which he pleases, and avow upon him only; for
upon several Tenants a Man shall not make joint Avowry, and if the
one makes the Suit it shall discharge the other, and he may plead it,
per Skipwith, quod nemo negavit. Br. Avowry, pl. 69. cites 24
Eliz. 3. 34.

3. A Man may make Avowry for two Heriots after two Deficients in one
and the same Avowry, when it is by one and the same Seigniory. Br.
Avowry, pl. 133. cites 27 Atl. 24.

4. In
Avowry.

4. In Replevin, the Defendant avowed, because there is a Custom with
in his Manor, that the Tenants shall chuse a Beadle to collect his Rents and
Amercements, and that in Case the Beadle be not sufficient, that he shall
distain the Tenants for Non-sufficiency of the Beadles, for the Rents and one is
and Amercements; and because such a Beadle was not sufficient of the
Rent, and also for Non-sufficiency of the Amencement, he avowed the
taking of an Ox. And as to the Rent, said, there was No such
Custom, and as to the Amencement he was sufficient, and Exception was made that he shall have
taken, because he took two Ifiues, where it is of one Ox, and there it
was agreed, that if any of the Ifiues pafs for the Defendant, he shall
have Return, and the Plaintiff was compelled to answer to both If-
fiues; Quod Nota. Br. Avowry, pl. 25. cit. 44 Eliz. 3. 13.

5. Two strain, and one avows for Rent due to him, and the other a-
vows for a thing due to him, both Avowries shall abate; for both cannot
have Return. Br. Avowry, pl. 6. cit. it as agreed. 3 H. 6. 44.

6. Avowry, because the Plaintiff held 20 Acres of him by 20 s. per
Ann. and Fealty, and for 100. of every Year of 6 Years being Arrear, he
was avowed; And per Cur. you ought to confefs you have been paid
the rent, viz. 100. for every Year of the 6 Years Residue of the
20 s. per Ann. Quod Nota. Br. Avowry, pl. 102. cit. 20 Eliz. 4. 2.

7. If a Man makes joint Avowries where there are severall Avowries,
the Avowry shall abate; Quod nota bene. Br. Avowry, pl. 145. cit.
21 H. 7. 37.

8. Lord and Tenant by 3d. if the Tenant dies, and the Feeme is en-
dowed of 1d. the may distrain and avow for the 1d. and the Heir for
the 2d. and so two Ditrefles during the Dower. Br. Avowry, pl.
139. cit. 24 H. 8.

9. If two Coparceners make Partition, and give Notice to the Lord, he

10. It was resolved by the Justices, that an Avowry may be for
Part of a Rent. 4 Le. 4. pl. 13. Patch. 31 Eliz. C.B. Anon.

11. One Avowry may be made upon two severall Titles of Land, tho'
the Avowry is but for one Rent. 1659. for one Rent may depend upon
severall Titles. L. P. R. 157.

12. Tenants in Common cannot join in Avowry, but ought to avow se-
verally for Rent; Admitted. Carth. 349, 343. Hill 6 W. 3. B. R.
Ward v. Everard.

(A a) Certainty in an Avowry.

1. Reception, supposing that the Defendant distrained him for Homage,
and after distrained him for the same Cause, and the Defendant
said, that the second Distress was for Rent Arrear, to which the Plaintiff
said, that Nothing Arrear; & non allocatur; because in Reception the
Plaintiff ought to maintain that the second Distress was for the first Cause;
Quod Nota; And per Thorp and Finch, a Man shall have Reception
without Avowry made, and before Avowry made, and after Belk. main-
ained

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(Edited and adapted for natural language)
tained that he took for the first Caufe, and the others e contra. Br. Recaption, pl. 2. cites 45 E. 3. 4.

2. Hors de Son Fie in Recaption by way of Replication when the Defendant has justified for other Caufe Pared of the Seigniory, is no Plea; for nothing shall come in Debate in Recaption but only if the second Distress was for the first Caufe; for if he disfrains twice for one and the same Caufe, he does a Tort, be the first Caufe right or wrong. Br. Recaption, pl. 3. cites 47 E. 3. 7.

3. And a Man shall not make Avowry in Recaption, or have Return in Recaption as in Replevin. Br. Recaption, pl. 3. cites 47 E. 3. 7.


5. And in Avowry by the Heir, he need not to shew the Day of the Death of his Ancestor; quod nota inde. Ibid.

6. Avowry upon the Plaintiff, because W. held of the Defendant by Fealty, and 20 s. per Ann. which was Arrear by 10 Years, and for 4 l. for the first 4 Years he was called upon the Plaintiff, who was intitled by W. and alleged Seisin by the Hands of W. and did not shew if the Arrears were in the Time of W. or in the Time of the Plaintiff, and yet well. Br. Avowry, pl. 38. cites 7 H. 4. 14.

7. Castrum where the Lord purchaseth the Seigniory; for there he shall shew &c. Br. Ibid.

8. And it is no Plea that the Plaintiff held by 4 d. per Aunum, which he proffered without saying that the Lord accepted it, for it he did accept it he shall be excluded of the Rett, nota. Br. Avowry, pl. 38. cites 7 H. 4. 14.

9. Avowry was for a Fine for Alienation upon a Custom that every Tenant ought to pay a Fine for every Alienation, and did not shew any certainty of the Fine, nor allege any Seisin of G. of Clare by whom he conveyed, but in E. mesne in the Conveyance, nor he did not say that the Land was held of G. of Clare, Lord of the Honour aforesaid, as of the Honour of G. for then it may be that it is held of him as of another Lordship or Manor; and for those Causes the Avowry was held insufficient. Br. Avowry, pl. 46. cites 14 H. 4. 2.

10. In Recaption, the Plaintiff counted that the Defendant at another Time disfrained him for such Caufe, and after disfrained him again for the same Caufe, facielitc, for 2 s. of Rent Service paying Replevin of the first taking, facielitc, Vi & Armis ac contra Pacem & Statutum, and the Defendant demanded Judgment of the Court, because he did not count that the Defendant made Avowry of the first taking; for otherwise it cannot appear if the lait was for the first Caufe, & non allocatur; for he may aver the first Caufe, and that the second Distress was taken for the same Caufe, per Bab. & Opinionem Curiae, and the Writ by him is good, contra Pacem & Statutum, but not Vi & Armis; but contra Newton, for it does not appear at first if he who disfrained was Lord or not, therefore it may be well Vi & Armis by him, contra Babington. Br. Recaption, pl. 1. cites 9 H. 6. 1.

And Ibid. says 11. If a Man disfrains for 2 Oxen, and the Tenant brings Replevin but of one only, the Defendant may shew that he took this and another, and asowe the taking of both, and have return of both upon the Matter. Br. Avowry, pl. 147. cites 21 E. 4. 6.

Br. Replevin, pl. 27. cites S. C. 12. In Replevin, the Defendant disfrained 20 Beasts, the Plaintiff complained but of 10 Beasts taken &c. and the Plaintiff was nonsuited, and the Defendant avowed for the taking of the 10 Beasts of which the Plaintiff was
was, and for the other 10 of which no Plaintiff was, and well, but he need not make Avowry for more than are comprised in the Avowry, Quod nota. Br. Avowry, pl. 62. cites 14 H. 7. 1.

13. Per Vavifer, where the Lord himself makes Avowry De son Tort &c. is no Plea but shall answer to the Tenure; contra where the Bailiff of the Lord makes Consequence. Br. De son Tort &c. pl. 53. cites 16 H. 7. 3.

14. A Man made Avowry for Aid for making Sons Knights, because the Plaintiff held of him by the third Part of a Knights Fee, and ill because he does not show what is a Knights Fee. Br. Avowry, pl. 114. cites 13 H. 8. 11.

15. An Avowry is in the Nature of a Declaration, and ought to contain sufficient Matter, whereupon he may have Judgment to have a Return; but if the Avowry, or any Declaration or Replication &c. wants Form, or omits Circumstances of Time, Place &c. there the Plea of the other Party may save such Imperfections, but cannot supply Defect of Matter of Substance, adjudged. 7 Rep. 25. a. Trin. 42 Eliz.

C. B. Butts’s Cafe.

16. Replevin of taking in C. the Defendant made Consequence for Damage seant; the Plaintiff replied, that C. contained Acres (leaving a Blank for the Number) and that he was seized in Fee of 100 Acres, Parcel of the said Common, and so preferred to have Common in the Refidue of C. as appurtenant to the said 100 Acres. The Prescription was traversed, and found for the Plaintiff; it was moved that the Plaintiff having left a Blank for the Number of the Acres, not confut what the Refidue were in which he preferred to have Common, but adjudged per rot Cur. praeter Williams for the Plaintiff, because in this Action he was not to recover any Land but Damages only, for the unlawful taking; besides it is agreed on both Sides, that there was a Refidue of Common, and so the Jury have found, and whether it is more or lesfs it is all one, because whatever it be, the Plaintiff ought to have Common there. Yel. 146.


17. Repleen, the Defendant avowes for Damage seant, in as his Freehold in Corringam; the Plaintiff replies that he is seized of a Messuage and 14 Acres of Land, and prefers to have Common in the Place where &c. all the Times of the Year, tanquam eis Messuagio & Terr. sequant. Ille Boscull v. thereupon was found for the Plaintiff, and now moved in Arreit of Judgment, that this Bar to the Avowry does not show what Vill the Messuage and Land is, whereunto he claims the Common, and of that Opinion was the whole Court; and also that it be after Verdict, yet it is Jotisall; Yelv. 177. and ordered that the Party replead. Cro. J. 238. pl. 2. Pazich. 8 Jac. B. R. Broxholme’s Cafe, Sir John Thorold.

18. In Replevin, the Defendant avowes in the Right of B. and shewed that H. held of A. the Father of B. by Feudage and Rent &c. and that the Seigniory descended to B. and so avowes the taking for 101. Rent for 50 Years, quia eadem a retro seans; it was assign’d for Error that the Avowry was ill, because it did not set forth that all the Rent was due to B. for some of it might be due to A. the Father; but per Coke if it cannot appear that all was due to B. the Son, it would be erroneous, but here it doth appear to be all due to him; for it is alleged that a retro seans to him, and Judgment affirmed. 1 Roll Rep. 59. pl. 19. Trin. 12. Jac. B. R. Harwood v. Paramount.

19. In Replevin, the Defendant avowes for Rent, and made Title by a Grant of the Rent out of the Tenements aforesaid, whereof the Caption aforesaid is supposed per Nossum of all his Land, which was not then in Lease, but did not then aver that the Place where the Caption was, was out of Lease at the Time of the Grant. The Plaintiff was nonsuit, and this was moved in Arreit of the Return, that the Avowry was not good, and
and so held Bridgeman, notwithstanding that it was alleged that the Grant was out of this Land per Nomen; but per Haughton contra, the Grant being alleged de Tenementis Predictiss is a sufficient Averment, that it was not in Leaf at the Time; and Dodderidge and Croke feemed to the same Intent, and Judgment was given accordingly for the Avowant. Roll Rep. 422. Trin. 14 Jac. B. R. Fawkner v. Fawkner.

20. Confuence was for 20 s. Part of the Rent of 15 l. Arrear, and for 40 l. Parcel of 200 l. Arrear for Nomine Pæne, and did not say in his Avowry that he was satisfied of the Rent; and therefore Judgment was given for the Plaintiff. Hutt. 96. Hill. 3 Car. Holt v. Sambach.

21. In Avowry for Damage feant, the Plaintiff in Bar prescribed for Common to two Acres of Land, and that he put in his Beasts to Common there; upon a general Demurrer the Bar was held ill, because he did not say that the Beasts were levant and couchant there, and the Court held it ill without special Demurrer, but agreed that it is cured by Verdict. Lev. 196. Mich. 18 Car. 2. B. R. Cheadle v. Miller.

22. In Replevin the Defendant avowed the Taking for the 3d. Part of a Penny, Rent due at Michaelmas, referred upon a Leafe for 90 Years &c. Upon a Demurrer it was objected that the 3d Part of a Penny could not be taken for it. Sed per Curiam, in the Case of Malham v. Bullen, Judgment was given for Damages found to half a Farthing, and in this Case adjudged for the Avowant, Nifi &c. 2 Jo. 138. Hill. 31 & 32 Car. 2. B. R. Edgcomb v. Burnford.

Farthing, and it would have been well enough, because there is no less Coin.

23. In Avowries the Commencement of particular Estates must be known; as that such a one was feaid in Fee, and demitied &c. so that it may appear that the Estate out of which it was derived is sufficient to support it, because that Seilin in Fee might be traversed; and any of the meane Alignements are traversable. Comb. 476. Patch. 10 W. 3. B. R. Scilly v. Dalby.

In Replevin the Avowant sets forth, that he was possed for Years, and made an Under-Lease to the Plaintiff, referring Rent, which being in Arrear, he distrain'd. After Nonfuit of the Plaintiff it was objected that this Avowry was ill, for that it set forth a particular Estate for Years, without proving who had the Fee, or the Commencement of the particular Estate; but it was held that it was true; yet it being after a Nonfuit, it was too late; for the Interlocutory Judgment is such on which a Writ of Error would lie. 6 Mod. 223. Mich. 3 Ann. B. R. Anon.

(B. a) Plea in Bar or Abatement. Good. And by whom it may be.

1. W HERE the Avowry is for Rent reserved upon Equality of Partition, upon Partition made between two Parceners, it is a good Plea that there were 3 Parceners, and the Third at the Time of the Partition was out of the Country, and came back within Age, and re-enter'd, and the other said that the Third after released her Estate, absine hoc that she entered, prist, and the others e contra. Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

2. Avowry upon K. because W. was feaid and held of the Plaintiff, and gave to T. and K. in Tail, the Remainder to them here, and T. died, and K. survived, and he avow'd upon K. by 2 d. and the Plaintiff said that W.
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Avowry.

Judgment for but for others held "Plaintiff pi. Procefs fay of Br. and Plea avow by therefe we therefore we be

2d. 7. 9. the Tenant, and the Party may be seized, Hands to pray cites infefted T. alone, who infefted the Plaintiff, who accepted the Services by his Hands; Judgment of the Avowry. Finch and Belk. said he should not have the Fee; for he is a Stranger to the Avowry. But per Thorp, it is sufficient, because he alleges Seifin by his Hands, and the Plea of the Stranger to the Avowry in Form as above, was held good to the Avowry.


3. And because the Defendant avow'd the taking of two Sheep for 2d. and 16 Oxen for 9d. and brought a Writ for all, he was amerced to 20s. for excessive Distrefs. Br. Avowry, pl. 19. cites 41 E. 3. 25.

4. Avowry upon A. B. who said that at the Day of the Taking f. S. was Tenant of Parcel of the Land, and this Plaintiff seized of the reft, and held by several Services, and as to the Seifin it was by seivest Distrefs. And per Belk. these several Tenures go in Abatement of the Avowry, by which we pray to be discharged of the reft. Finch said he does not make his Conclusion upon this, but is to avoid the Seifin by seivest Distrefs, and therefore bid him answer this, and of the reft to take it by Protestation, by which Issue was taken that he paid of his own Free Will, and not by seivest Distrees. Br. Avowry, pl. 30. cites 47 E. 3. 4.

5. In Avowry against three, the one came, and the Plaintiff counted of a But Perle Taking in S. The Defendant avow'd in D. abjique hoc that he took in S. and found for the Plaintiff, and he pray'd Judgment, and the best Opinion was that all is discontinued, because the other two Defendants did not one bad made any thing, nor no Process made nor continued against them. Br. Avowry, pl. 33. cites 49 E. 3. 24.

Process shall not be made against the others; but as here he made it for himself only, and also upon Plea to the Writ pleaded Sec. to have Return, if the Plea paid'd for him; for without Avowry in this Case he shall not have Return, and therefore in this Case the Process ought to have suff'd against the other two. Ibid.

6. A Stranger to the Avowry cannot plead in Bar to it. Br. Mefne, pl. As where there was Lord, Mefne, and Tenant, and the Mefne was arrer, and the Lord distrains the Tenant, and the Tenant offers the Rent, the Lord may rejeft, and for this Mischief Process of Forjudging was given. Quod nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

7. In Avowry for Rent-charge the Plaintiff said that the Grantor bad nothing in the Land, where the Taking was made before the Grant, and the others e contra, and fo to Issue, which is in Effet which the Grantor bad nothing in the Land charged at the Time of the Gift. Br. Avowry, pl. 35. cites 2 H. 4. 23.

8. Avowry upon N. S. for several Services. The Plaintiff said that J. N. held of the Defendant by one Penny for all Services, But what the Plaintiff has, which Penny be has paid to the Defendant, fo ought he to avow upon him, Judgment. And the Issue was taken, if the Land was held by divers Services or not. Br. Avowry, pl. 37. cites 7 H. 4. 10.

9. In Replevin the Bailiff made Conuniance, because N. T. held of the Lord by Fealty, and for two Shilling's Rent arrear made Conuniance upon N. T. and the Plaintiff said that N. T. levied a Fine to W. P. and the Lord jessed of the Services, and after W. P. died jessed, and the Land defended to three Daughters, fo ought he to have made Conuniance upon them; Judgment of the Conuniance, & non allocatur; for he is a Stranger to the Avowry. Br. Avowry, pl. 41. cites 7 H. 4. 28.

10. Exception was taken that a Stranger to the Avowry cannot plead in Abatement of it, nor otherwise but Haus de fon Fee, or a Thing which amounts to as much, As Release, and the like. But it was agreed per Cur. that a Stranger to the Avowry may plead all manner of Pleas where his Beasts are taken, so that he be Party to the Record, where the Avowry is not made upon any Person certain. Br. Avowry, pl. 46. cites 14 H. 4. 2.

11. In
In Avowry for Rent-charge, the Plaintiff said that at the Time of the Gift he had nothing in the Land; Judgment; and the Opinion of the Court was that it is a good Plea. Horton said he was feited at the Time of the Charge, pritn. Br. Avowry, pl. 47. cites 14 H. 4. 30.

In Avowry the Plaintiff said that he tender'd the Rent upon the Land the Day that the Defendant distrain'd, and he refused. But per Cockam, the Tender ought to have been pleaded to have been at the same Time that he distrain'd, and not the same Day; for he may come several times to distrain the same Day, and the Tender ought to be only when he distrain'd. Nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

If the Lord distrain for two Rent-Days, and the Tenant offers the one, the Lord ought to take it. Br. Avowry, pl. 6. cites 2 H. 6. 1.

Non-tenure, or Non tenet de illo, is no Plea in Avowry but where Seizin is alleged; [and] in Avowry, if the Plaintiff can avoid the Seizin it is sufficient; by the best Opinion. Br. Avowry, pl. 52. cites 8 H. 6.

In Replevin, the Defendant avowed severally for two several Tenures of two Acres of Land upon the Plaintiff as Tenant of Fee-simple, and the Plaintiff said, that the Father of the Defendant by the Leed &c. whose Heir he is, gave to him in Tail to hold by one entire Service; Judgment of the Avowry, supposing it to be by two several Tenures; and per Chaunter, it is not double, that is to say, the Tenure of the Fee Tail, and the sole Tenure; because he relied upon the lait. Br. Avowry, pl. 8. cites 9 H. 6. 26.

In Avowry Non tenet de illo is a good Plea. Br. Avowry, pl. 129. cites 10 H. 6. for it is a good Plea in Cassavit; but contra in Avowry; but Hors de fon Fee and Seignior is a good Plea in Avowry. Br. Avowry, pl. 129. cites 11 H. 4. * 11.

In Avowry the Plaintiff pleaded Hors de fon Fee and Seignior, or he may disclaim if he will; for he may do the hold of him. Br. Avowry, pl. 144. cites 21 H. 7. 20.—* This is misprinted, and should be (10)

Avowry upon one as upon his Very Tenant, because be held of him 16 Acres of Land by 25. and for the 25. Arrear be awowed &c. The Plaintiff said, that be held 32 Acres, that is to say, those 16 and other 16 by the same Services &c. abique hoc that be held the 16 Acres only by the 25. and the best Opinion was, that it is a good Plea without saying Riens Arrear to the Parcel; Quære, and see the Book. Br. Avowry, pl. 124. cites 20 H. 6. 20.

Avowry in two Places in A. and B. the Plaintiff said, that the two Places are in C. and D. and not in A. and B. and no Plea if he does not shew which Place is in one Vill, and which in the other; Quod Nota. Br. Avowry, pl. 130. cites 22 H. 6. 28.

In Avowry it is no Plea that the Plaintiff at another time disclaimed against the Father of the now Avowant, whose Heir he is. Br. Avowry, pl. 125. cites 27 H. 6. 2.

Avowry upon the Abbey of D. because he held of the Defendant, and alleged Seizin in the Grandfather of the Defendant, and the Plaintiff pleaded Confirmation of the Great-Great-Grandfather of the Defendant made to the Abbey of D. and the Monks there serving God in Frankalmoyn, and good, per Cur. because it was ancient Deed; but Littleton and Moyle said, that it was not well pleaded, because he did not answer to the Seizin of the Grandfather. Br. Avowry, pl. 11. cites 33 H. 6. 22.
21. In Avowry, the Plaintiff prayed Aid of one who came and joined, and would have pleaded in Abatement of the Avowry, because he alleged Sefin of the Avowry by the Hands of J. N. and did not say Thou Tenant of the Land, and it was awarded by all, that the Avowry was good notwithstanding this, and also that the Prayee cannot plead in Abatement of the Avowry; Admitted by the Plaintiff, unless as Amicus Curiae; Quod Nota; Per Cur. Br. Avowry, pl. 12, cites 34 H. 6. 8. 21.

22. In Avowry, the Defendant in the Replevin made Conscience as Bailiff of his Matter, and the Plaintiff prayed in Aid of one W. and be came upon Summons ad Auxiliam and joined and pleaded in Abatement of Avowry, because where he alleged Sefin of the Services by the Hands of J. P. because he did not say Thou Tenant of the Land, and permits he need not; for it suffices in Avowry, Cessavit or Elcheat, that he held of him &c. and the reason seems to be, because there may be Lord, Meine, and Tenant, and this is for the Services of the Meine, or it may be that the Tenant had made a Leafe for Life, and that the Avowry is made upon him by his Reversion; Quod Nota; but it was said there, that several Avowries were made which said Tunc tenens Terras &c. and this is the fullest way it be true. Br. Avowry, pl. 14, cites 34 H. 6. 21.

23. If the Tenant infers his J. S. and J. S. gives Notice to the Lord, and yet the Lord disrains and avows upon the Peffer, J. S. may join Gratias and abate the Avowry, the be a Stranger; Contrary of a Stranger without Notice. Br. Avowry, pl. 15. cites 34 H. 6. 46.

24. And where there is Lord, Meine, and Tenant, and the Lord disrains the Tenant, and avows upon the Meine, the Tenant shall not have Aid of the Meine, but the Meine may appear and plead, for he is Party to the Avowry, and this all in Perfon, as it seems, and at the first Day, and every Stranger upon whom the Avowry is made may appear Gratias, and plead either in Abatement or in Bar, tho' he be not Party to the Replevin. Br. Avowry, pl. 15. cites 34 H. 6. 46.

25. In Avowry, the Writ was abated, because no Place of taking was put in the Declaration, and yet the Defendant cannot have Return without making Avowry, tho' the Place of taking be wanting. Br. Avowry, pl. 126, cites 35 H. 6. 40.

26. Avowry was made, because F. was seised of 20 Acres of Land, and held them of K. the Lord by such Services, and alleged Sefin in N. the Eftate of which F. one A. bad, and after A. gave the Manor to T. C. now Defendant in Fee, and that the said A. their Tenant of the Land attorned by a Peony, the Eftate of which A. the Plaintiff has, and for 20 d. Arrer after the Grant and Attornment he avows; the Plaintiff saith, that H. P. was seised of the Premsifes in Fee, and leas'd to the said A. for Term of Life, and after H. P. granted the Reversion to the Plaintiff, and two others in Fee, to whom the said A. attorned, abique hoc that the said A. was seised of any other Eftate at the Time of the first Attornment &c. and this is an ill Plea for the one Part, viz. the Grant made to the Plaintiff, and to another it went in Abatement of Avowry, because it ought to have been made upon both; and the other Matter, viz. the Eftate for Life at the Time of the Attornment goes in Bar of the Avowry, and also there is no Privity between F. Tenant and H. P. Tenant, nor any Tenure between H. P. and K. the Lord, and therefore held an ill Bar. Br. Avowry, pl. 17, cites 35 H. 6. 51.

27. By which Choke changed his Plea, and said, that F. was seised, and held &c. who infused the said H. P. who gave Notice to K. the Lord, and after H. P. leas'd as before &c. and after granted the Reversion to the Plaintiff, and the Tenant attorned, abique hoc that the said A. Tenant was seised of any other Eftate at the Time of the Attornment; and per Wangl. he ought to travel that A. had not the Eftate of F. Tenant; Quare; for it was adjourned. Ibid.

28. Where
28. Avowry, Lord and Tenant by Knights Service, the Tenant avowed for Life, rendering Rent, and after granted the Recovery to W. in Fee, the Tenant attorned, and W. died, his Heir within Age, and the Lord seized him, and for the Rent of the Tenant for Life arrear the Lord avowed, and concluded the taking good and lawful by the Matter, and in the Land as within his Fee and Seigniory, and well without other Conclusion; And to fee, that Guardian shall avow upon the special Matter, and not upon his Tenant or Very Tenant &c. Boet. said the Tenant did not attorn to the Grantee, Prift, and a good Affid; for he is a Stranger to the Avowry, who can plead nothing but Hors de fon Fee, or a Thing which amounts to as much, and now he cannot plead Hors de son Fee Generally, by reason that the Land is held of the Lord in Chivalry; but if the Tenant did not attorn, it is Hors de son Fee as to this Rent reserved upon the Leafe for Life, Quod futu concefium, and the Affid taken ut supra. Br Avowry, pl. 83. cites 38 H. 6. 23.

29. Where the Tenant holds by 2d. and the Lord encroaches 4d. the Tenant shall not discharge it in Avowry. Br. Avowry, pl. 91. cites 5 E. 4. 87. per Danby Ch. J. and Choke J.

But per Thringing and Hill he may rebut in Avowry by the Deed.

Br. Avowry, pl. 91. cites 5 E. 4. 87.

In Replevin, the Defendant avowed upon H. O. a Stranger. As upon his very Tenant, the Plaintiff said, this same H. O. avowed to his Feme for Life, by which he had nothing but in True Uxoris, and prayed Aid of her, and the Aid granted, and after the Plaintiff seized it, and said Rien Arrear the Day of the Taking, and per Newton and Afton J this Plea doth not lie in your Mouth who are a Stranger to the Avowry; for a Stranger shall only plead Hors de son Fee, or a Thing which amounts to as much. Br. Avowry, pl. 56. cites 22 H. 6. 2.

And per to. Car. Leved by Distrefs, and so Rien Arrear, is no Plea for a Stranger to the Avowry, but as here the Plaintiff may have Aid of the Feme, and then they may have Aid of the Leafe, and then they all may plead Rien Arrear, or disclaim. Ibid — S C. cited 9 Rep. 20. a. in the Case of Avowries.

Br. Avowry, pl. 144. cites 21 H. 7. 20. S. P.

30. Note that Leved by Distrefs is a good Plea in Debt, and in Avowry not. And Rien Arrear is a good Plea in Avowry. Br. Avowry, pl. 136. cites 9 E. 4. 27.

31. Debt upon a Leafe for Years rendring Rent, a Tender of the Rent upon the Land, and Refusal by the Plaintiff is no Plea; contrary in Avowry. Br. Avowry, pl. 140. cites 14 E. 4. 4.

32. If a Man distrains for my Rent, and gets Seifin, and I release to him, this is no Bar to me in Avowry upon the Terrant for the same Rent, for the Release is no Admiision of Distress. Br. Avowry, pl. 134. cites 15 E. 4. 8.

33. Avowry was made insinuam as J. S. was seised of 10 Acres of Land, and held of him by Fealty, and 10s. of Rent of which he was seised as by the Hands of his very Tenant, and had Issue A. and died, and A. married the Plaintiff and had Issue between them, and after A. died, by which he avowed upon the Plaintiff as upon his very Tenant by the Manner; and the Plaintiff said, he held those 10 Acres and other 10 Acres by the said Rent of 10s. and Fealty, abique hoc, that he held the 10 Acres only by those Services where the Avowry conveyed the Tenancy of J. S. to the Plaintiff, which the Plaintiff did not deny; and per Brian, Choke and Jenny this is no good Bar, without bleeding how he came to the one 10 Acres, and to the other 10 Acres, because the Plaintiff did not deny the Conveyaue alleged in the Avowry. Br. Avowry, pl. 109. cites 18 E. 4. 17.

34. Avowry may be made because the Plaintiff held of him 20 Acres of which &c. by Homage, Fealty and Eftuage, notwithstanding that he does not avow that he held of him as of his Manor; and where a Man pleadt Jointure in Avowry with another not named, he ought to shew of whose Gift and Herb, and it is no Plea if he does not say that he held jointly
Avowry.

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family with him; for otherwise he is a Stranger to the Avowry, for a Stranger to the Avowry may plead in Abatement of the Avowry made upon a Stranger, if he who pleads it be Plaintiff, so that he be Party to the Suit. Br. Avowry, pl. 101. cites 19 E. 4. 9.

35. Replevin of taking his Beasts in S. in D. the Defendant said that S. is in T. and made Avowry for Damages; he is in the Abatement; and per Pigot and Cur. where he says that S. is in T. he ought to say abive bee, that is in D. for this Traverse goes in Abatement of the Writ, and so he did &c. Br. Avowry, pl. 103. cites E. 4. 2.

36. In Avowry by the Issue in Suit for a Rent-charge intailed, a Feasantry of the Ancestor of the Land out of which &c. discharged of the Rent, with Warranty and Affiats defuced is no Plea; for the Avowant is not to recover any Rent, for he is in Possession by his Avowry, and shall only have Return, and therefore is no Bar. Br. Avowry, pl. 79. cites 21 H. 7. 9, 10. Per Vavifor J.

37. Replevin and Avowry made of Rent-charge granted by Feoffee seised to another Use, the Plaintiff pleaded in Bar to the Avowry, a Reland made by Caflty que Use to Feoffee in Use after the Grant of the Rent; and per Cur. because the Avowry is made upon the Land, as the Land charged to his Distress, and upon no Person certain, therefore every Stranger, who has an Interest, may plead in Bar of the Avowry. Br. Avowry, pl. 61. cites 14 H. 8. 4.

38. And that where there are Lord, Mefne and Tenant, the Tenant may plead Release made by the Lord to the Mefne, and the Tenant may plead that the Lord has granted the Seignory to a Stranger, to whom he has attorned; and fee 14 H. 4. 2. the Record of the Cafe of Gloucester Fee accordingly, that a Stranger to the Avowry without Privyty may plead in Bar of the Avowry, where it is not made upon any Person certain; so it is at this Day, where a Man makes Avowry upon the Land for Rent Service upon the Statue of 21 H. 8. and so it is put in Ure. Ibid.

39. 21 H. 3. cap. 19. S. 4. The Plaintiffs and Defendants in Writs of Repleviance or Second Deliverance, shall have like Pleas and like Aid Prayers (Pleas of Difclaimer only excepted) as the Avowry &c. had been after the Order of the Common Law. The Defendant avow'd on the Statute Infra Feodum &c. Dominium upon a Stranger; the Plaintiff said Non Tenun generally, without alleging Tenure de aliquo, and traversed the Tenure alleged, but ruled ill; and held that he might have all Pleas which he might have at the Common Law, besides Difclaimer; for he might traverse the Tenure, or plead Hors de fon Fee, but not plead Nontenure generally at the Common Law. Cro. J. 127. pl. 16. Trin. 4 Jac. B. R. Paramor v. Chapman.

40. 32 H. 8. cap. 9. Enaets that No Person &c. shall hereafter make any It was reafolved Rent or Conuance for any Rent, Suit or Service, allege any Seiffin of such Rent or Service, in the fame Avowry or Conuance in the Possession of his Ancestor, Predecessor, or his own, or of any other whose Estate be pretends, must be walked to have, above 40 Years next before the making of such Avowry or Conuance, defculated where the Avowant was compelled to allege some Seiffin by Force of some ancient Statue of Limitation, and this was when the Seiffin was material, and of such Force as it could not be avoided in Avowry, tho' it was by Incroachment, as in Cafe of a Rent between Lord and Tenant, but in Cafe of a Reuvery or Grant of a Rent, there the Deed is the Title, and the Commencement thereof appears, and no Incroachment in this Cafe shall hurt, nor is any Seiffin material; So of a Gift in Tail since the Statute of Donis rending Rent, there no Seiffin is requisite, because the Reuvery is the Title and the Commencement thereof appears within Time of Memory; and this Conuuction stands with the Letter of this Act, the Words whereof are, viz. (No Man shall make Avowry and allege any Seiffin &c.) by which it appears that this Branch extends only where the Avowant ought to allege Seiffin, but when no Seiffin is requisite, it is out of the Letter and Intent of the Act, for the Intent is to limit 4 Time for the Seiffin, in Cases where Seiffin was required by Law to be alleged, and not to compel any to allege it where Seiffin was not necessery before. 8 Rep. 65. a. Mich. 6 Jac. Forrer's Cafe. S. P. Cro C. 80. Falkner v. Bellingham. And said that Laches of 150 or 200 Years will not prejudice. Ibid. 82. by Yelverton and Hutton J. A Rent mentioned in an Act of Parliament, or a Deed by Way of Re
s
Avowry.

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There are 2 Diversities in Law; 1st, that a Stranger to the Avowy shall plead nothing but Hors de Son Fee, or what is tantamount, and this true as to the Pleading any Matter in Bar as to the Avowry; but the Right Tenant the he be a Stranger to the Avowry, yet being made Party shall plead Matter in Abatement of the Avowry. 9 Rep. 20. b. in the Cafe of Avowries.

42. Another Diversity is, When Leafe for Life or for Years shall have Aid of one who is a Stranger to the Avowry, and when not; for upon such general Allegation that such a Stranger was feified in Fee, and fealed to him for Life or Years, he shall not have aid, because it would be in vain to grant Aid when the Leafe may plead Hors de Son Fee, as well as his Leffor; but upon special Matter disclosed he shall have Aid of his Leffor, who is the very Tenant. 9 Rep. 20. b. in the Cafe of Avowries.

43. Lord and Tenant by Fealty and Rent. The Tenant made a Leafe for Years, and the Leffor had done Fealty to the Lord, and paid his Rent constantly, and yet the Lord strains'd the Cattle of the Leffe for Rent, where in Truth none was wearied, and avowed upon a mere Stranger as his very Tenant. In this Cafe the Leffe may allege that his Leffor was, and yet is feigned of the Tenancy, and the Leffe shall have Aid of his Leffor, and the faile Avowry upon a Stranger shall not hurt the Leffe. 9 Rep. 20. Cafe of Avowries.

45. The Lord of the Manor avows the taking a Distress in the Land of his very Tenant held of him as of the Manor for Suit of Court; and the Beasts taken were the Befiefs of the Leffe of the very Tenant who was a Stranger to the Avowry, for which Exception was taken that he should not plead to the Avowry; but becaufe the Avowry was not made on the Perfon, but upon the Land according to 21 H. 8. the Court resolved that the Leffe shall not plead any Plea in Bar of the Avowry but Hors de fon Fee, or Disclaimer. Mo. 870. pl. 1208. Trin. 13 Jac. Brown v. Goldsmith.


46. The Defendant avowed for Rent, for that D. held of him by Fealty and Rent, whose Eftate the Plaintiff had. The Plaintiff replied that D. infringed W. who made a Leafe to the Plaintiff for Life, asfignsoc that he had the Eftate of D. Refolved that the Traverfe is void; for after the Statue
Statute of 24 H. 3. the Party is to avow upon the Land, and then it is not material what Estate the Tenant had, if he occupied the Land; but before the said Statute it had been a good Plea, and to the Statute hath changed the Law for the Traverse in Pleading, altho' there is not any Word thereof in the Statute. Mo. 593. pl. 1238. Trin. 13 Jac. C. B. Kingfyl v. Crawley.

47. In a second Deliverance the Defendant makes Cognizance as Bailiff to T. M. and set forth that T. M. Father of the said T. M. was seized of the Manor of M. of which the Land in Question is Parcel, and that the said Lands are held by Fealty and certain Rent, and derives the Tenancy to Sir A. C. and the Seigniory to the said T. M. the Son; and as Bailiff to him makes Cognizance for Fealty, ut infra Feodum & Dominicum sua. The Plaintiff protestando quod non tenet, pro placito dicit that the Defendant took the Cattle as in the Court, abique hoc that M. the Father was seized of the Services infra Tempus. The Defendant demurs. Banks, Crawley, and Potter resolved that the Plea was good, tho' no Title was made by the Plaintiff or his Matter. Reve J. wafer'd in the Point; but the others were positive in it, and Banks gave the Reason, That as at the Common Law the Tenant might plead any Plea in Bar to an Avowry for a Rent-charge, as S. E. 4. 23. a. is, so now, since the Statute, the Tenant shall plead any Plea to discharge the Land from the Dyshires. 2dly, That as the Statute hath always been construed favourably for the Benefit of the Lord, so it ought to be for the Benefit of the Tenant. 3dly, That it is no Reason that the Tenant shall have his Goods taken, and not use all Ways to redeem them, when not Party to the Wrongs. Raym. 255. Raymond J. cites Mar. 166. Hill. 17 Car. 1. C. B. Layton v. Grange.

48. In Replevin the Defendant made Connivance for an Heriot as Bailiff to T. S. The Plaintiff replied that A. and B. as Bailiff's to the said T. S. at another Time made Connivance in C. B. and sets forth the Record at large, propt patet &c. Upon a Demurrer it was objected that it was ill, because the Plaintiff did not set forth that the Connivance in the C. B. was made by the Agent of T. S. For it might be made by a Stranger without his Privity, to which the Court inclined; fed adjournatur. 2 Lev. 210. Mich. 29 Car. 2. B. R. Ingram v. Bray.

be S. C. but S. P. does not appear in either.—3 Keb. 585. pl. 36. S. C. & S. P. & Judgment for the Avowant affirm'd, Nis. —ibid. 389. pl. 59. S. C. & S. P. and the Court, prater Twifden, agreed that the Connivance being pleaded in Hac Verba, it is well enough; for the Connivance appears to be by his Order.

49. Plaintiff in Replevin may plead Riens in Arrear, or any other Plea, tho' he be a Stranger, and doth not make any Title to the Land. Resolved. Raym. 258. Hill. 30 & 31 Car. 2. C. B. Johnson v. Grant.

50. In Replevin the Defendant avowed, and shewed that A. B. was seised in Fee, and made a long Leafe rendring Rent, and conveyed the Reversion to the Plaintiff, and for Rent arrear he distrained. The Plaintiff replies that A. B. was seised of one Moiety, and C. D. of the other, before this Leafe; that C. D. died seised of the one Moiety, and this descended to his Son, and that the Plaintiff had conveyed the other Moiety to T. D. by Leafe and Release, and traverses, Abique hoc that the Plaintiff was seised in Fee ad aliquam Tempus after the said Conveyance &c. The Avowant demurred, because the Plaintiff made no Title to himself, and that he ought to have traversed Abique hoc that A. B. was seised in Fee temporis distantis, and of such Opinion was the Court, and adjudged for the Avowant, Nisi; yet here the Plaintiff had confes'd and avoided the Title made by the Avowant. Skin. 452. pl. 36. Mich. 5 W. & M. in B. R. Fuller's Cafe.
Avowry.

31. Defendant in his Avowry pleads that the Beasts belong to a 3d Person, and not to the Plaintiff, and therefore prays a Return. The Plaintiff demurs; for on the Avowant's own Shewing he ought not to have Return, having admitted the Property of the Beasts to be in another; but Judgment was for the Demandant; for the prior Possession was in him, and he has Right against all but the right Owner, and the Plaintiff by his Demurrer has admitted he has no Property in them. Cumb. 477. Pauch. 16 W. 3. B. R. Barrett v. Scrimshaw.

52. There can be no General Issue to an Avowry, but some special Point must be traversed; per Holt Ch. J. 2 Salk. 562. Pauch. 16 W. 3. B. R. Scilly v. Dalby.

53. 11 Geo. 2. cap. 19. Enactts, That whereas great Difficulties often arise in making Avowries or Conuniance upon Diffraffes for Rent, Quit-Rents, Reliefs, Heriots, and other Services, it shall and may be lawful to and for all Defendants in Replevin to avow or make Conuniance generally; that the Plaintiff in Replevin, or other Tenant of the Lands and Tenements, whereby such Diffraffes were made, enjoyed the same under a Grant or Demise at such a certain Rent during the Time wherein the Rent disfraffed for incur'd, which Rent was then and still remains due; or that the Place where the Diffraffes was taken was Parcel of such certain Tenements held of such Honour, Lordship, or Manor, for which Tenements the Rent, Relief, Heriot, or other Service disfraff'd for, was, at the Time of such Diffraffes, and still remains due, without further letting forth the Grant, Tenure, Demise, or Title of such Landlord, Lessor, or Owner of such Manor, any Law or Usuage to the contrary notwithstanding; and if the Plaintiff in such Action shall become Non-suitor, discontinue his Action, or have Judgment given against him, the Defendant in such Replevin shall recover double Costs of Suit.

(C. a) Replication and Traverfe.

1. A Vowry for a Heriot after the Death of J. S. his Tenant keritable. The Plaintiff said that J. S. infeffed him, absque hoc that he died seised of the Land, & non allocatur; for he shall say absque hoc that he died his Tenant; for it may be that he leaved for Lile, or made a Gift in Tail, or that he is Lord himself. Br. Avowry, pl. 142. cites 44 E. 3. 13.

* So are all the Editions of Brooke; but the Year-Book is (Frank-almoigne.)

2. In Avowry for Rent and Service as Lord in Tail, the Tenant may make Protestation that he holds by * Fealty only, and that where the Defendant avows as Lord in Tail, he has the Seigniory in Fee; Judgment of the Avowry. Br. Avowry, pl. 143. cites 46 E. 3. 19.

3. Avowry for 20 s. of Rent-service. The Plaintiff said that he held by 10s. absque hoc that he held by 20 s. and as to the 10s. Riens Arrear, and to the other 10 s. Nient fei'd, unless by Coertion &c. and an ill Traverse; for this implies double Matter, by which the Traverse was quah'd, and the rest of the Plea freed. Quod nota. Br. Avowry, pl. 121. cites 30 H. 6. 5.

4. In Avowry for 10 s. the Tenant replied that J. N. Lord of B. Que Estate the Tenant has in the Seigniory, by Deed, which he sign'd, confirmed to W. S. then Tenant, Que Estate the Tenant has in the Tenancy, to hold by Fealty and 7 d. &c. and the Defendant rejoined that the Tenant and his Executors
Avowry.

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Ancestors have held of him and his Ancestors time out of Mind &c. by Homage, Fealty, and 10s. as above, absque hoc that he has the Estate of J.N. Et non allocatur; for he ought to traverse the Confirmation, or that he who confirmed bad nothing in the Seigniory at the Time of the Confirmation, or that W.S. did not hold of him at the Time &c. and so he did at last; quod nota per tot. Cur. Br. Avowry, pl. 120. cites 30 H. 6. 7.

5. In Avowry for Damage feant in 2 Acres, Parcel of 1000 Acres, of which the Plaintiff was seised in Fee, the Plaintiff said that the Place was Parcel of 800 Acres, of which be himself was seised, absque hoc that the Place was Parcel of the 1000 Acres, and no Plea; for he ought to traverse that this was not the Soil of the Defendant, and not to traverse if it be Parcel of the 1000 Acres or not; for it may be no Parcel at one Time, and be Parcel at another Time. Quod nota. Br. Avowry, pl. 92. cites 5 E. 4 117.

6. In Replevin, the Lord avow'd for Fealty, and 2d. Rent, payable at Christmas and Easter; the Plaintiff said, that he was held by Fealty, and 2d. Rent, payable at Midsummer, and not at Christmas and Easter, and of this Rents Arrear, and as to the Fealty be tendered, and the Defendant refused, and there the Defendant shall not reply to the Rents Arrear, but shall maintain the Avowry that it is payable at Christmas and Easter or not, and so an Issue tendered which shall not be tried, and as to the Fealty when it is tendered and refused, the Defendant cannot disfain for it after Request first made, and this shall be made to the Person of the Tenant, and not upon the Land. Br. Avowry, pl. 106. cites 27 E. 4. 16.

7. The Defendant avow'd, that one being seised in Fee made a Lease to him, and that he took the Beasts Damage feant. The Plaintiff pleads in Bar, and maintains his Declaration, and traverses the Lease, upon which the Avowant demurs, and adjudged a good Traverse. Brownl. 182. Mich. 13 Jac. Hyen v. Gerrard.

8. The Defendant avowed, for that the King was seised of a Manor, and a Grange Parcel thereof, and granted the Inheritance to a Bishop, referring 33 l. yearly Rent, that the Bishop granted this Grange to the Ancestor of the Avowant, in which there was a Clauze, viz. that if the Grantee or his Heirs should be legally charged by Disreps, or with any Rent due to the King &c. then they might enter into B. and distrain till be or they be satisfied; that afterwards the Grantee and his Heirs, upon a Bill against them in the Exchequer, were decreed to pay the King 4l. per Ann. as their Proportion, by reason whereof he entered into B. and disstrained, and so justified the taking; the Plaintiff replied in Bar to this Avowry &c. and traversed that the Defendant was legally charged &c. Upon a Demurrer the whole Court held this Traverse ill, and Judgment was given for the Avowant. 2 Mod. 54. Trin. 27 Car. 2. C. B. Calthrop v. Heyton.

9. In Replevin, the Defendant avow'd taking the Goods as his own proper Goods. Plaintiff demurred, because he did not traverse the Property of the Plaintiff. And per Cur: this seems to be sufficient; for the Defendant cannot conclude to the Country, but the Plaintiff ought to reply, and upon that Replication Issue shall be joined, and the Property of the Plaintiff must be proved. Comyns's Rep. 247. pl. 137. Trin. 2 Geo. 1. C. B. Loveday v. Mitchel.

5 M  (D. a)
(D. a) Traverfe. Of what.

1. In Replevin, the Defendant avowed upon the Plaintiff for certain Services, and the Plaintiff said, that he held of one A. who held over of the Defendant by the Services aforesaid; Judgment of the Avowry; And per Marten, he shall take Traverfe, abique hoc that he held of him immediately; and so the Matter of the Plea is good; for it is confessed that he cannot disclaim in this Case where there is Lord, Mefne and Tenant, and the Lord avows upon the Tenant where he ought to avow upon the Mefne, but shall plead the Matter; for he holds of the Defendant by a Mefne so that he cannot disclaim. Br. Avowry, pl. 9. cites 9 H. 6. 27.

Br. Avowry, pl. 55. cites S. C. but Brooke says, he wonders that the Avowry was made for the Amortement, for it ought to have been made for not doing the Suit. Br. Avowry, pl. 55. cites 21 H. 6. 39.

2. Replevin of taking the 24th Day of August, Anno 17 &c. the Defendant avowed for Amortement for Non-sealance of Suit of Court, which Plaintiff avowed to the Defendant at his Court of N. and that he was summoned to be there the first Day of September, Anno 17 &c. and did not come, and was not served to 20 s. and avowed for the Amortement, abique hoc that he took them the 24th Day of August, prout &c. and the Mifte was accepted, and yet per Newton Ch. J. and Patlon J. the Traverfe ought to be abique hoc that he took them before the said first Day of September, for if he took them any Day before the first Day of September he did wrong, for he cannot disclaim for Suit before the Court; Quod nora bene. Br. Traverfe per &c. pl. 93. cites 21 H. 6. 39, 40.

3. In Replevin, the Defendant said, that J. P. was seised in Fee of the Manor of O. and W. P. was seised of 20 Acres of Land in Fee, of which the Place where &c. is Parcel, and held of J. P. as of the Manor aforesaid by Fealty, and to be Bailiff, and to answer the Profits of it, of which Services &c. and that J. P. leased the Manor to T. C. for Term for Life, and the Tenant attorned by Virtute cujus Seifius &c. the Estate of which W. D. the Plaintiff has, and at such a Court the Plaintiff was chosen Bailiff of the Manor for one Year, according to the Custom, and the Plaintiff refued, by which the Defendant as Bailiff of the said T. C. avowed the Taking upon the Plaintiff as upon the very Tenant of the said T. C. his Master by the Manor. Markham said, Richard and Robert were seised of the Land &c. before the Taking, and leased to the Plaintiff for Term of Years, Virtute cujus he was poosieled &c. at the Time of the Taking, abique hoc that he had anything in the Frankenement at the Time of the Taking, and an ill Traverfe, per Cur. Fulthorp said, the Traverfe shall be, abique hoc that he had the Estate of the said J. P. at the Time of the Taking; But Porling, said, No; for it may be that he is a Diffieror, and then he has not his Estate; Quare inde; but the Traverfe was taken after, abique hoc that he was seised in Fee at the Time of the Taking, and then well. Br. Avowry, pl. 58. cites 22 H. 6. 34.

4. Avowry upon Replication of taking in S. the Defendant made Conßance as Bailiff of A. for a Seigniory and Rent Arrear, by which he took in D. and impounded the Diffrels in S. and the Plaintiff the same Day broke the Pound, and took out the Beasts, and the Defendant took them in S. aforesaid, and a good Plea, without traversing the Place where &c. for the Defendant has justified two Takings. Br. Avowry, pl. 13. cites 34 H. 6. 18.

5. Avowry for Tenure of 2 Acres by 20 s. the Plaintiff said, that he held
Avowry.

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held those 2 Acres, and 2 other Acres by 12
ake hoc that he held the
2 Acres by 20 s. and well, per Brian, and he cannot do otherwise; but
Kebble contra; for the Quantity of the Services may be taken by Protas-
station, and traverse that he did not hold the two Acres only; Quod
Br. Avowry, pl. 87. cites 8 H. 7. 5.

6. In Avowry, the Defendant alleged Seisin of Homage, Fealty and
Rent, and for the Rent Arrear he avowed, there the Plaintiff cannot traver-
sfe the Seisin of the Services but only of the Rent; Quod Nota; by
which he did so, and took the Seisin of the Services by Protasstation; Quod

7. In Replevin, the Defendant made Confeance as Bailiff to T. S. for a
Rent-Charge; The Plaintiff replied in Bar, that the Defendant took the
Diffrefs without the Privity or Command of T. S. and that such a Day
had frst Notice thereof, and immediately disavowed the Taking.
Upon Demurrer it was adjudged, that this Replication is ill, for he
should have traversed the being Bailiff: 3 Lev. 20. Pach. 33 Car. 2.

8. In Replevin for taking his Horse in a certain Place called the
Common Marsh, the Defendant pleaded that he took it in a Place called the
Plot, and traversed the Taking in the Common Marsh, Unde petit Judicium
de narratione &c. and pro Returno habendo be made Confeance under
his Master's Command for Rent Arrear. The Plaintiff replied in Bar
of the Confeance, and traversed the Seisin alleged in his Matter; Per
Cur. the Traverfe of the Place is only in Abatement, and the making
Confeance Pro Returno habendo is right; for otherwise he could not
have a Return and Damages, but the Plaintiff should not have traversed
the Matter of this Confeance. 1 Salk. 93. pl. 1. Pach. 2 W. & M. in
B. R. Fook's Cafe.

9. In Replevin, the Defendant avowed, for that W. R. was feised,
and made a Lease to him for one Year, and so justified the Taking &c.
Damage seised. The Plaintiff replied, that true it is, that W. R. was
seised &c. but before he made a Lease to the Defendant be made another to
the Plaintiff, which is still in being and not determined; if the Plain-
tiff traverses the Lease of the Defendant it is good upon a general De-
murrer, being only in the Nature of a double Plea, but upon a special
Demurrer it is naught. 3 Salk. 333. pl. 4. Pach. 9 W. 3. B. R. Anon.
10. In some Cases the Defendant in Replevin alleges Property in himself
or another, with a direct Traverfe; and in some Cases the Plea is, that
the Property is in the Defendant, and not in the Plaintiff, which is tan-
amount to a Traverfe; for the Words (et non) make a Traverfe; and
per Cur. it will be good both ways, and there seems to be no Difference,
for the Defendant might have pleaded Property in Abatement or in Bar,
and it would have been good without a Traverfe, and Illie should have
been joined upon that, and therefore making Confeance or Avowry
that the Property is in himself seems to be sufficient. Comyns's Rep.

(E. 2) Where the Seisin, and where the Tenure shall be
traversed.

1. IN Replevin the Defendant avowed, and alleged Seisin of the Rent
by the Hands of the Plaintiff, it is a good Plea that he never was
seised by his Hands; for the Seisin in Avowry is traversable, and it is no
Espfeip for the Defendant to shew Grant of the Services made to him by
him
Fine and Deed of the Plaintiff, by which he attorned of the Fealty and other Services due, because the Services are not expressed. Br. Avowry, pl. 67, cites 24 E. 3. 30. 50.

2. In Treffap's the Defendant justified, because the Plaintiff held of 'J N. by Fealty, one Mark, and 4d. and the Defendant as Bastiff of 'J N. distrained for the Rent of one Year, and alleged Seifin &c. and the Plaintiff said that he held by the Rent of 4 d. and fealty, absoque loc that he holds by one Mark, prout &c. And per Cur. he may traverse the Tenure in Treffaps, tho' Seifin be alleged; contra in Avowry. Note the Diversity. But in Treffaps it is not good; for he shall say absoque loc that he holds by one Mark, Fealty, and 4d. by which he said so; for the Defendant did not suppose that he held by one Mark only. Br. Avowry, pl. 115. cites to H. 6. 3.

But it is no Plea that he holds of 'J N. absoque loc that he holds of the Defendant; for he shall not traverse the Tenure; but he may say that Hors de son Fee, or disclaim. Br. Avowry, pl. 116. cites to H. 6. 6.

Br. Traverser per &c. pl. 227. cites S. C.

4. Avowry, because W. B. held certain Land, of which &c. of one 'J. B. d. of his Manor of F. by Homage, Fealty, and Esgage. The Plaintiff said that he held of the Lord by a Half-penny and Fealty &c. absoque loc that the Lord was seised of the rest of the Services, viz. Homage and Esgage &c. Littleton J. said, you ought to traverse the Tenure by Service of Chivalry; for if he denies not the Tenure, the Homage and Esgage is incident, though he was never seised. Br. Avowry, pl. 96. cites 7 E. 4. 27.

5. But Seifin of Homage may be traversed in Avowry for Tenure by Rent and Homage; for this is Sogac, to which Homage is not incident; contrary to Knights Service. Ibid.

Where the Lord avows for that the Plaintiff holds of him by other Services than are due, as Fealty, Rent, and Suit of Court, and alleges Seifin of all, and for the Rent apear avows, where the true Tenure was by Fealty and Rent only. In this Case the Tenure of the Suit is not material, because it is of other Quality and Nature, and the Tenancy originally was not charged with any Service of such Nature as Suit is, and so the Tenure is traversable; but if the Rent was 2s. a Year, and the Lord gets Seifin of 5s. without Coercion of Diffrefs, there, because the Tenancy is charged with Service of such Nature, and it is not to be presumed that the Tenant would voluntarily pay more than he ought, there the Seifin in Avowry is traversable, and not the Tenure. 9 Rep 13. a Patch 42 Eliz. C. B. Buckmall's Case.

—Cro. E. 799. pl. 49. S. C. the Jury found the Tenure by Fealty and Rent only, and not by Suit of Court; and the Court held that it was found against the Avowant; for in an Avowry all the Tenure alleged is material, but in Treffaps or Refcouts if any Part is found it is sufficient.

6. If a Man incroaches Service of the same Nature as the Tenure is, As if a Man holds by 12 d. and the Lord incroaches 2s. there he shall traverse the Seifin. Br. Avowry, pl. 96. cites 7 E. 4. 27.

7. But where he incroaches a Thing of another Nature, as if upon Sogac Tenure he incroaches Service of Chivalry, there the Tenure shall be traversed, and not the Seifin. Ibid.

8. And in Avowry upon Tenure of two Acres by two Pence, the Tenant may say that he holds the one Acre only by 2 d. absoque loc that he held two by 2 d. Br. Avowry, pl. 96. cites 7 E. 4. 27.

9. And per Pigot, this Case was adjudged that where a Man avows for Tenure of a Hawk and Fealty, and the other says that he holds of him by Fealty and a Horfe, and traverses the Seifin of the Hawk, this was held no Plea; for he ought to traverse Absoque loc that he holds by Fealty and a Hawk; for this is of another Nature than the first Seifin was, and fo above he ought to traverse the Tenure, and not the Seifin. But Jenny and Danby Ch. J. held that he ought to traverse the Seifin, well enough.
Avowry.

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And Brooke says that the best Opinion of the Court was with Catesby, Littleton, and Pigor, as it seems. Br. Avowry, pl. 96. cites 7 E.

4.27.

10. In Replevin the Defendant avow'd for Fealty and 20s. Rent. The Plaintiff said that he held by 2d. for all Services, and as to the rest not seized, unless by Coercion of Distress. Jenny said, you ought to say abique hoc that he holds by 2d. but Brian said No, the Seisin shall be travel'd in Avowry, and not the Tenure. Br. Avowry, pl. 99. cites 12 E. 4. 7.

11. Where the Plaintiff confesses the same Tenure as is in the Avowry, but where of the same Nature, but he holds by less Rent, there the Plaintiff shall answer to the Seisin; but if the Defendant avows for Service of Chivalry, and Replevin the Plaintiff says that he holds in Sogage, there he shall travel the Tenure the Defendant and not the Seisin; per Nele J. And per Brian Ch. J. this is a good Di. Pl. avow'd avowed

because the Defendant held of him one Acre by Homage, Fealty, and Esgage, and 2 s. Rent, and alleged Seisin by the Hands of the Plaintiff as his very Tenant &c. and for 2d. Arrear at Easter he avow'd. Vavil or said Advoacre non; for you hold this Acre by Fealty and 2 d. of whose Service &c. abique hoc that you hold of us by Homage, Fealty, and Esgage, and 2 s. Rent, move &c. &c. Per Hulsey, you ought to travel the Seisin, and not the Tenure as here; for the Esgage made the Knights Service, and the Defendant has alleged Seisin of the other Services, and not in the Esgage, therefore he shall travel the Seisin of them, viz. of the 2 s. and of the Homage; for all this may be Sogage, and therefore he traveled the Seisin of that which made the Sogage Tenure, but not the Services of that which made the Service of Chivalry. And per Hulsey, in Avowry for Tenure by 10s. and alleges Seisin &c. the Plaintiff may say, that he holds of him by a Haste, abique hoc that he holds by 2 d. and not answer to the Seisin, good Brian concilts.

12. In Replevin the Defendant alleged that the Plaintiff held by Fealty and 5 s. Rent, and Suit of Court, from 3 Weeks to 3 Weeks &c. and by pleasing his Land two Days in the Year, and by 1 d. of Aid, and alleged Seisin, and for Arrear of the Land and the 1 d. of Aid he avow'd. Briggs by Protestation said that he did not hold by the Rent of 5 s. but held by Fealty and 1 d. Rent, and Suit of Court twice a Year, viz. such a Day for all Services, abique hoc that he holds to please his Land, or was ever seized of 1 d. of Aid, and of Suit to his Court, pront &c. and it was agreed that the Protestation was well taken, because the Defendant did not avow for the Rent [mentioned] in the Protestation; per Choke J. Br. Avowry, pl. 108. cites 21 E. 4. 6.

13. And note that of such Things wherof he confesses Parcel in the but where same Tenure, he shall not travel the Tenure, but anser to the Possession or Seisin of it. Ibid.

14. Avowry upon a Stranger to the Replication. The Plaintiff would For where have travel'd the Tenure, and was not suffer'd, because he was a Stranger to the Avowry, and so it seems that the Avowry was made upon the Person, and not upon the Land, as by the Statute 21 H. 8. but it does not appear, because it is ill reported, and in Avowry he alleged Tenure by one of Chivalry, and avow'd &c. and the Prayee said that he holds by Homage, Fealty, and Esgage, and 20 s. Rent, and for the Rent arrear he travel'd, and the other Seisin as above, he have, and no plea, without saying, and as to the Rent Rien arrear, and then a good Plea to travel the Tenure as above. Br. Avowry, pl. 2. cites 26 H. 8. 6.

But where they agree in Tenure, but not in the Parcels or Seisin, there the Seisin is travelable, and not the Tenure. Note the Diversity. Ibid.

5 N.

15. But
Avowry.

15. But where a Man holds by Rent and Service of Chivory, and the Lord and his Ancestors have been always seised of the Rent, but not of the Homage nor Ward; yet if the Ward falls, he shall have the Ward of the Heir; for the Seisin of the Rent suffices to be seised of the Tenure, as to this Purpose. But Brooke says otherwise: it seems to me making Avowry. Br. Avowry, pl. 96. says it was held by the Justices of both Benches. Fitz. 7 E. 6.

16. It was said that Anno 23 H. 6. it was held by all the Justices, that in Avowry Unques seise generally of the Services is no Plea, but shall be compelled to traverse the Tenure. Br. Avowry, pl. 56.

17. But unques Seise, generally of such a Parcel of the Services after the Limitation, is a good Plea. Ibid.

18. Or unques Seise of the Services by his Hand is a good Plea. Ibid.

19. But per Prifot, if a Man incroaches 20 s. upon me by Coertion of Distreß, who do not hold of him, I shall not avoid it by saying that the Seisin was by Coertion of Distreß, but shall be compelled to traverse the Tenure. Ibid.

20. But where it is a Tenure by Fealty, and the Lord incroaches Rent, he shall say that he holds by Fealty only, and as to the Rest seised by Coertion of Distreß. Ibid.

21. In Replevin &c. the Defendant justified the Taking &c. for that the Locus in quo &c. was the Freehold of C. and that he be Servant took the Cattle there Damage feinæ: the Plaintiff replied, that long before C. was seised, one f. s. a Stranger was seised, and so conveyed a Title to himself from f. s. but took no traverse to the Freehold allledged in C. The Court held clearly, that the Plaintiff should have traversed the Freehold of C. and Williams J. said it should have been thus, (viz.) abique hoc, that the same was the Freehold of C. Tempore Captionis, and Judgment for the Avowant. Bulst. 43. Mich. 8. Jac. Pompier v. Chamberlaine.

Brownl. 172.

22. Avowry set forth that C. was seised of one Messuage, two Barnes, one Mill &c. and 100 Acres of Land &c. in W. and held them of B. by 20 s. Rent, Fealty and Suit of Court; the Plaintiff replied that C. held 40 Acres by 9 s. Rent, Fealty, and Suit of Court, abique hoc, that he held Modo & Forma. The Question was whether he ought to traverse the Seisin or the Tenure, and it was likewise objected that here was double Matter, for that the Conclusion founds in Bar of the Avowry, and likewise in Abatement of it; but Hobart and Winch (only present) held the traverse good and not double; and Hobart said that true it is that if the Lord had Seisin of more than the very Services, in this Case it may not be avoided in Avowry, and no false Tenure shall be avoided &c. but when he joins another Fallity, and that is in the Quantity of Land. Now the false Quantity of the Rent had made the Tenure traversable, and the Judgment was commanded to be entered accordingly. Winch. 18. Mich. 19. Jac. Davies v. Turner.


BY Judgment in Avowry, the Defendant shall not have by this Scire Facias, for he has only Return which does not prove any Seisin; for he shall not recover Rent, and therefore cannot have Scire Facias
Facias of the Rent, nor of the Arrears to recover them, Quod nota
by Award. Br. Avowry, pl. 79. cites 21 E. 3.
2. Where Demurrer is upon Plea in Abatement of Avowry, the Judg-
ment shall be to answer over, and it is not peremptory; Per Finch and the
3. Avowry for Rent and Services, the Plaintiff was nonsuit, and the
Defendant bad Return, and the Return Hadendo was returned Nihil, by
which Withorneau illud, which was in the End Post per Vides & Salvos
Plegeos, the Plaintiff to answer as well our Lord the King for the Contempt,
as the Party of Damages and Injuries done to him, where Damages at
this Day were not given to the Defendant in Avowry, and the sheriff returned
Nihil, by which sijfed 3 Capitls's and Exigient, and the Plaintiff was outlaw-
ed, Quod nota, and sued Charter of Pardon thereof against the
Defendant, who came and counted of Damages, and all as above, by
which the Plaintiff demurred, and by the bet Opinion, because the Defen-
dant cannot have Damages upon the Avowry, he shall not have Damages
upon the Withernam which is founded upon it. But Brooke says, that at
this Day Damages are given in Avowry for Rent or Services by the Sta-
tute of [21 H. 6.] Capitulo [19 ] Contra for Damage feasant. Br. Da-
manes, pl. 16. cites 35 H. 6. 47.
4. Where a Man diftrainet for Homage, Fealty &c. which he may have
to be made to him, there he shall have the same Thing. Br. Avowry, pl.
89. cites 9 H. 7. 22.
5. But where he diftrainet for a Thing which is past, as Suit of Court,
reaping of Corn &c. there he may distrain, and yet shall not have the
Thing but Damages by the Defcretion of the Justices, Quod nota. Ibid.
6. 21 H. 8. cap. 19. S. 2. In any Repleijure or second Deliverance for Rents,
Customs, Service, or Damage feasant, if the Avowry, Conuance or Jufi-
fication be found for the Defendant; or the Plaintiff be nonsuit or otherwise
barrad, the Defendant shall recover such Damages and Costs as the Plaintiff
should have had if he had recovered.
7. In Repleijure by O. against A. B. and C. for taking a Horfe, A. aver-
ed, and B. & C. made Conuance for 11 d. Rent Service Arrear due by
O. to A. and found for the Defendants, and 2 d. Damages to all 3 Defen-
dants; and Judgment was given accordingly, that they should reco-
damn aua Predicta per Juratores aliem &c. but because B. and
C. made Conuance generally, and not as Bailiff nor as Servants to A. and
the Conuance in idem a Title and a Jufification in the Right of another,
and Damages given to all 3, and B. and C. who made Conuance had
not Right to recover any Thing, the Judgment was reversed. Yelv. 108.
7. 17 Car. 2. cap. 7. S. 2. When any Plaintiff in Repleijure shall be non-
fuit before Iffue joined in any of the King's Courts at Westminifter, the
Defendant making a Suggestion in Nature of an Avowry or Conuance for
such Rent, to aftarment the Court of the Case of Diffrefs, the Court upon
his Prayer shall award a Writ to the Sheriff, to enquire by the Oaths of Plaintiff
12 Men touching the in Sum Arrear at the Time of such Diffrefs taken,
and the Value of the Goods distrainet, and therupon Notice of 15 Days
shall be given to the Plaintiff or his Attorney of the fitting of such Inquiry;
and upon the Return of such Inquisition, the Defendant shall have Judg-
ment to recover against the Plaintiff the Arrears of such Rent, in Case
the Goods distrainet shall amount unto that Value, and in Case they shall not,
then so much as the Value of the said Goods shall amount unto, together with
his Costs, and shall have Execution as the Law shall require.
8. And in Case such Plaintiff shall be Nonuit after Conuance or Avow-
ry made, and Iffue joined, or if the Verdict shall be given against such
Plaintiff, then the Sheriff shall at the Prayer of the Defendant inquire con-
cerning the Arrears, and the Value of the Goods distrainet; and therupon
the Account, or be that makes Conuance, shall have Judgment for such Ar-
rears
Authority.

If a Man signs and seals a Leafe of Ejectment indentured, but does not deliver it, and at the same Time seals and delivers a Letter of Attorney, in which he recites, whereas he by Indenture of Leafe, bearing such a Date &c. (which is true) hath demised of B. such Land, habendum &c. Now these Presents Witnes, and he makes J. S. his lawful Attorney to deliver the said Indenture upon the Land, as his Deed; tho' according to the proper Signification of the Words, the Leafe ought to be taken to be delivered by him, and to this Letter of Attorney void to deliver it again, for this cannot be an Indenture if it was not delivered, nor can it be a Demise, as it is recited, if the Leafe was not delivered; yet all Parts of the Letter of Attorney being laid together, and the Intent the Parties, and Proof being made that the Leafe was not delivered, but only signed and sealed, it appears that this was only an improper Exprefion of his Intent, by calling it an Indenture and a Demife, for if he had intended that this was an Indenture sealed and delivered, this Letter of Attorney to deliver it upon the Land need not have been made. Rich. 24. Car. 2. B. R. between Every and Coke, per Curiam, it after what had been done, my Brother Baron [Bacon] and my self ruled it upon Evidence at the Bar.

2. A
(B) What shall be a good Execution of an Authority.

1. Vide for this Co. Lit. 112, b. 113, and the Irish Case of

2. A. devites Lands in Tail, and if the DONEE dies without Issue, Co. E. 26, that it should be sold by his Son in Law, he then having 5 Sons in pl. 5. Lee v. Law, and dies, and after one of the Sons in Law died in the Gift of Vincent, S. C. adjulg. the DONEE, and after the DONEE dies without Issue; the 4 surviving Sons in Law may sell it, because they were named generally Sons in...
3. If a Judgment be assigned to the King in Satisfaction of a Debt due to the King, with a Provision that if the Barons of the Exchequer, or any two of them revoke it, that it shall be void; and after 3 of the Barons revoke it, (there being four) as it seems, this is a good Revocation, for if three revoke it, two do it. Co. 5. Po. 91. [b.] Resolved.

If a Charter of Seisin be made, and a Letter of Authority be in 4 or 3 jointly or severally to deliver Seisin, two of them cannot make Seisin; because it neither by them 4 or 3 jointly, nor any of them severally. Co. Lit. 181. b.

3. If the King grants a Warrant to 4, solicitor, the Treasurer, Chamberlains, and Under-treasurer of the Exchequer, by which the King gives Power to them, or any 1 of them, to pay out of the King's Treasure the Costs and Expenses of any Man who shall be employed in the Service of the King, and after two of the said four give a Warrant for the Payment of a certain Sum to J. S., this is a good Warrant, tho' neither all four nor one only did it. Dubitat. Co. 11. Earl of Devon.

6. If a Warrant be made to 3 or any one of them conjunctim & dividim, to arrest J. S. upon Process, tho' this be joint and several, yet two of them may execute it, because this is in Execution of Justice, and therefore shall be more favoured than other Things, and perhaps the two may have a better Opportunity than the 3 shall have at another Time. Mich. 15 Jac. between Lover and Ludlam adjudged per Turrian; this being moved in Arrest of Judgment, where an Assumpsit was partly upon a Deliverance upon such an Arrest. 9. 4 Jac. B. R. in a Refrains against Bate and Groby, per Tankeld. 9. 11 Jac. B. R. adjudged. 14 Jac. B. R. between Walsete and Emson adjudged.


Upon a Latiitute, the Sheriff returned a Reftaus to this Effect, That by Virtue of the Writ to him directed, he had directed his Warrant to J. S. and J. N. his Bailiff, and that the Defendant was in the Custody of J. S. and was restored by the Persons mentioned in the Return. It was moved to quash this Return, because the Authority to arrest is by the Warrant given to two, and that the Defendant was in Custody of one only, who had no Power to execute the Warrant, unless it had been Conjointim & Dividim; but Per. tot. Car. the Return is good upon an old allowed Distinction, that where an Authority is given to 2 or more, for the Administration of Justice, any of them may execute it; otherwise of Privy Authority, unless it be Conjointim & Dividim. M. S. Rep. Mich. 3 Geo. B. R. Anon.

* This is a Letter of Attorney to make a Livery of Seisin conjunctim & dividim be made to three, and two of them make Livery, the third being
8. But in the said Case, if two make the Libery, the Third being present, and doing and saying nothing, this is good; for it shall be taken to be the Act of all, they coming there for that Purpose. *Debitatur D. 36 H. 8. 62.

9. If A. devises Lands to B. his Wife for Life, and devises further, that if it appears that there is not sufficient to pay his Debts, then the Deed is null. *Deed, 27 H. 8. 62.

10. If Celly que Ufe had devised that his Wife should hold his Land, and made his Wife Executrix, and died, and the Woman took another Husband, the Wife might hold the Land to the Husband, because she did it in another's Right, and the Husband should be in the Divisor. *Deed, 10 H. 7. 20. Co. Litt. 112.


12. If a Man devises Lands to B. his Wife for Life, the Remainder to C. in Fee, and by a Codicil he devises that B. shall have Power 6 Months before her Death to lease it for 6 Years; B. takes a second Husband, and her second Husband may lease it by Deed, or without it. *Deed, 33 H. 55. 104. *Deed, 104. 33 H. 55.


14. But the Reversion in Fee by the Statute of 27 H. 8. of Wills is Inconsistent, but not the Reversion in Fee by the Statutes, because the Vendor comes in by Force of the Deed, and not by the Statute, and shall pass by Title. *Deed, 157. 55 H. 307. 55 H. 307.

15. When a Will is recited in the Deed, in the Will he had Power to sell the Fee of the Land, but by the Will. *Deed, 157. 55 H. 307. 55 H. 307.
Authority.

Replevin; and then was cited a Case to be adjudged 2 Car. 2 R. between + Daniel and Upl, which intreatur Hill. 22 Jac. Rot. 720.

14. If a Man devises that his Executors shall sell certain Lands, and dies, and the Executors enter, and make a Feoffment of the Lands, this is an Execution of the Will to convey the Land to the Feoffor; for he is in by the Deed. Litt. * F. 169. Co. Litt. 113.

15. If a Man devises Land to his Executors to sell, and dies, the Executors may sell Part of the Land at one Time, and Part at another Time, as he can find Purchasers. Co. Litt. 113.

16. If a Man has Authority, and he does not then his Authority, all is void; As if one has Letter of Attorney to make Livery and Seisin to 2, and he makes it to one only, all is void, and he is a Defender to the Feoffor. Arg. Godb. 84. in pl. 95. cites 12 Aff. 24.

17. A. made a simple Deed of Feoffment, and Letter of Attorney accordingly, and the Attorney deliver'd the Seisin upon Condition. This was adjudged a Difficult. Br. Feoffments de &c. pl. 25. cites 12 Aff. 24.

18. A Commision indited to inquire whether certain Lands were to be seised into the King's Hands. The Commissioners inquired, and found that they were to be seised, and therupon they seised them; but all awarded void, because they exceeded their Authority, which was not to seise, but to inquire. Arg. Mo. 217. in pl. 355. cites 1 H. 6. Fol. * 10.


20. If a Capias be to several Coramors, and one executes it, it is void. Godb. 39. cites 34 H. 6.

21. An Act of Parliament ordains that a Difficult made by A. to B. shall be determined in the Chancery before the Chancellor, calling to him a Judge to hear and determine it along with him. In this Case the Subpoena against A. ought to be special for A. to appear in the Chancery before the Chancellor and the said Judge. By the Justices of both Benches, this Act ought to be pursued strictly; for it derogates from the Common Law. Jenk. 135. pl. 76.

22. Commision to hear and determine all Matters between J. N. and 3 others. They may determine Joint Matters and Several Matters between them. Br. Arbitrement, pl. 44. cites 2 R. 3. 18.

23. So if he have a Letter of Attorney to make Livery of 3 Acres, and he makes it of two Acres only, it is void for the whole. Arg. Godb. 84. in pl. 96. cites 4 H. 7.

24. If
Authority.

24. If a Letter of Attorney be to make a Grant in English, and he makes it in Latin, it is not good. Arg. Litt. Rep. 144. cites to H. 7, pl. 42. Arg. 8 P. and cites S. C. cited Arg. Holt's Rep. 465, and agreed by the Court in the Case of Thorold v. Smith, Trin. 5 Ann to be good Law.

25. If a Letter of Attorney misdescribes the Date, the Person, the Estate, or the Land in the Deed, it is void; Per Walter Ch. B. Litt. Rep. 146. in Scacc. 26. A Commission made to two cannot be executed by one alone. 2 A Committ- Inf. 356. 49. executed by 2, this was lately adjudged in Chancery to be void, and without Warrant; cited by Pen- more J. Yelv. 26. Mich. 44 & 45 Eliz.-—Noy. 47. Fenner said, he was in this Case in Chancery, and cites it as Shelly's Case.

27. J. S. Lady que Use before the Statute of 27 H. 8. devised, that A. S. C. cited Bridgm. 114. B. and C. his Females should sell his Land. J. S. died. A. died. It seems that the Survivors could not sell, and ruled accordingly. But the Re- porter says, Quære, if they had not been named A. B. and C. but Females only. D. 177. a. pl. 32. Hill. 2 Eliz. Anon. 28. The Lord Bray declared, the Uses of his Land to such a Woman with whom his Son should marry at the Nomination and Appointment of four of the Privy Council; one of them died before the Son was married. It was held, that the Authority of the other three is determined. Dyer 192. Mich. 2 & 3 Eliz. Butler v. Lord Bray.

29. By a Statute made 2 & 3 P. & M. cap. 4. Authority was given D. 42. pl. to Cardinal Poole, to dispose, order, employ, and convert the Benefices ap- to Cardinal Poole, to dispose, order, employ, and convert the Benefices ap- propriate to the Increase and Augmentation of the Living of the Incumbents. He made a Leaf for Years of a Parsonage appropriate. It was held, that the Leaf was void; for he had Authority but to the Intents specified in the Statute, and he had not the Fee simple given him by any Words of the Statute. No. 42. pl. 129. Trin. 4 Eliz. Anon. 30. A Man devised his Land to his Wife for Life, the Remainder to ano- D. 193. a. pl. ther for his Life, and after their Deaths be devised that the said Lands should be held by his Executors, or the Executors of his Executors; he died, andone of the Executors died intestate. Afterwards the other Exec- 22. S. C. in tendor made his Executor, and died, and then the Wife and he in Re- tor made his Executor, and died, and then the Wife and he in Re- mainder died. It was the Opinion of the Justices, that the Executors of one Executor should not make the Sale, for they had Authority jointly, and if one of them fail, the other cannot execute the Testament. Mo. 61. pl. 172. Patch. 6 Eliz. Anon. 31. The King granted a Commission under the Seal of the Court of Augmentations, to certain Persons to assign to the Wife of a Person attain- d, the third Part of the Lands of the Husband. The Commissioners assigned her the 3d. Part of the Rent of an House, which the King confirmed, and the accepted; Adjudged, that this Alignment of Dower was not good, because the Commissioners had not pursued their Authority, for that was to assign Lands, and they had assigned Rents issuing out of Lands, and the Confirmation by the King cannot make that good which was merely void. Dyer 263. Trin. 9 Eliz. Arundel (Lady) v. Pembroke (Earl).

32. A devised Lands to his Wife for Life, and that after the Death of his Wife the Lands should be sold, and the Money thereof coming to be distributed to three of his Blood, and made his Wife and another Execu- tators, and died; the Executors proved the Will; the other Executor died; the Wife sold the Lands, and held good; and that the Lands should be sold in the Life of the Wife, otherwise they could never be sold. 2 Le. 222. pl. 276. Patch. 16 Eliz. B. R. Anon.
422 Authority.

33. A Man devised all his Manors, Lands &c. to his Sister, except one Manor, which I appoint to pay my Debts, and made two Executors by Name, and died; the one Executor died; the other may fell and pay the Debts, for so was the Intention of the Testator. Dy. 371. b. pl. 3. Mich. 22 & 23 Eliz. Anon.

34. Devise of Land to A. for Life, Remainder to B. in Tail, and for Default of Issue to be sold by the Executors of Devisee. He made J. S. and W. R. Executors, and died. J. S. died; B. died without Issue; A. died. W. R. sold the Land. The Opinion of the Court was, that the Sale was void. And. 145. pl. 193. Patch. 28 Eliz. Lock v. Loggin.

Le. 63. pl. 78. S. C. fays, that it was adjudged, that the Condition should be [Vendition] for the manner of it is good.—Godb. 71. pl. 92. S. C. argued, but adjourned.

35. A. feited of the Manor of D. devised the same to J. S. and 3 others, and their Heirs, to the Intent the Devisees should sell it for the best Profit, and convert the Money to the Performance of his Will, and makes them his Executors, and dies, one of them refuses to meddle, the other 3 sold it in the Life of the 4th. It was adjudged, that the Sale was good by the three, either by the Common Law, or by the Statute of 21 H. 8. and by making them his Executors it is as much as if he had devised, that his Executors should sell, and in such Case the Sale by 3 without the 4th. is good, but the Statute makes it clear. Cro. E. 80. pl. 43. Mich. 29 & 30 Eliz. B. R. Bonitaunt v. Greenfield.

36. Where an Authority is given to several by one Deed, there all ought to join; Contrary where the Authority is given by Will. Arg. Le. 60. in pl. 78.

37. A Commission was directed to 8 Persons by Name, and 7 of them only made the Return. It was adjudged, that the Authority given to these 8 Persons was join, and not several, and ought strictly to be pursued. Bull. 195. Hill. 8 Jac. Anon.

38. An Authority may be well executed for Part, and void for the other if a Man makes Livery alone, it is void. Arg. Godb. 39. cites 19 H. 8. and 27 H. 8.

For he held it good Law, Part; by Hutton J. Arg. Ley. 79. Patch. 1 Car.

39. One devised Lands to his Wife for Life, and afterwards orders the same to be sold by his Executors, and the Moneys thereof coming to be divided among his Nephews, and makes A. and B. his Executors, and died. A. died. It was certified by Jones, Berkley, and Crooke J. on a Reference out of Chancery, that the Executors had not an Interest by the Devise, but an Authority only, and that the surviving Executor, notwithstanding the Death of his Companion, might sell. Cro. C. 382. pl. 10. Mich. 10 Car. Houel v. Barnes.

40. Devise to the Wife to give to my Children and Grand-children, according to their Demerits. Ld. Chancellor said the Children are not to come in by the Will immediately, but by the Act of the Devisee, and the is to give or distribute according to their Demerits, therefore he is Judge; and dismissed the Bill as to that. Chan. Cafes. 309. Hill. 30 & 31 Car. 2. Civil v. Rich.

41. A Person having only an Authority, cannot annex a Power of Revocation when he executes it. Vern. 355. pl. 352. Hill. 1 & 2 Jac. 2. in the Cafe of Wall v. Thurborn.

42. An
42. An Authority once well executed cannot be executed De novo; but S. P. seems where it is not well executed, it may be acted again; As where Exec. admitted by ters by Devise have a bare Power to sell Land, tho' they make a Peofumment, yet they may sell afterwards; per Ventris J. 5 Mod. 457. 2 W. & M. in C. B. Arg. in Cafe of Tippet v. Eyres.

As when the Jeeffe for Years will not conform to the first Liberty, the same Attorney may make Liberty again; and cited Palm. 289. Molyneux v. Tolin.—And to if Lands are given to J. S. the Remainder to such a Person as he shall appoint, and he appoints a Monk, he may notwithstanding appoint again.

So if a Letter of Attorney be to deliver Seisin, and the Attorney delivers Seisin within the Parts, which is no good Execution of his Authority, yet sure that does not hinder him from delivering Seisin upon the Land; per Pollexfen Ch. J. 2 Vent. 114. Hill. 1 & 2 W. & M. in C. B. An Inhabit Eas. Poffiff, was executed by the Sheriff in delivering a House; and after it was over, it was discovered that a Person was bid in a Room of the House, whereupon he was turned out, and the Sheriff delivered Execution again; per Pollexfen Ch. J. 2 Vent. 115 Hill. 1 & 2 W. & M. in C. B. cites Palm. 289. that it was resolved to be well.

43. Authority to chuse an Umpire. They chuse A. who refuses; then they chose B. A good Execution, by Pollexfen Ch. J. but the other contra, and Judgment for the Plaintiff. 5 Mod. 4. 58. 2 W. & M. C. B. Tippet v. Eyre. When they have chosen one general-ly, they cannot after chuse another, because they have executed their Authority; but if they chuse him conditionally that he will accept it, and he refuses, they may chuse another, because they never executed their Authority. 12 Mod. 122 Pfash. 9 W. 5.Reynolds v. Grey.—See Tit. Arbitrement (P) per tot.

44 All Authorities, whether judicial or ministerial, or private by one Person to another, must be pursued, for when one has no Right to do a Thing but by a derivative Power, he must first he has purrsed his Power, and especially if the Thing to be done be in trea, and more is done than warranted by the Power, all is void, cites 22 E. 4. 13. a If Court of Common Pleas holds Plea for Murder, it is merely void, cites 19 Ed. 4, 8. Kelway 126. Dy. 135 b [So] Citation in Admiralty, for Cause arising within the Body of a County, and Suit in Marshalsea, where neither Party is of the Houhhold, cites Sir J. Davis 46, 47. 10 Co. Cafe of Marshalsea March 8. 10. And as to private Authorities, he quoted 1 Init. 303. 49. &c. Cro. Ca. 335 1 Le. 35. 8 Co. 119. Plow. 393. Hard. 481. If Commissioners of Excise act beyond their Commission, they cease to be Officers pro tune; per Hall Serj. Arg. 12 Mod. 364. Pfash. 12 W. 3. in Cafe of Pullen v. Purbeck.


46. By a Marriage-Settlemeat 4000l. was to be raised for younger Child. It seems that dross Portions, in such Proportions as A. would appoint. A. appointed that he was 2600 l. to his 2d Son. Afterwards A.'s eldest Son dies, by which the 2d Son became Heir apparent, and A. makes another Appointment of the 2600 l. Son, yet to one of his Daughters; and decreed good, the other being made on a contract Condition of not becoming the eldest Son; per Wright K. 24tering eldest, he became incapacitated; and Ld. Keeper said that he had, as it were, only a defeasible Capacity in him. See 2 Vern. 351. S. C.

47. Where a Servant has an Authority to receive Money, he cannot receive any thing else in lieu thereof; and in the principal Cafe, a Banker's Note being taken by a Servant, the Question was if the Matter should be bound by it, the Banker breaking presently alter; and Powell J. inferring that he did not take this to be Matter of Law, but Matter only agreed to, of Evidence, whether this be good Payment Holt and the Court agreed.

Authority.
48. One Coroner gave another Coroner Authority Generally to put his Name to all Writs that came to him directed to the Coroners. He put the other Coroner's Name to a Warrant, by which J. S. was oppreß'd, and the Coroner's were taken into Custody. Per Cur. This General Authority must be intended to do all legal Acts, so that if the other Coroner to whom it was given abusès it, such Abuser cannot be a Contempt by that Coroner who gave the Power, and so he was discharged. 8 Mod. 192. Mich. 10 Geo. 1. Ld. Conningsby v. Steed.

(C)  What Authority is well pursued, and what not. Authority coupled with a Confidence.

D. Authority General, as absolute Owner of the Land.

As where Justice of Gaol Delivery have Power as Justice of Peace, if they make their Default as Justices of Gaol Delivery, the other Power is void. Br. Commissions, pl. 17; cites 9 H. 7. 9. per Brudnell and Keeble. And Justices of Gaol Delivery, and of Oyer and Terminer, may inquire in both Powers all at one Time, and make their Record as Justices in the one Form and the other all at one Time, and well; per Butler, Hubert, Bead, Wood, and Filmer. Ibid.

(E) Authority.
(E) Authority particular as absolute Owner of the Land.

1. 

1. **Lease** for Life hath Power to make Leaves rendering the ancient 2 Roll Rep. Rent, he cannot make them by Letter of Attorney. *Co. 9.* 395. Arg. cites S. C. that a Thing strained to the Person cannot be done by Attorney. — S. C. cited Palm. 436 by Jones J and agreed by him, that he cannot make the Leafe by Attorney; For it is not a Leafe of the Land, but a Declaration of the first Life, and the Feejee comes in by the original Agreement upon the first Fee-ment, as it is in Whitchlock's Case, § Rep. and it is Personol to the Owner of the Land in such Case; for it refers to the first Fee-ment.

2. A Tenant in Capite obtains the King's Licence to infeoff two of the Manor of Dale, upon Condition to give it back to A. in Tail, the Remain-der to B. in Fee; the Fee-ment was made to two accordingly; A. after-wards dies, his Heir being within Age; afterwards the Gift was made to the Heir of the Body of A. the Remainder ut supra. Resolved, that this Licence doth not extend to give this Land to the Heir of the Body of A. but a new Licence is necessary. *Jenck. 16.* pl. 29.

(F) What Authority is well executed. What not. Executed in the Name of him who gave the Authority.

1. 

1. WHEN a Man hath Authority to do an act, he ought to do it in the Name of him who gave the Authority. *Co. 9.* 389. Arg. cites S. C.— If Surveyors have Power to make Leaves, and they make Leaves in their own Names, it is not good; but they ought to be made in his Name that gave the Power. *Godb. 389.* Arg. cites 3 Mar. D. 132. [Greensfield v. Strech.] 2. So he that hath Authority to make a Lease for me, to he that hath Authority to surrender for me a Copyhold.

2. Attorney from Sir Philip Sidney, made Leafe in his own Name to Sir Richard Martin, and they were ruled in Chancery to be void, and also in Evidence at a Trial in B. R. Mo. 818. in pl. 1166. cites 4. Jac. in Can. the Earl of Clanrichard's Case.

3. But if Executors have Authority to sell Land, they may sell in their own Name for Necessity, for he that gave the Authority is dead. *9 Rep. 77.* Combe's Case.

4. The King by his Letters Patents gave Authority to the Surveyor to make Leaves of certain Lands for Life, reserving the ancient Rent, who made Leaves in this Manner, viz. this Indenture made between our Lord the King of one Part, and J. S. of the other Part, witness, that the King hath demised &c. and at the End of the Lease it was in Writs, whereof the Surveyor hath put his Hand and Seal; this Leafe was adjudged void; for tho' a Man may have a larger Authority by the Words in a Grant than the Law generally gives him, yet he must pursue that Authority which he hath, and be ought not to have put his own Seal to the Leafe, but the Seal of the King; for it cannot be the Leafe of the King.
without his Seal, and it should have been Dominus Rex per A. B. Sigillum suum aposuit. Mo. 70. pl. 191. Trin. 6 Eliz. Anon.

5. The Plaintiff having obtained a Decree in Chancery for 1000 l. gave a Letter of Attorney to his Son to compound the Suit; the Defendant procured the Plaintiff's Son to give him a Release, upon Payment of 100 Marks in Hand, and the other 100 Marks at a certain Day to come. All this was done; but the Son gave the Release in his own Name, and not in the Name of his Father, and for that reason the Court awarded the Release to be void. Mo. 818. pl. 1106. Hill. 9 Jac. in Chancery, Dabridge-court v. Athley.

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

(G) What shall be a good Execution of an Authority mixt with an Interest.

Cro. J. 445. pl. 7. Worledge v. Benbury, S. C. adjudged accordingly. * Pol. 331. v. Benbury, S. C. adjudged accordingly; but if the Lease had been with a Limitation, that if J. S. had lived so long, that peradventure had been material. —1 Cro. E. 461. (b) pl. S. Haddon v. Arrowsmith, S. C. adjudged. — Pope. 105. Hall v. Arrowsmith, S. C. & S. P. agreed in the whole Court; but in the principal Case, if the Copyholder had had an Easement in Fee by Copy, it had been a Forfeiture of his Easement to make an absolute Lease; because in that Case he docs more than he was licenced to do. — Owm. 72. 15. S. C. adjudged.

2. If the Lord gives Licence to a Copyholder for Life, to lease the Copyhold for 5 Years, the Copyholder may lease it for 3 Years, for this is comprehended within the Licence, in as much as he hath given him Licence to lease for more Years. Mich. 15 Jac. B. R. between Woolridge and Bambridge adjudged upon a special Verdict.

3. Licence to impark 200 Acres, he cannot impark 100 only. Arg. Ow. 73. cites 10 H. 7.

4. If the King licences A. to alien his Manor of D. and he aliens it, excepting one Acre, the Licence will not serve. Arg. Bridgm. 114. cites 23 H. 8. 6. Patent 76.

5. There is a Difference between a bare Authority or Power, and a Power joined with an Interest. In the first Case, if the bare Power is exceeded in the Act done, it is all void, but in the other Case it is good for so much as is within the Power, and void for the rest only. Jenk. 201. pl. 20. 215. pl. 57.

* But there is no such Title as Patent in Fitzh. — See 30 E. 3. 17. b. 18. a. As if the King licences his Tenant in Capite to alien 20 Acres, he may alien 10 Acres; but in Case of a Nucle Power, as a Power of Attorney to make Livery of two Acres, if the Attorney
Authority.

6. If the King licences to alias two Parts of a Manor hald in Capite, and he alias all, he has not pursed his Licence; but when Act of Parliament authorizes the Owner of Land in Capite to charge two Parts which he could not do at Common Law, if he charges all the Land, it is merely void as to the 3d Part, and therefore he has well pursed the Authority which the Statute has given him to charge the two Parts. 8 Rep. 85. Mich. 6 Jac.

7. So if A. has the Moiety of the Manor of D. known by the Name of D. and the King licences him to alias the Moiety of the Manor, and he alias the Manor, he has pursed the Licence; for in Truth nothing but the Moiety paffes. 8 Rep. 85. Mich. 6 Jac.

8. Sir Thomas Travell and Dame Frances his Wife, by Indenture bearing Date the 18th Day of Jan. 1693, did covenant to levy a Fine of several Manors &c. being the Estate of Inheritance of the said Dame F. T. of the yearly Value of about 1200l. the Uses of which Fine were declared to be to J. Y. and T. N. and the Survivor of them, and the Executors, Administrators, and Assigns of such Survivor for 1000 Years, in Trust to raise 2500l. for the Benefit of Sir T. T. and after the Determination of that Estate to the Use of Sir T. T. for Life, without Impeachment of Waife, with Remainder to Trustees to preferve contingent Remainders, with Remainder to the said Dame F. during her Life without Impeachment of Waife, with Remainder to Trustees to preferve contingent Remainders, Remainder to the Ilufe of such Marriage, Remainder to the Ilufe of the said Dame F. by any after taken Husband, Remainder in Default of such Ilufe to the said Sir T. T. and his Heirs for ever; in which said Deed there are severall Provisos in the Words following; Provided also further, and it is the further Intent and Meaning hereof, and of the Parties hereto, that in case the said Dame F. should happen to depart this Life in the Life-time of the said Sir T. T. and that there shall be no Ilufe of her Body by the said Sir T. T. lawfully begotten, or to be begotten, at the Time of such Deceafe of her the said Dame F. T. that then and in that Case it shall and may be lawful to and for the said Dame F. T. at any Time or Times during her natural Life, by any Deed or Deeds in Writing, or by her last Will and Testament in Writing, or any Writing purporting her last Will and Testament, the same to be respectively attested by 3 or more credible Witnesses, to charge all and every the said Manors &c. and Premises, or any Part or Parts thereof, with any Sum or Sums of Money not exceeding in the Whole the Sum of 1000l. to be paid to such Perfon and Perfons, and at such Days and Times, and in such Manner and Sort as the said Dame F. shall by such Deed or Deeds, Writing or Writings, to be attested as aforesaid, from time to time direct and appoint, and by the fame Deed or Deeds, Writing or Writings, for that Purpose to limit or appoint any Term or Terms, or Number of Years of and in the said Manors &c. and Premises, or any Part or Parts thereof, to any Perfon or Perfons whatsoever, nevertheless redeemable, and to become void on Payment of such Sum and Sums of Money as shall be thereon charged or appointed, not exceeding in the Whole the Sum of 1000l. fo as such Sum or Sums of Money so to be appointed as aforesaid, be not to be paid or payable till the End of 6 Calendar Months next after the Deceafe of Dame Ann Hodgson, Widow Relict of Sir Thomas Hodgson, any thing herein contained to the contrary thereof in any wife notwithstanding; Provided also further, and the further Intent and Meaning hereof, and of the Parties hereunto is, that if the said Sir T. T. shall happen to depart this Life, and that the said Dame F. T. shall him survive, and that

Attorney makes Livery of one it is void. Jenk. 215, pl. 37, cites 12 Aff. pl. 24, 8 Co. 84. Sir Richard Pexhall's Case.
there shall be no Issue of the Body of the said Dame F. by the said Sir T. T. lawfully begotten or to be begotten, living at the Time of the Decease of her the said Dame F. that then and in that Case it shall and may be lawful to and for the said Dame F. at any Time or Times during her Life, by any Deed or Deeds in Writing, or by her last Will and Testament in Writing, or any Writing purporting her last Will and Testament, the same to be respectively attested by 3 or more credible Witnesses, to charge all and every the said Manors &c. and Premises, or any Part or Parts thereof, with any Sum or Sums of Money not exceeding in the Whole the Sum of $2000. to be paid to such Person or Persons, and at such Days and Times, and in such Manner and Sort as the said Dame F. shall by such Deed or Deeds, or Writing or Writings, to be attested as aforesaid, from time to time direct or appoint; and for that Purpose by the same Deed or Deeds, Writing or Writings, to limit or appoint any Term or Terms, or Number of Years of and in the said Manors &c. and Premises, or any Part or Parts thereof, to any Person or Persons whatsoever, nevertheless redeemable, and to become void on Payment of such Sum and Sums of Money as shall be thereon charged or appointed, not exceeding in the Whole the Sum of $2000. so as such Sum or Sums of Money so to be appointed or limited by virtue of this present Previso, be not to be paid or payable till the End of 6 Calendar Months next after the Decease of the said Dame A. H. any thing herein contained to the contrary notwithstanding.” A Fine was levied pursuant to the said Deed, and by Indenture bearing Date the 17th Day of July 1703, and made between the said Lady T. of the one Part, and Thomas Northmore, Esq; of the other Part, reciting the said Deed of Covenant of the 18th Day of Jan. 1698, and the said 2 successive Powers for Dame T. to charge the said Estate with $1000. in case the said before Sir T. T. and with $2000. in case the said survived him, herein mentioned; and in Consideration of 150. the said Dame F. T. pursuant to the 2 several Provisions or Conditions before herein recited, and according to the Purport, true Intent and Meaning thereof, did thereby charge all and every the said Manors &c. and Premises, in Manner and Form following, (to wit) That in case the said Dame F. T. should happen to depart this Life in the Life-time of the said Sir T. T. and there should be no Issue of her Body by the said Sir T. T. lawfully begotten, or to be begotten, living at the Time of such Decease of her the said Dame F. T. then and in that Case the said Dame F. T. did thereby charge all and every the said Manors &c. and Premises, with the Sum of $1000. and she did thereby direct and appoint the said $1000. to be paid to the said T. N. or his Assigns in manner following, (to wit) 500. Parcel thereof, on the 1st Day after the End of 6 Calendar Months next after the Decease of Dame A. H. Widow and Relyct of Sir T. H. and 500. Residue of the said $1000. on the Day next following the said 1st Day, both which Payments to be made at or in the Guildhall of the City of Exeter, between the Hours of 2 and 6 of the Clock in the Afternoon of the same respective Days, and the said Dame F. did for that Purpose thereby limit and appoint the Term of 2000 Years of and in the said Manors &c. and Premises to the said T. N. and his Executors, Administrators and Assigns, the said Term to commence and begin immediately from and after such the Death of the said Dame F. T. nevertheless redeemable and to become void on Payment of the said $1000. in manner as aforesaid; and if the said Sir T. T. should happen to depart this Life, and that the said Dame F. T. should him survive, and that there should be no Issue of the Body of the said Dame F. by the said Sir T. T. lawfully begotten, or to be begotten, living at the Time of the Decease of her the said Dame F. that then and in that Case the said Dame F. T. did thereby charge all and every the said Manors &c. and Premises with the Sum of $2000. and she did thereby direct and appoint the said $2000.
to be paid to the said T. N. or his Assigns in manner following, (to wit) 1000 l. Parcel thereof, on the 1st Day after the End of 6 Calendar Months next after the Decesste of the said Dame A. H. and 1000 l. Residue of the said 2000 l. on the Day next following the said 1st Day, both which last mentioned Payments to be made at or in the Guildhall of the City of Exeter, between the Hours of 2 & 6 of the Clock in the Afternoon of the fame respective Days; and the said Dame F. T. did for that Purpose thereby limit and appoint the Term of 2000 Years of and in the said Manors &c. and Premises to the said T. N. and his Executors, Administrators and Assigns, the said last mentioned Term to commence and begin immediately from and after the Death of the said Sir T. T. nevertheless redeemable and to become void on Payment of the said 2000 l. in manner as aforesaid, which said Deed was executed by the Lady T. and attested by 6 credible Witnesses. The said Dame A. H. departed this Life several Years ago, and in the Life-time of the said Sir T. T. and the said Sir T. T. died the 19th Day of Feb. 1723; after whose Death the said Lady T. brought her Bill in Chancery against W. N. Esq; Heir at Law and Executor of the said T. N. to be relieved against the Assignment of her Interest in the said 2 Powers, offering to pay the said 150 l. and Interest to this Time. The said W. N. likewise brought his Cross Bill against the Lady T. to establisb the said Assignment, and to have the Benefit of it as to the said 2000 l. Upon hearing of which Causes before the Right Hon. the Ld. Chancellor on the 3d Day of Feb. last, his Lordship was pleased to direct as to the said N.'s Demands of 2000 l. by virtue of the said Deed of the 17th July 1703, that a Cause should be made on the said Deeds of the 18th Jan. 1698. and of the 17th July 1703, and that the same should be laid before the Judges of the Court of King's Bench for their Opinion thereon, upon these Questions;

Qu. 1st, Whether the Deed of the 17th July 1703, is a good Execution of the Power by the Defendant the Lady T. to raise the said 2000 l. Qu. 2dly, Supposing it to be a good Execution, then when the said 2000 l. is to be raised?

We have consider'd of the above written Cause, and are of Opinion that the Deed of the 17th of July 1703, is a good Execution of the Power by the Defendant the Lady T. to raise the Sum of 2000 l. therein mentioned, and that the same ought to be raised upon the Death of Sir T. T. therein named.

R. Raymond, Ja. Reynolds,
F. Page, E. Probyn.


9. Appeal from a Dismissin; at the Rolls upon this Cause; Sergeant Maynard by his Will devized several Manors, Meffuages &c. to Trustees, and inter alia, the Manor of Beer in the County of Devon, to the Use of his Grand-child Mary Maynard (since Countess of Stamford) for Life, with Remainder to Lady Hobart for Life, with Remainder to her first Son &c. with Remainder over, with a Power in the Will in the Words following:"I will, My Will is that my Grand-child M. M. when she by Virtue of any Clause in this my Will, or the Meaning thereof shall be or ought to be in the Possession of the Manor of Beer, and afterwards every Son of her or their Sons being in Possession thereof, and of the Age of 21 Years, and entitled to the said Manor of Beer, be impowered and may lease all or any the Tenements thereof for 1, 2, 3 or 4 Lives or Years so determinable in Possession, Reversion, Remainder, or Expectancy, and under the New Rents now reserved, and the like Agreements and Covenants as in the Leafes now in being, and by the present Tenants thereof respectively to be performed and kept, so as all Leafes to be made with other Edicts then formerly leded, then in being, exceed not 4 Lives, or determinable by Death of 4 Persons at most in one Tenement at one Time. Then follows this Clause; Item, My Will is that T. G. and every other Agent
Authority.

in his Place appointed as is herein after mentioned, and every other Person, to whom the Premises shall come into Pallettion, may then lease the same or any Part thereof at rack or utmost reasonable Rent, and such other Agreements for Reparations and against Waife as they can reasonably agree upon, such Leafe not to exceed the Term of 7 Years.

This Leafe was afterwards confirmed by a private Act of Parliament 5 & 6 W. & M. which recites the Will Verbatim, and confirms it, and likewise creates a Term of 1000 Years to raise Money to pay off Incumbrances; afterwards by Decree in this Court affirmed in Dom. Proc. wherein Sir J. H. (then an Infant) was Plaintiff, a Settlement was directed to be made pursuant to the Will, and a Settlement was made by the Trustees, but there was a small Variance in the Words of the Power of leasing in the Settlements from those in the Will (viz.) instead of the Words (Under the New Rents now referred &c.) as in the Will, the Settlement was (So as the Rents now referred &c.) and the Restriction comes under the Words So as &c. The Plaintiff claiming under a Leafe for 3 Lives by the Counties of S. for a valuable Consideration, by Virtue of this Power the Baron of Beer, Part of the Manor of Beer, which was out upon a Leafe for Lives at the Time of Sergeant Maynard's Purchase, but the Lives happened to drop before the Sergeant made his Will, and was in Hand at the Time of his Death. Plaintiff brings a Bill in this Court to be relieved against a Recovery in Ejectment by Defendant M. to whom the Term of 1000 Years was assigned, for securing a Sum of Money lent by him to the Trustees, and that the Plaintiff might redeem the Mortgage, or that the Mortgage Term should not be let up against him at Law to defeat his Leafe, but that he might be at Liberty to try the Validity of his Leafe at Law, against the Remainder-Man Sir J. H. The Bill was dismissed at the Rolls for Defect of Title in the Plaintiff, the Matter of the Rolls being of Opinion, that the Leafe was not warranted by the Power, and therefore determined with the Effeate for the Life of the Lessee.

It was argued for the Plaintiff that the Barton of Beer was within the Power in the Will and in the Settlement, and that the Leafe to the Plaintiff was a good Leafe pursuant to the Power, that tho' the Power in the Will and the Power in the Settlement varied in Words, yet the Sense was the same, and no material Difference between them; that the Will was executory, the Devise being to Trustees, who were to convey according to the Directions in the Will; that this Settlement was made pursuant to the Decree in which Sir J. H. was a Plaintiff, and tho' he was then an Infant, yet being a Plaintiff he is bound by the Decree, and no Day given him to slew Cause against it; that in his Answer to the present Bill he does admit that the Settlement was made pursuant to the Will, Act of Parliament, and Decree of this Court, and therefore he is bound and concluded by the Settlement, and cannot now take Exception to it; then taking the Power as in the Settlement, the Leafe is good; and * Cumberford's Case, 2 Roll. Abr. 262, is an Authority directly, the Restriction the same in both Cases, and coming under the Words So as &c. That this Case of Cumberford's was held to be Law in the Case of Walker and Wakeman. 1 Vent. 294. 2 Lev. 150. the Power of leasing being generally of all or any Tenements of the Manor of Beer, and the restrictive Clause under the (So as) shall be applied only to the Rents then referred, and not the Lands, and this Case of Cumberford was cited and allowed by Holt Ch. J. in the Case of Loveday and Winter, 5 Mod. 378.

That the subsequent Clause which impowers B. the Agent or Steward, to make Leaves for 7 Years of the Premises, does not alter the Case; for this Power is proper to be given for the Lands which never were in Leafe, and also for the Lands usually let, till they could get a new Tenant to take a Leafe upon a Fine, according to the Custom and Usage of the Country; that the Mortgage Term created by the Act of Parliament,
4.3 and I believe, but The Court upon a Settlement, will not set the Settlement against the Will, Act of Parliament, and Decree of this Court. * Bagot and Dighton, Tempore Cowper C.

Power to lease all or any of the Premises in the Indenture and Fine comprised now in Lease, and this Power don't extend to any Lands not then in Lease, and Lady Baltinglas's Cafe Vaugh. 28. cited as a Cafe in Point &c.

Triftram v. Rooper, Lady Baltinglas, Widow; and See Tit Powers, (A. 4) pl. 1. and see 2 Jo. 27 to 58. S.C.

King C. was affixed by Raymond Ch. J. Denton J. and Comyn's Baron. Raymond Ch. J. said, my Brothers agree with me in Opinion, and we are all of Opinion that the Lease made to the Plaintiff is not warranted by the Power.

It is very difficult to make a Difference in Reason between the Power in the Settlement, and the Power in the Will, the Words may vary but the Sense is the same. This Power is in Prejudice of the Remainder Man, and increases the Interest of the particular Estate, and therefore to be construed strictly, but supposing there be a Difference, I think this Power ought to be taken upon the Foot of the Will, and not upon the Settlement; the Power in the Will is all one Clause, and must be construed together, and the Cafe of Triftram v. Descantels Baltinglas, Vaugh. 28. is a Cafe in Point; so is the Cafe of Bagot v. Dighton, according to the Opinion of the Court of B. R. to whom the Cafe was referred by Cowper C. The Settlement recites the Will, the Act of Parliament, and the Decree, and if the Deed does make any Difference it must be contrary to the Will, Act of Parliament, and the Decree; but it was said the Defendant Sir J.H. does admit the Settlement by his Answer, and therefore is concluded by it; but that should have stood in a Court of Equity, and where the whole State of the Cafe appears upon the Record, the Admission of the Party is not an Estoppel at Law. As to Cumberland's Cafe Hale Ch. J. said, if it had been Res Integris, he should have been of another Opinion. 2 Lev. 150. Walker v. Wageman, and that Judgment is not founded upon the Authority of Cum-
Cumberford's Cafe. So in the Case of Winter and Larday, 5 Mod. 378. Cumberford's Cafe is cited, but no great Stress laid upon it; but if that Cafe be Law, it should not be carried one Step further.

King C. said, that it don't appear to the Court that the Plaintiff has any Title, and therefore it is not proper for this Court to remove the Mortgage out of the Way, to enable the Plaintiff to try the Validity of his Leaf at Law; Equity will not set up the Settlement in Opposition to the Will. I think there is no material Difference between the Power in the Will, and the Power in the Settlement; the Sense is the same. The Word Tenement in the Will, in Legal Understanding, has a general Signification, but in Common Understanding means Lands holden by Tenants, and this appear to be the Meaning of the Tenant by the subseuent Power to demife the Premisses for 7 Years at a Rack Rent. Vaugh. 28. is a Case in Point; and since the Court is of Opinion that the Leaf is not good, it is not proper for the Court to interpose in Favour of the Plaintiff to set this Mortgage out of the Way, in Order to trouble the Remainder Man with a Suit at Law, therefore the Decree of Dismission at the Rolls must be affirmed. MS. Rep. Pach 13 Geo. in Canc. Foot v. Marriot, Sir John Hobart and al.

10. H.T. Tenant for Life, with Power to make Leaves for Years determinable on 3 Lives &c. Remainder to T. T. his Son for Life, with like Power to make Leaves after the Death of H. H. and T. T. join in a Mortgage to C. in Fee, with a Covenant by C. for himself, his Heirs, Executors, and Administrators, to ratify and confirm all Leaves made by H. and T. under certain Restrictions, not perfectly agreeable with the Power in the Marriage-Settlement, particularly the Leaves were to be for Money really, and bona fide paid &c.

H. and T. made 2 Leaves, and then C. assigns his Mortgage to the Defendant E. and after the Allignment H. and T. make 2 other Leaves. The Plaintiff claims all the 4 Leaves, and brings his Bill to establish them.

For the Defendant it was insisted that the Leaves were void; 1st, they could not be good under the Power in the Marriage-Settlement, because that being a Power coupled with the Interest or Estate of H. Tenant for Life, and he and T. having departed with all their Estate by the Mortgage, the Power was gone &c.

2dly, The Defendant had no Notice of the 2 first Leaves at the Time of taking his Allignment from C. nor were the Leaves pursuant to the Covenant by C. to ratify &c. And 3dly, As to the Leaves since the Allignment, the Covenant by C. being only for himself, his Heirs, Executors and Administrators, and not Assigns, this Covenant could not bind the Defendant as Assignee, being collateral to the Land, and the Estate and Interest assigned; and T. joined in the Allignment to Defendant, and no Power or new Covenant referred as in the first Mortgage, and therefore the Leaves made after by T. are void.

It was objected that the Defendant don't deny Notice of the Leaves when he took the Allignment; but it was answer'd that Defendant lays he knew nothing of them, and the Plaintiffs have not charged Notice particularly, and Possession never went with the Leaves, so as to give or imply Notice to the Defendant.

The Matter of the Rolls said, that one of the Leaves claim'd by the Plaintiff is only an Agreement that the Covenantor should enjoy, whereas the Covenant is to make good Leaves to be made by the Mortgagee, and not Agreements for Leaves &c.

Ld. Chancellor said, that as to the 2 Leaves before the Allignment to the Defendant, the Question is, what Influence the Marriage-Settlement and the Covenant of the Mortgagee should have on those 2 Leaves, and holds this not good within the Settlement, and by the Mortgage the Power was gone; and as to the Covenant it must be shewn that the Leaf
Authority.

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is within the Limitations. A Covenant or Agreement to make a Lease by Mortgage is not within the Power, which is not to make good all Agreements for Leases, but Leases actually made.

As to the 2 subsequent Leases, when T. joined in the Assignment, and granted all his Estate &c. his Power under the Covenant was gone. As to the last Lease made by the Receiver under the Order of this Court, tho' by the Order the Receiver was to make Leases generally with Confect of T. that must be with reasonable Restriction, i.e. to make Leases, in order to receive the Profits annually; and here is a Lease made for a Life upon a Fine much less than the Value, therefore not good, and no Proof of Payment of the Fine nor Possession, which shews it fraudulent. Bill dismissed. Nota. A like Cafe of Corker and Enns 2 or 3 Days before, and the Bill dismissed. MS. Rep. Mich. 4 Geo. 2. in Can. Vincent v. Enns.

*(H) Who may revoke it.

If 2 submit themselves to the Award of J. & S. one only may re-

* This in the Original is (D) but miss-printed.


+ 28 P. 6. 6. b. adjourned. + 21 P. 6.

Brooke in Arbitrement, 5 Ed. 4. tho' bound in an Obligation & S. P. by
to stand to the Award; but he shall forfeit his Obligation thereby. + 8

+ 8 Alston J. Ed. 4. 10. b. 21 P. 6. 30. Co. 8. Viner 82. Contra § 5 Ed. 4. 3. where—Fitch.

Arbitrement, pl. 12.

cites S. E. 4. 1. (and is the Beginning of the S. C. of S. E. 4. 10. b.) but I do not observe any thing in

Brooke of revoking the Subdivision. § Br. Arbitrement, pl. 55. cites S. C. & S. P.

2. [So] If 2 of one Part, and one of the other Part, submit to the Award of J. & S. one of the said 2 may revoke the Subdivision with-

out the other. Contra 28 P. 6. 6. b.

where 2 Plaintiffs and one Defendant, or one Plaintiff and 2 Defendants, put themselves in Arbitrement, there the one Plaintiff nor the one Defendant without the other cannot discharge the Arbitrator.— Fitch Arbitrement, pl. 12. cites S. C. & S. P. accordingly.

3. So where 2 assgn Auditors, the one without the other cannot dis-

charge them; by Alston J. Quod non negatur. Br. Arbitrement, pl. 4.
cites 28 H. 6. 6.

Note. Where a Man is bound to stand to the Arbitrement of J. N.

Fitch. Ar-
cite, he cannot discharge the Arbitrator; contra if he was not bound to stand and S. P. re-
to his Arbitrement; but it seems clear that he cannot discharge the Ar-

Arbitrement, pl. 12. cites S. C. & S. P.

S. C. cited he cannot discharge the Arbitrator; contra if he was not bound to stand and S. P. re-

by Alston J. that

to his Arbitrement; but it seems clear that he cannot discharge the Ar-

bition. 8 P. 12. 4.


Wilde, S. C. & S. P. agreed.— Sid. 281. pl. 10. at the End of the Cafe of Nugare v. Degelder, is a Quere

if by the Revocation of the Defendant the Plaintiff may be entitled to an Action on the Cafe, or any

other Remedy where the Whole is by Parol.

5. Committing Admision by the Ordinary is not an Interest, but a Power or Authority, and Powers and Authorities may be revoked, and therefore he may revoke it. Br. Administratrix, pl. 33. cites 4 H. 7. 14.

5 S
(I) What shall be said a Revocation in Law.

1. If a Man makes a Feoffment to 4, to the Use of himself for Life, the Remainder to his Son in Tail, provided that if the Feoffor shall find any Offence or Disobedience in his Son, then he, upon the Payment of 12d. to the Feoffees, may revoke the first Uses, if the said Feoffees do give their Consent to the said Revocation, and after one of the Feoffees dies, the Power of Revocation is by this determined; for the Authority cannot survive, so that the Father upon the Tender of 12d. cannot revoke with the Consent of the surviving Feoffees. 44 El. B. R. between Arwater and Berti, adjudged.

2. If 2 submit themselves to the Award of 2 Arbitrators, and after by Order out of Chancery the Arbitrators are made Commissioners, to determine the Controversy between the said Parties, this is no Revocation of their Arbitratory Power. 40 El. B. between Hill and Hill, per Curiam.

3. If A. and B. submit to the Award of J. S. and after, before any Award made, revoke the Authority of the Arbitrator, this is not any Revocation in Law till Notice of this Revocation given to the Arbitrator. Co. 8. * Villor 82. per Curiam. 4 Ed. 4. 10. b. 21. b.

4. If A. of the one Part, and B. and C. a Feme sole, of the other Part, submit themselves to the Award of J. N. and after C. takes J. S. to Husband, and after the Arbitrator, before any Notice of the Marriage, makes an Award that B. and C. shall pay 30l. to A. yet this shall not bind J. S. and C. his Wife, nor B. For the Submission, by the Marriage of C. is revoked as to B. also, and this also without any Notice. 13 Car. B. R. between White and Gifford, & alio, per Curiam upon a Demurrer; upon which the Plaintiff discontinued his Action by the Consent of the Court. Intra mœns. 11 Car.

5. If the Lesfor by Deed licences the Lessee for Years or Life to alien, (who is restrained by Condition not to alien without Licence) and the Lesfor dies before the Lessee aliens, yet this is no Countermand of the Licence; for the Licence exemptes the Lessee out of the Penalty of the Condition, and it was executed on the Part of the Lesfor as much as could be. Co. Lit. 52. b. cites Black. 3 Jac. B. R. to be resolved.

6. If the King gives Licence to alien in Mortmain, and dies, yet it may be executed after. Co. Lit. 52. b.

So where the Lesfor afterwards

* Fed. 532.

granted him a Licence in Writing to alter Part, and then granted the Reversion, and the Lessee atter’d, and afterwards alien’d Part, and adjudged good, tho’ the Alienation was after the Grant of the Reversion. Cro. J. 102, 103. pl. 56. Mich. 5 Jac. B. R. Walker v. Bellamy.
7. Letter of Attorney to make Livery is revocable before it is executed; but after Execution lawfully had the same is executed, it cannot be revoked.

5 Rep. 90 b. Trin. 42 Eliz. in Sac. Cam. in Hoe's Cafe.

8. If a Man has a Power of Revocation, and of limiting new Uses, and he grants to new Uses, and has over and over determined to be a Revocation; but if he has other Lands, then there is something for the Words to operate on, and will not be a Revocation. If a Man has Lands, over which he has a Power of Revocation, and other Lands; if he gives all his Lands, that will not amount to a Revocation, in respect of the Lands over which he has a Power, because the Words may be satisfied as to the other Lands. Select Cases in Chan. in Ld. King's Time, 44. Trin. 11 Geo. Degg v. Macclesfield (Earl.)

(K) Determined.

1. Devised that J. S. and J. K. should sell his Lands after his Death by Advice of the Parson of the Church of D. Before the Wife and Sale the Parson died. J. S. and J. K. cannot sell. Mo. 62. pl. 172. J. S. his Trin. 6 Eliz. cited by Dyer, as lately adjudged in Franklyn's Cafe. Executors, and devised his Land to his Wife for her Life, the Remainder to his Daughter in Tail, and if she dies without issue of her Body, then his Executors, by the Agent of C. shall sell his Land, and died. M entered, and died. The Daughter entered. C died. The Daughter died without Issue. The Executor who survv'd sold the Land; but held that the Sale is not good. Dal. 45. pl. 36. Anno 4 Eliz. Anon.—S. P. cited per Cur. accordingly. Le. 286. in pl. 357 at the End.

2. If a Man should settle that his Feoffees should sell his Land, they ought to sell jointly by reason of their Joint Possession &c. But if all the Feoffees but one die before Sale made by them, then he that survives may sell, because the Possession of the whole is in him &c. Perk. S. 551.

3. If the Will be, that the Executors shall jointly sell, and one of them sells unto one Man, and the other sells unto another Man, and afterwards both the Executors join in a Sale unto a 3d. Person, in this Cafe the last Sale is good, and the other Sales are not good. Perk. S. 546.

4. If a Man willth that his Executors and his Feoffees shall sell his Land, and the Executors sold without the Feoffees unto one Man, and the Feoffees without the Executors sold unto another Man, and afterwards the Executors and the Feoffees sold unto a 3d. Man; In this Cafe the last Sale is good, and the other two Sales are not good &c. Perk. S. 553.

5. Refusal by one that has but a bare Authority, shall not disable him from executing it; As if an Executor that has a bare Power to sell Land &c. or an Attorney to give Livery, should say they would do nothing that will not discharge the naked Power; Per Pollexen Ch. J. 5 Mod. 458, in Cafe of Trippet v. Eyre.

6. A indebted to B. makes a Letter of Attorney irrevocable to B. to receive all Payments that shall become due to him, he being a Sea Captain. A. dies. There were Wages due to A. when he died, but none at the making the Letter of Attorney. The Master of the Rolls held, that B's Authority was determined, and that in neither Cafe should he claim Priority of Payment from the Administrators of A. who were Creditors likewile. Chan. Prec. 125. Mich. 1700. Mitchel v. Eades.

(1.)
(L) Transferr'd.

I. If I make a Warrant of Attorney to A. to make Livery and Seisin to J. S. of my Land, A. cannot make a Warrant to B. to do it, because the Person who is to do it is named by myself. Arg. Kelw. 44 b. Trin. 17 H. 7.

2. Where a Horse is lent for a certain Time, the Party to whom &c. has an Interest in the Horse during that Time, and in that Case his Servant may ride; but otherwise where the Loan was for a Time uncertain, Per North Ch. J. Mod. 210. pl. 43. Hill. 27 & 28 Car. 2. C.B. in Case of Bringloc v. Morrice.

3. A bare Power is not assignable, but where it is coupled with an Interest it may be signed; As where on a Leaf of Land Lett'r excepted the Trees, and Lett'r covenanted with Lett'r, that he, his Heirs and Assigns, should from Time to Time, during the Leaf, have Liberty and root up the said Trees; agreed per Cur. 2 Mod. 317, 318. Trin. 34 Car. 2. B. R. Anon.

(M) Corrected in Equity.

1. devise that his Executors nominate one of his three Nephews to inherit his Estate; the Court decreed them to nominate one of them in a Portnight, otherwise the Court would nominate one of them itself. Fin. R. 53. Hill. 25 Car. 2. Motely v. Motely.

2. A gave several Legacies, and devised, that the Residue of his Estate should be divided among several of his Kindred by Name, 16 in all, in several Proportions set down by him, but devised, that the Quantity of the residuary Estate should be as his Executor voluntarily, and without being thereto compelled by Law, should declare. The Executor declared what the Sum of the Residue was, and accordingly paid 15 of those Legatees, but the 16th exhibits a Bill to discover the Estate supposing it more. Decreed the Executor to Account. 2 Chan. Cafes 198. Trin. 26 Car. 2. Gibbons v. Dawley.

3. A Man having two Daughters, one by a former Wife, and another by his 2d Wife, devised his Estate to his Wife, to be distributed between his Daughters as his Wife should think fit. She gave 1000 l. to her own Daughter, and but 100 l. to the other. The Court ordered an equal Distribution. Vern. 355, 356. in pl. 352. Arg. cites Cragrave v. Perrott.

4. A devised a Personal Estate by his Will, or thereby raises Money, out of his Land to be disposed among his younger Children, according to the
the Discretion of two or three Persons. Decreed the Distribution to be equal. 2 Show. 242. pl. 241. Mich. 34 Car. 2. in Can. Anon.

5. An Estate was devised to A. to distribute amongst his Nieces and Nephews as he should think fit. One of the Nieces, to whom Nothing had been appointed, brought a Bill that the might have an equal Share of the Estate, and was dismissed. Vern. 356. pl. 352. Hill. 1685. Arg cites it as the Case of Swetman v. Woollallton.

6. A. has three Sisters, and devised 400£, a-piece to two, and to the 3d, what his Executors thought fit; The Lds Commissiioners decreed 400£. to the 3d, if the Estate would hold out. 2 Vern. 153. pl. 149. Trin. 1690. Wareham v. Brown.

7. W. by his Will devised, that his Personal Estate, and 400£. to be raised out of the Trust-Estate should be distributed by two Daughters his Executors, amongst themselves, and their Brothers and their Sisters, according to their Need and Nececity, as in their Discretion they should think fit, and if equal on their Power to dispose thereof, as they thought fit; and that the Defendants were not intitled to any Part thereof. The Ld. Keeper decreed a double Share thereof to the Plaintiff, the Heir, as looking upon him to stand well in Need thereof, and confirmed his former Decree, which was also upon an Appeal in Parliament affirmed. 2 Vern. 421. pl. 383. Patch. 1701. Warburton v. Warburton.

8. A. by Marriage Settlement is Tenant for Life, Remainder to Trustee. Cited to raise 400£. for younger Children's Portions, as A. should appoint. In the Case of Remainder to his first &c. Sons in Tail. A. has several younger Children, and assigns the 400£. among them, and particularly appoints Sir R. Affleck 2500£. to B. the 2d. Son. After, by the Death of the Eldest Son, B. to become the Eldest Son, upon which A. makes a new Appointment of the 2500£. to the other Children. Wright v. Warren in the Case of Affleck v. Affleck, pl. 299. Patch. 1706, cited it as the Case of a Daughter of Sir Geo. Crooke.

9. C. left a Power to his Wife to devise for Estate among his three Daughters in such Proportions as she shall think fit. It was held in Chancery, that the motto divide equally amongst them, unless a good Reason can be given for doing otherwise. Chan. Prec. 256. in the Case of Affleck v. Affleck, pl. 299. Patch. 1706, cited it as the Case of a Daughter of Sir Geo. Crooke.

10. By Marriage Settlement it is provided, that 2500£. be distributed among the Issue of the Marriage in such Proportions as W. Drey would appoint. He dies, leaving one Child only, but makes No Appointment. Decreed the Child to have the 2500£. 2 Vern. R. 665. pl. 591. Mich. 1710. Davy v. Hooper & al.

11. A Man gave Power to his Wife to devise 1000£ to, and amongst his Children and Children, and in such Manner and Proportion to each Child, as she should think fit. There were two Children, and the Elder being provided for, the Mother appointed the whole to the Younger. Upon which Appointment a Bill was brought for an unequal Distribution, but was dismissed. Cited by the Attorney General, Arg Cae's in Equ. in Ld. Talbot's Time, 74, as Mich. 1732. Litter v. Robinson.

Issue then living, and in such Case to raise a Sum not exceeding 1500£. as soon as may be, to and for the sole Benefit and Advantage of such Child or Children, (other than the eldest Son or that Marriage) in such Proportion, Manner, and Form, in all Respects, as the said R. should, for such Purposes, by his last Writing, direct and appoint; and in Default of such Appointment, then to and for the sole Benefit of such Child, if but one, but if more, (other than the Eldest) equally, and in equal Parts and Manner, to all Intents and Purposes. R. by his Will directs the 1500£. to be raised, and gives 450£. to his Son R. 1500£. to Jane, and nothing to E who had an Estate of 4 or 500£. per Annum, given him by another, and being into this Court for a Bill of the 1500£. his Bill was dismissed. Cited by the Att. Gen. Arg Cae's in Equ. in Ld. Talbot's Time, 74 as March 2, 1755. Austin v. Austin.

5 T 12. Where
**Bail.**

12. Where there is a sum of money provided for younger children, and one of the younger becomes elder, he shall have no part of this money; but where the money was by a private Act of Parliament appointed to be among A. B. and C. (naming them) and A. afterwards becomes elder, he is capable of an appointment in his favour. Cafes in Equ. in Ed. Talbot's Time, 93. Pach. 1735. Jermin v. Fellows.

13. The father by marriage settlement has a power to make an appointment of a sum, not exceeding a sum certain, for portions and maintenance of younger children in such manner, and under such limitations as he shall appoint. He has several younger children, and by his will (taking notice that the sum was provided for by their grandfather) he appoints the whole sum to one. This is not a good pursuance of his power. Cafes in Equ. in Ed. Talbot's Time, 72. Pach. 1735. Menzey v. Walker.

For more of authority in general, see Devises, Feoffment, Power, Trust, &c., and other proper titles.

*The difference between Bail and Mainprize is, first, he that finds Bail finds surety only to answer that special matter; but he that finds Mainprize, finds surety to appear and answer unto that cause whereof he was imprisoned, and touching all other matter and causes that shall be objected against him. 2dly, the pledges and surety of him that is delivered to bail may imprison him whole surety they are; for Stuard, Ch. J. in 55 E. 3. said, that they were his gaolers or Keepers, and if they suffered him to escape they should answer for the same. 3dly, The etymology of either of them doth shew and manifest the difference between them, for in the one the prisoner is delivered by the judge, judges, or courts, into the hands, and, as it were, into the prison of the sureties; for the words be, traditor in ballium; but in the other cases the words be, That such and such a man separate without any such delivery made by the court, as in the other cases. Ld. Coke of Bail and Mainprize, cap. 3.*

† Hob. 70. pl. 82. S. C. ruled accordingly in error in the exchequer chamber.—Cro. J. 53. pl. 13. Mich. 13. Jac. in Cam. Scacc. and the judgment in B. R. affirmed; because the bill, whenever it was filed, has relation to the first day of the term, and the day of filing is not material.—Jenk. 295. pl. 44. S. C.

2. Lev. 13. 2. In trover and conversion after verdict for the plaintiff, it was moved in arrest of judgment, that the action was commenced in Hill term, and the conversion alleged to be the 3d of February in the same term, and the bill filed relates to the first day of the term, to the cause of action. But resolved, that if the bill was entered before the 3d day of February, it is well enough; for it is that which gives this court jurisdicition. Vent. 135. Trin. 23. Car. 2. B. R. Tatlow v. Bateman.

* Bail.

(A) To what time bail shall relate.

1. In B. R. tho' the bail of the defendant be taken and entered the last day of the term, and the bill be put in at any time the same term, this is well enough by the court of the King's Bench, tho' in strictness of law the defendant is answerable but from the bail, as in custodia marechalli, and not before. Hobart's Reports 96. between † Plot and Plummer, adjudged in a writ of error.
3. So the Statute of Limitations may be pleaded to an Action, if the
Time be elapsed before the Day wherein the Bail is filed, tho' not before the
first Day of the Term wherein the Action is brought, for the Action shall
not be laid depending until the Bail is filed; and upon Search it was
found, that the Bail was filed the last Day of the Term. Vent. 135.

4. Bail put in mich. Term and excepted against, and additional
Bail put in in Hilary Term, and the Doubt was, if the additional Bail
were of Mich. Term; and some said, the Bail must refer to the Return
of the Writ, and others would have it refer to the Recognizance entered
into. The Mistchief would be in this Cape, to make the Bail refer to
Mich. Term, that if Bail had aliened Bona side in the Interim, to have
the Land charged with the Recognizance by that Relation. Holt said it has
been an old Question, whether Bail in B. R. be liable from the Time
wherein the additional Bail was given, for it is not Bail till
completed, and making the additional Bail to be Bail of the first Term, might do wrong to a third Person who
might be a Purchaser after the first, and before the Additional Bail put in.

(B) How it shall be performed. [What Render of Prin-
cipal will be a Discharge of the Bail, pl. 1 to 12. What
other Thing the Bail may plead in Discharge, pl. 12, 13, ter-
ter. 14, 16. Bail charged. How far, pl. 15.]

1. If a Scire Facias be brought against the Bail in Banco, upon a
Judgment had against the Principal, and Judgment given there pl. 4. S. C.
against the Bail, if no Capias ad Satisfaciendum was awarded against
the Principal before the filing of the Scire Facias, this is Error,
for by Law it ought to be: Mich. 13. Car. B. R. between South and that Execu-
tion might be there a-
against the Bail where no Capias was against the Principal, because the Recognizance in C. B. differs
from that in B. R. where it is a Sun certain, that the Principal shall render his Body; but the
others in C. B. held e contra, and that it is all one in C. B. and B. R. and so was the Opinion of all
the Court of B. R. —— Jo. 396. pl. 4. S. C. but S. P. does not appear.

2. If the Defendant in an Action in Banco finds Bail, and after
Judgment against him, and a Capias awarded, if he does not render
himself before the Capias returned Non est inventus, and filed, yet he
may render himself after the Return and filing thereof to save the

3. But in Banco Regis, if the Principal renders himself to Prison after Nay. 111.
the Capias against him returned Non est Inventus, and filed of
Record, this will excuse the Bail by the Court of the King's Bench.
Vill. 4. Jac. 3. B. between Fletcher and Mistet, per Curiam, is
not S. P.

4. So in Banco Regis, vel Banco, if the Principal renders himself Cro. R. 618.
after the said Return of the Capias, and alter the first Scire Facias pl. 4. Walms-
award...
awarded against the Bail, and before the Return thereof, this will discharge the Bail. Hill. 4 Jac. B. R. between * Fletcher and Muffet, per Curiain. *Rich. 8 Jac. B. between Boothby and Devonant, solved upon Denmure, tho' the Provostnomaries said, that their Cause was contrary in Banco. Contra Rich. 40, 41 El. B. R. between * Walmsey and Hawe adjudged.

5. So if Bail be taken, and Judgment given in Banco, and after this comes in Banco Regis by Writ of Error, and there a Capias is awarded against the Principal, and returned Non est inventus, and filed, and a Scire Facias awarded (*) against the Bail, yet if the Principal renders himself to Prison before the Return thereof, the Bail are discharged thereby, by the Court of the King's Bench, Hill. 4 Jac. B. between Fletcher and Muffet, per Curiain.

6. In Banco Regis, if the Principal be returned Non est Inventus, and a Scire Facias awarded against the Bail, who are returned summoned, and filed, and they at this Day do not bring in the Principal, they shall be charged. Hill. 4 Jac. B. R. in Fletcher and Muffet's Cafe; Per Popham and Williams.

7. But if the Bail, in the said Cafe, be returned Nihil, and an Alias is awarded, they may bring in the Principal well enough at the Return thereof, and discharge themselves. Hill. 4 Jac. B. R. in Fletcher's Cafe, per Popham and Williams. *Rich. 2 Car. between * Cafe and alias Plautus, and Dingley and Davies Defendants; which, Intercut Hiss. 22 Jac. Rot. Resolved per Curiain, B. R. that the Bail in Discharge of himself may bring in the Principal at any Time before the Return of the second Scire Facias, but after the Day of the Return of the 2d Scire Facias against the Bail paid, tho' the 2d Scire Facias is not filed of Record, yet the Day of the Return being past, the bringing in of the Principal afterwards will not excuse the Bail. P. 11 Car. B. R. between Fawcet and Avsic, per Curiain adjudged, and the Clerks said it was the Court.

* Jo. 158. pl. 4. S. C. & S. P. that it was so said by Broome, and agreed by all, that if the Defendant was alive, the Bail may bring him at any Time before the 2d Scire Facias; and that several Years in the Reign of Q. Eliz. they were allowed to bring in the Defendant on the Return of the 2d Scire Facias, but this was Ex Gratia Curia. — Lat. 149. S. C. but S. P. does not clearly appear. — Poph. 185. Calve v. Nevel, S. C. but S. P. does not appear.

8. If upon the Return of the first Scire Facias against the Bail in Banco, the Principal comes in and renders himself, this will excuse the Bail. *Rich. 10 Jac. b. between the Earl of Hertford and Kerston, adjudged.

9. If the Principal, in Discharge of his Bail, renders himself in Banco Regis to a Tip-staff of the King's Bench, in the Morning of the last Day of the Return of the 2d Scire Facias, and after Dinner of the same Day the Tip-staff carries him to a Judge of the said Court, who commits him to Prison in Execution, in Discharge of his Bail, but this is not entered of Record till another Day, but then this is entered as committed the last Day of the Return, tho' the Clerks of the Court say, That if the render'd himself, or was committed after Dinner, this is not sufficient to discharge the Bail, and tho' the Time of the Render and Commitment appears upon Examination as before, yet in as much as the Time of his Commitment does not appear upon Record, but only that he was committed such a Day, the
the Court will intend that he was committed in the Morning according to Law, in Discharge of his Bail. Cr. 16 Car. B. R. between Owen and Griffith, adjudged.

as Judge Bartlet was going down the Hall, and it was too late. Freem. Rep. 441. pl. 559, (bis) Mich. 1676. Anno.

10. If A. recovers in Debt in Banco against B. and after B. brings Hob. 116 pl. a Writ of Error in B. R. which is allowed in Banco, and after before the Return of the Writ of Error, the Bail by Habeas Corpus is brought into Court the said B. in Exonerationem Manucaptoris, yet this — But e is no discharge of the Bail, because the Writ of Error is a Supersedeas, so that he cannot pray in Execution, which is the Intent of the Bail, but if this Record be not removed at the Return thereof in Banco Regis, and after B. is brought into Court by Habeas General, that Corpus, this will be a Discharge of the Bail, for there he may be in Execution. Hobart's Reports 161. Bradshaw's Cafe.


11. If in an Action in Banco Regis, A. & B. are Bail for another, Lat. 149. S. and after Judgment against the Principal, he brings a Writ of Error, in Camera Scaccarii, and pending this Writ of Error, the Bail bring by Crew Ch. accordingly, in the Principal, or this Principal renders himself to Prison, tho' the Recoverer cannot pray him in Execution, nor (') can the Court put him in Execution, because the Writ of Error is a Supersedeas to it, yet this is a good Discharge of the Bail; for the Marshal ought to keep him in Prison as a Pledge, till the Judgment be affirmed or discharged, as does upon mean Process for want of Bail. Mich. 2 Car. B. R. between Calfe and alios Plaintiffs, and Dingley and Davus Defendants, per Cur. Inamita Hill. 22 Inc. B. R. pl. 4 S. C. & R. Rot. Hill. 12 Car. B. R. between Cotton and Oliver, per Cur. S. P. reprieved, adjudged; Contra H. 2 Inc. B. R. between Cador and H elderon, per Curiam.


12. If a Man hath Judgment in Debt in Banco, and the Defendant is taken in Execution, who after brings a Writ of Error, and his Body is removed in Banco Regis by Habeas Corpus, and there bailed, and the Bail bound in a Recognizance, That the Principal shall prosecute his Writ of Error with Effect, and if the Judgment be affirmed, pays, that these that he shall pay the Sum recovered, and after the Plaintiff in the Writ of Error pays the Sum recovered, and after the Judgment is affirmed, it seems that in a Surety Fasias against the Bail they cannot plead this Payment by the Principal in Discharge of themselves, because this Payment does not discharge the Principal himself.

13. So in this Case, if Mean between the Writ of Error brought, and the Judgment, the Deutee relieves to the Principal the Debt, it seems the Bail in a Surety Fasias against them, may discharge themselves by this Release, Dubiitare, Crim. 14 Inc. B. R. between Harrison and Hakyshy.

by the Bail in Bar to the Surety Fasias, is a good Ples, but they would not at this Time overrule the same; and the Parties, perceiving the Opinion of the whole Court, did rest satisfied therewith, and never moved it again. — 5 Mo. 832. pl. 1161. S. C. resolved a good Bar, because the Debt and Dury
Bail.

Duty remains notwithstanding the Error brought, and that it is not like to a bare Possibility.

Roli Rep. 386. pl. 7. S. C. adjournatur —— The Bail cannot say that the Principal has paid the Money, if he has not an Acquittance or Matter of Record to prove it. Arg. Stv. 324. Pach. 1652. cites the Case of Barnes v. Corbet. —— In Scire Facias on a Judgment had against the Principal for 351. 6s. d. the Bail pleaded that the Principal, after the Judgment, paid the Plaintiff 351. in Satisfaction of the Debt due on the Judgment, which he accepted; but adjudged for the Plaintiff upon Demurrer; for the Bail may plead Payment to the Plaintiff, in regard of the Condition of his Recognition, which is to pay the Condemnation or to render the Body, which the Defendant cannot plead, yet the Bail shall not plead Payment of a less Sum in Satisfaction, after the Money is become due. 2 Lev. 212. Mich. 29 Car. 2. B. R. Holmes v. the Manuactorus of Brown.

* Orig. is

(A.)

14. If A. is Bail for B. in B. R. in an Action of Battery, at the Suit of C. and a Verdict and Judgment is given in this against * B. for 100L Damages and Costs, and pending this Action; and before Judgment another Action of Battery is brought in Banco by C. against D. another for the same Battery, and a Verdict against him for 20L Damages, and after the Judgment against B. Judgment is given in Banco against D. and Execution and Satisfaction thereupon acknowledged in Banco, in a Scire Fac' upon the Judgment in Banco Regis against A. the Bail to have Execution of the Judgment for the 100L Damages, the Bail cannot plead this Recovery and Satisfaction in Banco, for it is not within the Condition of his Recognition. Pr. 11 Car. B. R. between Barnes and Hills, adjudged upon Demurrer, Intenture Hill. 10 Rot. 597.

15. If a Ban be Bail for J. S. in an Action brought against him in B. R. and the Plaintiff recovers there against J. S. and he brings a Writ of Error in Cam. Scacc. where the Judgment is affirmed, and Costs there assessed by the Statute of the 3 H. 7. the Bail in B. R. shall not be charged with these Costs assessed in the Writ of Error, but only with the principal Judgment. Tr. 4 Jac. B. R. by Tanfield and Fenner. P. 20 Jac. B. R. between Harly and Jones, adjudged per Cur. and laid by the Clerks to be the common Course.

Scire Facias against the Bail, upon a Recognizance, whether the Bail may plead that the Principal was taken in Execution before by the Sheriff upon a Cap ad Satisfaciend, and thereupon paid the Money. Tr. 11 Car. B. R. between Cockan and Procter, such a Plea pleaded in a foreign County, and the Court doubted whether it was a good Plea, but they ordered that he should swear his Plea, because it was a foreign Plea.

16. In a Scire Facias against the Bail, upon a Recognizance, whether the Bail may plead that the Principal was taken in Execution before by the Sheriff upon a Cap ad Satisfaciend, and thereupon paid the Money. Tr. 124 Car. B. R. between Oron and Holton, and also, adjudged upon Demurrer, Intenture Hill. 16 Car. Rot. 560.

18. Rotulo
*(C) Answear, Let the Common Law be kept.

[Bail discharged by Death of Principal, pl. 1, 2:

By what Plea, pl. 3.

Charged how far, by what Words, and what a Forfeiture;

pl. 4, 5, 6, 12.

What is to be done upon a Render, pl. 7, 8, 9, 10, 11.]

1. [If A. becomes Bail for B. in an Action at the Suit of C. and after C. recovers against B. and afterwards the Capias against B. is returned Non est Invenus, and this is filed of Record, and after B. dies before any Scire Facias sued against A. yet this will not excite A. to bring the Bail, in as much as B. died after the Capias returned and filed, and yet he might in his Discharge have brought in B. (if he had been living) before the second Scire Facias returned, but this is Ex Gratia Curiae. Trin. 5 Jac. B. R. between Tinkerley and Booth, adjudged upon Denuntione.

Court held that the Pleading the Death of the Principal before the Sci. Fac. brought, is not sufficient without more; for by the Return of Non est Invenus on a Capias, the Recognizance is forfeited, because there was Default in the Party, and that it be used that if the Principal render his Body on the first Scire Facias to accept it, yet that is Ex Gratia, and not of Necessity; and therefore the Death at the Time of the Scire Facias brought is not material, if he was alive when the Capias was returned; and Judgment for the Plaintiff. — — Hutt. 47. S. C. cited per Cur. by the Name of Timberley v. Calverley says, that in scire Facias against the Bail, Judgment upon Argument was given against the Plaintiff. — S. C. cited, and the President produced Jo. 50, Resolved that the Recognizance of the Bail is forfeited, if the Defendant dies after the Capias returned, and before any Scire Facias brought. Jo. 159. pl. 4. Trin. 2 Car. B. R. in the Case of Caffe v. Dingley and Davies.

2. But otherwise there has been, if he has been dead before the Capia returned and filed. Trin. 5 Jac. B. R. per Curiam agreed. pl. 4. S. C. & S. P. says, that it seems that by the Death of the Principal before his Death, which ought to have come of his Part, (but it seems this is not Law) and there cited by Justice Jones 43 Eliz. B. R. between Hobbs and Dowaiger adjudged; That the Death of the Principal before the Return of the Capias, discharges the Bail.

[The Recognizance is not forfeited; for he has Time always to come into Court, and render himself before the Time of the Return, to that if he dies before such Time, the Bail is discharged. — Bull. 531 S. C. adjudged against the Plaintiff. — — Lat. 149. S. C. & S. P. accordingly. — — Noy. 82. S. C. & S. P. ruled accordingly. — — Poph. 185. Caffe v. Nevil, S. C. adjudged accordingly.

[Mo. 551. pl 607 Hobbs v. Tadcaster, S. C. & S. P. adjudged accordingly; for the Recognizance of the Bail that the Principal shall render himself &c. is to be intended upon Process awarded against him &c.


3. —

18. Rotulio Parliamenti, 7 H. 5. Numero 21. The Commons prayed, that in a Scire Facias upon a Recognizance for appearance in Court, to find Suresies of the Peace, that the Party might have his Default by the Increase of Water, Imprisonment, Infirmity, or Command of the King, or his Lieutenant, Guardian of England, of which it was now doubted, whether he could take the Default for their Causes.
3. If B. be arrested at the Suit of A. and this is returned in Banco, where B. and C. as his Bail, become bound in a Recognizance, viz. B. in 200 l. being the Principal, and C. the Bail in 100 l. that B. shall appear to an Action to be brought &c. according to the usual Form, and afterwards Judgment is given against B. in the Action, and after a Scire Facias is brought against B. and C. upon their several Recognizances, who plead the Release of A. to B. the Principal, of all Debts, Duties, Judgments, Executions and Demands; this is a good Plea, as well for B. the Principal as for C. the Bail, because this discharges the Debt and Judgment, and the Bail may well plead a Satisfaction of the Judgment, and the Release is a Satisfaction. 


3. Carm. 21 Car. 2. R. between Bancroft and Willet, adjudged upon a Demurrer. 


5. If a Man brings a Writ of Error upon a Judgment in Banco, and finds Manucaptors to prosecute it with Effect, and after does not take out any Writ of Scire Fac. ad Audiendum Errorum; this is a forfeiture of the Recognizance of the Manucaptors; for this is a Default in him. Hill. 13 Jac. B. R. between Sir Thomas Middleton and Twine, adjudged.


7. If the Principal renders himself in Court in Exonerationem Manucaptors, this ought to be enter'd of Record. Hobert's Reports, 283. between Welby and Canning.

7. [And] when the Principal renders himself in Exonerationem Manucaptors in Court, if the Plaintiff or his Attorney be present, he ought to make his Election to take him in Execution, or to refuse him, of which an Entry is to be made of Record. Hobert's Reports, 284.

9. But
Bail.  

445

9. But if the Plaintiff be absent at the Time of the Render, he ought not to be presently discharged, because the Time of the Render is uncertain, and therefore he ought to be committed, so that the Plaintiff may have time to make his Election. Hobert's Reports, 284.

10. And when in the said Case he is committed, the Use is to call Hob. 210. the Plaintiff or his Attorney to take him in Execution, or to relinquish him, and to enter this Acceptance or Refusal of Record. Hobert's Reports, 284.

11. But in the said Case of the Commitment, if the Plaintiff and Hob. 210. his Attorney be dead, there ought to be a Means by Record to force an Answer, as by Scire Facias against the Executor or Administrator of the Plaintiff, to answer whether he will have him in Execution or not. Hobert's Reports, 284.

11. If B. be bound to A. in a Bill of 20 l. and in Consideration that Cro. E. 145; A. will deliver to him the said Bill, at times to find 2 sufficient Sureties, pl. 12. S.C. who will enter into an Obligation to the said A. for the Payment of the said 20 l. and B. after procures 2 to be bound to A. for the Payment of the said 20 l. which are not of any Worth or Value &c. this is not any Plaintiff.

Performance of the Promise; for insufficient Sureties are all one with no Sureties. Crit. 39 Eliz. B.K. between Gawer and Cappe, adjudged upon a Demurrer.

(D) Bail. By the Statute of Westm. 1.

1. Stat. Westm. 1. 3 For as much as Sheriff's and others, which The Words E. 1. cap. 15. have taken and kept in Prison Persons detainted of (Sheriffs and Felony, and incontinent have let out by Reprieve such as are not reprieveable, &c. and have kept in Prison such as are reprieveable, because they would gain of the one Party, and grieve the other; Gaols, so as this Act extends not to any of the King's Justices, or Judges of any superior Courts of Justice; first, for that they being Superiors are not comprehended in the General Words, as often have been observed. 2dly, (who have taken and kept in Prison) which Judges do not. 3dly, because in those Days Prisoners were commonly bailed by the King's Writ De Homine repellent and then also by the Writ De Offia & Atia, both which were directed to the Sheriff. 2 Inf. 185. 186. + In those Days Felony comprehended in it as well Treason as Homicide, Rape, or Burglary, Robbery, Arson, and all Larcenies and Thiefs. 2 Inf. 186.

+ Here it is proved that it is an Offence as well to bail a Man not bailable, as to deny a Man Bail that ought to be bailed; and the Reason is yielded wherefore the Sheriffs and others did so offend, because they would gain of the one, and grieve the other, viz. either for Avarice, or for Malice. 2 Inf. 186. Par. 2. And forasmuch as before this Time it was not determined which Persons were reprieveable, and which not, but only those that were taken for the Death of a Man, or by Commandment of the King, or of his Justices, or for the Forest; it was not certainly determined what not, within the General Words of the Writ de Homine repellent. 2 Inf. 186. * This Word (repleviable)
Bail.

*p"'s proof that this Act intends what Persons were to be releived by the Common Writ de Homine Replegiando, which was directed to the sheriff under whole Custody the Prisoners are, and of whom this Act speaks, and so it appears by the Register; and Repley, or Plav, is applied to the Sherif to take Plidges and Bail to the highest Courts of Record; and the Writ de Manucaptione directed to the Sheriff is grounded upon this Act, in which Writ not only Replegiare but Manucapere also is ufed. 2 Inft. 186.

† Here our Act first sets down what Persons were not bailable for certain Offences by the Common Writ de Homine Replegiando, and they are in Number 4; but by the ancient Law of the Land, in all Cases of Felony, if the Party accused could find sufficient Sweets, he was not to be committed to Prisow; but afterwards it was provided, that in case of Homicide the Offender was not bailable. 2 Inft. 186.

‡ The Words (by Command of the King) are as much as to say (as some affirm) as by the King's Courts of Justice; for all Matters of Judicature and Proceedings in Law are distributed to the Courts of Justice, and the King does judge by his Justices, 3 H. 4. Pol. 19. and 24 H. 8. cap. 12. and regularly no Man ought to be attached by his Body, but either by Process of Law, that is (as has been said) by the King's Writs, or by Indictment, or lawful Warrant, as by many Acts of Parliament is manifestly enactted and declared, which are but Expositions of Magna Charta; and all Statutes made contrary to Magna Charta, which is Lex Terrar, from the making thereof until 42 E. 3. are declared and enacted to be void, and therefore if this Act of Welfm. 1. concerning the extra-judicial Commandment of the King be against Magna Charta, it is void; and all Resolutions of Judges concerning the Commandment of the King, are to be underlaid of judicial Proceedings. 4 Inft. 187.

¶ The Words (or of his Justices) intend, upon any Case, whereas they are Judges, appearing to them. 2 Inft. 187.

Ⅰ And all these 4 are particularly excepted out of the Common Writ de Homine Replegiando, that the Sheriff in his County Court, which is not a Court of Record, shall not reply to any of these 4 that are committed; for Example, the Party be committed by the Person of Command of the King, albeit the Commitment be unlawful, yet the Sheriff shall not deal therein by the Writ de Homine Replegiando; but the superior Courts at Wethminster, upon a Habeas Corpus &c. shall do Justice to the Party in all these 4 Cases; so as Stalford, being well considered, impugngeth not in any for this Opinion; for his Opinion extends only to the County Court upon the Writ de Homine Replegiando, and not to the Superior Courts. 2 Inft. 187.

Perohns outlawed are attainted in Law, and therefore are not bailable, or to be bailed; for if a Man be arraigned of Homicide, and pleads Not guilty, and is foun Guildy, and for Difficulty of Clergy is repriewed, it was resolved by the Justices that he was not bailable; for the Intendment of the Law in Bails is Quod flat indifferenter, whether he be Guildy or no; but when he is convict by Verdict or Confession, then he must be deemed in Law to be Guildy of the Felony, and therefore not bailable at all, a fortiori, when the Party is attainted in Law. 2 Inft. 187, 188.

Avray the Party upon the Cap. Utag, plead Misfother, or allege Error &c. he may be bailed. 2 Inft. 188.

Perohns having abjured are all attainted upon their own Confession, and therefore not bailable at all by Law. 2 Inft. 188.

The Reason wherefore Provers or Approvers be not bailable, is; for Proovers do first confess the Felony to be done by themselves, and therefore they are not bailable, because is appears that they be Guildy of the Fact. 2 Inft. 188.

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* For in this Case Non flat indifferenter, as hath been said, whether he be Guildy or no, being taken with the Mainer, that is with the Thing stelen, as it were in his Hand, anciently called Handshibbnd. The like is anciently called Backberend, as a Bundle or Pardle at his Back, which Breton uelse for manifest Theft, Partum manifestum, and so doth Britton. 2 Inft. 188.

‡ Here are 2 Offences, 18, his breaking of the Prifon; for it is presumed that he that is innocent will never break Prisow; and 2dly, his Flying, Qua fator curatus, qui Judicium fugit. 2 Inft. 188.

§ The Appeal of the Approver is forcible against the Appellee, because the Approver confesseth himself Guildy of the same Felony, and therefore it serves in Nature of an Indictment against the Appellee so long as the Approver live, unless the Appellee be of good Fame; but yet the General Words do receive Qualification; for albeit the Proover be alive, yet if the Approver waive his Appeal, the Appellee shall be bailed, if no other Appeal be against him. 2 Inft. 188.

And
And such as be taken for * Houte-burning feloniously done, or for + falle * Burning of Houses &c. was Felony by the Common Law, as it appeareth by this Act, and by our ancient Authors, viz. Glanvill, the Mirror, Bracton, Britton, and Fleta. And this feemeth to be the Law before the Conquett. 2 Inf. 188.

† This appears to be Treason by the Common Law. 2 Inf. 188.

† This was alfo Treason by the Common Law, as it appeareth by the said ancient Authors; and both those were declared to be High Treason at the Common Law by the Statute of 25 E. 3. cap. 1. See more hereof in the 5d Part of the Inf. 2 Inf. 189.

Or Persons * Excommunicate, taken at the Request of the Bishop, or for *That is, he † manifeft Offences,

Chancery by the Bishop to be excommunicated, and after is taken by Force of the King's Writ of Excommunicatio capiendi, which is so called of Writs in the Writ called a Significant is not bailable, for in ancient Time Men were excommunicated but for Heresey, propter Lepram Animae, or other heinous Caufes of Eccleſiastic Confummation, and not for small or petty Caufes; and therefore in those Cauſes the Party was not bailable by the Sherif or Gaoler without the King's Writ; but if the Party offer sufficient Caution De pænando Mandatis Eccleſiae in forma Juris, then should the Party have the King's Writ to the Bishop to accept his Caution, and to caufe him to be delivered, and if the Bishop will not send to the Sherif to deliver him, then shall he have a Writ out of the Chancery to the Sherif for his Delivery; or if he be excommunicated for a temporal Caution, or for a Matter whereof the Eccleſiastic Court hath no Conʃummation, he shall be delivered by the King's Writ without any Satisfaction. 2 Inf. 189.

One taken by an Excommunicatio capiendi upon the Stat. 5 Eliz. cap. 22, and brought to the Bar by Hab Corp. was bailed, by the Opinion of all the Justices, contra Williams. Bullf. 122. Patcf. 9 Jac. Anon.— Ibid. Yelverton J faid, that fo it was resolved in one Rvptt Cafè, where he was taken by a Writ de Excommunicatio capiendi brought hitheſ by a Habecas Corpus, and upon Caue showed, he was bailed by the Court de Die in Diem, but neither the Sheriff nor any Jurife of the Peace in the Country can baiſ a one, but this Court here may well baiſ one, as in the Cafè before, de Die in Diem. † Or for open or manifeft Offences; for, as has been ſaid, Bali is quando fiat indifferenter, and not when the Offence is open and manifeft. 2 Inf. 189.

One was found Guilty of Felony, but it being doubted wheather Clergy was allowable or not, he was reproved without Judgment; and the Justices held, that he is not bailable, because by his being convicted he is more than one vehemently ſulpetted; and the Intendment of the Law in Bails is, Quod habet indifferenter if he be Guilty or Not, till Trial &c. D. 179. 2. pl. 42. Patcf. 2 Eliz. Anon.— Jerk. 219. p. 68. S. P. and as to him that is convicted, two Juries have paffed upon him, and it is evident that he is Guilty. By all the Judges of England.

Or * for Treason touching the King himself, ſhall be in † no wife reple. For by the Common Law a Man accused or indicted of High Treason, or of any Felony whatſoever, was baiſable upon good Surity; for at the Common Law the Goid was his Pledge or Surity that could find none. And this appears by Clerke, who fays, is qui sucurrunt, ut præditimus per Plegios falvos & fecuros in re praecipua, ut sub Plegios non habuerint, in Carcerem detruui; so as a Man by the Common Law was baiſable for any Offence until he were convicted; and this ſeemeth to be the old Law of the Land before the Conquett, viz. Ingenious quiſque fidudiores, qui enim (fi quando in crimen vocetur) juis fuum cuique tribuoiam guarum prætium fore prætent, idemuis adhibit. 2 Inf. 189.

That is, the Sheriff ſhall not repley them by the Common Writ de Homine Replegando; nor without Writ, that is, Ex Officie; but all or any of these may be baiſed in the King's Bench &c. 2 Inf. 189.

4. But ſuch as be indicted of Larceny by * Inquests taken before She. This Act divides Lar- ceny into two Kinds, Lar- ceny which amounted not above the Value of 12 d. if they were not guilty of some other Larceny of another time, or guilty of Receipt of Felons, or of Commandment or Force, viz. Grand or of Aid in Felony done, or guilty of some other Trepass for which one ought not to lie Life nor Member, and a Man appealed by a Prover after the Death of the Prover (if he be no common Thief nor defamed) shall from henceforth be + let out by fufficient Surity, whereof the Sherif ſhall be anfwerable, and that without § giving aught of their Goods.

and Petit Larceny is, when it is of the Value of 12 d. or under, and the Things stolen be rea- sonably valued, for the Ounce of Silver, at the making of this Act, was at the Value of 20 d. and now it is of the Value of 5 s. and above. 2 Inf. 189, 190.

* That
Bail.

That is, or Sheriffs in their Journeys, or Lords in their Leets, or thole that have Inflag-Thief, and Outflag-Thief &c. 2 Inst. 190.

That is to be understood where the Indictment was taken before the Sheriff in his Town, for where he was Judge of the Cause, for other Prisoners could not be bailed without Writ; and if the seript having insufficient Surety offered to him, refused to bail him, he should have a Writ De Manu-
capitione directed to the Sheriff to take Pledges of him; and if the Bailiff of a Hundred (which is intend-
ed of a Steward in a Leet) refused to take Pledges of one indicted before him, the Prisoner should have had a Writ De Manu-
capitione to the Sheriff to take Pledges of him; and all this appears by the Writ De Manu-
capitione. But since this time this Writ of Manu-
capitione is taken away by the Statute of 28 E. 3. 2 Inst. 190.

* For neither the Sheriff, nor this time of the King's Officers could do any thing for doing his Office.

2 Inst. 190.

So as at this Time there were Sheriffs in Fee, and Contables and Bailiffs in Fee, which had the keeping of Prisoners; these being attained of letting to Bail of any Prisoner not bailable, should lose the Fee and Bailiff for ever; and upon Office found, the King should have the Inheritance of the Office in him to be grantable over. 2 Inst. 190.

* Note, the Act of the Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping for Prisoners, do it contrary to the Will of his Lord, or any other Bailiff being not of Fee, they shall have three Years' Imprisonment, and make Fine at the King's Pleasure.

Par. 6. And if the * Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping for Prisoners, do it contrary to the Will of his Lord, or any other Bailiff being not of Fee, they shall have three Years' Imprisonment, and make Fine at the King's Pleasure.

Par. 5. And if the Sheriff or any other let any go at large by Surety, that is not reposeable * if he be Sheriff, or Constable, or any other Bailiff of Fee which has keeping of Prisoners, and thereby be attainted, he shall lose his Fee and Office for ever.

Par. 7. And if any * with-hold Prisoners releivable, after that they have offered sufficient Surety, he shall pay a grievous Amusement to the King.

Par. 8. And if he takes any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall be in the Great Mercy of the King.

Upon an As-
sembley of all the Justices of the Exchequer at Serjeants' Inn in Fleetstreet, this Term it was resolved by them, and so agreed to be hereafter put in Execution in all Circuits; That if a Man taken for Felony be examined by a Justice of Peace, it appeareth that the Felon is not bailable by the Law, and yet the Justices commit him to Goal but as upon Supicion of Felony, not making mention for any Cause for which he is not bailable, whereby he is brought before another Justice or Peace, not knowing of any Matter why he ought not to be bailed, whereupon they bail him, these Justices ought to be fined by the Statute of 1 & 2 Ph. & Ma. for they offend if they bail him, who by the Statute of Welm. 1. is not bailable, and therefore they at their Peril ought so to inform themselves, before the Bail taken, of the Matter, that they may be well satisfied that such a one is bailable by Law; and therefore observe well the Statute of Welm. 1. cap. 18. who is bailable and who is not by the Law. Poph. 56. pl. 1. Trin. 57 Eliz. 2 Hawk. Pl. C. 90. cap. 15. S. 12. S. P. and cites S. C.—— And. Ibid. S. 15. says, that the Offence of denying or obstructing Bail, where it ought to be granted, seems to be a Misdemeanor not only by the Statute, but also by the Common Law, and punishable thereby as an Offence against the Liberty of the Subject, not only by Action at the Suit of the Party wrongfully imprisoned, but also by In-
dictment at the Suit of the King. But Ibid. S. 14. says, it seems clear, that he who has his Power to call another is not bound to demand of him to find Sureties, and to forbear committing him till he shall refuse to find them, but may well justify his Commitment, unless the Party himself shall offer his Sureties.

For more as to this Statute see the Division of, Bail in Criminal Cases.
(E) By the Statute 23 H. 6.

Par. 1. —THE King considering the great Perjury, Extortion, and
Oppression which be, and have been in this Realm by his Shoe-lands' Cafe, riiffs, Under-Sheriffs, and their Clerks, Coroners, Stewards of Franchises, Per Cur this Bailiffs, and Keepers of Prisons, and other Officers in divers Counties of this Realm, has ordained by Authority aforesaid, in empowering of all such Extortion, Perjury and Oppression, that no Sheriff shall let to Farm in any riffs, but Manner his County, nor any of his Bailwicks, Hundreds, nor Wapen-
takes.

cites it as held so 3 Mar. Dryer 119. a. [Thrower v. Whetstone] —Bir Lty 126 Mich. 14 Car. 2. B. R. it was' said by Twilid, that it was held a Roll and Gyin when they were Chief Justices, that this Statute was a general Law of which the King's Court ought to take Notice, without pleading of it. —Hale Ch. J held, that this Statute was a general Law. 2 Lev. 103, 104 Pach. 26 Car. 2. B. R in the Case of Oaky v. Sell. — 3 Keb. 561. pl. 56. Oakes v. Cell. S. C. & S. P. held per Cur. accordingly. —Mod. 111. pl. 6 Wild said, that a Sheriff's Bond for Eafe and Favour was held at Common Law, and that so it was declared in Sir John Lenthall's Cafe.

It seems that Debt lies upon this Statute against the Sheriff, for letting to farm his County to his Under-Sheriff, excepting only one Hundred, if such Fae be by Deed. See Br. Grants; pl. 59. cites 21 H. 7. 56.

Par. 2. —Nor that any of the said Officers and Ministers by Occasion, or W. being Prisoner in Under Colour of their Office, shall take any other Thing by them, nor by a-
ny other Person to their Use, Profit, or Aid, of any Person, by them or any of them, to be arrested or attached, nor of none other for them, for the Ulag, in omitting of any Arrest or Attachment to be made by their Body, or of any Denoue, T. Person by them, or any of them by Force or Colour of their Office arrested or 30 took an O-attachment for Fine, Fee, Suit of Prison, Mainprize, letting to Bail, or fence-
ing any Eafe or Favour to any such Person so arrested, or to be arrested, for their * Reward or Profit, but such as follows; that is to say, for the Sher-riiff 220 d. the Bailiff which makes the Arrest or Attachment 4 d. and the Gaoler, if the Prisoner be committed to his Wards 4 d.

charge his Fees, and to render his Body at any Time upon a Summons &c. And in a Debt brought upon the Obligation against one of the Sureties, he pleaded the Conditions performed, upon which the Plaintiff demurs, and holds an infulent Plea. D. 118. b. pl. 1. Mich. 3 Mary Thrower v. Whetstone.


In *Affirmative, the Plaintiff declared, that whereas he had taken the Body of H. in Execution at the Suit of J. S. by Virtue of a Warrant to him directed as spectally Bally, the Defendant in Consideration that he would permit him to go at large, promised to pay the Plaintiff all the Money in which H. was condemned; it was the Opinion of the Court that this Consideration was not good, being contrary to the Statute. Cro. E. 199. pl. 22. Mich. 52 & 1 Eliz. B. R. Perkerstone v. Hurchin.

An Information was exhibited against J. Under Sheriff to Sir G. P. Sheriff of York, upon the Statute 23 H. 6. and it was shown, that he being Under-Sheriff, a Ca. Sa. was delivered to him to arrest the F. L. upon a Judgment for 103 l. the Defendant Clare Office took of the Plaintiff 50 l. for making of a Warrant upon this Writ against the Form of the Statute, whereby he hath forfeited 40 l. The Lord Hobart inclined that this making the Warrant upon the Ca. Sa. and the taking of 50 s. is within this Statute, and he referred it to §Bar and Stanningham's Cafe in Plowden, where an Obligation taken of one Execution is void by this Statute; the Client in this Statute for the Obligation is absolute, without any Reliance, but that all Obligations taken by Colour of his Office, with any other Conditions are made void. [The Book says further, viz. This taking of 50 s. for making of a Warrant upon a Ca. Sa. is Exortion at the Common Law, for which he may be indicted, but whether it be within this Statute or no, is doubtful. Hunt 70. Mich. 21 Jac. Lingley's Cafe.

Debt on a Sheriff's Bond, at the Defendant shall be a true Perjury: the Defendant without Pleading it was pleaded that he was in Execution for Debt, and that the Bond was given for Eafe and Favour, and to obtain his Liberty without fittising the Plaintiff in that Action; upon Denunver it was held by the Ch. J. that the Statute 23 H. 6. is a General Law, of which this Court must take Notice, without pleading it; but if it was not, yet the Bond is void at Common Law, fed admissi- tur. 2 Lev. 105 Pach. 26 Car. 2. B. R. Okey v. Sell. — 3 Keb. 520. pl. 8. Oake v. Cell. S. C. 5 Y

adjor-
Par. 5. And that the said Sheriffs, and all other Officers and Ministers aforesaid, shall let out of Prison all Manner of Persons by them, or any of them arrested, or being in their Custody by Force of any Writ, Bill, or Warrant, in any Action Personal, or by Cause of Indictment by Trelpass, upon reasonable Sureties of sufficient Persons, having sufficient within the Counties where such Persons be to Bail or Mainprise, to keep their Days in such Place as the said Writs, Bills, or Warrants shall require.

Par. 6. (Such Persons which be, or shall be in their Ward by Condemnation, Execution, Capias Ulatagam, or Excommunica, Security of the Peace, and all such Persons which be, or shall be committed to Ward by special Commandment of any Justices, and Vagabonds refusing to serve according to the Form of the Statute of Labourers, only excepted.)

One who was taken for Snuffion of Felony was bound in a single Obligation to the Sheriff, which had no Condition, nor was the Sheriff named Sheriff therein, and because in this Case he is imprisoned Colore Officis, the Sheriff being to keep Felons in Ward, and he was Mainpennable therefore by Failure of the Condition, and of the Word (Sheriff) the Justices held the Obligation void by this Statute. Br. Obligation, pl. 57. cites 37; H. 6. 1. — Br. Dette, pl. 115. cites S. C.

In Debt or a Bail Bond, Plaintiffs declared generally as upon other Bonds, (viz.) that the Defendant bound himself to them in so much Money, without paying per Nomina Viccinum civilis London, as usual. The Defendant prayed Oyer generally of the Bond and Condition, and made the Entry in the usual Form, (viz.) Petit Auditem Scripti Obligatorii Predecuri et ei legituri &c. petit etiam auditum Conditionis scripti illius, &c. et legitur in haec Verba. Then he pleaded the Statute 25 H. 6. against Sheriff's Bonds &c. and sets forth an Arreft &c. and that this Bond was taken for Eafe and Favour. The Plaintiffs perceiving their Miflake of omitting per Nomina Viccom, entered upon the Record the Defendants praying Oyer of the Bond &c. and then they set forth the Bond as well as the Condition thereof, &c. petit quod Scripta Prædicta irrotundam, & irrotulatam in haec Verba; by which it appeared, that it was taken by them, by the Name of Sheriff of the City of London, in express Words as usual. Then they reply and confess that they were Sheriffs of London &c. and the Arreft &c. and the Bond was taken within Nomina Vic Civitat' London sub Conditione Prædicta, to discharge the Party from the Arreft, abique hoc, that it was taken for Eafe and Favour; and upon a Demurrer to this Replication, it was held Br. that notwithstanding the Defendant had entered the Oyer of the Bond with &c. only, (viz.) &c. et legitur &c. yet the Plaintiff might enter it large on the Record, and by so doing he had avoided the Defendant's Plea of the Statute, because now it appeared on Record, that the Bond was taken by the Plaintiffs by the Name of Sheriffs &c. and that the Variance between the Bond and the Declaration was not material; neither was it any Departure in the Replication to say, it was taken by them per Nomina Vic'; to the Plaintiffs had Judgment. Carth. 501, 502. Pash. 6 W & M. in B. R. Abney and Hedegh Sheriffs of London v. White.

It is a good Par. 8. And if any of the said Sheriffs, or other Officers or Ministers aforesaid, take any Obligation in other Form by Colour of their Offices, that the Bond is void.
Bail.

If a Sheriff takes a Bond for a Debt, or also for a Due Debt, the whole Bond is void; for the Letter of the Statute is so; Per Cur. Hob. 14 Trin. 12. Jac. in Case of Norton v. Simms.

The Common Law was very rigorous as to the Execution of Process; the Capias was In quod habeas the Body at the Day of the Return, and if the Sheriff had arrested one, it had been an Escape to let him go. Before the making of this Statute the Sheriff usually took Sureties for the Appearance of the Prisoner, and by this Means used great Extortion, and took great Sums of Money; to prevent which Mischiefs this Statute was made, and so designed; 11th. for the Ease of the Prisoner, the Sheriff being now compellable to take Security, which he was not obliged to do before. 2dly. To prevent Extortion, and therefore directs that a Bond shall be taken in such Manner, and with such Conditions as is therein mentioned; Per North Ch. J. 2 Mod. 185. Trin. 28 & 29. B. R. in Case of Ellis v. Yarborough.

Par. 9. And that he shall take no more for the making of any such Obliga- An Ob- tion, Warrant, or Precept by them to be made, but 4d. ligation made to a Deputy of a Bailiff of a Franchise, or to an Under-Sheriff's Deputy, is void, by 25 H. 6. for it ought to be in the Name of the Bailiff or Sheriff himself. Nov. 69. Tavernor's Case.

Par. 10. And also that every of the said Sheriffs shall make yearly a De- puty in the King's Courts, of his Chancery, the King's Bench, the Common Pleas, and in the Exchequer, of Record, before that they shall return any Writs to receive all manner of Writs and Warrants to be delivered to them.

Par. 11. And that all Sheriffs, Under-sheriffs, Clerks, Bailiffs, Gaolers, Coroners, Stewards, Bailiffs of Franchises, or any other Officers or Ministers which do contrary to this Ordinance in any Part of the same, shall lose to the Party in this Behalf undamaged or grieved, his treble Damages.

Par. 12. And shall forfeit the Sum of 40 l. at every Time that they or any of them do the contrary thereat; in any Part of the same, whereas the King shall have the one Half, to be employed to the Use of his House, and in no otherwise, and the Party, that will sue, the other Half.

Debt was brought in London by a common Informer on this Statute against a Bailiff, for taking 5 s. 6 d. for Arrest on a Bond. After Verdict for the Plaintiff it was moved, that it ought to be brought in the proper County by the Statute 21 Jac. cap. 4. or otherwife that Statute will be avoided, the Offence in this Case being committed in Buckinghamshire; and said that it was so adjudged Pech. 27. Car. 2. in Case of Nichols v. Cockerill; fed adjournat. 5 Mod. 225. Trin. 8 W. 5. Newman v. Lun. —— Comb. 370. Newman v. Lun. S. Holt Ch. J. said it was adjudged in the Case of Barnes v. Eves, that Debt lies in this Court, and that it was since so adjudged in the Exchequer; that indeed my Ld. Hale adjudged it otherwise in Nichol's Case, and said that it is not yet settled. Et adjournatur.

Par. 13. And that the Justices of Affiles in their Sessions, Justices of the one Bench and of the other, and Justices of Peace in their County, shall have Power to inquire, hear, and determine of Office without special Commission, and upon all them that do contrary to these Ordinances in any Article or Point of the same.

Par. 14. And if the said Sheriffs return upon any Person, Capri Corpus, see Tit. or Reddick it, that they shall be chargeable to have the Bodies of the Return (R) said Persons at the Days of the Returns of the said Writs, Bills, or Warrants, in such Form as they were before the making of this Act.

S. 2. Provided always, that the Warden of the King's Gaol of the Fleet, and of the King's Palace of Westminster for the Time being, shall not be endangered nor prejudiced by this Ordinance in the Duty of his Office.

For more as to this Statute, see Letter (F) and several other Divisions under this Head.

(F) Secu-
(F) Securities given to Officers. Good or not by the Statute of H. 6. &c.

1. The Sheriff took a Bond of the Defendant, being in Custody, to appear on such a Day in B. R. and also adivine & ibidem ad respondenda the Plaintiff in plazo Transgressivus &c. It was objected that the Statute 23 H. 6. requires only a Bond for Appearance, and not to answer the Plaintiff in a Plea of Trespass, which is another Thing, and therefore the Bond must be void; but adjudged that the Bond was good, for there was nothing in it but what was comprised in the Writ; for that was to command the Sheriff quod habeat Corpus of the Defendant &c. such a Day ad Respondendum to the Plaintiff. Godsb. 136. pl. 160. Pach. 23 Eliz. Anon.

The Condition was as here, and the Defendant pleaded the Statute, and the Bond was adjudged void. Cro. E. 6:2. pl. 31. Pach. 42 Eliz. C. B. Scryven v. Dyther. But where one was arrested upon a Latitat, and gave a Bond conditioned personally to appear, it was resolved that in regard his Appearance was necessary to put in Special Bail, if the Party requires it, the Bond was therefore good, and that it was ruled between Woolverton and Seekford; and of that Opinion was the Court here, but they would advise. Cro. E. 176. pl. 7. Mich. 42 & 43 Eliz. B. R. Bolles v. Hewitt.

2. The Condition of a Bond to the Sheriff, on Arrest on a Latitat, was, That if the Defendant personally appear in B. R. at Wellminster, and there to answer &c. It was moved that this differ'd from the Form in the Statute, and therefore void; but as to the Word (Personably) the Justices held it Surplusage, and well enough, notwithstanding that because as the Case is, the Appearance of the Defendant ought to be in Person upon a Latitat, for he is supposed to be in Custodia Marechiali, and so it has been adjudged in C. B. where the Appearance of the Party arrested is de Jure Personall &c. Contra where Personal Appearance is not requisite. And as to the other Words (there to answer,) Wray put a Difference that in such Case the Bond is well enough; for it is in Effect only, that he shall appear in Animo ut respondet; but if the Words had been (appear and answer) it is a void Condition; for it may be the Plaintiff will never declare against him, but Gawdy and Ayliff J. e contra, and held the Bond void by reason of the Words aforesaid, but would not give Judgment against the Plaintiff; but Ex Gratia Curia suffer'd him to discontinue. 2 Le. 78. pl. 103. Pach. 26 Eliz. Seekford v. Eliz. Wolverton.

3. A Man was bound to his Creditor, who was not Sheriff nor Sheriff's Officer, to appear at his Suit in B. R. on such a Day, and then and there make Answer &c. but did not appear. All the Judges agreed clearly, that this Bond was not within the Statute 23 H. 6. and gave Judgment for the Plaintiff accordingly. Goldsb. 66. pl. 9. Mich. 29 & 30 Eliz. Raven v. Stockdale.

4. Debt on a Bond to a Sheriff, that if the Defendant did personally appear in B. R. &c. that then &c. The Defendant pleaded that he was taken by a Latitat by the Plaintiff (Sheriff,) who took this Obligation for his Deliverance, and that the Obligation was not according to the Statute. All the Justices, except Anderson, (who was absent) held that if it were in such an Action where a Man may appear by Attorney, it is void. At another Day it was held by three Judges against Anderson Ch. J. that a Man ought to appear in Person upon a Latitat. Ow. 90. Hill 29 Eliz. Laffell's Cafe.

Goldsb. 54. pl. 6. S. C. adnotatur. — Ibid. 61. pl. 20. S. C. Anderson held the Obligation void, because there is an express Form limited by the Statute, and this varying from the Form in Substance, it void; for in his Opinion he excludes the Party from his Advantage given him by the Statute. But all the other Justices held Opinion against him; for they said that a Man ought to appear in proper Person upon a Latitat; which Anderson
Bail.

453

for

'Ibid.

and

2

been

Blackett

alleged

nor

that

be

because that relates only to should ap-

those whose Bodies are taken and imprison'd, and not where their Goods

are attach'd; and Judgment accordingly. And. 267. pl. 274. Trin. 33


Ailion with Effet against J. S. for wrongfully taking and retaining his Cattle &c. and to make Return thereof, if a Return should be adjudged by Law, and also shall indemnify the Sheriff &c. The Defendant pleaded that this Bond was cleared Colero Office, and not warranted by the Statute; for the Condition was to indemnify the Sheriff. Upon Demurrer it was held good per tot. Cur. because the Condition was according to the usual Practice. Law, 686. Mich. 9 W. 5. Blackett v. Crilop.

6. In Debt upon Bond, the Defendant pleaded that the Plaintiff was Cro. E. 562. Sheriff, and took the Bond upon Arrest for the Intalengent of the Prisoner, pl. 58 S. C. The Statute is that Obliga-
tions taken in any other Form, than is there pre-
fer'd, shall be void for this Cause; and the first is, that it be made to the Sheriff himself; 2dly, That it be made by the Name of his Office; 3dly. That it be only for Appearance at the Day; but here the Suficiency of the Surety is Matter, and not Form, wherefore it was adjudged for the Plaintiff. — 2 And. 175. pl. 97. S. C. & S. P. held accordingly by 2 Justices; but the Reporter lays Nota the Cafe supra, and quere.

7. The Sheriff took a Bond to appear at Westminster. The Term was In the Re-

adjourn'd to St. Albans's, and the Defendant appear'd there. The Bond is a Quere, not forfeited; but Popham Ch. J. was of Opinion that the Bond was void, because of the Word (Westminster) in the Condition; for there is no such Whether the Name in the Writ for Appearance. Mo. 430. pl. 601. Hill. 38 Eliz. Bond had been forfeited; and it had appeared at Westminster, and not at St. Albans's. Ibid. — Cro E. 466. (b) pl. 16. Hill. 38 Eliz. H. R. Corbet v. Cook, S. P. and seems to be S. C. and it was held that the Obligation shall always relate to the Day and Place comprised in the Writ, because that shall have Regard to the Adjournment; and yet if the Term be adjourned he ought to appear in B.R. or otherwise shall forfeit his bond.

8. A Sheriff brought Debt upon Bond condition'd, that if H. L. should Cro E. 656. Personally appear before the Queen's Majesty and her Council of her Court of Requets &c. forthwith to answer all Contempts as shall be then laid to his Charge, that then &c. The Defendant pleaded the Statute 23 H. 6. and Ander-

son that the Sheriff Colero Precepti under the Seal of the Queen of the and Glo-

r of Requets, took and imprison'd the said H. L. and detain'd him till the Defendant and the said H. L. become bound as aforesaid. And upon Demurrer it was adjudged for the Defendant, because the Bond is void by that Statute. 2 And. 122. pl. 66. Mich. 40 & 41 Eliz. Step-

neth v. Loyd.

nor the body, nor the Obligation; for that Court had no Power by the Statute, nor by the Common Law, and tho' it was alleged that this Obligation is within the Statute. In regard the Sheriff took it Colero Office, although he was not lawfully in Custody, it was notwithstanding adjudged for the Defendant, and they held that the Statute intends only Obligations taken by [of] such as are in their Custody by the Course of Law, and
9. In Case the Plaintiff declared that he sued forth a Latitum, and delivered it to the Sheriff to arrest J. S. and acquainted the Sheriff of his Cause of Action, and that he intended to declare in Debt, and that he did arrest him, and afterwards let him go, ab ipse aliqua Securitate inventa; and at the Day returned Capit corpus & paratum habeo &c. which was false &c. The Defendant pleaded that J. S. being arrested, put in Sureties for his Appearance J. N. and J. D. two sufficient Persons in the Country, who were bound to him in 40l. &c. and pleaded the Statute, and that by reason thereof he let him at large, abique hoc that he let him at large without any Security found, pront &c. Adjudged that the Traverfe was good, and that the Statute commands him to let the Prisoner go upon Bail, and he is compelled to take Bail, but their Sufficiency is left to his Discretion; and tho' the Return was false, viz. Paratum habeo, when he was at large, yet that is but a Contempt to the Court, and finable; but the Party shall take no Advantage of such Return. Cro. E. 624. pl. 5. Mich. 40 & 41 Eliz. B. R. Barron v. Aldworth.

10. Debt upon Bond of 40l. the Defendant pleaded the Statute 23 H. 6. that he was arrested at the Suit of J. S. and that he together with one M. gave this Bond for his Appearance, when neither of them had any Thing in the County, or were Inhabitants therein, and to the Bond void; but all the Court held that it was good, for the Statute doth not make any Bonds void, but those which oppose the People, and if the Sheriff takes Bond with one Surety it is good enough. Cro. Eliz. 852. Mich. 43 & 44 Eliz. B. R. Blackbourne v. Michaelbourne.

11. In an Action of Debt upon an Obligation dated 25th Sept. the Defendant pleads that Ca. Sa. was awarded against B. who was taken upon it the 30th of Sept. and that Obligation was made for the Enlargement of B. The Plaintiff demurred, and had Judgment, because it appears that the Obligation was made before the Arrest, and therefore it could not be avoided by 23 H. 6. cap. 10. but he ought to have pleaded it with a Primo deliberato after the Arrest; and it was agreed by Yelverton and Fenner, that if a Capias be awarded against B. and before the Arrest the Sheriff takes an Obligation of him for his Enlargement when he shall be arrested, that by special Pleading it may be avoided by 23 H. 6. Noy. 43. Collins v. Phillips.

12. A Capias was directed to the Sheriff to arrest G. R. to answer the Plaintiff in Placito Debiti of 300l. the Condition of the Bond of Appearance was to answer the Plaintiff in Placito Debiti only, (leaving out the 350l.) upon an Action of Debt brought by the Sheriff on this Bond, and a Demurrer, it was adjudged, that the Bond and Condition was good, for the Statute 23 H. 6. does not prescribe any strict Form, but that it ought to be made to the Sheriff by his Name of Office, and to express the Day and Place of the Appearance, and tho' it vary in other Circumstances, it is not material, neither doth the Statute restrain him to any Sum or Security, tho' generally 40l. hath been held sufficient to excuse him for an Escape, yet that is left to his Discretion. Cro. J. 286. pl. 2. Mich. 9 Jac. B. R. Villiers v. Hattings.

13. Upon a Fieri Facias the Sheriff took a Bond to pay the Money in Court at the Return of the Writ, and this was adjudged good, for the Statute extends only to such Bonds, which are made when the Defendant is in Custody. 10 Rep. 99. b. Mich. 10 Jac. Bewlage's Cafe.

14. A Bond was made to Neale who was Sheriff of Warwickshire, and it was Vicecomiti Com. Prediff., and Warwick was in the Margin; Per Doderidge, this was held no good Bond, for he ought to be named Sheriff, and of that County. 2 Roll Rep. 365. Trin. 21 Jac. B. R. Neale v. Cowper.

15. In
15. In Debt upon a Sheriff's Bond for an Appearance, the Name of the County was wrote in the Margin, and the Bond was made to N. Vic. in Cont. perdit. &c. instead of perdit. The Court held that this was not a good Bond, because it did not appear to whom it was made; for it does not appear that N. was Sheriff of the County; for perdit. is not perdit.; but it it be taken, yet there is no County named before, and the Bond ought to be made to the Sheriff, who should be named as Sheriff, and of what County. Palm. 378. Trin. 21 Jac. B. R. Noel v. Cooper.

16. Debt on a Bond of 2013. The Defendant pleaded the Statute 26 H. 6. and that the Plaintiff was a Sergeant at Arms attending on the Council of the Marches of Wales, and took the Bond under Colour of an Attachment out of the said Court, and so void. It was intifed for the Plaintiff that he was not an Officer intended by the Statute, which extends only to Sheriffs, Bailiffs, and other Ministers, and Keepers of Prisons; besides the Council is a Court of a later Erection, and the Court seem'd to be of that Opinion; but because the Plaintiff made the Arrest out of the Marches, viz. in London, which is out of the Jurisdiction, therefore this Obligation is out of the Statute, and so Judgment for the Plaintiff. Cro. C. 399. pl. 10. Parch. 9 Car. B. R. Johns v. Stratford.

17. A Bond given to appear upon an Attachment out of Chancery is void. In Debt on the Statute 25 H. 6. Per Roll Ch. J. Sty. 234. Mich. 1659. Burton a Sheriff's Bond, the Defendant pleaded the Statute of 25 H. 6. and that an Attachment issued out of Chancery against him, by which the Plaintiff (then Sheriff) was commanded to have the Defendant come Regis in Commissary pro gesto. Parch. whereunto & c. virtue cuius the Defendant was taken and detained, till he gave the Bond and Condition pro Enfaimamento & Favoire, which the Plaintiff took Colore Officij, and to void the Statute; upon Demurrer it was intifed for the Defendant, that an Attachment out of the Chancery was not within the Words of the Statute; but the Court inclined that Attachments out of Chancery were within the Statute, and that it was the constant Practice for Sheriffs to take Bail in such Cases; then it was objected, that the Hid was the for the Defendant to appear come Regis in Commissaria &c. &c. and the Condition of the Bond was to appear come Regis in Commissaria &c. and Hid. instead of according as the Writ is, but it was held that the such Bonds have been held void, yet of late the Courts have not been so strict upon the Words of the Conditions. 2 Vent. 257. Mich. 2 W. & M in C. B. Lawton v. Haddock.

18: It was questioned heretofore, if a Sergeant at Arms of Wales were within the Statute; but it has been since raled that he is not; Per Roll Ch. J. Sty. 234. Mich. 1659. in Cafe of Burton v. Low.

19. Sufficiency of Bail taken by the Sheriff is not traversable; for the Sid 96 pl. Bail is only for the Sheriff's Security to save him from Amertements; for the 28 S. C. held that neither the Place where the Bail was taken, nor the Sheriff's Intention to deceive the Plaintiff is his Debts, by taking of insufficient Bail, as alleged is not traversable.

The Sufficiency of the Bail is not material, it is only for the Sheriff's own security. If he takes no Bail at all an Action lies against him, for then he does not do by Colour of this Law; Per Cor. and by Atkins, the Statute is not advantageous to the Plaintiff at all, unless the Sheriff lets go the Prisoner without taking any Bail, and then he must render treble Damages. Mod. 288, 289 pl. 17 Trin. 28 Car. 2. C. B. in Cafe of Ellis v. Yarborough. — 2 Mod. 177 S. C. and Judgment per tot. Car. for the Defendant, and if the Sheriff takes Bail, and the Defendant does not appear, the Sheriff is no otherwise chargeable than by Amertements.

20. Debt upon Bond by the Marshal of B. R. conditioned that if A. P. Lev. 254. S. a Prisoner in B. R. continues a Prisoner, and in the same Custody of the Plaintiff, or of his Deputy &c. until he should be discharged lawfully &c. The Traverse of Defendant pleaded the Statute 23 H. 6. cap. 10. that he, together with the E. & F. and he said P. then a Prisoner in Execution, made the Obligation pro Eject. in the most Ma-
Bail.

ment &c. Plaintiff replied, that the Bond was given pro meliori Securitate of the Plaintiff, that P. should not escape, and traversed the Cafe and Favour. Upon Demurrer it was argued, that the Plaintiff having taken this Bond of his Prisoner was now secure, tho' he should escape, and by Consequence the Bond was taken pro Eamemento &c. Plaintiff; on the other Side it was said, that a Bond with such Condition made to a Stranger without the Marshal's Privity had been good, and it does not appear that this was by any Agreement with the Marshal, but the contrary; for he traversed it in his Replication, and the Defendant by his Demurrer hath confiest the Replication to be true, and so it appears upon the Record that this Bond was for a lawful Intent, and not pro Eamemento &c. Favour. It was adjudged accordingly. 1 Sand. 161. Mich. 20 Car. 2. Lenthall v. Cook.

Sid. 456. pl. 21. Debt upon a Sheriff's Bond. The Defendant pleaded the Statute, and took an Exception to the Condition of the Bond, which was that if the said M. appear &c. then the Condition of this Obligation shall be void &c. whereas it should be, then this Obligation shall be void &c. For if M. had appear'd at the Return of the Writ, yet the Bond would remain in Force, it being said the Condition should be void, and so the Bond would be single, and therefore void; for the Statute expressly requires that there shall be a Condition; but it was resolved by the Court that the Bond was well enough; for these absurd Words at the End of the Condition shall not be regarded, especially since it appears in the Beginning that the Condition was for the Appearance of M. which is all the Statute requires, and the Bond and Condition is sufficient if all that Claufe had been left out. 2 Saund. 78. Pasch. 22 Car. 2. Maleverer v. Hawksby.

Vent. 51. S. C. but S. P. does not appear.

22. The Defendant was arrested upon a Latitas, and gave Bond to the Sheriff for his Appearance ad respondendum quern' in placo debiti. The Question was, whether this Bond was void by the Statute of 23 H. 6. 10. because made for another Thing than contained in the Writ, which is only de placo Transferr', and the Act etiam Bille is only to give the Defendant Notice, that the Plaintiff will declare against him for it when he appears, and the Bill does not come in till after Appearance. All held the Bond to be void, because it varied clearly from the Writ. Freem. Rep. 105. pl. 123. Pasch. 1673. B. R. Mildmay v. Cox.

23. Debt upon a Sheriff's Bond. A Man was arrested upon a Latitas in placo Transferrerit, ac etiam Bille pro debito 40 l. The Condition was to appear at the Return of the Writ, to answer the Plaintiff in placo debiti. It was urged that this made the Bond void by the Statute 23 H. 6. For the Condition should have been to answer the Action upon which the Process went out, and that was but an Action of Trespafs; and the adding the Act etiam pro Debito &c. is but to satisfy the late Act for the Direction of the Sheriff to what Value he should take Bail; so this
this is a material Variance from the Statute, and not like some of thofe
Form
mentioned in Beauleage's Cafe, and in Dyer 364. and to this the Courte
is not inclined. 1 Vent. 233. Hill. 24 & 25 Car. 2. B. R. Mildmay v.
this
the
Condition
was to answer
F. &c. in Placito Transf' of 100 l. and the Writ was in Placito Transf' ac etiam Billa pro 100 l. de Debito
Sed per Cartam, the Statute doth not prescribe any particular Form, the Intention of it being to
suppress Evictions and Oppriffions by Sheriffs, therefore if the Bond is made in his Name of Office, and if the
Term and Place of Appearance is mentioned in the Condition, and at excep. Suit, it is well enough. 2 Jo.
137, Hill. 51 & 52 Car. 2. B. R. Cadwell v. Dunkin.——Raym. 220 S. C. and it seemed to Hale Ch.
J. that it is not the fame Writ mentioned in the Condition, and therefore for the Defendant, but it was
adjudg'd. ——- A. 111. pl. 18. S. C. adjudged for the Defendant Niff.——- Ibid. 164. pl. 40. S.
C. and per Car. the Writ being in Placito Transfregiellionis, the Condition of the Bond to answer ac etiam
Bills of 100 l. in Placito Debiti, is void being another Writ, but if the Writ were in Placito debiti, or
the Bond taken only to answer the Writ in Placito Transfregiellionis, it were well enough, and a Nil
Capit per Billam was awarded.

24. Debt upon a Bond to the Sheriff, which was Noveltim Universi &c. nos W. W. and T. R. de Com. Cambria teneri J. K. Vicecomes, without saying Cambria or Com. pred', ad respondendum the Plaintiff generally, without saying in what Actio. The Defendant pleaded the Statue. The Plaintiff demurred. Hale and the Court held this Bond good, for tho' the Statue directs the Bond to be taken by the Name of his Office, yet the Bail being named de Com. Cambria, he shall be intended Sheriff of that County; and tho' it is said ad respondendum generally, and the Latitat is in Placito Transfregiellionis, yet that is good; for no other Actio shall be intended; besides, the Words of the Statute require no more than an Appearance, and no Words ad respondendum, to these Words are only Surplusage. 2 Lev. 123. Hill. 26 & 27 Car. 2. B. R. Kirkebridge v. Willon.

25. In Debt upon Bond, conditioned to appear before his Majesty at Westminster, to answer A. of a Plea of Trespass, and also of a Bill to be exhibit-
ed against him for 100 l. The Defendant pleads the Statute of 23 H. 6. 522. 528. Patch. 2
S. C. cited
Geo. 1. B. R.
and shews that the Writ was to appear coram Dom. Rege at Westminster &c Plaintiff demurs; and upon Argument the Opinion of the Court was against the Plaintiff; 1st. Because the Condition of the Obligation was to appear before his Majesty, whereas it ought to have been Coram Dom. Rege. 2dly. Because it is not said in the Condition to whose Bail he was, viz. in is to answer, whereas it is said to have been a Bill ipfius A. 2 Lev. 177.
Mich. 28 Car. 2. B. R. Moor v. Finch.

upon Oyer was, that if the Defendant did appear &c. ad respondendum, Prost' J. R. de Placito Transf' ac etiam Billa. The Defendant pleads the Statute 23 H. 6. 522. 528. about Sheriff's Bonds; Plaintiff demurs; for the Defendant in Demurrer it was infifted, that the Condition of the Bond carried from the Writ. The Writ was, ad respondendum. Prost' J. R. de Placito Transfrigellionis &c. ac etiam Billa ipfius J. which Words (ipfius J.) are omitted in the Condition of the Bond. Parker Ch. J. said, the Statute only requires that the Sheriff should take a Bond, conditioned for the Appearance of the Party such a Duty at Westminster, and does not say even to answer the Plaintiff. The Appearance mentioned is a Personal Ap-
pearance. The Act etiam Bills goes only to the Matter of Bail, whether Common or Special is to be required, and came in Utter after the Statue. If the whole Writ might be omitted, as certainly it may, since the Statute does not require it, then any Part of it may be so likewise, nor does this Bond vary from the Form preferred by the Statue. It is the Party appear, he is bound to answer any Bill that shall be filed against him. The Bill in the Condition of the Bond cannot be intended of any other than the Bill of the Plaintiff, and the rest being of the same Opinion, Judgment nil pro Quo'.

26. Debt upon Bond made to the Sheriff, the Condition was, to appear before the Judges of the King's Bench at Westminster, and did not say before the Justices ad Placita coram nobis tenenda ubique &c. but in every thing else it was pursuant to the Statute. The Defendant pleaded the Stat. 23 H. 6. and upon Demurrer it was objected, that this was a ma-
terial Variance, for the Appearance ought to be in Court; but by the Condition of this Bond the Appearance may be elsewhere; besides, co-

a 6 A 457
28. In Debt on a Sheriff’s Bond upon Oyer of the Condition, it appeared to be for an Appearance in B. R. in Trespass of 100l. whereas the Writ was de Placito Trauageffonis ac etiam Bill de debito 100l. It was argued, that this Bond was not warranted by the Statute, of H. 6. upon Account of this Variance. But it was answered, that the Appearance, and the Day, and the Court, and the Party at whose Suit &c. are all well expressed as they should be, and the Ac etiam is not of the Substance of the Writ, but only declares the Intention how he will declare, and is grounded on the 13 Car. 2. Resolved, that the Bail Bond was good in the principal Cafe, and Judgment for the Plaintiff. 2 Show. 51. pl. 38. Paish. 31 Car. 2. B. R. Gardiner v. Dudgeat.

29. The Bail Bond to the Sheriff is to make the Party appear according to the Writ, and not according to the Condition of the Bond, and the Bail are by Virtue of the Bond engaged that he shall answer according to this Writ, if it require special Bail, either to render him, or to give special Bail, which if he does not, they will not file bis Appearance, but sue the Bail Bond, and the Bail cannot plead to it, Quod Comperuit ad Diem; for it is no Appearance till filed. This is the confirm Practice of the Court; every Bail ought at his Peril to feel and notice the Writ before he be bound, and thereby he may know what it is he engages for; if he do otherwise, he is bound to do he knows not what, and he must suffer for it; agreed per Cur. 2 Show. 51. pl. 38. Paish. 31 Car. 2. B. R. in Cafe of Gardner v. Dudgeat.

30. Debt upon a Sheriff’s Bond to appear Die Luna proS post Offab. Pur &c. The Defendant pleaded, that Hilary Term this Year ended Die Sabbati proS post Offab Pur, and that no Court was held at Westminster Die Luna proS post Offab Pur, so that he could not appear &c. and upon Demurrer the Plaintiff had Judgment, because the Condition being impossible at the time of making the Obligation, the Obligation is sliute, but the Reporter adds aNota, that he did not plead the Statute 23 H. 6. for if he had pleaded it, an Obligation without a Condition, or with an impossible Condition, (which is all one) it had (perhaps) been void by that Statute. 3 Lev. 74. Mich. 34. Car. 2. C. B. Graham v. Crawfiah.

31. On a joint Bill of Middlex against 3, with an Ac etiam superior Scriptum Obligatorium, by them jointly and severally; the Sheriff took one Bail Bond for the Appearance of them 3, and there being no Appearance, the Plaintiff took an Assignment of the Bond, and now would have had the Sheriff amerced. It was agreed, that the Bail Bond was not according
In what Actions.

1. If one condemned by false Verdict in Debt or Damages dies, if one in Amtaint, he shall have a special Writ to bail him, upon Sureties taken that if the Amtaint passes against him he shall render himself to Prison, or satisfy the Debt. F. N. B. 206. (D.) Execution for Trepass brings Amtaint, he shall be bailed, and if he was in C.B. after some Doubt, because no Precedent was to be found thereof in that Court, tho’ it was common in B. R. D. 192, a. b. pl. 59 Mich. 3 & 5 Eliz. Kempe’s Case. F. N. B. 106. (D) in the new Notes there (a) cites S. C. but that some held, that a Writ should be sent to the Warden of the Fleet to have the Prisoner in Court, QuoLibet Die pendente Placito, — A Cate cited in D. ibid. to that Purpose is, Patch. 16 E. 5. 6.

In such Caute the Court does not usually bail him, because the Verdict is intended true till revered; but sometimes the Justices upon good Consideration will bail him; Per Wray. Cro. E. 5. in pl. 4. Patch. 24 Eliz. B. R.

2. One taken on an Attachment issued out of the Chancery is not bailable, Sheriff may, and such Bond is void; Per rot. Cur. clearly. 3 Le. 206. pl. 269. Mich. 30 Eliz. C. B. Bland v. Ricardus.

for a Contempt; agreed per Car. 1d. Raym. Rep. 322. Hill. 13 W. 3, the King v. Daws —— 2 Salk. 603. pl. 1. S. C accordingliy. —— 12 Mor. 572. S. C. & S. P. admitted. —— See Vent. 234. where such Attachment went and the Sheriff took Bond, which was held void, because the Condition to appear was Coram Rege in Concilariar umbique et apud Welfmonsterium and because of the Addition of Wellminster the Bond was held void; cited per Hale Ch. J. as adjudged Mich 1649 in Cafe of Button v. Low. —— 2 Vent. 277. 233. Mich. 2 W. & M. in C. B. Lawson v. Haddock, the Court inclined, that Attachments out of Chancery are within the statute of 25 H. 6. and said, that it is the conftant Pratice for Sheriffs to take Bond in such Cases.

In an Attachment of Privilege, which is a Capias in the 1st. Process, the Court hold to Bail for any Sum, tho’ never to small; for an Attachment of Privilege being a Capias in the first Process without a Summons, does not arise from a Supposition of a Nihil returned, and that there are no Illies to answer the Debt but this Process arises from a Debt due to the Officers of the Court by the Acts of the Court, and therefore another Officer ought not to appear without seeing a Security given for such Debt, and therefore they hold the Defendant to Bail in this Case, tho’ the Debt be never so small. G. Hilt. of C. B. 50.

On a Demurrer the Question was, whether the Sheriff can take a Bond upon an Attachment for Contempt out of this Court. By the Act of 15 Car. 2, a Sheriff is not empowered to take Bail, tho’ the Court or a Judge may take a Recognizance; it is true, Persons taken by Virtue of Attachments out of Chancery for not appearing and answering, have been usually bailed, and the Reason is, because the Party upon entering his Appearance, and paying the usual Contempt, is discharged of Court; whereas in this Court the Party is to appear in Court de Die in Diem, and be examined on Interrogatories to be exhibited against him, and it is not determined that a Sheriff can take Bail upon Attachments out of Chancery, but rather doubted; and in the present Case all the Judges were of Opinion, that no Bail could be taken, and gave Judgment for the Defendant. Rep. of Prat. in C. B. 14. Mich. 4 Geo. 1. Field v. Walford.

Debt on a Sheriff’s Bond taken on an Attachment out of Chancery, upon a Demurrer the Question was, whether the Sheriff could take such a Bond or not? The Court gave Judgment for the Defendant, and said, that a Sheriff cannot take a Bail Bond upon any Attachment for a Contempt. Rep. of Prat. in C. B. 1660, Patch. 7 Geo. 2 Waddington v. Fitch—Baines Notes in C. B. 53. S. C. Judgment nihil, and no Caute was shown.

3. If an Andita Querela be grounded on a Realise or Record, the Party may be bailed; but not on a Survivant of Matter in Fact, as o an Arbitrament or Uterly; Per Coke Ch. J. Roll Rep. 133. in pl. II. Hill. 12 Jac. B. R.

of the Lord Dier and Wray, and in all his Time, it had never been used to bail the Party upon a Matter in Fact as upon the Statute of Uterly and the like; for should he be bailed in such Cases, then every Man may be defeated of his Execution: but if the Party will shew a Matter of Writing in his Discharge
Bail.

Disharge, then it has been used to deliver him to Bail upon calling the other Party, and asking him if he can deny it &c. —— Admitted per Cur. that Plaintiff in Aud. Quer. may be bail'd. Sid. 286. in pl. 23 PaCh. 18 Car. 2. B. R.

If the Party that brings an Audita Querela be out of Prison, the Court will bail him, tho' grounded upon a Surmise of Matter of Fact, as Payment &c. but if he be in Prison, then not, unless it be upon a Specialty. Vent. 46. Mich. 21 Car. 2. B. R. Anon.

See Tit. Audita Querela (E) pl. 17. and the Notes there.

But he ought not to be bail'd before the 4. A Person taken in Withyam upon a Homine Replegiando, upon pleading Non Cerit, may be bail'd. 2 Salk. 5. 2. pl. 3. Mich. 12 W. 3. B. R. in Cafe of Moor v. Watts, cites Kelw. 71. a. F. N. B. 74.

Writ of Withyam is return'd. Ibid.

One in Execution for a Fine is not bailable. 1 Mod. 59. pl. 36. PaCh. 4 Ann. B. R. Col. Layton's Case. — And per Holt Ch. J. Bail in Case of Execution was always refused. Ibid.

The Plaintiff that the Defendant shall perform the Judgment of the Court, and now the Law hath determined that Matter, and what remains now is only for the Defendant to perform the Judgment, and for the not performing it he lies in Execution. L. P. R. 172.

5. One taken in Execution is not bailable by Law, unless an Audita Querela be brought, (Hill. 21 Car. B. R.) for bail is put in to secure the Plaintiff, that the Defendant shall perform the Judgment of the Court, and now the Law hath determined that Matter, and what remains now is only for the Defendant to perform the Judgment, and for the not performing it he lies in Execution. L. P. R. 172.

6. When the Action is only for Damages, there the Party is not held to bail, unless in Mayhem, or some notorious Battery; and the Reason is, there is no certain Sum for which the Caution can be ascertained; but in Mayhem, and where by the Injury it is apparent, that the Damage will exceed the Sum of 10 l. there the Judge may by special Rule hold to bail. G. Hift. of C. B. 30.

But now by a general Rule, Hill. 8 Geo. 2. if a Prisoner be discharg'd for want of Prosecution, and afterwards is arrested by 7. On a Bottomry Bond for Payment of Money inter alia, the Court inclined to think the Defendant should give bail. Rep. of Præct. in C. B. 34. PaCh. 13 Geo. 1. Delfow v. Tutt.

8. The Defendant had been arrested and held to Special Bail, and afterwards render'd in Discharge of his Bail, and the Plaintiff proceeded against the Defendant as a Prisoner, and recovered a Judgment. In Action of Debt brought upon that Judgment, and the former Bail being vacated by the Render, the Court held that the Plaintiff might well hold the Defendant to Bail in this Action, he not now having Bail in the first Action. Rep. of Præct. in C. B. 77. Mich. 6 Geo. 2. Revel v. Snowden.

9. Motion in the Treasury for Bail in an Action for meane Profits, after a Recovery in Ejsmonth, upon the Leisflor of the Plaintiff's Affidavit that the meane Profits amounted to 89 l. Bail was order'd for 80 l. This is a Caufe of Action which is bailable or not, at the Discretion of the Court or a Judge. Barnes's Notes in C. B. 87. Mich. 13 Geo. 2. Hunt v. Hudson.

See Tit. Utrary Law (H. b) Upon Writs of Error.

But of Error I. In a Writ of Error brought in B. R. if the Error is apparent, we may use to bail the Defendant; per Coke Ch. J. 2 Bulst. 164. Hill. 11 Jac. 1. cites 1 H. 7. 20. which he said is a very notable Case.

II. They cannot bail the Party there, by reason of the great Delay that may be, it being uncertain how long or short a Time the Parliament will continue; per Coke Ch. J. 2 Bulst. 164.
3. 3 Jac. 1. cap. 8. No Execution shall be paid upon any Writ of Error or Superfedeas, for the Reversing of any Judgment in any Action of Debt upon Bond, or for Rent, or upon any Contract, in the Courts of Record at Westminster, Counties Palatine, or in the Court of the Grand Seison, unless such Person, in whose Name such Writ of Error shall be brought, shall be bound with 2 sufficient Sureties, by Recognizance to be acknowledged in the Court, where such Judgment is given, in double the Sum adjudged to be recovered, to prosecute the said Writ of Error with Effect, and to pay all Debts, Damages, and Costs adjudged under the former Judgment, and all Costs and Damages awarded for delaying Execution, if the said Judgment be affirmed.

4. And by 13 Car. 2. cap. 2. Execution shall not be paid in Debt upon the Statute of 2 Ed. 6. for not setting forth Tithes, nor in any Action upon the Cafe, upon any Promise for Payment of Money, Actions of Trover, Covenant, Decrime, and Treafeus, until such Recognizance be entered into as is directed by 3 Jac. cap. 8.

5. And by 16 & 17 Car. 2. cap. 8. it shall not be paid in Personal Actions, Dower, and Ejecttione Firme, till Security given to pay Costs, provided not to extend to Writs of Error brought by Executors, or on Penal Statutes.

Ejectment, that the Plaintiff in Error had not given his own Recognizance to the Defendant, that if the Judgment is affirmed &c. he will pay the Costs and Damages &c. To which it was answer'd that he (the Plaintiff in Error) had found a sufficient Man to be his Bail, who were bound in a Recognizance &c. by which the Intent, tho' not the Letter of this Statute, was satisfied, and the Party himself lives in the remote Parts of this Kingdom. The Court held, that the Intent of this Statute was for the Security of the Party Defendant in a Writ of Error, which Intent is only fully observed, because the Bail already given is better than his own Recognizance; and this hath been the constant Practice of all the Courts &c. ever since the Statute was made; because of the Inconvenience of the Parties coming from remote Parts; the Superfedeas was allowed. Carth. 1st. Pach. 2 W. & M. B. R. Barnes v. Bulker.

6. If Error be affliy'd in Matter of Law, then the Ufe is to take Bail of the Party; but if the Error be upon Matter in Fact, then the Ufe is not to take Bail before the Matter in Fact be tried; said by Coke Ch. J. to be a Rule oberved in taking Bail upon a Writ of Error brought. 3 Built. 62. Trin. 13 Jac.

7. If an Executor brings a Writ of Error, he shall not find Bail within But in 4 the Statute 3 Jac. 1. cap. 8. to answer the principal Debt; but he shall find Bail to answer the double Costs upon the Statute 13 Car. 2. cap. 2. if this Gale v Till, found against him; so held in the Cause mentioned by Twildren. Sid. 183. Pach. 16 Car. 2. B. R. Anon.

that an Administrator who brings a Writ of Error shall not give Bail, tho' he is not exempted by the Statute, neither shall he pay Costs.
2. W. was indicted and convicted of Deer-stealing &c. at the Sessions, and brought Error in B. R. It was moved to bail him till the Error determined, but denied; for per Cur. the Plaintiff in Audita Que- rela may be bail’d, yet one in Execution who brings Writ of Error shall not. Sid. 326. pl. 23. Patrch. 18 Car. 2. B. R. 'The King v. Whites-
more,' S. C. says he must continue committed, else there would be no Remedy to bring him into Custody, in case the Judgment should be affirmed.

9. Persons in Execution for a Fine to the King brought Hab. Corp. and cited 11
    Mod. 59. pl. 56. Patrch.

Layton’s Cafe, where after Precedent search’d, Holt Ch. J. said he found the Cafe not put fair in Cafe of Execu-

6. Upon a Writ of Error brought in B. R. to reverse an Outlawry in this Court, the Question was if Bail ought to be put in before the Allow-
ance of it by the Statute of 31 Eliz. cap. 3, and it was resolved that in all Writs of Error it ought, and so the Words must be intended, or other-
wise that Part of the Statute will be of no Effect, if it should be extended only to Cafes where the Error is for want of Proclamation; for it doth not appear at the Time of the Allowance of the Writ of Error what Errors the Party will align. Freem. Rep. 162. pl. 178. Trin. 1674. Elliot’s Cafe.

11. Debt on Bond. The Condition was for Payment of Money and Per-
formance of Covenants. Judgment thereupon, on which Error was brought; and it was ruled that it is not within the Statute 3 Jac. cap. 8. which requires Bail to be put in in Cafes of Debt or Contract. Comb. 105. Patrch. 1 W. & M. B. R. Garret v. Dandy.

12. One in Execution upon a Judgment for Usury, brought a Writ of Error in B. R. and moved to be bailed, but it was denied, tho’ there was an apparent Error in the Record, and tho’ it was formerly the Practice to bail in such Cafe, for per Curiæ, we ought not to enlarge a Prifoner in Execution; but it is otherwise upon an Audita Querela, per Holt Ch. J. 3 Salk. 58. pl. 18. Patrch. 7 W. 3. Anon.

13. In Debt upon a bail Bond in C. B. Judgment was given for the Plaintiff, and Error brought in B. R. and Bail put in according to the Statute and Judgment affirmed, and thereupon Error was brought in Parliament; it was infifted that Bail in this Cafe was not require-

able by the Statute 3 Jac. 1. but per Cur. the first Recognizance does not include Payment of Cofts to be asseized in the House of Lords, and therefore a new Recognizance ought to be given within the Intent of the Statute. 1 Salk. 97. pl. 2. Hill. 1 Ann. B. R. Tilley v. Richardfon.

14. Note, by the Statute of 3 Jac. 1. cap. 8. when a Writ of Error is brought on a Judgment bail upon a Bond to pay Money (only) there special Bail ought to be given; and after a Year a Scire Facias ought to precede the Levari, or Fieri Facias. 11 Mod. 2. pl. 4. Patrch. 1 Ann. B. R. in a Nosa.
15. In Error brought on a Judgment in Caso on a Bountree Bond, it was mov'd that the Plaintiff in Error might put in special Bail; Holt Ch. J. said, this is not a Bond only for the Payment of Money, for if he does not go the Voyage, he forfeits the Penalty; for his going the Voyage, Return, and Payment of the Money, are all Conditions; and inclin'd, that it did not require special Bail; fed adjournatur. 11 Mod. 260. pl. 16. Mich. 8 Ann. B. R. Bull v. Clifton.

16. Sheriff brought Debt upon Bond, and Judgment was had by Nil dict without Oyer of the Condition, and a Writ of Error was brought upon the Judgment, and a Superfedeas taken out; it was moved to set aside the Superfedeas, because the Plaintiff in Error had not put in bail, according to 3 Jac. 1. cap. 8. On the other Side it was said, that the Bond was for Appearance, and so out of the said Statute; to which it was anwer'd, that it appeared upon Record to be an Obligation for Payment of Money, and that the Court must confine themselves to the Record, and judge upon that only; but per tot. Cur. it was held that they ought to examine it by Affidavit, for otherwise the Plaintiff in Error would be oblig'd to put in Bail contrary to the Intent of the Statute, because the Declaration was only upon the Penalty, without mention of the Condition. MS. Rep. Mich. 12 Ann. C. B. Valentine (Sheriff of Lancaster's) Cafe.

17. A. gave Bond to B. conditioned that C. should pay B. 20 l. C. gave Bond to A. reciting the Bond given by A. to B. and then follows this Condition, viz. That if the Money be paid by C. according to the Condition of the said Bond (given by B.) then this Obligation to be void, otherwise &c. A. brought Action on the left Bond, and had Judgment, whereupon C. brings Writ of Error. The Question was, whether special Bail was to be put in by the Plaintiff in Error by the Statute of 3 Jac. 1. cap. 8. Per Parker Ch. J. this Bond stands only as a Security for Damages, and may be discharged without one Penny paid to the Plaintiff, and there is no Difference between this Bond and a Bond to save harmlesfs, and therefore out of the Meaning of the Act. And Pratts J. thought this Case the'posibly within the Words of this Act, yet is out of the Meaning of it, which is plainly this, viz. That where a Recovery does necessarily import a Debt due, there this Act takes place. But not where a Recovery may or may not import a Debt due, and the Reason is, that Delay in the latter Case is not esteemed so prejudicial as in the former; fed adjournatur. 11 Mod. 281. Hill. 1 Geo. 1. B. R. Hammond v. Webb.

(I) Where Common, and where Special Bail. And necessary in what Cases.

1. IN Homine Replegiando the Sheriff returned that the Defendant claim'd in Homine the Plaintiff as Villein; by which the Counsel of the Plaintiff was ordered to find Surety to have him here at a Day, and had Writ to the Sheriff to deliver him, but could not get the Sheriff to take Security there-of in the Country. Quod nota. Br. Surety, pl. 4. cites 8 H. 4. 2. Defendants, or frank, and the Plaintiff was compell'd to find Surety to sue with Effect. Br. Surety, pl. 5. cites 11 H. 4. 15.

2. In Trefpass the Defendant pleaded that the Plaintiff was his Villein regardant to his Manor of E. &c. and they were at Illue upon Frank &c. and the Plaintiff found 4 Sureties to sue with Effect &c. Br. Surety, pl. 6. cites 9 H. 5. 1.

4. In an Action brought upon the Stat. 13 Eliz. of Fraudulent Conveyances, a Rule was shewn by the Justices that it was the Practice in B. R. that in all Actions brought upon Penal Statutes the Defendant shall only put in Common Bail. Yelv. 53. Mich. 1 Jac. B. R. St. George's Cafe.

a Statute is in the Nature of a Fine or Amercement set on the Party for an Offence committed, and therefore no Person ought to suffer any Inconvenience by reason of such Law, till he is convicted of such Offence; for then the Defendant would suffer [be liable to] an Action of [for] a Penalty before it ought to be let. G. Hist. of C. B. 30.

In all Actions upon a Penal Statute Common Bail suffices; but when a Writ is Special, there cannot be Common Bail without summonsing before a Judge; per Holt. 12 Mod. 251. Mich. 10 W. 5. Anon.

5. After Judgment for the Plaintiff it was assigned for Error that no Bail was enter'd for the Defendant. It was shewn to the Court that the Attorney was dead, but had been paid his Fees for entering it, and that this appeared by his own Book; and the Plaintiff pray'd that the Bail might be enter'd, and so it was by Order of the Court in this Cafe, and between other Parties. Roll Rep. 372. pl. 27. Patch. 14 Jac. B. R. Denham v. Cumber.

6. In Trespass against A. and B. Verdict was for the Defendants. It was moved in Arrest, for that no Bail was enter'd for B. For every Defendant is supposed to be in Cultodia Marechalli; and in this Cafe the Venire Facias was to try the Iffue between the Plaintiff and the Defendants, whereas B. was no Party in Court, therefore he cannot have Judgment, and it appearing that there was no Fraud in the Plaintiff, the Judgment for this Reason was arrested; but if B. had appeared at the Suit of any other Person in the same Term, it had been sufficient. Poph. 145. Trin. 16 Jac. B. R. Dennis v. Sir Arthur Manwaring.

7. An Executor, tho' sued by an Attorney of B. R. shall not be compell'd to put in Special Bail, notwithstanding his Privilege as to other Persons sued by him; and upon Search no Precedent could be found where such pretended Privilege had prevail'd. 3 Bulst. 316, 317. Mich. 1 Car. B. R. Smale v. Warne.

or more; for it is not their Debts, nor shall their Bodies be liable to Execution for it. 2 Browne. 295. Hill. 7 Jac. C. B. Anon.— S. P. that they shall never find more than Common Bail. Sid. 65, pl. 34. Mich. 15 Car. 2. B. R. in a Nara.

8. If, where Special Bail is required, the Plaintiff's Attorney doth (before any Bail put in) deliver a Declaration to the Defendant's Attorney, (unless it be only to shew such a Cause of Action as requires Bail) he shall not afterwards compel the Defendant to put in good Bail, but Common Bail shall serve. L. P. R. 86.

9. After the Roll is mark'd to have Special Bail, Common Bail ought not to be filed; but if the Roll be not mark'd for Special Bail, nor the Cause of Action express'd in the Writ, Common Bail may be enter'd; (Hill. 22 Car. B. R.) for nothing appears to the Court that Special Bail was required, and then Common Bail is to be filed of course. L. P. R. 174.

10. In Case against Baron and Feme the Feme appeared, but the Baron would not; and Bail being impleaded upon, it was pray'd that the might be delivered on Common Bail, but Glyn Ch. J. said that if there be Cause to have Special Bail, the suit lie in Prifon till the Husband appears and puts in Bail for her; for she cannot put in Bail for herself, the being Covert Baron. Stry. 475. Mich. 1655. Atlee v. Lady Baltinglas.
11. An Executor of an Executor brought Debt upon Bond for 2000L. Special Bail and upon Motion that the Plaintiff might accept Common Bail, because the Bond was only for Performance of Covenants, the Court order'd that Bail should be accepted according to the Bond given, and not according to the Penalty. It was held in this Cafe, that where Executors are Defendants they need not find Special Bail, because in Auter Droit. Sid. 63. Mich. 13 Car. 2. B. R. Boothby v. Buller.

Covenants, no Bail shall be given but with respect to the Breaches, and the Damage done thereby; but the Measure of that shall be taken from the Plaintiff's Oath. 1 Salk 100. pl. 11. Hill. 9 W. 3. B. R. Anon.

12. In Scand. Magnatnum the Court upon Motion ordered Special Bail to be given. Raym. 74. Patch. 15 Car. 2. B. R. The Earl of Stamford v. Goodall.

such Cafe Bail is not requireable. 2 Mod. 215. Patch. 29 Car. 2. C. B. 2d Dorchester's Cafe. —12 Mod. 49. pl. 18. Patch. 2 Ann. B. R. the Court said it was refused in Ld. Wharton's Cafe. —In Action on the Cafe for calling a Person of Quality Woret, by which she left her Marriage, the Defendant was order'd to find Special Bail. Lev. 39. Titn. 15 Car. 2. B. R. Anon.

13. The Defendant shipped Goods at Brazil, without paying the Custom, but promised to pay them at Lisbon, but came to England directly without touching at Lisbon, and offering to sell the Goods here, the Portugal Amn. Defendant bailiff complained to the Privy Council, and he still refusing to pay them, they committed him; and being brought by Habeas Corpus he moved to be bailed, but it was opposed, because it might cause a Breach between the 2 Crowns; but the Court inclined that he should be bailed, the Defendant and if the Matter could be proved, he might be indicted, but they say he should prayed Time to inspect the Return before the filing it, and therefore he was remanded. Sid. 143. pl. 23. Patch. 15 Car. 2. B. R. the King v. Indicalmois.

An Action was brought, but promised to pay them at Lisbon, but came to England directly without touching at Lisbon, and offering the Goods here, the Portugal Defendant bailiff complained to the Privy Council, and he still refusing to pay them, they committed him; and being brought by Habeas Corpus he moved to be bailed, but it was opposed, because it might cause a Breach between the 2 Crowns; but the Court inclined that he should be bailed, the Defendant and if the Matter could be proved, he might be indicted, but they say he should prayed Time to inspect the Return before the filing it, and therefore he was remanded. Sid. 143. pl. 23. Patch. 15 Car. 2. B. R. the King v. Indicalmois.

14. Cafe for affirming that he was of full Age, and by that Means had borrowed large Sums on Mortgages, when in Fact he was under Age; it was moved that he might put in special Bail, but denied; for special Bail shall not be given by Virtue of the Statute of 13 Car. 2. cap. 2. but where it was required to be given by the Rules of the Court, and the Aetiam will not compel special Bail, unless the Cause expressly appears to be for Real Value, as Debt, Trover &c. but where special Damages may arise as in this Cafe or other Cales by Reason of special Declarations, special Bail shall not be required. Sid. 183. Patch. 16 Car. 2. B. R. Chetwin v. Venner.

15. On a Motion to have a special Latitat, viz. with an Accition, where the Party intended to declare in Trepafs only, and this was upon a Sumire that there was a great Mayhem, the Court said, that upon Affidavit thereof they would make one with an Accitam, and to it it was mov'd for special Bail upon Affidavit that the Cause of Accition was Battery and Wounding, and that the Plaintiff had several Wounds with a Sword;
16. In all Cases where Process may issue forth to take the Body of the Perfon, if an Appearance only and not Bail is required, there every such Perfon must upon an Arrest cause common Bail to be filed, which is an Appearance upon Record. L. P. R. 85.

17. In Account special Bail is not required, but otherwise it is in Debts on Account; Per Broome. 2 Roll. Rep. 53. Mich. 16 Jac. B. R.

18. In Action of Debt against the Executors, upon the Suremise of a Dearthavit, Defendant was held to special Bail, and so ruled upon Motion. Vent. 335. Trin. 53 Car. 2. B. R. Anon.

19. Judgments in Ejectment against casual Ejectors for want of an Appearance shall be set aside, and Reinstatement granted, if no Latar hath been found out against, nor common Bail filed for, such casual Ejector or nominal Defendant, within fourteen Days after such Appearance. Trin. 4 W. & M. per Cur. L. P. R. 85.

20. By the 5 & 6 W. & M. cap. 21. (and continued by 5 Ann. cap. 20.) 


22. Action against Master of a Ship for indenting Goods he had on Board, and he was held to special Bail; but if it were for negligent keeping, common Bail would have done; Per Holt. 12 Mod. 251. Mich. 10 W. 3. Anon.

23. Defendant shewed the Composition Aff, and that the Plaintiff's Debt, according to the Composition he had made with the rest of his Creditors, was under 10 l. and that the Plaintiff would be bound, tho' a Non-subscriber; yet the Defendant was held to special Bail, because Non confat that the Plaintiff will be bound, for he may deny the ab-
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Bail.

Feod ing &c. so that this would be to determine the Merits of the Caufe, viz. that he was bound by the Composition; alter, if the Plain tiff had subscribed, or had been summoned before a Judge, and the Mat ter had received a Determination. 1 Salk. 99. pl. 7. Mich. 10 W. 3. B. R. Anon.

24. In an Action for Money won at Play, Gould & Turtön were for denying special Bail, for since the Plaintiff played upon Tick, they would not help his Security; but per Holt, the Practice has been other wise, and he in any manner was to be Sir of the Money against it, and to say they were not to better his Sec urity, would as well prove there should be no Bail in an Indebitatus a fumpfit &c. 1 Salk. 100. pl. 10. Hill. 11 W. 3. B. R. Anon.

J. said, they never ought to enter into the Merits of a Caufe upon a Question about Bail; for to order common Bail upon Merits would blur a Man's Caufe of Action, and no Man ought to have his Caufe tried with Disparagement upon it, and that this may be for Money won at play, yet it was a lawful Con tract which the Act of Parliament allowed of, and no Man ought to be wiser than the Law; and this was giving Money against Money, for which Indebitatus affumpfit would not lie, but an Action upon the special Contract, and to say that because he depended upon the Defendant's Word at first, he therefore should have no special Bail, would be a Reason why there should be no special Bail in any simple Contract, and hence special Bail was ordered; and it was said to be so ordered in like Ca fes in the Common Picas.

25. One summoned before a Judge, to show Cause why common Bail should not be taken, did not come, whereupon a Day was given him for to come, or else that common Bail should be; he comes before the Day, and con tents to common Bail, which was accordingly filed; and at the Day came to make Oath of a Debt above 10l. but per Cur. he ought not to be received, Bail being regularly filed. 12 Mod. 324. Mich. 11 W. 3. Anon.

26. It was moved to have leave for the charging of M. being a Prisoner in Newgate, with a Scandalum Magnatum & Ac-eriam Billæ of 100l. in order to hold him to special Bail, for saying the D. of S. was a Cheat, and had cheated the King and the Army; Holt said, this being a poor Man, to charge him thus will be a perpetual Imprison ment to him, and special Bail has been often demanded in these Actions, yet it has been frequently denied; but he was ordered to find two that would swear themselves worth 25l. each, and himself to be bound in 100l. 12 Mod. 420. Mich. 12 W. 3. Duke of Schomberg v. Murrey.

27. It has been held once, that if the Plaintiff had been Non-pro.display in a former Action, that if he began again he should have but common Bail, but this has not been abided by; Per Cur. 12 Mod. 501. Pasch. 13 W. 3. Anon.

28. If upon Examination before a Judge one do not make out a good Cause of Action, common Bail shall be ordered; Per Holt Ch. J. 12 Mod. 526. Trin. 13 W. 3. Taylor v. Brudon.

29. If one has several Causes of Action, each whereof is too small for special Bail, he cannot join them to enforce special Bail; Per Cur. 12 Mod. 527. Trin. 13 W. 3. Anon.

30. Per Holt Ch. J. when, upon Contest about Common or Special Bail, it does appear that the Plaintiff has misconceived his Action, and that if any Action lies it is of another Sort, there Common Bail ought to be accepted. 12 Mod. 579. Mich. 13 W. 3. Anon.

31. Where the Plaintiff was Non-suited for Want of a Declaration, and afterwards brought another Action for the same Cause, Holt Ch. J. said, he had known it held by the Court, that he should have but Common Bail to the said Action. Ld. Raym. Rep. 679. Trin. 13 W. 3. Almanion v. Davila.

32. A
32. A Prisoner for Debt under 100l. was discharged by the Justices pursuant to the late Act, and afterwards was arrested for a Sum above 100l. Ruled, upon Conference of all the Judges, that he must put in special Bail. 6 Mod. 301. Mich. 1 Ann. B. R. Cragget v. Glover.

33. Special Bail was denied in Scandal, tho' the Words were very bad, and imply'd Treason. 11 Mod. 49. pl. 18. Pach. 4 Ann. B. R. Sir William Drake's Cafe.

34. In Debt brought upon a Judgment in B. R. pending a Writ of Error in the Exchequer Chamber, Bail never was allowed. 10 Mod. 16, 17. Hill. 9 Ann. B. R. per Cur. in Cafe of Goodwin v. Godwin.

35. 12 Geo. 1. cap. 29. S 1. No Person shall be held to special Bail upon any Process issuing out of any superior Court, where the Cause of Action shall not amount to 10l. nor out of any inferior Court where Cause of Action shall not amount to 40s. And in all Cases where the Cause of Action shall not amount to 10l. in a superior Court, or to 40s. in any inferior Court, and the Plaintiff shall proceed by way of Proceeds against the Person) shall not arrest the Body of the Defendant, but shall serve him Personally, within the Jurisdiction of the Court, with a Copy of the Proceeds; and if such Defendant shall not appear at the Return of the Proceeds, or within 4 Days after, it shall be lawful for the Plaintiff upon Affidavit being made and filed of the Personal Service of such Proceeds (which Affidavit shall be filed Gratis) to enter a common Appearance, or file Common Bail for the Defendant, to and proceed thereon, as if such Defendant had entered his Appearance, or filed Common Bail.

36. S. 2. In all Cases where the Plaintiff's Cause of Action shall amount to 10l. or 40s. as aforesaid, Affidavit shall be made and filed of the Cause of Action, (which Affidavit may be made before any Judge or Commissioner of the Court out of which such Process shall issue, or else before the Officer who shall issue such Process, or his Deputy) and for such Affidavit 1s. over and above the Stamp Duties, shall be paid, and no more, and the Sum specified in such Affidavit shall be endorsed on the Back of such Writ or Process, for which Sum so endorsed, the Sheriff &c. shall take Bail, and for no more; but if any Writ or Process shall issue for 10l. or upwards, and no Affidavit or Indorsement shall be made, as aforesaid, the Plaintiff shall not proceed to arrest the Body of the Defendant, but shall proceed in like Manner, as is by this Act directed in Cases where the Cause of Action does not amount to 10l. or 40s. as aforesaid.

37. In
38. In Action of Debt upon a Judgment, wherein above 10l. had been recovered, the Question was, whether the Defendant should be obliged to put in bail? The Court were of Opinion, that if there was Bail in the Original Action, then no Bail is required in the Action upon the Judgment, but if no Bail in the original Action, then Bail is to be put in where the Deb is above 10l. and an Affidavit made thereof according to the late Act of Parliament. Rep. of Pract. in C. B. 32. Hill. 13 Geo. 1. Jackson v. Duckett.

39. On a Motion for a common Appearance, the Plaintiff's Affidavit of Facts and that the Defendant entered the Plaintiff's Hop-Ground, and did take and carry away sever modes 1000 of Hop Poles, to his Damage 20l. The C. & S. P. Court said the Act of Parliament did not distinguish Actions, but that and therefore the Plaintiff might hold to bail in Trespass, as well as in any other Action. Rep. of Pract. in C. B. 106. Trin. 7 Geo. 2. Cook v. Sankey. Cur. the Plaintiff is the proper Person to swear to his Damage by the Act of Parliament, but no Rule was made.

40. In an Action of Covenant brought by Patente of Drury-Lane Playhouse against Defendant, for not performing Dances upon the Stage according to Articles, whereby Plaintiff swore himself damaged 100l. Defendant moved in the Treasury for a common Appearance, but did not obtain a Rule, the Plaintiff having sworn to a certain Damage. Barnes's Notes in C. B. 57. Parch. 8 Geo. 2. Fleetwood v. Poitier.

41. Action was brought upon a Lease dated in 1727, for 2 Years Rent due since the Year 1733, when Defendant became a Bankrupt. Defendant moved for a common Appearance, and produced his Certificate for the same, confirmed and enrolled. Upon hearing Counsel on both Sides, neither the Plaintiff nor the legal Interest in the Estate being in Defendant, a common Appearance was ordered to be accepted. Barnes's Notes in C. B. 60. Parch. 8 Geo. 2. Cantrel v. Graham.

42. In an Action of Debt upon Bond attested by one Witness only, Plaintiff had been nonsuited on Non est datum pleaded, the Witness not making sufficient Proof of the Execution of the Bond. Plaintiff brought a new Action on the same Bond. Defendant moved for a common Appearance, and obtained a Rule to have the Cause, which was discharged on hearing Counsel on both Sides. Note, Defendant did not in his Affidavit deny the Execution of the Bond. Barnes's Notes in C. B. 68. Parch. 10 Geo. 2. Harris v. Roberts.

43. Plaintiff made Affidavit that the Defendant had seized and detained his Ship to his Damage, and a Capitas ad Respondendum was thereon indorsed for Bail without a Judge's Order. Rule for common Appearance and Superintendence was made absolute; for the Damages in this Case are uncertain, and the Plaintiff was not intitled to Bail without a Judge's Order. In Debt, Assumpsit, Trover, Bail is of Course; but in Trespass and Demurr, at Discretion; for Words, no Bail, unless Slander of Title. Barnes's Notes in C. B. 78, 79. L. Writ v. Tolcher.

44. An Action was brought for a malicious Prosecution for Forgery. Upon An Affidavit the Plaintiff had obtained a Judge's Order for holding the Defendant to Bail for 200l. The Defendant being arrested and held to Bail accordingly, applied to the Judge who made the Order; the Judge was not being fully satisfied, directed the Defendant to apply to the Court; was made whereupon he moved to be discharged on Entering a common Appearance, absolute, and by Affidavits shewed that the Plaintiff was acquitted on a Habeas in the Indictment, and not on the Merits. Per Cur. Let the Plaintiff have Caused why a common Appearance should not be taken. Rep. of Pract. in C. B. 148. Parch. 11 Geo. 2. Ruithell v. Gately.

45. Action was brought for 50l. Penalty given by Act of Parliament for Defendant's Practising as an Attorney, not being duly admitted, wherein the Delen-
Defendant was held to Bail. Rule to show Cause why common Appearance, and Superfedeas was made abolnsce. This is for a Fine or Amereement, and is in the Nature of a Qui tam. Barnes's Notes in C. B. 80. Hill. 12 Geo. 2. Whittingham v. Coghlan.

(K) In what Cases. By what Persons Bail must be given.

1. Upon Plene administrativit pleaded, Judgment was against an Executor. She brought Error. It was moved that the should not have a Superfedeas to stay Execution without putting in Sureties upon the Statute of 3 Jac. cap. 8. But resolved that this Case is out of the Statute; for where the Execution shall be of the Goods of the Testator, and Damages only de Bonis propriis, it was unreasonable that the Party should be enforced to find Sureties to have the intent Condemnation with his own Goods. Cro. J. 350. pl. 2. Mich. 12 Jac. B. R. Goldsmith v. Platt.

So of an Executor, he shall find Bail to answer the principal Debt with.

In the Stat. 3 Jac. but by 15 Car. 2. cap. 2. he shall find Bail to answer double Costs, if found against him; fild per Twifden T. to have been fo adjudged. Sid. 185. —— S. P. because they are only named, and it is not their own Debt. Litt. Rep. 3. Hill. 2 Car. B. R. cited by Hendon as adjudged in B. R. Knight v. Weather.

2. Judgment in Debt on a Bond was given against an Administrator, who pleaded Plene administrativit. It was resolved per rot. Cur. that he shall not be compell'd to put in Bail upon the 3 Jac. 1. cap. 8. on a Writ of Error by him, and a Superfedeas was awarded for the Execution. Cro. C. 59. pl. 3. Hill. 2 Car. in Cam. Scacc. Sir H. Mildmay's Cafes.

S. P. per Cur. obiter. Lev. 39. Trin. 12. Car. 2. B. R. Anon. —— The Court would not agree that an Executor should be held to Bail upon a Surmise of a Devastavit. Vent. 521. Mich. 29 Car. 2. B. R. in Cafe of Ent v. Withers. —— But Ibid. 355. Trin. 23 Car. 2. B. R. Anon. in Debet and Detinet the Defendant was held to special Bail on such Surmise, and so ruled upon Motion.

In Debt against an Executor on a Judgment fuggeting a Devastavit, he shall give Bail; for there the Action is in the Debet and Detinet. 1 Salk. 98. pl. 4. Mich. 8 W. 5. B. R. Page v. Price.

3. Scire Facias against an Administrator upon Devastavit alleged, and Judgment de Bonis propriis, whereupon he brought Error. Per rot. Cur. he shall find Bail, because being charged here de Bonis propriis, it is not like the Cafe where an Administrator is charged de Bonis Testatoris; but here it is as if he were charged in proprio Jure, and is not like Mildmay's Cafe, nor Goldsmith's and Platt's Cafe. Lev. 245. Trin. 20 Car. 2. B. R. Fitzwilliams v. Moor.

But S. P. resolved contra; for the

Lev. 245. Trin. 20 Car. 2. by Twifden J.

If Executor finds Bail in an inferior Court, and afterwards the Cause is removed by Habesas Corpus, he shall find Bail in the superior Court.

Lev. 245. Trin. 20 Car. 2. by Twifden J.

But S. P. resolved contra; for the

Lev. 245. Trin. 20 Car. 2. by Twifden J.

that when a Cause is removed by Hab. Corp. to find Bail in all Cases where Bail was found in the inferior Court, yet this shall not extend to the Cafe of an Executor, where the Cause does not require special Bail by the Course of this Court, unless in Cafe of a Devastavit. Lev. 268. Trin. 21 Car. 2. B. R. Caffle v. Willer. —— Sid. 418. pl. 2. S. C. ruled that common Bail should be accepted; by all the Court, contra Twifden and Lacy, Secondary —— 2 Keb. 312. pl. 4. S. C. accordingly per Cur.

All Executor being sued in an inferior Court, put in special Bail. The Cause was removed into C. B. by Hab. Corp. The Court held he shall put in bail to appear to a new Original within 2 Terms, but not after, nor to pay the Condemnation-Money. 1 Salk. 98. pl. 4. Mich. 8 W. 5. B. R. Page v. Price. —— And Ibid. says that Trin. 11 W. 2. in B. R. It was held by Holt; Ch. 1. that in all Causes removed by Hab. Corp. the Defendant shall find special Bail, except in the Cafe of an Executor.

Executor, Administrator, or Heir shall not find Bail; for they ought not to have been held to Bail below, the Debt not being their own. C. Hill. of C. B. 31.
5. A Feme covert sold'd a Bond. Afterwards she was arrested and carried to Prison; but upon Affidavit made that she was Covert, and entering her Appearance, the Court discharged her without Bail. Freem. Rep. 210. Trin. 1676. Lady Thornborough's Case.

6. Debt in London against the Defendant as Heir. The Casual being re-2 Jo. 52 moved into B. R. the Question was, whether he should put in Bail here, as he must have done in London, where they compel Heirs and Executors to find Bail; but special Bail was denied to be found in this Case. 2 Lev. 204. Mich. 29 Car. 2 B. R. Lawrence v. Blith.

7. An Executor or Administratrix shall not be held to special Bail, because the Demand is not on the Person, but in Rem, viz. the Assets of the Deceased, unless there be a Devittavit suggested. G. Hilt. of C. B. 10, 31. An Heir, sued as such, shall no more be held to special Bail than an Executor; per Cur. 12 Mod. 511. Patch. 13 W 3. Anon.

8. In Debt on a Judgment against an Executor, the Executor shall not put in special Bail upon a Suggestion of a Devittavit; but where upon such Judgment Execution is taken out, and the Sheriff returns a Devittavit, the Executor shall put in special Bail upon an Action of Debt as above; but in the Bray's Cafe, other Cafe, common Bail shall serve. Carth. 264. Hill. 4 W. & M. S. C. accord. B. R. Dupratt v. Tellard.

S. P. cited to have been adjudged accordingly in B. R. in Cafe of Knight v. Weather.

9. Where an Executor is sued in the Detinat, as he must upon the Contracts of his Teitator, he shall not put in special Bail; but he must, if he is sued on his own Bond or Contracts.

10. A Motion by an Out-Pensioner of Chelsea-College for a common Appearance, suggesting that he is a Soldier, and within the Act 5 Geo. 2. cap. 3 for preventing Mutiny and Desertion, was denied; and the Court held the Defendant no Soldier within the Meaning of that Statute. Rep. of Pract. in C. B. 77, 78. Mich. 6 Geo. 2. Bowler v. Owens.

11. Debt upon a Judgment was brought against a Soldier. The original Action, in which the Judgment had been recovered, was for a Debt under 101. The Defendant being held to Bail, it was moved to set it aside; but the Court said the Act of Parliament for preventing Mutiny &c. intended the Debit that was due at the Time of holding to Bail, and this being an Action of Debt on a Judgment for upwards of 101. tho' the original Cause of Action did not amount to so much, is not within the Intent of the Act, and is denied the Motion. Rep. of Pract. in C. B. 89 Patch. 6 Geo. 2. Nichols & al' v. Wilder.

(L.) Taken. By whom.

1. 3 H. 7. cap. 3

WO Justices (1. Quor' have Power to let to Bail. One Justice Persons bailable by Law, until the next Quarter-

Sessions or Gaol Delivery, and shall there certify the Issue on Pain of 10 l. and the Sheriff and all others, having the Custody of Gaols, shall certify the Names to appear at the Sessions of all Prisoners in their Custody to the Justices of Gaol Delivery at their General Gaol Delivery, on Pain to forfeit 5 l.

2. An

extends only to Cales of Felony where two Justices are required where Ball is taken, Per Gu. MS. Cales 3 Ann. Anon.
2. By 1 & 2 P. & M. cap. 13. Bail for Felony, or Suspicion thereof, must be taken in open Sessions, or by 2 Juries, whereof one to be of the Quiorum, being both present at the Time of such Bailings; provided that Juries of Peace, and Coram, within the City of London and County of Middlesex, and in other Cities, Boroughs, and Towns Corporate within this Realm and Wales, shall within their several Jurisdictions have Authority to let to Bail Felons and Prisoners, in such Manner and Form as they have heretofore accustomed, this Act or any thing therein contained to the Contrary notwithstanding.

3. It seems that no Juriour of Peace could have bail'd any one for Felony before the Statute of 1 R. 3. cap. 3. which was made void by 3 H. 7. cap. 3. For before this he ought to have been bail'd by the Sheriff, or other Keeper of the Prison where he was in Ward, or by the Constable, and by no other Officer, unless Juries of B. R. Juries in Eyr, or Juries of Gaol Delivery. Popn. 96. pl. 1. Trin. 37 Eliz. Anom. 

Upon Plaint before the Sheriffs of London, and a Precept to the Sheriffs to arrest one, the Sureties shall be found and offered to the Sheriffs, and this is the common Course; per Cur. ibid.—40 Eliz. B. R. Gabriel v. Glere.

4. An Action was brought in the Court of Nottingham, and a Capias was awarded to the Serjeant and Officer of the said Court, who arrested, and committed him to Nottingham Prison, and the Prisoner offered the Mayor or of Nottingham, Keeper of the said Gaol, Sureties &c. to appear at the next Court to answer the Plaintiff in the said Action. It was objected, that the Sureties should have been offered to the Serjeant; for the Sureties is but an inferior Officer, and that the Mayor is Judge of the Court in some Repeats, yet he may be an Officer for keeping the Gaol, and there he is not the only Judge, but the Sheriffs also, and the Prisoner being in Prison under him, it is proper to offer Sureties to him, and when the Party is brought to the Gaol he is under the Mayor's Custody, and not of the Serjeant's. Cro. E. 76, 77. pl. 36. Mich. 39 & 40 Eliz. B. R. Loffe v. Kelbridge.

5. A Rule was made and agreed per ter. Cur. to be entered in Court, That for the future, No Bail should be taken upon any Audita Querela to be allowed, but only in open Court, and not otherwise, or in any other Manner. Bulk 140. Trin. 9 Jac. in Cafe of Torrey v. Adey.

6. The King's Bench may bail if they please in all Cases; but C. B. must remand, if the Cause of Imprisonment returned be just; Per Vaughan Ch. J. Vaugh. 157.

7. 4 W. & M. cap. 4. § 1. The Judges of B. R. or C. B. or any two of them respectively, whereof the Ch. J. to be one, and the Barons of the Coif of the Exchequer, or any two of them, whereof the Ch. Baron to be one, may by Commissions under the Seals of the respective Courts, commit Felons, other than Attornies and Solicitors, in all the Counties of England and Wales, and Town of Berwick, to take Recognizances of Bails in Actions depending in the said Courts, in Manner as the Juries and Barons have used to take the same, which Recognizances shall be transmitted to some of the Juries and Barons, who upon Affidavits of the due Taking, shall receive the same upon Payment of the usual Fees, which Recognizance shall be of like Effect, as if it were taken De bene esse before any of the said Juries or Barons, for taking of which Recognizances the Felons empowered shall receive 2 s.

8. § 3. Any Judge of Assize may take such Recognizances, which shall be received without Oath, upon Payment of the usual Fees.
(M) In Inferior Courts, and upon removing Causes thence.

1. If a Man arrested in Franchise has a Writ of Privilege, and removes the Body and the Cause, and after does not come to prove his Cause of Privilege, the Plaintiff in the Franchise may have Procedendo, and therefore it seems that there the first Sureties remain; Contra if he had been dissuised by Allowance of the Privilege, for then his Sureties are discharged; but it seems, that when they remove the Body and the Cause, they do not remove any Sureties, but then there is not any Record against them, and then it seems that the Privilege being allowed the Sureties are discharged; Contra where the Privilege is not allowed; for then the Prifoner and the Cause was always remaining with those of the Franchise. Br. Procedendo, pl. 13. cites 31 H. 8.

2. Where a Cause is removed by Habeas Corpus, it is the Cause of C. B. to take Recognizance of Bail before an Action brought; and the Court said, they ought to take Notice of the Cause of C. B. Cro. J. 98. pl. 23. Mich. 3 Jac. B. R. in Case of Hargrave v. Rogers.

3. Bail was given in an inferior Court, and upon an Habeas Corpus brought, Popham Ch. J. took Bail. Afterwards a Procedendo was awarded—pl. 5. Furneley v. Baffler, and Judgment against the Principal in the inferior Court, which was S. C. remanded on a Writ of Error, and upon a Sci. Fa. against the Bail below, it was allowed and was adjudged, that they were discharged, albeit the Bail taken by the Ob. adjudged, that the Writ was not filed, for that could not be till the Term. But it was agreed, accordingly, by all, that if the Procedendo had been delivered to the Sherif before the taking of the Bail by Popham, it would have been a Superficea to the first Writ, and the Bail in the inferior Court must have failed. Yelv. 120. Hill.

5 Jac. B. R. Farnley v. Fawler.

4. Sci. Fa. against the Defendant, being Bail in an inferior Court, who Mo. S.; 6. pl. pleaded, that after the first Action brought, and Bail put in, the Cause was removed by Habeas Corpus into B. R. and Bail put in there and accepted, and afterwards the Cause was remanded by Procedendo, and then Judgment against the Principal. All the Court held the Bail in this Case charged, for when the Record is remanded by Procedendo, it is as if it never had been removed, but if it be removed, and Bail filed in this Court, and afterwards in another Term it is remanded, there it is otherwife, for there the Court is poftified of the Cause. Cro. J. 363. pl. 25. Mich. 12 Jac. B. R. Belton v. Buller.


5. In all Cases but that of Devastavit, where Bail is found below in an inferior Court, and the Cause is removed by Habeas Corpus, special Bail shall be found here, that the Cause of Action be of a less Sum than, special Bail by the Court of the Court ought to be found for; Per Cur. Lev. 268. Trin. 21. Car. 2. B. R. in Case of Castle v. Willer.

6. If an Habeas Corpus be returned into any of the Courts above, tho' the Sum be under 10 l. they will hold him to Bail, that for the Plaintiff may not be in a worse Condition than he was below, where the Defendant was held to Bail. G. Holt, of C. B. 31.

7. Debt for 59 s. upon a Plaint levied in an inferior Court, and Bail put in; afterwards the Cause was removed by Habeas Corpus into B. R. and there the Plaintiff declared as in Debt upon a Bond for 6 l. The Question was, whether the Bail put in here upon a Habeas Corpus should be liable? and adjudged that they should not, for it was another
other Cause of Action than that to which they were bail. 3 Salk. 55.


The Reason why the Defendants in all Cases are obliged to put in Bail is, that their Jurisdictions being confined, they cannot follow the Debtor out of their Jurisdiction; therefore they have always, (in the leaf Pledges) put in Bail that live within their own Precincts, and where it is otherwise it would be improper to give Caution, and therefore it becomes here necessary that Bail should be given in all Cases. G. Hutt. of C. B. 51.

9. The Defendant conditioned a Ship for want of being registered in England, and Plaintiff brought Trover and Conversion in London, which was removed by Habeas Corpus. Holt Ch. J. said, that tho' it was upon a Habeas Corpus, they might inquire into the Cause of Action, and if they saw Occasion, order special Bail; for otherwise the inferior Court might be made use of to oppress People, by laying great Actions upon them there, and here if the Defendant has acted as Judge, and the Matter was within his Cognizance, his Sentence, whether right or wrong, binds till it be reversed; and if it were in the Admiralty of France it would be so, and the only Remedy in such Case is to appeal. 7 Mod. 9. Patch. 1 Ann. B. R. Lumly v. Quarry.

(N) As to putting in Bail; and when. And the Manner and Entry thereof.

1. IN Cafe of Felony by the ancient Law, the Bail might keep the Felon in Prifon until the Day of his Appearance; at this Day the Bail is bound in Cafe of Felony to the King in a certain Sum of Money, and the Principal in another Sum Sistere je Judio; by the Justices of both Benches. Jenk. 129. pl. 63. cites 8 E. 4. 5.

2. The Bail upon a Writ of Attaint is to proccute with Efficient, and to pay the Condemnation, and to deliver up the Plaintiff’s Body, if it be found against him. Jenk. 129. pl. 63.

3. In Cafe of Error the Recognizance is that the Plaintiff shall fine cum Efficient, and pay the Condemnation or render his Body to Prifon. Jenk. 129. pl. 63.

4. Attaint was brought in C. B. on a Verdict in B. R. in an Information of Usury; the Plaintiff was in Execution for the Penalty, iam pro Rege quam pro Parte; resolved that the Recognizance of the Bail shall be the King and to both the Queen and the Party, and (as well to discourage Suitors in the Attaint, who are in Execution by Trial, by Verdict, as also by Reaffirm the Warrant to the Justices that he should find Mains to render his Body and satisfy the Sum,) that it should be in the Copulative, both to pay the Condemnation, and to render the Body to Prifon. D. 364. b. 395. a. pl. 39. 31. Mich. 21 & 22 Eliz. Anon. to the King pro fine Interesse, and to the Party pro fine Interesse. Jenk. 129. pl. 63.

5. An
5. An Infant being in Execution upon a Condemnation in Debt, brought a Writ of Error; his Father and his Brother was his Bail; it was the Opinion of the Justices, that they two only should enter into the Recognizance, that the Infant shall appear, and that if the Judgment be affirmed, that they shall pay the Money, and not that they shall render the Body of the Infant again to Prison; for that when once he is discharged of the Execution, he shall never be in Execution again. 3 Le. 113. pl. 162. Pauch. 20 Eliz. B. R. Tucker v. Norton.

6. One in Execution for Debt on a Judgment in C. B. brought a Writ of Error in B. R. and prayed to be bailed; all the Court held that if there be any Error apparent he shall be bailed, and the Sureties shall be bound to answer the Debt if the Judgment be affirmed, and not to deliver the Body in Execution, and the Clerks said that all the Precedents in the Court are so; and Gawdy said that in the 4 & 5 Eliz. all the Precedents were altered, for before that Time it was a Doubt, but then the Law was resolved as above. D. 139. b. Marg. pl. 29. cites Pauch. 35 Eliz. B. R. Onkaill v. Trufiel.

7. But where one is in Execution on a Statute Merchant, and he sues an Audita Querela, and thereupon is bailed, his Sureties shall be bound to render his Body to be imprisoned, as he was before; Per Gawdy, and this was agreed per tot. Car. D. 139. b. pl. 29. Marg. cites Pauch 35 b. cap. 10. a Recognizance must be acknowledged to the King, in a certain Sum of Money to see with Effect, and to the Party to pay the Condemnation if it be found against the Plaintiff, or to deliver up his Body. Jenk. 159. pl. 63.

8. Note, that in Case of bailing of a Prisoner, the constant Rule observable in B. R. is this, that where the Return of the Sheriff is to be at a Day to come, as Octavius Michael. proxime sequentij and the Prisoner is bailed (being bailable) before the Day of the Return, the Bail then to be taken ought to be in a Sum of Money, and not to be Body for Body. The Reason of this is, for that before the Return, he is not present in Court; but if the Prisoner be bailed after the Day of the Return, and when he is present in Court, the Bail is then to be Deo in Deo, and in this Case the Bail is to be taken Body for Body, because the Prisoner is present in Court; and this was agreed by the Court to be the constant Rule and Course of the Court, and Man Secondary did affirm the constant Rule of the Court to be so. Bulit. 45. Mich. 8 Jac. in Case of Smith v. Jones.

9. Error of Judgment in Debt, because the Entry of the Bail was only, and not for the Judgment, whereas it ought to have been Sub Pena Condemnationis; the Court held it to be well enough, for the Bail being once taken, stands as well for the Judgment as the Execution; and ordered it should be amended, and made Sub Pena Executionis Judicati. Cro. J. 272. pl. 5. Hill. 8 Jac. B. R. Hampton v. Courteny.

10. A Latitut was against A. and B. for a Conspiracy; both were taken; A. put in Bail to the Action in Mich. Term, and B. in Hill. Term; the Plaintiff prayed that the Bail be taken off the File of Mich. Term, and put upon the File of this Hill. Term, because otherwise it would be Error; for there can be no Proceeding upon a Joint Action upon Bail put in in several Terms by two; Quod Clench Deputy-Secondary affirmed. Lat. 183. Hill. 2 Car. Anon.

11. One may depose a Sum of Money in lieu of Bail if the Court please, and they may thereupon order the Plaintiff to wave other Bail, (22 Car. B. R. and Trim. 23 Car. B. R.) if the Sum deposited be sufficient to satisfy the Plaintiff in Case the Trial pafs for him; for then
the Plaintiff can suffer no inconvenience by it, for the Court may order him to take the Money depolited for his Satisfaction after such Trial had. L. P. R. 173.

12. Till Bail put in, the Defendant is not in Court to plead any Thing, nor is the Plaintiff obliged to declare against him. 3 Lev. 343. Mich. 4. W. & M. in C. B. in the Case of Dalhwood v. Folks.

13. There was a Question if Bail be put in one Term, and new Bail is added the next Term after, if this should be a Bail as of the first Term, or only of the Term when added? The Clerks differed, but the Court was of Opinion it was only Bail of that Term when the additional Bail was put in; for they said it was not Bail till completed and accepted, and making the additional Bail to be Bail of the first Term, might do a Wrong to a 3d Person, who might be a Parchasor after the first, and before the additional Bail, was put in; per Cur. 1 Salk. 100. pl. 12. Hill. 11 W. 3. B. R. Anon.

14. The Cause returned upon an Habeas Corpus was a Writ of Excommunicatio capiendo, which recited a Significavit of an Excommunication of one D. a Quaker, for teaching School without a Licence; the Defendant was bailed, whilst the Return was under Consideration; and the Entry was traditur in Ballium & interim Curia vuln advisari, and the Condition of the Recognizance was to appear the first Day of Term, and so from Day to Day, and if this Court should adjudge the Return good, then to render his Body to Prison. 1 Salk. 105. pl. 8. Trin. 12 W. 3. B. R. the King v. Davion.

15. V. was arrested by the Name of J. V. Esquire, who pretended himself to be Earl of Buckingham, and upon a Motion the Question was, how he should put in Bail to as not to eitop him; the Court held this being in a civil Action he need not join in the Bail-Bond, and then there is nothing to eitop him; and in a Criminal Action, the Court allowed the Earl of Banbury in an Indictment not to join but to find others who gave Bail for him, by the Name of G. K. Esq; for their Act could not conclude him. 1 Salk. 3. pl. 7. Trin. 1 Ann. B. R. Smith v. Villiers.

16. If a Writ be returnable in one Term, Defendant ought to put in Bail in that Term, scclicit, at any Time before the Expiation Day of the next Term, and till then it is Irregular to proceed upon the Bail-Bond; but one in the mean Time might take an Affidavit upon it and a Warrant. 6 Mod. 226. Mich. 3 Ann. B. R. in Case of Fox v. Tilley.

17. Bail was put in before a Judge, and excepted against, and other Bail added. The last Bail justified before a Judge, without giving Notice to the Plaintiff's Attorney. The first Bail justified in Court, and the Defendant moved to strike off the additional Bail, shewing by Affidavit that the additional Bail had voluntarily got himself added in the Bail-Piece on Purpose to have the Defendant in his Power, and surrender her when he thought proper. The Court ordered the additional Bail to be struck off. Rep. of Præct. in C. B. 17. Mich. 6 Geo. 1. Hufday v. Boyes.

18. The Bail may enter into Recognizances at different Times, and before different Judges; but the first is De bene Est, and no compleat Bail is given till the last is taken, and the first is of no Value till the last is taken, and so there is no Relation to the taking of the first; for then the Bail and Entry is intire and perfect, and not before. 8 Mod. 189. Mich. 10 Geo. Croft v. the Bail of Harris.

19. A Judge may take Recognizance of Bail at his Chamber, and the Entry in his Book is a good Warrant for the Entry of it in the Office. Ibid. 188, 189. in S. C.
(O) Of giving Notice of Bail.

NOTICE of Bail (on an Arrest &c.) ought to be not only by a
Note given of the Parties Names, who are to be Bail, but also of
their Addition, Trade, Subsistance, and Place of Abode, that so they may be
the more easily inquire d after by the Plaintiff or his Attorney. 11 Mod.
2. pl. 6. Pach. 1 Ann. B. R.

(P) Exceptions to Bail in General, and Justifying.

BY the Statute 4 W. & M. cap. 4. S. 2. the Justices and Barons re-
This Stat-
Specifely made such Rules for Justifying such Bail, as to them
bail seem meet, so as the Conipellors be not compell'd to appear in Person in the
Courts, (unless they live in London or Westminster, or within 10 Miles there-
of,) but the same is to be determined by Affidavits taken before the Commit-
fee of such Bailors who are impower'd to examine Bail upon Oath.

that Time the Bail was taken De bene fide before the Judge; and if they were not excepted against in
20 Days Time, then such Bail stand; which was the same Notice given to the Plaintiff to except to the
Bail, as the Defendant had to appear to the Writ; for from the Telle of each Writ to the Appearance-
Day, are 20 Days in C. B. The Bail-piece is left with the Philazer till after the 20 Days are expired,
and then it is filed in Court. In B. R. it is left with the Judge, because the Judges determine all Things
relating to the Prisoners in their own Court, who are not to be deliver'd out of Court without their Au-
thority. G. Hill, of C. B. 51, 52.

2. If the Plaintiff accepts the Bail, he may take away the Bail-Piece
from the Judge's Chamber, and file it for his own Expedition, but after
20 Days then it becomes absolute, and the Defendant takes it away,

3. Per Cur. In London the Plaintiff never excepts against Bail; but
there is an Officer who receives Bail, and if he takes insufficient Bail,
upon Complaint made to the Aldermen, he must either pay the Debt, or
the Profits of his Office are sequefter'd till the Debt be satisfied; and
when a Cause is removed up hither, the Bail and Clerk below are dis-
charged; and if the Bail given below are offered here, they may be ex-

4. The Plaintiff must except within 25 Days after Bail put in, and No-
tice thereof, and of the Place of their Abode, otherwise the Bail shall be
filed. Upon a Capt. Corpus he has 20 Days, and upon a Hab. Corp. 28.

5. Where a Cause is removed out of an inferior Court by Habeas Cor-
pus, if the Bail below offer themselves to be Bail above, the Plaintiff is
compellable to take them, because he might, but did not, except against
them below. After where a Cause comes out of London; per Holt Ch. J.

6. After Exception against Bail they must justify themselves, or the Plain-
tiff must withdraw his Exception, before he can proceed to Trial, so as
to charge them; per Cur. 12 Mod. 385. Pach. 12 W. 3. Anon.

7. The Committees are to take Bail, but are obliged by Rule of
Court to keep a Book wherein are the Names of the Plaintiff and Defen-
dant, and Bail, and the Perfon who transmits the fame, and who makes

Affida-
Affidavit that the Recognizance was duly acknowledged in his Presence, and on such Affidavit the Judges make a conditional Allocatur, and the Bail are to stand absolute, unless the Plaintiff excepts against them within 20 Days; and if he excepts, the Bail may justify by Affidavit taken before the Commissioners in the Country. G. Hist. of C. B. 32.

8. Bail cannot be justified before a Judge in His Chamber, except it be by Consent, or for Necessity in Vacation; but in the latter Case they ought to be justified again in Term, and upon that the Defendant is compelled to accept a Declaration to go to Trial at the Assizes, if it be an insufferable Term; and upon putting in Bail, it is not enough to give Notice of their being put in, but it ought to be of their Names, Places of Abode, and Trade or Vocation, that the Plaintiff may know how to inquire after them; and after Exception to Bail there is no set Time to justify, or change them for better, but it must be in convenient Time. 6 Mod. 24, 25. Mich. 2 Ann. B. R. in Cafe of Wood v. Shepherd.

9. All the Clerks said that they knew the Sheriff annexed after the Assignment of the Bail-Bond; but Holt Ch. J. said he had known it denied per religios Justiciarios. 6 Mod. 122. Hill. 2 Ann. B. R.

It was declared by the Court to have been the constant Practice, that no Exception could be taken to the Bail which had been taken by the Sheriff; but the Plaintiff may proceed against the Sheriff to make him return his Writ, and bring in the Body, and the Court will then compel the Sheriff to put in good Bail, as they did. Rep. of Pract. in C. B. 61. Mich. 4 Geo. 2. Hamley v. Dowhary.

10. If one accepts of an Assignment, and the same are given as Bail to an Assignment that were Bail to the Sheriff, he cannot deny them; but per Holt, if the same that were Bail [before] become Bail to the Action, and be excepts against them, and they do not justify, he may go on with Amercements against the Sheriff. 6 Mod. 122. Hill. 2 Ann. B. R.

11. Upon a Writ of Error, where Bail is put in, the Defendant in Error has 20 Days to except, and he need not give the Plaintiff Notice that he excepts; but he cannot take out Execution without giving the Plaintiff a 4 Days Rule to put in better Bail; but in all other Cases he must give Notice; per Clarke, Secondary. 1 Salk. 98. Mich. 3 Ann. B. R.

Income Days is not material, nor inconvenient, because it is only in Delay of the Plaintiff in Error himself. 11 Mod. 53. pl. 3. Mich. 3 Ann. B. R. Morris v. Spencer.

S. P. accordingly; but the Rule need not be served within 20 Days, yet it must be before Execution taken out for want of Bail; Per Car. & omnes Clericos. 6 Mod. 250. Mich. 3 Ann. B. R. the S. C.

12. Bail was put in upon bringing a Writ of Error; the Course is, that the other Side shall have 20 Days to except against them, which Exception must be entered in the Book of the Clerk of the Errors, and then he who excepts must take out a Rule to put in better Bail, and serve the Attorney on the other Side with it; but such Rule needs not to be served within 20 Days. 3 Salk. 56. pl. 6. Gibbons v. Dove.

13. Upon a Motion to stay Proceedings on a Bail Bond, the Court declared it should be a standing Rule of Practice, that in all Cases of Exception to Bail, such Exception should be made in the Epitomizer's Book, or on the Bail-Piece with the Commissioner before it is transmitted, and afterwards above in the Epitomizer's Book, or on the Bail-Piece. Rep. of Pract. in C. B. 55. Mich. 3 Geo. 2. Busby v. Walker.

14. Affidavit of Justification by Bail, that they were severally worth the Sum wherein they were bound by their Recognizances, after all their just Debts paid and satisfied, was held to be insufficient, not being in common Form; the Word (just) ought to be omitted. Barnes's Notes in C. B. 57. Patch. 8 Geo. 2. Harriman v. Clegg.

15. The
15. The Defendant because Bail to the Sheriff for the Appearance of W. R. At the Return of the Writ Bail was filed above, but excepted to, and that Exception entered on the Bail Piece; afterwards without any complete justification, the Plaintiff delivers his Declaration generally, and proceeded to Issue, Trial, and Judgment, and then brings this Action to which the Defendant pleaded compertit ad Diem, and in Order to maintain that Plea, the Court was now moved for leave to strike out the Exception on the Bail Piece, that it might be filed, inquiring that the Proceeding generally was a Waiver of the Exception; and the Court ordered them to new Caufe, Rep of Prac. in C. B. 155, 156. Hill. 12 Geo. 2. Walh v. Haddock.

16. It being doubtful whether Sunday should be reckoned as one Day in Notice to justify Bail, it was determined per Cur. that for the future Sunday shall not be counted one (it not being a proper Day to inquire after Bail upon) but two Days Notice must be given, of which Sunday shall not be one; upon Motion for Defendant to justify Bail, Notice was served Saturday June 23, to justify Bail Monday 25; the Notice being insufficient, the Bail were not suffered to justify. Notes in C. B. 222. Trin. 13 Geo. 2. Gregory v. Reeves.

(Q) Given by a wrong Name, and the Offence of Personating another.

1. In Ejectment Bail was put in for the Defendant by the Name of Parkes, but the Declaration and all the Proceedings were by the Name of Parkhurst. After a Verdict for the Plaintiff the Judgment was arrested, because it did not appear that the Defendant was in Cuitodia Marechalli; and, for Parkhurst and Parkes cannot be intended the same Person. Cro. E. put in Bail by the Name of Gerrat.


and all the Proceedings against him were by the Name of Gerrat. It was moved in Arrest of Judgment, that here was no Bail entred, for they were Bail for Gerrat, when the Defendant's Name was Gerrard, but adjudged good, for otherwise every Defendant may give a wrong Name to his Attorney, by which he would be bailed, and then move it in Arrest of Judgment. Golds. 139 pl. 8. Hill 48 Eliz. Gerrard's Cafe.

2. The Plaintiff having recover'd against the Principal, and sued a S. C. cited Sci. Fac. against the Bail, and having Judgment against him, whereupon he was taken. The Bail complained to the Court that he was not the Man, but perforated by another, and which he proved by divers Wit- nesses; and it was confes'd by the Defendant and those that procured the Bail. It was awarded that a Verdict should be made of that Bail quoad him, and of the Judgment on the Seire Factas. Cro. J. 256. pl. 14. Mich. 8 Jac. B. R. Cotton's Cafe,

much the same, the Bail being known to be at Canterbury at the time the Bail was entered into at the Judges Chambers; but it appearing further, that the same Bail was Bail for the same Principal in two Actions in C. B. before another Judge, within 4 or 5 Days after he is supposed to have been entered as Bail at the other Judge's Chambers in the Cafe here, and that the Principal was bound in a Bond with the Bail for the Bail's Debt about the same time, or very little after, and that the Principal was insolvent, and gone beyond Sea, the Court refused to discharge the Proceedings against the Bail.

3. 21 Jac. cap. 26. Enacts, That it is Felony without Benefit of Cler. See Tit. gy to acknowledge, or procure to be acknowledged, any Bail in the Name of Personating, other, pl. 5 and
Bail.

other Person not privy or consenting thereto, provided that it shall not con-
rupt the Blood, or take away Decor.
The Defendant was indicted upon the Statute for acknowledging Bail in the Name of another, the Jury found a special Verdict, that this Bail was taken before a Judge De bene esse, but never filed, and whether this was Felony or not, was the Question? It was indicted that it was, because the filing, or not filing it, was not material; for if it should, then it would be in the Power of the Attorney to make it Felony or not; the Man had done all in his Power to do for perfecting the Bail, therefore he is within the Intent of the Statute, which was made to punish the Abuse of counterfeit Bail: but it was answered, and to held that is not Bail till filed, and made a Record of the Court. 2 Sid. 90. Trin. 1678. B. R. Timpe-
ley's Case.

4. R. offered himself to be Bail in an Action before Justice Whitlock, affirming upon his Oath he was a Subsidy-Man, and asse'd 4l. for Goods in the Subsidy-book; but afterwards, upon further Examination, he confess'd he was not a Subsidy-Man, and also confess'd he had been Bail in other Actions, and had sworn he was a Subsidy-Man, whereas now he confess'd he was not. He was by the Judgment of the Court committed to Prison, and to stand upon the Pillory, with a Paper mentioning his Cause, viz. for false Bail. Cro. C. 146. pl. 25. Mich. 4 Car. B. R. Royfon's Case.

5. 4 & 5 W. & M. cap. 4. S. 4. Enacts, That any Person representing or personating another before Commissioners appointed to take Bail, shall be ad-
judged guilty of Felony.

(R) Liable in what Cases, and how far.

Cro. J. 449. 1. THE Bail, before Judgment against the Principal, made a Lease of his Lands for a valuable Consideration, and afterwards the Plaintiff obtained a Judgment against the Principal; the Question was whether these Lands are liable to the Judgment? Montague and Crook held that they were liable, for otherwise many Bailments and Judgments might be defeated; but Haughton being contra, Curia ad-

Anciently in special Bail in civil Ac-
tions, where the Bail is to
stand Bail in the Place of the
Principal, and to answer no
Action was to stand Bail to all Actions that he should be charged with, when in Court. This was hard in Case of Special Bail, and is therefore now alter'd, tho' alter'd only by Rule of Court, and that as to Common Bail, the Law is still the same. 10 Mod. 153. 12 Ann. B. R. in Case of the Queen v. Ridpath.

3. Bail ought to answer no more than what is mentioned in the Ac-


5. The
Bail.

5. The Plaintiff brought an Action of Trespass &c. by Bill of Middlesex, with an Action for 40l. and recover'd 100l. It was held by the Court that the Bail should not be liable for more than the Action; for that is the Measure of the Undertaking; and Holt Ch. J. held that the S. C & Bail are not liable at all, because the Recognizance is to answer the Condemnation-Money, and since that cannot be, they are bound to nothing.

6. The Plaintiff obtained Judgment against the Principal for 238l. which Judgment was contested by him so far as he could, even to an Affirmance in the House of Lords, and afterwards the Plaintiff obtained a Judgment upon a Scire Fa et against the Bail; and the Question now was, whether they should pay Interest from the Time the Judgment was had against the Principal? They offered to pay the principal Sum and Costs; and it was inlinit for the Plaintiff, that he ought to have the whole, and the Court inclined to that Opinion. 8 Mod. 326. Mich. 11 Geo. Anon.

(S) Of Assigning of the Bail Bond.

1. An Action of Debt was brought against the Bail upon their Recognition, which was, that if the Defendant should be convicted, C. B. in the then as well the Debt as Damages and Costs, which should be adjudged for the Tract of S. C. in the Plaintiff, should be levied on their Lands and Chattels. The Principal was upon a Ca. Sa. against him in Easter Term, 7 Jac. did not render his Bond; but afterwards in Mich. Term did render his Body, and the Court accepted it, and held the Bail should be discharged, and Judgment for the Defendant. Brownl. 65. Trin. 8 Jac. Booth v. Davenant.

Debt.—After Judgment against the Principal, Debt was brought against the Bail, upon their Recognition, and it was moved for an Imparlance, because Debt lies in such Cases, for by this Means the Bail will be ousted of his Plea of no Capias filed against the Principal, and also be abridged of his Time to bring in the Principal, which he hath till the second Scire Facias returned, and for this Reason the Court granted an Imparlance, that such Action lies not; Quod nota. Raym. 14. Pach. 15 Car. 2. B. R. Goddington v. Lee.

2. Tho' the Bail taken by the Sheriff be ever so good, yet the Plaintiff may refuse an Assignment of it, and proceed against the Sheriff by Amercements, therefore it behoves him to take good Bail. It is true, the Sheriff shall not be brought in Contempt for not bringing in the Body, but the only way is to amerce him, and Sheriff may proceed upon the Bail Bond; and the Plaintiff by 23 H. 6. cap. 10. has Election of Bail or Amercement; per Cur. 12 Mod. 447. Pach. 13 W. 3. Pickering's Case.

3. The way upon taking Assignment of Bail Bond is to indorse a Promise upon it, to save the Sheriff harmless against Amercements, and yet the Bond continues still in the Sheriff's Custody. 12 Mod. 516. Anon.

4. If Sheriff take insufficient Bail, and Plaintiff's Attorney accepts of an Assignment of it, he thereby discharges the Sheriff from Amercements; Per Holt Ch. J. 12 Mod. 527. Trin. 15 W. 3. Anon.

5. The Sheriff upon Assignment does not part with the Possession of the Bond, because if the Plaintiff be nonsuited the Sheriff must be indemnified; but he must produce it at the Trial; Per Holt Ch. J. 12 Mod. 527.

6. The Defendant being Sheriff, and having taken up a Man upon an Salk. 658. Attachment, took a Bail Bond from a sufficient Bail for his Appearance, pl. 1. S. C. It was moved by Raymond, that the Prosecutor should be compelled to accordingly take an Assignment of the Bail Bond, and this he said was frequently granted.
Bail.

Raym. Rep. granted in the Common Pleas, where Obligee was a sufficient Person; but the Court denied the Motion. 12 Mod. 579. Mich, 13 W. 3. the accordingly: King v. Daws.

Plaintiff may either accept an Affidavit, or proceed against the Sheriff by Amencements, and the Sheriff may reimburse himself by taking the Bail Bond, but if the Bond is not sufficient he is without Remedy.

7. 4 & 5 Ann. cap. 16. Enacts, that where the Sheriff or other Officer takes a Bail Bond upon an Arrest made upon any Person upon Process issuing out of any of the Courts of Record at Westminster, the Sheriff or other Officer shall, at the Request and Costs of the Plaintiff in such Action, or of his lawful Attorney, assign to the Plaintiff the Bail Bond, or other Security taken from such Bail, by endorsing thereof, and attesting of it under his Hand and Seal, in the Presence of two or more credible Witnesses, which may be done without any Stamps, provided the Affidavit so endorsed be duly stamped before an Action brought thereupon. And if the said Bail Bond or Affidavit, or other Security taken for Bail be forfeited, the Plaintiff, after such Affidavit made, may bring an Action in his own Name; and the Court where the Action is brought, may, by Rule or Rules of the same Court, give such Relief to the Plaintiff and Defendant in the original Action, and to the Bail upon the said Bond, or other Security, as is agreeable to Justice and Reason; and such Rule and Rules of Court shall have the Nature and Effec of a Deceance to such Bail Bond, or other Security for Bail.

8. Debt upon a Bail Bond as Assignee of the Sheriff of Suffolk, according to the late Act of Parliament, and declared generally without shewing Matter specially, that it was a Sheriff’s Bond, which by the late Act is assignable; to which there was a Demurrer; Per Cur it should have been shewn that it was a Bond assignable; and when Mr. Salkeld found the Opinion of the Court against him, he prayed to discontinue, which was granted on Payment of Costs. 11 Mod. 170. pl. 7. Pach. 7 Ann. B. R. Bushell v. Haynes.

9. Holt Ch. J. said, that upon an Action by an Assignee of a Sheriff’s Bond, it is enough to set forth, that the Bond was Pro Comparsentia of the Defendant, and there is no Need of setting out the Matter at large. 11 Mod. 237. Collins v. De-la-Fountain.

10. Holt Ch. J. made it a Rule of Court, and ordered it to be screen’d up in the Office, that no Bail Bond shall be assigned in Town till 4 Days after the Return of the Writ, and not till 6 Days after the Return in a Country Cause. 11 Mod. 253. pl. 4. Mich. 8 Ann. B. R.

11. In Debt by Assignee of a Bail Bond, it was objected to the Declaration on a Demurrer, that the Breach of the Condition was set forth to be, His not appearing Secundum Exigentiam Brevis, nor set forth on what Day the Writ was returnable, and then Non confat, whether he did appear or not Secundum Exigentiam Brevis, and fo whether the Bond was forfeited or Not; and Parker Ch. J. held the not setting forth the Return of the Writ to be a fatal Objection; sed adjournatur. 10 Mod. 190, 191. Mich. 12 Ann. B. R. Sethern v. Gibber.

12. H. a High Sheriff did, by a legal Instrument, make L. his Under-Sheriff in Tyme for A. who had been Under-Sheriff the Year before; neither L. nor A. took the Oaths required by 27 Eliz. cap. 12. After H.’s Year was expired, and before a new Sheriff appointed, A. makes an Affidavit of a Bail Bond; and the Question was, whether A. was such a Person, as that his Affidavit of the Bail Bond was a good Affidavit within the Statute for the Amendment of the Law. (S. B. A. always acted as Under-Sheriff, and L. not at all;) See the Point debated; sed adjournatur. 10 Mod. 233. &c. Hill. 1 Geo. 1. B. R. Kitchin v. Fagg.

13. An Action of Debt was brought upon an Affidavit of a Bail Bond taken by the Sheriff, who had arreisted the Defendant upon a Capias &c. and upon a Demurrer to the Declaration it was objected, that the
the Plaintiff had not set forth the Capias, or the 

leste, or Return of any 

Capias, as he ought to have done, and the Court of C. B. being of that 

Opinion, a Writ of Error was brought in B. R. but the Judgment of 

C. B. was affirmed; for it is the Capias which gives Life to the Bond. 

8 Mod. 74. Trin. 8 Geo. Tucker v. Goldburne.

14. Affinies of a Bail Bond by the Sheriff, brought Debt and had 

Judgment by Nis dicti, wheraupon Error was brought, because it was 

not thewn that the Sheriff affinned the Bond to them by icaiding the same 

and attaching it under his Hand and Seal in the Presence of 2 or more cre-

dible Witnesses, as the Statute 4 Ann. cap. 16. Par. 29. directs, but only 

alleges that the Sheriff at the Costs of the Plaintiff in the Suit, 

according to the Form of the Statute in that Case lately made and provided, did affin-

to the Plaintiffis the said Bond; but the Court unanimously over-rulled the 

Exception; " All Defects (which would have been aided by Ver-

" dicel) being aided after Judgment by Nihil dictor, by the fame Act 

" of 4 Ann." and it being expressly alleged that the Bond was affin-

aged Secondum Formam Statutis, and Judgment was affirmed. 2 Ld. 


Sir William Morgan.

(T) Of suing the Bail.

1. If a Man be by Mainprize, and does not keep his Day, Capias shall if-

sue against him and his Mainperrors; quod nota. Br. Processt, pl. 


2. Recognizance of Bail by F. & B. was joint and several, and Judg-

ment was held against the Principal; two Scz. Fac. issued against both the 

Bail, and upon Default Judgment was Quod Querns habeat Executionem 

against them secundum Formam Recognitionis praebi. The Plaintiff 

brought a Ca. Sa. against F. only, and levied the Debt upon him only by 

imprisoning him till he paid it; it was moved for a Superfeades and 

Restitution, because the Judgment in the Sci. Fac. being joint, the Ex-

ecution by the Capias ought to be so also; and the' the Recognizance 

was joint and several, so that he might have brought Sci. Fac. against one 

only, yet having elected to take it against both, the Ca. Sa. should be so 

too; but per Cur. this is not Judgment to recover, but that Habeat Ex-

ecutionem, and is to according to the Recognizance joint or several. 

Where the Judgment is joint, the Execution should be so too; but the 

Recognition out of which this Sci. Fac. issues as out of the Judgment be-

ing joint and several, tho' the Sci. Fa. was joint, yet the Execution may 

be several as the Record is, out of which it issues, and so the Execution was 


Personal Actions; and this Statute wills that if Execution is not done within the Year, then it shall be 

commanded, quod Execut Faciat; but it is not said that after the Sci. Fa. be taken; 

Judgment to re-

cover; and therefore the Recognizance of the Bail, which is joint and several, continues as it was, and 

is not altered by the Sci. Fa. and if Debt be brought it ought to be upon the first Judgment; and it is 

not like to an Obligation; for the Lieu (Lien) of the Obligation is altered and changed by the Judg-

ment upon it——2 Keb. 260. pl. 28. S. C. Twifden doubted, but Windham agreed; but all agreed 

that on joint Execution against both, either may be taken; but the (Writ of) Execution must be against 

both, viz. Sci. Fa. cos &c. Et adjournatur.—Ibid. 274. pl. 53. S. C. The Court denied a Superfeades, and 

held that a Sci. Fa. never goes out against one.

2. If 3 Men bring an Action, and the Defendant puts in Bail at the Suit 

of 4, they cannot declare; but if he had put in Bail at the Suit of one,
that one might declare against him; per Twifden J. Mod. 5. pl. 16. Mich. 21 Car. 2. B. R.

3. An Hab. Corp. ad Faciendi' & Recipiendi' was directed to an inferior Court. A Plant was return'd in Trefofs on the Cafe against the Defendant, and thereupon special Bail put in for the Defendant, ad fellaam qvrentis in querela. The Plaintiff afterwards declared against the Defendant and another jointly, and had Judgment against them, and now brought a Seire Facias against the Bail. Sed per Cur. the Bail are not liable to this joint Action, and so they were discharged. 2 Jo 188. Hill. 33 & 34 Car. 2. B. R. Nichols v. Tucker.

4. M. the Defendant, and A. were Bail for J. S. in an Action brought by T. who recovers and brings a Sci. Fa. against M. and A. jointly, and had Judgment; A. dies, and then T. dies. The Executor of T. brings a Sci. Fa. against M. the Survivor, to which he demurred; It was argued that by the Plaintiff's bringing a Sci. Fa. against both, his Election to make the Recognizance joint or several is determined; and compared to the Cafe of an Obligation, and that being a Personal Lien it should survive &c. but it was answered, that by the Seire Facias nothing is recovered, it is meerly a Thing relative, and now this Sci. Fac. was to revive the 1st Recognizance, and needs not take Notice of the Judgment in the Sci. Fac. and that therefore the Plaintiff here had the like Election as T. had; Jones J. asked him, What if Execution had been for Part? to which it was said, then he must shew it, and pray Execution for the Residue: Adjournatur. Skin. 82. pl. 24. Mich. 34 Car. 2. B. R. Banaton v. Morris.

because there it made joint. Quere hereof, the Court taking Time to advise; and in this Cafe Jones J. said that there would be a Difference between an Obligation and a Recognizance.

5. In a Cause at Law there was Bail and Judgment. The Defendant brought his Bill in this Court, and in order to obtain an Injunction did, by Order, enter into a Recognizance for bearing the Cause &c. and thereupon had an Injunction, which he kept on Foot a Year; after which he surrendered himself at Law, in Discharge of his Bail. The Defendant in this Court then moved for Leave to profecute upon the Recognizance. Upon reading an Affidavit of Notice it was granted, no Defence being made on the other Side. P. R. C. 300.

6. By the Course of the Court the Plaintiff, after Judgment against the Principal, may sue out a Sci. Fac. both together against the Bail, with Trefle backward, so that there be 15 Days between the Trefle and Return of each Writ; per Eyre J. Comb. 287. Trin. 6 W. & M. in B. R. Anon.

7. One cannot stay Proceedings upon Bail-bond till other Bail be put in, and justified, if excepted against; per Holt Ch. J. 12 Mod. 614. Hill. 13 W. 3. Anon.

8. In Seire Facias against Bail, the 2d must be tried on the Return of the first, and both cannot be taken away at a Time. There ought to be 15 Days inclinfor between the Trefle of the first and Return of the second; per Holt. 7 Mod. 40. Trin. 1 Ann. B. R. Anon.

9. The ancient Course was, that a Bail-bond could not be put in Suit till a Rule was had to ansverse the Sheriff for not having the Body ready; and now Proceedings on the Bond-bond were set aside, because there was no Capi Corps return'd. 6 Mod. 229. Mich. 3 Ann. B. R. Anon.

11. Debt was brought in C. B. and a Recognizance taken, and an Action of Debt was brought on that Recognizance in B R. The Court was moved that there might be no special Bail given; for that this was only a Device to better the Security. Sed per Holt Ch. J. and Powell, upon a Recognizance of Bail in C. B. no Capias lies, because it is for a Sum certain;
485

Bail.

tain; but upon the like Recognizance in B. R. a Capias lies, because it is body for body, and there may be a Reason to help them to a Capias pias upon the Recognizance. 3 Salk. 55. pl. 2. Pasch. 4 Ann. B. R. Anon.

12. The Bail was arrested upon a Clausum fregit, with an Ac etiam in Debito sinee demand. The Plaintiff thereupon proceeded to Judgment; and now, on Motion to set aside these Proceedings, the Question was whether the Plaintiff should not have sued by special Writ; and the Court held that an Ac etiam in Debito is an Action of Debt within the Meaning of the Rule of Court, but that the Defendant, i.e. the Bail, must be arrested at least 4 Days before the Return of the Writ or Proces, so that he may have Time to render the Principal. Rep. of Præct. in C. B. 18. Mich. 6 Geo. 1. Wright v. Duxon.

13. If the Bail are sued upon the Recognizance, they must give Bail; Held by 2 Judges, the Court not being full. 3 Mod. 237. Pasch. 10 Geo. 1. Chitty v. the Bail of Anfruther.

14. Two Persons entered jointly and severally into a Recognizance of 4000 l. Bail for another, and afterwards the Plaintiff brought a Sci. Fa. against both of them jointly, and had Judgment for 4000 l. against each of them; and now it was objected, that this Judgment was erroneous, because a several Judgment cannot be given upon a joint Sci. Fa. no more than upon a Bond. It is true, a Recognizance may be joint and several, (as this was) and such a Recognizance may warrant a joint and several Sci. Fa. but yet a several Judgment can never be had upon a joint Sci. Fa. against each of the Cognizors, for the Plaintiff might have brought a Sci. Fa. against each of them severally, and not against both jointly. The Court was of Opinion, that would be to multiply Actions, and that this was the constant Form, and so the Judgment was affirmed. 8 Mod. 199. Mich. 10 Geo. Cornith v. Clerk & al.

15. The Court held, that in order to charge the Bail a Ca. Sa. against the Principal must be left with the Sheriff 4 Days before it is returnable. Rep. of Præct. in C. B. 34. Pasch. 13 Geo. 1. Laycock v. Arthur.

16. A Capias issued into York, a Trefatum Capias into Middlesex, and a Sci. Fa. against Bail in York, and Judgment thereon, and Trefatum Execution into Middlesex; and now the Court was moved to set aside the Judgment, because the Sci. Fa. against Bail ought to be where the Bail or Recognizance is enter'd on Record; and in this Case the Sci. Fa. issued into York, whereas it ought to have issued into Middlesex, the Bail being recorded at Westminister; but Cur. advizare vult. Rep. of Præct. in C. B. 53. Pasch. 2 Geo. 2. Dalton v. Teafdale.

(U) Scire Facias against the Bail. Proceedings therein.

1. UPON a Writ of Error brought the Bail entred into a Recognizance, conditioned, that if the Judgment is affirmed to pay the Money &c. and a Sci. Fa. being brought on this Recognizance, it was objected against the Sci. Fa. that it was not returnable on any Return Day, but on a Day certain; and it not being grounded on any Bill, or thing
thing in Nature of a Bill, it ought to be returnable on a Return-Day; but if the Sci. Fa. had recited the Condition of the Recognizance, then it had been in Nature of a Bill, and well, but here it is a Writ, and therefore ill; and all the Clerks said, that so was the constant Usage, and the Court stayed the Judgment. Lev. 246. Trin. 20 Car. 2. B. R. Allen v. Cutler.

2. M. the Defendant and 2 others, entered into a Recognizance for the good Behaviour of M. Afterwards M. was indicted, for that he was being so bound, did assault J. S. and so had forfeited his Recognizance; but this Indictment was quashed, because he ought to have been professed by Scire Facias, and not by Indictment. Raym. 196. Mich. 22 Car. 2. B. R. the King v. Moor.

3. A Writ of Error was brought by the Bail to reverse 2 Judgments in Ireland, viz. that against the Principal, and that against the Bail. The Court held, 1st. That the Writ was abated in the whole. 2dly, That the Record of the Judgment against the Principal was not removed by this Writ, and so it was said it had been resolved formerly in one 1500th's Case, which was cited by the Ld. Ch. J. and remembered by Jones Attorney General; but the Question was, how the Defendant in the Writ of Error should proceed to have the Fruit of his Judgment against the Bail, the Record being removed hither, and so they could not grant the Execution in Ireland? And it was proposed by Hale Ch. J. to take out Sci. Fa. into Middlesex upon the Recognizances which are now here, and upon the Return of them to grant Execution into Ireland. But afterwards it appearing that these judgments were not made Records here, by reason they were not entered upon the Rolls, they said they would send a Certificate to the Judges in Ireland, that nothing was removed here before them, and therefore they might grant Execution; but upon the Judgment against the Principal, the Party might have Execution there, for that Record was never removed. Freem. Rep. 416, 417. pl. 552. Mich. 1675. Eutlace v. Keppin.

Ca. Sa. a- against the Principal, in Order to charge the Bail, must lay 4 Days exclusive in the Sheriff's Office, and a Sci. Fa. must lie in a convenient Time, for no certain Time is limited, and the first Sci. Fa. may be antedated, even in Term Time; Per Clarke. Secondary; but per Holt Ch. J. it cannot, where it issues by Rule of Court. 2 Salk. 599. pl. 6. Trin. 11 W. 3. B. R. Anon.

The first Sci. Fa. was, 5. In C. B. there is but one Sci. Fa. and upon a Nihil returned, Execution. But in B. R. there are 2, and 2 Nihils returned, but both must not be set out together; for the first should be duly returned before the 2d due out, and the 2d should bear Teste on the Day of the Return of the first. 2 Salk. 599. pl. 4. Trin. 8 W. 3. B. R. Anon.

5. The 24th October and returnable 21st October, the Alias was testified the same Day, and returnable the 7th of November; the Court held this very well, there being 15 Days inclusive. 2 Salk. 599. pl. 7. Mich. 11 W. 3. B. R. Goodwin v. Peck.

6. Where the Sci. Fa. is against the Bail, it should be in sae Parte, but where it is against the Defendant himself it should be in hac Parte. 2 Salk. 599. pl. 5. Mich. 10 W. 3. B. R. Lugg v. Goodwin.

Parte was held good. [But it is not distinguished there, whether the Sci. Fa. was against the Principal or the Bail.]—Ld. Raym. Rep 393. S. C. and Holt Ch. J. said, that upon Search of Precedents where the Sci. Fa. was sued against the Defendant upon a Judgment against himself, In hac Parte, is well
7. Judgment in Sci. Fa. against the Bail was reversed upon a Writ of Er- Carth. 447.
ror, because there was no Warrant of Attorney; for such a Warrant to the S. C. but
principal Action is no Warrant to the Sci. Fa. because these are distinct Ac- S. P. does
tions; therefore there ought to be a particular Warrant of Attorney to this Sci. Fa. against the Bail, and it ought to be entered upon the Return of the Sci. Fa. for then the Suit commences. 2 Salk. 603. pl. 13. Patch.


8. C. but S. P. does not appear,—2 Ld. Raym. Rep. 849. S. C. but S. P. does not appear: But Ibid, 1252. S. C. & S. Pa. and Holt Ch. J. said, that the Plaintiff might pray a Sci. Fa. without an Attorney, but when he comes to pray Judgment upon it, he does it by Attorney, and there is no Warrant of Attorney before, and therefore it is Error; and of that Opinion were all the Court, and Judgment was reversed Nisi &c.

8. In C. B. there is but one Scire Facias against the Bail, and upon a Nihil returned there is Execution; but in B. R. the Court is to have 2 Scire Facias’s against the Bail, (viz.) a Sci. Fa. and an Alias Sci. Fa, but both must not be fixed out together, as formerly; for the first shall be duly returned before the Alias Sci. Fa. is fixed out, which must bear Tefe on the Day of the Return of the first, and there must be 15 Days inclusive between the Tefe of the first and the Return of the Alias; now the Court was moved to let aside a Judgment obtained against the Bail upon 2 Scire Facias’s brought against them, because it did not appear that the Judgment was had on the Return of 2 Nilils, and it was referred to the Matter to examine this Matter. 8 Mod. 227. Hill. 10 Geo. Andrews v. Harper.

9. If the first Sci. Fa. against the Bail bears Tefe the same Day or on which the Ca. Sa. is returnable it is good; for in many Cases the Law takes Notice of the Fraelion of a Day, and here it shall be took that the Ca. Sa. was returned before the Sci. Fa. was fixed out, which might very well be, tho’ both were on the same Day. 2 Ld. Raym. Rep. 1567, 1568. Patch. 3 Geo. 2. Stewart & al’ v. Smith & al’

(W) Remedy for the Bail; and Stay of Proceedings. In what Cases.

1. THE Bail cannot join in a Writ of Error to reverse the Judgment a Geo. C. 1545.
against the Principal, and also the other Judgment against the Bail but the Bail alone shall have Error to reverse the Judgment against them- pl. 4 S. C. selves, and the Principal another Writ to reverse the first Judgment. And a Writ brought by the Bail to reverse the 1st and 2d Judgment was held ill. Jo. 396. pl. 4. Mich. 13 Car. B. R. South v. Griffin.

nor take Advantage of any Error therein; and that if the Writ of Error had been brought for Error only in the principal Judgment it had been clearly ill, but because the Writ of Error supposes Error in the principal Judgment, and also in the Judgment in the scire Facias against the Bail, as also in Redditione Executione superinde, Jones held that the Writ of Error will lie for that part, and shall be void for the Residue. But Berkly and Croke (Brampton being absent) were of Opinion that the Writ was ill, and should abide in all, because it is grounded on the first Judgment, and also upon the Judgment in the Sci. Fa. and so coupling them together all is void; but if the Bail in their Writ of Error had recited the first Judgment, (as of Necessity they must make Mention thereof) and the 2d Judgment in the Sci. Fa. and alleged Error in that Judgment, and in the Execution thereof &c. it had been well enough.
2. Judgment on a Sci. Fa. against the Bail, who brought a Writ of Error as well upon the Judgment against the Principal, as upon the Judgment on the Sci. Fa. but it was quashed, because they were not Parties to the original Judgment. 5 Mod. 397. Patch. 16 W. 3. Atwood v. Duell.

3. It was ruled per Holt Ch. J. that the ancient Course was, that a Bail Bond could not be put in a Suit till a Rule was had to answer the Sheriff, for not having the Body at the Return of the Rule; and the Course now is to stay Proceedings on the Bail Bond, if there is no Return of a Capii Corpus. 3 Salk. 56. pl. 4.

4. If one who becomes Bail has a Warrant of Attorney to indemnify him, yet he cannot enter it up, and take out Execution upon it, till some Proceeds is gone out upon the Bail Bond, whereby he has an Injury done him.

5 Mod. 2. pl. 5. Patch. 1 Ann. B. R.

5. There ought not to be a Stay of Proceedings on a Bail-bond upon bringing Principal, Interests, and Costs into Court. After Notice of Trial, unless it be brought in such Time as the Plaintiff may not be delay'd of his Trial; per Cur. 6 Mod. 25. Mich. 2 Ann. B. R. Butler v. Rolfe.

6. If the Defendants in the Scire Facias will confess Judgment, and enter into a Rule to pay the Debt, or to deliver up the Principal within 4 Days after the Judgment shall be affirmed, in such Case the Proceedings on the Sci. Fa. should be stayed. 8 Mod. 130. cites it as resolved.


7. A Motion to stay Proceedings in an Action of Debt on a Recognition, because a Writ of Error was brought upon the original Judgment. The Court were unanimous that the Plaintiff might proceed to Judgment, but Execution to stay till the Error was determined. Rep. of Pract. in C. B. 24. Trin. 9 Geo. 1. Covert v. Allen.

8. A Motion to stay Proceedings on the Bail-bond. The Case was, one H. being Defendant in the original Action was arrested on a Teftatum Capias into Suffolk out of London, and by Mistake the Bail was taken, and filed with the Filaizer of Suffolk, but should have been filed with the Filaizer of London. The Court held the Proceedings on the Bail-bond regular, and would not stay them, but upon Payment of Costs, and the Defendant's giving the Plaintiff Judgment on the Bond to the Sheriff, to stand as a Security for the Plaintiff's Debt, and the original Defendant's accepting a Declaration, and pleading thereto, and taking Notice of Trial after Term; but the Defendant not consenting to these Terms, no Rule was made. Rep. of Pract. in C. B. 44. Patch. 1 Geo. 2. Wickling & al v. Cockledge.

How and when the Bail are discharged.

1. In Precipe quod reddat three were received by Reversion by Default of Tenant for Life, and found Surety, and after at the Venire Facias returned, by Illeue joined by them, the one of the three was dead, and the Illeue and the Surety remained. Br. Surmise, pl. 21. cites 19 E. 4.

2. If a Man be arrested in London &c. and finds Surety, and after removes the Body and the Cause by Writ of Privilege, and is dismissed, the Sureties are discharged. Br. Surmise, pl. 23.

3. Contra if the Plaintiff obtains Proceedendo, because the Defendant did not prove his Cause of Privilege; for there in Effect he was always Prisoner to the Franchise; contra where he is once dismissed. Ibid.


5. The Plaintiff, by Coun and Practice with the Principal, would charge the Bail and free the Principal, and therefore the Bail was by the Court discharged. Bullit. 43. Mich. 8 Jac. Welfley v. Brown.

6. T. A. Senior, being arrested in London, and sued there in Debt upon an Obligation, was removed by Habe. Corp. into B. R. and put in Bail. J. S. the Obligee did not declare against him, but declared against T. A. Junior, who was also bound in that Bond and had Judgment, no Bail being filed; and upon a Writ of Error brought, this was assign'd for Error; then J. S. moved that the same Bail might be filed for T. Junior, which was denied by the Court; and now there being 3 Terms past'd since the Bill was put in for T. the Elder. J. S. moved that he might be Liberty to declare against him; but that was likewise denied, because every Plaintiff ought to proceed by the Rule of the Court, within 3 Terms after Special Bail filed; therefore it was ruled that the Bail should be taken off the File, and the Defendant should not answer. Cro. J. 620. (bis) pl. 11. Mich. 18 Jac. r. B. R. Atfield v. King.

7. B. was Bail for 6 Persons, against whom the Plaintiff got Judgment, and 2 were taken in Execution. Adjudged that till all the Prisoners are in Execution, the Bail is not discharged; for the Law expects a compleat Satisfaction. 2 Mod. 312. Trin. 30 Car. 2. B. R. Altr y v. Ballard.

Altr y v. Palfryman, Bail for Ballard, S. C. but S. P. does not appear.——Vent. 315. S. C. adjourns; but adds that Judgment was for the Plaintiff.

8. A Writ of Error on the Judgment against the Principal is no Superfedeas to the Proceedings against the Bail, though when the first Judgment is reversed the other fails. Agreed per Cur. 2 Snow. 85. pl. 73. Hill. 31 & 32 Car. 2. B. R. Anon.

9. An Infant was Bail, and taken in Execution at little more than 20 Years of Age, but was discharged after full Proof of his Non-age; but the Court held it a Matter of Discretion to Bail him or not, he being in Execution; but if he had brought his Audita Querela before he had been taken in Execution, he must have a Superfedeas of Course. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Ogle, and Loyd v. Eagle.

10. Where a Man is admitted to Bail, he is by Intendment of Law in their Custody; but when he is taken from the Bail by the Proceeds of R. they are discharged; per Ch. J. but per 3 Jutt. contra, that they are not discharged till the Committee entered; for tho' he is committed on a Conviction on an Information, the Bail on a Motion in this Court may have him brought up at any Time, and render'd back again in Discharge of Bail themselves. 8 Mod. 195. Mich. 10 Geo. 1. The King v. the Bail of Strudwick.
Bail.

11. Bankruptcy in the Principal shall not avoid a judgment regularly obtained against the Bail, tho' the Principal, if taken in Execution, should have been discharged on producing a Certificate according to 5 Geo. 24. 6 Geo. 22. per Cur. 8 Mod. 348. Pasch. 11 Geo. 1. Heavyhile v. Davis.

(Y) Discharged by Death of the Principal.

1. In a Sci. Fac. against the Bail they pleaded the Death of the Principal on the Day of the Judgment; the Court held they might plead it, because in such Case they cannot have a Writ of Error to reverse the Judgment. Cro. E. 159. pl. 20. Mich. 32 & 33 Eliz. B. R. Water v. Perry.

Plea was, that the Principal died before Judgment; and all the Justices (prater Wray) held the Plea not good, because it is a Surmise against the Judgment; for Judgment cannot be given against a dead Man; but per Wray, the same is Error in Fact, and of such Error the Party may have Advantage in this Court; but it was ruled that the Defendants should be sworn that their Plea was true.

2. The Plaintiff recovered in Debt in B. R. and immediately upon the awarding a Ca. Sa. the Defendant died; it was a Quere if in such Case an Action of Debt lieth against the Special Bail; the Executors having nothing, a Scire Fac. doth not lie against the Bail; and in C. B. the Court was divided in that Case Godb. 354. pl. 450. Trin. 21 Jac. B. R. Anon.

3. The Bond was that if the Defendant be convinced in the said Action, and does not pay the said Condemnation or render his Body to Prifon, that be would pay the Debt. In Scire Facias against the Bail, he pleaded that before any Ca. Sa. sued, the Defendant died, and Judgment was given against the Plaintiff; but Hobart was at one Time against the Judgment when it was moved, because he took it that the Defendant in the original Action, ought in convenient Time after the Judgment, to have offered himself, or that otherwise the Recognizance was forfeited; but the 3 other Justices e contra, because the Statute is in the disjunctive, viz. to render his Body to Prifon, or to pay, and the one by Death of the Party, being the Act of God, becomes impossible, and this before any Capias sued, which is a Demand in Law, he is discharged, and afterwards on View of Precedents adjudged for the Bail. Jo. 29. pl. 1. Pasch. 21 Jac. B. R. Sparrow v. Sowgate.

4. If the Principal dies before the Return of the Capias, the Bail are discharged; but if he dies after the Return of the Capias and before the Return of the Sci. Fa. they are not discharged, for the Sci. Fa. is as it were but a Writ of Grace; Per Cur. Freem. Rep. 338. pl. 418. Trin. 1673. in Cafe of Menate v. Coltlo.

Salk. 57. pl. 9. Anon.

5. A Bail Bond is entered into to appear the 1st Day of Michaelmas Term; the Defendant dies the 10th of Nov. and the 12th Nov. the Bond is assigned over, and sued; and upon a Motion the Suit was had, paying of Costs, for the Plaintiff was at no Damage upon the Defendant's not appearing the first Day of the Term, for it he had appeared and filed Bail, the Plaintiff could not have tried his Cause that Term; so that the Defendant dying within the Term, the Bail ought (as well upon the Bail Bond, as if they had been put in Court to the Action) to be discharged. 2 L. P. R. 254.

6. The Principal died before the Return of the second Sci. Fa. against the Bail, and after a Capias returned against the Principal, and it was urged
urged that since the Bail would have been discharged by rendering the 
Principal at any Time before the 2d Sci. Fa. returned, and that they 
were now deprived of that Advantage by the Act of God, it were but 
reasonable to discharge them; but per Cur. it cannot be, for it is In-
dulgence to allow a Render after a Capias returned in Discharge of 
them; and their Recognizance is forfeited upon the Capias returned against 
the Principal, and the Court will only discharge the Bail alter, where 
they render, but not where they cannot; but the Death of the Party 
before a Capias returned, had been a good Plea to the Sci. Fa. and to 
was the Rule. 12 Mod. 601. Anon.

7. Sci. Fac. against the Bail, who pleaded that the Principal died be-
fore the Return of the Capias &c. and upon a special Demurrer, this was "the 
adjudged ill, for it should be that he died before the Return of any Ca-
pias, that it may appear he was not alive at the Return of the first before any 
Capias, for if he was, the Recognizance is forfeited. 3 Salk. 57. pl. Capias filed 
out, is a good Plea, is, be-
cause the Principal had Election either to pay the Money, or to render his Body to Prision, and the 
last is become impossible by the Act of God. 2 Salk. 57; pl 11.

8. The Plea of the Death of the Principal before the Return of the 
Capias is good, but the pleading his Death generally without confining it 
to some Time is not good; Per Pratt. J. 10 Mod. 306. Pach. 1 Geo. 1. 
B. R.

9. In Action upon the Recognizance of the Bail, they pleaded the 
Death of the Principal ante Emancipation Brevis; Parker Ch. J. held 
this an immaterial Plea; for Death before the issuing out of the Capias is 
came on 
Death before the Return of it; but it be found that the Principal again, Pach. 
did not die before the issuing out of the Capias, it is plainly nothing 
to the Purpose, for notwithstanding this he may die before the Return 
of it; and the others being of the same Opinion the Plaintiff would have 
had his Judgment, had not another Objection been started. 10 Mod. 

the Plea might, yet that now he was somewhat doubtful. 10 Mod. 306.

10. One T. S was arrested at the Suit of H. the Plaintiff, and S. the De-
pendant became Bail to the Sheriff for the Appearance of the said T. S. at 
the Return of the Writ; but before any further Proceedings H. died, yet his 
Attorney took out an Affidavit of the Bail Bond, and proceeded to Judg-
ment and Execution against the Bail; and now the Court was moved to 
eteile these Proceedings as irregular, and the Matter being so reported 
by the Master, they were set aside. 8 Mod. 240. Pach. 10 Geo. 
Hutchiddon v. Smith.

11. The Principal died after a Ca. Sa. returned, but before the Return of the 
the 2d Sci. Fa. the Bail are chargeable, because it was their Omission 
that they did not surrender him, he being alive at the Return of the 

was denied for the same Reason. Mich. 1 Geo. 2. B. R. Glyn v. Yates.

(Z) Ren-
(Z) Discharged by Render of the Principal.

1. A Man condemned in Debt renders himself to the Court, and prays his Sureties may be discharged; and the Plaintiff is demanded, for the Court said he may elect either his Body; or to take his Goods in Execution, but by this order the Sureties were discharged. Cro. E. pl. 22. pl. 3. Mich. 25 Eliz. C. B. Anon.

2. After Judgment against the Principal, he came into Court and rendered himself, and prayed that the Court in Discharge of his Bail would record his Render, which was granted; and the Court demanded of the Plaintiff, whether he would have Execution of the Body, who replied he would not, whereupon the Court awarded that the Sureties be discharged. Le. 58. pl. 74. Pach. 29 Eliz. C. B. Fullwood v. Fullwood.

3. Upon a Capias against the Principal after a Judgment in Debt, and Non Inventus returned, a Sci. Fa. was awarded against the Bail, which was returned Nihil; and upon a 2d Sci. Fa. against him, the Principal was brought in, and the Bail prayed that he might be in Execution; but the Court ordered it to be observed as a Rule, that if a Cts. be awarded returnable the next Term, wherein Nihil is returned, the Principal shall never afterwards render himself in their Discharge; but if it be returnable de Die in Diem, then the Body might be brought in upon the first Sci. Fa. and that there shall be 15 Days between the Issue and Return of the Seire Facias, so that there may be convenient Time to seek the Principal. Cro. Eliz. 738. Hill. 42 Eliz. B. R. Alien v. Dilton.

4. The Render ought to be in the Court where the Judgment is; Per Cur. Cro. J. 98. pl. 27. Mich. 3 Jac. B. R. in Cave of Harrgrave v. Rogers.

5. The Plaintiff by Practice with the Principal would charge the Bail, and discharge the Principal upon Oath (the Practice being very flagrant, and both Principal and Bail being in Execution, the Bail first, and afterwards the Principal) the Bail was discharged by the Court. 1 Bullit. 43. Mich. 8 Jac. Westley v. Brown.

6. If the Principal after Judgment renders himself in Discharge of his Bail, it is still at the Election of the Plaintiff to take out Execution either against him or his Bail; but if he takes the Bail, tho' he has not full Satisfaction, he shall never afterwards charge the Principal. Cro. J. 320. Pach. 10 Jac. 1. B. R. Higgen's Cafe.

7. After Judgment against the Principal a Ca Sa. issued against him, which was returned; but before it was filed a Sci. Fa. issued against the Bail. One of them brought an Action against the Principal, and being taken upon the Proces, and brought into Court, the Bail prayed that he might be delivered in Execution for the Debt upon the Judgment, which was done accordingly, and the Plaintiff was informed by the Court of Necessity to pray the Body of the Principal to be committed in Execution for his Debt. 2 Bullit. 260, 261. Mich. 12 Jac. Duport v. Wildgoose.

8. Scire Facias against the Bail on a Recognizance acknowledged according to the Stat. 3 Jac. cap. 8. for Errors brought in Actions of Debt. The Defendant pleaded in Bar, that after the Writ of Error allowed, and
Bail.

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and before any Default, the Principal render'd his Body in Execution. Ad-

against the

judged per tot. Cur. a good Bar, because the Principal, who is the Plain-

principal in

D. R. He

brought Er-

in Cam.

and

ertiff in the Writ of Error, may render his Body in Execution, and so ex-


pace Bail according to the Statu. 5 Jac. to preceding with Effett. The Writ was returnable 3d Feb. and on

the 1st of Feb. A Sci. Fa. was brought on the Bail with the Writ of Error, who pleaded that it was returnable 3d Feb. and that on the 2d of Feb. the Principal came here into Court, and render'd himself in Dis-

charge of the Bail, and by Order of the Court was committed to the Marshalsea, and yet remains there in Execu-

tion. The whole Court agreed that the Plea is not good; but per Coke, it ought to be that in eadum

Cura redditis &c, & per eandem Curiam commitisse; for the Court ought to commit him, and rendering himself

is not sufficient, unless committed per Curiam in Execution, which cannot be in this Case, because it

appears the 2d Day of Feb. which is Candlemas Day, is not Dies Juridicus; and Haughton J. agreed, and

and therefore Judgment for the Plaintiff — Cro. J. 452. S. C. adjudge'd accordingly that it is no Plea; for this Ma-

nuposition is not to render his Body, but to pay the Debt adjudge'd, which is grounded upon the Statute of

5 Jac. cap 8. that for the avoiding Delays in Executions, the Party who sues a Writ of Error in

Debt shall pay the Debt, or find Sureties to pay the Debt, otherwise there shall not be any Stay of Exe-

cution, wherefore it was not sufficient to render the Body; but he ought to pay the Debt, or his Sure-

ties for him, and not to let him to Bail, and to render himself when he will. — Roll Rep. 392, 393.

pl. 15. S. C. and Coke Ch. J. and Haughton J. held accordingly that that he be in Prison, yet if it be

without Render and Commitment, all is void; and Judgment was given for this Default in Pleading for the

Plaintiff. — S. C. cited Poth. 186. and that the Plea is adjudged ill, the Render being pleaded
to be on a Dies non Juridicus.

9. In Seire Facias against the Bail, he pleaded that the Principal red-

Hob. 210. didit se, and ruled a good Plea, and that it shall be tried by the Re-

pl. 267.

cord; and if the Attorney for the Plaintiff be not in Court when he renders

Wolley v. Wa-

bail, the Court shall commit him, ex Officio; and if the Plaintiff re-

S. C. & S. P.

fusse him, he shall be discharged, and Entry thereof made on Record accordingly.

Mo. 888. pl. 1249. Wolley v. Davenant.

10. A Sci. Fa. was brought against his Bail, who pleaded that the Prin-

cipal on such a Day render'd himself, and was committed in Execution in

Discharge of his Bail. The Plaintiff reply'd that the Principal was a

Servant attending upon the Duke of L. a Lord in Parliament, and that it

was fraudulently agreed between the said Principal and his Bail that he should render himself in Time of Parliament, that he might be discharged by

Privilege, which was done accordingly. Upon Demurrer it was doubted by

Lev Ch. J. and Doderidge (ibentibus reliquis) whether the Bail was

liable; for the Principal may surrender himself before or after Judge-

ment in Discharge of his Bail; and Doderidge said that the Pleading

had been stronger if it had been alleged, that before he render'd himself

there was an Intent to be deliver'd by Privilege, so to deprive the Plaintiff

and that after he elog'd him self, so that he could not be taken. Palm. 275.


should remain in Cudofy of the Tipstaff; per Cur. 7 Mod. 77. Mlch. 1 Ann. B. R. in Case of Good-

win v. Hilton.

11. There is a Difference between Manuscriptor's, which are, that the

Party shall appear at the Day; for there the Court will not excuse them to

bring the Party in before the Day; but in Case of Bail they may dis-

charge themselves, if they bring the Defendant's Body into Court at

any Time before the Return of the 2d Sci. Fa. against the Defendant;

for when one goes upon Bail, it is intended that he is, notwithstanding

that, in Cudofy Marefchall; per Doderidge. Quod nota. Godb. 339.


12. A 2d Sci. Fa. illis against the Bail. They pleaded Nat tid Re-

Palm. 752.

cord, and afterwards brought the Principal into Court, and pray'd that he

S. C. accord-

might be in Execution, and they discharged. Agreed by the Justices and

ingly.

Clerks, that it he had been brought in either before or upon the Return

of the 2d Sci. Fa. that he should be in Execution, and they discharge'd; but

since they had pleaded to the 2d Sci. Fa. the Court could not com-

pel

The Defendant was arrested, and gave a Bail bond to the Sheriff, and before the Day be rendered himself to the Marshal. Per Cur. This may be recorded, and it shall be a good Bar to the Action brought upon the Bail-bond; but the usual Way is to put in Bail before a Judge, and afterwards for the Defendant to render himself in Discharge of his Bail, and to get his Bail-piece, and discharged upon Record. 2 L. P. R. 214.

14. B. was Bail for 6 Persons, against whom the Defendant got Judgment. It was agreed that if 5 had surrendered themselves, yet the Bail had been liable. 2 Mod. 312. Trin. 30 Car. 2. B. R. in Case of Attry v. Billard.

15. It was moved that the Bail, upon his producing the Principal, might be relieved against the Bail-bond, tho' a Term had interv'n. Afton said the Practice had been both Ways, according to the Circumstances. Holt, Gregory, and Eyres held that Proceedings should stay on the Bail-bond; but Dolben said he never knew it done where a Term or Affises interv'n; whereupon the Court agreed that they would not relieve the Bail in such Cases for the future. Comb. 217. Mich. 5 W. & M. in B. R. Anon.

16. If the Defendant Reddidit in Discharge of his Bail, the Bail-piece should be mark'd, otherwise the Plaintiff may proceed against the Bail. Comb. 263. Trin. 6 W. & M. in B. R. Anon.

After Judgment against the Principal, he render'd himself before the Return of the Ca. St. but did not give the Plaintiff Notice of it, nor get the Bail-piece discharged, and the Plaintiff proceeds to Judgment against the Bail upon a Sci. Fa. and the Court would not relieve them upon a Motion, because no Exoneretur was enter'd, but put them to their Audita Querel. 1 Salk. 101. pl. 14. Trin. 12 W. 3. B. R. Lyell v. Galletly.

It is the Practice of the Court, that the Bail are not discharged without entering an Exoneretur on the Bail-piece, on Notice given of the Surrender; but if the Defendant did not give Notice, it is an Irregularity which will not be supplied by the Court without paying Costs; but if the Bail surrender'd the Principal fairly, tho' not strictly regular, they ought to be favour'd, and are indulged by the Court to surrender him at any Time before the Return of the 2d Sci. Fa. 8 Mod. 251, 252. Trin. 10 Geo. in Case of Wild v. Harding.

17. A sued B. in 3 Actions, and he gave Bail to each Action. The Plaintiff recover'd in all, and then the Defendant render'd himself, and one of the Bail entered an Exoneretur on the Bail-piece, but the rest did not. Per Cur. the Render is a Discharge in Poife as to all; but not compleat and actual as to all, till an Exoneretur is enter'd upon all. 1 Salk. 98. pl. 3. Pasch. 8 W. 3. B. R. Williams v. Williams.

18. Two Actions were brought against the same Person, and the same Persons were Bail in both. Per Cur. a Reddidit is in one Action is a Discharge of the Bail in the other also. 12 Mod. 99. Trin. 8 W. 3. Williams v. Barter.

19. If one surrenders in Discharge of Bail before Recognizance forfeited, he need not give Notice to the Plaintiff, but it may be pleaded to the Sci. Fac. against the Bail; but where a Capias is gone, and a Non est inventus returned, whereby he forfeits his Recognizance, if he would ask a Favour of the Court, he ought to give Notice; per Holt Ch. J. 12 Mod. 296. Mich. 10 W. 3. Anon.

S. P. because they are bound, that he shall prosecute his Writ of Error with Effect, or pay the Money, if Judgment be affirmed. 3 Salk. 57. pl. 12.
21. Upon Non est Inventus returned on the Capias against the Principal, the Bail's Recognizance in Suits and of Law is forfeited, but if the Defendant renders himself before the Return of the Alias Sci. Pa. against the Bail, the Court will stay Proceedings, but instead of a Sci. Fa. the brought in Plaintiff brought Debt against the Bail upon their Recognizances, who pleaded a Render before the Return of the Latiat ; Per Cur. theo this is not pleadable, yet the Court will allow a Render as well on an Action of Debt as on a Sci. Pa. and that at any Time before the Return of charged, for the Latitat. 1 Salk. 101. pl. 13. Hill. 11 W. 3. B. R. Anon. that the Defendants had surrendered the Principal before the Action commenced, and now by a Rule of Court here, if Debt be brought upon a Recognizance of this Court, the Defendant has 8 Days in full Term to render the Principal, whereby the Defendants have now equal Advantage in Case of Debt and Sci. Fa. upon a Recognizance. To which it was answered by Decr, that theo that be a Rule in B. R. yet there is no such Rule in C. B. and that being a Recognizance of C. B. we must do it in as would be done there if the Action were brought there ; and so said the whole Court, that he should have the same Power as in C. B. and formerly they would not suffer an Action upon a Recognizance in this Court, because of the greater Mischief it would be to the Defendant than a Sci. Fa. but sure the Action was always well maintainable, and so Rule is in Avoidance of that Mischief. It was directed to inquire how the Court of C. B. was, for they must guide themselves hereby in this Case. 6 Mod. 152, 153. Patch. 5 Ann.' B. R.

22. Upon the reddidit the Bail are discharged, even upon the red. By Course of didit se before a Judge, but the Principal thereupon is not in Execution, till the Plaintiff has made his Election to have him in Execution, to be an Entry, and upon such Election there is a Commitment entered in the Book of Try made by the Defendant's Attorney, and the Entry must mention it to be at the Request of the Plaintiff, and all this is supposed to be in Court, Per Holt Ch. J. 12 Mod. 534. Mich. 13 W. 3. Watfion v. Sutton.

Book to be kept for that Purpose in the Office of B. R. to the Intent the Plaintiff may know how to proceed; that is, to charge the Party in Execution, or to take a Fi. Fa. or other Writ. That by the late Rule of Court, besides this Entry, there must be 2 Days Notice to the Plaintiff's Attorney before a Committee can be entered, or a Discharge upon the Bail-piece. 7 Mod. 98. Mich. 1 Ann. B. R. in Case of Goodman v. Hilton.

23. Bail shall have eight Days in full Term, after Return of Proceedings against the Principal, to render. 12 Mod. 650. Hill. 13 W. 3. Smith v. Oxbring.

24. It was offered at the Bar to have been ruled in the Case of Lee v. Runge, That the Principal ought to be two Days in Custody, before an Entry should be made of a reddidit se. 7 Mod. 77. Mich. 1 Ann.' B. R. in Case of Goodin v. Hilton.

25. Per Holt, the reddidit se cannot be entered upon the Bail-piece, for the Scire Facias is grounded upon that, and the reddidit se would destroy it; but the Remedy of a Bail is upon an Audita Querela to be grounded on the reddidit se. 7 Mod. 77. Mich. 1 Ann. B. R. in Case of Goodin v. Hilton.

26. Upon bringing the Bail Piece to the Secondary of the Office, and giving him Satisfaction that the Principal rendered before, or upon the Return of the second Sci. Pa. he will give you a Discharge or Superfederals of the Sci. Pa. per Holt Ch. J. 7 Mod. 44. Trin. 1 Ann. Anon.

27. The Defendant in an Indictment in B. R. and being bailed likewise in an Action in C. B. rendered himself to the Fleet, in Discharge of his Bail to the Action, and removed himself by Habeas Corpus to the King's Bench, and escaped; upon Motion of the Bail to the Indictment that their Recognizances might not be effreated, for that he was taken out of their Custody by Commitment to the Marshall, it was denied; for they might have had him committed in Discharge of themselves. 1 Salk. 105. pl. 9. Trin. 1 Ann. B. R. Anon.
28. 1 Ann. S. 2. cap. 6. If a Prisoner be taken on an Escape-Warrant, and committed to the County-Gaol, his Bail may charge him in Calendar there, by a Writ to the Sheriff, and it shall be deemed a sufficient Render.

29. And the Sheriff shall return such Writ &c. on Pain of $ 40 a

30. It was agreed that the Court of Record is, upon Redditi being signed by the Judge, to get a Certificate from the Clerk if the Papers to the Master of the Office, which is his Warrant to enter a Discharge upon the Bail-piece; but such Certificate does not make the Redditi be better or worse. 7 Mod. 98. Mich. 1 Ann. B. R. in Cafe of Goodwin v. Hilton.

31. If the Bail surrender the Principal at or before the Return of the 2d Sci. Fa. it is good, tho' the Plaintiff has not immediate Notice of it; but if he is at any further Charge for want of Notice, the Principal shall not be discharged without paying it. 6 Mod. 238. Mich. 3 Ann. B. R. Anon.

32. If at any Time after the Return of the Capias the Bail surrenders the Principal at a Judge's Chamber, and thereupon he is committed to a Tipstaff, and escapes, or is refused, this is not a good Surrender, because it is an Indulgence to the Bail to accept it after the Return of a Capias, and upon such a Surrender he ought to be 2 Days in the Custody of the Marshal to make it good; but it is otherwise if the Bail surrenders him before or at the Return of the Capias, because that is Matter of Right. 6 Mod. 238. Mich. 3 Ann. B. R. Anon.

33. The Principal surrender'd himself the 2d of May, and Notice was given to the Plaintiff's Attorney. The Surrender was before Justice Tracy on the 9th of May, and 2 Days afterwards before Justice Poets; the Bail-piece was discharged on the 4th of May, and the 3d Sci. Fa. was returnable on the 9th of May. The Plaintiff's Attorney took the Bail-piece from the Judge's Chamber, and kept it for a considerable Time. There was not 15 Days between the Tefe and Return of the 3d Sci. Fa. neither was it 4 Days in the Office. On this Report by the Master, to whom a Reference was made, the Judgment was set aside. 10 Mod. 281. Trin. 4 Geo. in Cafe of Manning v. Turner.

36. The Defendant was bailed before a Judge by one Person, who surrendered him to the Fleet Prison. The Plaintiff served the Sheriff with a Rule to bring in the Body. On Motion to stay Proceedings against the Sheriff, a Question arose, whether one Person only being Bail, the Rend was effectual or not? And the Court held, that it was not, and refused to stay Proceedings against the Sheriff; but afterwards 2 Bail being put in and justified, Proceedings were stayed against him on Payment of Costs. Plaintiff insisted, that he had been delayed of a Trial, and that the Bail ought to be bound for the Debt, and were too late to render, but Curia e contra, because the Plaintiff had proceeded against the Sheriff as before, and not upon the Bail-bond. Barnes's Notes in C. B. 46, 47. Pach. 6 Geo. 2. Steward v. Bishop.

37. The Defendant was surrendered by his Bail to B. R. Prison instead of the Fleet, by Mistake; he was afterwards surrendered rightly, and the Bail moved to stay Proceedings upon the Bail-bond. A Rule was made to shew Cau'e, which was afterwards discharged upon hearing Counsel on both Sides, the Plaintiff having been delayed of a Trial. Barnes's Notes in C. B. 32. Pach. 7. Geo. 2. Low v. Ravell.

38. In an Action upon a Bail-bond, the Defendant pleaded Comperuit ad Dicem. Illue was joined in Nulli roll Record, and at the Day given for Defendant to bring the Record of the Appearance into Court, the Defendant produced a Record of Bail and Surrender thereupon, but one Person only being Bail, it was looked upon as no Bail, and Plaintiff had Judgment. Barnes's Notes in C. B. 171. Mich. 8 Geo. 2. Smith v. Randall.

39. The Court ordered the Hour of the Day, or true Time of the Defendant's Surrender, to be entered by the Palmer, in order that it might appear.
Bail.

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whether the Surrender was made before or after the Rising of the Court, C. B. 129.
Barnes's Notes in C. B. 61. Hill. 9 Geo. 2. Ling v. Woodyer, and cites the Cafe of Maion vs. Bruce, Trin. 7 & 8 Geo. 2.

40. Motion to set aside Execution against the Bail, it appeared that
the Defendant was rendered, and the same entered in the Judge's Book,
but not in the Bail-piece as usual, the same having been taken away by
the Plaintiff's Attorney, so that the Render could not be entered thereon.
The Court held the Render to be good, and ordered the Executions to be set aside, with Costs. Rep. of Pract. in C. B. 123. Mich. 9 Geo. 2.
Knight v. Winter.

41. Moved to vacate a Render, because the Defendant would not pay
the Fees, which were not demanded till after the Render made, cites 2 Keb.
2. that it is not a complete Surrender till it be entered on Record. Or-
dered, that the Entry of the Render in the Judge's Book be struck out.

(A. a) Of the Bail's rendering the Principal. At what
Time.

1. AFTFR a Capias against the Principal returned Non est Inventus,
awarded, and then he brought in a Principal; And per Popham, it may
be very well, unless the first be returned warned, and Judgment given
thereon for the Sci. Fa. otherwise it would be to little Purpofe; where-
fore the Principal was received. Cro. J. 109. Hill. 3 Jac. B. R. Hill.
v. Saundeford.


3. The Plaintiff, Ambassador for his Mafter the King of Spain, reco-
ered in an Action upon the Cafe; the Defendant brought Error and re-
moved the Record, and then upon the 2d. Scire Facias the Bail brought in
returned Nihil of the Body of the Defendant. Resolved, that the removing of the Re-
hil, and the record did not stop the Court that they could not accept of the Body
of the Defendant in Execution; and after that the Body might be accept-
ed only upon the first Scire Facias, and not upon the 2d. but the Clerks the Princi-
pal, that it was otherwise in Popham's Time. Mo. 850. pl. 1156. Pach.

disallowed the bringing him in on the 2d Sci Fa.— Roll Rep. 571. pl. 24 S. C. and by Coke and
Haughton, the Writ of Error shall not lay the Sci. Fa. against the Bail.

Roll J.*g, that out of Indulgence to the Bail, it has been the Usu of latter Times, that if the Bail
do bring in the Principal before the Return of the 2d Scire Facias, which was taken out against the Bail,
thereupon to discharge the Bail; but ancienly it was not so, but it was then counted too late to bring

Before the revoc Scire Facias's returned the Bail may discharge themselves by Render of the Principal;
Per the Attorney General, and not denied by the Court. 17 Mod. 17 Mich. 1 Ann. B. R. in Cafe of
The Practice of B. R. is, that where Judgment is obtained against the Principal, in such Cafe the Bail
may surrender him at any Time before the Return of the 1st. Sci. Fa. where it is afterwards returned
Sci. Faci, or at any Time before the Return of the 2d. Sci. Fa. where two Nihil are returned. And if the
Plaintiff proceeds by Action of Debt on the Recognizance, the Bail may surrender the Principal within
8 Days after the Return of the Writ. 3 Mod. 140. Hill. 11 Geo. in Cafe of Strong v. How.

4. In Debt, the Defendant was condemned, and his Bail would have
Ibid. cites delivered him in Execution, but he had Protection during Parliament. one Sci Facias
Upon Capias against him the Sheriff returned Non est Inventus. Sci ret.
6 L.

Facias

C. B. 129.
S. C. accordingly.
Bail.


If a Render 5. By the Course of C. B. the Court after Scire Facias returned receives the Body; but in B. R. after Non est Inventus returned, they will not permit the Bail to bring in the Defendant; Per Harvey, and to a Ca Sa. Brownlow the chief Prothonotary; Nor after Imparlance, as the Report may or mays he understands. Litt. Rep. 194. Mich. 4 Car. C. B. in Bagwell's plead this in a Cafe.

2. Show. 445. Pawling v. Ludlow S. C. adjudged for the Defendant. Comb. 4. Hawley v. Ludlow, S. C. and by the Ch. J. Thought the Bail shall discharge the Body; the Bail shall discharge the Bail; and a Sci. Fa. returned against the Bail, and before they pleaded they brought him in, and he was committed in Execution.

6. The Court was moved, that the Bail to an Action might be discharged, because they had now brought in the Principal, and it was but one Day after the Return of the Writ; but Roll Ch. J. answered, that it may not be, because they come in upon the Return of the 2d Sci. Facias. Sty. 425. Mich. 1654. Barker v. Wotton.

7. Debt upon Bond conditioned, that if Full shall appear warrant试卷 Writ. &c. The Defendant pleaded, that before the Day of Appearance be did render himself &c. Upon a Demurrer it was objected, that it was ill; for where the Condition of a Bond is for Appearance at a Day certain, if he appear before it is not good. But the Ch. J. held, that if the Party renders himself to the Officer before the Day of Appearance, he is to fee that he appear at the Day, either by keeping him in Custody, or letting him to Bail, and it he does not appear, it seems to be the Deafate of the Plaintiff who had his Body before the Day of Appearance. 3 Mod. 87. Mich. 1 Jac. 2. B. R. Pawley v. Ludlow.

On a Motion to set aside a Render

8. The Court will receive a Render upon the Return of the first Sci. Fa. against the Bail, and so they will upon the 2d. Sci. Fa. so as it be done.
on the Day of the Return, either sitting the Court, or afterwards at a Judge’s made after Chamber; but tho’ the Court does receive such Renders in Favour of the Bail, yet it is De nora Gratia, and not De Jure, and therefore the Bail cannot plead such Render to a Sci. Fa. brought against them. 3 Salk. to be the Opinion of this Court.


10. Debt on the Recognizance against the Bail, who had rendered the Principal before the Return of the Latitat against them. The Court were of Opinion that this is equivalent to a Render before the Return of the 2d Sci. Fa. when the Plaintiff proceeds that Way, and ruled to enter an Exoneretur on the Bail Piece notwithstanding the Plea, Replication and Demurrer before this Motion. Carth. 515. Trin. 9 W. 3. B. R. Dolidv v. King.

11. At the End of Hill. Term 13 W. 3. Holt Ch. J. said, that the Judges had made a Rule that if the Plaintiff in the original Action brings Debt against the Bail upon their Recognizance, the Bail shall have 8 Days after the Return of the Writ to render the Principal; and if there are but 4 Days in the following Term after the Return of the Writ, he shall have 4 Days in the following Term. Ld. Raym. Rep. 721. Hill. 13 W. 3. in Cafe of Milner v. Pett.

12. Bail may render the Principal when they please, and may take him up on a Sunday, and render him the next Day; per Cur. 6 Mod. 231. Mich. 3 Ann. B. R. Anon. Agreed. 7 Mod. 85. Mich. 1 Ann. B. R. in Cafe of Hall v. Hill.


14. An Action of Debt was brought on the Recognizance against the Bail, the Writ was returnable the Exception-Day of the Term, and the Principal was surrender’d, and an Exoneretur entered on the Bail-piece the 14th Day of Jan. So it was moved that the Bail might be discharged, and they were discharged accordingly. 8 Mod. 340. Hill. 11 Geo. in Cafe of Strong v. How.

15. After Notice of a Writ of Error, the Plaintiff cannot take out a Capias against the Principal in order to proceed against the Bail; and a Resolution 4 Ann. to the contrary was thought per Raymond Ch. J. to be against Reason. Gibb. 175. Mich. 4 Geo. 2. B. K. Sweetapple v. Goodiellow.

16. A Motion to discharge a Judge’s Summons to stay Proceedings on a Bail-bond on a Suggestion that the Defendant had surrender’d himself in Discharge of his Bail. It appeared that Exception was taken to the Bail, and that the Render was made before justification, so that the same was irregular, and did not warrant the Suggestion in the Summons, wherefore the Court set the same aside. Rep. of Pract. in C. B. 58. Mich. 4 Geo. 2. Gwinnell v. Procter.

(B. a) Panills
Bail.

(Ba.) Punishment of refusing Bail, where it ought to be granted; or taking insufficient Bail.

1. Deb't upon the Statute 23 H. 6. tam quam &c. for that the Plaintiff being arrested in a Suit in the Court at Nottingham, and there committed to Prison, offer'd sufficient Bail to the Mayor, Keeper of the said Prison, which Bail he refused to accept, and kept him in Prison contra formam Statuti. Upon Nil debet pleaded, the Plaintiff had a Verdict. It was moved in Arrest, that the Statute of 18 Eliz. cap. 5, that no Action shall be brought, [for any Penalty on any Penal Statute] but by Information or Original Writ, and not otherwise; whereas this is by Bill of Debt, and therefore Judgment was given for the Defendant, tho' it was urged that the Plaintiff here was the Party grieved. Cro. E. 76. pl. 36. Mich. 29 & 30 Eliz. B. R. Widdow v. Clecke.

2. In False Imprisonment the Defendant justified under a Latitut. The Plaintiff in his Replication confest d the Latitut; but further set forth, that after the Arrest, and before the Return of the Writ, he tender'd sufficient Bail, which the Defendant refused. Upon Illue join'd it was found for the Plaintiff. It was moved that tho' it is an Offence in the Defendant to refuse Bail, yet it is not within the Statute 23 H. 6. cap. 10. because a Sheriff's Bailiff is not an Officer intended in that Statute, and the Taking being by lawful Proceeds, he could not be a Trespassor ab Initio. Said per North Ch. J. if the Writ and Warrant are good, then the refusing Bail is an Offence within the Statute 23 H. 6. and a Special Action on the Cafe had been the proper Remedy against the Sheriff, but not against the Officer. 2 Mod. 31. Patch. 27 Car. 2. C. B. Smith v. Hall.

3. Where the Sheriff takes insufficient Bail, and the Plaintiff will not accept them, he is liable to an Action as well as to Aancements; per Holt Ch. J. 1 Salk. 99. pl. 6. Hill. 10 W. 3. Etherick v. Cooper.

Holt Ch. J. said it had been adjudged in Ch. J. Glin's Time, that if the Sheriff takes insufficient Bail, and has not the Party at the Return of the Writ, an Action would lie against him; but the contrary has been once held in C. B. It was indeed always agreed, that an Action would not lie for taking insufficient Bail; but it was not settled whether it would not lie for taking insufficient Bail and not having the Party at Return of the Writ; for tho' the Statute commands him to take reasonable Bail, yet if he has not the Party he shall be aomed, and the Statute does not exempt him from that. 6 Mod. 182. Hill. 2 Ann. B. R. in Cafe of Grovenor v. Soane.

4. If a Prisoner, that is bai'd by insufficient Sureties, appears according to the Condition of the Recognizance, it seems that those who admitted him to Bail are safe, inasmuch as the End of the Law is antver'd, and the Appearance of the Prisoner as effectually procured by such Sureties as if they had been ever fo sufficient. 2 Hawk. Pl. C. 59. cap. 15. S. 6.

(C. a)
(C. a) What Recovery against the Bail shall be a Dis-
charge of the Principal.

1. S C I R E Facias to have Execution of Damages recovered, in
an Appeal the Defendant pleaded that after Judgment the Plaint-
iff brought a Sci. Fa. against the Bail, and had Judgment and Execu-
tion awarded against them; upon Demurrer this was adjudged no Plea,
because the Defendant did not file that the Plaintiff was satisfied by the
Execution against the Bail, for he may always charge the Principal till
Freeman.

(D. a) Declaration.

1. D E B T upon Recognizance entered into by the Bail, the Plaintiff
declared that in Mich. Term he had Judgment against their Prin-
cipal, and that in Easter Term before the Defendants became Bail by Re-
cognizance conditioned &c. in Placito Præd; but did not set forth, that
there was any Aution pending in Easter Term; but per Cur. the common
Form is fo upon a Sci. Fa. against the Bail, and the like may be in an
Aution of Debt upon the Recognizance. 6 Mod. 159. Patrick 3 Ann. B.

2. In Debt upon a Recognizance of Bail, the Plaintiff declared in
the short Manner now practised, without setting out the Condition of
the Recognizance; the Court declared no Opinion, but seemed inclina-
table to think that the Condition of the Recognizance does not operate by De-
fautance, but in Part of the Recognizance itself, and that the Plaintiff
ought to set out the Condition in his Declaration; and ordered the
Plaintiff to file the Record of the Recognizance, but gave him Lib-
erty to withdraw his former Declaration, and declare de Novo if he
Bailin.

3. Plaintiff declared on a Recognizance of Bail, without setting forth
the Condition, Defendant demurred generally. Court gave Judgment for
the Plaintiff; the Recognizance in the Declaration does not appear to be
conditional, but absolute; if conditional Defendant might have
v. Porter.

(E. a) Pleadings. In General.

1. If is no Plea for the Bail to say that the Principal was arrested at
In Sci Fa.
another Man's Suit, and had to Prison; for which Reason he could
not render him. Arg. 2 Mod. 28. cites 22 E. 4. 27.

Plaintiff had arrested the Principal in an inferior Court, by reason whereof they could not bring the Body into
Court. This was adjudged no Plea; for they might remove the Body with an Habeas Corpus cum Cauta,
Bail.

or pay the Condemnation. Money in the inferior Court, and to discharge the Party from thence, and bring him into Court. Mo. 406, pl. 924; Palch. 5; Eliz. B. R. Marshall v. Vincent.

2. Bail was given that A. upon 8 Days Warning, shall appear to any Action to be brought by B. for such a Debt; and if A. shall be condemned in the Suit, and not pay it, then the Bail would answer B. the Condemnation. B. brought Action against A. in which A. was condemned, and did not pay, by reason whereof B. brought Debt against the Bail upon the Recognition, and set forth the Suit against A. and the Condemnation, and that he had not satisfied it; but they did not that A. had 8 Days Warning to appear to the Action; and Fenner and Yelverton held that he need not shew it; but Popham, Gawdy, and Williams were of the contrary Opinion; for A. is an Esstranger, and the Bail is bound only to answer such Condemnation in such Action only as shall be brought upon the 8 Days Warning given; for that is the Ground of all, and there is no Reason that A. by his voluntary Appearance, without 8 Days Warning, should prejudice his Bail. Brownl. 85. Mich. 2 Jac. Hargrave v. Rogers.

3. In Sci. Fa. against the Bail, the Defendant pleaded, that the Principal was dead before the Sci. Fa. brought. Upon a Demurrer because he did not allege when he died, nor that he died before the Copies brought against him, the Plea was held ill; per tot. Cur. Cro. J. 97. pl. 26. Mich. 3 Jac. B. R. Williams v. Vaughan.

S. C. cited Arg. 2 Mod. 28. — St. Trin. 324 Arg. S. P.

4. The Principal was in Execution, and a Comitatum entered, and after a Sci. Fa. was brought, and two Nihilis returned against the Bail, and Judgment upon the Sci. Fa. and now they come and move to set it aside, but the Court would not, it being the Act of the Court, and the Party should have come and pleaded it upon the Seire Facias. Skin. 129. pl. 16. Trin. 35 Car. 2. B. R. Anon.

5. In Seire Facias against the Bail, they plead in Bar, that after Judgment against the Principal a Ca. Sa. issued against him, directed to the Sheriff of London, who returned Non Est Inventus, and thereupon a Petition Ca. Sa. issued against him to the Sheriff of Surrey, upon which he was taken in Execution, and detained until the Plaintiff himself required the Sheriff to discharge him. Upon Demurrer it was adjudged for the Plaintiff, for the Replication only alleging that no such Ca. Sa. issued to the Sheriff of S. the Defendant ought not to have rejoined that such Writ did issue, but should have taken Issue thereon; for his Rejoinder only affirms what he had before alleged in his Plea in Bar, and so is only an Addition of Superfluous Matter of Fact. 2 Lutw. 1269. Mich. 3 Jac. 2. Sparks v. Cole.

6. Upon a 2d. Sci. Fa. return'd against the Bail they demurred, for that there was a Variance between the Recognition and the Record of the Judgment, for the Recognition was, that the Defendants became Bail for the Principal at the Suit of the new Plaintiff, which must be intended a Suit in his own Right; but it appears by this Sci. Fa. that the Judgment was obtained by him in an Action of Debt as Administrator, and to not the same Action to which the Defendant was Bail; fed non allocutur. 2 Lutw. 1279. Trin. 4 Jac. 2. C. B. Baxter v. Peach.
Bail.

7. A Writ of Error depending on the principal Judgment, here is no Plea for the Bail; Per Holt Ch. J. Comb. 235. Trin. 6 W. & M. in B. R. Davenport v. Israel. 


After Capias returned against the Principal, the' Writ of Error be brought, yet Plaintiff may proceed against the Bail; for the Writ of Error does not supersede the Recognizance; Per Cur. 12 Mod. 567.

8. H. being committed for Suspicion of High Treason was bailed to appear here the first Day of this Term, and now his Bail moved, that the Recognizance might not be excepted, alleging by Affidavit, that he was violently taken out of his House in the Night by a Party of French, and carried into France. The Attorney General opposed it, and said, it would be made appear this was done by his own Contrivance to avoid the Rique of a Trial. Holt Ch. J. said, that if it can be made out that he himself was consenting, the Recognizance is forfeited; yet if we should treat it now, they will afterwards come and controvert it in the Exchequer, therefore the better course is to award a Sci. Fa. against the Bail, whereupon the Merits of the Cause will be finally determined; for it will be a good Plea, it true. Comb. 385. Mich. 8 W. 3: B. R. Hunt's Cafe.

9. In Debt upon a Bail-bond, the Defendant pleaded the Statute of 23 H. 6. cap. 10. and shewed an Arrest of a wrong Writ. The Plaintiff replied, and shewed the right Writ, and traversed the wrong Writ. The Defendant demurred; and Exception was taken, that the Plaintiff should not have traversed the wrong Writ. Holt Ch. J. said, the Plaintiff has no need to traverse the wrong Writ, but only to reply the right Writ, and rely upon that; For it may be, there were two Writs, and the Defendant might be arrested by Virtue of a Writ returnable Die Martis &c. and then another Writ might come to the Sheriff returnable Die Mercuiri, which coming to his Hands when the Defendant was in Custody, amounts to an Arrest in Law, and he might give a Bail-bond to appear upon it, therefore the Traverse is not to good. But the Plaintiff had Judgment. Ex Relatione M'ri Jacob. Ld. Raym. Rep. 562. Paich. 12 W. 3: Anon.

10. The Bail to the Action may plead an usurious Contract, tho' he be not privy to it; Per Holt Ch. J. 12 Mod. 493. Paich. 13 W. 3: Anon.

11. In Debt on a Bail-bond, if the Defendant has put in Common Bail, He cannot plead that he has put in Common Bail, but Comperuit ad Dicen; for he must plead according to the Operation which Things have in Law. 1 Salk. 8. Mich. 6 Ann. B. R. in Cafe of Stroud v. Lady Gerrard.

12. In Affumptit against Eliz. G. Defendant pleads in Abatement that her Name is Honoria and not Eliz. Plaintiff replies, that Imposuit Common Bail by the Name of Eliz. and prays Judgment if the shall say that her Name is not Eliz. And per Cur. the putting in of Bail is the Act of the Court, and not of the Party, and therefore cannot eftop her; but the Defendant appearing by that Name may eftop herself, and Bail is an Appearance as well as Bail, but then it ought to be pleaded as an Appearance if the Plaintiff will use it as an Estoppel. 1 Salk. 8. Mich. 6 Ann. B. R. Stroud v. Lady Gerrard.

13. Variance between the Sci. Fa. and the Recognizance of Bail cannot be assignd for Error, unlefs Oyer of the Recognizance was demanded below, because in such Cafe the Recognizance is no Part of the Record before the Court; and the Court being of this Opinion gave Judgment for the Defendant in Error, Nifi. 10 Mod. 444. Trin. 5 Geo. 1. B. R. Anon.

14. Judg-
14. Judgment was had against the Principal, and a *Sci. Facias* was brought against the Bail of Thomas K. by the Name of John K. and after 2 Nihilis returned the Bail were taken in Execution. It was moved, that upon this the Bail be discharged, and so they were. 8 Mod. 113.

Hill 9 Geo. 1723. Atwood v. Beach.

But per Cur. if the Sci. Fa. had been *returned Sci. faci*; they could not be discharged, because they might have pleaded this Matter in Abatement. I. b. d.

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(F. a) Pleadings.

**Payment.**

2 Le. 215. 1. In *Sci. Facias* the Bail pleaded that the Principal had paid the Condemnation Money to the Plaintiff, according to the Condition of the Recognizance; Per Cur. it was ruled no Plea without pleading Payment of Record; for the Condition is, that the Defendant shall satisfy the Debt, or otherwise the Sureties would do it, which is to be understood Satisfaction of Record. Cro. E. 132. pl. 6. Pach. 31 Eliz. B. R. Ord-way P. v. Parret.

If this should be suffered, every Man should be inforced to try his Action twice, and so the Plea was disallowed.

But the Recognizance was, that if the Principal was condemned, he should pay the Debt within such a Time or render his Body. A Sci. Fa. was brought against the Bail, who pleaded Payment by the Principal before the Day in the Recognizance, this was held a good Plea without Specialty, for the Recognizance to them was as but as an Obligation with a Condition, upon which they might well plead Performance; but the Party in the Sci. Fa. upon this Recovery cannot plead it, except Satisfaction be acknowledged on Record, for by mere Payment he shall not avoid Matter of Record. Cro. E. 235. pl. 5. Pach. 33 Eliz. C B. Brunkhorne's Cafe.

1 Mod. 24.

2. *Sci. Facias* against the Bail, who pleaded that before the Return a Capias was brought against the Principal, whereupon he was taken at H. Shaw, S. C. and not saying where pleaded, *Non jubeat*; the Plaintiff re-plied, the Defendant is demurred, and the Plaintiff had Judgment, because the Defendant did not allege any Place where the Money was paid. Vent. 49. Mich. 21 Car. 2. B. R. Peril v. Shaw.

Fault — Upon a *Writ of Error* brought, the Bail entered into a Recognizance, that if the Judgment is affirmed, to pay the Money; a Sci. Fa. was brought on this Recognizance, and the Defendant pleaded Payment of the Money; but the Plea was ruled to be ill for want of a Venue. Lev. 246. Trin. 2. Car. 2. B. R. Allen v. Cutler. — 2 Keb. 596. pl. 82. S. C. but S. P. does not appear.

3 Keb. 349. pl. 5. Barford v. Peal, S. C. and the Court agreed the Plea of Payment before the Sci. Fa. brought might well be pleaded by the Bail, but in this Cafe, it being for a just Debt, the Court gave Leave to discontinue.

4. In *Sci. Fac.* upon a *Judgment* against the Principal for 35 l. 6 s. 8d. the Bail pleaded, that the Principal after the Judgment paid the Plaintiff 34 l. in Satisfaction of the Debt due on the Judgment, which he accepted; upon Demurrer it is adjudged ill, because the Bail shall not plead Payment;
Bail.

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1. Bail is a legal right given to the Bailor to have the Bailiff pay the Bailor's Bond if the Bailor does not fulfill the conditions of the bond. It is a transaction of a less sum in satisfaction after the money is become due. 2 Lev. 212. Mich. 29 Car. 2. B. R. Holmes v. Brown.


3. In Sci. Fa. upon the Recognizance, the Bail pleads Payment by G. brought to the Principal, before the Return of the 2d Sci. Fa. against the Bail, but a Sci. Fa. against the Defendant is resolved that the Plea was ill; because in Strictness of Law, the Recognizance is forfeited by the filing out of the first Sci. Fa. against the Bail to J. Bail. Ld. Raym. Rep. 157. at the Bottom, cites it as Hill. 8 & 9 W. S. in an Action brought by the Plaintiff against him in the Palace Court, wherein the Plaintiff obtained Judgment; and this Sci. Fa. was not filed. Conie's only the Plaintiff should not have Execution generally & c. The Defendant pleads Payment by the Principal, before the Return of the 2d Sci. Fa. which was agreed to be a bad Plea, because the Recognizance was forfeited by the Return of the 1st Sci. Fa. the Plaintiff demnns, and adjudged that the Sci. Fa. ought abate. Ld. Raym. Rep. 216. East. 9 W. 5. Guilliam v. Hardy.

4. A Recognizance in an inferior Court was, that the Defendant shall not withdraw nor object himself from the Execution of the Judgment; Per Holt Ch. J. if the Defendant pays the Money, that is an Execution of the Judgment, and consequently the Recognizance is performed; but if a Ca. Sa. be returned Non est Inventus, and the Money is not paid, then the Defendant hath withdrawn and abjured himself from the Execution, and the Bail may plead Payment by the Principal; to which John agreed, and Judgment affirmed. 2 Ld. Raym. 1224, 1225. Hill. 4 Ann. Read v. Charnley.

5. In Sci. Fa. the Bail pleads in Bar that the Plaintiff, after Bail put Cot. E 131. in, and before Judgment, released to him all Demands; the Plaintiff demurred, Gawdy and Popham held it to be no Bar, because it was only a Possibility; but Clench and Fenner contra, because the Recognizance was acknowledged before the Release, and the Uncertainty rests nor appear only upon the Condition thereof; & c. Eliz. 579. Mich. 31 & 40 Eliz. Hoe v. Marshall.

6. Gawdy and Popham; but Fenner and Clench contra, as in Mo. but that afterwards Clench (as the Reporter says he heard) changed his Opinion, and agreed with Popham and Gawdy, whereupon (Repugnance Fenner) Judgment was given for the Plaintiff.—1 Rep. 70. B. Patch. 34. Eliz. Hoe's Cafe. S. C. adjudged no Bar.——Godsb. 166. pl. 93. S. C. adjudged accordingly.

7. In Sci. Fa. the Bail pleaded, that after the Judgment the Principal came into Court and rendered himself in Discharge, but that the Plaintiff refused to have him in Execution; the Plaintiff denied the rendering of himself. It was resolved that the Plea was ill, for the Bail being on Record, the Render of the Defendant to Prition must be likewise of Record, and therefore the Bail should have concluded this Plea from patet per Recording, and the other Nul Tiel Record. But the Reporter says, that his Opinion is, that tho' a Man thus refused to take the Defendant in deni J. in Execution upon his yieldings, and that entered on Record, yet he may discharge it after take him by Ca. Sa. for it is but a forbearing for a Time, and not a Renouncing or a releasing his own Act of Execution, when he shall fee Caufe. Hob. 210. pl. 267. Mich. 15 Jac. C. B. Welby v. Canning.

8. Plaintiff demurred, for that it should be proper pates per Record; Keeling J. said, that tho' the Committer is entered on Record, yet the Party is not ellopped to say, that the Principal is not in Prition, and shall be tried by the Country, and the Record is only Evidence, and not conclusive. The Book says Quære; for there are Precedents of Entries both ways. Sidd. 216. pl. 19. Trin. 16 Car. 2. Middleton v. Manus captors of Silvertere.
10. Where a Ca. Sa. against the Principal is returned Non est Inventus, the Bail cannot plead a Render, but must be relieved upon a Motion; for the Admittances of all such Renders are Ex Gratia Curiae, and not Ex Merito Justiation; for the Condition of the Recognizance is broken by the Non-render upon the Return of the Ca. Sa. Ld. Raym. Rep. 156, 157. Hill & 9 W. 3. Wilmore v. Clerk.

11. In Error by the Bail it was assigned that Judgment was given against him, where No Capias was awarded against the Principal before the Sci. Fa. was awarded against him; it was held that the Writ of Error well lay for the Bail and the Judgment in the Sci. Fa. was reversed. Cro. E. 733. pl. 65. Mich. 41 & 42 Eliz. in Cam. Scacc. Price v. Price.

12. A brought Debt against D. and recovered in B. R. then D. brought Error in Cam. Scacc. and found Sureties to prosecute with Effect; afterwards for non prosecuting &c. a Sci. Fa. was brought against the Plaintiff in Error, who appeared and was taken in Execution, and now a Sci. Fa. was brought against the Bail; it was moved that they were discharged by the Appearance of the Plaintiff in the Writ of Error; Per Coke, if this Bail upon the Writ of Error are of the Nature of Bail at Common Law in an Action, they are discharged, but it is otherwise if they are Bail for the Debt; but ordered this Matter to be pleaded, and then they would advise. Roll Rep. 361. pl. 13. Pauch. 14 Jac. B. R. Askew v. Downes.

13. Error by the Bail of the principal Judgment, and also of Judgment upon the Sci. Fa. & redemption executions superinde, and was assigned in the Judgment in the Sci. Fa. against the Bail was, that no Capias was awarded against the Principal; all the Judges, except Hobart, held that it is all one in B. R. and C. B. that a Capias ought to be against the Principal, and returned Non est Inventus, otherwise no Sci. Fa. ought to be against the Bail; for if the Principal be taken on the Capias or he renders himself, no Execution ought to be against the Bail. Cro. C. 481. pl. 4. Mich. 13 Car. B. R. South v. Griffith.

14. A Sci. Fa. was brought against the Bail for the Plaintiff in Error, who pleaded, that the Plaintiff in Error did not prosecute it with Effect; the Plaintiff in the Sci. Fa. replied Proteftans, that he did not prosecute the Writ of Error with Effect, Pro placto, that the Judgment was affirmed by the Justices of C. B. and the Baron De Gradu de la Coife, & hoc paratus est verificare per Recordiam; the Defendants demurred, because it was not alleged that 6 were present when the Judgment was affirmed, which is expressly required by the 27 Eliz. cap. 8. Sed non allocatur, for the Defendants would then have pleaded Nulli Tiel Record, for if there were not fix their Proceedings were coram non Judice. Vent. 75. Pauch. 22 Car. 2. B. R. Barret v. Milward.

15. In S. Fa. by Administrator, the Bail pleaded that the Testator did not sue out any Capias against the Principal, and does not say that neither the Intestate nor Administrator did; for if the Administrator did, it is well enough; the Ld. Ch. J. said, that perhaps this Prima Facie may be good, and if the Administrator has sued out any Capias it may come properly on his Part to allege it. Freem. Rep. 333. pl. 418. Trin. 1673. Menate v. Cottlo.

16. Sci. Fa. against the Bail of H. they pleaded that the Original was laid in the County of York, in which Action jo laid, there was no Judgment against H. but that the Judgment upon which this Sci. Fa. was brought was bad against the said H. on an Action laid in the County of the City of York &c.
&c. and so the Bail not liable. The Prothonotary being asked informed the Court, that th'o' by the Course of the Court the Plaintiff might declare in other Courts against the same Parties, and the Judgment would be good, yet by such Variation of the County, the Bail is discharged, and not liable to the Damages in the new Declaration, and Judgment was given for the Defendant. 3 Lev. 235. Trin. 1 Jac. 2. C. B. Yates v. Plantin.

17. Sci. Fa. against the Bail, upon a Recognizance conditioned, that The Defendant should be again'd against the Principal that he should pay the Money or render his Body to Prison; the Plaintiff sought forth that he had recovered &c. but that the Principal did not pay the Money or render himself; the Bail pleaded, that there was no Declaration delivered against the Principal within two Terms after the Recognizance; upon Demurrer, the Plaintiff had Judgment; for th'o' by the Course of the Court, it was ordered, that the Defendant lie in Prison two whole Terms, without any Declaration delivered against him, he may be discharged by a Rule, yet if a Declaration be delivered afterwards delivered, and Judgment thereon, his good, and the Bail liable. 2 Vent. 143. Hill. 1 & 2 W. & M. C. B. Dod v. Dawton, and had Judgment by Default, and a Sci. Fa. being brought against the Bail, they pleaded that there was no Declaration delivered within two Terms after the Action commenced; but the Court upon Demurrer held the Bail liable. In the Case the Plaintiff declares soon after the Injunction dissolved. 3 Mod. 274. Hill. 1 W. & M. in B. R. Doe v. Dawton.

18. In Sci. Fa. against Bail, the Defendant pleaded that no Capias issued against Principal; the Plaintiff replied, that a Writ of Error was sued, and therefore he could not sue a Capias &c. the Defendant demurs; and per Powell Justice, Error upon the Principal Judgment is no Bar to hinder the suing of a Capias in order to charge the Bail, and it was so adjudged in this Court very lately; Judgment for the Defendant. Ld. Raym. Rep. 342, 343. Paich. 10 W. 3. Ward v. Bendall.

19. M. and W. were Bail for J. S. at the Suit of R., who obtained a Judgment for 200l. M. died, and a Scire Facias was brought against his Executrix and W. the other Bail. Afterwards a 2d Sci. Fa. illumi'd, and 2 Nihilis returned. Judgment by Default was against W. The Executrix protestando that she had fully administrator'd, and had not Affets pleaded in Bar, that there was no Ca. Sa. against the Principal before the first Sci. Fa. Plaintiff replied that he did protest a Ca. Sa. against the Principal, returnable Graff. Trin. upon which the Sheriff returned Non est inventus. The Defendant protestando that the Replication was insufficient, rejoined that the Ca. Sa. was deliver'd to the Sheriff after Graff. Trin., and after the 1st Scire Facias issued &c. and traversed that it was deliver'd to the Sheriff at any Time before the Return thereof. Upon Demurrer it was adjudged that the Traverse of the Time was not material; for if the Writ is actually out, and the Sheriff makes a Warrant before it is deliver'd to him, it is legal. 2 Luco. 1823. Mich. 10 W. 3. C. B. Redman v. Idle.

20. Sci. Fa. against the Bail, who pleaded that there was no Ca. Sa. 2 Ld. Raym. against the Principal. The Plaintiff replied, and set forth a Ca. Sa. and Rep. 1996. Non est inventus returned; but it appeared that it was tefted a Year after the Judgment, and no Sci. Fa. appearing it must be accounted illegal; but per Holt Ch. J. the Want of a Sci. Fa. previous to a Ca. Sa. after a Year, is but Error, of which the Bail cannot take Advantage. 6 Mod. Writ was in due course after 2 Years after the Judgment, and adjudged for the Plaintiff.

21. In Sci. Fa. the Plaintiff declared that he had recovered against R. and the Defendants became Bail that he should either pay &c. or render himself to the Prison Mareskalli Mareskaltic nolite &c. Upon Oyer the Recog-
Bail.

Recognizance was, that R. should pay &c. or render himself to the Prison Marshal, &c. Domine Regime coram ipfa &c. Then they pleaded that there was no Ca. Sa. returned against the Principal. The Plaintiff replied that there was a Ca. Sa. returned &c. and set it forth. On Demurrer it was objected, that there was Variance between that Writ and the Recognizance; for the Writ and Declaration was, that the Defendant in the Original Action should render himself Prisoner to the Marshal Marshal &c. and the Recognizance was to the Marshal Marshal &c. but adjudged, that this being a Sci. Fa. upon a Recognizance of Bail taken in B. R. the Marshal must be intended the Marshal of this Court, and not of the Prison of the Palace. 2 Salk. 602. pl. 12. Trin. 4 Ann. B. R. Ball v. Ruffell.

22. In Sci. Fa. against the Bail it was objected, that it appear'd by the Capias set out in the Replication that there were but 5 Days between the Tefe and Return of it; whereas every Capias fixed out against the Principal, in order to charge the Bail, ought to have 8 Days between the Tefe and Return, and ought to be 4 Days in the Sheriff's Office; which the Court agreed to; but said it was only an Irregularity in Proceeding, and therefore the Defendants should have moved the Court to have them set aside for the Irregularity; but in Point of Law the Ch. J. said, Proceeds in the Court may be made returnable due in Diem, especially Proceeds which goes into Middlesex. Ld. Raym. Rep. 1177. Trin. 4 Ann. B. R. in Case of Bail v. Ruffell.

23. Judgment was enter'd against the Principal thus, Ideo videtur justiciarisc, that the Plaintiff should recover his Debt &c. Whereupon a Sci. Fa. was brought against the Bail, and a good Judgment against them. They brought a Writ of Error to reverse the Judgment against them, because Judgment was enter'd against them before a good Judgment was enter'd against the Principal; for Videur justiciarisci &c. is no Judgment, and the Court held that the Judgment should be reversed. 2 Le. 1. pl. 2. Mich. 32 & 33 Eliz. B. R. Thacker v. Damport.

(G. a) In Criminal Cases.

1 One indicted and found Guilty of the Death of a Man by Misadventure. As by calling a Stone over a House, and by Chance killing a Man, Woman, or Child, is not bailable. Coke of Bail &c. cap. 5. cites 3 E. 3. Corone 354.

2. So if one indicted be found Guilty of the Death of a Man Se defendo, he ought not by Law to be bail'd; for according to Bra'ton's Rule, Inveniantur Culpabiles. Coke of Bail &c. cap. 5.

3. One indicted of Conspiracy, viz. That he with others conspired falsely to indict another of Murder or Felony, by Means whereof he was indicted, and afterwards convicted, shall not be bail'd. Coke of Bail &c. cap. 5. and says that this was the Resolution of all the Judges, upon the Question demanded by King E. 3. himself, as appears 27 Aff. 1.

4. One indicted for Burglary may be bail'd. Coke of Bail &c. cap. 5. cites 29 Aff. 44.

5. One
5. One indicted or appeal'd of Robbery may be bai'd. Coke of Bail &c. cap. 5. cites 44 E. 3. 3.

6. One indicted or appeal'd of Rape may be bai'd; yet that was no Felony at Common Law till the Stat. Wettm. 2. cap. 34. Coke of Bail &c. cap. 5. cites 44 E. 3. 38.

7. Appeal in B. R. against R. for stealing 3 Pigs, and it was awarded that the Defendant shall remain, without being let to Mainprize, because it was reported to the Court by a Solicitor that he was not of good Fame, and he said that he bought the Pigs of two Men; and it was laid by the J u tices, that if he could bring in any Proof that he bought them, that then he should go by Mainprize; and the same it thofe, of whom he laid he bought them, would come and testify that they sold them to the Appellee. Br. Corone, pl. 162. cites 16 E. 4. 5.

8. A Man was taken by Capas Litigation in Felony by Name of J. S. Gent, who said that his Name is Yeoman, and not Gentleman, and is not this Person who is outlaw'd, and had the Plea; and because it was in Appeal, Scire Facias was awarded against the Appellant, if he could lay any thing against this Plea, and the Defendant was let to Bail. Br. Ultagary, pl. 42. cites 5 H. 7. 10.

9. The Intendment of Law in Bails is, that it stands indifferent whether he be Guilty or not, till Trial &c. D. 179. pl. 42. Patch. 3 Eliz. 3.

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10. If a Person be committed by her Majesty's Commandment from her A Man committed, or by Order from the Council-Board, or if any one of 2 of her Council commit one for High Treason, such Persons so in the Case before committed, may not be delivered by any of her Courts without due Trial by the Law, and Judgment of Acquittal had; nevertheless the Judges may award the Queen's Writs to bring the Bodies of such Persons before them, and it upon Return thereof the Causes of their Commitment be certified to the Judges, as it ought to be, then the Judges in the Cases before mentioned ought not to deliver him, but to remand the Prisoner to the Place from whence he came, which cannot conveniently be done, unless Notice of the Cause in Generality, or else specially, be given to the Keeper or Gaoler that shall have the C custody of such Prisoner; and to this all the Judges and Barons &c. did subscribe their Names, and deliver'd one to the Lt. Chancellor, and one other to the Lt. Treasurer. And 298. pl. 304. Patch. 34 Eliz.

Incorporated in the King, and cites 53 H. 6. 28 b. Proin's Case, [Poines's Case] where the Return was that he was imprisoned Virtue Warranti of the Council, and held by all the Justices that he is not bailable, tho' 2 only of the Council committed him; per Coke Ch. J. Ball Rep. 134. Holt Ch. J. said that the Resolution in And 297. was by all the Judges, upon a Meeting to afford the Liberties of the Subject, and was enter'd in the Council-Book for their Direction. Comb. 345. Mich. 7 W. 5. B. R. in Case of the King v. Kendall and Roe.

11. If a Man be indicted as Principal of the Death of a Man he is not to be bail'd, but it indicted as Accessory before or after he is bai'able. Coke of Bail &c. cap. 5.

Cafe, if one is indicted as Principal, and the other as Accessory, and the Principal has Judgment of Death, or is outlaw'd, the Accessory is no ways bai'able; but all this is to be understood of Judgment at the King's Suit; for in Appeal of Murder, or Death of a Man, the Law alters in some Cases, but that this seems to rest much in the Differenc of the Justices on considering the Circumstances of the Offence.

One indicted as Accessory for Receipt of any Person outlaw'd, or otherwise attainted of Murder or Felony, is not bai'able. Coke of Bail &c. cap. 5.
12. If one be appealed by an Approver, and be of good and honest fame, he may be bailed during the Life of the Approver. Coke of Bail &c. cap. 5.

13. One indicted for putting out Eyes, or Cutting out of Tongues, may be bailed. Coke of Bail &c. cap. 5.

14. The Defendant was indicted for Murder, and the Trial coming on, the Prosecutor alleged, that there had been great labouring of the Jury, and therefore did not proceed, suspecting a partial Jury, but brought an Appeal, and tho' by the Appeal the Indictment still continued, and was not gone, yet the Delay being occasioned by the Prosecutor the Party was bailed; but by Coke J. if the labouring the Jury had been prov'd, peradventure he would not be bailable. Bulst. 85. Mich. 8 Jac. B. R. Morgan's Cafe.

15. The Jury on an Indictment of Murder found a special Verdict, whereupon the Court were divided, 2 against one, and thereupon the Prisoner moved to be bailed, but all the Court denied it; and as for the Verdict there was a Curia advifare, and the Matter adjourned, and the Prisoner carried away in Custody. Bulst. 89. Mich. 8 Jac. Morgan's Cafe.

But I'd. Coke in his Treatise of Bail and Mainprize, cap. 5, Par. 1, says, that one imprisoned for High Treason is not bailable or main-prizable, and says he takes it to be the same of Petty Treason, as where the Wife kills her Husband, or the Servant his Master &c.

Coke Ch. J. saith, that they might Bail one in B. R. for Treason, but that they would not do it. 3 Bulst. 115. Mich. 13 Jac. obiter.

The King's Bench may bail for High Treason, but it is a special Favour, and not done without the Consent of the Attorney General. Comb. 111. Patch. 1 W. & M. in B. R.

17. If the Court of B. R. commits a Man, or if the Chief Justice of B. R. commits a Man, he is not bailable by any, tho' no Cause be declared, and peradventure there is a Cause which touches the State, and which is not convenient to be known. Roll Rep. 134. Hill. 12 Jac. B. R. in the Brewer's Cafe.

18. The Defendant was found guilty of Manslaughter on the Coroner's Inquest, and moved to be bailed, because there was no Indictment, but denied; and per Coke and Haughton, the Statute of Wilm. is, that no Bail shall be taken, but that must be intended no ordinary Bail; and the Statute of Queen Mary is, that Bail shall be taken where the Party is bailable by Law in Manslaughter, so that it appears he is not bailable at all if he confess the Fact, or if it is notorious. Roll. R. 268. pl. 43.


19. Bail was allowed in Murder, because the Prisoners were in Danger of afearing, and no Trial could be so had, tho' it was against the Statute, but it may have a favourable Construction at the Discretion of the Judges. Lat. 12. Hill. 1 Car. Herbert and Vaughan's Cafe.

Appeal lodged against A. convicted of Manslaughter, but not prosecuted, he being before Clergy had. 12 Mod. 109. Hill. 8 W. S. Armstrong v. L'Ilfe.
21. A Woman who had been twice indicted of Witchcraft before, and acquittted, being indicted a 3d Time, moved to be bailed, infiting that the Prosecution was for Malice, and she was bailed accordingly to appear at the next Assizes. Sty. 116. Trin. 24 Car. Camell's Cafe.  
22. A. and C. to whom A. was Second in a Duel, were formerly in- dieted for Killing a Man, and found Guilty of Manslaughter only by the Grand Inquest, and being brought to the Bar to be arraigned for it, were denied to be bailed. Sty. 371. Parch. 1653, the Cafe of Ld. Arundel and Ld. Chandois. 

could not bail him till Clergy had, according to Buckler's Cafe in Style. 12 Mod. 102. Mich. 8 W. 3. the King v. Kent —— S. P. accordingly, unless a Pardon be ready to be produced sub pote favilli, and then we may, tho' attained of Murder or Treason; and so on a Writ of Error to reverse an Attain- der, we may bail him, and bind him to prosecute a Writ of Error. 12 Mod. 108. Mich. 8 W. 3. Arm- strong v. L'Isle. 

23. Roll Ch. J. said, he doubted whether one indicted of Perjury may be bailed, tho' the Clerks of the Criminal Side said he might. Sty. 368. Parch. 1653. Anon.  
24. One committed by the Council of State and the Parliament, for publishing a seditious Pamphlet was denided to be bailed. Sty. 397. Mich. 1653. Capt. Streeter's Cafe. 

a fort. the Parliament being dissolved, he was bailed. Ibid. 415. 

25. One indicted on Suspicion of Robbery was outlaw'd, and taken on the Oulawry, and brought Writ of Error, and being brought to B. R. by Habeeus Corpus, prayed to be bailed, and took two Exceptions to the Indictment; it. That he was in Prifon, and knew nothing of the Oulawry. 2dly. That the Charge is too general, and No-body prosecutes; but per Roll Ch. J. he cannot be bailed. Sty. 418. Trin. 1654. Baxter's Cafe.  
26. One brought out of Wales by Hab. Corp. moved to be bailed, because they had no Goal Delivery there; and by Roll Ch. J. he was bail- ed to the next Assizes. Sty. 418. Trin. 1654. Anon.  
27. A Perfon accused of High Treason, and not within the Habeeus Corpus Act, is not de Jure to be bailed by this Court. Raym. 381. Trin. 32 Car. 2. B. R. in a Memorandum there cites it as resolved in Ld. Stafford's Cafe. 

28. The Defendant being indicted for Murder at the Quarter Sessions, and the Indictment being removed into B. R. by Certiorari, the De- fendant appeared, and pleaded Not Guilty, and he moved to be bailed, which the Court granted, being satisfied by several Aids and Up-ports that there was good Reafon for it. 2 Jo. 222. Mich. 34 Car. 2. B. R. Farrington's Cafe. 

29. The Court of B. R. has Power to bail in all Cases of Treason. S. P. by Skin. 163. cites the Opinion of the Judges in the House of Lords, 1678. Cale Ch. j. 

in Zachary Crofton's Cafe. 

30. B. R. may Bail in Cases where they cannot try the Party bailed, As Perfons taken here for Offences committed in Ireland are bailed here to appear in Ireland, tho' they cannot be tried there. Skin. 163. pl. 12. Hill. 35 & 36 Car. 2. B. R. in Ld. Danby's Cafe. 

31. So any Lord of Parliament committed for High Treason by a Justice of Peace, or Secretary of State, may be bailed in B. R. tho' he cannot be tried there. Skin. 163. pl. 12. Hill. 35 & 36 Car. 2. B. R. in Ld. Danby's Cafe. 

32. Per Cur. We are not bound to bail a Man committed for Suspici- on of Murder, where 'tis expressed that a Man was killed, tho' the Coroner's Inquest find it but Man Slaughter, but we ought to have the Exa-
Examination before us, and if it appears to be a Cafe of Hardship, we may bail. Comb. 293. Mich. 6 W. & M. in B. R. the King v. Pepper.

33. 'Tis not proper for Justices of Peace to give Copies of Examinations about Murder, and where it is found Homocide by the Coroner yet he out to commit the Criminal. Comb. 293. Mich. 6 W. & M. in B. R. in Cafe of the King v. Pepper.

34. Two were committed by Warrant from the Secretary of State for High Treason, in afflicting the Escape of Sir James Montgomery, who was committed by the Secretary of State for High Treason; but because it was not expressed in the Commitment what was the Species of Sir James Montgomery's Treason, and these Persons are to be charged with the same Species of Treason, therefore the Court held that they were bailable. Comb. 343. Mich. 7 W. 3. B. R. the King v. Kendal and Roe.

Sir J. M. did the Fact; and for want thereof they were bailed. — Skin. 596. pl. 9 S. C. and the whole Court agreed that they should be bailed for the same Reason — 5 Mod. 78. &c. S. C. Holt Ch. J. said, he thought it must be considered of, tho' he counted very much as to the not specifying the Treason, that the particular Sort ought to be expressed in the Warrant; and they were bailed.

When one is committed by one of the Privy Council, the Cafe of the Commitment ought to be set down in the Return; but contrary where the Party is committed by the whole Council, there no Cafe need be alleged; per Cor. Le. 70, 71. Mich. 29 & 30 Eliz. Howell's Cafe. — S. C. cited by Holt, and says the Law was then taken to be so; but now since the Habeas Corpus Act, the Cafe must be inserted, the the Commitment be by the whole Council. Comb. 333. Mich. 7 W. 3. B. R. in Cafe of the King v. Kendal and Roe.

A Commitment for Treason generally, without expressing the Species of Treason, is good; for the Process is the same in one Sort of Treason as in another. 10 Mod. 554. Trin. 2 Geo. 1. B. R. in Harvey of Comb's Cafe.

35. An Indictment was found against B. at the Sessions at N. for Petty Treason, and Murder of her Husband, she was brought to the Bar, and moved to be bailed, and it appearing upon Affidavits of the Fact that the Prosecution was malicious, and nothing being done, either upon this Indictment or the Coroner's Inquest, and the Man being dead above a Year, she was bailed. 5 Mod. 323. Hill. 8 W. 3. B. R. Barney's Cafe.

the Wife was indicted of Petty Treason, and the Mother of Murder; Holt Ch. J. thought the Sessions could not indict for Petty Treason, and there is a N ota, that a Letter was read whereby the Prosecutor demanded several Things of them, and said that the would not be quiet till they complied; they were bailed, and a Rule of Court made, that the Justices take Examinations, and send them to the Affidaries, and bind over Witnesses to prove Indictments at the Affidaries, and the Record to be certified thereto.

36. The Ld. Mohun having been bailed by Holt Ch. J. appeared upon the last Day of the Term; and he being in Court, it was prayed that he stand committed, there being an Indictment of Murder found against him by the Grand Jury; this was opposed by his Counsel, because he was bailed by the Ch. J. and he having all the Informations before him, and the fame Witnesses being sworn upon the Indictment as upon the Inquisition before the Coroner, there would be the same Reason for him to stand upon the first Bail, as there was at first to admit him to Bail; but it was answered, that there would be a Difference between an Inquisition found before a Coroner, where the Dispositions are in Writing, and examinable, and an Indictment for Murder, found before a Grand Jury, where the Evidence is secret, and they are sworn not to discover it; and there may be more Evidence given to a Grand Jury, than was given to the Coroner, and more Evidence may be also given upon the Trial than was given to the Grand Jury, for the Party may conceal some of his Evidence to prevent Pratizes; and the Court sentenced tocline strongly.
Bail.

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to commit him upon what had been said, but when it was added that there would be a Sessions of Parliament within two or three Days, they committed him; and it was said, that if the Lords in Parliament pleased, they might remove the Judgment by Certiorari, and admit him to Bail there. Skin. 683. Alch. 9 W. 3. B. R. the King v. Ld. Mohun.

36. The Defendant was indicted for Murder, the Court would not Bail him, tho' the Evidence upon the reading did not seem sufficient to prove him guilty; for per Holt, allowing Bail may discourage the Prosecution, and it is not fit the Court should declare their Opinion of the Evidence before Hand. 1 Salk. 104. pl. 7. Trin. 11 W. 3. B. R. Anon.


38. A Man brought to this Court by H. & C. upon a Commitment by a Justice of the Peace, who have Cognizance of the Cause, is not bailable till the Order is qualified, because till then he is in Execution. 11 Mod. 45. pl. 6. Pash. 4 Ann. B. R. Anon.

39. A Motion was made for a Habeas Corpus to bring up the Body of the Defendant, charged with picking a Pocket, and offered to bring unexceptionable Bail, and to lend down a Tipstaff to inquire of his Reputation; Per Holt Ch. J. tho' we have a discretionary Power, yet it being certified (furnished) that he was charged with the Fall, I think we ought to refuse to bail him; which (on consulting his Companions) he accordingly did. 11 Mod. 261. pl. 18. Mich. 8 Ann. B. R. the Queen v. Mickal.

41. It was doubted whether Persons committed by Rule of Court are intitled to the Benefit of this Act, and it was resolved by 2 Judges, viz. Eyre and Fortescue, (adjwnt Powis, & dissentient Prat) that none are intitled to make their Prayer but such as are committed by a Warrant of a Justice of the Peace, or Secretary of State, and not those committed by Rule of Court; for that is not in the Meaning of the Act of Parliament, (a Commitment by Warrant.) 10 Mod. 429. Hill. 5 Geo. 1. B. R. Anon.

(H. a) By the Habeas Corpus Act.

1. 31 Car. 2. cap. 1 If any Person shall stand committed or detained for any 2 J. 3. Crime, unless for Felony or Treason express'd in the Warrant, in the Vacation-time, it shall be lawful for the Person, (other than Persons convict or in Execution) or any one upon his Behalf, to complain to the Ld. Chancellor, or any one of the Justices of the one Bench or the other, or the Barons of the Exchequer of the Degree of the Chief; and the Ld. Chancellor, Justices or Barons, or any of them, upon View of the Copies of the Warrants of Commitment and Detainer, or upon Oath that such Copies were denied, are required upon Request made in Writing by such Person, or upon his Behalf, attested by 2 Witnesses present at the Delivery of the same, to grant a Habeas Corpus under the Seal of such Court, whereby he shall be one of the Judges, directed to the Officer in whose Custody the Party shall be, returnable immediately before the Ld. Chancellor, or such Justice, Baron, or any other Justice or Baron, of the Degree of the Chief, of the said Courts; and upon Service thereof the Officer or his Deputy shall bring such Prisoner before the Ld. Chancellor, or such Justices, Barons, or one of them, before whom the Writ is returnable, and, in Case of his Absence, before any other of them, with the Return of such Writ, and the Causes of Commitment and Detainer, and thereupon
upon within 2 Days the Lord Chancellor, or such Justice or Baron, shall dis-
charge the Prisoner, taking his Recognizance, with one or more Sureties, in
any Sum according to their Discretions, having regard to the Quality of the
Prisoner and Nature of the Offence, for his Appearance in the Court of B. R.
the Term following, or at the next Assizes, Sessions, or Gaol Deliveries for such
County or Place where the Commitment was, or where the Offence was com-
mitted, or in such other Court where Offence is cognizable, and shall certify
the Writ with the Return and the Recognizance into the Court where the Ap-
appearance is to be made, unless it shall appear to the said Lord Chancellor, Jus-
tice or Baron, that the Party is detained upon a legal Process, Order or War-
rant, signed and sealed with the Hand and Seal of any of the said Justices or
Barons, or some Justice of Peace, for such Matters for which the Prisoner is
not bailable.

S. 4. If any Person shall have wilfully neglected 2 whole Terms after his
Imprisonment to pray a Habers Corpus, he shall not have any Habers Corpus
in Vacation-Time in Pursuance of this Act.

S. 7. Provided that if any Person committed for High Treason or Felony,
plainly and specially express'd in the Warrant of Commitment, upon his Prayer
or Petition in open Court the first Week of the Term, or first Day of the Se-
essions of Oyer and Terminer, or General Gaol Deliveries, to be brought to his
Trial, and shall not be indicted the next Term or Sessions after his Commit-
mment. The Judges of B. R. and Justices of Oyer and Terminer and Gaol
Deliveries respectively, upon Motion made to them in Court by the Prisoner, or
any other for him, the last Day of the Term or Sessions, are required to set at
Liberty the said Prisoner upon Bail; unless it appear upon Oath that the King's
Witnesses could not be produced that Term or Sessions. And if any Person so
committed, having made his Prayer or PETITION as aforesaid, shall not be in-
dicted and tried the 2d Term or Sessions after his Commitment, or upon his
Trial shall be acquitted, he shall be discharged from his Imprisonment.

2. It was moved that the Defendant might be bailed upon the Hab.
Corp. Aet, for want of Prosecution within a Term. Per Cur. the Grand
Sessions held at Chefler, where the Cause ariseth, is in Nature of a Term,
and if this Prayer had been enter'd there, we might have bailed him (upon
Motion) the first Day of this Term; but the Prayer being here upon
the first Day, that can give him no Advantage; The Discretion of Bail-
ing, which the Court had before, is now restrained by that Aet; and
where the Aet faith (Witnesses,) yet if one Witness only be sick, it is within
the Aet; and the Words of the Aet being (upon Oath made) an Affidavit
was taken in Court viva voce; but this was afterwards waived, and the
Prisoner was bailed by the Consent of the Attorney General. Comb. 6. Hill.
1 & 2 Jac. 2. B. R. The King v. Lt. Delamere.

3. C. was brought by Hab. Corp. the last Day of Mich. Term, and
pray'd to be discharged or bailed, having enter'd his Prayer the 1st Day
of Trin. Term last, and was indicted in that Term, and now this Term was
indicted again for the same Species of Treason, but never tried on either of
them. The Attorney General intilit that the first Indictment was for a
Foreign Treason, but the 2d was for a Treason in England; but by Holt Ch.
1. the Commitment and both Indictments are for the same Species of Trea-
on, tho' the Overt-Acts are differently laid; but the last Indictment agrees
exactly with the Commitment; besides the Prayer relates to the Commit-
ment; so that the Party ought to be tried for the Treason for which he
is committed, within 2 Terms; and the Delign of the Aet was to pre-
vent a Man's lying under an Accusation for Treason &c. above 2 Terms;
to which Eyre J. agreed; but both declared they would give no Opin-
on in the Case, but bailed him by virtue of their discretionaty Power.
12 Mod. 66. Mich. 6 W. & M. in B. R. Crosby's Case.

4. The Defendant was committed to Newgate by the Privy Council,
for aiding Col. D. to escape out of the Tower, where he was committed for
High
High Treason; and being brought here by Hab. Corp. was bailed, because tho' the Commitment was for High Treason, yet there was no Prosecution, and a Seiffens was past. 1 Salk. 103. pl. 1. Trin. 7 W. 3. B.R. Fitz-Patrick's Café.

5. One committed for Treafon or Felony ought to enter his Prayer the 11th Week of the Term, or Day of the Seiffens next after his Commitment, or he shall not have the Benefit of the Hab. Corp. Act; but if an Act of Parliament be made which takes away the Power of Bailing for a Time, he need not then enter his Prayer: for that is thereby dispensed with; but then he ought to enter it the first Week of the Term, or Day of the Seiffens, after the Expiration of that Act of Parliament; and for want thereof the Benefit of the Hab. Corp. Act was denied; but because the Detendant had been long in Prison, and his Trial had been delayed, and Affidavit was made that his Life was in Danger, the Court bailed him: 1 Salk. 103, 104. pl. 4. Hill. 8 W. 3. B.R. Ld. Aylesbury's Café.

it was reasonable to bail him upon the Power which they have at the Common Law, he having lain so long, his Health in Danger, and it not appearing when the Witness will return, and he was bailed accordingly to appear the 11th Day of the next Term; S.C. 12 Mod. 117. S.C. and the Court bailed him by virtue of their Discretionary Power, without any Regard to its being in or out of the Hab. Corp. Act; but for the Reasons before-mentioned, and because Goodman, who was sworn to be a material Evidence against him, was here in England several Months after his Lordship's Imprisonment, and that at all that Time he was neither indicted nor prosecuted.

6. In an Act for Subpoena of the Hab. Corp. Act of 31 Car. 2. cap. 2. were these Words, viz. "That no Judge or Justices shall bail or try &c. "without Leave from the King signed by 6 Privy Councilers." It was intimated that the Hab. Corp. Act was not suspended, nor is B. R. restrained by these Words (Judges or Justices), because the Power and Jurisdiction cannot be taken away but by plain and positive Words expresting the same, nor do they extend to the Ld. Chancellor &c. and that a Statute which deprives a Man of his Liberty, shall not be construed so favourably as other Acts of Parliament; and the Cales of Lord Aylesbury, Fitzpatrick, and * Sir William Windham were cited, who were bailed during former Suspendens of this Act. But it was answered, that tho' Words must certainly relate to this Court, because before the Act of Suspension was made, no Judge or Justice could bail for High Treason, and therefore those Words must relate to this Court, which is composed of Judges; that the Ld. Aylesbury's Café was not parallel to this, the Hab. Corp. being suspended only as to him, and them that were then committed on Suspension of Treason, or treasonable Practices, but not to such as were committed expressly for High Treason; that if the Judges are restrained the Court must be too, because it is composed of Judges; and that it is to be observed, that this Act is penned in the most general Words that could be thought on, and that the Law-makers could have no other Intention than to restrain the Judges from Bailing either in or out of Court, and this seems to be the plain Construction of the Act, therefore if this Court can neither bail the Prisoners or try them, it will be to no Purpose to grant our Hab. Corp. And so it was denied, and the rather because it was denied in Lawyer's Café; for the Court would not try him till they had an Order from the King, as the Act directs. 8 Mod. 98. Mich. 9 Geo. The King v. the Prisoners in the Tower.

7. Sir William Windham was committed to the Tower for High Treason by Mr. Secretary Stanhope, and being now brought into Court the 3d Day before the End of the Term, by the Deputy Lieutenant of the Tower upon an Hab. Corp. to him directed, it was pray'd by Mr. Serjeant Pengelly that the Return to this Writ might be filed. The Return was read, and the Warrant was as follows, viz. 47 James
Bail.

"James Stanhope, Esq; one of his Majesty's moft Hon. Privy Council, and Principal Secretary of State.

These are in his Majesty's Name to authorize and require you to receive into your Custody the Body of Sir William Wyndham, Bart. herewith sent you for High Treason, and you are to keep him safe and close, until he shall be delivered by due Course of Law; and for so doing this shall be your Warrant. Given at Whitehall the 7th of October, 1715.

To the Lieutenant of the Tower of London, or his Deputy."

Then Mr. Serj. Pengelly intifted that Sir W. W. ought to be admitted to Bail upon this Warrant of Commitment by Mr. Secretary Stanhope, dated the 7th of October laft, and this becaufe of the Length of Time of his Imprifonment, without any Prosecution against him; That 8 or 9 Months and 4 Terms had interv'n, and nothing done; That there was another Inducement of great Weight, in his Apprehension, from the Frame and Form of the Warrant, and as to the Generalty of the Commitment, besides the ill State and Condition of his Health, the Danger his Life would be exposed to without a Prosecution; that he had been there always ready to have answer'd any Prosecution, or any Thing that might have been objected against him; that nothing had been done by him to delay and protract the Prosecution; that Mr. Attorney General had had 4 full Terms; that Sir W. had omitted taking Advantage of the Hab. Corp. Act, by not making his Prayer the first Term after his Commitment, which he might have done. Upon these Circumstances, where there had been a long Default of Prosecution, nothing proceeded from Sir W. W. It was the Right of every English Subject to pray to be admitted to Bail; that every Perfon committed for Capital Offences must be tried in a convenient Time, or in Default of a Prosecution he ought to be discharged upon Bail. All Commitments before Conviction were for safe Custody only, and the fame Rule of Justice, the fame Administration of the Law that punished Offenders, provided for them a Course to safe their Imprifonment, and to discharge themselves from the Imputation of their Offence.

That this Court had full Power, in these Cases, to bail; it had been exercifed in several Instances; that he would observe in general how this was at Common Law. It was the Liberty of every Perfon, who was accused, tho' indicted of Treafon, or of any Felony whatsoever, to be bailed upon good Security; so that a Man was then bailable for High Treafon. Co. 2d Inf. 189. Ha. Pl. Cor. 99. 104. An Accusation was of no Force to deprive a Man of his Liberty; he was either bailable by the Sheriff ex Ofifico, or by the Writ de Homine Replegiando; but tho' the Statute of Westm. 1. cap. 15. which was made 3 Ed. 1. took away this Power of the Sheriff to bail ex Ofifico, or upon the Writ de Homine Replegiando; yet it had been always held that the Court of B. R. was excepted out of this Act. The fame Power which it had at Common Law still remain'd; This was agreed in both the Authorities before mention'd, and it was confirmed by contant Experience. Hence it was that this Court was intrufed with the Liberty of all Perfons whatsoever; They were to inquire into the Reasons of the Confinefment of any Perfon.

That after this, in Processe of Time, when Commitments grew more frequent and general, the fame contant Experience held good as to the Power of this Court. There were then Commitments by the Council Board, the Star-Chamber, and other Courts, by the immediate Warrant and Command of the King, and by the Lords and others of his Majesty's Privy Council, and this was for some Time, and during the Reigns of
Then the Act directed what was to be done by the Sheriff or other Officers upon this Writ, and upon his making a Return, and certifying the true Cause of the Detainer and Imprisonment, the Court, within 3 Days after such Return made and delivered in open Court, were to proceed to examine and determine whether the Cause of such Commitment appearing upon the said Return were just and legal or not, and should therein do what to Justice should appertain, either by delivering, bailing, or demanding the Prisoner; so that upon this Act the Remedy which the Party had, prevented any long Delay. The Cause of the Imprisonment was to be just and legal, and this upon the Form of the Commitment as well as upon the Substance of it; and tho' the Cause were just and legal, yet the Court was obliged either to deliver or bail the Party, if the Warrant was not formal and good; that by the express Words of this Act it did not appear that it was in their Discretion either to discharge or bail, and this Act did not give the Court any new Power.

That before the Habeas Corpus Act there were Instances of the Court's inquiring into the Nature of the Commitment, and letting the Party to Bail. 2 Sid. 179. Sir Robert Pye's Case. The Case was this; Sir R. Pye and Ma. Finch, being committed to the Tower, moved by their Counsel for an Habeas Corpus; and this being granted and returned, it was moved that they might be bailed, they having been a long Time imprisoned, without any Prosecution made against them. And it was then laid by the Court, that tho' they had been imprisoned for Suspicion of Treason, they could not deny to them Bail, in case the Counsel of the Commonwealth, that then was, did not proceed against them; for it was the Birth-right of every Subject to be tried according to the Law of the Land, and ought not to perish in Prison; whereupon they were bailed. He said that a Man ought not to perish under an Accusation or Commitment. There was also Zach. Crofton's Case, 1 Kcb. 303, 306. 1 Sid. 78. Trin. 14 Car. 2. The Books say, that after he had been in the Tower, being committed there for High Treason by the Lords of the Council, March 23, 1660, he was brought into Court upon an Alias Habeas Corpus the Beginning of that Term; and upon the King's Serjeant offering to indict him that Term, he was removed, and by Rule brought up the last Day of the Term; and then thro' the Delay of the Prosecution, and no Indictment being against him, he was admitted to Bail. That it was said in Keble, that Cornwellings's Case was only by Length of Time; so in that Case it appeared that Bailing of the Party was the Event of it. He said that there were later Instances than these, where Bail had been the Event of a long Imprisonment. Yates's Case, Hill. 2 W. & M. Show. 190, 191. B. R. 'Yates was committed to the Prison of Hull for High Treason, and it was moved that he might enter his Prayer here, that he might be tried; but it was denied by the Court, because it must be at the Assizes for the Place; yet because of the Length of Time to the Assizes, it being not for that County till the Summer, to prevent his Imprisonment during that Time, he was bailed. Persons must be tried in a reasonable Time; and Sir Barth. Shower there insisted, that otherwise by a Commitment to Dover, Canterbury, or any Place where the Assizes were but rare, a Man might be a Prisoner a Year or two; so that in these extraordinary Instances as well...
well as in the Nature of the Thing, this Court had taken Security to the Government, and let the Prisoner out upon Bail; that a Man was not to be confined 6 or 8 Months by way of Punishment; that this here was a much harder Case; 8 or 9 Months had been endured, and no Cause shewn, or a Step taken towards a Prosecution.

That after this there were other Instances, as Lord Aylesbury's Case, Hill. 8 W. 3. that he having neglected to make his Prayer in the proper Time, and having lain a long time in Prison, and the King delaying to try him, the Court thought fit to bail him. That in the Case of the King v. Cage & al for the Murder of Conway Seymour, Lt. Ch. J. Holt said, that there were many Cases omitted out of the Habeas Act, and that before this Act there was a Rule at Common Law, that Prisoners in Prison, in convenient Time, must be bailed, and that Trials for capital Offences ought to be recent, and that the Court would consider of the Circumstances, if the Party were to be admitted to Bail. He said, that to be continued in Custody a long Vacation, when the Commitment was so long since, would be very hard; but the Court would regard a proper Time for these Prosecutions, that here was not the least Preparation or Attempt made towards carrying on a Prosecution. That tho' there was no Time expressly limited by the Statute of King Cha. 1, for these Prosecutions, yet it was apprehended, that now by the Habeas Corpus Act of the 31 Car. 2. there was a full Obligation upon the Discretion of the Court to admit Prisoners to bail, that upon this Act there is no limited Time for a Prosecution. The Words are, viz. "If any Person shall be committed for High Treason or Felony &c. upon his Prayer or Petition in open Court, the first Week of the Term, or the first Day of the Sessions of Oyer and Terminer &c. to be brought to his Trial, shall not be indicted some time in the next Term or Sessions &c after his Commitment, the Judges of B. R. Justices of Oyer and Terminer &c. shall the last Day of the Term or Sessions, let at Liberty the Prisoner, upon Bail, unless Oath be made that the King's Witnesses could not be produced the same Term or Sessions; and if any such Person &c. shall not be indicted and tried the same Term or Sessions &c. after his Commitment &c. he shall be discharged from his Imprisonment." He agreed, that this was a proper Measure for the Court to go by. What the Parliament have thought a reasonable Time ought to govern the Discretion of the Court. By this Act the King did declare that to be an Obligation upon himself and his Courts of Justice, and he contented by that Law, that if there was no Prosecution in that Time, the Prisoner should be bailed the first Term, without an Affidavit of the King's Witnesses being then out of the way, and discharged the 2d Term, if not tried. That tho' the Party did not make his Prayer in due time to be within the Act, yet the Rule of Justice was the same to all Persons.

That in the present Case, as there had been no Attempt to shew any Reason for a Delay of the Prosecution, notwithstanding the Length of Time, this Neglect had been sufficient to have induced the Discretion of the Court to bail Sir W. W. yet he said farther, that from the Form here of this Warrant he ought to be admitted to Bail first, for that there was a great Incertainty in it; (a Person committed generally for High Treason) without the particular Species of Treason had been expressed, the Court will not continue Sir W. W. longer in Custody; by Law the Warrant ought to express the Species of Treason. It was not sufficient to commit a Man for Treason generally, or else at that Rate it would be in the Power of the Person who makes the Warrant, whenever he thinks a Matter is a Treason, to commit the Party for it. That Ld. Coke had laid it down as a Rule, 2 Init. 591. that a Mittimus must contain the Cause, tho' not so certainly as an Indictment ought
Bail.

ought, yet with such convenient Certainty as it might appear judicially to the Court what the Offence was, whether for High Treason against the Person of the King, or for counterfeiting the Great Seal, or for counterfeiting of the King's Money. So it was in the Case of Petit Treason; it was not sufficient to say in a Warrant, that it was for Petit Treason generally, but it must be expressed for the Death of such an one his Matter &c. If it were in the Case of a Felony, it must not be for Felony generally, but it ought to say for the Death of such an one, or for Burglary, or for Robbery, or for the stealing of an Horse, or the like, that it might appear judicially to the Court, that it was an Offence for which he ought to suffer Death; for in a Case of so high a Nature, concerning the Life of Man, the convenient Certainty ought to be shown to the Court, and this not only for the Sake of the Party in Pris on, but for the Benefit of the King, in Case there should be a Breach of Prison, if any one should assist him to make his Escape; therefore in the first Place, as the Species of the Treason ought to be set forth, so it must be in Cases of Felony, or else the Felony might be only stealing of Charters of Land, or Wood growing, or the like, which a Justice of Peace might apprehend to be Felony, tho' in Law they were not so. A farther Reason I. d. Coke gave, was, that if a Man were indicted of Treason, or indicted or appealed for Felony, the Capias thereupon which the Party did comprehend the Caufe of that Indictment &c. a fortiori the Munitus whereby the Party was to be arrested, having no Ground of Record as the Capias had, must, purloining the Effect of the Capias, comprehend the Caufe in convenient Certainty. With this agreed H. Pl. C. 107. He said, that upon this Point there had been an Instance in this Court expressly for this Caufe, Mich. 7 W. 3. Kendall, Roe p. 46 of which there was a short Report 5 Mod. 78. 85. the Caufe was this; They were committed to a Megllenger by Sir W. Trumbull, one of the Secretaries of State, for aiding and affisting Sir James Montgomery to make his Escape, he having before been committed for High Treason, without mentioning what Species of High Treason he was charged with, and upon Debate they were admitted to Bail, because the particular Species was not mentioned. It was held not sufficient to commit them for aiding and affisting a Person charged with High Treason in his Escape, without a particular Description of the Treason in the Person committed, and it not appearing to the Court that the Caufe was sufficiently ascertained, they admitted them to Bail. Sir Barth. Shower, of Council with the Prisoners, said, That if Sir James Montgomery had been committed for such a Caufe generally, for which the Prisoners then stood committed, in aiding and affisting him in the making his Escape he ought to have been bailed, and this was not denied by the Court. The Reason given in that Book (5 Mod.) was a general Rule, that if the Warrant had expressed the Species of Treason, they had been Guilty of the same particular Species; this was not for the Sake of the Party, but for the better Custody of him by the Gaoler. But he said, that upon his general Return here, as it is, it was entirely in the Discretion of the Magistrate to make what he will to be High Treason; he may not confine himself to the Particulars within the Statute of 23 Ed. 3. so that for the Satisfaction of the Court, the particular Species of Treason ought to be mentioned, whether it be for compounding the Death of the King, the levying War against him &c. or else a Man may be continued in Custody only upon the Apprehension of the Magistrate. He said, that this Case of Kendall and Roe was a very strong and positive Opinion; that the Statute of K. Ch. 1. and Experience ever since, had confirmed this Opinion, and from the express Words of this Statute the Court ought to examine, whether the Caufe of Commitment were just and legal, not from the Circumstances of the Fact.
Bail.

Fact only, but from the Form and Frame of the Warrant; that in the Statute of Car. 2. the Words were ("committed for High Treason or Felony plainly, and specially expressed in the Warrant of Commitment") this must go to the specific Offence; you cannot say a Man is committed for Felony, without specifying the Act.

He said, that there was a further Instance which would move the Discretion of the Court in this Matter, and that was Sir W. W.'s ill State of Health, and the Condition he had been in during his Confinement; that a longer Confinement without a Prosecution would expose his Life to great Danger; that he would not enter into the Expressions of the Terms of his Indispositions; there were Affidavits of that from his Physicians; that he had for some Years been under this Indisposition, an Inflammation in his Lungs; that his Physicians did say it had affected him in such Manner already, that a Remedy might come too late without the Air of the Country; that there was also this Circumstance in the Family, his Father died of the same Distemper in the Lungs about the same Age; that the Danger might still be increased by 2 or 3 Months longer Confinement this hot Season of the Year, and then there would be no need to carry on a Prosecution or Indictment against him. That Sir W. W. had done every thing that signified his Obedience; he would not attempt or do any thing that might give Offence; that this was no Surprize; on the other Side, he had given all Opportunities he could to their carrying on a Prosecution; and that upon these Circumstances he hoped that the Court would exercise their Discretion, in granting him an Enlargement upon Security; that there were present 4 noble Persons to be his Bail, that he should answer any Accusation against him, and for his good Behaviour in general, which would be a better Security to the Government than to keep him in Custody.

Then Mr. Jeffrys, of Counsel for Sir W. W. prayed the Affidavits might be read, which being done, he observed, that from the first Affidavit it appeared that Sir W. W. had this Inflammation in his Lungs from his Youth; that his Father died of it about the Age he was now of; that in 1710 he was forced to leave this Town, and go into the Country; that in 1714 the Cough returned upon him very violently; that his Sicknes and Indisposition now was to be imputed to his want of Air and Exercise; that Dr. Horney, the Physician of the Tower, was of Opinion, that if his Disorder should increase upon him this hot Season of the Year, it might endanger his Life.

Then the Affidavits of two of his Servants were read, how this Indisposition had been during his Confinement &c. Upon which Mr. Jeffrys proceeded, and said, that they did not pretend to move for a Discharge of the Commitment; that Sir W. W. was very willing to give Testimony of his Innocence, and therefore now only prayed to be bailed.

Then he took Notice of the Form of the Warrant, viz. "I fend you herewith the Body of Sir William Wyndham for High Treason, to be safely and clofely kept, until he shall be delivered by due Course of Law &c." and said that the Liberty of all the Subjects of England were concern'd in this Matter, and that here was a Commitment without Oath. That my Ld. Coke, 2 Inst. 51. on his Reading upon the Statute of Magna Charta said, that where there was any Witness against an Offender, he might be taken and imprisoned by lawful Warrant, and committed to Prison; that the Statute of 25 Ed. 3. cap. 4. took Notice and recited the Statute of Magna Charta, and then Enacted, That none should be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it were by Indictment or Presentment, or by Process made by Writ Original at the Common Law; that in this Case there
there did not appear so much as a bare Suggestion. Here was a Commit-
ment without any Fact made out, without any Proof of a Crime; that our Liberties from that Time forward would be at the Disposal of the Secretaries of State; we should be but Tenants at Will to them. He said, that from the Generality of the Crime in the Warrant it was void, because the Crime was not specified; It did not appear what this Offence was; that it was very well known the Species of High Treason were very different; that the Judgment was very different. In some Cases it was to draw, hang'd and quarter'd; in others, as for counterfeiting the Coin, the Quartering is no Part of the Sentence. The Species of Treason to be expressed in the Warrant was not for the Benefit of the Party only, but was also for the Benefit of the Crown, that it might be known what Sort of Crime it was, and what Judgment was due; that it was said 1st. 52, that it was for the King's Benefit, and that the Prisoner might be the more safely kept.

That if the Lieutenant of the Tower should have permitted Sir W. W. to have made his Escape, could he be charged with High Treason? What Sort of Judgment must there be given here? There was no such Thing as a Judgment in Law generally for Treason.

That in the Case of Kendrick and Roe, Mich. 7 W. 3. three things were objected, 1st. whether the Secretary of State had Power to commit; but this was over-ruled. 2dly, Whether the Commitment could be to a Meffenger and this not prevailing, it was 3dly inferred upon, that the Species of Treason which Sir James Montgomery was committed for ought to have been set forth, and upon this they were admitted to Bail.

That there was another Matter of Weight here as to the Manner of the Commitment; he was to be safely and closely kept, and the Lieutenant of the Tower has done this very fully; that there was a Form and proper Conclusion to all Warrants; that Ld. Coke took Notice of this Form, and of the Conclusion, that if the Party behaved himself ill in Custody, he might be so closely kept for the safer Custody of him; but that the Magistrate had only Power to commit the Party, not to direct any such Thing concerning his Confinement.

That this Case here was the same as Ld. Arlesbury's Case; he said, he had some particular Reason to know it very well, he was committed 21 May 1695, and he continued in Custody till Hill. Term following; that this Term, when he came to make his Prayer according to the Habeas Corpus Act, he was told he was not within it, for that he ought to have made his Prayer the first Week in the Term after he was committed, the Act of Suspension not reaching this Case.

Mr. Reeves argued of the same Side, that there was sufficient to make the Court exercise their Power of Bailing; first, the length of Time of the Imprisonment, and no Prosecution; There was besides this, the State and Condition of Sir W. W.'s Health; his Life would be in Danger by a longer Continuance in Custody; then there was the Form and Generality of the Warrant; that either of these Reasons was sufficient, but when all 3 concurred, that Case would be the stronger.

That first, as to the length of Time, Sir W. W. was committed the 7th of October last; that between 8 and 9 Months had palled, and during that Time there had been no Prosecution; that tho' there was no Time limited by Law for a Prosecution, yet it ought to be set on Foot in some reasonable Time; that here was not any Reason given why Sir W. W. had not been prosecuted.

That as to the Habeas Corp. Act, it appeared from it that Persons were to be kept in Custody but for some convenient Time, and he would submit it, whether this Act did not say what should be a sufficient Time.

"It was enacted, that if any Person committed &c. should enter his Prayer

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"the first Week of the Term &c. to be brought to Trial, and should not
be indicted that Term &c. he was to be let at Liberty upon Bail the 4th
Day of the Term &c." That in this Case Sir W. W. had neither enter'd
his Prayer the first Term after his Commitment, or the 2d, or 3d, but
at the End of the 4th; That if he had come with his Prayer the first
Term, the Courts of Justice must have bailed him; and it must be sub-
mitted whether the Court now in their Discretion ought not to do it.
Then as to his Health; as to the Circumstances of this Case; the Na-
ture of Sir W. W.'s Indisposition, the great Danger he is under, the
Inflammation in his Lungs, it being a Dittemp his Father died of
about the same Age, and the dangerous Symptoms now upon him; these
Things too must be submitted to the Courts; That as to the Form and
Generality of the Warrant, the Cafe of Kendal and Roe was in Point,
that if the Warrant were ill, the Party ought to be admitted to Bail.
There was a Commitment generally for High Treason, "Receive and
'take into your Custody Kendal and Roe for High Treason." And if this
were good, could then what came afterwards make that Warrant a bad
one, by describing the Species of Treason? It the general Part be good,
the other could never make it bad. Then it said "For aiding and afflit-
ing Sir James Montgomery to make his Escape, being in Custody for
"High Treason," now this might be a Treason for Compelling the King's
Death, Levying of War against him &c. in which Case Perons aiding
and afflicting knowingly, would have been guilty of High Treason; but
if the Offence were Harbouring a Jefuit, Counterfeiting of Money, Coin-
ing of Money &c. that the Aiding and Afflicting the Offender to make
his Escape would not be High Treason; That the Court there did not
go into an Examination to supply the Defect of the Warrant, but they
took it upon the Face of the Warrant, and because there was not a suf-
icient Charge of High Treason, and purely upon the Generality of the
Warrant, Kendal and Roe were admitted to Bail.

Then to apply this, if there were a Cafe of High Treason for which
he might be committed, the Court will bail him. He might be com-
mitted for Counteifting of the Coin; and if so, would not the Court,
after 4 Terms, bail him? Surely the Court would have done it: That
the Court could not take any Notice of what he was committed for,
but from what was express'd in the Warrant; and tho' the Warrant
were good, yet upon the Uncertainty of it he ought to be bailed; That
upon the Habeas Corpus Act it did seem to be the Opinion of the Parlia-
ment, that the Species of Treason ought to be express'd. What was
else the Meaning of the Words "Plainly and specially express'd in the
"Warrant of Commitment?" No one was to have the Benefit of this Act;
to be bai'd, if in the Warrant the Treason or Felony were plainly or
specially mentioned.

That as this Case was, he hoped they had a very strong one; that
there were 4 Noble Perons of great Fortune who would have the Cus-
tody of this Gentleman, and that he should appear at all Times; that
this was a late a Custody as that of a fingle Peron, the Gaoler; that
from the Circumstances of his Health, and the Explication of the Warr-
rants, the Court might exercise their Discretion of Bailing.

Then Sir Joseph Eekyll (the King's Ch. Serjeant at Law) spoke on
the Behalf of the Crown, and said, that there was no Doubt but the
Court had a Power of Bailing; they had it at Common Law, and it was
not taken away by any Statute; that gives no Reason in this Case for
the length of Time, which only holds when there is a Failure of Pro-
fecution &c. which did always suppose the Innocence of the Party; the
Commitment was on the 9th of Oct. last, at which Time many Per-
sons were involved in the Rebellion, and the Prosecution of these Per-
sons had taken up the Time of those who had the Honour to serve the
Crown;
Crown; so that it was not a Neglect, nor to be imputed to those engaged in the Prosecution, because he might have accelerated the Prosecution, and called upon the Crown to have been brought to his Trial by the Habeas Corpus Act; so that the Reason turns upon them; that the length of Time was owing to his Neglect, that he did not make his Prayer in proper Time.

That as to the Habeas Corpus Act, it was reasonable the Court should copy after it, but when that Act came to be considered, it would appear directly otherwise, than as the Objection had been made; that Act was designed for those that would take the Benefit of it, and not to affit those that would not, nor was any Reason to be drawn from the Statute to induce the Bailing, for it took away the Benefit from those who did not claim it, and never designed to grant the same Advantage to those that did not desire it, as to those that did.

That all the Cases which had been cited, except that of Kendall and Roe and Yeates, Show. 192, 191. went upon the great length of Time only; but whether this and the Presumption of the Party’s Innocence were not anwiered by the publick Bailiffs, that the King’s Counsell had been concerned in, he would submit to the Court.

That as to the Liberty of the Subject, which had been thrown in, that was to be regarded only as Popular Way of Talking, but they, who had the Honour to serve the Crown, had more Reason to do it, against the Rebellion that was rais’d to destroy the Liberties of England, as well as the Person of the King.

That these Warrants were legal Warrants, and this Objection was made in Crofton’s Case, but not allowed; that the Habeas Corpus Act inlisted upon this Matter, saying “the Treason or Felony must be plainly and specially expressed in the Warrant”, there (plainly and specially) must be the same Thing; it was never the Design of the Statute to consider the Difference of High Treason; they were of the same Consequence in Law; they were all capital Offences; it was the same Crime in Law, and therefore the Species need not be expressed. That as to the Discretion of the Magistrate, it was for him to judge of Accusations that come before him; where was the extending and amplifying of his Power, if he were left to distinguish between Offences? All Treasons were in a written Law, they were all enumerated in the Statute of 25 Ed. 3, or in subsequent Statutes, otherwise there would be less Power left to the Magistrate than there was in a Judge upon an Accusation before him; that as to the Case of Kendall and Roe, that was plainly different, for there was a Commitment for having aided and assisted Sir J. M. in his Escape, being committed for High Treason; it ought to have been particular as to the Species of Treason, because the Crime committed by Kendall and Roe was for Secondary Treason, and this depended solely and entirely upon the first Warrant of Commitment, and therefore such a particularity might be necessary to bring these Persons to be punished for the High Treason, and yet not so in the Principal Case; for if Sir J. M. had been before the Court, that would have been some Doubt whether the Treason must be specified; but that in the Case of Kendall and Roe for Secondary Treason, it could be so no further than the Treason expressed in the Warrant, so that there may be a Difference between that and the present Case.

That as to the Matter of the State of Sir W. W’s Health, the Court must go according to Law and Justice; it was a tender and compassionate Point to intermeddle with; he said they were on the harther Side on this Case, from what it would be in the Case of another Person; it did not appear to be any chronical Distemper; it did not return by Fits. That Sir W. W. did not apply upon the Habeas Corpus Act, but
but thought then the Indisposition he lay under not a sufficient Ground; that he was not now in worse Condition than he had been.

Then Mr. Attorney General said, that as to the Objections which had been made concerning the Liberty and Property of the Subject, that they would be at the Pleasure of a Secretary of State, and as to the Warrant of Commitment that it was not said that he was charged upon Oath; this latter Objection had been over-ruled oftentimes, and if there should be a Mistake in the Warrant, that would not make the Liberty of all the Subjects of England at the Discretion of a Secretary of State.

As to the length of Time since this Commitment, it had been said, that where the Statute of Habeas Corpus was silent, the Court would bail by Common Law, but length of Time was only good Reason in Discretion; He argued that there was a Rebellion in the Kingdom at the Time of that Commitment, and since the Rebellion had been quelled, all Persons concerned for the Crown, and who should have taken care for this Prosecution, had been employed. That Sir W. W. might himself, if he had thought fit, have demanded a Prosecution; that he knew so much of a Prosecution against Sir W. W. that as far as the Matter appeared unto him, it must be in Somersetshire, and tho' one Affixes had lapsed, yet what was before said was a sufficient answer to it.

That as to the Legality of the Warrant not mentioning the Species of the Treason, this Exception was taken in Z. Crofton's Case 1 Sid. 78. and not allowed, and the Bill of Rights in Ruth. Collections, was only that Warrants without Cause shewn, were illegal. That the Officer which commits must judge of the Treason, whether it were generally or specially committed, and if it were specified in the Warrant that it was for Treason in conspiring the Death of the King, that might be proved by levying of War, and what Light could he have more than now, so that such a specifying did not make it more certain, or more for the Advantage of the Party, and the Warrant was not traversable. That as to the Time in Crofton's Case, there was a Year and a half's Confinement; that there had been many Instances of such Commitments as these, and in the Case of Kendall and Roe, if it had been an illegal Commitment, they must have been discharged without Bail; that in that Case it did appear that Sir J. M. was dead, and that he being not to be convicted, there could be no Conviction of those that let him escape, and they were bailed without Debate, chiefly for that Reason; the Warrant indeed was only just touched upon. That most of the Things which had been said were inferred upon in Mr. Harvey's Case this Term, and disallowed.

That as to the State of Sir W. W.'s Health, if he had known any Thing of that being inflected upon, he would have sent the Physician of the Tower to see him, but as far as it appeared he said Sir W. W. looked well, that the Affixes were not far off, and then it might apply for a Trial, or enter his Prayer, and be discharged.

Mr. Solicitor General observed, that in the Habeas Corpus Act there were 3 Sections, wherein mention was made of the Causes to be contained in Warrants of Commitment, the first had the Words "Felony" or Treason plainly expressed in the Warrant of Commitment, the 2d had the Words "High Treason or Felony plainly and specially expressed in the Warrant of Commitment," and the 3d had the Words "Petty Treason or Felony plainly and specially expressed in the Warrant of Commitment," and by comparing all these together, it appeared that the Parliament did not intend any other, but that it should only appear whether the Offence was High Treason or Felony. Then to consider the Case at Common Law, he said that this Act had not altered the Law, but the Return upon the Commitment will have the
Bail.

fame Confirnation as at Common Law. To what Purpofe should the Species of Treafon be fet forth? there was no Neeceffity to mention the overt Act, yet if any Thing more than High Treafon was to be fet forth, it must be the overt Act; it would be of no Ufe to the Prifoner, nor of any Ufe to the Court, that it would appear that the Court had Jurifdiction, without afcigning the overt Act.

That as to the Objection about the Power of the Secretary of State, he faid there was no Doubt but he had a Power to commit; in the Cafe of Kendall and Roe this Objection was fcoimed at; and my Ld. Ch. J. Holt faid, that it was made more for Delight than Neeceffity; that by a Resolution in Leonard's Rep. it appeared that the Court took this Difference, that where one was committed by one of the privy Council, the Caufe of committing ought to have been fet down in the Return, but contrary where the Party was committed by the whole Council, there no Caufe ought to have been alleged; that this was offered, to fhew that the Secretary of State had Power to commit, that these Words (plainly andpecially) were sufficiently anfwered by a Warrant for High Treafon only, without any particular Species of Treafon; for fuppofe it had been laid for High Treafon in complaining the King's Death, of which there were divers Overt Acts, would the Prifoner hereby be better informed? In Z. Crofton's Cafe there was another Reafon given, for it was faid that the King need not discover the Particulars, for it might be inconvenient to him, and no one could know what the Confequence of this might be.

That in the great Caufe of an Habeas Corpus 3 Car. in the Cafe of Sir John Corbet, Sir Edward Hampden and all, upon the general Return of a Commitment per Speciale Mandatum Domini Regis; it was agreed, that if there had been any particular Description of the Offence, it had been fufficient. In 27 H. 7. a Commitment pro Subfpectione Feloniae was by all Sides allowed to be good. So it was in the Time of H. 8. pro Homicidio facto. So 30 Eliz. Brown's Cafe, pro Subfpectione Proditionis; that in Vaug. 142, 143. Bulthell's Cafe, this Return was taken for granted; that was on a Commitment of Bulthell and all, for having acquitted Pen and Perad on an Indictment for a Riot &c. and it is there faid by my Ld. Ch. J. Vaughan, that it might have been objected that as the Return of an Habeas Corpus for Treafon or Felony had been good, the Return there was fufficient, and he wondered it had not been mentioned, and it was not objected to either at the Bar or at the Bench; but it was obferved that there was a Difference between the 2 Cafes, for upon a general Commitment for Treafon or Felony, the Prifoner (the Caufe appearing) might prefs for his Trial, which ought not to have been denied or delayed, and upon his Indictment and Trial the particular Caufe of his Commitment must appear; As to the Cafe of Kendall and Roe he faid, that the Judgment of the Court was not upon the Species of Treafon being not fet forth; my Ld. Ch. J. Holt gave no Opinion as to that Matter, but an Objection was there made that Sir J. M. was not charged to be guilty of High Treafon, now he must be guilty of this to make the others guilty of High Treafon in aiding and afifting him to make his Escape; he added, that it was not faid in that Cafe that a general Commitment for High Treafon was not good.

As to the length of Time, he faid that it was to be considered upon the Habeas Corpus Act, whether it was not a good deal owing to Sir W.'s own Neglect, by not applying to the Court sooner, when that Act had chalked out a Method; for upon entering his Prayer in proper Time, if he had not been indicted that Term, upon Motion in open Court the laft Day of that Term, he muft have been difcharged: That these were Conditions put upon the Party, of which if he would have the

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Benefit, he must follow what was by them prescribed. That there had been Attempts upon the Government every Body knew; it was not necessary to specify that; Could it be said the Warrant was void for want of this? surely it was legal and just, and the Secretary in doing what he had done, had but done his Duty.

On the Reply Mr. Serjeant Pengelly said, that the Attorney General had not given any Reason for his Delay of a Prosecution, that it was not intimated upon that they had any Witnesses, or that any of these Witnesses were out of the Way or absent, to obstruct the carrying on a Prosecution; that this being so, it was plain from the Hab. Corp. Act, there was no other Excuse to be given to the Court, viz. that the Witnesses could not be found, or were not in the Way, or by Reason of some Absence; if Mr. Attorney General had been pleased to have given any Account of that, it might have given some Satisfaction in this Case. That upon every Commitment for High Treason, there must be express Evidence of that Fact, and this shews that every Thing must then be in a Readiness to make out the Substance of the Commitment; it destroyed all Presumption of the Witnesses being out of the Way; they ought to have proceeded speedily; that their Delay of not sitting for an Hab. Cor. could not be imputed to their Prejudice, but it might evidence how much they were prefled at that Time, as that Mr. Attorney should happen not to think of this particular Case; that Sir W. W. was not to be involved in the Case of those that were in the Rebellion; whatever they deferred, whether a recent Prosecution or not, he was not within the Act made for their Trial; his was a particular Case; his Confinement was to be answered for by a Default of their Prosecution; that he was not to be neglected, because others of an inferior Quality were to be tried; that others of a less Quality had been proceeded against in the Country, and a Person of his Quality had been neglected, tho' in Town, always ready to be brought to Justice, and that tho' there was no Pretence of a Prosecution against him, he must now go down into Somersetshire; that it was not said there was ever an Intention to prosecute him; that this looked like a wilful looking over his Case, and if this Prosecution in Somersetshire should not succeed, yet it might be a Satisfaction to some People. He said that the Liberty of a Gentleman of Quality ought not to be restrained upon such Suggestion, or a Report that Mr. Attorney would prosecute; Imprisonment was only for safe Custody; the Clause of the Hab. Corp. Act, if their Prayer was not entered in due Time, took away only the Remedy the Party might have against the Judge or Officer as to any Penalty upon that Act, but it was never intended to prevent his being bailed; this was the Consequence, that the Party should not have the Benefit of that Act, so as to bring an Action for the Penalty. It was a Waver of the Penalty, but still he did not forfeit his Liberty; it gave him leave to get his Liberty sooner than he else could, nor took away any Benefit he had at Common Law; that Sir W. W. stood clear still to have the Advantage of that Statute; that Mr. Attorney had no Interruption either in Mich. or Hillary Term, especially in this Town; there were 2 Terms compleat; that the Hab. Corp. Act said, that 2 Terms were a reasonable Time for a Prosecution, but his Client had laid 2 Terms more; this was a double Time, and a double Punishment; it doubled the Inconvenience upon the prosecuted; for by Law the Prosecution ought to be freth. That as to the Form of the Warrant, he said that they (the King's Council) had not given any Instance where it had been adjudged good. The Event of Crofton's Case was against them, when he was brought up upon his Hab. Corp. he was remanded for 2 or 3 Days, and at the End of the Term he was let to bail; the Court thought that a general Commitment was not sufficient to continue him in Custody.

That
That there was great Reason why the Species of High Treason should be mentioned; Was there any Instance of a Commitment for Felony generally held to be good, and allowed? If a Commitment for Murder or Felony generally were not good, could there be any Difference, why it should not be so too in Case of High Treason? for as Treason is the Genus, so is Felony. He said the Reason of this was, because the Court of B.R. which was a superior Court, might have some Control over the Actions of inferior Magistrates, and ought to have Satisfaction shewn them; that it was a Crime of that Nature for which a Person ought to be committed, and in order to this, there must be some convenient Certainty in their Warrants as to the Species of Treason; the Fact imported it, As if a Man were taken in actual Rebellion. That particular Species arose immediately from that Fact; Shall an inferior Magistrate be trusted with the Examinations of Facts, and yet make the Court a general Certificate without having the Species, tho' it were not necessary to set forth the Overt Act?

As to the Cases in Rulhworth, and the several Instances infit on, as for Suspicion for Treason, so for Suspicion of Felony, so pro Homicidio, he said that there were not Law, and that there were at that Time several Commitments made, when the Secretaries of State pleaded, without the particular Species of the Treason; that the Certificate of the Judges in Rulhworth was made only to excuse themselves; that they had not set any Persons at Liberty, but where the Cause of the Commitment had not been certified or returned to them; that as to the Cause of Kendall and Roe, my Ld. Ch. J. Holt said, it was a strong Objection, that the particular Sort of Treason was not mentioned, and this was infit on at the Bar in Montgomery's Cafe.

That as to the Case in Vaugh. it was strong for him; for upon such a general Commitment for Treason or Felony, the Prisoner (the Cause appearing) might prefer for his Trial, which ought not to be deny'd or delay'd; which shews that if this Commitment be allow'd, yet the Party ought to be prosecuted immediately, and this Prosecution ought not to be defer'd.

That if Mr. Attorney General desired any Recognizance or Bail to be given, Sir W. W. should submit to it, and would be forth coming to appear at any Time, which would be a far greater Security than his Commitment.

Mr. Jeffrys by way of Reply also said, That Sir W. had been so close kept, that he had not Use of Pen, Ink, or Paper for 2 Months, so that he could not apply for an Enlargement from his Imprisonment.

That as to the Case of Kendal and Roe, no Answer had been given to it; for tho' Sir James Montgomery was dead, yet his Death could not alter that Case; As to the Saying by Mr. Solicitor that the Objection about the Power of a Secretary of State to commit was there stated at by the Court, it was there mentioned by my Ld. Ch. J. Holt; and tho' their Power be now agree'd to, yet they were but formerly, Clerks of the Council, and are but of late grown to be Great Ministers of State. The Attorney General has said, that we should stay till next Term; so much he knew of a Prosecution; so that as yet he does not know it with any Certainty. The Habeas Corpus Act says, that there ought to be Oath made that the Witnesses cannot be produced. Mr. Attorney did not say that he had Directions to prosecute, or that he would prosecute.

Mr. Reeves, by way of Reply, further added, That it was not said how long Time Mr. Attorney had Directions to prosecute in Somersetshire; There had been already an Affidavit in Somersetshire; there was a considerable Time between October and that Affidavit, and 2 Terms had since interven'd. Sir W.'s Commitment was in this Town,
Town, and if he had enter'd his Prayer in time, he would have been intitled to be bail'd long since: That it Mr. Attorney did intend to try him in Somerfiethire, he would have an Opportunity to do it after his being bail'd as well as now; but as to Sir W.'s own Case, it was of far greater Consequence; for if he were kept in Custody, he would be in Danger of his Life; but the Prosecution might nevertheless go on; and as to the Crown, there could be no Inconvenience.

As to the Case of Kendal and Roe, that had not been answer'd: It was there determined that it was an ill Commitment. The Judgment of the Court there was, that such a general Commitment was a Reafon for the Court to bail, tho' not a void Commitment; that this was what they now intitled upon. Take it to be a good Commitment, the Party still ought to be bail'd: this did not shew that it was an illegal Commitment. As for that which was said further, that Sir James Montgomery was dead, this was not taken Notice of by the Court; but Judgment was given upon the Form of the Commitment; that as to the Objection, that it ought to have beenthere aver'd that Sir James Montgomery committed High Treafon, this made the pretent Case the stronger.

That as to the Reafon given for a Delay of the Prosecution by the Rebellion, it did not appear that Sir W. W. was in Custody for an Act done in the Rebellion, or for any other Act of High Treafon whatsoever.

That for the Length of Time, the Generality of the Warrant of Commitment, tho' not a void Warrant, their being ready to give Bail to appear in Somerfethire, after so long being in Custody, he hoped the Difcretion of the Court would be induced to bail him.

Then Sir W. W. himself spoke; That for 2 Months after his having been committed, he was so closely confined that he could not enter his Prayer, if he had known it was necæry; that no body was allowed to come to him till the Habeas Corpus Act was suspended, not even his Wife; and afterwards only the Duke of Somerset and his Lady, and his own Wife; That there had been 16 or 17 in the Tower, and all the Warrants of Commitment contained the particular Species of Treafon except 2 or 3: That he had lately had an Opportunity to look upon the Habeas Corpus Act, and there was a Claufe in it, that no Person which should be set at Liberty upon an Habeas Corpus &c. should be again committed or imprifoned for the fame Offence. Then how could that be made appear, but only by the Species of Offence express'd in the firft Warrant? That his Commitment was before any of the refult that were in the Tower.

That as to the Prosecution in Somerfethire, there had been 3 Quarter-Seiffions and one Affifles already pafs'd; that if Mr. Attorney would lay upon his Honour, that he had Evidences upon Oath to find a Bill againit him, he would be content to lie by the next Vacation.

The Ch. J. then said, that the Cases which had been mentioned were soon found out; and that his Brother Pengelly had had, he did believe, a very full Account of them; That as to what Sir W. W. had mention'd concerning his Confinement, it would be proper that Affidavits should be filed of it that Night, that they might have Time and Opportunity to lay before the Court the Matter of Facts as well as the Matter of Law; and the laft Day of the Term let Sir W. W. be brought here again.

Then a Request being made to the Court, that Counsel and a Solicitor might have Leave to have Access to Sir W. W. the Ch. J. said, that as to the Counsel and Solicitor's going to him, that would be proper to be mention'd to the Secretaries of State.
Major Doyley, the Lieutenant of the Tower, being asked concerning the Nature of the Confinement, said that no-body had been let in to Sir W. W. but by particular Warrants; no Person whatsoever, or any Letter, was to be admitted to go to or from him. Upon which the Ch. J. asked the Lieut. about Sir W.'s being able to send any Meffage, what he could do as to that; and the Lieut. answered, no-body but (such an one), and that not without communicating the Meffage to one of the Secretaries of State. Then the Ch. J. said to the Lieut. Let us have the Warrants brought up with you. It any Answer be put in as to the Nature and Circumstances of Sir W.'s Health, let these Affidavits be filed by To-morrow Night. Let us look upon these Cafes that have been mentioned, when they were, and how they are, viz. Yates's Cafe, Ld. Montgomery's Cafe, Zach. Crofton's Cafe, and the Cafe of Kendall and Roe.

Then a Rule was made for the Lieutenant of the Tower to bring up Sir W. W. again the last Day of the Term; which being done, the Ch. J. delivered the Opinion of the Court, viz.

That Sir W. W. being brought up there from the Tower by a Habeas Corpus, the Return to it was, That he was charged there by a Warrant under the Hand and Seal of Mr. Secretary Stanhope, (in the Words as above.)

That it was directed to the Governor of the Tower of London, or his Lieutenant.

That it had been pray'd that Sir W. W. might be let out upon Bail; and to induce the Court to do this, several Reasons had been offered to the Court; That it had been admitted on all Sides, that the Court had Power to bail upon a Commitment for High Treason, tho' there were a good and proper Commitment; yet as for the Circumstances of the Case, that the first Thing infilited upon or objected, was from the Form of the Warrant; and there the first Objection was, that he was to be kept in safe and close Custody; that this was more than by Law could be justified; It was only a safe Custody for the Party, so to be taken care of, that he might not make his Escape. He said this was advanced without any Authority, or one single Instance, and against 40 Precedents; that there had been many Occasions when this Exception might have been taken; That in Kendal and Roe's Cafe some Notice was taken of this Exception; but it was there allowed as proper to be done. What had been the Consequence, if the Imprisonment had been more close than by Law it ought to have been? That is not the Consequence that the Court should discharge the Prisoner.

That the next Objection that was made was, That this Warrant was not said to be made upon Oath, and this was pray'd in a pretty strong manner, that if People might be committed in this manner, it was making them for their Liberties Tenants at Will to the Secretaries of State. But, in the first Place, he said it was a hard way of Arguing, that because no Oath was express'd in the Warrant, therefore he was committed without Oath; and if the Oath were not express'd in the Warrant, it was not necessary. This was also pray'd, without one single Authority; that many Commitments had been in that Form; many had been brought before the Court in that Form. In some of them Mention had been made of this Thing, but it was never taken to be of any Weight; but on the contrary Trin. 2 W. & M. this Matter was particularly infilited upon, that a Warrant of Commitment without Oath was illegal, and it was over-ruled. This was Ferguson's Cafe. In the Cafe of Kendal v. Roe, it was infilited upon, and not allowed; That there might be an Imprisonment in many Cafes without an Oath; That this Matter was lately under Consideration in the House of Lords, and the Judges were asked their Opinions upon it, which were deliver'd on the 6th by
by my Ld. Ch. J. King, That Warrants of Commitment were good without being upon Oath; That in many Instances Warrants without an Oath could not be illegal. There might be many Instances where an Oath was not necessary; A Person may be found with treasonable Papers about him, or may be taken in the Fact. The Magistrate that commits, must fee that the Party is guilty. Where a Magistrate executed a Matter within his Jurisdiction, it should never be presumed that he abused that Jurisdiction.

As for the next Objection that was made, that the Warrant was too general, not saying for what Species of High Treason the Commitment was, he said, that this was likewise advanced without any Authority; none of the Books cited did prove it; Ld. Coke, tho' he said the Warrant must contain the Cause of Commitment, did not say that the Magistrate must go into a Specification of the Offence; the first Reason given for this was grounded upon 2 Co. Inst. 591. that the Warrant must contain the Cause, that it might appear to the Court judicially, that the Offence was for High Treason, either against the Person of the King, or for what else; but he said, he would not go over the Reasons mentioned in that Book, for that they could not be supported in all Parts. But the Court did in all Cases rely upon the Judgment of the Magistrate; that it had been admitted that it was not necessary to fet forth the Overt Act, and if it be not necessary to set forth the Overt Act, it must be left to his Discretion, whether the Offence were High Treason or not; the Court could never from thence form any Judgment, whether it were High Treason or not. In the same Book it was allowed, that a Commitment pro alta Proditione contra Perfonam Domini Regis would be sufficient, but what Judgment could the Court form of that? One Species was for Compafling the King's Death, and another was for Levyng of War &c. each was High Treason against the King's Perfon; could the Court form any better Judgment upon the one than he could upon the other? So again for Levyng of War, there were many Species of Levyng of War, and there were some Riots which were very near Treason. Then this Objection was urged further, that this Certainty was required, because it might be extended to others who might be alluding to a Person so committed in making his Escape. But he said, that this only shewed that the Party was not so strictly guarded as he ought to have been; but was the Party therefore to be permitted to go at large? The next Objection was made by Sir W. W. himfelf, and very plausibly, that the Habeas Corpus Act did suppose the Offence should be specified in the Commitment, (because there was a Clause in it, that no Perfon which had been delivered, or fet at large upon an Habeas Corpus, should at any time thereafter be again imprisoned or committed for the same Offence) or else it could not appear upon the 2d Commitment that it was for the same Offence as the first was for; as to this he said it was true, the Offence could not appear to be the same in both Commitments, without being specified, but this must arise upon Circumstances, and for Proof the Evidence of the Identity of the Fact did not turn upon the Warrants, but upon the Examination of the Facts upon which the Warrants were grounded. If the first were for High Treason in Killing the King, the next might be for Compafling the Death of the King. Here this must not turn upon the Expressions of the Warrant, the Act is penal against him that made the Commitments, and it will lie upon him to make out that there was a 2d Fact; so it would be if the Expression in the Warrant should be different. As in the first for Levyng War against the King, this was one Species of High Treason; if the 2d, for Compafling the King's Death, that was another Species of High Treason; yet if the Fact was the fame, the Party must be delivered upon this Act; he would be intitled
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titled to bring his Action for the Penalty against the Officer, and it puts
the Proof upon the Officer, that the 2d Commitment was not for the fame
Offence with the 1st; so that this Expolition of the Act, by specifying
the particular Treafon, will not anfwer the End of it, for if the Spe-
cies were not the fame in both Commitments, the Facts might be the
fame, or if the Species were the fame, the Facts might be different.

There was a further Objection, and that was the Cafe of Kendall
and Roe; he faid, that Cafe was thus: They were committed for High
Treafon, for affiifting in the Efcape of Sir J. Montgomery who had been
committed for High Treafon, and their Warrant of Commitment ran
thus, viz. "Sir W. Trumbal, Knr. one of his Majefty's moft honour-
able Privy Council, principal Secretary of State.

"These are in his Majefty's Name to authorize and require you to re-
ceive into your Cufody the Bodies of Thomas Kendal, and Richard
Roe, herewith fet you, they being charged with High Treafon, in
having been privy to and affiifting the Efcape of Sir James Montgomery
out of the Cufody of William Sutton, one of his Majefty's Melfengers
in Ordinary, and charged with High Treafon, you are to keep them in
fafe and close Cufody until they shall be delivered by due Course of
Law, and for fo doing thisfhall be your fufficient Warrant. Given at
the Court of Whitehall, the 24th Day of October, 1695.

"To the Keeper of Newgate,
William Trumbal.
"or his Deputy."

He faid there was an imperfect Report of that Cafe in 5 Mod. 78,
and in this Court there were feveral Exceptions taken to that War-
rant of Commitment, but they were all over-ruled; the Exception
there taken that the Secretary of State could not commit was fcouted
at by the Court, as Mr. Solicitor General has obferved; another Ob-
jection was, that the Commitment by Sir W. T. ought to have fpeci-
fyed what the Treafon was, for it was infifted upon that there might be
a Sort of High Treafon, the affiifting of which would not be Treafon,
as the Aiding, Receiving, Abetting and Comforting a Counterfeiter of
the Great Seal, Co. 12. 81, 82. or of a Counterfeiter of Money. It was
also infifted that Sir James Montgomery being dead, they could not
be tried; and therefore they ought to be admitted to Bail. He faid this
Cafe did not all turn upon the Species of Treafon, but upon this, that
their Fact and their Crime were fpecify'd as not dependant upon Sir
James Montgomery's Crime, but upon the Words of his Warrant of
Commitment. It was, that he was committed for High Treafon, but
not charged with High Treafon. If they aided and affiifted him in his
Ecape, their Crime might be dependant upon his; therefore he must be
committed for a particular Species of Treafon to make them liable to the
fame Punifhment he was fo committed for. He faid that this Matter
turn'd upon 2 Things; firft, That Sir James Montgomery was guilly-
ful, That he was committed for that particular Offence. It was then
objected very ingeniously by Mr. Reeves, that if a Commitment gener-
ally for High Treafon were good, what came afterwards in it could not
make it bad. He faid the Anfwer to this was, That he that was com-
mitted for High Treafon might not be committed for the fame Treafon
of which he was Guilty, fo that what came afterwards might make it
ill. He was not committed for High Treafon generally, but for a par-
ticular Treafon, fo that he may not be Guilty of that Treafon: As it
was in Cafe of a Felony for theling Frith or Apples growing, fo that
when you came to fpecify the particular Fact, the general Words may
lofe their Force. So it was in Cafe of calling one (Thief), if the Words
went on (for theling Apples growing), these Words were not actionable,
theo (Thief) in general was actionable. He concluded that there were
the
the Objections which had been made; these were the Reasons which had been offered in this Case; but then, on the contrary, it appeared from 2 Init. 52. that this Warrant was good. It says the Caufe must be contained in the Warrant, as for Treafon, Felony &c. or for Suppicion of Treafon or Felony &c. So was 1 And. 298. Ruth. Coll. 1. Vol. Pa. 507. 509. 538. That Case was very full to the Purpofe, and upon a very particular Occafion; for it was, as it was faid by my Ld. Ch. J. Coke, then the Solicitor General, to be a Direction for all Council-Commitments. The Occafion was, that several Persons had been committed at several Times to several Prifons without good Caufe, Part of whom being brought up into the King's Bench, were according to Law fet at large and difcharged of their Imprifonnement, at which ferveral great Men were offended, and procured a Command to the Judges that they fhould not do fo afterwards; notwithstanding which the Judges did not furceafe, but by Advice amongft themselves made certain Articles, and delivered them to the Ld. Chancellor, and Ld. Treasurer. The Words were thefe, viz. And where it pleased their Lordships to will divers of us to fet down in what Cases a Person fent to Cufody by her Majefty, her Council, fome one or 2 of them, are to be detain'd in Prifon, and deliver'd by her Majefty's Courts or Judges; we think that if any Person be committed by her Majefty's Commandment from her Lefon, or by Order from the Council-Board, or if any one or two of her Council commit, and for High Treafon, fuch Persons fo in the Caufe before committed may not be deliver'd by any of her Courts without due Trial by the Law, and Judgment of Acquittal had, nevertheless the Judges may award the Queen's Writs to bring the Bodies of fuch Persons before them; and it upon Return thereof the Caufes of their Commitment be certify'd to the Judges, as it ought to be, then the Judges in the Caufes before ought not to deliver him, but to remand the Prifoner to the Place from whence he came, which cannot conveniently be done, unless Notice of the Caufe in generality or elfe peculiarly (or as the Words are in Rulhworth, in General or elfe in Special) be given to the Keeper or Gaoler that fhall have the Cufody of fuch Prifoner; this was figned by all the Judges and Barons &c. and they delivered one to the Lord Chancellor, and another to the Lord Treasurer.

Mr. Selden in Rulhworth infifts upon this as the Opinion of all the Judges, and produced the Report under Ld. Anderson's own Hand, and this was afterwards ordered to be entred in the Council Books, fo that this was not an Excufe only made by the Judges, as was objected by his Brother Pengelly, but a direct Opinion of theirs; it was their De-fee to remedy the Inconvenience that then was; it was an Application of the Judges themfelves to prevent the Hardships that were exercifed then upon the Subjects. It was there put, that if the Caufe of Commitment was certified the Prifoner muft be remand'd; fo that if the Caufe appear either in General or in Special in the Warrant of Commitment, according to this Resolution it will be well; and Keeling (who was a great Man) in Zach. Crofton's Cafe, affirmed, that if the Caufe of Commitment were for High Treafon generfly, it was a good Warrant. He faid, that the Houfe of Commons, immediately after the Debates in Rulhworth, came to a Resolution, that no Freeman ought to be detain-ed or kept in Prifon, or otherwise restrained by the Command of the King, or the Privy Council, or any other, unlefs fome Caufe of the Commitment, Detainer, or Restraint were expresfed, for which by Law he ought to be committed, detained or restrained; fo that a Commitment for High Treafon generfly is good; fo was Vaugh. 142. Ld. Ch. J. Vaughan there allowed it for Law, by not denying the Objection there railed from fuch Warrants, but by diftinguifhing upon it, and Buffet's Cafe was final and conclusive. These were the great Opini-
Bail.

In the Time of Q. Eliz. and in 3 Car. 1. when this very Matter was under Consideration; they were the Opinions in Ld. Ch. J. Vaughan's Time, and have been the constant Practice ever since. So he concluded, that these Objections which had been made, were not of any Weight as to the Warrant of Commitment. As for the other Points, upon the Length of Time since the Commitment, and the Indilpolition of Sir W. W. he said, that as to the former, the Calees that had been cited did not come up to this Cafe, and it would not be necessary to go thro' them all; but yet, tho' this were here a good Warrant, the Court were of an Opinion, that Sir W. W. ought to be bailed.

As to the Affidavits concerning the Indilpolition, he said, they were Nonlenc/, and that the Indilpolition must be a present Indilpolition, not in Purpose or Expectation, but the length of Time was to be considered; The Commitment was about the Middle of Oct. last; there had been something laid of a Crime elsewhere, but nothing of that was laid before the Court. Here was no Oath or Charge of any Crime, nor was it laid directly that there would be certainly a Prosecution elsewhere. If the Act did arise in Middlesex, there had been 4 Terms past, and if it arose in the Country, there had been 3 Quarter Sessions, which tho' not considered in this Cafe, yet there had been an Alliés, and yet no Prosecution forwarded. There had not been any Preparation towards it, nor yet was it laid certainly that there could be one.

He said, there was a Thing that might have been a great Objection against Sir W. W.'s then being bailed; that he should lie still so long, and not make any Application. But the Reason given for this was of some Weight in determining the Discretion of the Court; it was that the Habeas Corpus Act was suspended at that Time, tho' not as to this particular Cafe. The Gentleman might think himself included, and be mistaken in it. However, under these Circumstances he said it seemed very reasonable that Sir W. W. should be bailed, and to appear here again the first Day of next Term.

That had Sir W. W. made his Prayer the first Day of this Term, and it had appeared that the Matter did arise in another County, the Court could not have bailed him by the Habeas Corpus Act; but they were not then upon that Act, but at Common Law; he said that they were intrusted with the Liberties of the Subjects of England, and as they were bound on the one Hand to take Care of them, so they there were on the other Hand to take Care of the Government, that a Person might not escape Justice, where there was a due Prosecution against him; that he would have taken Mr. Attorney General's Word, if he had said at the Bar that he would certainly have indicted Sir W. W. but there not being any thing of that in this Cafe, they were all of an Opinion to bail him.

He concluded that there had been a great many Objections made by the Counsel; but to start Objections against that which had been newly heard and determined by the Court, that they might throw a greater Hardship upon the Court of the Court, and make it look more odious in the World, where they over-ruled a great many Objections (tho' these great many were made up but of few) was not fair, nor a Practice to be suffered, but he hoped it would not be done any more.

Then the Attorney General said, that he had Notice of Sir W. W.'s Bail, and did not object against them; and thereupon Sir W. W. entered into a Recognizance of 10,000 l. and the Duke of Somerfet, the Lord Rochester, the Lord Tumont, and the Lord Gower as his Bail, into a Recognizance of 5000 l. to appear here again the first Day of the next Term.

Mich. 3 Geo. Sir W. W. appeared the first Day of this Term, and was continued according to the Course of this Court to the last Day thereof;
thereof; when he appearing again, the Attorney General said, that he had his Majesties Commands for prosecuting him, for Mifprision of Treafon, and would proceed againft him accordingly, and to aniver the Delay of such a Proceeding an Affidavit was read, that a MATERIAL Witnefs for the Crown was then in Holland &c. upon which the Court declared, that the Attorney General's faying he would prosecute &c. was a good Ground for them to continue Sir W. W. upon Bail till the next Term.

Hill. 3 Geo. The firft Day of this Term Sir W. W. again appeared, and was continued till the laft Day thereof, upon which Day he was discharged; the Attorney General declaring, that he had his Majesties Order for prosecuting Sir W. W. for a Mifprision of Treafon, in concealing the High Treafon for which my Lord Landifoal was indicted; but the King having been pleaded to pardon my Lord Landifoal, and to order him to fucceafe the Proceedings upon the faid Indictment, He now confented that Sir W. W. might be discharged. Trin. 2 Geo. 1. B. R. the King v. Sir William Windham.

8. These Lords have been committed to the Tower by my Lord Townfend one of the Secretaries of State, for treafonable Practices againft the Government, upon the late Suffenion of the Hab. Corp. Aét, which being expired upon the 24th Day of May laft, they applied upon the 26th Day of May to Mr. Baron Price at his Chambers for an Hab. Corp. according to the 31 Car. 2. c. 2. which being granted, and they (being brought up to him from the Tower) did inuit upon their Privilege as Peers to be discharged, a Peer not being required to give Bail for a Mifdemeanour; but the Judge being of an Opinion that they ought to give him Bail, elfe he could not discharge them &c. they waived their Claim of Privilege, and entered into Recognizance (with Bail) to appear at B. R. the firft Day of this Term, which was upon the firft of June; and they appearing accordingly, it was moved by their Counfel that they might be discharged, and not continued upon their Recognizance till the laft Day of the Term; and my Lord Marlborough's Cafe in the Houfe of Lords was quoted, but it was refufed by the Court; and Parker Ch. J. faid, that the Court could not take Notice of what they were committed for, that they had nothing before them but the Recognizance, and they could not take Notice of the Warrant of Commitment, or for what they foomed committed, and that the Lords muft be continued upon their Recognizance till the laft Day of the Term, according to the Courfe of the Court, the whole Term being in Law accounted for as one Day. The fame Day (thefe Lords going immediately into the Houfe of Peers) debate arose upon this Matter, and the Opinion of the Judges then prefent being (as it was delivered by the Ch. J. King) that Baron Price and the Court had done their Duty &c. that the Judge was obliage to take Bail upon the Hab. Corp. Aét, and ought not to have discharged the faid Peers; but this Debate being adjourned to infpect their Journals for Precedents &c. Upon the 4th of June, the Court of B. R. was again moved to discharge this Recognizance, to which Mr. Attorney General confented, faying, he had received his Majefly's Command to content to the Diffcharge of the faid Recognizance &c.

9. Mr. Harvey having been committed for High Treafon by my Lord Townfend's Warrant, (one of the Secretaries of State) to the Prison of Newgate, was about the Beginning of this Term brought up upon an Habeeus Corpus, and Mr. Serjeant Darnel and Mr. Hungerford, being of Counfel for him, moved that he might be discharged upon Bail, and they alleged the ill State of Health he was in, of which they produced Affidavits; and further infisted upon the Insufficiency of the Warrant of Commitment, as it, That he was

was not charged with any Offence. 2dly, That this Charge against him must be upon Oath, the Warrant being only "Receive into your Custody Edward Harvey, herewith lent you for High Treason." And 3dly, That the Species of Treason ought to have been mentioned; That Mr. Harvey was on the 21st of Sept. last committed for treasonable Practices against the Government to the Custody of a Magistrate, and about the Beginning of May he was sent to Newgate on this Warrant; That he was a Member of Parliament, and his Attendance there was very necessary.

Upon this one Claxton, an Apothecary, was examined upon Oath by the Ch Justice, concerning the Nature and Danger of Mr. Harvey's Indisposition.

To this it was answer'd by Mr. Attorney General and Mr. Solicitor General, That the Habeas Corpus Act was generally "for High Treason or Felony," the Words were "plainly and specially express'd," not specifically; That the Bailing was a Matter in the Discretion of the Court, and Mr. Harvey was not intituled to that Favour till the last Day of the Term; That an Offence was sufficiently charged in the Warrant "Sent this for High Treason," is charging a Man with High Treason; That in the late Duke of Ormond's Case, the Act for his Attainder was generally for High Treason; and in Case of Commitment for Murder the Warrant need not mention the particular Person killed, nay it was not necessary in an Indictment. It was replied by Mr. Harvey's Counsel, That the Species of Treason ought to be express'd in the Warrant. The Habeas Corpus Act was, that the Prisoner should be bailed, except where the Charge against him was plainly and specially express'd, and cited Crotton's Case, 3 Sid. 78. And as for the late Duke of Ormond's Case, the Act for his Attainder refers to the Articles of Impeachment.

Then it was said by my Ld. Ch. J. Parker, that this was an Illness which had been a good while upon Mr. Harvey, and it was proper they should be satisfied about it, there seeming not to be any immediate Haste or Danger; That they could not take Notice of the Matter about the Warrants, unless it had been more particularly express'd, and perhaps the first Commitment was of more Service to Mr. Harvey than his Liberty could have been, considering his Examination before the Secretary of State; for then there might have been some Reason for his being detained in Custody: That in my Ld. Montgomery's Case his Sicknels was occasioned by his Confinement; but here he knew not how Mr. Harvey had been kept in Newgate, or was kept before going thither. He said he knew him very well, and that he seemed not to be in that State of Health he formerly enjoy'd. Pratt J. said that he did not think that an Indisposition was, in all Cases, a Reason for the Court to bail. And then the Ch. J. added, that a Magistrate might be mistaken in his Opinion about the Offence, but yet he was not bound to fet out all the Evidence. It could not signify any thing to the Party, whether one Species of Treason or another was express'd in the Warrant; but if there was a Fault in the Commitment, the Court could not therefore admit him to Bail. In Cases of Felonies it was every Day practised, that if, upon Examination of the Fact, it did appear that the Party ought not to be bailed, the Court did order the Justice of Peace, who made the first Warrant insufficiently, to make a new one to supply the Defect of the former.

Then Mr. Harvey's Counsel prayed, that his Prayer might be enter'd pursuant to the Habeas Corpus Act, which was done accordingly.

About 2 or 3 Days afterwards Mr. Harvey was brought up again by Rule, and the Court were of an Opinion against bailing him; but ordered him to be brought up again the last Day of the Term. Several Affidavits were read, and particularly one of the Mellinger's, describing the
the Nature of Mr. Harvey's Disorder, and the Circumstances how he came to be under it; The Judges delivered their Opinions Seriatim, and the Substance of what they delivered is as follows:

That it appeared from the Affidavits, that this Indisposition came upon Mr. Harvey by his own Hand; for when he was first in Custody of the Messengers he seemed to be very easy and well, but after he had been examined by the Council, he was very much dejected, and did not speak for 6 Hours, and the next Morning he stabbed himself in the Breast; being under these Circumstances he was confined in the Messengers Hands, and not sent to Prison till lately; so that, in the first Place, this Indisposition was not such as to induce the Court to bail him, because it was occasioned by his own Act after he was in Custody, and he was then much better than he had been, neither was the Indisposition such as manifestly endangered his Life, as it might be in the Case of an acute Dilemper; The Affidavits were only that his being confined for a few Days would make his Case the more doubtful, there being then some ill Symptoms upon him.

2dly, That the Behaviour of this Gentleman after his Examination, the changing of his Countenance, and stabbing himself in the Manner aforesaid, carried a strong Suspicion of guilt, tho' it was not sufficient to charge him with any Crime.

3dly, that the Delay of a Prosecution, as attended with these Circumstances, was not such as to incline the Discretion of the Court to Bail him. Croston's Case, Ld. Montgomery's Case, and Ld. Wiltshire's Case, were much stronger in this Point. Besides, this Gentleman was not before in a Condition to be tried, and since he was moving towards his being discharged, the Attorney General ought to have some time to prepare a Charge against him if he should think fit.

4thly, That there was a Grand Jury then sitting; that there had been a Rebellion in the Nation, and there was a great deal of the same Spirit left; that in such a time of Danger to the Government, the Court ought to be very careful how they discharged a Person committed for High Treason.

5thly, That there had been no Precedent of this kind produced, and if the Court should bail this Gentleman, every one who should be committed for High Treason, and should be indisposed by his own Act, would have a Right to be bailed. Their Compasion ought to be consistent with Justice and the Rules of the Court. That if this Indisposition had been by the Visitation of God, or had been occasioned by his Confinement, it might have been of another Consideration; but here he was remanded, and ordered by Rule to be brought up again on the last Day of the Term, when he was bailed, but to appear there again the first Day of the next Term, when he entered into a Recognizance of 10,000 l. and his Bail into one of 5000 l. each.

For more of Bail in General, See Error, Execution, Domine Replegiando, In Custodia, Maintripe, Replebin, Superledeas, Utlatury, and other proper Titles.
Bailiff.

(A) Bailiff. What Person may be.

1. A Clerk may be Bailiff of a Manor. 4 H. 4. 2. b.

2. A made a Lease for Years of a House, and then conveyed it to J. S. and dies. J. S. being beyond Sea, the Conveyance was burnt in the Fire of London, and thereupon the Heir of A. enters, and receives the Rents; but the Deed of Settlement being found by Verdict, the Heir during the Lease was only as a Bailiff and Receiver, and decreed to account. Fin. R. 283. Hill. 29 Car. 2. Litter v. Litter.

(B) The making of a Bailiff.

1. If a Man takes Cattle, claiming Property to himself as an Heriot. Fitzh. Baylile, pl. 7. cit. S. C. & S. P. by Thorne, and thereupon Issue was joined whether he was retained or not.

2. But if he took them without any Command, for Services due to the Lord, if the Lord agrees to the Taking for Services to him due, yet he cannot be said to be his Bailiff for this Time. 7 H. 4. 34. b.

3. In Trespass Quare Clausum fregit, the Defendant justified as Bailiff of the King, but showed no Specialty. The Court agreed, that one may be made Bailiff to the King by nude Matter of Fact, as well as to a common Person; but they seem'd to think this Making traversable. Kelw. 174. b. pl. 2. Mich. 7 H. 8. Anon.

4. A Man may make Consonance as Bailiff to the King, or to a Corporation, notwithstanding that he was not Bailiff; and so he may as Bailiff to another Man, if he agrees; for it is not traversable whether he was Bailiff or not, if the Party agrees after. But Brooke says Quare, if he neither agrees nor disagrees. Br. Bailie &c. pl. 1. cit. 26 H. 8. 8.
5. A Corporation aggregate may appoint a Bailiff to distrain, without
Deed or Warrant, as well as a Cook or Butler; for it neither vests or
divests any sort of Interest in or out of the Corporation. 1 Salk. 191,
pl. 3. cites it as so held in Cam. Scac. between Cary and Matthews.


(C) What Things a Bailiff may do.

1. A Bailiff of a Manor may lease the Fishery for Years. 3 P. 4.
pl. 6. cites S. C. and it was objected that he did not shew that he had Power to lease, by which &c. but he dared not demur, but pleaded that he filed after the Term &c.

2. A Bailiff by any usage cannot make a Lease of his Master's
Land of an Estate of Freehold. 19 Ait. 9.

fays this was laid down for Law per Cur. — Br. Leafe, pl. 25. cites S. C. and that the Receipt of the Rent by the Predecessor Prior will not aid against the Successor.

3. A Bailiff may give Licence to another to go over the Land; for
this is a Trespass to the Possession only, and the Bailiff hath the
Dilposal of the Profits of the Possession, ergo, dubitatur 9. 13
Jac. B. R. between Winkfeld and Bell.

4. A Bailiff of a Manor may himself take, or may command anot-
er to take Cattle Damage leasen upon the Land, for he hath the Care
of all Things within the Manor. 9. 5 Jac. B. between Tomilson and
Benson, per Curiam.

5. Lord and Tenant. The Tenant makes a Feoffment in Fee, the Bailiff
of the Lord accepts the Services of the Feoffee, before Notice of the Feomi-
gment given to the Lord; this shall not bind the Lord. Quod non. Br.
Acceptance, pl. 21. cites 41 E. 3. 23.

6. A Bailiff cannot exchange the Lord's Land; per Yelverton, to which

7. In Trespasses it is a good Plea, that the Bailiff of the Plaintiff leasen the
Land at
Will, and
good; for he is accountable, and Debt lies thereof by the Lord; per Choke. Br. Bailie, pl. 51.
cites 2 E. 4. 4. — Br. Leafe, pl. 44. cites S. C. & S. P. accordingly by Choke and Moyle.

8. Bailiff
8. Bailiff of a Manor may pay Rents issuing out of the Manor, and shall S. P. per have thereof Allowance; but contra where he pays the Lord's Debts due by Contract or Obligation; for this is out of his Power. Br. Bailie, pl. R. 2. 26. cites 4 H. 7. 14. per Keble.


10. A Bailly has greater Interest and Authority to meddle with than he hath a Cazbody. Arg. Cro. J. 84. in Cafe of Gibfon v. Searl, cites 10 H. 7. 21.

doth Things for the Profit of his Master, although he doth them voluntarily, as 2 E. 4. 12. Is. yet it is intended to be done in the Name of his Master, and in Debts thereupon the Declaration shall be that the Matter let; per Williams J. Cro. J. 177. pl. 16. Trin. 5 Jac. in Cafe of Gibfon v. Searle.

Per Yelverton J. a Bailly has Authority to meddle with the Land, but no Interest therein; he has no permanent Estate, but is de terminable at the Lords Pleasure; Fenner J. accorded. Cro. J. 178. pl. 16. Trin. 5 Jac. B. R. Gibfon v. Searle.

11. Trefpafs by the Dean and Chapter of P. against J. A. for cutting S. C. cited of ten Load of great Wood, and twenty Load of Underwood; the Defendant by Dyer Pl. said that the Plaintiffs are seized of the Manor of H. of which the Defendant is Bailiff, where there is a Park which has been inclosed with Pales Time out of Mind, and because the Park wanted Pales, he cut the great Wood and made Pales and inclosed it, and sold the Underwood, and expended the Money in Wages of those who paled the Park, Judgment &c. per Fineux Ch. J. the Justification is good without proving Specialty; for there is a Diversity where a Thing passes from them as a Lease from Years, or a Licence to a Man to enter their Land, and to take Trees, &c. and where the All is done for those of the Corporation; and in the one Cafe it cannot be without Specialty, and in the other contra. Br. Trefpafs, pl. 288. cites 12 H. 7. 25.

Licence by Tythe-gatherer to a Parishioner, to carry away his Corn without setting out his Tythes. Per Cur., clearly, such Licence is void. Noy. 134. Brickenden v. Denwood.

12. So of Letter of Attorney to deliver Seisin, and all that which gives Interest from them, but contra where no Interest is given, but an All done by them as their Servant, and the Matter of the Justification is good; for it belongs to the Office of Bailiff to improve the Manor by his Discretion as well as he can, for 'tis sufficient tho' another may do better. Br. Ch. J. Cro. Trefpafs, pl. 288. cites 12 H. 7. 25.


A Bailiff may do any Thing to his Master's Benefit, but not to his Prejudice without his Assent; Per Yelverton to which Fenner agreed. Cro. J. 178. pl. 16. Trin. 5 Jac. B. R.

13. So of Houses or other Things incident to it. Br. Ibid. Bailiff may justify the cutting of great Trees to repair a House or the covering of it as it was before, but not of a more costly Covering. Br. Bailie, pl. 41. cites S. C.

14. And so he may repair the Pales. Br. Ibid. —-If a Bailiff cuts down Trees and repairs an ancient Pale, this is good; Per Cur. obiter. Ow. 28 cites 12 H. 6. [but seems misprinted for 12 H. 7.]


17. Nev
17. Nor where it has been hedged can he make Pales. Br. Ibid.
18. But a Bailiff may take Ageries to pasture the Land of his Master. Br. Ibid. per Countable.


22. And per Tremayle, he may low Land which has not been sown before, and make a Hedge in Defence of it. Br. Ibid.
24. A Bailiff may be Steward of the same Manor; for they may well stand both together; per Yelverton, to which Fenner agreed. Cro. J. 178. pl. 16. cites 29 H. 8.

Dul. 53. pl. 21. S. C. & S. P. accordingly; for the Title of Entry is a Thing eligible in his Master, which he may accept of or refuse, and such Election does not appertain to the Office of a Bailiff.—S. C. cited Arg. Palm. 71.


Roll Rep. 248. pl. 27. S. C. of Ne'vil cited Arg. and Coke Ch. J. and Haughton said the Reason of that Cafe was, because he cannot discharge the Action attached in his Master.

27. Payment by a Bailiff shall be sufficient Seisin, unless it work a Prejudice to the Lord. As if the Lord has not been teased of his Rent in 60 Years, and the Tenant makes one his Bailiff generally of his Manor, he cannot, without express Commandment of his Master, pay this remedy of Rent to the Lord; for this shall be special Prejudice to him, the which a Bailiff without Commandment cannot do. Agreed. 6 Rep. 59. a. Hill. 4 Jac. C. B. in Brediman's Cafe.

28. Bailiffs cannot enter for Non-payment of Rent; per Hobart Ch. J. Hob. 154.

3 Mod. 157. S. C. & S. P. per.to Cur. and Judg. for the Plaintiff in Trespass. —Show. 61. S. C. adjudged; and in all the said Books a Difference was taken between a Justification in Trespass and an Avowry.
Cleaned & Oiled

September 1987
January 1989