AN EPITOME OF ALL THE Common & Statute LAWS OF THIS NATION,

Now in force.

Wherein more then Fifteen hundred of the hardeſt Words or Terms of the LAW are Explained; And all the moſt uſeful and profitable Heads or Titles of the LAW by way of *Common Place*, Largely, Plainly, and Methodically handled.

With an Alphabetical TABLE.

By WILLIAM SHEPPARD, Eſq;

Publiſhed by His Highneſs Special Command.

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TO THE
READER.

THE great deſire which God hath beſtowed upon me for the advancement of Publique good; the kind aeceptance of my former Labors of this nature; and the cleer conviction of my Judgment, that the effect will be anſwerable to my aim and intentions, have been the impulſive cauſes of my publiſhing this Methodical *Abridgment* of both the Laws, as well that called *Common*, as the *Statute-Law* (now in force.) Wherein I have at once perform'd two things, *viz.* My *utmoſt ability* in collecting the diſperſed Caſes and particular Concluſions of Law under the general Entituling words, whether they be of the firſt, or ſecond *intention:* My *commanded duty* in faithfully rendring them into Engliſh, according to the deſcription of the Act of Parliament in that caſe provided.

In purſuance whereof to ſay there are no faults, would be an arrogancie, and an unpardonable ſin againſt that humility which I pretend to. Prolixity will be eaſily anſwered from the variety of the Subject which I have undertaken: And for the few miſtakes which I my ſelf, ſince the Impreſſion, have diſcovered; I doubt not but the candor of an ingenious Reader will find me an excuſe, from the perplexity which our Law (as it confuſedly lay) did groan under. My labor herein is now grown old, having been the induſtrious ſearch of thirty ſix years; though my intention for making them publique is of a much younger date; and not out of any pettiſh deſign of keeping the Law from the Vulgar, or irreligious hiding my talent in a napkin, but it had its reaſon from this, that I eſteem'd my ſelf the meaneſt of thoſe of my Profeſſion, and did modeſtly diſtruſt my own ſufficiencie for ſo great an undertaking, expecting ſtill when ſome more able

able perſon would have befriended the World with ſo great a favor, as the orderly *Deduction* of our Laws from their *Chaos* into Methodical form. But weary with expectation, and not willing ſo great a good ſhould be wholly neglected, I have attempted to manifeſt my good will to my Country by this following Tract; of which I dare ſay the Reader will find a requital of his pains; for that it will at once both facilitate and direct his Intention, whether it be to *know*, or to *act* what the *Law* requires. Beſides, the difficulties of the Phraſe and Terms are here explained, as they occaſionally fall in under any Head; and Definitions of ſuch things as are the Subject of the Laws, are here ſet down, and with as much certainty as the *Nil lege difficilius, &c.* will admit.

For all which I deſire nothing of the Generality but good acceptance; and that thoſe whom *God*, *Nature* and *Induſtry* have furniſhed with exemplary abilities in our Profeſsion, would not wholly neglect the publike for their own private good; but either from my attempts contrive *de novo* ſomething of their own, in order to that end whereto I have expoſed mine, or that they would bring to perfection what I now offer; till when, I am ſure, their carping at me will not be rational: And if perchance they ſhall either new-mould or amend, yet whether what I have here endeavoured be not in the mean time uſeful, I ſhall leave to the indifferent Readers to determine.

Farewell.

AN ALPHABETICAL TABLE OF THE *PRINCIPAL TITLES*,

The moſt uſeful whereof are largely treated in this Book.

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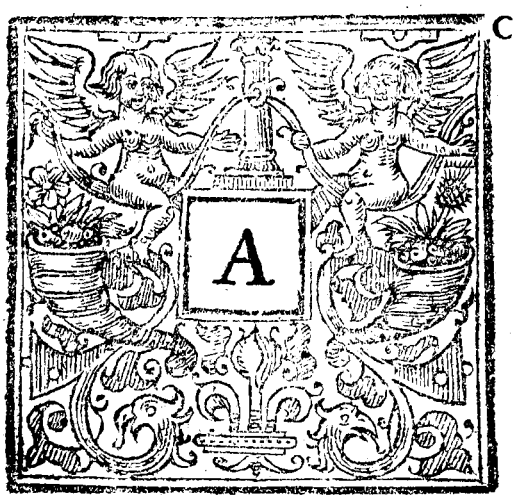
CHAP.

CHAP. I.

Of Acceptance.



ACCEPTANCE is the taking in good part or agreement unto ſome Act done, or ſomething given; which if he had not accepted of and received, he might have had and required ſome other thing, whereof he is now barred by Acceptance, or he might have avoided ſomething done, which he hath now affirmed by this: And this is of a Rent or other thing; and it is either expreſs or implied: And it is ſometimes of a Rent by an iſſue in tail after his anceſtors death, or by the ſucceſſor of a ſpiritual perſon after the death or departure of his predeceſſor, or by a wife after her husbands death, or by him in remainder, or by an Infant at his full age, or by an heir after his anceſtors death, or it may be by the party himſelf that made the eſtate. And ſometimes it is of a ſum of money or other thing either of the ſame nature, or of another nature; and by the taking of the Rent in ſuch caſes, the party that accepteth it is barred for his time to take any advantage of the eſtate, or him of whom he took the rent that was before voidable, and might by him have been avoided before the acceptance of the rent, but is now by this means affirmed: And in other caſes by ſuch acceptance he is eſtopped to do or have ſomething that before he might have done or had; as appeareth in the examples following. *Terms Ley. Dyer* 46.9.

Acceptance.

The Kinds.

Affirmance.

Whereſoever the acceptance of a rent by any ſhall bar him that doth accept and affirm the eſtate of him from whom it is accepted, there muſt be theſe conditions and qualities in the caſe. 1. There muſt be a privity either in Deed or in Law between the party giving and the party taking: And therefore if a diſſeiſin of any iſſue, &c. accept a rent, this ſhall not prejudice an iſſue. 2. There muſt continue in the taker a power of acceptance to, and at the time he muſt have the next eſtate: And therefore if the iſſue in tail before his acceptance have ſuffered a recovery of his Reverſion, and after accept the rent, this will not affirm the Leaſe againſt the Recoverer. 3. The Leaſe on which the Rent accepted is reſerved, muſt be a good Leaſe, and not void or determined by Re-entry; and therefore if a Leaſe be on condition for years that ſuch an act be not done, the eſtate ſhall ceaſe and become void, no acceptance of the Rent reſerved upon that Leaſe after will affirm the Leaſe: 4. The Leaſe muſt begin in the life-time of him that made it. 5. If there be any precedent Leaſe, the acceptance muſt

Sect. 1.

1. Where and in what caſe the acceptance of a rent is a bar.

must be after the end of that Leaſe: And therefore if one ſeiſed in Fee make a Leaſe for ten years rendring rent, and after make him an Eſtate tail, or to him and his wife, and then make another Leaſe, or himſelf and his wife of her land to the ſame party, and the iſſue or wife after his death accept the Rent during the ten years, this doth not affirm the ſecond Leaſe. 6. The acceptance of the Rent muſt be by one that hath right to the land at the time, and not before his right come: And therefore if the iſſue in tail before his anceſtors death accept the Rent, this is no bar to him after. 7. The accepted thing muſt be a Rent, and not a ſum in groſs, or an Annuity newly created: And therefore if one make an Eſtate, and therein the Feoffee, Leſſee, or Donee covenant to pay to the Feoffor, Donor, or Leſſor a ſum of mony yearly, or grant to him a new Annuity or Rent out of the Land, and the iſſue ſucceſſor &c. accept this, this is no bar nor affirmance of the Leaſe. 8. The Leaſe on which the Rent is reſerved muſt be by Indenture. *Broo.* 166. *Dyer* 46. 9. 11 *H.* 4. 15. 14 *H.* 8. 11. *Dyer* 27. *Broo.* 399. 879. *Coo.* 3. 64. 26 *H.* 1. 2. *Broo. Acceptance* 2. *Dyer* 91. 13.

1. By iſſue in tail, or his Feoffee.

If a Tenant in tail make a Leaſe for years rendring Rent, and die, and his iſſue accept the Rent; this doth bar that iſſue that he cannot avoid the Leaſe, and doth affirm the Leaſe for his time: And if ſuch a Leſſee for years make a Leaſe of part of the land for all the term, and the iſſue accept the Rent of the Leſſee or Aſſignee, this is an affirmance of the Leaſe for ſo much of the land as the Leſſee or Aſſignee hath, and for the reſt alſo. 21 *H.* 7. 38. *Dyer* 30. & 95. *Broo.* 166. *Coo.* 3. on *Walker's* Caſe, 23.

If there be Tenant for life, the remainder in tail, and he in remainder make a Leaſe for years rendring rent, after the Tenant for life dyeth, and then the Tenant in tail dyeth, and after his death the iſſue in tail accept the Rent the next Rent-day; this doth not bar the iſſue and affirm the Leaſe. *Dyer* 279.

If Tenant in tail make a Leaſe for forty years to begin ten years after rendring rent, and dye, and after the iſſue in tail enter, and make a Feoffment before the ten years expire, and at the ten years end the Feoffee wave the poſſeſſion, and the Leſſee enter and pay the Rent at one of the days of payment, and the Feoffee accept it, this hath affirmed his Leaſe. *Plow* 437. *Coo. ſuper Lit.* 46. 6.

2. By the ſucceſſor of a ſpiritual perſon.

If a Biſhop, Abbot, Dean or Prebend by their common Seal had made a Leaſe for years rendring Rent, and die, and the ſucceſſor accepted the Rent, this would affirm the Leaſe for his time. *Dyer* 46. 309. *Coo.* 3. 65. 2 *H.* 7. 38. 37 *H.* 6. 3, 4. *Broo.* 380. 322.

3. By a wife after husbands death.

If a husband and wife make a Feoffment in fee, Gift in tail, or Leaſe for years or life of the land of his wife rendring Rent, and die, and after his death the wife take the Rent, this expreſs acceptance doth affirm the eſtate, and bar the wife and her heirs of entry and action both for ever; and if ſhe diſtrain and avow for the Rent, or bring an Action of Waſte againſt ſuch a Leſſee; this is an implyed acceptance, and will bar her and hers alſo. So if the husband and wife make a Leaſe by Indenture rendring Rent, and the husband before the Rent-day die, and the wife before day take another husband, who at the day doth accept the Rent, and then dies; this acceptance by her husband is her acceptance, and will bar her for ever. 26 *H.* 8. 2. 15 *Ed.* 4. 18. *Dyer* 46. *FNB.* 192. 3 *H.* 6. 53. *Broo. leaſe* 3. 11. *Dyer* 159.

4. Of a Lord of a Manor, or he in remainder or reverſion.

If a Lord of a Manor grant a Copyhold eſtate for three lives, and after make a Leaſe for three lives rendring a Rent, and give Livery of Seiſin, and ſo diſſeiſe the Copyholder, and after the Lord granteth the Fee to the Copyholder, and he accept the Rent of the Tenant for life, this doth affirm the Leaſe. *Dyer* 30. 207.

If a Diſſeiſor make a Leaſe for life rendring Rent, and after grant by Fine the Reverſion to the Diſſeiſee, and he accept the Rent of the Leſſee, it ſeems this is a bar. *Dyer* 30. 207.

If one make a Leaſe for years, (if the cloſe of the Condition be not, That then the Eſtate for years ſhall ceaſe or be void) rendring Rent, with clauſe of Re-entry for non-payment, and after non-payment and a legal demand made, the Leſſor doth accept the Rent at another day of payment; this doth bar the Re-entry and affirm the Leaſe: And if it be an Eſtate for life, or any Freehold that is granted rendring Rent,

let

let the close of the Condition be how it will, until an actual entry, acceptance of the Rent will bar the Lessor, and affirm the Lease or Feoffment. *Coo.* 3. 64. *Coo. super Lit.* 211.

If a Tenant make a Feoffment by Collusion, and the Lord die, and his heir accept the services of the Tenant, by this he is barred to take advantage of the Collusion. *FNB.* 142. *a.*

5. By an Heir.

If a man seised of land in the right of his wife make a Lease for years not warranted by the Statute of 32 *H.* 8. rendring Rent, and after their death the heir accept the Rent; now it seems by this he hath affirmed the Lease. *Dyer* 229.

6. By an Infant at full age.

If an Infant make a Lease for years rendring Rent, and at his full age accept the Rent, by this he hath affirmed the Lease and barred himself: And if it be a Lease for years, the remainder for years to a stranger, rendring Rent, and he accept the Rent of the first Lessee, this doth affirm it for the remainder also. So it seems if he accept the performance of other Covenants, this may affirm the Lease. And so it is of Copyhold land: If an Infant-Copyholder make a Lease for years rendring Rent, and at his full age accept the Rent, this shall bind him. *Trin.* 2 *Car. B. R. Ashfield's* Case. *Plow.* 545. 18 *Ed* 4. 14 *H.* 8.

Sect. 2.

II. Where and in what case the wife barreth not.

If lands be given to the husband and wife, and the heirs of the body of the husband, and he lease for years rendring Rent and die, and the issue in tail accept the Rent during the life of the woman, this is no bar, nor affirmance of the Lease. *Coo.* 3. 64. *Broo. Accept.*

1. By issue in tail, or his Feoffee.

If the Tenant in tail make a Lease for twenty years rendring Rent, and the Lessee make a Lease of the land for ten years, and the Tenant in tail die, and his issue accept the Rent of the second Lessee; this is no bar to the issue, nor affirmance of the first or second Lease: but if the first Lessee pay it, it is good; so also if the second Lessee pay it as Bailiff to the first Lessee. *Broo.* 166.

If the Tenant in tail make a Lease for years not warranted by 32 *H.* 8. as if he make a Lease to begin after his death rendring Rent, and the issue accept the Rent, yet this doth not bar him. *Dyer* 279.

2. By the successor of a spiritual person.

If a Parson, Vicar or Prebend make a Lease for years rendring Rent, and the successor accept the Rent, this is no bar to him, nor affirmance of the Lease: So if that a Bishop had made a Lease for Tythes or the like, or any other void Lease, and his successor accept the Rent, yet this would not bind. *Coo.* 3. 65. *Dyer* 46. 37 *H.* 6. 34. *Broo.* 38. 321.

If a Bishop had made a voidable Lease to *one*, and after made a good Lease confirmed by the Dean and Chapter to another, and the successor had accepted the Rent upon the first Lease, this would not affirm this first Lease. *Dyer* 46. 9.

If a Bishop had made a voidable Lease and die, and his successor had accepted the Rent only due to the King in the time of the vacation of the Bishoprick, it seems this is no affirmation of the Lease. *Sed quære* of this Case. *Hil.* 18 *Jac. B. R.*

3. By a woman after her husbands death.

If the husband alone make a Feoffment in fee, Gift in tail, or Lease for life or years rendring Rent, and die, and the wife accept the Rent, this doth not bar the wife nor her heirs, nor affirm the Lease. So if the husband alone make a Lease for life rendring Rent, with a Letter of Attorney to his wife to give Livery, and she doth so (as it seems she may) and after his decease she accept the Rent, this is no bar. 26 *H.* 8. 2 and 15 *Ed.* 4. 18. *Perk. sect.* 199.

If husband and wife had at the Common-Law before the Statute of 32 *H.* 8. made a Lease for years by parol, rendring Rent to them, and the husband had dyed, and the wife had accepted the Rent, yet she might have avoided the Lease, unless it were by Indenture. *Dyer* 91. *b.*

If husband and wife by Indenture enfeoffs *A.* of the land of the wife, and *A.* in the same Indenture covenants and grants to pay to them yearly during their lives forty shillings, the husband dyeth, the wife accepts the Rent; this shall not bar the wife. 26 *H.* 8. 2 *a.*

If the husband and wife make a Lease by parol, rendring Rent, and she accept the Rent after his death, this will not bar her. *Plow.* 431. *per Bromley.*

4. By a Lord of a Manor, or by him in remainder or reverſion.

If one have title to have a Writ of Eſcheat, and he after accept the Rent of the Tenant, he is not barred of this advantage: For if the Lord accept the Rent by the hands of the Heir or Feoffee of the Diſſeiſor, that is in upon a Title of diſcent or feoffment after the Eſcheat accrued, this is no bar: but if he avow for the Rent in a Court of Record, or accept homage or fealty of the Tenant that is in by diſſeiſin; by this he is barred. *Coo. ſuper Lit.* 268.

If a Leaſe be made upon a Collateral Condition, or Condition to do ſome Collateral thing, as not to alien, or the like; and after the Condition broken, he in Reverſion not having notice thereof doth accept the Rent; this is no bar nor affirmance of the Leaſe. *Coo.* 3. 64.

If a Tenant in tail be the Remainder in tail, and the firſt Tenant in tail make a Leaſe for years rendring Rent and die without iſſue, and he in Remainder accept the Rent; this is no bar. *Ceſſante ſtatu primitivo, ceſſat derivativus*; (the primitive eſtate ceaſing, the derivative alſo ceaſeth.) *Broo.* 370.

If a Copiholder makes waſte, by which a forfeiture accrues to the Lord, and afterwards the Lord accepts the Rent, this ſhall not conclude him of his entry by book, becauſe by the forfeiture the Eſtate was meerly void, *H.* 28. *q.* And yet ſee the Caſe, if a Copiholder enfeoffe a ſtranger to his own uſe by Livery in fee, and after pay the Rent to the Lord as before, this is a continuance of the Eſtate. *Arden* and *Banmore's* Caſe, in *Cromp. Jur. f.* 214. *b.*

5. By an heir.

If one make a Leaſe at will and die, and after his death the heir accept the Rent, this doth not bar him nor affirm the eſtate: for Acceptance cannot make good a Leaſe determined by the Leſſors death, no more then a Leaſe determined by Entry. 14 *H.* 8. 11.

If Leſſee for life or Tenant in dower make a Leaſe for years rendring Rent, and die, and the heir accept the Rent, this is no bar to the heir. 2 *H.* 4, 5. 11 *H.* 4. 15.

Sect. 3.

III. Where and in what caſe the acceptance of another thing is a bar, and where not.

If the husband and wife make a partition of his wives land, and it be not equal, and he die, and after his death ſhe doth enter into and agree to that unequal part; this will affirm the Partition, and bind her for ever. 2 *Ed.* 3. *cui in vita* 17. *Coo. ſuper Lit.* 170.

If the husband be ſeiſed of three Manors of equal value, and chargeth one of them with a Rent and dyeth, and ſhe accept this Manor charged for her dower; in this caſe ſhe is barred, and muſt hold the Manor charged with the Rent; but if ſhe had taken the proviſion the Law made by Writ of Dower, there ſhe ſhall have a third part of all diſcharged. *Coo. ſuper Lit.* 173. 18 *H.* 6. 27. 26 *Ed.* 3. *Dower* 133.

1. To a woman after her husbands death.

If a woman accept of a Rent or other land, or part of the ſame land whereof ſhe is to be endowed, or a Jointure made to her after marriage, by theſe means ſhe may be barred of her Dower; for which ſee more in *Dower*. *Dyer* 266. 317. *Coo.* 4. 25 26. 7. 40.

2. To a Feoffor, Leſſor, &c.

If one make a Feoffment or Leaſe on condition that the Feoffee or Leſſee ſhall do ſome act, as make a Leaſe for life or the like to the Feoffor or Leſſor, and he do ſome other thing, as make a Leaſe for years or the like, and the other accept it; now by this he is barred to take any advantage for the breach of the Condition; but if the Act to be done were to a ſtranger, and he accept another thing for it *contra*, it is otherwiſe. *Coo.* 3. 64.

3. To an Infant.

If an Infant that is a Parcener make a diviſion, and it be unequal, and at her full age ſhe accept of it, and enter upon the part allotted her, by this ſhe hath affirmed the partition and barred herſelf. *Coo. ſuper Lit.* & *Lit.* 4. 171.

4. To the Lord of a Manor.

If there be Lord, and the Tenant enfeoffe his heir within age, or a ſtranger, and the Lord receive homage of the heir, or accept the ſervices of the Feoffee, and after the father die: Now in this caſe he is barred of the Wardſhip by his acceptance, and cannot aver the Colluſion. *FNB.* 142. *Fi Gard* 33. *Broo.* 121.

5. To an Obligee.

If one be bound in an Obligation, with Condition that the Obliger or a ſtranger ſhall pay to the Obligee a ſum of money at a day and place certain, and the Obliger or ſtranger pay, and the Obligee accept a leſs ſum before the day at any place or at the time in any other place then the place appointed, or the Obliger or ſtranger give,

and

and Obligee accept any other thing, as a horſe or the like in recompence, in ſatisfaction, be it before or at the day; by this he is barred to take any advantage upon the obligation, and this is held to be a good performance of the Condition: But the giving and taking of a leſs ſum for a greater at the time and place of payment, nor the giving of a horſe or the like, if it be by a ſtranger to the Condition; and the Acceptance by the Obligee in this caſe is no bar to the Obligee, nor performance of the Condition. So if a Condition be to make an Eſtate of Twenty pounds *per annum*, or to deliver twenty Quarters of Corn, and he make an Eſtate of Ten pounds *per annum*, or deliver ten Quarters of Corn, and the Obligee accept this at the time and place of delivery, it ſeems this is no bar; (but if the Obligee make a Deed of Receipt of leſs, this by way of Releaſe may be a bar.) And if a Condition of an Obligation be to do any Collateral thing, as to account, make a Feoffment or Leaſe, or grant a Rent, or the like, the giving and taking of money or any other thing in recompence and ſatisfaction will not bar. And if the Condition of the Obligation be to pay money to a ſtranger, and the Obliger give, and the ſtranger accept a horſe or other thing in recompence, yet this is no bar to the Obligee, nor good performance of the Condition: And if it be to pay money to the party himſelf, and he give, and the Obligee accept a horſe or the like in ſatisfaction of part of the debt, and ſay not for what part, this is void for incertainty. *Perk. ſect.* 751. 753. *Coo.* 5. 117. *Dyer* 1. *Broo. Accept. Det.* 43. *Coo. ſuper Lit.* 212, 213. *Dyer* 50. *Perk.* 749, 752: *Coo.* 9, 78. *Coo.* 4, 3. The gift and acceptance of a horſe or other thing in ſatisfaction of a Judgment, is no bar in a *Scire facias* upon the ſaid Judgment. *Trin.* 9. *Jac.* See more in *Obligation, numb.* 8. *Agreement, Accord.*

Condition of an Obligation.

Upon a Judgment.

Acceptance by a Witneſs of a leſs ſum for his charge then is reaſonable, will bind him. *March.* 18. *pl.* 43:

By a witneſs.

CHAP. II.

Of Actions in generall.

AN Action is nothing elſe but the right of proſecuting in Judgment of *that which is due to one*; or it is the lawfull demand of ones right; or (as others define it) the Form of a Suit given by Law to recover a thing. But this is ſometimes taken alſo for the power or ability a man hath to ſue, as at other times it is taken for the execution of this power, the Suit it ſelf; and this is the proper ſenſe of the word. *Coo. ſuper Lit. fol.* 284, 285.

1. *Action*, what.

Of Actions, ſome do concern the Pleas that were called the Pleas of the Crown, *Placita Coronæ* or *Criminalia*, *(i.)* Pleas of the Crown or Criminal, (of which we ſhall not ſpeak at all here;) and others do concern Common Pleas, called *Placita Communia ſeu Civilia*: Theſe are either Real, Perſonal, or Mixt.

The kinds of Actions.

The Real Action is ſuch a one wherein Frank-tenement or Inheritance is to be recovered; or ſuch an Action whereby the Demandant claimeth title to any Lands or Tenements, Rents or Common in Fee-ſimple, Fee-tail, or for term of life.

And this again is either Poſſeſſorie, *(i.e.)* of a mans own poſſeſſion; or Anceſtrel, *(i.e.)* of the ſeiſin and poſſeſſion of his anceſtor. And this laſt is either Droiturel, when nothing doth deſcend from the anceſtor but a naked right; or Poſſeſſorie, *i.e.* when the anceſtor doth die in poſſeſſion, and the land it ſelf doth deſcend.

The Perſonal Action is ſuch an Action, as is in the perſonality only, whereby a man claimeth debt, or goods, or chattels, or damages for wrong done to his perſon; or when ſome perſonal thing, as a debt or ſum of money or damages is to be recovered. And this is again ſo perſonal, that it cannot be brought by or againſt an Executor or Adminiſtrator: So are all the Actions that are founded on ſome wrong done by

Executors.

or

Action personal. or to the perſon of another, and for which a man ſhall recover damages only; as Actions of Treſpaſs, Treſpaſs upon the Caſe for miſdoing, Debt upon an Eſcape, Waſte and Covenant grounded on a perſonal Covenant for a thing to be done by the perſon of the Covenanter, and the like: In all which Caſes, upon the death of the party by or to whom it is done and made, the Action doth die and is gone, and neither Executors or Adminiſtrators can ſue or be ſued in it. Or it is ſuch a perſonal action as doth continue to and againſt Executors and Adminiſtrators, as all other actions do. *March Rep.* 9. *pl.* 23. 13 *pl.* 33.

Popular. And this perſonal action is alſo either Popular, (*i. e.*) given to any man that will ſue, as upon a Statute; or it is Particular, (*i. e.*) ſuch an action as is given to one, or ſome men in certain.

The Mixt action is ſuch an action, as wherein not only the thing it ſelf being a real thing in demand is to be recovered, but alſo damages for the wrong, as in Aſſiſe, Waſte, *Quare impedit*, and the like.

Demandant and Tenant: Plaintiff and Defendant. He that ſueth in an action Real for title of land, is called a Demandant; and he that is ſued, is called a Tenant: but he that ſueth an action Perſonal, is called Plaintiff; and he that is ſued, is called Defendant.

In every action and the proceedings thereupon three things are to be done. 1. The Cauſe or matter of fact muſt be ſhewed, and this the parties muſt do. 2. The Law muſt be ſhewed, and Judgment given according to the Law upon the matter of fact appearing in the Caſe; and this the Judges muſt do. 3. The Execution of the Judgment given by the Judges; and this the Officers of the Court muſt do. *Plow.* 36.

Proceſs, what. The whole proceeding of a Suit from the original to the end, is called the Proceſs: it is ſometimes taken for the proceedings from the original to the Judgment: but moſt properly it ſignifieth nothing but the Writs and Precepts that iſſue out in all actions Criminal and Civil.

Sect. 1. 2. *A Writ*, what. A Writ is a Precept in the name of the Lord Protector, *&c.* written in parchment and ſealed with the Great Seal. Wherein there is, 1. The Salutation. 2. The matter or cauſe of the Complaint briefly ſet down, called *Breve, quia rem breviter enarrat*, for that it doth tell the matter in ſhort. 3. The Concluſion, wherein are, 1. The Teſt, which in the Chancery is the Lord Protector himſelf, in other Courts the Chief Juſtice of the Court as a witneſs. 2. The place. 3. The time or the date. Theſe Writs admit of many diviſions and diſtinctions; ſome be Criminal, and ſome Civil or Common. Of Criminal, ſome be againſt the perſon to have Judgment of death, as Writs of *Appeal of death, Robbery, Rape, &c.* And ſome to have Judgment of Damage to the party, Fine to the King, and Impriſonment, as Writs of *Appeal of Maihme, &c.* Theſe Civil or Common actions alſo admit many diviſions and diſtinctions; for theſe are alſo Real, Perſonal, and Mixt. But ſometimes they come open, and ſometimes incloſed in the Seal; and hence perhaps they are ſaid to be open or patent, and cloſe. But ſome of them are ſaid to be *Brevia amicabilia*, ſome *Brevia adverſaria. Amicabilia* are Writs of Entry for the paſſing of a Common Reovery, and a Writ of Covenant for the paſſing of a Fine. *Adverſaria*, are all other Writs, which are either Original, (*i.e.*) the foundation of the Action, as *Diſtreſs*, &c. Mean, (*i.e.*) between the Original and the Judgment, as *Capias*, *Exigent*, &c. Judicial, (*i.e.*) tending to the execution of the Judgment given, as *Elegit, Fieri facias, Levari facias, Habere facias ſeiſinam*, or *poſſeſſionem*, &c. Original Writs have ſome of them a certain form and rule; others are to be framed according to the Caſe. Original Writs are ſome of them Real, ſome Perſonal, ſome Mixt. Some of them alſo are Writs of Prevention; or *Anticipantia*, as *Warrantia Chartæ, Audita Querela, &c.* which may be had before Impleading, or Execution ſued. Some for Reſtitution, as *Waſte*, *Treſpaſs*, &c. Some of them are to ſtay Suits in other Courts; ſome to remove Cauſes out of, or ſend them back to, or reform diſorders in other Courts, as *Accedas ad Curiam, &c.* Some, to enable other Courts in an Action. Some, to be eaſed of a Burthen coming or come upon a man. Some Proceſs or Writs are after appearance, when the parties be at iſſue, to make the Inqueſt to appear, as *Venire facias*, *Habeas corpora*, and the like. But moſt Writs are to recover ſome debt or duty, or amends or recompence in lieu thereof. Some of theſe are of little or no uſe at this day; as

The kinds:

Native

Nativo habendo, *Libertate probanda*, *Libertatibus allocandis*, *Manucaption*, *Extirpation*, *Paſſagio*, *Hæretico comburendo*, *Quale jus*, *Sine aſſenſu capitali*, *Occupavit*, *Contra formam Collationis*, *Exoneratione ſectæ*, *Diem clauſit extremum*, *Mandamus*, *Quæ plura*, *Devenerunt*, *Melius inquirendum*, *Valore maritagii*, *Ætate probanda*, *Præcipe in capite*, *Droit de Guard*, *Intruſion de Guard*, *Ejectment de Guard*, or *Ejectione cuſtodiæ*, *Raviſhment de Guard*, *Datum eſt nobis intelligi Excommunicato capiendo*, and in any other ſuch like. Others there are, whereof there neither is, nor is like to be much uſe; as, *Inhibition*, *Indicavit*, *Sequeſtro habendo*, *Ne admittas*, *Attornato faciendo*, *Homine replegiando*, *Domo reparandâ*, *Præmunire*, *Summons ad auxiliandum*, *Plegiis acquietandis*, *Monſtraverunt*, *Protection*, *Eſſendi quietum de tollonio*, *Eſtrepment*, and the like.

Others there are which are Writs appointed to be uſed in Real actions, as Writs of *Right*, and of *Entry*, *Aſſiſe*, *Ayle*, *Beſaile*, *Mordaunceſter*, *Nuper obiit*, *Caſu conſimili*, *Cui in vita*, *Coſinage*, *Formedon*, *Quod ei deforceat*, *Eſcheate*, *Rationabili parte*, and ſuch like, very ſeldom uſed in theſe days. Others there are of more common uſe, as *Accedas ad Curiam*, *Recordari*, *Certiorari*, *Pone*, *Attachment*, *Audita Querela*, *Capias ad computandum*, *Corpus cum cauſa*, *Diſceit*, *Warrantia chartæ*, *Dedimus poteſtatem*, *Dower*, *Diſtringas*, *Diſtreſs*, *Error*, *Dum non fuit compos mentis*, *Dum fuit infra ætatem* *Capias pro fine*, *Ex parte talis*, *Extendi facias*, *Faux judgment*, *Habeas corpus*, *Habeas corpora*, *Injunction*, *Juſticies*, *Meſne*, *Moderata miſericordia*, *Ne omittas propter aliquam libertatem*, *Niſi prius*, *Partitione facienda*, *Per quæ ſervitia*, *Prohibition*, *Procedendo*, *Proprietate probanda*, *Quare ejecit infra terminum*, *Quid juris clamat*, *Quem redditum reddit*, *Quod permittat*, *Quo minus*, *Quo jure*, *Quo warranto*, *Recaption*, *Reſcous*, *Recordare*, *Replevin*, *Returno habendo*, *Scire facias*, *Second deliverance*, *Sequatur ſub ſuo periculo*, *Summons*, *Summons ad warrantizandum*, *Superſedeas*, *Venire facias*, *Venditioni exponas*, *Withernam*, *Latitat*, and ſuch like: Others there are of moſt common uſe; as, *Account*, *Action of the caſe*, *Debt*, *Annuity*, *Treſpaſs*, *Waſte*, *Covenant*, *Detinue*, *Ejectione firmæ*, *Capias ad reſpondendum*, *Capias*, *Capias ad ſatisfaciendum*, *Fieri facias*, *Elegit*, *Exigent*, *Habere facias*, *Seiſinam*, *Poſſeſſionem*, *Replevin*, and ſuch like. Of ſome of theſe you ſhall have the definition here; the reſt you ſhall find in other places annexed to the things about which they ſerve.

Summons, is a Writ to the Sheriff to cite or warn one to appear at a certain day, and it muſt be by certain ſummoners in the Tenants land, not by his goods, Rent or Common; and if it be againſt an heir, it muſt be in the land that did deſcend; and if it be to recover the Freehold, it muſt be in the ſame land: Elſe making default, he may at the Grand Cape wage his law of Non-ſummons; but if he appear, it matters not where he was ſummoned. *Coo.6.54. 37 H.6.26.* 3. *Summons*, what.

It is when a Suit is put without a day by the demiſe of the King; then this Writ ſhall go out, or a Reattachment as the caſe is, and as the firſt action was, to revive the ſuit: And this is either general, when it is one man for all ſuits; or ſpecial, when it is for one man for one ſuit only. 5 *H.7.40. Coo.7.29 Fincheſley* 441. *Reſummons*, what. *Reattachment*, what.

A *Capias* is a Writ to take the body of a man; and of theſe there be divers ſpecies: as before Judgment, a *Capias ad reſpondendum*; after Judgment, a *Capias ad ſatisfaciendum*, *Capias pro fine*, *Cap.* and others. That before Judgment is called *Cap. ad reſp.* And if the Sheriff return upon that, *Non eſt inventus*, *&c.* then the Proceſs is *Alias capias*, *Pluries*, and *Exigent*: which *Exigent* muſt be five times proclaimed, and the party not appearing is outlawed. *Capias*, what: The kinds. *Alias capias.* *Pluries capias.*

Exigent, It is a Writ, and lieth where a man doth ſue an Action perſonal, and the Defendant cannot be found, nor hath any thing within the County whereby he may be attached or diſtrained; then this Writ ſhall go forth to the Sheriff to make Proclamations at five Counties every one after another, that he appear, or elſe that he ſhall be outlawed; and if he be, then all his goods and chattels be forfeit. And this goeth forth in ſome caſes before Judgment, and in ſome after Judgment. Before Judgment in a perſonal action it cannot be had till there have been three *Capias's ad reſpondendum* one after another, with a *Non eſt inventus* returned. But one upon a *Capias* upon an Indictment of Felony, and then the *Exigent* doth iſſue after the firſt *Capias*. After Judgment, on a *Capias ad computandum*, or *Capias ad ſatisfaciendum*; *Exigent*, what.

and

and then it doth iſſue out after the firſt *Capias*. See at large, *ſtat.* 18. *Ed.* 3. *chap.* 5. *Fitz. proceſs* 192. 5 & 6. *Ed.* 6. 26. 6 *H.* 6. 1. 8 *H.* 6. 10. 31 *Eliz.* 3. 12. 25 *Ed.* 3. 14. *Coo.* 3. 12.

If the *Exigent* be returned not fully ſerved, without any folly in the Plaintiff, as where the Defendant after demand at two Counties rendreth himſelf in Court, and upon Mainpriſe found hath a *Superſedeas*, and yet appeareth not at the day: but otherwiſe it is upon a *Superſedeas* by another perſon bearing the ſame name, or in caſe where no more Counties but four can be holden, between the delivery of the Writ to the Sheriff and the Retorn, the Plaintiff bringing a new *Exigent* before any other County holden, but elſe not, ſhall have the benefit of the former Counties: and therefore it is called an Exigent *allocato Comitatu*, or *allocato Huſtingo*, if it be in *London*. 22 *Ed.* 3. 11. 38 *Ed.* 3. 1. 14 *Ed.* 3. 1. 17 *Ed.* 3. 43. *Fitz. Exigent* 14.

Allocato, what.

Capias ad reſpondendum, what.

Capias ad reſpondendum, is a Writ to take the body of a man, after an Original or Summons is retorned *Nihil*. *Fitz. Waſt.* 45. See *Utlarie*.

Latitat, what.

A *Latitat* is a Writ, whereby all men in Perſonal actions are called into the Upper-Bench.

Writs, or Proceſs in Real Actions.

Sect. 2.

Writ of *Right*, what.

THe *Writ of Right* lieth properly where a man is ſeiſed of land in Fee, and another recover it againſt him by default in a *Precipe quod reddat*. Now he that ſo loſeth by default, may ſue this Writ; or where one dyeth ſeiſed of land in Fee, and a ſtranger abateth and entreth into the land, and deforceth the heir, here the heir may have this Writ, or an Aſſiſe of *Mortdaunceſter*. *FNB.* 1.

Writ of Right *quando Dominus reviſit, &c.*

Is a Writ which lieth in caſe, where lands or tenement that be in the Seigneury of any Lord, are in demand by a Writ of Right. *Regiſt. Orig.* 4.

Writ of Right on a *Diſclaimer*, what.

Is a Writ that lieth where the Lord in the Kings Court, *ſcil.* in the Common-Pleas, doth avow upon his Tenant, and the Tenant diſclaimeth to hold of him, upon the Diſclaimer he ſhall have this Writ. And if the Lord aver and prove that the land is holden of him, he ſhall recover the land for ever. *Old N. B. fol.* 150.

Writ of Right *de Rationabili parte*, what.

Is a Writ that lieth always between Privies blood, as Brothers in Gavelkinde, or Siſters, or other Coparceners, as Nephews or Neeces, and for land in Fee-ſimple, when the one doth enter upon all. *Regiſt Orig.* 3.

Writ of *Entry*, what. The kinds of it.

A Writ of Entry *ſur diſſeiſon*, lieth where a man is diſſeiſed of his Freehold, then he or his heirs ſhall have this Writ againſt the Diſſeiſor or any other that is Tenant of the land. And if the Diſſeiſor alien or die ſeiſed, then the Diſſeiſee ſhall have this Writ againſt the Alienee or the heir in the *per*. And then the Writ ſhall ſay, *In quod A. non habet ingreſſum niſi per B. qui illud ei demiſit qui inde injuſtè diſſeiſivit.* And if the heir or Alienee die ſeiſed or alien to another, then the Writ ſhall be in the *per & cui*, and ſhall ſay, *In quod idem A. non habet ingreſſum niſi per B. cui C. illum demiſit, qui inde &c. Coo ſuper Lit.* 238, 239.

Precipe, what.

Precipe is the beginning of many Writs of great diverſity: There is a *Precipe in capite*, a *Precipe quod reddat*, as Writs of Right, Debt, and others; ſome be *quod permittat*, as Writs *de quod permittat*; ſome be *quod faciat*, as *de conſuetudinibus & ſervitiis, de domo reparanda, &c.* And ſome of theſe contain ſeveral Precepts, and ſome joint, and ſome are ſole. See *Coo.* 2 *par. Inſtit.* 40.

Ad communem legem, what.

It is a Writ lying where a Tenant for life in Dower, or by the Curteſie, doth alien his land and die; then he in Reverſion may have this Writ againſt him that hath the land. *Terms ley.*

Conſimili caſu, what.

The Writ of Entry *Conſimili caſu*, is a Writ of Entry granted where Tenant by the Curteſie or for the life of himſelf or another, alieneth in fee or in tail, or for any other life then what he hath, and this is given to him in Reverſion againſt the party that it is ſo aliened to, and in the life of the Tenant. *FNB.* 206.

In caſu proviſo, what.

It is a Writ lying where a Tenant in Dower doth alien the land in fee, in tail, or for life ſhe hath in Dower, in this caſe he in Reverſion, Fee-ſimple, tail, or for life, may either enter, or have this Writ, (which he will) againſt the Alienee or him that is Tenant of the Freehold of the land, and that during the life of the Tenant in dower.

It

It is a Writ lying where a Biſhop, Abbot, or other that had a Common-Seal, alien the lands they have in the right of their Churches without the conſent of the Covent or Chapter, and die, then the ſucceſſor might have this Writ or a Writ of Right. *Terms ley* 80. *Bro.* 380. *Sine aſſenſu capitali*, what.

It is a Writ lying for a man, where he is in time of peace put out of his lands or tenements, or any profit aprender, as Rent-Common to be taken in a place certain, and ſo diſſeiſed of his Freehold, then he may have this Writ to recover the ſame again. *Coo. ſuper Lit. fol.* 135. *Aſſiſe*, what.

Formedon, It is a Writ lying where a Tenant in tail doth diſcontinue, or is diſſeiſed and dyeth, then the iſſue in tail may have this Writ for his remedy; and in this caſe he muſt have a *Formedon in Diſcender*: And if it be to remain over for want of iſſue, then he in Remainder muſt have a *Formedon in Remainder*: And if there be no Iſſue nor Remainder, then the Donor or his heir may have a *Formedon in Reverter*. *Coo. ſuper Lit.* 326. *Formedon*, what.

Is a Writ that lieth for the Tenant in tail, Tenant in dower, or Tenant for term of life, having loſt by the default, againſt him that recovered, or againſt his heir. *Regiſt fol.* 171. *Quod ei deforceat*, what.

Grand Cape, is a Writ in an Action real, lying where the Tenant doth not appear after the firſt Summons, but maketh default; then this Writ ſhall go forth to ſummon the party to anſwer the default, and alſo to the Demandant: and for this default he ſhall forfeit his land to the uſe of the Lord Protector, unleſs he can come into Court and wage his law that he was not ſummoned according to law, or let by water, or by impriſonment; for then he may plead with the Demandant. *Old N. B.* 177. 50 *Ed.* 3. 16. *Grand Cape*, what.

Petit Cape, is a Writ lying where any Real action is brought, and the Tenant appeareth, and afterwards maketh default; then this Writ ſhall go forth to ſeiſe the lands into the Lord Protectors hands. *Dyer* 24. *Petit Cape* what.

Sect. 3.

Ex gravi querela, is a Writ that lieth for him unto whom any lands or tenements in fee within a City, Town or Borough, being deviſable, are deviſed by will, and the Heir of the Deviſor entreth into them and detaineth them from him. *Regiſt. fol.* 244. *Ex gravi querela*, what.

This *Perambulatione facienda* is a Writ lying between two Lords of Manors, when there is queſtion between them about the bounds of their Manors to aſcertain them, and this is by agreement of both Lords. If one diſagree, the other may have a *Rationabilis diviſis*. 3. *Perambulatione facienda*, what. *Rationabilis diviſis*, what.

This *Rationabili parte bonorum*, is a Writ lying within the Province of *York* and Dioceſe of *London*, upon the cuſtom there for the wife and children of the deceaſed to recover a third part of his goods, after funeral-expences and debts defrayed. *FNB.* 122. *Rationabili parte bonorum*, what.

This *Libertatibus exigendis, &c.* is a Writ whereby Juſtices in Eyre were commanded to admit an Attorney for another man. *Regiſt. Orig.* 19. *Libertatibus exigendis in itinere*, what.

Libertatibus allocandis, is a Writ for a Citizen or Burgeſs that hath a freedom, and is impleaded before Judges that will not allow it, to compel them to allow it. *FNB.* 229. *Libertatibus allocandis*, what

It was a Writ uſed for them that were queſtioned for ſlaves, and did offer to prove themſelves free. *FNB.* 77 *Libertate probanda*, what.

Licentia ſurgendi, is a Writ whereby the Tenant eſſoined *de malo lecti*, obtaineth liberty to ariſe. *Regiſt.* 8. *Licentia ſurgendi*, what.

Licentia tranſfretandi, is a Writ directed to the Keepers of the Port at *Dover*, to command him to let one paſs there, that hath the Kings licence. The Writ called *Paſſagio*, is of this nature, directed to the Keepers of the Ports. *Licentia tranſfretandi*, what. *Paſſagio*, what.

Leproſo amovendo, is a Writ that lieth for a Pariſh to remove a Leper or Lazar that doth thruſt himſelf into the company of his neighbors, either in Church or other publike meeting, to their annoyance. *FNB.* 234. *Leproſo amovendo*, what.

This is a Writ for the reſpiting of the Sheriffs account. *Reg. Orig.* 139. *Reſpectu computi Vicecomitis habendo*, what.

It is a Writ that lieth for him that hath a way through his neighbors ground, and he hath ſtopped it that he cannot paſs. *Quare obſtruxit*, what.

Pontibus reparandis, what.

Pontibus reparandis, a Writ to the Sheriff to require ſome to repair a Bridg that are bound to it. *Regiſt.Orig* 153.

Ventre inſpiciendo, what.

This is a Writ for the ſearch of a woman that ſaith ſhe is with child, and thereby keepeth the land from him that is next heir at Law. *Regiſt.Orig.*227.

Extirpation, what.

Extirpation, is a Writ lying againſt him, who after a Verdict found againſt him for land,&c. doth malicioufly overthrow any houſe upon it, &c.

Expenſis militum levandis ab hominibus de antiquo dominico, &c. what.

This is a Writ given to Tenants in antient Demeſne, to forbid the Sheriff to levy any thing of them towards the expences of the Knights in Parliament. *Regiſt. Orig.*191.

Expenſis militum levandis, what.

Expenſis militum levandis, is a Writ to the Sheriff to levy the allowance for the Knights of the Parliament. *Regiſt.Orig.*191.

Non ponendo in Aſſiſis & Juratis, what.

This is a Writ granted in divers Caſes to Free-men of ſerving in Juries. *Weſtm.2. ch.*38. *Articuli ſuper chartas* 9. *FNB.*165.

Turno vicecomitum, what.

Turno vicecomitum, is a Writ given to relieve thoſe that are called out of their own Hundred to do ſuit at the Sheriffs Turn. *Regiſt.Orig.*174.

Domo reparanda.

This is a Writ lying for one againſt his neighbor, by the fall of whoſe houſe he feareth hurt to his own houſe, to force him to repair. *Regiſt.Orig.*153.

Juſticies, what.

Juſticies, is a Writ in the nature of a Commiſſion, directed to a Sheriff for the diſpatch of Juſtice in ſome eſpecial cauſe, wherewith of his own authority he cannot deal in his County-Court. *N.B.* 35,41,73.

Sect. 4. *Curia claudenda* what.

Curia claudenda, is a Writ lying againſt another man that ought to incloſe his ground to ſever it from another man his neighbors, and doth not, to compel him to do it. And he that brings it. 1. Muſt have a Freehold in his Cloſe. 2. It muſt be for a Cloſe next adjoining. 3. He muſt be able to charge the other with the Repair time of mind. *FNB.*127. *Dyer* 295.38.52. *Finches ley* 96.

Pone per vadium, what.

This is a Writ commanding the Sheriff to take ſurety of one for his appearance at a day aſſigned. *Regiſt.*

Homine replegiando, what.

Homine replegiando, is a Writ lying where a man is impriſoned, and not by any ſpecial commandment of the Lord Protector or his Juſtices, nor for the death of man, nor for the Kings forreſt, nor for any ſuch thing for which a man is not repleviſable, and in ſuch a caſe where he is bailable by Law; or where one is detained as a Villain or Ward, and is none, in this caſe he may have this Writ to replieve him. *FNB.*66.

Ponendo in ballum, what.

Ponendo in Ballum, is a Writ to command Bail to be taken of a priſoner. *Regiſt. Orig.*133.

Bilanciis deferendis, what.

Bilanciis deferendis, is a Writ to a Corporation to command it to carry the Weights there to ſuch a place to carry wooll. *Regiſt.Orig.*270.

Manucaption, what.

Manucaption, is a Writ lying for a man that is taken for ſuſpition of Felony, and offereth Bail for his appearance, and cannot be admitted thereunto by the Sheriff or other that hath power to bail. *FNB.* 249. See more of Proceſs. *Stat.Articuli ſuper Chart.*15. 5 *Ed.*3.11. 6 *H.*6.1. 8 *H.*6.10. 10 *H.*6,10. 19 *H.*7.9. 23 *H.*8.14. 8 *Eliz.*2.

For Proceſs againſt thoſe that are indicted and appealed, See Statutes 5 *Ed.*3,11. 6 *H.*6.2. 1 *H.*5.5. 1 *H.*6.10. 6 *H.*8.4. 31 *Eliz* 3.

4. Who may bring Actions, and againſt whom they maybe brought or not, and how.

Infant.
Lunatick.
Prochein-Amy.
Guardian.
Diſability.
Executor.
Husband and wife.

For anſwer to this Queſtion, it is to be known, 1. That Ideots, Mad-men, and ſuch as be deaf and dumb, or any other man, woman or child, (except perſons diſabled by Law) being wronged, may bring the proper Action appointed for remedy in that caſe; and all, or any of theſe wronging others,may be ſued: And if an Ideot ſue or be ſued, he muſt do it in perſon; an Infant muſt ſue by Prochein-amy, and being ſued muſt defend by Guardian. But ſome men there are that are diſabled to ſue; and this diſability is either for a time only, or perpetually: And it is alſo either abſolute, or *ſecundum quid*, and *quoad* only; as a man outlawed cannot ſue in his own right, but he may ſue in anothers right as Executor; a Feme-covert cannot ſue but with her husband. There are ſix manner of men (ſaith *Littleton*) who if they ſue, Judgment may be demanded whether they ſhall be anſwered, &c. Or there are ſix kinds of diſabilities of the perſon diſabling him to ſue, ſo long as the diſability doth continue. *Lit ſect.*196. *Cook upon it.* 1. The Villain might not have ſued his Lord in his own right,

right, but as Executor he might have ſued him. (2.) A man outlawed in any Action, or upon any Indictment, cannot ſue any man in his own right whilſt he doth ſo continue; and yet a perſon outlawed may ſue in anothers right, as Executor or Adminiſtrator to another: So in his own right the perſon outlawed may bring a Writ of Error to reverſe that Outlawry, or an Attaint. *Lit. ſect.* 197. *& Coo. upon it.* (3.) An Alienee that was born out of the liegeance of the Lord Protector, in a ſtrange Country, under a ſtrange Prince, could not ſue; if he be ſubject to a King that is an enemy, he cannot ſue in any action; or if he be ſubject to a friend, he may not have a Real or Mixt action: but this impediment may be by Act of Parliament, or the Lord Protector's Letters-patents removed, and the party hereby be put in a capacity to ſue. *Lit. ſect.* 198. *& Cook upon it.* (4.) He that hath a Judgment given againſt him upon a Writ of *Præmunire facias*, ſo long as the Judgment is in force, may not ſue another. *Lit. ſect.* 199. *& Cook upon it.* (5.) Where a man is entred and profeſſed in any Order of Religion, as Monk, Frier, or the like, ſo long as he continues ſo, and is not dearraigned, he is diſabled to ſue. *Lit. ſect.* 200. *& Cook upon it.* (6.) A man Excommunicate, till he is abſolved, cannot ſue in any action. And theſe diſabilities hold for Suits in Courts of Equity alſo. But it ſeems that any of theſe diſabled perſons may ſue in *Anter droit*, *(i.e)* in anothers right, as being Executor or Adminiſtrator to another, they may ſue ſo far as is needful to the performance of that truſt. *Dyer* 275. 371. 187. 227. *F.N.B.* 36. 26 *H.*8. 1. *Cook* 8. 68. 3 *H.*6. 39. 23. 44 *Ed.*3. 27. 16 *Ed.*4. 4. 21 *H.*6. 30. *Dyer* 77. *Cook upon Lit. fol.* 124, 125, &c. So he that is attainted of Treaſon or Felony, or a convict Recuſant, or abjured the Realm, is diſabled to ſue for the time he continues in that eſtate. But in all thoſe caſes the diſability being removed, the *Præmunire* or Attainder being pardoned, or Outlawry reverſed, Excommunicate perſon abſolved, *&c.* the party may ſue again as before. 29 *Aſſ.* 47. 7 *H.*4. 39. *Cook upon Lit.* 128, 129. And in all theſe caſes, the Defendant when he doth firſt appear, ere he make any delay, Eſſoin, or otherwiſe anſwer, muſt take exception to the Plaintiffs ability, and ſhew his diſability, and demand Judgment of the Court, and pray that the Writ may abate; for if he make any Anſwer, the Exception comes too late.

Excommunicate.

Felon.

Abatement.

2. If husband and wife deliver goods, he alone muſt bring a Detinue for them, 8 *Ed.*4. 15. So upon an *Aſſumpſit* made to her to pay him mony, 27 *H.*8. 24. So if he have execution of a Statute made to his wife, or upon the execution of it by his wife before the marriage, and after marriage he is outed, he alone muſt ſue for relief, 37 *Aſſ. pl.* 15. But the wife can in no caſe ſue alone after marriage, nor can the huſband ſue alone for any kind of treſpaſs done to her before or after marriage, but they muſt joyn. So for Recovery of her inheritance, and upon an *Ejectione firmæ*, they muſt join, *Coo.* 5. 16. 97. *Dyer* 805. 9 *Ed* 4. 52. And therefore if the wife were beat before or after marriage, they muſt join; but if the husband die, ſhe may ſue alone; and if the beating during marriage be ſuch as thereby he loſe her ſervice or company, the husband alone may ſue, 20 *H.*7. 5. *Adjudg. Paſch* 16 *Jac. B.R.* But if a Bond or Bill be made to them two during Coverture, he may, or may not join with her, 3 *H.*6. 37. So if an Account be to be made to her, by one who was her Receiver whilſt ſhe was ſole, and yet in debt for the arrearages of account, they muſt join, 16 *Ed.*4. 8. *Plow.* 418. And yet it hath been ſaid, that in all Actions wherein nothing but damages are to be recovered, and the husband alone may releaſe it, he may ſue alone, or join his wife with him, as where ſhe is beat or ſlandered; but it is ſafe to ſue in both their names. See *March* 212. *pl.* 249. So where a Reverſion is granted to them, and the Leſſee break a Covenant. Sir *John Bret's* Caſe, *Paſch.* 14 *Jac. B.R.* 2 *H.*4. 7. 38 *H.*6. 3. 37 *Aſſ.* 11. *Coo.* 5. 18. So if he have a Leaſe for life in her right, and he make a Leaſe for years, and the Leſſee do waſte, he may bring the Action of the Caſe with, or without his wife. *Germy verſ. Longer. Paſch.* 38. *Eliz. B.R.* So if the husband make a Leaſe of her land, and the Leſſee doth waſte, it is ſaid he may ſue with, or without his wife, 3 *H.*6. 53. But *Quære* of this: For if ſo it be ſuch an Action, as wherein the place waſted is to be recovered, he may recover her inheritance from her. And if the wife have a Rent-charge arrear before her marriage, he may with or without his wife ſue for it. *Fenner's* Caſe, *M.* 37. *&* 38 *Eliz.* The wife that

Sect. 5. How husband and wife may ſue and be ſued.

Election.

hath a husband, cannot be ſued in any caſe without him for any thing ſhe hath done: but he may in ſome caſes be ſued without her, for things done by her; as if goods were delivered to her being ſole, now they muſt both be ſued for it, 39 *Ed.* 3. 17. Trover and Converſion will lie againſt them both; but take heed how you declare: *Draper's* Caſe, *M.* 7. *Jac. B. R.* So if he do waſte in the land he hath in her right, they muſt both be ſued. So if one had ſued her for Recuſancie on the Statutes, her husband muſt have been joined. So if one ſue a man for land he hath in right of his wife, they muſt be joined, *Coo.* 5. 75. 52. 11. 62. *Coo. upon Lit.* 3. If ſhe being ſole, make a Bond or *Aſſumpſit* now after marriage, they muſt both of them be ſued upon it, *Dyer* 355. But if they both during the Coverture make an Obligation, the husband alone may be ſued, 43 *Ed.* 3. 10. And if one be poſſeſſed of the Wardſhip of certain land, either in his wives right, or jointly with her, the Writ of Dower ſhall be brought againſt the husband alone, *Coo.* 1. *p.* 39. And in all caſes where they are both ſued, albeit the husband may anſwer alone, yet the wife ſhall never be forced to anſwer without the husband, 34 *H.* 6. 29. 40 *Ed.* 3. 34. 2 *R.* 3. 15. 41 *Ed.* 3. 22. See in *Waſte.*

Covenant. 3. In caſes where the Covenantees have, or are to have ſeveral intereſts or eſtates, there when the Covenant is made to and with the Covenantees, *& cum quolibet eorum, aut altero eorum, (i. e.)* with either of them, and to either of them, in this caſe theſe words make the Covenant ſeveral. As if one by Indenture demiſe Black-acre to *A.* and White-acre to *B.* and Green-acre to *C.* and Covenant with them and either of them, or Covenant with them and every of them, that he is lawful Owner of all theſe acres; in this caſe the Covenant is ſeveral: but if he demiſe to them the three acres together, and covenant in this manner, the Covenant is joint, and not ſeveral. And if *A.* and *B.* do covenant jointly and ſeverally, in this caſe the Covenant may be joint or ſeveral, and the Covenanters may be ſued either the one way or the other at the election of the Covenantee, *Coo.* 5. 19. *Dyer* 338. *Broo. Conveiunt.* 49. Six Merchants covenant with the Owners of a ſhip *ſeparatim*; this word makes the Covenant ſeveral. *Coo.* 5. 23.

Sect. 6. *Obligation.* 4 If two, three, or more bind themſelves in an Obligation thus, *Obligamus nos*, *i.* We bind us, and ſay no more; the Obligation is, and ſhall be taken to be joint only, and not ſeveral. But if it be thus: *Obligamus nos & utrumq; noſtrum*; or, *obligamus nos & unumquemq; noſtrum*; or, *obligamus nos & quemlibet noſtrum*; or, *obligamus nos & alterum noſtrum*; We bind us & either [or every] of us: In all theſe caſes the obligation is both joint & ſeveral; ſo as in theſe caſes the obligee may ſue all the obligers together, or all of them apart at his pleaſure; but it ſeems he may not ſue ſome of them, and ſpare the reſt, but he muſt ſue them all together, or all apart by ſeveral *Precipes*; and in this caſe he may have ſeveral Judgments & ſeveral Executions againſt the Obligers, and take all their bodies in execution, but he ſhall have ſatisfaction but once, or from one of them only: for after he hath been ſatisfied by one, the reſt ſhall be diſcharged. But in the firſt caſe, where the Obligation is joint and not ſeveral, the Obligee muſt ſue all the Obligers together; for he cannot ſue one alone with effect, without the reſt, unleſs it be in ſome ſpecial caſes; as where one of the Obligers alone doth ſeal the Deed, or where all of them do ſeal, but one of them is an Infant, a woman Covert, a Monk, or the like, or where one of them is dead; for in theſe caſes, one or ſome of them may be charged without the reſt: But otherwiſe the Plaintiff cannot proceed in his ſuit againſt one, or ſome of them, without the reſt, except the Defendant give him advantage. For howſoever the ſuit be well begun, (for when one or ſome of them alone is, or are ſued, it ſhall not be intended that the reſt are living, until it be ſhewed by the other party;) yet the Defendant is not bound to anſwer, unleſs the reſt be ſued alſo. And therefore in this caſe, he or they that is or are ſued alone, are thus to *Abatement.* take advantage of it, *viz.* To ſhew the matter to the Court, and to plead in abatement of the Writ: For if he appear and ſhew it not, but plead *Non eſt factum*, or the like to the Obligation, the Jury muſt find againſt him, and he will be charged with the whole debt: And ſo alſo if one appear, and the other make default and is outlawed, it ſeems he that doth appear muſt anſwer all. *Hil.* 19. *Eliz. B. R. Adjudg.*

5. If a Bond or Promiſe be made by two or more, not one or any of them may be ſued without the reſt whilſt they live, *M.* 7. *Jac. B R. Coo* 9. 53. And if a promiſe be made

made to two or more, no one of them can ſue whilſt the reſt live, but they muſt ſue all together:

Executors.

6. If an erroneous Judgment be againſt many, regularly, they muſt all join in a Writ of Error, or Attaint. *Coo* 5.25. 11.43. And if there be many Executors, and ſome accept, and ſome refuſe, if they bring any action, they muſt all be named in the Writ: and yet if one Executor have goods in his poſſeſſion, and he alone ſell them, perhaps for this Contract he may bring an action for the money in his own name; ſo alſo if the goods be taken out of his poſſeſſion alone, it is ſaid he alone may ſue for them. But the ſafeſt way in theſe Caſes, is to ſue in the names of all the Executors; for, the poſſeſſion of one of them, is ſaid to be the poſſeſſion of all of them. If many do commit a Treſpaſs to me, I may ſue all, ſome or any one of them at my choice; and the Recovery againſt one, will diſcharge and bar me againſt all the reſt.

Perſonal action.

7. Where the wrong and action given for relief is ſaid to be perſonal, there no action lieth for or againſt an Executor or Adminiſtrator; for the Rule in this is, *An Action perſonal dieth with the perſon.* And therefore if *A.* beat *B.* or ſuffer an eſcape, (which is a wrong to *B.*) he being a Sheriff, or do waſte in the lands of *B.* or enter into the lands of *B.* and *A.* or *B.* die, here the action is gone for ever; and ſo in all caſes where the wrong is *ex maleficio.* But where it is *ex contractu*, that it ariſe by way of Contract, there the Executor or Adminiſtrator ſhall have action: As if one deliver goods to another man, and he die, his Executor ſhall be charged: And albeit a man hath received profit, if the action be perſonal, yet in moſt caſes he ſhall not be chargeable in Equity. *Plow.* 181, 183. *Dyer* 14, 169, 322. *Coo.*9,84. 11,80. See *Executors. Brownl.* 2 *part.*9.

8. A Creditor may ſue the Executors or the Heir, which he will; or he may ſue both, if he will; but he can have but one Execution with ſatisfaction, *Brow.* 2 *par.*97. See *Enfant, Husband and wife, Ability.*

9. If two retain an Attorney, and both die, the Executor of the Survivor only ſhall be charged for the Fees; for a Perſonal contract doth ſurvive of both parties, otherwiſe of Real contracts, as Warrantie. *Brown.* 2 *par.* 99.

10. If one Covenant with *A. B.* and *C.* to pay *A.* 10l. and he die; in this caſe, *B.* and *C.* not the Executor of *A.* muſt ſue, *Brownl.* 2 *part*, 207.

For anſwer to this queſtion, theſe things are to be known.

5. Where the Plaintiff may bring one Action or other at his choice.

1. If the Sheriff have one in execution for my debt, and ſuffer him to eſcape, I may (for my relief herein) have an action of Debt, or an action upon the Caſe. So if I ſell my goods to one upon an Executory contract for money, I may have either of theſe actions for the money. *Coo.*4.92.

Debt.

Action upon the Caſe.

2. If an Officer take Toll of me, who ought to go quit of Toll, I may have a general action of Treſpaſs, or an action of the Caſe againſt him at my choice: So if one diſtrain my goods that are not diſtrainable by Law, I may have either of theſe actions againſt him, *Coo.*4.94.

Treſpaſs.

3. If one diſtrain me or my Tenants to come to his Leet, who have a Leet my ſelf the place, I may bring an action of Treſpaſs, or Treſpaſs on the Caſe againſt him, *Coo.*4.94. And albeit it be in ſuch caſe wherein I may have an Aſſiſe for my relief in the diſturbance, yet I may have an action of the Caſe alſo at my choice, *Coo.*9.5.

4. If I be Executor of a Leſſee for years, and be ouſted by the Leſſor himſelf, I may have for my relief herein an action of the Caſe, *Ejectione firmæ*, or action of Treſpaſs at my choice, *Coo.*4.95.

5. If one contract with me for good conſideration, to deliver to me twenty buſhels of Corn a year, every year during my life, and he fail to perform with me one year, for this I may have an action of the Caſe; but no action of Debt will lie upon this Contract till all the days be paſt, that is, till my death; after which my Executor or Adminiſtrator may have an action of Debt, *Coo.*4.94. So likewiſe if a ſum of money be given in marriage to be paid at ſeveral days, no action of Debt will lie until all the days be paſt; but an action of the Caſe will lie upon every failer, *Coo.*4.94.

Detinue.

6. If one find my goods, or I deliver them to him, and he having them in his cuſtody convert them, I may at my choice have an action of Detinue, or an action of the Caſe upon the Trover and Converſion, *Dyer* 121,22. If I deliver to one money

open

Account.

open (not in a bag or box ſealed) to keep to my uſe; in this caſe for my relief, I may have an action of Debt or Account, but not an action of Detinue, *Dyer* 22. If I be a Brewer, and buy Corn of a man to ſerve my turn, to be delivered me at ſuch a time and place, and he fail me, whereby I am forced to buy elſwhere; in this caſe I may have an action of Debt, or an action of the Caſe, at my choice, but not an action of Detinue, *Dyer* 22.

Maſter and Servant.

7. If a ſervant buy goods for his maſter, and give a Note of the Receipt of them to his maſters uſe, and undertake by his Note to pay the money at a day, but this Note is not ſealed; in this caſe an action of Debt doth not, but an action of the Caſe doth lie againſt the ſervant, *Dyer* 230.

Sect. 7.

8. If I (being a Sollicitor) retained for *J.S.* do retain an Attorney for him to ſue, and I do aſſume to pay him his Fees; in this caſe he may have an action of Debt, or an action of the Caſe againſt me (at his choice) for his Fees. *Adjudg. Hil.* 16 *Jac. Bradfords caſe.* 33 *H.*6.8. 17 *Ed.*4,5. But if I retain the Attorney for *J.S.* and ſay no more, in this caſe (it ſeems) he can have neither of theſe actions againſt me. And yet if I ſay to him, *Be Attorney for J.S. and if he pay you not, I will*; in this caſe he hath an action of the Caſe only. And if I ſay, *Be his Attorney, and I will pay you*; in this caſe I may be charged in both theſe actions at his pleaſure. 43 *Eliz. Simpſon's* Caſe.

9. If one grant me a Rent out of his land, with clauſe of Diſtreſs, I may diſtrain, or bring an Annuity at my choice: But if the Grant be not for him and his heirs, I may not have an Annuity againſt his heir, *Dyer* 344.

If one have a Judgment for Debt in any Court of Record, whilſt this is in force, the Plaintiff cannot have a new action upon the firſt Cauſe; but he muſt ſue Execution upon the Judgment. For which he may have a *Fieri facias*, *Cap. ad ſat.* or *Elegit*, at his choice: Or he may outlaw him after Judgment, if he pleaſe: Or the Plaintiff may bring a new action of Debt upon the Judgment, *Coo.*6,45: 5,88. And albeit the Record be removed out of one Court into another, yet within the year the Plaintiff may take out his Execution at his pleaſure. If one have a Judgment to recover an Annuity, he hath no remedy for the recovery of this, but by ſuing out a *Scire facias* on this Judgment, *Coo.*6.45. See *Election.*

6. Within what time Actions muſt be brought, or not.

All actions of Treſpaſs *Quare clauſum fregit*, actions of Treſpaſs, action *ſur Trover*, Detinue and Replevin for taking away Goods and Cattel, all actions of Account, other then Accounts which concern the Trade of Merchandiſe between Merchant and Merchant, their Factors and Servants; all actions of Debt grounded upon any Lending or Contract without Eſpecialty, and for arrearages of Rent; all actions of the Caſe, other then for Slander, which ſhall be ſued, muſt be commenced and ſued within ſix years after the cauſe of ſuch action or ſuit accrued, if the Plaintiff be then of full age, diſcovert, *compos mentis*, at liberty out of priſon, and in *England*; otherwiſe within that time after he become ſo; and not after.

All actions of Treſpaſs for Aſſault, Menace, Battery, Wounding, and Impriſonment, within four years after the Cauſe, and not after.

All actions of the Caſe for words, within two years next after the words ſpoken, and not after.

But if in a former action, a Judgment being given or arreſted, or the Defendant outlawed, and the Outlawry reverſed, a new action may be brought within a year of the reverſal or arreſt of Judgment or Outlawry, 21 *Jac.*16.

For the opening whereof take theſe things. 1: Where one is indebted to another for Wares, and the Debt is gone in time, and after they account together, and he is found ſo much in debt; in this he may bring an action upon this account, notwithſtanding this Statute; *March.*106.*pl.*182. 2. A Truſt is not within this Statute, and therefore no lapſe of time herein ſhall take away remedy in Equity: But in other ordinary caſes, where he is barred in Law by the time, he is barred in Equity alſo, *Mar.*129. *pl.*207. 3. The time muſt be accounted from the time that the Plaintiff hath compleat cauſe of action, and not from the time of the promiſe; as if one promiſe to pay upon requeſt, or when one is married, or returned from *Rome*, or the like, *Hughs, Rep.*437.

All

All Actions, Bills, Informations which ſhall be brought for any forfeiture upon a penal Law, then made or to be made, whereby the forfeiture was given to the Lord Protector only, was to be brought within two years after the offence done, and not afterwards.

And all others, except the Statutes of Tillage, which gave the benefit to the King and Proſecutor, was to be brought by the Proſecutor within a year after the offence done; and in his default, and for the King, within two years, and not after; and where by any Statute it is appointed to be brought in ſhorter time, there it muſt be brought in ſhorter time: *Stat.* 31 *Eliz.* 5. See more in *Limitation.*

7. Where, and in what place Actions muſt be brought.

All real and mixt actions, as *Waſte*, *Ejectione firmæ*, *&c.* muſt be brought in the County where the land lieth, and cannot be laid in any other place, for they are local. So all actions of Treſpaſs; for Treſpaſſes which are local (as *Quare clauſum fregit*) muſt be brought in the County where the land lieth, and the ſame place muſt be ſet down in the Declaration wherein the wrong was done: But (by the Common-Law) all perſonal actions (that are not Local in their own nature, as *Quare clauſum fregit* is) and briefly, all tranſitory actions may be brought in any County where the Plaintiff pleaſeth; and the Plaintiff by his Declaration may ſuppoſe it to be done in any place or County. And ſo was it held by Juſtice *Dodridg*, *Hil.* 16: *Jac. B. R.* But by the Statute of 6 *R.* 2. *chap.* 2. the title whereof is this, [*Writs of Debt, Account, &c. ſhall be commenced in the Counties where the Contracts were made*;] and the Act it ſelf is thus, [*To the intent that Writs of Debt and Account, and all other ſuch Actions, be from henceforth taken in their Counties, and directed to the Sheriffs of the Counties where the Contracts of the ſame Actions did riſe: It is ordained, That if from henceforth in Pleas upon the ſame Writs it be declared, That the Contract thereof was made in another County then is contained in the Original Writ, that then incontinently the ſame Writ ſhall be utterly abated.*]

The Defendant in Debt upon a Bond, pleads this Statute of 6 *R.* 2. and that the Bond was not made in *L.* as in the Writ is alleaged, and prays that the Plaintiff being preſent in Court, may be examined upon it; who thereupon was examined in Court upon his oath, who confeſſed upon his oath that it was made at *H.* in the County of *C.* whereupon it was adjudged, that the Plaintiff ſhould take nothing by his Writ, &c. 9 *H.* 5. *R* 109. *Old book of Entries*, 183. *Cromp. Jur. Courts*, 101. *B. F. N. B.* 116. Yet nevertheleſs the Law is held to be, and the practice is at this day, That one may lay a Tranſitory Action, as Debt, Detinue, Annuity, or Account, &c. in what place he pleaſeth; and ſo the Plaintiff uſeth to do. And accordingly it was held by Juſtice *Dodridge*, *Hil.* 16. *B. R.* for (ſaid he) the Statute was never put in ure. And ſo it is held in *Coo. upon Lit.* 282. *Perk. Grant* 80: *Broo. ch.* 451. *Kitch.* 180. 136. That in an Action brought for Tranſitory things, as beating a man, or the like; the wrong being done in one Town, the Plaintiff may alleage it to be not only in another Town, but alſo in another County; and the Jury upon *Not guilty* pleaded are bound to find for the Plaintiff. And in theſe caſes, if the Plaintiff lay the thing to be done in another place, the Defendant may not traverſe it, and ſay it was done in another place, and not the place ſet down in the Declaration, unleſs there be ſpecial cauſe of Juſtification, which doth extend to the place: As if a Conſtable of a Town in another County arreſt a man for the breaking of the Peace, and the Action being laid in another County, there he may traverſe the County, but withall he muſt add, *And all other places ſaving the Town whereof he is Conſtable.* So for taking of goods, damage feſant in another County, *Coo. upon Lit.* 283, 282. A Leaſe for years was made of land in *London*, and the Leſſor brought debt for the Rent againſt the Aſſignee in *Middleſex*; this is not well brought, by the opinion of the whole Court. Debt for Rent upon privity of Contract, may be brought in any County: but if it be upon privity of Eſtate, as by the Grantee of the Reverſion, or againſt the Aſſignee of the Leſſee, it muſt be brought in the County where the land is, *Hughs Rep.* 335. But if an Action be brought againſt an Officer, as Juſtice of Peace, Conſtable, Churchwarden, Surveyor of High-ways, or the like, for any thing done about his Office, it muſt be laid in the County where the fact was committed, or upon Trial it will go againſt the Plaintiff, 21 *Jac.* 12. *Ord.* 3. *March*, 1654.

Sect. 9.

The

The like is the Law upon an Action brought againſt a man for doing any thing under any Ordinance of Parliament. *Ord.* 2 *Decemb.* 1646. *Coo.* 2 *par. Inſt.* 231. For the place where Criminal Actions may be laid and tryed, See *Stat.* 17 *H.*8.4. 28 *H.*8.15. 33 *H.*8.12.23. 2 & 3 *Ed.*6.24. 2 *H.*5.5. 11 *H.*7.9. 9 *H.*5.7. and the new Law, 20 *Septemb.*1649.

For anſwer hereunto, take theſe things:

8. Where the Plaintiff may join ſeveral cauſes of wrong in one Action; and where Plaintiffs or Defendants may be joined in Action, or not.

1. In Perſonal actions one may comprehend ſeveral cauſes or wrongs in one Action or Writ, ſo as they be of one nature, and againſt one perſon: as Debt and Detinue may be joined together; and one may bring one Action of Treſpaſs for ~~divers~~ ſeveral Treſpaſſes done in divers places, and at divers times. So for divers Treſpaſſes one after another in the ſame place, the Plaintiff may have relief by one Writ with a *Continuando*, (that is) that divers times continuing from ſuch a time to ſuch a time he did Treſpaſs him, *Coo. upon Lit.* 257. *FNB.*91: And yet it hath been ſaid that this cannot be, except the Plaintiff make a regreſs after his firſt entry, *Baron Henden at Glouceſter-Aſſizes*, 17 *Car.*

2. So one Action of the Caſe may be brought for divers *Aſſumpſit's*; and ſo may one Action of Waſte be brought for divers Waſtes, done upon divers lands, granted by divers Leaſes. But if the cauſes and wrongs be of divers natures, as Debt and Treſpaſs, and the like, albeit they be againſt one perſon, yet they cannot be joined together in one action, *Coo.*8.87. 3 *H.*4.13. 11 *H.*6.18.

3. So likewiſe in Real actions which are founded upon a wrong or deforcement, and doth not comprehend any Title in them, there the Demandant may demand in one Writ or Action divers lands and tenements which came to him by divers titles; as where divers Manors deſcend to me from divers anceſtors, and I am diſſeiſed or deforced of them, I may have one Writ of Right or Entry into the nature of an Aſſiſe, or an Aſſiſe, and comprehend all theſe Rights in the ſame Writ. But if I bring a Writ of Entry *ſur diſſeiſin*, made to my Mother and my Aunt, Copartners in Fee-ſimple, the Writ ſhall abate, becauſe the Title is by ſeveral Anceſtors, *Coo.*8.87.

4. The Plaintiff brought an Action of Debt for 3*l.* 18*s.* againſt the Defendant and his wife, and declared for 39*s.* upon a Contract of the wives, *dum ſola fuit*; and 39*s.* upon an *In ſimul computaverunt*, with the husband only, and after iſſue: *Nil debet* found for the Plaintiff, Judgment was ſtaid for Error, *Hobard* 258.

5. So if the Defendant be by one Writ ſued for one thing as Executor, by reaſon of the buying of the Teſtator, and for other things of his own buying; and declare, That upon an account the Executor being found in debt to him theſe ſums, promiſed him payment; this is not good in one Action, for the Defendant is to be charged in two manners, *Hob fol.*120. *pl.*115. And yet in *Hobards Reports*, *fol.*8. an Action of the Caſe was brought for ſlander about Murther, and a Conſpiracie to take away his life for it, in one Writ; and in a Writ of Error brought, wherein divers other Exceptions were moved, no Exception was taken to this; it ſeems therefore to be good.

6. Two or more Plaintiffs may not ſue in one Action for ſeveral Cauſes, though of the ſame kind: And therefore two cannot join in one Writ to ſue upon two Bonds for Debt due to them, or to ſue one man for Treſpaſſes. But if two or more have cauſe to have one Action, as if one Bond or *Aſſumpſit* be made to two or more, in this caſe they may and muſt ſue all together. And if two men have more lands or goods together in joint-tenancie, and thereby wronged in it, regularly they muſt ſue jointly in one Action for it; and if they be Tenants in Common of lands, in a Perſonal action, as for a Treſpaſs or the like wrong, they muſt ſue jointly; but in a Real action they muſt ſue apart, *Cook upon Lit.*195,196,198.

7. Nor can one man ſue ſeveral Defendants in one Writ, in Actions of the ſame nature, as for ſeveral Treſpaſſes; but if one Treſpaſs be done by divers, the Plaintiff may make it joint or ſeveral, as he pleaſeth. *Coo. upon Lit.*331,332. And yet two that join in a Treſpaſs, do ſo make one Treſpaſſor, that one of them is anſwerable for his fellow; and if they be ſued in one Action, they may ſever in Pleas and Iſſues, yet one Jury muſt aſſeſs damages for all, and there ſhall be but one ſatisfaction, and a Releaſe

Releaſe to one will diſcharge them all; and as to the damages, he that is no party to the iſſues ſhall have an Attaint as well as his fellows: And if they be ſued in ſeveral actions, though the Plaintiff may make choice of the beſt damages, yet if he take one ſatisfaction, he can take no more; and if he go about to take ſatisfaction twice, an *Audita Querela* lieth. *Hob. Rep.* 91. *See before* 3. *See more in Brownlow's Rep. fol.* 20.

For this take theſe things.

Sect. 9. 9. Where an Action may be barred by a former Action had for the ſame thing, or not.

1. When one is barred in any perſonal action by Judgment upon Demurrer, or upon Confeſſion, or upon Verdict; this is a bar to him for the ſame thing in any other action for ever. *Expedit reipublicæ ut ſit finis litium.* 2. And in actions real where a man is ſo barred in any action, by this he ſhall be barred in the like action, or any action, or any action of the ſame nature. But in this caſe the party againſt whom the Recovery is, may notwithſtanding have an action real of a higher nature, *Coo.* 6:7. And therefore it is a good plea in Treſpaſs to ſay, that the Plaintiff in another action hath recovered againſt him for the ſame cauſe. So a Recovery againſt another, if it be for the ſame thing, and execution made, which gives ſatisfaction. *Trin.* 3. *Jac. B.R. Brown and Wotton.* 3. But a Recovery or Bar in an action popular by Covin, ſhall be no Bar to an action ſued with good faith, *Stat.* 4. *H.* 7. *ch.* 20. 4. A Bar in one *Ejectione firme* is a Bar in another brought for the ſame Ejectment, but not for a new Ejectment, *March* 59. *pl.* 91:

10. Remedy for him who is cauſeleſly vexed.

1. If one do malitiouſly vex another, and cauſe him to be arreſted or attached at the ſuit of one, where there is none ſuch, or without his conſent, he ſhall be impriſoned ſix moneths without Bail, and not enlarged till he have ſatisfied the party grieved his treble damages, and 10*l.* forfeiture, *Stat.* 8. *Eliz.* 2. See *Accuſation:* 2. If one be twice arreſted for the ſame cauſe, this is a miſdemeanor puniſhable in the Plaintiff, *Goldsb.* 30. *pl.* 5.

The Proceedings of Law in Actions, and the Terms concerning Pleading, are theſe which follow.

Circuit of Action, what it is.

Circuit of Action, is a Term of Law ſignifying a longer courſe of proceeding to recover the thing ſued for, then is needful. *See for this more in the Terms of the Law.*

Appearance, what it is.

Appearance, is where a Tenant or Defendant in any Action doth appear and ſhew himſelf in perſon or by Attorney in the Court where the Action is ſued, to anſwer the Action and defend the Suit. And the not appearing by the Tenant or Defendant at the day he ought to appear, is called a Default.

Default, what.

Saver of Default, what.

Saving of a Default is, where ſomething is or may be ſaid or done to ſave the default of another that ought to appear in any Action; or when a man cometh after his default, and ſheweth good cauſe why he did it.

Eſſoin, what.

Eſſoin is, where an Action is brought, and the Plaintiff or Defendant cannot well appear at the time he is to appear in Court, for ſome ſpecial cauſe, ſickneſs or the like, allowed to him by Law for a good excuſe; and this doth ſave his default for this time.

Fourcher, what.

Fourcher doth ſignifie a ſhifting, delay, or put-off by a Plaintiff or Demandant in a Suit.

Departure in deſpight of the Court, what.

Departure in deſpight of the Court, is when the Tenant or Defendant doth appear to the Action brought againſt him, and hath a day over in the ſame Term, or is called after, though he had no day given him, ſo that it be in the ſame Term, and he do not then appear, but make default.

Count or Declaration, what.

The *Declaration* or *Count* is the ſhewing in writing of the grief and complaint of the Plaintiff or Demandant againſt the Tenant or Defendant, wherein he ſuppoſeth to have received wrong.

Continuance, what. *Darrein Continuance*, what. *Dies datus*. *Ex aſſenſu partium.*

Continuance of a Suit, is the putting of it off from time to time by the Plaintiff or Demandant, to give it a being: And the laſt day given for this prorogation is called *Darrein Continuance*; when the further day is given by the Court, it is called *Dies datus*; and when it is by the agreement of the parties, it is called *Ex aſſenſu partium.*

Continuando. *Continuando*, is a Term uſed in an action of Treſpaſs, whereby the Plaintiff doth ſuppoſe the Treſpaſs to be continued from ſuch a time to ſuch a time.

Adjournment, what it is. *Adjournment*, is when any Court is diſſolved, and aſſigned to be kept at another day or place.

Imparlance, what it is. *Imparlance* is the deſire of the Defendant in the Suit after the Declaration put into the Court, and the Courts Order thereupon, that the Defendant ſhall have a longer day to anſwer the matter. And this is alſo by the conſent of the parties.

Journeys Account. And this alſo is by ſometimes *Journies account*, which is a kind of continuance of a Suit begun and interrupted.

Diſcontinuance, what it is. *Diſcontinuance* of a Suit, is the interruption or breaking of a Suit; which being done, the Plaintiff is without a day, and muſt begin his Suit again.

Miſcontinuance, what it is. *Miſcontinuance* of a Suit, is where a Suit is continued, but not well continued: By this alſo the Suit is determined, and the Plaintiff is put to begin anew.

Retraxit, what it is. *Retraxit*, is where the Plaintiff in a Suit comes in perſon into the Court alone, or with the Defendant, and ſaith he will proceed no further: This now is peremptory, and a perpetual bar to him.

Nonſuit, what it is. *Nonſuit*, is where the Jury is ready to appear, or to give up their verdict, or when the parties have demurred in Judgment, and have a day given them further; and at that time the Plaintiff being called, doth wilfully make default and renounce his ſuit. This is always after appearance.

Sect. 10. *Abridgment of a Plaint or Demand, or Plea.* *Abridgment* of a Plaint, Plea or Demand, is a form in pleading, whereby the Demandant-Plaintiff is put to, and doth abridg or aſcertain his demand. But of this and of all the reſt of the particulars before named, ſee the Firſt Part of the *Marrow of the Law*, Chap 58.

Pleading, what. *Pleading*, taken largely, doth ſignifie all the ſayings of the parties to a Suit, after the Declaration put in; that is, all that is contained in the Bar, Replication, Rejoinder, Surrejoinder, &c. But more properly and ſtrictly, it is taken for the Anſwer or Defence of the Defendant to the Declaration of the Plaintiff. And ſome kind of Pleas are called Exceptions: And when the Plea is ſuch an Anſwer, as it doth deſtroy the Action of the Plaintiff for ever, then it is called a Bar.

Plea or *Defence.* *Exception.* Bar, what it is.

Abatement of a Writ or Plaint, what. *Abatement* of a Writ or Plaint is, where a Writ, Plaint, or Avowry is brought, wherein there are any of the Cauſes of Abatement; then the Defendant finding fault with it, and taking Exception againſt it in time, may by Pleading or Motion deſtroy it, and put the Plaintiff to begin his Suit again.

Nihil dicit, what. *Nihil dicit*, is a failing to put in Anſwer to the Declaration of the Plaintiff by the day aſſigned: which if a man do, Judgment will be given againſt him for ſaying nothing to the contrary.

Non ſum informatus, what. *Non ſum informatus*, is a formal Anſwer put in of courſe by an Attorney in defence of his Clients ſuit, by which he leaveth the ſame undefended, and ſo Judgment paſſeth againſt him.

Nihil debet, what. *Nihil debet*, is a general Anſwer uſed to an action of Debt without a Specialty, whereby the Defendant doth ſay, that he doth owe nothing to the Plaintiff.

Not guilty, what *Not guilty*, is a kind of Plea uſed to actions of Treſpaſs and ſuch like actions, whereby the Defendant doth abſolutely deny the thing wherewith he is charged.

Riens arere, what. *Riens arere*, is a kind of Plea uſed to an action of Debt upon arrearages of Account, whereby the Defendant doth alleage that there is nothing behind.

Faint action or pleading, what. A *Faint Action* is, when the Writ is true, and yet the Plaintiff by Law can recover nothing by it. And a *Faint Plea* is a covenous kind of Plea to deceive a third perſon.

Bewpleader, what it is. *Bewpleader* is a Writ in the nature of a Prohibition, to forbid the Sheriff to do ſomething he had been uſed to do. But it is now out of uſe.

Dilatory plea, what. A *Dilatory Plea* is a Plea that makes a delay and put-off in the matter, and is not to the matter.

Colour, what. A *Colour* is a fained matter, which the Defendant in an action of Treſpaſs or Aſſiſe uſeth in his Plea, by which he giveth the Plaintiff a ſhew of good matter, though in truth he have none; and the end of it is to bring the matter to be tried by the Judges, and not by the Jury.

A *Forrein plea*, it ſeems, is ſuch a plea as is not triable in the County where it is made. *Forein plea*, what it is.

A *Double plea*, is where the Defendant in an action pleadeth a plea wherein there are two matters, either of which is a ſufficient bar to the action of it ſelf. *Double plea*, what it is.

Modo & forma, are words of art in pleading, when the Defendant in his Anſwer denieth the thing laid to his charge to be done in manner and form as is declared. *Modo & forma*, what it is.

Negativa pregnans, is where the Defendant to an action pleadeth ſuch a negative plea, which includeth in it an affirmative plea alſo. *Negativa pregnans*, what.

Proteſtation is a form uſed in pleading, when one will not directly affirm or deny any thing which is alleaged by another or by himſelf; or a defence and ſafeguard to the party which maketh it, from being concluded by the act he is about to do, that iſſue cannot be joyned upon it. *Proteſtation*, what.

Que eſt meſme, or which is the ſelf-ſame thing; It is a word of art uſed in an Action for a direct Juſtification of the very act complained of by the Plaintiff as a wrong. *Que eſt meſme*, what.

Monſtrance is a form of pleading, when one makes uſe of a Deed in a Court as Plaintiff or Defendant, that he ſaith he is ready to ſhew the Deed, for it muſt be ſhewed forth in Court, *Monſtrance de fait.*

Que eſtate, it ſignifieth a plea whereby a man intitling another man to lands, &c. he ſaith, that the ſame eſtate that the other hath, he himſelf hath from him. *Que eſtate*, what.

Action of the Writ, is a kind of pleading whereby one ſheweth ſome matter whereby he ſheweth the Plaintiff hath no cauſe to have that Writ which he hath brought, and yet it may be he may have another Writ or action for the ſame matter. *Action of the Writ*, what.

Uncore priſt, or *yet ready*; it is a form of pleading uſed by a Defendant in an action being ſued for a debt due at a day paſt, to ſave the forfeiture of a Bond; ſaying, That he tendred the money at the time and place, and there was none to receive it; and that he is now alſo ready to pay the ſame. *Uncore priſt*, what.

Traverſe ſignifieth ſometimes to *deny*, and ſo it is uſed in pleading; and then it is made by the words [*without that:*] and ſometimes it ſignifieth to *overthrow* or *undoe:* So a Traverſe of an Indictment, is to deny the point of an Indictment. *Traverſe*, or *Sans ceo*, what.

Confeſs and avoid, is a form of pleading, when the Defendant doth by his anſwer confeſs the effect of the Plaintiffs charge, but by ſome new matter he doth avoid it and put it from himſelf. *Sect.* 11. *Confeſs and Avoid*, what.

Concluſion of a Plea, is the latter part of the pleading in the Declaration, Bar, or Replication, which is and muſt be apt according to the precedent matter: As if the Suit be upon a Deed, and he hath pleaded in avoidance of it, then he demand the Judgment of the Court if it be his Deed; and if it he hath pleaded in diſcharge of the Debt, then he demands Judgment if he may have that action, and if one plead in abatement of a Writ or bar of an Action, he doth conclude, *And this he is ready to aver.* This is called an Averment. *Concluſion of a Plea*, what. *Judgment ſi fait Judgment ſi action.* *Averment*, what

Replication is, where the Defendant in the Action maketh an Anſwer, and the Plaintiff thereupon maketh an Anſwer to his Anſwer. *Replication*, what.

Departure from a plea or matter, is where a man pleadeth a plea in bar, and the Plaintiff doth reply to it, and he after in his Rejoinder pleadeth or ſheweth another matter contrary or not purſuing to his firſt matter: *Departure from his plea*, what.

Variance is, where one part of the pleading doth not agree with another part thereof. *Variance*, what.

De ſon tort demeſne, or, *Of his own wrong*; are words of art uſed by way of Reply to a plea of the Defendant, whereby he doth charge the other party to do the thing otherwiſe then as he hath ſet forth. *De ſon tort demeſne*, what.

Rejoinder is, where after the Plaintiff in the Action hath replied to the Anſwer of the Defendant, the Defendant doth again make Anſwer to the Plaintiff. And if now after this the Plaintiff ſhall anſwer again to the Defendant, this is called a *Surrejoinder.* *Rejoinder*, what *Surrejoinder*, what.

Jeofaile is, where the parties to any Suit in pleading have proceeded ſo far that they have joined iſſue, which ſhall be tried, or is tried by a Jury: And now it doth appear that there is ſome fault in it, and they cannot go on ſafely; this being ſhewed to the Court, it ſhall be ſtayed. *Jeofaile*, what.

Sect. 12.
Peremptorie, what.
Repleader, what.
Novel Assignment, what.
Interpleader, what.

A *Peremptorie* is an art in pleading that is final, without hope of renewing. *FNB.* 35.

Repleader is, where the pleading in any part of it is bad, and by order of the Court or consent of the parties he is to plead again.

Novel assignment, is a form of pleading in an action of Trespass, whereby a man doth assign more certainty in the place then he did before.

Interpleader is the discussing of a point incidently falling out in the pleading, before the principal cause can have an end.

Counterplea, what.

Counterplea is a kind of Replication against a praying in Aid, desired by or offered to a particular Tenant in defence of a Suit.

Resceipt, what.

A *Resceipt* is, where an Action is brought against a Tenant for life or years, and he in the Reversion comes into the Court and prays to be admitted to join in defence of the Title.

Demurrer, what

Demurrer is a kind of pause upon a point of difficulty in Law arising in the pleading, wherein they can go no further till the Judges have determined it. But of this, and all the rest before, See more in the *First Part of the Marrow of the Law*, *Chap.* 58.

For the several kinds of Actions, see them in their proper places. And for the rest of the Proceedings in Actions, see *Error*, *Trial*, *Judgment*, and other Titles.

CHAP. III.

Of an Action of the Case in general.

Action of the Case, what it is.

AN Action of the Case is a Writ brought against one for an offence done without force; as, for not keeping promise, for breaking trust, for slanderous words, deceit, or the like misdemeanor: And is called an *Action of the Case*, because the whole Case (so much as is in the Declaration, (save only the time and place) is set down in the Writ; and there is no other Action given in the Case, save only in some few Cases where the Plaintiff hath his choice to bring this, or some other Action.

How many kinds of it there be.

This Action is sometimes about *Words*, (that is) if another speak that to, or of me, by which I am any way damnified. And sometimes it is about *Deeds*, and then it is either for not doing what a man ought to do, either by his own undertaking, or the requiring of Law; or it is for doing something he should not do; or it is for doing something otherwise then he should do. That for *Defamation*, is either of Great men, called *Scandalum Magnatum*; or it is of ordinary men. That for *Deeds*, is either upon an *Assumpsit* or Promise, upon a *Nusance*, upon a *Trover* and *Conversion*, upon a *Deceit*, upon a *Conspiracie*; or it is upon some other *Non-feasance*, or *Mis-feasance*. Amongst Slanders and Defamations also, some tend to the disgrace of the person of another, some to the disgrace of the Title of his Land. Those against the person also do some of them tend to the peril of his life, some to his prejudice in his livelihood and estate, and some to his reproach in his name only. *Cook* 4. 92, *&c.* *Dyer* 8. 72.

Sect. 1.

We shall begin with Actions for *Words*; and we will say a little to the Scandal of great men. But first of all we will give you certain general Rules that concern all sorts of *Defamation*, or the Slander of all sorts of men.

A *Defamation* also may be by *Deeds*, as by bringing an Action, or the like.

Of an Action of the Case for Slanderous words.

WE shall first give you in sundry Rules, the general Doctrine of Actions of the Case touching Slanders; and these like the Veins in the Body, run through the Body of all the Cases hereafter following, wherein the words are, or are not Actionable, as they fall within these Rules. And then we shall give you the Cases themselves, as examples answering to these Rules. The Rules are these. General Rules touching this Action.

1. In these Actions for words, the Law doth much heed how the words do sound, and are esteemed amongst the men of the place where they are spoken, whether they be odious in the estimation of men or not. And for this purpose, it is held, that words may be actionable in one Countrey, that being spoken in another Countrey, are not actionable; and this I take to be the most sure and best touchstone of all actionable words.

2. The sense of the words in these Cases, is much looked upon by the Law; and for the finding out thereof, the occasion, subject matter, and coherence of the Discourse must be weighed; *Sensus verborum sumendus ex causa dicendi*, *Coo.* 4. 16. Words that of themselves will bear an Action, yet sometimes being considered *causa dicendi*, (*i.*) By the occasion of the speech, will not bear Action. *March Rep. f* 20. And they are to be taken as they are spoken *Conjunctim & uno halitu*. New Book of *Enteries*, *F* 22. 6.

3. All scandalous words which touch or concern a man in his life, as to say, He is a Traytor, Thief, or the like; or which touch him in his Liberty, as heretofore to have said of one, *He was Villain to J. S.* or which concern a man in Member in any corporal punishment, as to say, *A man hath stoln sixpence*, (which is petit *Larceny*) or the like: Or which scandal a man in his office, or place of trust, as to say to a Judge or Justice of Peace, *He is a corrupt Judge or Justice of Peace*, or the like; or which slander a man in his calling or trade, by which he gets his living, as to say to an Attorney, *You are a cheating knave*; of a Tradesman that lives by buying and selling, *He is a Bankrupt*, or the like; or which tend to the loss of a mans preferment, as to say to a man about to be preferred to a Benefice, *That he is an Heretick*: Or of a Woman like to have a Husband, *That she is a whore*, or the like, if by this means they lose their preferment; or which charge a man to have any dangerous disease, by reason of which he ought to separate himself, or be separate by the Law from the society of men, as to say a man hath the *French Pox*, *or the Plague*, or the like: Or which tend to the slandering of a mans title, as to say, *He hath no estate in his Mannor*, when he is about, and hath need to sell it, or the like: Or which tend to a mans disinheritance, as to say to an Heir to Land, *He is a Bastard*, or the like: Or which tend any way to a mans particular damage. All such words are Actionable, *Coo.* 4. 13, 14, *&c.* *Coo.* 10. 130. *Dyer* 26. 72. This general Rule for the clearing of it doth admit of many Extensions, and many Exceptions and Limitations, which we shall lay down in the Rules that follow: And first of the Extensions.

4. Many words (though of themselves they be not Actionable) yet being equivalent to words that are Actionable, may bear an Action. *Pasche* 15 *Car.* B R. *agreed*; for they may *prima facie*, sound from the mouth of the speaker, in the ears of the hearer, as bad as any Actionable words.

5. It matters not how the words (if they be Actionable) be published or divulged, whether by writing or speech; for the Action is maintenable in both Cases. A man might have been charged in this Action for a slander, by a Bill in the Star-Chamber, and so he may be now by a malicious Indictment, *Coo.* 4 14, 15.

6. It is all one, as to the maintenance of the Action, if the words be spoken or written to the person slandered before his face, or of him behinde his back. *Old Book of Enteries*, *Coo* 4. 14, 15. and *Hobb. Pl.* 292.

7. Nor is it material, whether they be spoken in the second or third person; for the Action is alike maintenable in both Cases, *Coo.* 4. 14, 15, 16.

8. Nor is it material, in what Language they are written or spoken, if the hearers do, or may attain to understand it, *Hobb. Rep. Pl.* 165, 236, 351, 236.

9. Nor

9. Nor is it material, whether the words be uttered by way of affirmation, as *A. is a thief*; or hearſay, or report, as *J. S.* ſaith, *A. is a thief*, and *J. S.* did never ſay it; or by way of Interrogation, as, *Haſt thou been at* London *to change the money thou didſt ſteal from me?* Or by way of negation, when it doth imply an affirmation, as *you are no thief*, or the like; for in all theſe Caſes they are Actionable. *Paſche* 15 *Car. Appletons* Caſe, *B. R. Hill.* 4 *Jac. B. R.* Lady *Morriſons* Caſe. See *March. Rep. f.* 7. *Pl.* 18. One ſaid, *That he would prove that* J. S. *had ſtoln his Books*; or ſay, *I will prove he hath ſtoln my Books, and I will have him before a Juſtice*; it ſeems either of theſe Speeches are Actionable. *March. f.* 19. *Pl.* 44. It lieth for words ſpoken thus, *Haſt thou been at* London *to change the money thou didſt ſteal from me.* It is ſaid it lieth for ſaying to one, *I dreamed this night that* J. S. *did ſteal a horſe*, *March. Rep: f.* 58. *Pl.* 9. But I much doubt the laſt Caſe: It lieth for ſaying, *I do verily think* J. S. *to be a horſe-ſtealer*, *Goldsb.* 186. So for words ſpoken thus, *A Woman told me, that ſhe heard ſay that* J. S. *&c. Goldsb.* 139. *Pl.* 43.

10. Nor is it material, whether they be uttered by way of earneſt, or ſeemingly onely in jeſt, but with a minde to ſlander; for the Action will lie in both Caſes.

11. Nor is it material, whether the man that uttereth them, be ſober, or drunk with Wine, or Paſſion; for the Action lieth alike in both Caſes.

12. Nor is it material, whether the words be delivered in one or more ſentences or ſpeeches.

13. Nor is it material, how the words be uttered, either directly or indirectly, and obliquely; for the Action doth lie alike in both Caſes.

14. The ſlander that doth concern a mans life, liberty, member, or any corporal puniſhment, his office, truſt, calling, or that charge him with a foul Diſeaſe, to cauſe a ſeparation; theſe Actions are maintenable, without averring in the Action any particular damage come to the Plaintiff by the ſlander. *Averment.*

15. This Action may lie for words, though the words in a proper ſpeech cannot be true; as if a Woman ſay to me, *Thou haſt ſtoln my goods*; for ſhe hath no goods, but what is her Husbands adjudge, *M.* 9 *Jac.*

16. If a man ſpeak againſt another, words that are not in themſelves Actionable as that he is a *Rogue*, *Knave*, *Cozener*, *Fornicator*, or the like; yet if the Party can make it appear by proof, he had any ſpecial loſs hereby, he may perhaps have an Action for theſe words: But then he muſt make a ſpecial Averment in his Action of his loſs. Thus much of the Rules of Extenſion: Now to the Rules of Limitation or Exception. *Averment.*

17. When words in themſelves Actionable, are ſpoken too generally, ſo that they are uncertain, they will not then bear an action; as to ſay, *A man deſerves to be hanged*, *M.* 4 *Jac. B. R. He ſeeks my life*, or the like. *Coo.* 4. 15. *Hobb. Rep. Pl.* 196. 332. 3. *Sect.* 2.

18. Words not poſitively affirmative, will not bear an action; as, *I fear you will be charged with Felony, &c. Hobb. Rep. Pl.* 381. Or, *Arreſted for Felony. Hobb. Pl.* 286 or the like. *Hobb. Rep. Pl.* 381.

19. Words of a double and indifferent meaning, when one of the ſenſes is good, will not bear action; for, *Verba accipienda ſunt in mitiori ſenſu*; as if one ſay of another, *He did burn my Barn*, *Coo.* 4. 20. For it may be a Barn without Corn; or, *He hath the Pox*; For it may be the ordinary, not the French Pox, *Coo.* 4. 17. For theſe actions are not to be maintained by a ſtrained conſtruction upon mens words, but where the words do clearly import a ſlander. But if the common ordinary and violent ſenſe, and intent, be the worſt, that ſenſe ſhall be taken, as *A. had the uſe of her body*, this is to be taken in the worſt ſenſe, *Hill.* 4 *Jac. B. R. Hobb. Rep. Pl.* 350. 236.

20. Words of a doubtful meaning, that have no clear and certain Intendment, eſpecially if they be inſenſible, will not bear an action; as to call one *filching fellow*, *Coo.* 4. 15. Or to ſay, *He ſmells of a murder*, *Hobb. Rep. Pl.* 350. or the like. And yet if they have a bad Intendment in the Countrey where they are ſpoken with an Averment thereof, they may be Actionable, *Hobb. Rep. Pl.* 394. 323.

21. Actionable words may be qualified, and made unactionable by ſubſequent words;

words; as, *Thou art a Thief*, [*for*] *thou haſt ſtollen a Tree, my Apples, or Corn*, or the like. But if he ſay, *Thou haſt ſtollen my Wood out of my Barton, Corn out of my Barn*, or the like; theſe words are actionable. *Hob. Rep. pl.* 97. *pl.* 406. *Coo.* 4. 19. *Hob. Rep. pl.* 381. 406.

22. Words that do not import an act, but an intent or inclination to a thing, are not actionable, *Coo.* 4 19. To ſay, *He is a Thieviſh fellow*; *He had a mind to have killed me*, *Coo.* 4. 16. And yet if that intent be an offence puniſhable, as an intent of Treaſon is, the words are actionable. And therefore adjective words, as to ſay, a man is a *Thieviſh*, or *Traiterous*, or *Seditious fellow*, are not actionable: and yet if they be ſuch as import an act done, as *Perjured Knave*; or the like ſlander in a mans Office, as to a Judge, *Corrupt Judge*, *Bribing Knave*; or ſlander to a mans Trade, as to a Tradeſman, *He is a Bankrupt fellow*, or *Bankruptly fellow*, or the like, theſe words are actionable.

23. Words that are impoſſible, are not actionable; as to ſay, *He is perjured, and that may be proved by ſtakes, &c.* *Coo* 4. 19. *My Mare doth piſs as good drink as* J. S. (being a Brewer) *makes*. *Mich.* 15 *Car. B.R.* or the like.

24. When it doth appear in the action brought, that the words ſpoken are no damage to the Plaintiff, no action will lie upon them: as when he ſaith, *Thou haſt killed my wife, or kinſman*; and the Record ſhews him or her to be alive, *Coo.* 4. 16. *Hob. Rep pl.* 11. But if it appear not upon Record, ſome ſay the Plaintiff muſt aver it, or his action is not well laid; others ſay the Defendant muſt ſet it forth, and this is the ſafe way, and for this there ſeems to be better reaſon, *Hob. Rep. pl.* 11. *March Rep.* 110 *pl.* 189.

25. Words that are uncertain in themſelves, will not bear action, as to ſay, *Thou haſt taken away the money of* J. S. for it may be done without Felony, *Hob. Rep. pl.* 11. *Thou haſt taken away my money*, *Hob. pl.* 136. and theſe cannot be made certain by an *Innuendo*. But to ſay, *Thou didſt kill a woman great with child, innuendo A. uxor eujuſdam Defunct.* was ruled good, *Mich.* 2. *Ja. B.R.* And *A.* ſued *B.* for ſaying, *My Brother* (*innuendo* the Plaintiff) *is perjured*; and upon *Not guilty* pleaded, and Verdict for the Plaintiff, it was adjudged good, for theſe words are certain in themſelves: not like to this, *One of my brothers is perjured*. *Wiſeman's* Caſe, *Mich.* 3. *Ja. B.R.* See for the *Innuendo*, *Brownl.* 1. *par.* 7: 13. 9. 10. *Innuendo.*

26. When the perſon charged is uncertain, no action will lie; as if one without any other ſpeech precedent, ſay, *One of the ſervants of* J. S. *is a Thief*, and he have divers ſervants, or the like, *Coo.* 4. 17. *Hob Rep. pl.* 351. and yet words ſomewhat uncertain at firſt, by an Averment and the Verdict of a Jury may be made certain, in caſe where they are ſpoken of one man in certain, as, *My brother is perjured*, and averred it was meant of him, and the Jury found it ſo, *M.* 3. *Ja. B.R. Wiſeman's* Caſe. *Hob Rep pl.* 350. So likewiſe when the thing charged is uncertain, no action can lie for the words, *Hob. Rep. pl* 145. 119. *Coo.* 4. 25. To ſay, *This boy is a thief*, of *J. S.* then preſent, is certain enough, *Brownl.* 1. *par.* 2. If two men ſpeak together of *J. Syms* and *W. Syms*, and one of them ſaid, *Theſe* Symſes *make Half-Crown peeces*; this is certain and actionable: Otherwiſe it is if he ſay, *The Symſes, &c.* for this is incertain, *Hughs Rep.* 391. So if there be divers Defendants in a Suit, and he ſay, *Theſe Defendants did, &c.*

27. When there be actionable words ſpoken amongſt others, but upon the whole diſcourſe it appeareth the party did not intend them in a ſlanderous ſenſe, theſe words are not actionable. As if their dialogue be about killing of Hares, and one ſaith, *He killed ſix in one day*, and thereupon the other ſaid, *He is a Murderer*; theſe words here will not bear an action. So if one ſay to another, *Thou art a Traitor, for I truſted thee to buy Land for me, and thou boughteſt it for thy ſelf*: Or, *Thou art a Thief, for thou robbedſt my Orchard of my Apples*. And if in this caſe the party ſue upon thoſe ſingle words, and name not the reſt, the Defendant may in his plea ſhew all the words ſpecially, or he may plead *Non culp. modo & forma*, and give the ſpecial matter in evidence; or he may traverſe theſe words, and juſtifie the ſpeaking of the words as they were, or he may upon the evidence have the words found ſpecially, as he ſhall ſee cauſe, *Coo.* 4. 13. or he may plead Not guilty to a part, and juſtifie the reſt. *N. B. of Entries*, *f.* 24. *a.* 25. *a.* 26. *a.* 27. *a.*

28. The

28. The words ſpoken, though actionable, muſt be ſpoken in the hearing of ſome body, or elſe the action will not lie; the Writ doth ſay ſo, *In præſentia quamplurimorum ligeor. &c. Hob. Rep. pl. 63.* And (as ſome ſay) they muſt be ſpoken in a language that the hearers do underſtand; and therefore if they be ſpoken in *Welſh*, that no action will lie, unleſs one of the hearers do underſtand *Welſh*: and ſome Judgments are on this ſide, and others hold the contrary, and (in my opinion) upon better reaſon; for a man may call another *Thief* in Latine or Welſh, in the hearing of ſuch as underſtand it not, but they may remember the word and ask the meaning, and ſo a man may be grievouſly ſlandered without remedy. And yet it is held, if a man ſend or give a ſlanderous Letter to the party ſlandered, or ſpeak ſuch words in one mans ear only in private, both theſe are actionable, *Hil. 38 Eliz. Cromp. Jur. 13. Hob. Rep. pl. 63. 276.*

29. The Charge muſt be falſe, for the Writ is *Falſo & malitioſe*, and ſo it muſt be, or it is not actionable; for if the thing that he is charged with by the words be true, the Defendant may juſtifie it; but he muſt ſee he do not plead Not guilty, but make a ſpecial Juſtification.

30 The words muſt be ſpoken purpoſely; and therefore it is conſiderable here, *quo animo* they are ſpoken: for the Writ is *malitioſe*, and ſo it muſt be, or the words are not actionable. And therefore it is held, that if a Miniſter preaching, recite a Hiſtory; or a Lawyer pleading, do innocently and pertinently ſpeak words whereby a man is charged with a crime, and it proye falſe, this is not actionable: So if one adviſe his friend to forbear the company of *T. S.* for he hath the Pox, &c. this is not actionable, 40 & 41 *Eliz. C. B.* And yet if ſuch men ſhall make this but a cloak of their malice, *contra*: and circumſtances will clear it with what mind he did it, *Mic. 31 Jac. Brook's* Caſe. *Hob. Rep. pl. 399.*

31. If the ground of the damage do not appear in the action, no action will lie; as to ſay a man did *Cozen by falſe weights*, and do not ſay he is a *Tradeſman*, or getteth his living by buying and ſelling, *M. 17. Car. B. R.*

32. When it doth not appear that he that ſpake the words had notice of the ground or occaſion of the offence, no action will lie: as, *A. hath Thieves in his houſe*; for he may not know it.

33. If this ſlander be in a courſe of Juſtice, and be not malitious and touch a mans life, it is not actionable, *Kelw. 26.* And therefore it lieth not againſt a man for ſuing a Writ of Forgery of Falſe Deeds, or exhibiting Articles againſt a man for his good Behaviour, *Coo. 4.* Nor doth it lie againſt a man for putting in Articles againſt a Maſter of Chancery or Juſtice of Peace, to have the good Behaviour, though the things be falſe. But if he begin there, and give over there, and then begin elſwhere out of courſe, it is otherwiſe, *Brownl. 1 par. 3, 4. 2 par. 100.* It had lien againſt a man for ſlanderous matters (wherein the Court had not juriſdiction) put in a Bill in Star-chamber, *Brownl. 2 par. 100. Hughs 444.* But herein let the party take heed he go not out of the Rode of Juſtice, nor ſay more herein then is neceſſary. For if a Robbery be done, and common report is that *J. S.* hath done it, he may arreſt him; but if he ſay he hath done it, this is actionable: So if he tell abroad in Taverns the ſame thing, here he may be made liable to action by it, *March. 76. pl. 119. Hob. Rep pl. 105, 238, 381, 71, 112.* So one may indict another for ſuch a thing: But if I indict a man for Felony upon ground, this is juſtifiable; if I ſay he hath done the Felony, and it be not ſo, or I will ſpeak of it in an Ale-houſe, I may be charged in this action for a ſlander; and I cannot juſtifie the ſpeaking of ſlanderous words upon a fame, arreſt, impriſonment, no nor upon Indictment; for if I juſtifie, I muſt prove he is guilty of it. And yet if there be malice, and a conſpiracie in a courſe of Juſtice to take away my life, here I may have an action of the Caſe for the ſlander and vexation. As if two or more conſpire to indict me for a Felony, and I be on a Trial *legitimo modo acquietatus*, I may have a Writ of Conſpiracie againſt the Indictors. And if any man procure me falſly and maliciouſly to be indicted, arreſted, and impriſoned, though I be not acquitted, I may have an action of the Caſe, *Paſch. 3 Jac. B. R. Roll. 372. Hob. R. pl. 11.* But if upon the Trial there do appear any probable cauſe for the Indictment and proſecution, this action will not lie, *Hob. Rep. pl. 350.*

34. Where

Sect. 3.

34. Where any thing is the cauſe or ground of action, or tends neceſſarily to the maintenance of it, this thing muſt be averred to be, or not to be, as the caſe requires, or the action will not lie: As if one ſay, *My ſon ſtole his Hens*; in his ſuit he muſt aver he is my ſon, *Mich.* 14 *Car. B.R.* If I ſay, *He that dwels in the next houſe to I.S. one R.L. did rob me*; if he ſue, he muſt aver he dwels in the next houſe to *I.S. Paſch.* 7 *Jac. Clark's* Caſe. So if I ſay, *Pritchard's man robbed me*; if he ſue, he muſt aver he is *Pritchard's* man. See *Cook* 4. 16. *Hob. Rep. f.* 8. *Averment.*

35. If the words in themſelves be incertain, and will not bear an action, as to ſay, *One of my Brothers is perjured*; they may not be made actionable by averment, or an *Innuendo*, as words of a double ſenſe; by an *Innuendo* he meant the worſt ſenſe, as *Pox*, *Innuendo* the French Pox, *Coo.* 4. 17. 20. So to make incertain words certain, *He took my money with a ſtrong hand, innuendo Felonicè*, *M.* 15 *Car. B.R. He forged a Writing, innuendo* ſuch a Deed, *Hob. Rep. pl.* 4. 48. The office of this word is only to contain and deſign the ſame perſon which was named incertain before, as thus: Two are ſpeaking together of *B.* and one of them ſaith, *He is a Thief*; there *B.* in his Count may ſhew, that there was a ſpeech of him betwixt thoſe two, and that one of them ſaid of him, He (*innuendo* the Plaintiff) is a Thief; or elſe to declare the matter or ſenſe of the words themſelves, which was certainly expreſſed before, as thus: *A.* and *B.* ſpeaking of *C. A.* ſaid, *that C. was a Traitor*, to whom *B.* ſaid, *that he was ſo too*; in this caſe if *A.* bring an Action for theſe words, he may ſhew in his Count that there was a ſpeech betwixt him and the Defendant of *C.* and that the Plaintiff ſaid to the Defendant, that *C. was a Traitor*: and that the Defendant ſaid then to the Plaintiff, *that he* (*Innuendo* the Plaintiff) *was ſo too*, [*Innuendo*, a Traitor] in both theſe caſes the *Innuendo* is good, becauſe it doth its office in deſigning of the perſon, as alſo in declaring of the matter or ſenſe of the words which was certain before, *Mich.* 20. *Jac. B.R.* But an *Innuendo* cannot make a perſon certain, which was incertain before, nor alter the matter or ſenſe of the words themſelves, *Coo* 4. 17. See more; *Brownl.* 1 *par.* 7, 9, 10, 13. 2 *par.* 34, 272, 273. It lieth not for ſaying, *He hath ſtollen* 40 *ſtaure of Lead* (meaning Laad in ſtaure) from the Minſter; for it ſhall be intended parcel of the Minſter, *Brownl.* 2 *par.* 84. *Innuendo.*

Out of all which it appears, that in all Caſes where this Action will lie for words, the words muſt have theſe qualities in them.

1. They muſt be particular. 2. They muſt expreſs or imply an affirmation. 3. Sufficient certainty both in the perſons, and thing charged. 4. They muſt be plain. 5. The thing muſt be directly, and in plain terms, and not by inference or argument applied to the perſon charged. 6. The things charged muſt be ſuch as (if true) were againſt ſome Law, and the party may be puniſhed for them, or he muſt have ſome ſpecial prejudice by the words which he muſt aver. 7. The charge muſt be out of a courſe of Juſtice. 8. The words muſt be ſenſible and plain. 9. They muſt be ſpoken in the hearing of ſome body. 10. And in a Tongue that ſome of the hearers do or may underſtand. 11. The thing charged by the words muſt be falſe. 12. The words muſt be ſpoken maliciouſly, and purpoſely to ſlander. 13. The thing charged to be done, muſt be poſſible.

Scandalum Magnatum, is a wrong done to ſome eminent perſon of the Land, as *Duke*, *Earl*, *Baron*, *Chancellor*, *Treaſurer*, *Privy-Seal*, *Juſtice* of the one *Bench*, or of the other, by falſe news, or falſe meſſages, whereby debates and diſcords between them, or any ſcandal to their perſons may ariſe, *Stat.* 2 *R.* 2. *chap.* 5. *Weſtm.* 1. *chap.* 34. *Scandalum Magnatum*, what it is.

In this caſe the party defamed may have his Action in the name of the *Keepers of the Liberties*, and his own, upon the Stat. of 2 *R.* 2. And hereby he ſhall recover damages for the wrong, and the party ſhall alſo be otherwiſe puniſhed. And if the Slander be divulged in the nature of a Libel, it is puniſhable by Indictment; and great Fines are impoſed for this offence, for that the reproach of ſuch perſons is the reproach of the State it ſelf, and of the Commonwealth. *Coo.* 5. 125. *Old book of Entr.* 593. *Cromp. Jur.* 35. 19. 13.

It matters not in what manner the words or reports be publiſhed, whether by ſpeech or writing reported from another, or ſpoken by ones ſelf; or by hanging

Where and for what words or deeds a man may have this Action of *Scandalum Magnatum*, or not.

up a writing in any open place: for publication may be by writing as well as by ſpeech, *Cromp. Jur.* 13.

For the manner.

For the matter.

But if by any of theſe ways ſuch perſons had been ſlandered by theſe, or ſuch like words as follow, they might have been relieved by this means. And this action did lie for theſe words: *You maintain ſedition againſt the Kings proceedings*; or, *You uphold and countenance them that do ſo*, Coo. 4. 13. Or, *You are a Traitor to your Prince, or Rebel againſt him*, Sur. Monteagles Caſe, *M. 9 Jac. B. R.* Or *You are a baſe Lord, and a paultry Lord, and keep none but Rogues and Raſcals like your ſelf.* E. of Lincoln's Caſe, *Trin. 5. Jac. B. R.* Or, *It is your grief that you are a Subject.* Countee of Salop's Caſe, *M.* 40 & 41 *Eliz. B. R.* Or, *You charged them that tranſport, or import Merchandizes to, or from ſuch a place, that they ſhould not pay Cuſtom for it, nor ſuffer the Cuſtomers to ſearch them*, Old Book of Entries, 593. Or, *You have no more conſcience then a Dog; ſo you have goods, you care not how you come by them*, Duke of Buckingham's Caſe, *M.* 4. *H.* 8. *Rot.* 659. Or to a Chief Juſtice, *You are a corrupt Judge*, Cromp. Jur. 35. Or, *You ſaid you would winde my guts about your neck*, Lord Abergavinie's Caſe, *Cromp. Jur.* 13. So alſo it is thought of theſe words, *You are uſed to do things againſt Law, to impound the Subjects beaſts, and keep them in a Caſtle that they cannot be replieved*; or, *You have ſent Commiſſioners to ſpoil the Country.* And generally any words which being ſpoken to an ordinary man will give him an Action, being ſpoken to ſuch an eminent perſon, will give him this Action. But if a man do bring a Suit in a Legal way, or do Legally proceed by Indictment or otherwiſe for any miſdemeanor; as if a man ſue a Writ of *Forger of Falſe Deeds* againſt a Peer of the Realm, or cauſe him to be indicted for a Crime, it is doubted whether for theſe acts this Action be given, *Dyer* 285. *Kelw.* 27. *Cromp. Jur.* 35. Yet for a Conſpiracie to indict theſe perſons, they have remedy as other men have.

It hath been adjudged that theſe Statutes do extend to Extrajudicial, and not to Judicial ſayings or doings. And therefore a man may not be puniſhed for an Appeal of Murder, Robbery, &c. brought againſt a Peer, nor for affirming it to Councel, and the like, though the thing be falſe: For it is a Maxim in Law, That a man ſhall not be puniſhed for ſuing of Writs in the Kings Court, be it for right or wrong. And therefore to have charged a man with any thing falſly in the *Star-chamber*, proper to the Court, while it ſtood, was not actionable: But to have charged one with a Felony there falſly, was actionable, *Coo. 2 par. Inſt.* 228.

Where and what words will bear an Action or not, for others; and how.

For the manner of ſpeaking.

It will lie for words ſpoken thus, *I will juſtifie that* Barns *is a Thief. Trin. 9 Jac. B. R. Barns Caſe. Adjudg.*

It will lie for ſpeaking words thus, *What, I. S. that Thief? Nelſon's* Caſe, *Paſch.* 15 *Jac. B. R.* and *Hardwick's* Caſe, 40 *Eliz. Co. B.* So, *Have you brought my horſe you have ſtoln?* Main's *Caſe Adjudg Trin.* 18 *Jac. B. R.* or, *The twenty pounds you ſtole from me?* So for theſe words, *Thou waſt in the Tower for High-treaſon. Cur. 9 Jac. B. R.* But this Caſe others doubt.

Sect. 4.

It is ſaid it lieth for this, *I did dream this night that you ſtole a horſe.* But this ſeems to be a ſtrange Caſe, and not ſo much as to report ſuch a thing as is falſe. So it lieth for ſaying, *I think in my conſcience A. is a Thief. Adjudg. Hob. Rep.* 152. For ſaying, *Did not you kill I. S.* It will lie for ſaying, *That* I. S. *told me that* A. *was a thief, when* I. S. *never told him ſo M 9 Jac. B. R. Adjudg.* But it doth not lie for ſaying, A. *reported that* B. *did ſteal a horſe*, if it be true he did report it; but then it muſt be ſo alleaged in pleading, *per Juſt. Tanfield Hil. 4 Jac. B. R.*

Averment.

And it is ſaid it will not lie for this, *Will you not leave your ſtealing!* It lieth for ſaying thus, *Haſt thou been at* London *to change the money thou didſt ſteal from me? Mich.* 15 *Car B R.* It lieth for calling one *Thief* in Welſh, or any other unknown language; but then it is ſaid it muſt be averred in the Action, that one at leaſt of the hearers did underſtand it; And it is ſaid it hath been adjudged in the Exchequer-Chamber, that otherwiſe it will not lie. But I wiſh it may be well weighed; for they that hear the words, may carry them, and get the meaning from another that can interpret them; and ſo a man may be grievouſly ſlandered without remedy: And it is all one in reaſon, not to know the men, as not to know the tongue: But if one ſlander a meer ſtranger, that one of the hearers do not, perhaps never ſhall know, is

not

not this actionable? It is doubted of words ſpoken thus, *I am perſwaded thou wouldſt, if thou couldſt, kill the King.* If *I.S.* and my ſelf be ſpeaking together of one *Fox*, and I ſay thus, *Go tell him he is a Thief, and I will juſtifie it*, though *I.S.* never tell him ſo, *M.9.Jac.B.R. Foxes* Caſe.

I did tell Mr. *Carus, That I am neither Traitor to my Prince nor Rebel to my Country*, as *I.S. is*, and theſe words are ſpoken to *Corel*; the words are actionable, though never ſpoken to *Carus*, nor to any but to *Corel* himſelf. *Curia, Mich. 9. Jac.*

The Declaration was, That the Defendant *dixit de præfato* the Plaintiff, *Thou, innuendo* &c. *haſt ſtoln*, &c. and it was adjudged good: For, *dixit de præfato*, is all one with *dixit ad præfatum*, and theſe words may be ſpoken in his abſence, *Stoner's* Caſe, *Paſch.5 Jac. B.R.* and *Dickenſon's* Caſe adjudged *M.20. Book. b. Eadem ratione*, to ſay to ones face, *He is a Thief.* Words in the ſecond perſon, the party not preſent, Actionable.

If one exhibite Articles in writing to a Juſtice of Peace, and write thus, *I.H.* (who was the Informer) *doth charge K:* (who is the Plaintiff) *that he did commit Burglary in breaking of my houſe, and ſtealing of my goods:* an Action will lie for this, though he change the perſon, *adjudg. Paſche 9 Jac. Pets Caſe, B.R.*

If a Miniſter in a Certificate to his Ordinary, where he was of duty to certifie ſome other matter, had inſerted a ſlander, an Action will lie for this, *Reads Caſe, M.7. Jac. B.R.*

To write a Letter in private ſealed to the party ſlandered, unleſs he deliver it to his own hands, is (as it ſeems) actionable; ſo to ſpeak it but in one mans hearing, and bid him keep counſel, *M.9.Jac. B.R. Hob. Rep. pl 63.*

It lieth for ſaying, *You are no Thief, Paſch.15 Car.* but it muſt be intended ironically. It will not lie for ſaying, that *I have Articles againſt you for Felony*, Adjudg. *B.R.* Nor for this, *I have matter enough againſt I.S. about the death of I.S.* Nor, as it ſeems, for this, *I.S. hath found Felony in I.S. and can prove it.* See *Hob. Rep. pl.3.395. Quære* the laſt Caſe.

It will lie for ſaying, *I will prove that you have ſtollen my books or my horſe*, Paſche 15 Car. B.R. So, *I can prove you a thief, and ten men will juſtifie it*, Paſche 5 Jac. B.R. So, *It will be proved by many vehement preſumptions, that I.S. was a plotter of the death of I.R.* Paſche 7 Jac B.R. It is ſaid it lieth for this, *I.S. is a Felon:* To which a ſtander by ſaid, *Take heed what you ſay:* To which he ſaid, *Is not he a Felon that doth conceal Felons, or ſteal trees?* Hil. 17 Jac. Newland's Caſe, *or takes my goods upon Execution? à Fortiori*, if the laſt words be firſt, they are actionable.

And as it is in theſe caſes where the charge is of Felony, ſo it will be where the charge is of a leſſer offence as to the manner of the ſpeech.

It will not lie for ſaying, *One of you three, or one of the company* (where be more then one) *or one of you two* (where two be together) *is a Thief*, Adjudg. *Harris* Caſe. Or one of the ſervants of *I.S.* if *I.S.* have more then one ſervant, or one of my brothers, where I have more then one, *Coo.4 17.* Or one that is near to *I.S.* or about *I.S.* or mine adverſary, *hath done a Felony, or other Act:* For any of theſe words, no Action will lie.

For this is altogether incertain in the party charged to commit the offence, and an Averment will not help here, *Hob. Rep. 375. pl. 351.* And the Defendant in theſe caſes may do well in avoidance of the Action, to ſet forth that there were more in the company. *Incertainty.*

It will not lie for theſe words, *One I.S. ſtole the horſe that was loſt. M.7 Jac. B.R. Reads Caſe.* So, *Stiles ſtole my horſe*, omitting the Chriſtian name: But this laſt may by an *Innuendo* be made good. And yet ſome circumſtances may make ſuch words certain and actionable, as *Mich.3 Jac. B.R.* as if the precedent conference were about one man incertain, or the like.

Wiſeman ſued his brother for ſaying, *My brother* [*innuendo* the Plaintiff] *is perjured:* Upon *Not guilty*, it was found for the Plaintiff, and Judgment given. And this difference taken where the words are incertain, as in the Caſes before. But where they are certain in themſelves, ſo that it may appear that the ſpeaker intended a perſon certain, they may be made certain, as before.

It hath been adjudged also to lie for these words, *Thou didst kill a Woman great with childe, Innuendo* J. *uxorem cujusdam* R. S. *defunct.* Here the offence, and person committing it, are certain, *Mich.* 2 *Jac. B. R.*

Foxcroft sued *Lacy*, and declared, That a talk was between *Walter* and *Gwin* about a suit wherein the Plaintiff and others were Defendants, and therein the Defendant *Lacy* spoke these words, *These Defendants (Innuendo the Plaintiff, and the others) are those that did help to murther* I. S. [meaning *J. S.* deceased] who was murthered by one *T. G.* who was hanged for it: This was adjudged to be Actionable, for words may be certain by reference, *Id certum quod certum reddi potest, Hob. Rep. pl.* 119.

If one say to a Woman, *Your Husband is a thief*; or to a man, *Your Wife is a thief*, this is certain enough, and Actionable: But if he say your Brother, or your son, *Contra*, unless the Plaintiff aver he hath but one brother, or one son, which is himself, *Trin.* 14. *Jac. B. R. per Dodridge.*

Sect. 5. So likewise it will not lie, when there is an uncertainty in the thing charged; as in these cases for saying, *Thou art a false thief, rogue*, or some such like thing, *Brook Action of the Case*, 112. To declare for calling one Thief, or *Verba similia*, is not good; but to declare for calling one Thief, and to say further, *Ac eadem verba sæpius repetivit*, it seems good, *H.* 41. *Eliz. C. B. Goldsb.* 55. *pl.* 11.

It is said it was adjudged not to lie for these words, *Thou wast whipt about* Taunton, *or burnt in the hand or shoulder, for stealing sheep*, *Hills* Case, *Mich.* 8 *Car. B R.* So it will not lie for saying, *Thou art a healer of Felons, or didst strain my Mare*, *Averment.* without Averment that the words have such a meaning in the Country, *Cook* 4. 25.

It is said it lieth not for saying, *Thou hast cozened all my kinred*; 18 *Eliz. B. R.* It lieth not for saying, *Who ever is the falsest thief in the County of* Salop, *what ever he hath stoln*, J. S. *is falser then he.* But these words are Actionable with Averment, that there are Felons within that County, *Haselwoods* Case, *Pasche* 1 *Jac. B. R. Rol.* 107.

It lieth for saying, *Thou stollest a piece from me*, *Appletons* Case adjudged.

No Action will lie for a slander by Indictment, though false, 27 *Ass. pl.* 12. nor for a false *Affidavit* in the Chancery, by which one is imprisoned, *Trin.* 41 *Eliz. B. R. Heires* Case; nor against *J. S.* for taking a false Oath, by which bad Bail is taken instead of good Bail, *Trin* 41 *Eliz. B. R.* Nor for preferring Articles in the Sessions, though false, *Cook* 4. 15. Nor for Articles exhibited before a Master of the Chancery, for to have the good behavior for prosecuting a legal course in the Country, though it be false and unjust, yet this Action will not lie. But the Party is to be punished in the same Court for the misdemeanor, *Trin.* 19 *Jac. B. R. Hunters* Case. But if things be inserted, those Judges have not the Conusance of *contra*, *Cook* 4. 14. And if one Indict another, or charge him legally for a Felony where none is, nor any reason to charge him, here an Action will lie, *Trin.* 14 *Jac. B. R. Dennis* Case. But all these Actions must be *malitiose indictavit*. For a slanderous complaint put into a Member of the Parliaments hands it seems is not Actionable, *Trin.* 21 *Jac.* It lieth against the Husband and Wife, for the Wives saying; *Thou hast stoln me two Cocks*, [*Innuendo, &c.*] These words are Actionable, and shall be taken for *two Cocks*, and the *Innuendo*, and *me*, void, *M.* 9 *Jac. B. R.*

For the matter of the words which hazard a mans life. This Action lieth for calling a man *Traitor, Buggerer, Sodomite, Robber, Murderer, Felon, Thief, Sacriledger, House Robber*, 30 *Ass.* 19. 27. *H.* 7. 14. 21. *Cook* 10. 130. 4. 15. 16. *&c.* 27 *H.* 8. 14. 22. *Dyer* 26. 19. 236. *Newlands* Case. *Church-Robber. Trin.* 7 *Jac. B. R. Beringtons* Case. And so for saying, *A man hath committed Treason, Buggery, Sodomy, Burglary, Robbery, Murder, Sacriledge*, or *Felony*. *Pets* Case.

It lieth not in our Law (as it seems) for calling a man *Heretick*, unless he have some special loss by it. 27 *H.* 8. 14. *Sed Quere. Hob. Rep. in pl.* 276. *f.* 297.

It did lie for saying, *There is no King in* England, *Trin.* 37 *Eliz. Mayes* Case adjudged. *B. R.*

It lieth for saying, *Thou hast spoken words that are high Treason. Atwards* Case.

Or,

Or, *Thou wouldſt kill the King and all his Subjects, if thou couldſt.* This was adjudged. *Sydenhams* Caſe, *Hob. Rep. pl.*152.

It is ſaid it doth lie for this, *Thou art no true Subject*, Sir *William Walgraves* Caſe, *M.* 32, 33 *Eliz. Cook, B. R.* Or, *I am a true Subject, but thou ſerveſt one who is none at all. Sed Quere* at this; for it is ſaid that it lieth not for ſaying, *Thou art no true Subject to the King. Smiths* Caſe. 5 *Jac. B. R.*

It doth lie for ſaying, *Thou art an enemy to the State. Chambers* Caſe. 38 *Eliz. B. R.*

It lieth for ſaying, *Thou waſt partaker with the Rebels in the North, in their Rebellion.* But not for ſaying, *Thou waſt partaker with the Rebels in the North,* and no more.

It lieth not for ſaying, *Thou haſt coyned Gold, and art a Coyner of Gold.* Nor for ſaying, *He did make Half-crown peeces, and did carry a Cloak-bag full of clippings.* For theſe words are altogether uncertain, *Hughs, Rep.* 391. 375.

It lieth for ſaying, *Thou haſt killed* J. S. or *murdered* J. S. or *poyſoned* J. S. If he be *revera* dead, when the words are ſpoken. *New Book of Entries, f.*25. Yet ſee *Brownl.*2. *part.*219.

And here ſome ſay, That the Plaintiff that doth ſue, muſt aver in his Declaration that he is dead. But it is ſaid to be adjudged to lie for ſaying, *Thou haſt poyſoned* J. S. albeit he be not dead. But this is clear, That if it appear by any part of the Record, that the Party ſuppoſed to be killed, is alive, as if the words be, *Thou haſt killed my Wife,* the Action will not lie; and if the Plaintiff do not ſhew him to be dead (as it ſeems by the better Opinion he need not) then it concerns the Defendant to ſhew it in avoidance of the Action, *Cook* 4. 16. 14. *New Book of Entries, f.* 24.

It lieth for ſaying, *She hath ſacrificed a childe, to the intent to kill my Mother. Lock verſus Lock.* But it will not lie for this, *He ſmells of the murder lately done. Dyer* 317. Yet to ſay, *He is infected with the murder lately done,* may be Actionable.

It lieth for ſaying, *Thou haſt poyſoned* J. S. If he be dead, adjudged, *Bumfords* Caſe, *Paſche* 7 *Jac. Cook. B. R.* But againſt this Judgment, *Miles* Caſe; and the reaſon thereof in *Hob. Rep. pl.* 11. is objected, That he doth not ſay he did it *ex ſcientia* wittingly: Hereupon, *March, f.*36. concludes it will not lie. This Reaſon will ſhake other Caſes out of queſtion, as, *Thou art a murderer*, or, *haſt murdered* J. S. or, *haſt killed* J. S. For it may be with giving Phyſick, or otherwiſe, againſt his will, or in doing Juſtice, *&c.* For there is a *Homicide* lawful and juſtifiable. But this is the common acceptance of the word, That he killed him voluntarily, and unlawfully, and therefore I think without queſtion Actionable, See more, *Brownl.* 2. *part,*299.

It will not lie for ſaying, *Thou haſt killed* J. S. *Brownl.* 2. *part.*118.

It lieth for ſaying, *He took my Wife by the hand and ſaid, Thou and I will be married ſhortly; after that he diſpatched his Wife out of the way.*

It lieth for this, *I will call him in queſtion for killing my Aunt, and I doubt not but I ſhall prove it.* Adjudged. 39 *Eliz. Webs* Caſe. *A.* told me, *She poyſoned her firſt Husband,* adjudged to lie for this. *Megs* Caſe.

This Action will lie for calling one *Witch*, and ſo it hath been often adjudged, as in *Lewis* Caſe. *M.* 13 *Jac.* And *Rogers* Caſe. *Trin.* 39 *Eliz.* and *Hil* 4 *Jac. B. R.* And yet ſome Judgments have been given on the other ſide and it hath been doubted. *Hob. Rep. pl.* 155. becauſe there is a good and a bad *Witch.* But I think it is at this day unqueſtionable, and that Reaſon of little weight; for the word imports a foul charge; both of them uſe unlawful means, and have too much familiarity with the Devil. So it will lie for this, *The Devil appears to thee every night in the likeneſs of a man, and thou conferreſt with him, and he giveth thee what thou askeſt; and therefore thou haſt ſo much money.* Adjudged, *Hob. Rep. pl.* 137. 155. So for this, *Thou haſt bewitched* J. S. *to death.* So it will lie alſo (as it ſeems) for calling one *Conjurer*; for the *Witch* and *Conjurer* both deal with the Devil; the *Witch* by agreement, the *Conjurer* by Prayers, and ſuch like powerful means. *Sect. 6.*

It lieth for ſaying, *Thou art a Witch and Inchanter, and haſt bewitched* Strongs *children.* But not for this, *Thou haſt bewitched children, that they are waſted and deſtroyed. Brownl.* 1. *part.*7.

So

So it will lie for saying, *Thou doest confer with an Evil spirit.* But it will not lie for calling one *Inchanter* or *Sorcerer*; for the former have personal conference with the Devil, but these meddle with medicines, and ceremonial forms of words called *charms* without apparitions. It hath been said also, that this Action will lie for calling one *Hag:* but this is doubted by others, unless he can aver that in the language of the place it doth signifie *Witch.*

This Action will not lie for these words, *Thou seekest my life, Coo.*4.16. Nor for these, *Thou didst write a Letter to one,* [*or hire one*] *or give one counsel to kill me, Coo.*4 16. or *wouldest have killed* [*or robbed*] *me, Trin.*4. *Jac. B. R. Tanfields* Case. Or, *Thou wentest about to poyson a child, Eatons* Case. And yet it is said to be resolved in the Exchequer-Chamber in one *Passeys* Case, That it will lie for these last words, *March. fol.*12. And then for all such like words as in the Cases before, which do carry in their sound a foul slander, and of something done. And it is agreed on all sides, that it will lie for these words, *Thou didst lie in wait to rob* [*or to murder*] *me, Pasch.*5. *Jac. B. R.* So for this, *Thou didst procure one to lie in wait to murder me;* Adjudged.

And that in all Cases where the words import an intent, joyned with any overt act or attempt, that these words are actionable; for then the thing is punishable by the Good Behavior or Indictment. And I find it adjudged to lie for these words, *Thou hiredst a Rogue to come with thee to my house to murther me,* Sutton's *Case, Trin.*33 *Eliz. B:R.* And it was said to be adjudged for this, *Thou hast sent one to kill me.* And yet it will not lie for this, *Thou hast procured a perjured Knave to seek my blood,* 32 *Eliz.* Sir *Edw Hastings* Case.

It is said to be adjudged to lie for this, *He sought my innocent blood,* Sir *Edward Hartberies* Case, *B.R.* But this is doubted; for it lieth not for saying, *Thou seekest my life,* Hexts *Case, Coo.*4. Nor for this, *Thou hast procured one to seek my blood,* 32 *Eliz. B.R.* Sir *Edw. Hastings* Case.

It will not lie for these words, *Thou wast the cause of the death of I.S.* Adjudg. B.R: *Prows* Case. Nor for this, *Thou art a blood-sucker, and seekest my blood, Helliards* Case, *M.*37. 38 *Eliz. B.R.* But it lieth for this, *He is a manslayer, and hath lain in wait to kill,* 28 *Eliz. B.R.* adjudg.

It is said it lieth not for this, *He is a Felon, for he knoweth of a murder and concealeth it.* Nor for this (as is said) I.S. *gave* W.S *money to shift him away assoon as he had killed* R.T. *Parrants* Case, *B.R.* But I must beg leave to suspect both these Cases, for the words are very scandalous; and I have seen the Report of a Case where it is said to be adjudged to lie for these words, *Thou art a concealer of Felons, and hast shewed such favor to a horse-stealer. that he and the horse is conveyed away, and I can hang thee if I will. Boudman vers. Tooker, Pasch.*7 *Jac. B.R.* And I have seen a Report, that it lieth for these words, *Thou art a concealer of Felonies, Pendants* Case. *If* I. *had consented to* C.. I.S. *had been dispatched out of the way:* Adjudged to lie for this, as is said, *Cardinals* Case.

It is said it lieth for these words, *Thou wast arraigned at* Warwick-*Assizes for stealing a horse, and didst make good friends, or else thou hadst been hanged, M* 8 *Car. B.R.* And for this, *He was in the Gaol at* Norwich *for robbing one on the High-way,* Sprat *and* Hains *Case.*

And yet in *Hob. Rep. pl.*196. it was agreed not to lie for these words, *Thou wast in* Warwick-*Gaol for stealing a horse* Nor will an Action lie for these words, *Thou hast been indicted for Felony,* or *thou wast impeached for Felony*, or, *thou wast arrested, imprisoned,* [*or in Gaol*] *and arraigned for stealing a horse:* For this may befall an honest innocent man, and these Cases do differ a little from the first Case, *Hob. Rep. pl.*209,289. Nay, it is said that it hath been resolved by two Judges, it will not lie for these words, *Thou hast been in Gaol for coyning, and hast been burned in the hand for it, Trin. Jac. B.R.* But I cannot receive it without doubting of it. See *Brownl.* 1 *par.* 16.

Innuendo. It will lie for saying, *Thou didst burn a barn full of corn, Coo.*4.14. But it will not lie for saying, *Thou didst burn a barn:* Nor may one say, *Innuendo a barn full of corn. Idem new Book of Entries, f.*25. Adjudg.

It

It will not lie for ſaying, *Thou art a breaker of houſes*, *M.9. Jac. Slaughters* Caſe.

It will lie for ſaying, *Thou art infected of Robbery lately done*, *Dyer* 317. and, *thou doeſt ſmell of it.* Or for ſaying, *I was robbed and you were privy thereunto, and had part of the money*, *Goldsb.*137. *pl.*42. So it will lie for ſaying, *You were in priſon in a gaol for ſtealing of Mr.* Piggots *beaſts*, *Goldsb.* 130.*pl.*26.

It will lie for ſaying, *Thou haſt ſtollen my two Cocks (or Hens) or Horſe, or any other goods*, *Trin.*5 *Jac.B.R. Benſers* Caſe adjudg. So it lieth for this, *Thou didſt ſteal my horſe and waſt in gaol for it*, *Hob.Rep pl.*196. So it lieth for ſaying, *Thou art a Steal-gown, and the firſt gown that thou didſt wear thou didſt ſteal*, Adjudg. *New book of Entries*, *f.*23.

It lieth for laying, *Thou haſt robbed the Church of* S. *and taken away the lead thereof*, *Paſch.* 5 *Jac. B. R.* But not for ſaying, *Thou haſt robbed the Church*, without more.

It lieth for ſaying, *He ſhould have been hanged for a Rape, and it coſt him dear*, *M.*39.40. *Eliz.B.R. Redferns* Caſe.

It hath been thought by ſome, that it lieth for theſe words, *Thou didſt like of thoſe who do maintain ſedition againſt the King*, *Coo.*4.13. *Sed quære.*

It lieth for ſaying, *He hath ſtollen a horſe, and it will be proved by twenty witneſſes*, Adjudg. *Hares* Caſe. But it will not lie for theſe words, *He hath ſtollen a Mare*; or, *I.S. is forſworn*, Adludg. *Paſch.*17 *Jac.B.R. Barhams* Caſe. For this is an incertain charge.

It will not lie for theſe words, *It is in my power to hang thee*, 17 *Jac.B.R. Pridhams* Caſe. Nor for theſe words, *Thou haſt deſerved hanging*, *Mich.*4 *Jac.B.R.* and *Paſche* 38 *Eliz. Hollands* Caſe. Nor for theſe words, *If thou hadſt had thy right, thou hadſt been hanged for breaking of the houſe of I.S. Brownl.* 1 *part*, 3. See *Brownl.* 2 *part*, 280.

It ſeems it lieth for this, *I ſtole a Mare, and you knowing the ſame, conveyed her to D. to the houſe of I.S. Goldsb.*132.*pl.*28.

It will not lie for theſe words, *Hugh Hall hath received the three parcels of cloth from the thief again that he did ſteal from him, when there was a felony done. Goldsb.* 119.*pl.*2.

This Action will lie for theſe words, *There is not a purſe cut within twenty miles, but* I.S. *knows of it, and hath a ſhare in it*, *Balls* Caſe. And yet the contrary is ſaid to be adjudged.

It lies for theſe words, *I was rob'd, and thou waſt privy to it, and hadſt part of the mony*, Adj.38 *El.Redfords* Caſe. And it is ſaid to be reſolved to lie for theſe words, *A. hath half my goods, and ſhall be hanged for it*, 8 *Jac. B.R. Long* and *Kings* Caſe. But this I cannot receive for Law: For it is ſaid to be adjudged that it will not lie for theſe words, I. *had forty pounds worth of Plate, and* A. *hath it, and will be hanged for it*, *Trin.*12. *Jac. Kings* Caſe. Nor will it lie for theſe words, J.S. *was robbed of twenty pounds, and* A. *had it, and will be hanged for it*, By two Judges, *Paſch.*9. *Jac. Foord verſ. King.* Nor will it lie for theſe words, I. *was robbed, and* A. *received part of the goods ſtollen, and* I. *could hang him for it*, *Newlins* Caſe, *P.*7. *Jac.* And yet all theſe words import a more certain and foul ſlander then the firſt words do, I. *heard it ſpoken that* I.S. *was one of them that was at* Purnels *Robbery, and that four of them went to his houſe the next morning*, Adjudged to lie, 40.41. *Eliz. R.B. Reads* Caſe: yet ſome doubt of this.

It is ſaid to be agreed, that an Action will lie for theſe words, *A. did ſet on me, and took my purſe from me*, (not ſaying) *in the high-way.* And for this, *Thou didſt ſet on me in the high-way, and took'ſt my purſe from me*, Adjudg. *Stoners* Caſe, *M.*10. *Iac. B.R.* And for this, *Thou didſt meet me on the high-way and askedſt my purſe, and I gave thee five ſhillings for fear*, *Bonds* Caſe. And yet it is ſaid to be reſolved not to lie for theſe words, *Thou tookeſt away my purſe in the high-way, and I will ſwear it. Quære*, for I ſee little or no difference between this and the laſt Caſe; the words carry as bad a report as the former words do. But it ſeems to be agreed that no Action will lie for theſe words, *Thou didſt take away my money*; nor for theſe words, *Thou didſt* *Sect.* 7.

didſt beat me, and take away my money: Nor for this, *Thou didſt take away my money with a ſtrong hand, March. f.59. pl.91.* Or, *thou didſt take away my purſe, and twenty ſhillings in it, Hob. Rep. pl.268.* Adjudged, *Mich.36.37 Eliz. Cook, B R. Lynes* Caſe. It will lie for ſaying, *He hath robbed* J. S. notwithſtanding *J. S.* were never robbed *per Cur. M. 9 Jac. B. R.*

It is ſaid to be adjudged not to lie for theſe words, *I have an action againſt* J S. *who hath ſtoln by the High-way ſide, Denizens* Caſe. 36, 37 *Eliz B R.* This ſeems to me ſomewhat a hard Caſe; and yet *Hob Rep. pl.*382. hath a Caſe ſomewhat like, *I have matter enough againſt him, for* J. S. *hath found forgery againſt him, and can prove it.* The Reaſon ſeems to be taken from the manner, not the matter of the Speech.

It hath been judged to lie, for theſe words, *There is many an honeſter man hanged. And there was a robbery committed, whereof I think him to be one; and I verily think him to be a horſe-ſtealer, Goldsb.*136. *pl.*127.

It lieth for ſaying, *Thou haſt ſtoln my goods, and I will have thy Neck, Brownl.*2. *part.*230.

It is ſaid alſo, it will not lie for ſaying, *Thou art a cut-purſe, Trin.* 17 *Jac. B.R.* For he may be a Glover: So that it will not lie for theſe words, *Thou art a cunning cut-purſe knave*; and this is ſaid to be adjudged, *Trevillians* Caſe, *B. R.* Theſe Caſes ſeem hard to me; for the common and neceſſary intendment of the words, is in the worſt ſenſe; and to call a man *Cut-purſe* (me thinks) is actionable. And it is ſaid to lie for this, *Thou didſt pick five ſhillings out of my Pocket*, adjudged, *Drumers* Caſe. So it will not lie for ſaying, *Thou art a Coyner of money*, or, *haſt coyned money, Trin.* 17 *Jac. B.R.* For it may be his Trade. Nor for theſe words, *Thou getteſt money every day by coyning Gold, M.* 19 *Jac. B. R. Burnels* Caſe.

It will not lie for ſaying, *Thou art a prigging pilfering-fellow, and haſt pilfered away my Goods from my Wife and children*, adjudged *Carter's* Caſe. *M.* 37, 38 *Eliz. B. R.* Nor for this, *Thou art a filching fellow, and haſt filched away Ten pounds from me*, adjudged, *Hob Rep. pl.*323. Nor will it lie for ſaying, *Thou art a healer of Felons*, *Averment.* or, *Thou haſt ſtrained my Mare*; without a ſpecial Averment, that it hath ſuch a meaning in the place, that it doth import a ſcandal. *Brownl.*1. *part.*13.

It will lie for theſe words, *Whoever is a falſe thief in* Gloceſterſhire, J. S. *is* *Averment.* *falſer then he.* But in this Caſe there muſt be an Averment, that there is a falſe thief there, *Hazelwoods* Caſe. *M.* 2 *Jac. B. R.* But it lieth not for theſe words, *I can finde in the Pariſh a falſer knave then B. who was indicted for Felony*; and this knave is *I. S.* in *Hazelwoods* Caſe.

It will not lie for ſaying *Thou art a ſeditious knave*, or, *a thieviſh knave*, or, *a trayterous knave, Cook* 4.19. And yet it hath been ſaid, it was agreed to lie for calling one *Trayterous knave, Hil.* 32 Q. *Ward* and *Thorns* Caſe. But it will not lie for ſaying, *Thou art a rebellious knave*; for this may be upon a Writ of Rebellion in the Chancery.

This Action will not lie for ſaying, *Thou maintaineſt a rebellious knave*, or [*rebellious perſons*] Nor for this, *Thou art a maintainer of thieves abroad and at home, and doſt maintain* J. S. *in ſuch a Caſtle.* And yet it is ſaid, it doth lie for theſe words, *Thou art a maintainer of thieves in thy houſe.* And clearly to ſay, *Thou maintaineſt thieves in thy houſe, to rob thy Neighbors.*

It lieth for ſaying, *Thou doſt harbor and maintain Rebels and Traitors, Goldsb.* 48. *pl.*7. But not for ſaying, *Thou didſt ſteal by the High-way ſide, Brownl.* 1. *part.* 143. And yet it will not lie for ſaying, *Thou keepeſt none but thieves*, [or, *cut-purſes*] *in thy houſe, and haſt their goods, M.* 17 *Jac. B. R.* Nor will it lie for this, *Thou art a favorer of thieves, Dyer* 75. Nor for this, *Thou keepeſt men which rob on the High-way* [or which, *rob me*,] for all this may be unawares. Nor as it ſeems for this, *Thou keepeſt men with intent to rob me.* But it will lie for theſe words, *Thou harboreſt, and maintaineſt traytors, conveyeſt them out of the Realm, and maintaineſt them with money there. Paſche, 29 Eliz. Goldsb.* 48. *pl.* 7. Accord. So it ſeems it will lie for this, *Thou haſt been a ſetter of thieves to rob me*, or, *haſt hired one to rob me:* If I be robbed, this is Actionable, *Hil.* 13 *Jac. B. R.* So to ſay, *Thou haſt received thieves, knowing*

knowing them to be ſo. *Matthews* Caſe. But to ſay, *Thou art a receiver of thieves*, contra.

This Action will lie for theſe words, *Thou haſt houlſtred* [or, *received*] *goods that were ſtoln, knowing them to be ſtoln*; but unleſs it be added, *ex ſcientia*, it ſeems they are not Actionable, *M.* 17 *Car. B. R. Haws* Caſe, adjudged. But if the manner of receipt ſpoken of, were ſuch as is not Felony; the Defendant muſt ſhew how it was for the clearing of himſelf, *March, f.* 16. And yet if one ſay, J. S. *hath ſtoln a horſe, and his ſon is conſenting to it*; it ſeems the ſon cannot have this Action for theſe words, *Trin.* 14 *Jac. Lewkners* Caſe.

It hath been ſaid, it will not lie for ſaying, *Thou haſt ſtoln away my Corn*; be- *Sect.* 8.
cauſe it doth not appear, whether the Corn were ſevered, *Trin.* 37 *Eliz.* And yet divers Judgments are recorded to be to the contrary, as this, *Hil.* 14. *B. R.* for ſaying, *Thou didſt ſteal my Corn, and carry it into the Market*, *Glovers* Caſe. *Paſche*, 7 *Jac. B. R.* and *Paſche*, 40 *Eliz. Cook B. R. Thou art a falſe knave, and didſt ſteal my Corn*, *Harris* Caſe. *Thou art a Corn-ſtealer*, 39 *Eliz. Cook, B. R.* For ſaying, *Thou art a thief, and haſt ſtoln my Corn.* Adjudged, *Kelham* and *Mandes* Caſe, *B. R.* 2 *Jac.* Alſo it is ſaid to be adjudged to lie for this, *He hath ſtoln my Wood*, 5 *Jac. B. R. Litchfields* Caſe. *March. Rep.* 211. *pl.* 248.

It lieth for this, *Male did ſteal my Corn out of my Barn*, *Hil.* 14 *Jac. Cook, B. R.* adjudged. So for ſaying, *Thou art a thief, and haſt ſtoln the Town-beam*; meaning the Town of *Wickham.* But not for ſaying, *Thou art a thief, and haſt ſtoln a Tree*, or, *haſt ſtoln my Maiden-head*, *Brownl.* 2. *part.* 3. *Trin.* 18 *Car. B. R.* And for this, *He hath felonioufly taken my Wood*, *Paſche*, 38 *Eliz. Cook, B. R.* For this muſt be underſtood of Wood cut: But if he ſay, *He hath ſtoln my Tree*, or, *my Trees*, contra; *Arbor dum creſcit, lignum dum creſcere neſcit*, *Trin.* 4 *Jac. B. R. Rot.* 1366. Accord. *March.* 211. *pl.* 280. Accord. *Brownl.* 2. *part.* 280. But it ſeems all theſe Judgments are not approved by the Court of Common Pleas: For there it hath been oft agreed, this this Action will not lie, for ſaying, *Thou art a thief, for* [or, and] *thou haſt ſtoln my Trees*, or, *Apples out of my ground*, or, *Corn out of my field*, or, *an Acre of my Corn*, or, *twenty load of my Furzes*, *Hob. Rep. pl.* 106. *pl.* 97, 98, 473. 406. Nor for this, *Thou haſt robbed my Hop-ground*, or, *ſtoln my Apples out of my Orchard*, [or] *and it will be proved by ſtealing of my Apples in my Orchard*, *Co.* 4. 19. So it will not lie for theſe words, *Thou art a thief, for thou tookeſt away my Cattle upon an Execution, and I will hang thee*, *Mich.* 7 *Jac. Wilks* Caſe. And yet ſome do put a difference between [*and*] and [*for*,] and ſay, *That for this thou art a thief, and haſt ſtoln my Trees or Apples*, &c. it ſhall lie. But all agree, that it lieth not for theſe words, *Thou art a thief, for thou haſt ſtoln*, &c. It was ſaid to be adjudged, that it will not lie for this, *Thou haſt robbed me, and taken away my evidence.* It will lie for this, *Thou haſt ſtoln my Cock*, *Brownl.* 1. *part.* 1. And yet this is but *Petit Larceny.* It will not lie for ſaying, *Thou art drunk, and I never held up my hand at the Bar as thou haſt done.* Nor to ſay, *Thou waſt araigned for Felony*, or, *didſt hold up thy hand for Felony*, *Bro.* 2. *p.* 273.

It is ſaid to be adjudged to lie for theſe words, *A. is an arrant thief, and he hath ſtoln my Apple Trees*, *M.* 7 *Jac. B. R. Eyres* Caſe. But it was moved in Arreſt of this Judgment, and in *Mynors* Caſe, *M.* 4 *Jac. B. R.* This difference was agreed there, and it was ſaid, It had been often adjudged there accordingly; and it ſeems that Court is of this opinion ſtill. But the Judges of the Court of Common Pleas are utterly againſt it, and will by no means admit of this difference: And therefore they judge the Action to lie alike in both Caſes, *Hob. Rep. pl.* 406. 98. 17. 20. But all agree it will lie without queſtion, for ſaying, *Thou haſt ſtoln my Apples out of my Loft*, or, *thou haſt ſtoln the Corn out of my Barn*, or, *thou haſt ſtoln my Wood*, [or, *Furzes*] *out of my Barton*, *Hob. pl.* 258. *Hil.* 37 *Eliz. B. R. Caſtlemains* Caſe.

It lieth not for this, *Thou art a thief, for thou haſt cut off the ear-mark of my ſheep, and ſet on thine own*, 29 *Eliz. B. R.*

It lieth for ſaying, *Bear witneſs, I arreſt you for Felony*, Per curiam, *M.* 17 *Jac. B. R. Serles* Caſe. So for ſaying, *If I could finde* J. S. *I doubt not but within two days to arreſt* H. *of ſuſpition of Felony*, Adjudg. *Herles* Caſe. *Coo.* 4. 15. And it is ſaid it hath been ruled to lie for theſe words, *I charge you with Felony, and I charge the Con-*

ſtable to take you, M.5.Iac.B.R. Alſo it hath been ſaid to be adjudged to lie for theſe words, *Bring me to the Conſtables houſe, for I am robbed, and I will bring him to the houſe of* I.S. *to arreſt him, for he ſetteth them to rob me from time to time*, Adjudg.B.B. And yet in other places we find it affirmed and ruled, that it will not lie for ſaying, *I charge you for Felony for taking money out of the pocket of* I.S. Nor for theſe words, *I arreſt you for Felony*; or, *I charge you with Felony*, *Hob.Rep. pl.*381,394,286,38. and elſwhere. See *Brownl. 1 part*, 18.

And to reconcile theſe, I take the difference to be this. If I do arreſt a man for a ſuſpition, and in the arreſt uſe theſe words when there is cauſe, this is in the due way of Juſtice, and not actionable. But if I uſe theſe words without any juſt cauſe, or where I do not proceed in a courſe of Juſtice, but before or after the arreſt, or otherwiſe ſpeak any of the ſaid words, they are actionable, *Hob Rep.pl.*258.

Which concern a man in his Office or place of truſt.

It is ſaid that this Action will lie for any Officer, againſt him that ſhall ſay, *He hath no skill in his Office.* But for a manual Tradeſman, it will not lie for theſe words, *He hath no skill in his Trade. Sed quære* of this laſt, *Hil.*16.*Iac.*B.R. It will lie for ſaying to any Officer, *You are an Extortioner*; or, *you have extorted twenty ſhillings above your due Fees*, Coo.10.61.

Judge, Juſtice.

It will lie for ſaying to a Judge or Juſtice of Peace, *You are a corrupt man* (or *Judg*) or *Juſtice of Peace*; or, *You deal corruptly*, or *you take bribes*, or *you do not miniſter true juſtice*, or *you are a falſe Judge or a falſe Juſtice of Peace*, Coo.4.16.Broo.112. But it will not lie for theſe words, *If any man will give him bribes, Sheep or Capons, he will take them.* Adjudg.*Paſch.*35*Eliz.*B.R. Sir *Chr.Helliards* Caſe.

It will lie for ſaying to a Judge or Juſtice of Peace, *You are an Ambodexter*, or *you take money on both ſides*, *M.*2.*Iac.B.R. Dawtreys* Caſe. Or, *You cover (or hide) Felonies*, *Dyer* 72. and *Stuckleys* Caſe, *P.*7.*Iac.B.R.* Or, *You are a common Barreter*, or *you are a common Champertor*, or *you are a common maintainer of Suits*, *Hob.pl.*188, 145. So for ſaying, *You took money of a Felon brought before you, to let him eſcape*, *Paſch.*37.*Eliz.B.R. Rot.*147. Adjudg. *Cottons* Caſe; and *Trin.*36.*Eliz. Staffords* Caſe, *B.R.* See *Brownl. 1 part*, 11.

It lieth for ſaying, *I was like to be killed at his houſe*; *he enticed me into his ſtable to ſee his horſes, and there he inſtigated* I.S. *to beat me*, *M.*2.*Iac.B.R.*

It doth lie for ſaying of a Juſtice of Peace, *He hath done me wrong in returning the Recogniſance for* I.S. *in twenty pounds, whereas it was taken but for ten pounds*, Paſch. 4 Jac.B.R.

Some think it will lie for theſe words, *He can hear but with one ear*, *Cholmleys* Caſe. And for theſe words, *He doth maintain the worſt people againſt Gods Law.* 35 *Eliz. Butlers* Caſe, adjudged.

It will not lie for ſaying to a Juſtice of Peace, or Judge, ſpeaking of the Tenants of his Manors, and his taking of Fines; *When your Tenant took his Land, you cozened him of his Fine, and dealt corruptly, and I will make you appear where you dare not ſhew your face for your baſe dealing*, *Trin:* 4 *Iac.* And if the diſcourſe be about health, and one ſay, *He is a corrupt man*, *M.*7.*Iac.Co.B.* So if the talk be about his Eſtate, and one ſays, *He is a Bankrupt.* Or, if the diſcourſe be about his Uſury, or his fraud in an Executorſhip, and thereupon one ſaith, *He is a corrupt man, or a falſe man*, or the like. And therefore in ſuch like Caſes, if the Plaintiff ſet forth part of the words only, it will concern the Defendant to ſet forth the whole matter in avoidance of the Suit, *Coo.*4.14. And yet if the words be ſpoken indefinitely, without any ſuch reference as in the Caſes before, they will be actionable. *Sermo relatus ad perſonam, intelligi debet de conditione perſonæ. Hob.Rep.pl.*351.

Sect. 9.

It will not lie for ſaying to a Juſtice of a Peace, *You are an Uſurer, or you have not dealt honeſtly about a Will*, *Co* 4.16. *New Book of Entries*, *fol.*22. Nor for ſaying, *He hath gotten all he hath by ſwearing and forſwearing.* Adjudg. *N. B. of Entries*, *f.*21.

Preacher.

This Action will lie for ſpeaking theſe words to a Preacher, *You have made a ſeditious Sermon, and moved the people to ſedition. Coo.*4.19. and *Philips* Caſe, *Paſch.* 24 *Eliz. B. R.* But it will not lie for ſaying to him, *Thou art an Adulterer*, or, *thou haſt had two children by* J. S. *and I will cauſe thee to be deprived for it*, adjudged, *Parrets* Caſe, *M.* 38, 39 *Eliz.*

It

It will lie for saying to a Sheriff, or any such like Officer, *Thou art an Extortioner*, or, *Thou hast by colour of thy Office, extorted twenty shillings above thy due Fees*, Co. 10. 61. And *Stanleys* Case, *Pasche*, 14 *Jac. Co. B.R.* And *Jones* Case, 38, 39 *Eliz.* *Sheriff.*

It lieth for saying to a Serjeant or Barrester, *You are a dishoneſt man in your profeſſion*, or, *you have undone many men*, adjudged. *Trin.* 37 *Eliz.* Or, *You did diſcloſe my counſel to my adverſary*, or, *you are a couzening knave, and ſhewed a counterfeit* [*or forged*] *Deed, knowing it to be ſo*, *M.* 39, 40 *Eliz.* *M.* 20 *Jac. Curia.* But it will not lie for saying, *You ſhewed a counterfeit* [*or forged*] *Deed*, without more. It will lie for saying, *He giveth bad counſel*, or, *he is no Lawyer*, or, *he is an ignorant man in the Law*, or, *he hath no skill in the Law*, *M.* 8 *Car. B R.* in *Cawdreys* Case. Alſo it lieth for this, *He is the ſimpleſt Lawyer towards the Law*, adjudged, 39, 40 *Eliz. B. R.* Or, *He hath no more Law then an Ape*: But to say, *He hath as much Law as an Ape*, is not actionable; and yet see the Case after, contrarily adjudged, *Goldsb.* 126. *pl.* 17. And yet it will not lie for these words, *He is no Schollar*, or, *Thou waſt never any Schollar* (or to speak to a Schollar.) *He hath no learning*, or, *he is an ignorant man*; in general, without reference to his office. Nor will it lie for saying, *Thou art a drunken fellow*, or, *thou art an Aſs*, in *Cawdreys* Case. It will lie for saying to him these words, *Thou a Barreſter! a Barreſter! thou waſt put from the Bar*, adjudged, *Paſche* 8 *Jac. Cook. B. R. Beſtlies* Case. So it will lie for these words, *Thou a Counſellor! thou art a concealer of the Law*, adjudged, *Trin.* 2 *Jac. B. R. Coxes* Case. It will lie for saying to a Barreſter, *You are a bribing knave*, or, *you are a corrupt man*, or, *you are a common Barrater*, or, *you are a common Champertor*, or, *you are a common maintainer of ſuits*, *Hob. Rep. pl.* 188. 145. *pl.* 17. *Cook* 4. 16. It lieth for saying, *He hath the falling ſickneſs*, by *Tanfield* Juſtice, *Hil.* 4 *Jac. B. R.* So it will lie for these words, *He was of my Counſel, and revealed the ſecrets of my cauſe*, *Snags* Case, *Trin.* 13 *Eliz. B. R. New Book of Entries, f.* 22. And yet it seems it will not lie for this, *Go to him, he will deceive you*, adjudged, *March. Rep.* 146. *pl.* 217. *Brownl. Rep.* 1. *part.* 11. To say to a Lawyer, *Thou art a paltry Lawyer, and haſt as much Law as a Jackanapes*, *Goldsb.* 126. *pl.* 17. *Lawyer.*

It will not lie for these words to a Lawyer, *Thou haſt nothing but what thou haſt gotten by ſwearing and forſwearing*. *New Book of Entries, f.* 22. Nor for saying, *Thou art a Bankrupt*, *March. Rep. f.* 8.

It will lie for saying of an Attorney, *He is an extortioner*, *Hil.* 40 *Eliz. Cook B.R. Stanleys* Case; or, *he is a bribing knave*, *Cook* 4. 16. *Hob. Rep. pl.* 17. adjudged; or, *he is a corrupt man, and doth deal corruptly*, *Cook* 4. 15. or, *his credit is faln, he dealeth on both ſides*, *M.* 42, 43 *Eliz. Cook, B. R. Kings* Case; or, *he is an ambodexter*, or, *he taketh money on both ſides* [*or on both hands*] *in ſuits*, *M.* 2 *Jac. Dautreys* Case, *B. R.* But it will not lie for saying of him, *He is a common maintainer of ſuits*, *Hob. Rep. pl.* 45. It lieth for saying of him, *He is a falſe practiſer*, *per* 3. Juſtices, *Paſche*, 17 *Jac. Moors* Case; or, *he is a cozening knave*; or, *he is a knave*, adjudged. *Yardlies* Case, 18 *Eliz. B. R.* And yet, *Forging knave*, hath been doubted, *Paſche* 17 *Jac. B. R. Moors* Case; I know not upon what reaſon. It hath been adjudged to lie, in *Smails* Case, *Brownl.* . *part.* 16. And it is said it will not lie for these words, *Thou art a falſe couzening knave, and haſt couzened my two kinſmen of their Land, and deſerveſt the Pillory*, 26 *Eliz. B. R.* Nor for saying, *He couzened* J. S. *out of his Land*, adjudged. It lieth for saying, *You are a dishoneſt man in your profeſſion*. It lieth for saying, *Thou art a common Barrater*, *Hob. Rep. pl.* 188. Or, *thou art a common Champertor*, *Hob. Rep. pl.* 183. 145. 351. Or, *thou art a Champertor*, *Boxes* Case. *M.* 14 *Jac. Cook, B. R.* Or, *thou art the ſimpleſt* [*or fooliſheſt*] *Attorney, towards the Law*, *M.* 39, 40 *Eliz. Cook. B. R. Martins* Case, adjudged; or, *thou haſt no skill in thy Office*. But it will not lie for saying, *Thou haſt no skill in Husbandry*, or the like, this is not actionable. It will lie for these words, *Thou didſt diſcloſe thy Clients counſel to his adverſary*, *Trin.* 17 *Car. Cook, B.R. Sanderſons* Case; or, *thou art a ſuborning knave*; or, *thou art an extorting knave, and didſt ſuborn one to be forſworn before the Lord Chief Juſtice*, 20 *Jac.* If a Suit be between *R.* and *B.* and *B.* say to *R.* J. S. *your Attorney is a bribing knave, and hath twenty pound of you to couzen me*; this is actionable, adjudged, *M.* 1 *Jac. Cook, B. R. Yardlies* Case. But it will not lie for *Attorney.*

ſaying to an Attorney, *Thou art a uſurer*, or, *thou haſt plaid the knave with me about a Will*, *Cook* 4. 16. And it is ſaid it will not lie for this, *My Father was not pecked over the Bar as thy Father was*, *Trin.* 41 *Eliz. Cook*, *B.R* And yet it is ſaid it will lie for ſaying, *Thou waſt pecked over the Bar*, *quere*, what difference. Nor will it lie for this, *He was or will be pecked over the Bar*, *Trin.* 41 *Eliz. Knightlies* Caſe, *Cook*, *B. R. Hob. Rep. pl.* 145. Nor for this, *I think thou art no Attorney*, *but an Attorneys Clerk*; *and if thou be*, *I ſhall have thee pecked over the Bar the next Term*, *and thy Ears nailed to the Pillory*, *Hob. Rep pl.*159. *Paſche*, 7 *Jac. Cook*, *B. R. Trotmans* Caſe; for theſe words are of an uncertain ſenſe. It is ſaid it will not lie for ſaying of him, *He gets his living by falſe Writs*, adjudged, *B. R.* Nor if one ſpeak of going to him, if another ſay, *Go not to him*, *for he will couzen* [*or deceive*] *you*, *Paſche*, 18 *Jac. Ratcliffs* Caſe.

It lieth for this, Brown *is a good Attorney*, *but that he will play on both ſides*, *Brownl.* 1. *part.*5.

It ſeems it lieth for this, *Thou haſt couzened* J. S. *of his Fee*, *I will ſue thee for it in the Star-Chamber*; *for thou didſt not come for* J. S. *Brownl.* 1. *part.* 3. 15. 16. 6. 7. 2. *part.*253.

It lieth alſo for this, *Is he your Attorney*, *he is the fooliſheſt and ſimpleſt Attorney towards the Law*: *And if he do not overthrow your cauſe*, *I will give you my ears. He is a fool and an aſs*, *and ſo I will prove him*, 126. *pl.*21.

Receiver. It lieth for ſaying of the Receiver of the Court of Wards, *Maſter Receiver hath couzened the King*, *and delt falſly with him*, *Trin.* 17 *Jac.* Sir *Miles Fleetwoods* Caſe,

Auditor. *Hob. Rep. pl* 351. So to call an Auditor of the Court of Wards *Frauditor*, is actionable in Sir *Miles Fleetwoods* Caſe.

Conſtable. It lieth for ſaying to a Conſtable, *Thou hideſt or covereſt Felonies*, *or favoreſt Felons*, *Stucklies* Caſe, *Paſche*, 7 *Jac. B. R.* and *Bondmans* Caſe.

Sect. 10. *Phyſitian.* It lieth for ſaying of a Phyſitian, *He hath no learning or skill in Phyſick*, *M.* 8 *Car. B. R.* in *Cawdreys* Caſe. And yet to ſay, *He is an aſs*, *or hath no learning*, *or is no Schollar*, in general, it ſeems is not actionable. But it will lie to ſay of a Doctor of Phyſick, *He is a Mountebank*, *an Emperick*, *and a baſe fellow*, adjudged, *Paſche*, 12 *Car. B. R. Hughs Rep.*441.

Major. It lieth not for ſaying to a Major, *Thou haſt couzened all thy brethren*, 8 *Car. B. R.* Major of *Tivertons* Caſe, for the words are too general and incertain to uphold an Action.

Jury-man. It lieth for ſaying to a common Jury-man, *Thou art a common Jury-man*, *and haſt been the death and the overthrow of a hundred men*, *by thy falſe and ſubtil means*, adjudged, *Paſche*, 7 *Jac. Cook*, *B. R. Peters* Caſe. With Averment that he was a Jury-man.

Overſeers of the poor. It is thought it will lie for ſaying of Overſeers of the poor, *That they have couzened the poor of their money*, 9 *Jac. B. R.* yet this ſome doubt. But it ſeemes clearly, it will lie for ſaying, *They have couzened the poor of their bread.*

Commiſſioner. It lieth for ſaying of a Commiſſioner, *That he hath a Commiſſion to hear and end a difference between* A. *and* B. *Thou art a corrupt man*, *and haſt taken bribes of* A. *to defraud equity and juſtice*, adjudged, *Paſche*, 3 *Jac. B. R.* Sir *George Mores* Caſe. So to ſay of him, *That he put out Depoſitions taken*, *and put in ſome not taken*, adjudged, *Hil.* 17 *Jac. B. R.* Sir *Nich. Parkers* Caſe. So for ſaying, *He hath returned Depoſitions that were not taken*, 40, 41 *Eliz. B. R. Fiſhes* Caſe; and whether he be nominated by the Court or Parties, it is all one in the Caſe.

Arbitrator. It lieth not for ſaying of an Arbitrator, *He hath taken bribes*, or, *he is corrupt.*

Weigher of Corn. But it will lie for ſaying to one appointed to be a common weigher in a Market or Fair, that did weigh Corn between us, *He hath taken bribes to make falſe weights.*

Steward. It lieth for ſaying of a Steward in a Leet, *He hath added a preſentment*, *which the Jury never made*, *M.* 4 *Jac. B. R. Carrs* Caſe, eſpecially if he keep many Courts.

Bailiff. It will not lie for a Bailiff that had the ſelling of his Maſters Corn for three years, for ſaying, *Thou art a conzening knave*, *and haſt couzened thy Maſter in ſelling by falſe meaſure*, *Hob. pl.*93. But if he did continue in his office, and theſe words did make his Maſter put him away, *contra.*

It will not lie for ſaying of a Scrivener, *That he made falſe writings.* *Scrivener.*

It lieth for ſaying of a Mathematical Meaſurer or Surveyor that is learned, and doth it by Art, or any ſuch Officer, *He hath no skill in his trade*, or, *he is a cheater or couzener in his trade* But to ſay ſo of one that doth meaſure by the Poll onely, *contrà*, *Hil.* 16 *Jac. B. R. Loudons* Caſe. *Meaſurer of Land.*

Out of all this, it appeareth, That where ever this Action is maintainable for any Defamation in a mans Office, the words muſt be ſpoken, either generally without any reference, and ſo may be referred to his Office, or with reference to his Office; for if they be ſpoken of any other ſubject then his Office, they will not be actionable, *Agree.* 16 *Jac. B. R.* in *Loudons* Caſe. And the party that ſues for the ſlander, muſt ſhew in his Declaration, that he was ſuch an Officer at the time of the words ſpoken, otherwiſe the action is not maintainable. And it is not ſufficient to ſay he had been ſuch an Officer before the time of the ſpeaking of the words; but he need not ſhew that the hearers did know him to be ſuch an officer, *Hob. Rep. pl.* 104. 93. 351. yet if the words be ambiguous, but there is a pregnant violence in them to lead the hearers and Court, to take them in the worſt ſenſe, they muſt be taken ſo, as in the Caſe of Sir *Miles Fleetwood*, *Hob. Rep. pl.* 35.

It lieth upon this ground alſo, againſt them that ſlander a Lawyer, or an Attorney with *ignorance* or *unfaithfulneſs* in the Caſes before ſet down. Which concern a man in his Trade or Calling, whereby he gets his living.

It will lie for ſaying to a Victualler or Inn-holder, *He hath the Pox, or any other infectious diſeaſe in his houſe*; if he loſe his gueſts thereby, *non aliter*, *Co.* 4. 17. *Trin.* 9 *Jac. Ladlams* Caſe. So for ſaying, *He keeps a houſe of common Baudry*, curia, *Hil.* 4 *Jac. B. R. Thornes* Caſe. *M.* 39, 40 *Eliz.* And for this it ſeems it will lie without that conſequence, and without Averment thereof. So this Action will lie for ſaying of any Tradeſman that gets his living by buying and ſelling, or did ſo of late, and hath given it over a little while, as a Merchant, Shoomaker, Mercer, or the like Tradeſman that uſeth buying and ſelling. *He is a bankrupt, and I will drive him out of the Country for a bankrupt*; *M.* 9 *Jac. B. R. Dayes* Caſe, adjudged. Or, *he will be a bankrupt very ſhortly*, *Co.* 4. 19. *Dyer* 72. *Longs* Caſe. *M.* 7 *Jac. Co. B. R. Seleys* Caſe. *Paſche*, 12 *Jac. B. R.* Or, *he is a bankrupt, and fled beyond the Sea for money*, *Trin.* 9 *Jac. B. R. Trulocks* Caſe. Or, *I will prove that he hath been a bankrupt, and hath agreed with his creditors for five ſhillings a pound. Edmunds* Caſe. *Hil.* 3 *Jac. B. R. Rot.* 855. Or, *he is broken*, *Hil.* 17 *Jac. B. R. Johnſons* Caſe. But it will not lie for ſaying, *I will ſue out a Commiſſion of Bankrupt againſt* J. S. Nor will it lie for calling a Gentleman, or one that is no Tradeſman, *Bankrupt. Fincheſley* 186. Nor for ſaying to a Tradeſman, *Thou art a branded Rogue, and a Rogue by the Statute*, *M.* 19 *Jac. B. R. Harriſons* Caſe, unleſs he can aver any ſpecial loſs by it. Nor will it lie for theſe words of a Merchant, *Doth he ow you money? get it quickly and take heed how you truſt him*, *Trin.* 36 *Eliz. Vaſpicks* Caſe. Nor for this, *He is a falſe knave, and keepeth a falſe debt book, for he chargeth me unjuſtly with what I never received*, adjudged. *Hil.* 37 *Eliz. B. R. Brooks* Caſe. Nor for ſaying, *He is a couzening knave*, *Paſche*, 15 *Car. B. R.* And yet in theſe two laſt Caſes, if the ſpeeches be with reference to his Trade, *Quere*. It will not lie to ſay of a Tradeſman, *He is not worth a groat*; no, nor albeit he aver that in the Country, it means that he is a *Bankrupt*, *Paſche*, 15 *Car. B. R. Axes* Caſe; for his credit may be good, and he not worth a groat.

It will not lie for ſaying to a Merchant, *He is a couzening knave*, *March. Rep. f.* 8. *pl.* 19. But ſee more in *Brownl.* 1. *part.* 4. 16.

It will lie for ſaying to a Goldſmith, *Thou art a couzening knave, for thou haſt ſold me a Saphir for a Diamond*, *Hil.* 32 *Eliz. B. R.* But if one ſay to a Taylor, *Thou art a couzening knave, becauſe thou haſt ſold me a chain for Gold, where it is half Copper, and thou art a couzening knave upon record, and haſt been impriſoned for couzening*; no Action will lie for theſe words, 32 *Eliz. B. R.*

It will not lie for calling *Rogue* or *Cozener*, nor for ſaying, *He is a cozening Rogue, and hath cozened* R.W. *of thirty pound, and goeth about to do the like to me*, *Brownl.* 2 *part*, 190.

It doth not lie to ſay of a Carrier, *He is a common Barreter*. *Hob. Rep. pl.* 183. 188.

It

It lieth for saying of a Journeyman-Shomaker, *Do not meddle with him, for he will undo you*, or *he will cut you out of doors*; with an Averment that this word [*cut*] doth intend in the Country [*undo.*] *Pasc.*15 *Car. B.R.*

It lieth for saying of a servant, *He doth defraud, cozen, or cheat his master, or will undo him*, if by this he have any special damage, otherwise not: But in the first case there must be an Averment of damage in particular. *March, f.*1.

It lieth for saying of a Brewer, *He sels naughty Beer*, *M.* 15 *Car. B.R.* Or, *My Mare doth pis as good Beer as he doth brew*, if he can aver a loss by the words. *Dykes* Case, *March.*60.

It lieth for saying to a Brasier, *Thou didst cozen* I.S. *in a Brass pot*, Adjudg. *Pasc.* 7 *Jac. B.R.* So by the same reason to say to any Tradesman, *He did cheat a man in trading*. So to say of a Farmer, Badger, or any man that sels by weight and measure, *He sels by false weights and measures, or he did keep false measures, by which he did cozen the Country.* But it lieth not for saying, *He had (or he kept) false weights or measures in his house*, *Hob pl.*93. *Pasch. Co. B.* 17 *Car. Payns* Case But to say this of a Bailiff that sold his masters Corn for a while, and hath given over. it seems it will not lie. But to say of a Tradesman, *He doth sell by false weights or measures*, will bear an Action, *March Rep* 119. *pl.*197.

It lieth for saying, that *he kept a false bushel by which he did cheat and cozen the poor*, if he shew he were a Farmer, and did sell his Corn, and that by these words he lost his Customers, *March* 116. *pl.*192.

It lieth for saying to one that had oversight of a Gentlemans Farm, and sold his Corn, for these words; *Thou art a cozening Knave, and thou hast cozened me in selling false measure in my Barley, and the Country is bound to curse thee for selling with false measures, and I will prove it; and thou hast changed my Barley which I bought of thee. B.R. Rep.*1 *par.*4. So for this, *Thou didst keep and sell by false weights, and in* 240 *bestowing thy weights were false two ounces, and I will prove it*, *Brownl.*1 *part*, 42.

To say of a woman Inkeeper, *She is a pocky unwholsom woman, doth wear a skarf to hide her blanches in her neck, it is a pocky household*, may happily bear an action, *M.* 9 *Jac. Ludmans* Case.

Sect. II. Out of all which it is to be observed, that where-ever this Action lieth for a slander to a man in his Trade, the words must be spoken either generally, and so may be referred to it, or must be relative words, as *Bankrupt* or the like, or with expres reference to it; for if they be spoken of any other thing, they will not bear an action: And the party that sues must set forth in his Declaration, that he was such a Tradesman in particular; and it is not enough to say, he got his living by buying and selling, but he must say he is a Merchant, Mercer, or the like, and that he was so a little before or at the time of the words spoken, else no action will lie, *Hil.* 7 *Car. B.R. Collins* Case, adjudged *M.*17 *Car. Co. B.* But if the count be that he have been of that Trade for twenty years last past, and lay the words to be spoken within that time, it is good. But if he say that he hath been of that Trade for divers years last past, *contra. Hil.* 17 *Jac. B.R. Johnsons* Case. *Hob. Rep. pl.*1. 6.93.

Averment: In all these Cases there must be a special averment of some loss by the words spoken, *Pasc.*15 *Car. B.R. Axes* Case. But others upon better reason and authority hold the contrary. But all agree it to be best to alleage some special damage, if the Case will bear it. *March, f.*96.

Which tend to a mans disinheritance. It lieth for saying of a lawful Heir to Land, before or after his fathers death, *He is a Bastard*. And this will lie, though the words were spoken before or after he hath the land in possession, and though he be not about to sell the land, and though he have no loss by the speaking of the words, *Co.*4.17 *M.*20. *Jac. B. Elborows* Case: for by this the title of his Land may be called in question. But if the party speaking claim as next heir to the Land, he may justifie it, and it will not bear an action, *Trin.*25 *Eliz. B.R. Banisters* Case. *Co. idem.* And if the Plaintiff omit this, the Defendant may set it forth by way of bar. To say a man is his Villain, will not bear action now, as it seems, because Villenage is gone.

Which charge a man with an infectious disease. It lieth for this, *He hath the French pox, or is infected with the French pox, or is laid with the pox, or the pox doth haunt him twice a year*, *Co.*4.17. and *Ludlams* Case, *M.*2 *Jac.*

M. 2 *Jac. per* Fenner *and* Williams *Juſtices.* So, *Thou haſt caught the French pox, and carried it to thy wife, Hob. Rep. pl.* 290. So for ſaying, *Thou art a pocky Whore, and the pox hath eaten out the bottom of thy belly, that thy guts are ready to fall out, M* 7 *Jac.* Co.B. *Miles* Caſe. *Trin.* 15 *Jac.* B.R. *Milwards* Caſe. So it ſeems it will lie for ſaying, *Thou haſt the great pox,* 20 *Jac.* B.R. *or the plague.* So it lieth for ſaying, *Thou art a leprous knave, not fit for company, or thou art a leper, Trin.* 4 *Jac.* B.R. *Rot.* 1051. But it will not lie for ſaying, *One hath the Falling-ſickneſs, Hil.* 4 *Jac.* B.R. *or the Pox, Co.* 4. 17. Nor for this, *Hang him, he is full of the Pox, Co.* 4. 17. It will not lie for ſaying, *Thou art a pocky Whore,* 44, 45 *Eliz.* Adjudg. *Curia. M.* 7 *Jac. Co.B.* Nor will it lie for this, *That pocky Drab doth wear a ſcarf about her neck to hide her blanches, I will not eat with her for ten pounds*; by three Judges, *Trin.* 9 *Jac. Ludmans* Caſe. Nor for this, *Thou haſt lien in Fullers tub, Chapels* Caſe. Nor will it lie for theſe words with this Averment, *That none do lie there but ſuch as have the French pox,* Adjudg: *M.* 44, & 45 *Eliz. Boddin* and *Jones* Caſe. Nor for this, *Thou art a pocky Drab, doeſt wear a ſcarf about thy neck to hide thy blanches*; *you are a pocky houſhold, and I will not eat with you for twenty Nobles.* And yet if they were ſpeaking of the French pox, and the party ſpeak theſe words, it is dangerous, *M.* 9 *Iac.* Nor for this, *He hath been in Fowlers tub,* (meaning a Chyrurgeons tub, wherein none were but ſuch as had the pox) *I will not ſay of the pox, but he lay in the tub that time that* Lagmans *wife was laid of the pox, and his hair fals from his head, and he is a pilled and a Raſcal-knave, and a Villain, and no Chriſtian, and thinks there is neither heaven nor hell, Goldsb.* 135. *pl* 34.

If I have Land, and have need, and am about to ſell it, and another ſay, *It is his Land, and I have no right to it, or I have no Title to it, or I have no good Eſtate of it, or that I can make no good Eſtate of it*; and hereby my Chapman doth deſiſt and fall off, I may have this Action: And albeit he or ſome other have a colourable Eſtate, yet if he have not a good Title in Law to it, this will bear an Action, *Co.* 4. 18. *New book of Entries,* 28. As if two have Leaſes of the ſame Land, and he hath the latter which is not good, and he ſay, *The Land is his, and the others Eſtate is not good*; this is actionable. *Mildmays* Caſe, Adjudg. 6 *Eliz. Co. B. Co.* 1. 177. Which ſlander a mans title of his land.

If I be about to ſell my Land, and another ſaith, *I know one that hath a Leaſe of the Land, and he will not part from it at any rate*; this is actionable, Adjudg. *M.* 37, 38 *Eliz.* B.R. *Pennymans* Caſe. *M.* 20 *Iac.* B.R. *Elborrows* Caſe. The Plaintiff ſet forth he had much Land by Inheritance, and the Defendant intending to impeach his Title, ſaid, *His wife ſhall not ſit above mine, for her husband is a baſtard, innuendo* the Plaintiff; It was adjudged to lie without any Averment. So it will lie for ſaying, *Your father is a baſtard, 6 Eliz. Co. B.* So, *Thou art an Alien,* 15 *Jac. B.R.* adjudged. And yet in caſe where I claim an Eſtate, if I ſay ſo, *That I have a title, and the title of the other is not good*; theſe words may be juſtified, and are not actionable, *Co* 4. 18. But there muſt be a ſpecial Averment of ſome loſs; and therefore he muſt ſhew that he was the Heir, and the other intending to impeach his Title, or that there was a communication for a ſale: For ſome hold, that if there were only an intent of ſale in the Owner, and no progreſs, no Action will lie for the ſlander of the Title, *Co. New book of Entries, f.* 35. *M.* 18 *Jac. Sleeds* Caſe. Yet ſome Judges have held it will lie without any Averment; for it may cauſe the King or Lord to ſearch for the Title, and bring a loſs in time to come. *Sect.* 12.

If one be heir to his father or brother, who intend to ſettle their land upon him, and another ſay, *He is a Baſtard,* and thereupon they give away the land from him, this will bear Action, adjudged, *Hughs Rep.* 451.

If a woman be like to have a husband, or a man a wife, and one ſay of him or her, *He (or ſhe) had a baſtard, or ſhe is incontinent, or lay with* I. S. *or* I. S. *had the uſe of her body,* and he or ſhe loſe their match thereby; this Action will lie for this ſlander, *Co.* 4. 16. *Hil.* 4 *Jac. B.R.* Dame *Harriſons* Caſe. *M.* 8 *Car. B.R.* So if a Widower be like to have a Maid or Widow, and one ſay to her, *I wonder you will have him, for he was like to ſtarve his laſt wife, and would not allow her neceſſaries*; and by this he loſe her. Adjudged. Which tend to hinder a mans preferment.

If a Divine be to be preſented to a Benefice, and one ſay to him, *He is an Heretick,*

or

or a Baſtard, or excommunicate; and hereby he loſe his preferment, he may have this Action for this Slander, *Co.* 4. 16.

If a Lawyer ſtand for an Office, as for a Stewardſhip, or the like, and being in ſpeech about him, one ſaith to another, *He is an ignorant man, unfit for this place*; and thereby he loſeth the place, this Action lieth for this Slander, *Sanderſons* Caſe, 17 *Car. Co. B. R.*

And ſo by the ſame reaſon, if any common ſervant be like to have a ſervice, and by ſome ſlanderous ſpeeches he loſeth his ſervice; it ſeems he may have this Action for his relief. *Agreed. M.* 15 *Car. B.R.* But in all theſe Caſes, there muſt be a ſpecial Averment of the loſs of the preferment; otherwiſe the Action is not maintainable.

Averment:

Which doth tend to the hurt of a man in his Liberty, or to bring any corporal, or mony puniſhment on a man.

I finde in the Judgments and Opinions of men upon this point, very great contradiction alſo; and ſo much difficulty and uncertainty in the Law in theſe Caſes, that it is hard to give you any Rules on which you may relie herein.

Some ſay an Action will lie for any words which may induce any corporal or pecuniary puniſhment; others, the contrary. We ſhall ſay this onely in the Slanders within this degree, and the next that follow, it is good to obſerve how the words do ſound, and what the thing ſaid, if true, would produce. For if the words do ſound Scandalous, or if the thing charged were true, it would bring any ſharp puniſhment, eſpecially to the body, there (for the moſt part) the words will bear Action; we ſay (for the moſt part) for it is not always ſo. But on the other ſide, if the words do not ſound foul, as to ſay, *You built a Cottage, did ſtrike in the Church*, or the like; or the puniſhment of the thing charged would be but light, *As to be bound to the good behavior*, or the like; or none at all, there (for the moſt part) it will not lie. And yet in this Caſe alſo, ſometimes it will lie, *Co.* 4. 17. *Kitch.* 173. *Co.* 4. 19. *Dyer* 285. 37. But if any ſpecial loſs happen to the Party, by the ſpeaking of the words there, though the words in themſelves be not Actionable, yet they may be Actionable in reſpect of the loſs, *M.* 17 *Car. B.R.* As if one had ſaid, *Thou ſpeakeſt againſt the Book of Common-Prayer*, and thereby he was vexed in the Spiritual Court, *Co.* 4. 17. *March Rep. f.* 114. *pl.* 115.

It is held ſomewhat confidently, the Action will lie in all the Caſes, and for any of the words following, (*viz.*) *Thou haſt bewitched my cattle,* [*my milk*] *my beer, or any of my goods, M.* 18 *Jac. B.R. Sturdens* Caſe. But it will not lie for ſaying, *Thou haſt bewitched my ware, that I can catch no fiſh.*

But it lieth not for this, *Thou art a Sorcerer or Inchanter, Brownl.* 1. *part.* 8. 9. 14. 2. *part.* 276.

It hath been agreed, that ſince the Statute of 1 *Jac.* an Action will lie for calling one *Witch* generally. It hath been ſaid, it will not lie for ſaying, *Thou art a Witch, and haſt bewitched my childe*; for the words ſhall be taken *mitiori ſenſu*, of another bewitching. See *Quere* of this, *Hughs* 341.

It lieth for ſaying, *Thou haſt a Baſtard, Co.* 4. 17. So for ſaying, *Thou didſt ſteal ſixpence, Hob. Rep. pl.* 258. So for ſaying, *Thou didſt hire one* [*or ſend one*] *to my houſe to kill me, Trin.* 33 *Eliz. B. R. Suttons* Caſe, adjudged. Or, *Thou didſt lie in wait to kill* [*or to rob*] *me, Paſche,* 5 *Jac. B. R.* Or, *Thou ſoughteſt the life of* J. S. if he be dead, adjudged, *Mich.* 7 *Jac. Weblins* Caſe. So for ſaying of a Woman, *She is a Baud and a Whore, and keepeth a houſe of Baudry*, Dame *Bartlets* Caſe. *Trin.* 38 *Eliz. B. R.* And *Morgans* Caſe, *Trin.* 16 *Car. B. R.* adjudged, and many others. See *March.* 212. *pl.* 249.

It is ſaid it will lie for this, *Thou didſt report money was faln, Fincheſley* 185.

It will lie for any of theſe ſpeeches, *Thou art a forger of falſe Deeds* [*or writings, or thou haſt forged a Feoffment,*] *Bond, Leaſe, or Releaſe, Dyer* 285. 37. *Paſche,* 39 *Eliz. B.R. Wades* Caſe Or, *Thou art a forger of writings,* 39 *Eliz. B.R. Goodals* Caſe. Or, *This is a forged Deed made by* J. S. *under a hedg*, Sir *G. Reynels* Caſe. Or, *Thou haſt forged the will of* J. S. adjudged, *Paſche,* 7 *Car. B. R. Mackeniſts* Caſe. Or, *Thou haſt ſued out a Writ againſt me, and got a counterfeit Warrant of thine own making*, adjudged, *M.* 20 *Jac. B. R. Stones* Caſe. Or, *Thou cameſt with a counterfeit Commiſſion*, when he had a good Commiſſion, *Yorks* Caſe. Or, *Thou haſt forged a Re-*

a Record in Abergavein *Court, M. 7 Car. Co. B.R.* adjudged. For this is puniſhable by the Common-Law, though not by the Statute. But not for ſaying, *Thou art a forging knave, Goldsb.* 25. *pl.*5.

It is held ſomewhat confidently, That it will not lie in all the Caſes, or for any of the words following, *Thou art an Extortioner, or thou art a peace breaker, common Quarreller, ſuſpected to be a common Pilferer, common Rioter, a common Libeller, or thou art a common Champertor, or thou art a common maintainer of Suits, thou art a Recuſant, or men cannot have their Cattle go in the Common, but* J. S. *killeth them with dogs,* Dyer 118. *Thou haſt robbed my Orchard, thou haſt ſpoken againſt the Book of Common-Prayer, or thou haſt ſet up an unlawful Cottage againſt the Statute, thou haſt made a forcible entry into Land, or thou didſt ſtrike a man in a Church with a Weapon, thou art a Foreſtaller, Regrator, or Ingroſſer.*

It would have lien, when villenage was here, for ſaying, *Thou art a vilain to* J. S. 2 *Ed.* 4. 5.

It lieth for any of theſe ſpeeches, *I will prove thee* [*or I can prove thee*] *perjured, M.* 7 *Jac. B. R. Roberts* Caſe. Or, *Thou waſt perjured in the Star-Chamber,* or, *thou waſt committed for perjury there, Co.* 4 19. *Hob. Rep. pl.* 107. 15. Or, *Thou perjured beaſt,* adjudged. 18 *Jac. B.R. Benſons* Caſe. Or, *Thou art perjured, or waſt perjured,* adjudged. *M.* 25 *Eliz. B. R.*

It lieth for ſaying, *Thou art a perjured man,* 25 *Eliz. B. R.* adjudged. It will not lie for theſe words, *Thou haſt got thy living by ſwearing and forſwearing,* adjudged. *M.* 9 *Jac. B. R.* So, *Thou haſt taken a falſe oath* [or, *haſt forſworn thy ſelf*] *in the Kings-Bench Court, the Leet of* S. or any other Court of Record, *Hariſons* Caſe, *B. R.* As, *Thou tookeſt a falſe Oath in the Biſhops Court at* Exceſter, *or in the Leet of* S. *or in the Quarter-Seſſions at* Gloceſter. 38 *Eliz.* Adjudged. *Caſtlemains* Caſe. *Co.*4. 15. *Hob. Rep. pl.* 346. 360. One ſaid, *Thou art forſworn and haſt taken a falſe oath at* Hereford *Aſſizes againſt* John *at ſtile.* The opinion of the Court in this Caſe, was, *That the Action would not lie:* Otherwiſe, if he had ſaid, *Thou art forſworn, and haſt taken a falſe Oath at the Aſſizes againſt ſuch a one, with Averment That he was ſworn in the cauſe, March. Rep. f.* 7. *pl.* 17.

It lieth for ſaying, *It is a main-ſworn man, Brownl.* 1. *part.* 9, 10, 11, 14, 15.

So it lieth for ſaying, *You have cauſed* J. S. *to perjure himſelf,* adjudged. *Brownl.* 1. *part.* 2. See *Part.* 2. 49.

If one ſay of a witneſs preſently after a tryal, *He hath now forſworn himſelf,* adjudged; it lieth for this, *Hughs Rep.*445.

It lieth for this ſaying, *He was forſworn in Chancery, and the Lord Keeper committed him for it,* adjudged. *Hughs Rep.*444. But not for ſaying, *He is a proper witneſs, he will ſwear any thing.* But the words muſt import the perjury was committed in a Court of Record and judicially there. And if the words will not bear, it cannot be ſtrained by an *Innuendo* to it. As if the words be, *Thou waſt forſworn,* the Plaintiff cannot make them Actionable by an *Innuendo,* in the Quarter-Seſſions of *S.* and in the ſervice of the Court, *Trin.* 19 *Jac. B.R.* And 48 *Eliz. B.R.* So it will not lie for ſaying, *Thou waſt forſworn at* Horſley *Court, Innuendo* the Court Leet there, for it may be the Court Baron there. And yet it is ſaid, the contrary hath been adjudged. So neither will it lie for ſaying, *Thou waſt forſworn in the Kings-Bench;* for it may be the Priſon ſo called, not the Court, *M.* 42 *Eliz.*

It lieth for ſaying, *Thou haſt procured one to commit perjury,* or, *thou art a procurer of perjury.* 25 *Eliz. B. R.* Or, *thou haſt ſuborned one to come ten miles to be perjured, and given him money to do it, Harris* Caſe. *Paſche,* 5 *Jac. B.R.* But if the words import he did it not, *contrà.*

It lieth for charging one ſworn in a Court upon a *Voyer dire,* as well as upon an Iſſue that he was forſworn; for this perjury is puniſhable by the Common Law, *M.* 7 *Car. Cawdreys* Caſe. So it is thought of theſe words, *You were forſworn in your Anſwer in the Court of Requeſt;* for this is puniſhable by the Pillory. So it is ſaid, it lieth for this, *He hath delivered an untruth in a material thing in the Star-Chamber. Sed Quere.* But not for ſaying, *He hath delivered an untruth in his anſwer in the Chancery,* 38, 39 *Eliz. Browns* Caſe.

Sect. 13. It will lie for ſaying, *Thou art a forſworn fellow; for by thy falſe oath thou haſt hanged as true a man as thy ſelf*, Adjudg *Rats* Caſe, and 39 *Eliz. Brooks* Caſe. So for ſaying, *I. S. is mean ſworn*, with an Averment that it doth ſignifie *perjured* in the place where the words were ſpoken. Adjudged, *B. R.*

We have ſhewed before, that it lieth for ſaying, *Thou waſt forſworn in the Leet at* W. [*or in* Hereford-*Aſſizes, or in the Quarter-Seſſions at* Glouceſter,] and that is out of queſtion. But it is ſaid by ſome, it will not lie for ſaying, *Thou waſt forſworn at the Leet at* W. *or at* Hereford-*Aſſizes, or at the Quarter-Seſſions at* Glouceſter; for it may be in ordinary diſcourſe, and extrajudicially; and a Judgment is cited, *M.* 38, 39 *Eliz. B. R. Willis* Caſe, to be given accordingly: Yet I cannot but doubt it, for the vulgar acceptance is alike in both caſes; and there is a Record of a Judgment on this ſide againſt the other Judgment, 38, 39 *Eliz Cockins* Caſe. And *Hil.* 1 *Jac. B. R.* it was ruled to lie for this, *Thou haſt taken a falſe oath in the Quarter-Seſſions at Glouceſter.* If I ſay to one coming out of a Court where he was ſworn, *Thou haſt forſworn thy ſelf*, it is ſaid to be actionable, *Harriſens* Caſe. And yet it is ſaid, if I ſay to a man giving his oath in a Court, *You are forſworn*, and ſay not, *in your teſtimony in this cauſe*, or the like, this is doubted, *M.* 7 *Car.* B. R. *Cawdreys* Caſe. This diſtinction ſeems to me a very nice one. *Quære bien.* It lieth not for ſaying, *Thou art a falſe forſworn man*, 25 *Eliz.* B. R.

It is ſaid it lieth not for ſaying, *Thou art a common Swearer, or thou art a common haunter of Ale-houſes, or thou art a common fighter, or thou art a Sabbath-breaker, or thou art a common Whoremonger, or thou art a common Whore, or thou art a Whore, a Whoremaſter, or a Bawd, or thou art a Harlot, or thou art a common breaker of the Peace, or a common Affrayer, or thou art an Adulterer, or thou art a Fornicator, or thou didſt lie with* I. S. *or* I. S. *doth lie with thee*, [*or uſe thy body*] M. 39 Eliz. B. R. *Or thou art a Queen, or thou art a Thieviſh whore*, Adjudg. *Hil.* 17 *Jac. B. R.* Nor for this, *Thou art the Hackney-whore of* I. S. *Bodins* Caſe. *Or, thou waſt rid up and down ſtairs, M.* 9 *Jac. B. R.* And yet for many of theſe one may be bound to the good behavior, and for others of them puniſhed by Fine or great penalty. See *March.* 2. *part* 5. It lieth for ſaying to a woman, *She keeps a Bawdy-houſe, or houſe of Bawdry.* But it lieth not for ſaying, *She is a Bawd or Whore*, albeit ſhe be married. And yet in *London* by a ſpecial cuſtom it lieth for theſe words, *Trin.* 17 *Car. B. R. March f.* 107. *Brownl.* 1 *part*, 162.

It lieth not for ſaying, *Thou art a falſe forſworn Knave, or thou haſt forſworn thy ſelf, M.* 7 *Jac. B. R.* Nor for this, *Thou haſt but one Manner, and thou haſt got it by ſwearing and forſwearing*, Co. 4. 15. Nor for ſaying, *He was detected for perjury in the Star-chamber*, Co. 4. 16. Nor for this, *Thou art a perjured Knave, that is to be proved by a ſtake parting the land of* A. *and* B. *Co.* 4. 19. So if in a cauſe depending betwixt *A.* and *B.* in the Kings Bench, certain *Affidavits* being openly read in the Court, the Defendant ſaith openly, *There is not a word true in them, as I can prove by twenty witneſſes*; this is not actionable, *Paſch.* 15 *Car.* B. R. *Moltons* Caſe. *March Rep. f.* 20. *pl.* 45.

It lieth not for ſaying, *I have matter enough againſt him; for* I. S. *hath found forgery againſt him, and can prove it*, Adjudg *Hob. Rep pl.* 395. Nor for this, *Thou haſt forged a Writing, Hob. Rep. pl.* 3. Nor for this, *Thou getteſt thy living by falſe Writs*, Adjudged. Nor for ſaying, *Thou haſt made a falſe Bond (or a falſe Deed) Paſch.* 39 *Eliz. B. R.* Nor for this, *Thou art a Varlet, and haſt ſuppreſſed thy brothers will to deceive others of Legacies, Trin.* 17 *Jac. B. R. Godfreys* Caſe. Nor for this, *This is the writing of* I. S. *he hath forged this Warrant*; *Hob. Rep. pl.* 3. For theſe words in theſe Caſes are too general and incertain to bear an Action. So if one ſay to another, *Whereas* I. S. *had made and ſealed to him a Bill for* 10*l. thou didſt ſhew me the Bill releaſed, and after ſealed, thou didſt forge that ſeal*; no Action will lie for this, *Hob. Rep. pl.* 48. Nor for this, *Thou haſt made the Great Seal.* Nor for this, *Thou haſt made falſe Records, and doeſt verifie them.* Adjudged.

It is very much doubted whether the Action will lie, or not lie, in all the Caſes, or for any of the words following; *Thou art a common Drunkard, a common Rioter.* And for this it is yet ſaid, it hath been ruled, it will lie, *M.* 8 *Car.* B. R. *Stones* Caſe. Or,

Thou

Thou art a common Night-walker, or thou art a common Eves-dropper, or thou art a common Barretor, or a common Hedg-breaker; for, for these a man may be bound to the good behavior.

But most men incline that these words are not actionable, *Thou art a branded Rogue, M. 19 Jac. B R Harrisons* Case. And yet the better opinion was, that it will not lie for this, *Thou hast bought Titles, Hares* Case. *Thou hast hired one to rob me*; or *thou art a setter of thieves to rob me*; or, *thou keepest men with intent to rob me*; or, *thou keepest men to rob me, Hil. 13 Jac. B R.* But if I be robbed, these are dangerous words. But to say, *Thou keepest men which do rob me, or which have robbed me, contrà.*

And yet it is held, that for most of these words in this last rank, if they be spoken in reference to mens Trades, &c. or if any special loss can be averred to come to the party by the speaking of them, that then they may be actionable. *Co.* 4. 15, 17, 20 *M. 19 Jac. B.R. Harrisons* Case.

It is held somwhat clearly, it will lie for this, If one say to a Lord of a Mannor, *Thou art a couzening knave, and keepest couzening Courts to couzen men of their Fines, 4 Jac. B. R.* Which tend to a mans disgrace and reproach only.

It is held somewhat clearly, it will not lie for these words, and in these Cases following: *Thou art a Varlet*; or, *thou art a Rogue*; or, *thou art a Rascal*; or, *thou art of evil name*; or, *thou art a Villain*; or, *thou art a Slanderer*; or, *thou art a Cheater*; or, *thou art a cheating Knave*; or, *thou art a Pillory-Knave*; or, *thou art a cozening Knave, a Vermine of the earth, a false brother, 25 Eliz. B.R.* Or, *thou art a false fellow*; or, *thou art a Lyar*; or, *thou art a Conspirator*; or, *thou art a Railer*; or, *thou art a sower of discord*; or, *thou art a Malefactor*; or, *thou art a Miscreant*; or, *thou art a Drunken fellow*; or, *thou art a Bastard*; or, *thou art an Heretick*; or, *thou art a Schismatick*; or, *thou art an Hypocrite of the Church*; or, *thou didst famish thy last wife with thy wretchedness*; or, *thou art an Extortioner.* It will not lie for saying, *Thou art a cozening Knave, and hast cozened me of a hundred pounds, and I will make thee stand on the Pillory for it*, Adjudg. 30 *Eliz. B.R.* Nor for this, (unless it be of a Goldsmith) *I will prove thee a Cozener, for selling me a Saphir for a Diamond, Brownl. 2 part.* 100. Nor for this, *Thou getteſt thy living by cozening*, or, *thou hast cozened* I.S. *in buying Saddles for him, Pasch. 27 Car. B.R.* Nor for this, *Thou hast cozened me and all my kindred, 18 Eliz. B.R.* Nor for this, *Thou art a false Knave, and hast cozened me and my two kinsmen*, Adjudg. 26 *Eliz. B.R.* Nor for this, *Thou hast cozened all the Town of Coventry*, Adjudged. So it lieth not for saying, *He is a very bad fellow, for he made* I. S. *drunken in the night, and cozened him of a thousand marks, Goldsb. 125. pl. 12.* It lieth not for saying of any man, *He is a Papist, and hath a Pardon from the Pope, and can help you to such a one, if he will.* Or thus, *He is an arrant Papist, and, it were well if all such were hanged for they would have the Crown from the Kings head, if they durst, Brownl. 2 part, 166.* To say, a man is a Recusant, or received a Recusant-Priest, or hath committed a Riot, or the like words, that, if true, would bring one in question and danger upon a penal Law; with Averment of special damage by them, will bear Action, otherwise not. See *March. f. 114, 115.* and *Brownl. 1 par. 9, 11, 12.* It will not lie for saying, *Thou art a Papist, and hadst a Pardon from the Pope, Brownl. 2 par. 166.* It will not lie for saying, *Thou art a Hornsby, and a Cuckoldly knave, Trin. 9 Jac. Palmers* Case. Nor for this, *Thou hast cozened the Earl of* Hartford *of as much as thou art worth, Trin. 9 Jac B.R. Tucks* Case, *Curia.*

It is very doubtful whether it will, or will not lie in these following Cases; *Thou didst hold up thy hand at the Bar, or thou hast deserved hanging, M. 4 Jac. B.R. It is in my power to hang thee, 7 Jac. B.R. Thou didst deserve hanging, Trin. 16 Car. B.R.* Or, *Thou deservedst the pillory, or hast deserved to have thine ears nailed to the pillory, Pasch. 37 Eliz. B.R.*

To me there seems great reason, that these five last should bear an Action; for they necessarily imply the doing of such a thing as hath deserved it: yet the current Opinion and Cases go the other way.

And yet it is held for many, if not for any of these words, if any special loss can be averred to come to the Plaintiff by them, that he may have this Action for the speaking of them; also many of these words having reference to a man in his Office or

Trade, are actionable, *Co.*4. 15, 17, 20. *M.* 19 *Jac. B.R. Harrisons* Case.

Of an Averment in this Action, and where and what Averment is necessary, and what other thing must be shewed in the Declaration to maintain the Action, or not.

It matters not whether the Plaintiff set forth all the circumstantial words as they were spoken, so as he set forth the very words truly. As if he set forth the talk be, *Will you be present at such a Trial between* A. *and* B. *and in truth it was between* R. *and* B. (or the like) and he say, *I'll warrant you* B. *dare not be there, for he is broken. Hil.* 17 *Jac. B.R. Johnsons* Case.

An Action will lie for these words, *I will justifie that* Barns *is accessary to the Burglary for which* C. D. *was hanged*, without averring that he was hanged for such a Burglary, *Trin* 9 *Jac. B.R.* Adjudg. *Barns* and *Hunts* Case.

If an Action be brought for saying words, as, *Thou hast strained my Mare, art meansworn*, or the like, there must be an Averment that the words have such a meaning in that Country; but this is confidently denied by others. See in *March. f.* 18. The safe way is to aver it.

Sect. 14. If an Action be brought for saying, *A man hath killed I. S.* and he sue for this slander, it need not be averred, that the party said to be killed is dead, Adjudg. *B.R. Co.*4. 16. *Hob. Rep. p.* 11. And this seems to me clear Law, yet hath been much opposed, *March. Rep.* 109. *pl* 187.

If the slander be upon a Report, it must be averred that there was no such Report, *Hil.* 4 *Jac. B.R.* Lady *Morrisons* Case; and *Pasch.* 42 *Eliz. Co. B. Morleys* Case, adjudged.

If an Action be brought for saying, *Thou wast in the gaol at* S. *for robbing*, &c. he needs not aver that he was not in gaol, but this is the best pleading. *Sprat* and *Hayns* Case. To call one *Bankrupt*, if one bring Action, he must aver he is a Tradesman.

By the better opinion, this Action will lie for a slander in another tongue, or by a strange word, without averment of the meaning of the words, *Hob. Rep. pl.* 165, 268. *March. f.* 18. But an Averment of special damage is not necessary, in case where the words touch or concern a mans life, liberty, or member, or any corporal punishment, or which scandal a man in his Office or Trade, or which charge him with any great infectious disease, by reason of which he must be separate from humane society. But if they be in scandal of a mans Title, or in other cases, there must be an allegation of particular damage; yet the best way in all these Cases is to alleage some special damage, if the Case will bear it.

If any words be spoken (in themselves not actionable) of a young woman or man, charging them with Incontinencie or otherwise, by which they lose their match; or of any man, by which he loseth an office, service, or preferment he stands for; his loss of the match, or office, *&c.* must be specially averred, or else it is not good, *Pasc.* 15 *Car. B.R. Axes* Case, *Sandersons* Case, *Trin.* 17 *Car. Co. B.*

So if any words of passion only, not actionable, be spoken; as to say, A man is forsworn, he is a Rogue, Villain, or the like; if any Action be brought upon them, it must be maintained by a special Averment of loss, *Co.*4. 15.

There are other words which concern matter meerly spiritual, and determinable in the Ecclesiastical Court only; as for calling a man a Bastard, a Heretick, a Schismatick, an Advouterer, a Fornicator; for calling of a woman a Whore, or charging her with any particular act of Incontinencie, or the like. Yet in these Cases, with an Averment of a particular damage, an Action will lie at the Common-Law, as it is adjudged in *Anne Davis* Case, *Co.*4. 17. *a.* & *f.* 20. *a.* 27 *H.* 8. 14. *Regist. f.* 54.

By *Popham* Chief Justice, If one say of a woman that is an Inholder, *That she hath a great infectious disease*, by which she loses her Guests, an Action will lie. This must be taken with an Averment of that particular damage; otherwise an Action will not lie, unless the disease be such for which she ought to separate herself, or to be separated by the Law from common society, *Co.*4. 17.

Axe and *Moods* Case cited before; The Plaintiff being a Dyer brought an Action for these words, *Thou art not worth a groat*; Adjudged that the words were not actionable, because that many a man in his beginning is not worth a groat, and yet hath good credit with the world, *Pasch.* 15. *Car. B.R.* But in this Case it was agreed, that if the Plaintiff had averred specially that he was thereby damnified, and had lost his credit,

credit, ſo that none would truſt him, with ſuch an averment the Action would have layen.

The brother of the Defendant ſpake theſe words to the Plaintiff, *Thou thief, thou Gaol-whelp, thou haſt ſtollen a peece of ſilver from my maſter:* and hereupon the Defendant ſpake theſe words, *That which my brother ſpake is true, I will juſtifie it.* And in this caſe it was agreed, that Action will not lie for them, without averment that he had notice of his brothers words. *Brownl.* 2 *par.* 100.

In the Caſe of the Foreman of a Shoomakers ſhop, cited before, for theſe words, *It is no matter who hath him, for he will cut him out of doors*; the Plaintiff averred, that the common acceptation of theſe words *inter Calcearios* is, that he will begger his Maſter and make him run away, and ſhewed a ſpecial damage by the ſpeaking theſe words, and it was adjudged that the Action would lie, which I conceive was only for the particular damage: For to ſay of a Servant, *That he doth cheat, cozen, or defraud his Maſter, or that he will beggar his Maſter*, or the like, will not bear an Action without an averment of a particular damage. *M.* 15 *Car. B.R.*

And in this caſe it was ſaid by the Court, that for ſome words an Action will lie without an averment of any particular damage, as for calling of a man Thief, Traitor, and the like: And ſome words will not bear an Action without an averment of a particular damage; as if a man ſhall ſay of another, *That he kept his wife baſely, and ſtarved her*, theſe words of themſelves will not bear an action; but if the party of whom they were ſpoken were to be married to another, and by theſe words is hindred, in ſuch caſe, with an averment of the particular damage, an action will lie.

So likewiſe in the Caſe of *Dicks* and *Fenne*, which I cited before, where one ſaid of the Plaintiff, being a Brewer, *That he would give a peck of mault to his Mare and lead her to the water to drink, and ſhe ſhould piſs as good Beer as the Plaintiff brewed:* It was reſolved that the words themſelves were not actionable, becauſe of the impoſſibility of them; but it was agreed by the Court, that if there had been a ſpecial damage alleaged, as loſs of cuſtom, or the like, the action would have layen, *M.* 15 *Car. B. R.*

Haws Caſe cited likewiſe before; one ſaid of him, that he had ſpoken againſt the Book of Common-Prayer, and ſaid, *That it was not fit to be read in the Church*; for which he brought his action, and ſhewed how that by reaſon of the ſpeaking of theſe words by the Defendant, he was cited into the Eccleſiaſtical Court, and had paid and expended ſeveral ſums, &c. Adjudged that the words themſelves were not actionable, becauſe if they had been true, they charge him only with an offence againſt a penal Law, which doth not inflict corporal puniſhment, but for non-payment of penalty, *M.* 17 *Car. B.R.* But it was reſolved, that for the particular damage the action would lie. See *Brownl.* 1 *par.* 10. 13. 2 *par.* 100. 129.

That in all Caſes for words, where there is any thing that is the cauſe or ground of the Action, or tends neceſſarily to the maintenance of it, in ſuch Caſe the Action will not lie, without that thing be expreſly averred to be, or not to be, as the Caſe requireth, *Haſlewood* and *Garrets* Caſe cited before; *Whoſoever is he that is falſeſt Thief, and ſtrongeſt in the County of* Salop, *whatſoever he hath ſtollen, or whatſoever he hath done*, Thomas Haſlewood *is falſer then he:* Reſolved that the words were actionable, with an averment that there were *Felons* within the County of *Salop*; but fault of ſuch averment, the Judgment given in the Common-Pleas was reverſed in this Court. *Paſch. Jac. B.R.*

Note Reader, if there were no Felons in that County, (which will rather be intended, if it be not averred that there were ſome) then the ſpeaking of the words could be no ſlander to the Plaintiff, and ſo no action can lie. *Hob. Rep.* 39. *Blands* Caſe cited before: He brought an action againſt *A. B.* for ſaying, *That he was indicted for Felony at a Seſſions holden*, &c. and did not aver that he was not indicted; and after a Verdict for the Plaintiff, Judgment was ſtayed, becauſe there was no averment, *ut ſupra.* Note, if he were indicted, which he doth tacitely admit, yet no cauſe of Action, for the words in themſelves are not actionable, *Hob. pl.* 2 9.

Johnſon againſt *Dyer*; the Defendant having communicated with the Father of the Plaintiff, ſaid to him, *I will take my oath that your ſon ſtole my Hens*; and the

Plaintiff

Plaintiff did not aver that he was his Son, or that he had but one Son, and therefore adjudged, that the Action would not lie in this Case, if he were not his son, then no cause of action, *M.* 15 *Car. B.R.*

Sect. 15. One *Clark* said that he had a son in *Nottinghamshire* who had his Chest picked and one hundred pounds taken out of it, in one Locksmiths house, and I thank God I have found the thief who it is, it is one that dwelleth in the next house, called *Robert Kingston*. Upon which, *Kingston* brought an action, and had a verdict, and it was moved in Arrest of Judgment, because that he did not aver that he dwelt in the next house, *Pasche* 7 *Jac. B. R. Crook.* One said that *Pritchards* man robbed him, who brought an action, and did not aver that he was *Pritchards* man, and therefore it was held that the action would not lie, and the Justices in this case would not give Judgment.

Non constat in this Case, that the Plaintiff was the party of whom the words were spoken; for there might be another of the same name dwelling elswhere; and therefore he ought to aver that he dwelt in the next house, that he may be certainly intended to be the same person of whom the words were spoken. See *Brownl.* 7. *part.* 13. 2. *part.* 100.

What shall be said a good bar or plea in this Action.

The Defendant may plead not guilty; or if the Plaintiff sue upon some of the words, when all together, are not actionable, the Defendant must set them forth at large, (*Co.* 4. 13. 19.) as he spake them, and traverse, or justifie, or plead not guilty to the rest of the words, as the Case is. *Co. New Book of Entries, f.* 24. *a.* 25. *a.* 26. Or, if the words be true, and he be able to prove it, he may justifie the speaking of them; as if I say *J. S.* was perjured, I may shew he was so in the Star-chamber; or he is a thief, I may shew he was attainted of *Petit Larceny.*

Justification. It is not a good Justification for calling one Murderer, to say there was a murther done, and the Plaintiff was indicted for it, or that the common fame was he did it. *Dyer* 236. *Broo.* 127. *New Book of Entries*, 26, 27. Nor can one justifie for charging one with a Felony after he hath a pardon, *Hob. Rep. pl.* 106. 71. To say a man was indicted for Felony at *S.* it may be justified, if it be true, *Hob. Rep. pl.* 289. but the words are not actionable. So in a charge of *Perjury*, it is not a good justification to say, he swore such a thing in a Court falsly, unless he adde this, knowing it to be false. *M.* 38, 39 *Eliz. B. R. Willis* Case. See *Brownl.* 1. *part.* 10. 11. 14. 13. 2. *part.* 49. 272.

If one call a man Thief, he may justifie it, for that he stole a sheep, *Hob. Rep. f.* 258. 27 *H.* 8. 22. If *J. S.* say to another, *J. S.* is a Thief to *J. S.* and to me, and in an Action brought by him, I justifie for a *Felony* done to me onely, this is not sufficient, for the charge is of a double *Felony*, and the justification to a single *Felony*, *M.* 21 *Jac. B.R.* See *Brownl.* 1. *part.* 2. 5. 7. 13. 2. *part.* 100.

Where the Verdict of the Jury will maintain the Declaration and the Action, or not.

That where the words that are found, do not agree with the Declaration in the substantial and essential form, that in such case they do not warrant the Declaration: But if they do agree in the substantial and essential form, though they agree not in every word, yet they do well warrant the Declaration, and by consequence maintain the Action.

Sydenham against *Man*, for these words, *If Sir* John Sydenham *might have his will, he would kill all the true Subjects in* England, *and the King too; and he is a maintainer of Papistry, and Rebellious persons.* The Defendant pleaded other words, and traversed the speaking of the words *Modo & forma, &c.* The Jury found that he spoke these words, (*viz.*) *I think in my Conscience that if Sir* John Sydenham *might have his will, he would kill, &c.* and finde all the subsequent words before alledged. In this Case, it was resolved against the Defendant, *Hob. Rep. pl.* 252. *pl.* 213. But this Case notwithstanding is doubted by some.

Fenner against *Mutton*, in an Action upon the Case for words, which were thus, *Nicholas Fenner procured eight or ten of his neighbors to perjure themselves*; the Defendant pleaded not guilty; and the Jury finde that the Defendant said, *That* Nicholas Fenner *had caused eight or ten of his neighbors to perjure themselves*, *M.* 4 *Jac. B.R.* This was doubted by *Tanfield* Justice, and by him held not a sufficient Verdict to maintain the words.

Chipsam

Chipſam againſt *Jeek* for theſe words; *Chipſam is a Thief, for he hath ſtollen a Lamb from* A. *and Geeſe from* B *and killed them in my ground.* Iſſue was joined whether the Defendant ſpake the words *modo & forma, &c.* the Jury find that the Defendant ſaid, *That the Plaintiff was a Thief, for he hath ſtollen a Lamb from* A. *and killed it in my ground*; but they find he ſpake nothing of the Geeſe: yet it was reſolved, that the finding of the Jury did well warrant the Declaration of the Plaintiff. *Hil.* 3 *Jac. B. R.*

Norman and *Symons* Caſe, the Plaintiff brought an Action for words, and declared that they were ſpoken *falſo & malitioſe*; the Jury find the words ſpoken *falſo & injurioſe*, and it was adjudged that the Action would not lie, becauſe the finding of the Jury doth not warrant the Declaration in the ſubſtantial form of it. *Trin.* 7 *Car. B. R.*

Burgis brought an Action for theſe words, *Burgis is a maintainer of Thieves, and a ſtrong Thief himſelf:* Iſſue was joined whether the Defendant ſpake the words *modo & forma*, and the Jury found all the words except the word [*ſtrong*] and in this Caſe the Plaintiff had Judgment, 6 *E.* 6. *Dyer f.*75. 21. Here we may obſerve, that though every word alleaged in the Declaration be not found, yet the eſſential and ſubſtantial form of the words being found, that is ſufficient to maintain the Declaration. This, I ſay, you may obſerve, not only by this Caſe, but the Caſes alſo before put.

Barber brought an Action againſt *Hawley* for theſe words, *John Barber and his children be falſe Thieves, men cannot have their Cattel going upon the Common, but they will kill them and eat them, &c.* Iſſue was joined whether the Defendant ſpake the words *modo & forma*, and the Jury found that he ſpake theſe words, *viz. Men cannot have their Cattel going upon the Common, but* John Barber *and his children will kill them with* Barbers *dogs*; in this Caſe it was adjudged for the Defendant.

The Action is brought for ſaying, *I know him to be a Thief*; and the Defendant pleaded other words *abſque hoc*, and the Jury find he ſay, *I think him to be a Thief*; this is not ſufficient. See *Hob. Rep. pl.*213.

If one ſay to another of a woman paſſing by, *She is a Witch, and hath bewitched my child* [*innuendo* the Plaintiff] and Verdict is given for the Plaintiff, now it is out of queſtion. *Paſch.* 18 *Jac. B R. Roberts* Caſe.

If the Declaration ſay, that the Defendant ſpake of the Plaintiff theſe words, *Eyres* [*innuendo* the Plaintiff] *is a Thief*, and Verdict be given hereupon for the Plaintiff, this is good and made certain. *Eyres* Caſe, adjudged *M.* 7 *Jac. B. R.*

If one bring this Action for divers words, whereof ſome are, and ſome are not actionable, and the Jury aſſeſs damages for all together, this is Error and cauſe to arreſt the Judgment. But if it appear they do diſtinguiſh them, then it is well, 25 *Eliz. B. R.* Out of all this take notice, it is good policie, when one lays his Action for words, to ſuppoſe the Action for divers ſlanders, as for words ſpoken at ſeveral times and ſeveral ways; that in one of the Charges the Plaintiff may be ſure to hit the very words, or the ſubſtance thereof. *Sect.* 16.

Of an Action of the Caſe upon an Aſſumpſit.

AN *Aſſumpſit* is nothing but a voluntary promiſe made by word of mouth only, by which a man doth aſſume or take upon him to do or pay any thing to another. *New Terms of the Law.* *Aſſumpſit*, what it is.

If it be in Writing and by a Deed, it is of another conſideration; we meddle not with this. But an *Aſſumpſit* ſeemeth to differ from an Agreement, but as the *Genus* and *Species*: For an *Aſſumpſit* is but a ſpecial kind of agreement, and every Executory Contract hath an *Aſſumpſit* in it, *Co.* 4. 44.

There are two conſiderable parts of it; the Conſideration of the *Aſſumpſit*, and the *Aſſumpſit* or Promiſe it ſelf.

This Action of the Caſe upon an *Aſſumpſit* (as the Contract) is either expreſs, as when one for good cauſe doth promiſe that himſelf or ſome other ſhall pay money, make a Houſe, ſeal a Bond, make a Leaſe, or the like: Or implied, and ſupplied by the

the Law, as in every Executory contract there is an *Assumpsit* implied. *Co.* 5. 19. 4. 94. 49. *Plow.* 308.

They that are expreſs, are alſo abſolute or conditional: And theſe are alſo ſome of them, ſuch as have a conſideration called *Quid pro quo* in them; and ſome of them are without conſideration called a bare or naked promiſe, which is where a man bargaineth or ſelleth his lands or goods, or promiſeth to give one money or a horſe to build a houſe, or do any thing by a day, and there is no recompence appointed to him for the doing thereof; this is void, and no Action lieth for the not doing thereof; for the rule is, *Ex nudo pacto non oritur actio.* Alſo theſe *Aſſumpſits* are either Real, or Perſonal.

Every Promiſe muſt have a Conſideration; and that muſt be of ſome benefit to him that makes it, or diſadvantage to him to whom it is made. *March.* 202. *pl.* 243.

What ſhall be ſaid a good implied *Aſſumpſit*, or *Aſſumpſit* in Law, on which an Action will lie, or not.

If I intreat one to be bound for me, there is in this an implicite *Aſſumpſit* that I ſhall ſave him harmleſs; and upon this if he be moleſted, he may have this Action. 2 *Car. per Juſt. Richardſon* at *Northampton*-Aſſizes; for the *Aſſumpſit* is implied.

If any goods beſides money be delivered to one to deliver over to another, or to the uſe of another, or to be imployed to any other purpoſe, or on condition that if he do ſuch a thing, he ſhall keep them; in all theſe and ſuch like caſes, ſome think there is an *Aſſumpſit* implied, upon which this Action will lie in caſe of breach of the truſt. *Dyer* 21, 22, *&c.*

If I bid one do work for me, and do not promiſe any thing, the Law makes it, and he muſt ſay it was worth ſo much, and that which he deſerves is recoverable in this Action. *Trin.* 8 *Car.*

Every Executory Contract doth imply an *Aſſumpſit*: So every Debt that is not upon a Specialty (or for Rent upon a Leaſe) but which may be turned into Damage, as upon an Account, or upon a Buying or an Agreement, hath an implied Promiſe, and the Plaintiff may ſay that the Defendant did promiſe to pay it, and make the Debt the Conſideration. See divers Caſes *infra.*

An Executor cannot be charged in account for any Receit or Occupation by the deceaſed, nor in debt upon the Contract of the deceaſed; but an action of the Caſe it is thought will lie in the firſt, and it is clear will lie in the laſt Caſe, upon the implicite Contract. *Co.* 4. 8. 94. 133. As if one receive my money to account, and he and I caſt it up and agree in certain what is due, and then he die; in this caſe it ſeems I may have this Action againſt the Executor or Adminiſtrator, albeit I cannot have an Account. *Hil.* 13 *Jac. per Ch. Juſtice.*

A bare ſubmiſſion to an Award without any expreſs promiſe, is ſufficient to yield this Action upon the *Aſſumpſit* in Law. Adjudged. *Neals* Caſe, *M.* 37, 38 *Eliz. B.R.* and in *Trin.* 18 *Jac. B.R. Brooms* Caſe. And ſo in divers other Caſes.

What ſhall be ſaid a good expreſs *Aſſumpſit*, on which this Action will lie, or not. For the manner.

As touching this point, the manner and the matter is conſiderable. As to the manner, it matters not in what form of words the *Aſſumpſit* is made, ſo the ſenſe be clear; and therefore if one promiſe me twenty pounds when I have done a work, or to do a work, or if I do a work, or ſo as I do a work, all theſe are good *Aſſumpſits*, *Plow.* 5. 305. So if one promiſe me twenty pounds, if I marry his daughter, or with the marriage of his daughter, theſe are good, *Plow.* 305. Or if you will ſatisfie me, I will do ſuch a work.

Sect. 17. Matter. *Aſſumpſit* imperfect.

As to the matter, it is conſiderable together, or apart. Together; and as to this, this muſt be known. 1. That the whole agreement muſt be conſummate. If *A.* and *B.* agree, that *A.* ſhall lend *B.* twenty pounds for a time, and for this that *B.* ſhall morgage to *A.* ſuch Land upon requeſt; and after *A.* upon requeſt of *B.* deliver wares to *C.* for part of this twenty pounds, and hereupon *B.* doth promiſe to accept it for part of the mony, or to redeliver it to *A* upon requeſt, this Contract is perfect and good to give action, *Old book of Entries*, *f.* 4. So if *A.* owe *B.* one hundred pounds, and *C.* being a Clothworker to *A.* having clothes of his in his houſe, and they three agree that *B.* ſhall have theſe clothes for his money, and that *C.* ſhall deliver them,

this

this is good, and sufficient. *Adjudged.* So one possessed of a Field of Corn, agreeth with another, that he shall have all the Corn there for Twenty pounds, to be paid him at *Michaelmas* next, *Co.* 4. 92. But if the agreement be onely in inchoation and not perfect, no action will lie upon it. And therefore if two speak together about an agreement, and they in the midst of their discourse break off, and say they will talk further of it to morrow, no Action can be brought upon any of the conference of this day. See *Contract, chap.* 15. *sect.* 4.

If two be in Speech about marriage between their Children, and one say to the other, I intend to give my daughter One hundred pounds to him that shall marry her with my consent, this is imperfect. 2. It must be sensible and certain.

If an agreement be between me and another, that for Ten pounds paid he shall give me a Horse, or a Watch such a day; this is good and certain enough, *Fitz. Debt.* 89 So if the agreement be that he for good cause shall make good such a house, this is good, and shall be taken for repair of it, *M.* 2 *Jac. B. R.* So if the agreement be about a horse for Twenty shillings in hand, and Ten pounds more to be paid at the death or marriage of the buyer, for which he shall become bound with sufficient surety by their writing obligatory, that for this, the seller will deliver the horse upon request; this is certain enough and good, *Hob. Rep. pl.* 79. But if the agreement be such as cannot be made certain and sensible, it is void. And therefore if the agreement be, to save harmless, and not for what, or against whom, this is void. So if it be agreed between *A.* and *B.* that *A.* shall keep *B.* without damage against *J. S.* for ten pounds, in which the Obligee is bound to the Obligor; or, if the Assumpsit be, that *A.* shall pay to *B.* his part of the sum of moneys that shall be levied for the trying of the customs of *M.* These are all insensible and void, on which no Action will lie. See *Co.* 10. 102. 76. *Dyer* 356. 3. It must agree. If one in consideration that I have given and delivered to him one horse, and have promised unto him, that upon twenty pounds paid to me, I will deliver him such an Indenture, and he assume to pay me this twenty pound at *Michaelmas*; this is not repugnant, but good to give Action for the Twenty pound at *Michaelmas*, if not paid, *Co.* 5. 37. But if the agreement be repugnant and contrary to it self, it is void. If it be agreed between *A.* and *B.* that *A.* shall do such a work, and *B.* shall give so much for it, but *A.* shall not sue for the money: this is void, and will not binde on either side before the work be done. But after the work is done, it may perhaps bear an Action, *Quere*, 7 *H.* 6. 44. 21 *H.* 7. 24. 3.

Assumpsit insensible and incertain.

Assumpsit repugnant.

In the matter considerable apart, there are three things to be considered. 1. The persons to the Assumpsit, and for or against whom this action doth lie. 2. The cause or consideration of it. 3. The promise it self.

As touching the persons to the Assumpsit, these things are to be known. 1. The persons that do promise, must be able in Law to Contract; otherwise the promise will not binde; and therefore regularly the Assumpsits of Infants, Women that have Husbands, and such like, do not binde; yet generally promises made to them are good. But see how and more of this point in Contract before. 2. A promise to the Wife is all one as if it were to the Husband; and therefore, if one say to my Wife, that if I will let *A.* out of prison, being there in execution for a debt owing to me, that if the prisoner pay it not to me by such a day, he will pay it; in this Case I alone without my Wife may sue him, 27 *H.* 8. 24. 3. If a promise be made to my Servant to my use, I may have an Action upon it, and suppose it to be made to my self, *M.* 36, 37 *Eliz. B. R. Jordans* Case. But of this, and of Contracts made by, or with Servants, for their Masters, enough already hath been spoken. But otherwise it is of Contracts made with a Stranger to my use; and therefore if there be Mother, Son, or Daughter, and the Mother having a Joynture on her Sons Land, the Son in consideration that his Mother doth surrender, doth assume with her to pay the Daughter One hundred pounds at a day; in this Case the Daughter (at least in a Court of Law) cannot sue for this Hundred pound, but the Mother must sue for it. And yet it is thought the Daughter may sue in a Court of Equity for it, Adjudged. *Trin.* 18 *Jac. B. R.* If one in consideration that I have paid him Ten pounds, assume to a stranger to assure me an Acre of Land, no Action will lie for me at Common Law

In respect of the persons to the contract. Women covert.

Infant.

Non compos mentis.

Servant.

Stranger.

upon this. But in a Court of Equity, happily I may have relief, *Jolleys* Case.

Executor. *Pasche, 9 Jac. B. R.* by three Judges. 4. This Action lieth for an Executor or Administrator, upon a promise to the deceased. And if a man promise to pay money, or to pay that which is in the nature of a debt, or where the ground is a true debt, and he die before it be done, the Executor or Administrator shall be charged with it. *Hob. Rep. pl.* 278. *Co.* 9. 68. *Plow.* 182. But otherwise it is when it is to do some Collateral thing, as to build a house, or the like; or when it is to pay money in consideration of some Collateral thing, as in consideration of the enlargement of a man out of prison, or the like. And upon this difference it hath been oft adjudged, *Trin.* 3 *Jac. B. R.* yet see *Co.* 10. 77. That for the Assumpsit of the Testator to pay a debt or perform a duty, an Action of the Case lieth against the Executors, *New Book of Entries, f.* 1, 2.

Assumpsit by two or more to a person incertain. 5. If an Assumpsit be made by two or more, they must be sued together, and one of them cannot be sued alone, as long as the rest live. But if one of them die, the rest may be sued alone, *M.* 7 *Jac. B. R. Curia.*

If another and I be speaking about marriage between his Daughter and my Son, and in conference I use these words, *That I shall give him One hundred pounds that shall marry my Daughter with my consent:* No Action will lie upon this, though he do after marry my Daughter with my consent, *Pasche,* 3 *Jac. B. R. Goldsmith ver. Weston.*

In respect of the cause or consideration. To make the cause or consideration of an Assumpsit good, it must have all these qualities. 1. It must be valuable, that is, it must import some gain to him that makes the promise, or (at the least) some loss to him to whom it is made, or both. But the proportion of the value is not considerable; for a peny, or pint of Wine, will as much engage a promise of One hundred pound, as more. *Hob. Rep. pl.* 6, 7. *Trin.* 7 *Jac. B. R. Friends* Case. *Co.* 10. 102; 76. But in that Case the Jury will probably give damage accordingly, as the cause is. And the Law is all one in this, when the Contract is in a writing, or a writing sealed and not delivered: But if it be in a writing sealed and delivered as a Bond or Bill, there the consideration is not at all material. *Fitz. Debt.* 126. *Broo. Action of the Case,* 40. But if there be two parts of the consideration, and one part is valuable, and the other not, it is good. But in a *Non-Assumpsit* both parts must be proved, or the Action will fail, *M.* 4 *Jac. B. R. Lees* Case; but care must be had in giving of damages. See *Brownl.* 2 *part.* 274.

Sid. 18. If *A.* delivered to *B.* the eighth of *May*, One hundred French Crowns, and delivered also as many the ninth of *May*, and *B.* in consideration thereof did then and there assume to deliver six shillings in silver for every Crown upon a *Non-Assumpsit*, verdict for the Plaintiff, and entire damages, the Judgment was reversed; for the Assumpsit goeth onely to that which was last delivered. *M.* 42, 43 *Eliz. Pilsworth* and *Seals* Case.

2. The consideration must be lawful; for if the consideration moving the promise, be either *Malum in se*, or, *malum prohibitum*, it is void. And yet if part of the promise be lawful, and part unlawful, there it may be good. *Dyer* 359. *Co.* 10. 102.

3. If the consideration be Executory, there it must be duly performed, 9 *H.* 7. 13. otherwise the action will not lie. And therefore if one promise to me, so I will help him to gather his Tithe-Hay and Corn, he will pay me Ten pounds: If I help him to gather his Hay onely, I cannot recover the Ten pounds, *M.* 7 *Jac. B R.* 8 *H.* 7. 13. See *Brownl.* 1. *part.* 8. 2. *part.* 137, 138, 279.

All these things are valuable and good considerations, money paid, or any valuable thing done, paid, or delivered, to suffer a Tenant at will to hold the Land longer, *M.* 9 *Jac. B. R. Coventries* Case. *Loan of money, New Book of Entries, f.* 1, 2. To marry ones childe or friend, *New Book of Entries, f.* 2. To Ear Land, Solicite Suits, to deliver one in prison on an Execution for debt, out of prison; to forbear a Suit for a certain time, to make, or give up, or release an estate or interest into Land, *Plow.* 30. *Kelw.* 69. 77. To stand to an Award to be made, not to trouble a man upon a Judgment I have against him, *Hoseboots* Case; to become bound as a surety with another, *M.* 9 *Jac. B. R.* to keep goods safe committed to him, *Old Book of Entries, f.* 9. To marry my Daughter or Kinswoman, or (as it seems) any other at the request of him that makes the promise. To make an Obligation; and finally, any thing which

which for the matter of it may be good in a Promiſe, may be good in a Conſideration. See for theſe things more, *Brownl.* 1 *par.* 41. 2 *par.* 274, 279.

In conſideration that a ſtranger ſhall ſurrender a Leaſe to me at the requeſt of the Plaintiff, and that the Plaintiff ſhall cancel an Indenture, is a good conſideration, if it be done to produce an Action, *Paſch.* 9 *Jac. B.R. Collins* Caſe.

If *A.* be indebted to me, and for payment thereof deliver me goods, and *C.* in conſideration that I will deliver him the goods, doth promiſe to pay me the money; this is a good promiſe. *Brownl.* 1 *part*, 3.

Tenant at will of Land ſowed ſurrendreth to him in Reverſion, and for this he promiſeth; it ſeems this is no good conſideration: but if he be a Tenant for any Term of years, it is otherwiſe. *Brownl.* 1 *par.* 6.

If *A.* owe to *B.* fourſcore pounds, and *A.* in conſideration that I will be bound with him for the money to *B.* promiſe to enter into a Bond of one hundred pounds to me, and I become bound with him, this is a good conſideration to give an action upon his breach of promiſe. *Adjudg. M.* 9 *Jac. B.R. Knevats* Caſe. So alſo a promiſe to do any ſuch thing, may be a good conſideration of another promiſe; for one promiſe may be a good conſideration of another promiſe, if they be made together at one time, for otherwiſe they are both void. *Hob. Rep.* 16. 116. *M.* 2 *Jac. Co. B. Somes* Caſe, and *M.* 4 *Jac. B.R. Cadels* Caſe. *Brownl.* 1 *par.* 10.

If one for forty ſhillings paid, aſſume to deliver me forty quarters of corn at ſuch a time and place for ten pounds to be then paid, this is good; and if I bring the money at the time and place, I may ſue for the corn; if he bring the corn, he may ſue for the money. *Plow.* 182. *Coo.* 4. 93. Goods, or a promiſe of goods may be a good conſideration for goods, or a promiſe for goods, as well as money. *Fitz. Debt.* 68. But if there be none of this in the Caſe, it is but *Nudum pactum ex quo non oritur actio.* One doth promiſe me in conſideration that I will not enter a Caveat againſt the Probate of the Will of *I. S.* that he will pay me ten pounds, this is a good conſideration, whether I have any cauſe to do ſo or not. *Adjudged in the Exchequer-Chamber.*

If *A.* and *B.* be bound in a Bond jointly and ſeverally to pay money, and in truth *A.* is principal, and *A.* ſaith to *B.* Pay the money to the Obligee, and I will repay you; this is a good promiſe, and if *B.* do pay it, he may recover it again by this action. *Adjudg.* 9 *Car. B R.*

If I have a Judgment againſt a man for twenty pounds, and I promiſe him that if he will pay me the money, I will give him five pounds, this is a good conſideration to bind the promiſe; for it will coſt me charge and pains to recover it. *Trin.* 38. *Eliz. Dixon verſus Adams.* So if one take away my goods wrongfully, and I promiſe him, ſo he will let me have mine own goods, to give him ten pounds. *Adjudg. Pool & Clipſons* Caſe, *temp. Car. R.*

If one ſay to me, that if I will depoſe before the Maior of *A* the truth of that which I do affirm, he will pay me twenty pounds, this is good; and if I do voluntarily depoſe it before the Maior, I may recover the money by this action. *Hil.* 38 *El. Co. B.*

If *A.* owe to *B.* twenty pounds, and *C.* ſay to *A.* Pay him his twenty pounds, and I will pay it to you again; this is a good conſideration to make good the promiſe. *Adjudg. M.* 7 *Car. B.R.*

If one have a Judgment againſt me for one hundred pounds, and he promiſe me, ſo I will pay him fifty pounds, he will acknowledg ſatisfaction or releaſe the execution of the hundred pounds by a day; this is a good conſideration to give an Action, if it be not done. Adjudg. *Cook & Harvies* Caſe, and *M.* 38 *Eliz. Co. B. Reynolds & Pynhams* Caſe.

If one have goods delivered to him in pawn, and another deſire him to deliver the goods pawned to him, and he will pay him the debt for which they were pawned, this is a good conſideration: and the certainty of the goods need not be ſhewed in the count, as in caſe where goods are demanded or damage for them. *Brownl.* 2 *part*, 274. So a conſideration to go to *Weſtminſter*, to cure a poor man, or marry a poor woman, are good conſiderations.

If I be bound in a Bond of 20*l.* to pay 10*l.* by a day, and fail at the day, and after the Obligee bid me pay twelve pounds to *I. S.* and he will deliver me up the Bond by a

day, this is good to give an Action if he do not deliver it. *Harveys* Caſe, 4 *Jac.*

If one that hath my Goods, promiſe me, ſo that I will let him have them for a moneth, that he will deliver them to me; this is a good conſideration to uphold an Action againſt him, if he do not deliver them, *Paſche*, 37 *Eliz. Co. B.R. May verſ. Alvers.*

Theſe alſo are good conſiderations, That upon account between them, the Defendant was found ſo much in debt to the Plaintiff, *Hob. Rep. pl.* 117. So that he was in debt to him, and in conſideration of forbearance promiſed to pay it, *Co.* 10. 77.

The Plaintiff declared, That the Defendant in an Account between them, was found in arrerages; and in conſideration that the Plaintiff would defer the day of the paiment of his debt, for a little time, he did aſſume to pay it; it was judged good, *Goldsb.* 48. *pl.* 6.

An Action was brought by *Richard Body* againſt *A.* and declared, That whereas *K. Rawly* was indebted to *Body*, and the ſaid *A.* indebted to *R.* in Fifty pound, in conſideration that the ſaid *K. R. allocavit eidem A.* Fourteen pound, *& promiſit ei ad exonerandum eundem* A, Fourteen pound, *parcel. predict.* Fifty pound; the Defendant did aſſume to pay the Fourteen pound. It was adjudged a good conſideration, *Goldsb.* 49. *pl.* 8.

If the Executor or Adminiſtrator of one that did ow me money, in conſideration thereof, and that he hath aſſets in his hands, aſſume to pay me ſuch a day; this is a good conſideration to make the promiſe actionable, eſpecially if I give any time for it. But if there were no debt originally due, or no aſſets in their hands to pay it, ſome ſay no Action will lie, *Co.* 9. 93, 94. But Juſtice *Hutton* at *Sarum* Aſſizes, 21 *Jac.* held the Action will lie, though there be no aſſets, and without giving time; and ſo was it held in *Barns* Caſe, *Paſche*, 9 *Jac. B. R. per cur.*

If an Executor ow me Five pounds for the Teſtator, and buy of me Six Barrels of Beer, and in conſideration hereof, promiſe to pay me for both; this is a good conſideration for both, to charge him *De bonis propriis*, *Trin.* 37 *Eliz. Co. B. R. Wheelers* Caſe.

If *A.* ow *B.* One hundred pounds, and *C.* being a Clothworker to *A.* have clothes of his in his houſe, and they three agree that *B.* ſhall have theſe clothes for his money, and *C.* promiſe to deliver them; this is a good conſideration to binde *C.* to deliver them, for hereby he ſhall be diſcharged againſt *A*, adjudged. *Trin.* 2 *Jac. B. R. Warder verſus Chapman.*

If I demand Ten pounds of another, and he promiſe me, that if I can prove it to be a true debt, he will pay me; if I prove it as I may in the ſame Suit for it; this will be a good conſideration, adjudged. *M.* 18 *Jac. Stat. verſ.* Mary, *Co.* 11. 59. 10 *Ed.* 4. 11.

If a Scrivener promiſe me in conſideration, that I will let him have the putting out of my money, that he will take good ſecurity for it; this is a good conſideration, and makes a good Aſſumpſit, *M.* 7 *Jac. B. R. Kellingworths* Caſe.

If I deliver one Ten pounds to redeliver to me again, and he do not ſo, it ſeems I cannot have this Action for my relief, but I may have an Action of Account; but if there be a promiſe to redeliver it, perhaps this Action will lie, *Hil.* 37 *Eliz. Co. B. R. Howdels* Caſe.

If one in conſideration of a Leaſe for years made by me, promiſe to pay me a ſum of money; for this money I may have this action. But if for this he promiſe to pay me a yearly rent during the Leaſe, it ſeems I cannot have an Action of the Caſe, but my proper remedy is an Action of Debt, *Lit. Brook, Sect.* 452. *Fitz. Debt.* 129. *Morgans* Caſe, *M.* 18 *Jac. B.R.* And yet if I promiſe another the Herbage of my Ground for a year, and he promiſe me Twenty ſhillings for it, either of us may have this Action againſt the other, adjudged, *M.* 17 *Jac. B. R.* Sir *George Marſhals* Caſe.

If one promiſe me in conſideration, he is indebted to me, ſo much rent reſerved on a Leaſe for Land, that he will pay me by a day; this is not a good conſideration;

other-

otherwiſe it is if it be for herbage, or for the forbearance of a Rent reſerved on a Leaſe of Land, 14 *Jac. B.R.* Sir *George Marſhals* Caſe, adjudged. *Hill.* 9 *Car. B.R. Bret* and *Heaths* Caſe.

If one in conſideration of Land ſold to him by me, promiſe me Twenty pounds at a day certain; or I ſell my Land for Twenty pounds to be paid me on a day certain; in theſe caſes I may have this Action for the money, though the Land be not aſſured; for he may compel me in Chancery to aſſure it, 3 *H.* 7. 14. 2 *H.* 7. 12.

If I promiſe in conſideration of a ſurrender to be made to me of ſuch Land to pay Ten pounds, and a ſurrender is made, but it is not a good ſurrender in Law; this is no good conſideration to raiſe the Action, *Hill.* 37 *Eliz. B.R. Sleigh verſ. Bateman.*

If I buy Land, Trees, or Corn of a man for money, and he promiſe to make my aſſurance, or deliver the Trees or Corn by a day, and do not, or ſell it to another, I may have this Action, 21 *H.* 7. 41. *Dyer.* 22. *Co.* 10, 130. *Old Book of Entries*, 6.

If I be ſeiſed of Copyhold Land in Fee, and am in debt to *J. S.* One hundred pounds, and lying very ſick, I make *W. L.* my Executor, and declaring my minde to be to ſurrender it to the uſe of my Executor, to enable him the better to pay the debt, and *L. S.* (heir to the Copyhold) perſwades me not to ſurrender, but to let the Land diſcend to him, and he aſſume to pay the Hundred pound to *J. S.* This is a good conſideration to give this Action to the Executor, *Hil.* 9 *Jac. Grayes* Caſe. *Sect.* 19.

If I promiſe to one in conſideration, he will be bound for my Friend, I will ſave him harmleſs; this is a good conſideration to give an Action, *M.* 9 *Jac. B.R. Somerſhals* Caſe.

If I promiſe to one in conſideration, he will lay down his own money to pay for cloth bought by *J. S.* for me, that I will pay it him again; this is good, *Trin.* 9 *Jac. B. R. Moors* Caſe.

If one in conſideration of a Pint of Wine promiſe to aſſure me Land by a day, and do not; this is a good conſideration to give this Action upon the Aſſumpſit, adjudged, *Friends* Caſe. *Trin.* 7 *Jac. B.R.*

If I requeſt one to ſolicite a buſineſs for me, and after he hath done, promiſe him Ten pounds for it; this is a good promiſe, and not naked: For the requeſt, and the merits are joyned together; but if it be a meer voluntary courteſie, it is otherwiſe, *Hob. Rep. pl.* 128. 72. *Dyer.* 355. And it hath been ſaid to be adjudged to lie in this Caſe, when I do requeſt *B.* to bail my ſervant, and after I ſay to him, In conſideration that you have at my requeſt bailed my ſervant, I will pay you Ten pounds ſuch a day; that this is good. See *Brownl.* 1. *part.* 7, 8. 73.

If one be about to buy goods or borrow money of me, and another before the ſale or loan, tell me, That if the buyer or borrower pay not, he will; or if he bid me deliver the things, and if the buyer pay me not, he will pay me on requeſt; theſe are good conſiderations. But otherwiſe it is when the promiſe comes after the borrowing or buying, 12 *H.* 8. 12. 44 *Edw.* 3. 21. But here muſt be a Demand before the Suit begin. *Demand.*

But if I promiſe to another Twenty pounds, becauſe he is my Kinſman or acquaintance; this is not good, it is but *Nudum pactum* onely, *Plow.* 309. 302. *Nudum pactum.*

If one on the Eighth of *May* deliver me Ten pounds, and I do the Ninth of *May*, promiſe him in conſideration hereof to repay the Ten pounds; this is no good conſideration. But if it were at the ſame time, it were good, *M.* 42, 43 *Eliz. Pilſworths* Caſe. So if I ſell one all my Lands or Goods, and nothing appointed by the agreement what I ſhall have for it; it is good, and I ſhall have the worth of it.

If one buy a horſe or ſome other thing of me for money, and no money is paid, nor earneſt given, nor day ſet for payment, nor the thing delivered; in theſe Caſes no Action will lie for the money, or the thing ſold, but I may ſell it to another; it is *Nudum pactum*, *Plow.* 309. 302. So if I promiſe to pay one money, to give him a horſe, build a houſe, or the like; and nothing, and no recompence appointed to me for doing it; theſe are void promiſes, upon which no Action will lie.

If I promiſe in conſideration of ſomething paſt, as becauſe he hath builded a houſe, quitted me a Treſpaſs, or hath let my friend have Wares, that I will pay him money,

money, or do any thing elſe; this is *Nudum pactum*, *Plow* 5. 202. yet ſee *Brownl.* 8. 9. So if I ſay to another to whom *J. S.* doth ow money, If he do not pay you, I will pay you; this is *Nudum pactum*, *Do. & St.* 105. 12 *H.* 8. 12. *Dyer.* 21. 27. This hath been often adjudged. So if one promiſe me, if I will deliver him One hundred Crowns, he will deliver them to me again. But if he do deliver me Twenty Crowns, and in conſideration thereof, I did at the time promiſe to redeliver them; this is a good promiſe, adjudged.

If I without other cauſe promiſe to give one Twenty pounds towards his loſſes by fire, or to build his houſe anew: Theſe Aſſumpſits are not good to give an Action, 17 *Ed.* 4. 4. *Plow.* 308. So if *J. S.* ow me money, and another ſay, That he will be my pay-maſter, and pray me to take him debtor for it; this is not good. *Fitz. Debt.* 126. If one promiſe me Twenty pounds, becauſe I have built him an houſe, or, if one ow me Twenty pounds, and another come to me, and pray me to take him debtor for it; or, if he ſay, if the other do not pay it at *Michaelmas*, he will: Theſe are not good conſiderations to raiſe Actions, *9 Edw.* 5. 14. 44 *Edw.* 3. 21.

If I promiſe to one ſo [*or, if*] he will marry my Daughter, [*Kinſwoman, or Servant*] that I will give him [*or pay him*] Twenty pounds, or, if I promiſe Twenty pounds with my Daughter in marriage; in all theſe Caſes the party may have this Action for this money, *Plow.* 307. *Fitz prohib.* 3. *Do. & St.* 104. So alſo it is ſaid, That if one promiſe me One hundred pounds in conſideration that I have married his Kinſwoman; that this is good to give an Action, becauſe the conſideration doth continue, *M.* 8 *Car. B. R. per curiam*, and in *M.* 4 *Car. B. R.* it is ſaid to be ſo adjudged. But againſt this it is ſaid to be adjudged in the Exchequer Chamber *inter Sandil & Jenny*, That if I entreat one to marry my Daughter, and after the marriage, ſay, That in conſideration he hath at my requeſt married my Daughter, that I will pay him Ten pounds ſuch a day, this Action will not lie; yet the former Judgment ſeems moſt to agree with the Caſes before, and with Reaſon. So if I promiſe to a Woman, that if ſhe will marry with my Son, I will give her to her marriage, the one half of all my goods; this is good and actionable. See *Brownl.* 1. *part.* 18.

If a Bail pay the debt, and hereupon the Plaintiff promiſe to deliver to him the principal Obligation, and a Letter of Attorney to ſue the principal; this is no good conſideration to raiſe an Action, adjudged in the Exchequer Chamber, 38, 39 *Eliz. Dixon verſ. Adams.*

If I promiſe to a Woman, having a Husband who hath a Daughter and Heir to Land, That if ſhe will give her conſent I ſhall have her Daughter, I will pay her Ten pounds: This is a good conſideration, adjudged. *Hob. Rep. pl.* 10.

If I promiſe Twenty pounds to a man in conſideration he will not beat me: This is no good conſideration to make the Aſſumpſit Actionable, 21 *Jac.*

One did declare, that in conſideration that he had ſold a horſe to him, that he would pay him Five pounds, it is ſaid to be adjudged in the Exchequer Chamber good, albeit it had implied time paſt, *Paſche*, 8 *Jac. Co. B. R. Mary Andrews* Caſe.

If the Obligor pay the money to the Obligee after the day, and thereupon the Obligee promiſe to deliver the Bond, and do not, no Action will lie; for the conſideration is not good, nor hath the Obligor any remedy but in a Court of Equity.

Forbearance. If *A* ow to me Ten buſhels of Corn, and deliver them to *B* to deliver to me, and *B.* pray me to forbear it till *Michaelmas*, and he will pay me the Corn, or the worth of it; this is a good conſideration and Aſſumpſit, *M.* 18 *Jac. B. R. Jacksons* Caſe.

If I be in debt to *J. S.* and I deliver goods to *B.* to pay the debt to *J. S.* and *J. S.* require the debt of *B.* who doth deſire him to forbear it three weeks, and he will pay him; this is a good Aſſumpſit to give an Action *Williams* Caſe. *M.* 7 *Jac. B. R.* But he ſhall recover damage onely for Forbearance; for the debt is recoverable ſtill as it was before, *M.* 4 *Jac. Lees* Caſe, *B. R.*

If *A.* and *B.* be bound joyntly and ſeverally to *C* who releaſeth to *A.* and after *B.* and *C.* being talking together of the debt, *B.* in conſideration that *C.* would forbear him

him till ſuch a day promiſed to pay it; this is no good promiſe, for by the Releaſe to one the other is diſcharged, and the debt gone, no good conſideration therefore. *March.*201. *pl.*243.

If I have a Writ againſt *I.S.* and *I.S.* knowing of it doth pray me to forbear to go any further on that Writ, and he will pay me twenty pounds; this is a good conſideration, *Hob.Rep. pl.*278. and he need not ſhew any cauſe of the firſt action. But if the conſideration be to forbear, and ſay not how long this is no good conſideration, *Yardlies* Caſe, *Hob.Rep.pl.*287. But if one owe me money, and he himſelf or another on his behalf promiſe me that ſo I will forbear him [or not ſue him] till ſuch a day, or not go forwards in my ſuit begun againſt him till ſuch a day, that he will pay me; this is a good conſideration to give an Action. *Co.*9.93.94. *New Book of Entries, f.*8.10.47. Sir *Moyl Finches* Caſe, *M.* 4 *Jac. B.R.* But if *re vera* no debt were originally due, ſome doubt whether the Action will lie or not: And ſo if the Promiſe were by an Executor that hath no Aſſets in his hands. *Co.*9.90.94.

If one owe money to me, and he promiſe me that in conſideration that I will agree to give further day for the mony he owes me for ſix moneths, he will ſecure it to me; this is no good conſideration; for he may agree to give day, and ſue after. *M.* 7 *Jac. B.R.*

If one be bound by obligation to me to pay *I.S.* money on ſuch a day, and the Obligor promiſe *I.S.* that if he will forbear him till ſuch a day, he will then pay it, this is no good conſideration, for *I.S.* had not cauſe of ſuit, *per Juſtice Bridgman.* So if an Infant buy wares or other unneceſſary apparel, and when he comes to full age in conſideration that he had a good bargain, he doth promiſe if the other will forbear him a moneth, he will pay him; this is no good conſideration. *Adjudg.*30 *Eliz. Withipoles* Caſe. *Sect.* 20.

If one promiſe to build me an houſe, make me an eſtate or any other thing, and there is nothing given or promiſed by me for it; this is no good *Aſſumpſit*, but a *Nudum pactum.* And where one doth promiſe to do a work by a day, and it is not agreed what he ſhall have for his pains, or when, or if it be agreed, no part of the money is paid; he cannot ſue for the not doing of the work, nor the workman for his money till he have done the work. But if there be a mutual promiſe of work, and of recompence for the work, they may have mutual actions on both ſides, 3 *H* 6.36. *Dyer* 21. *Plow.*5.

If I promiſe money to a Phyſitian to cure another poor man, or to a Labourer to mend a high way, theſe are good conſiderations in *Aſſumpſits* on which this Action will lie in reſpect of the nature of the works. *Do. & St.* 105. *Plow.* 35: 17 *Ed.*4:5: *Hob. Rep. pl* 278. and if the day of payment be come, they may ſue for it before the work be done.

If a Priſoner promiſe the Sheriff in conſideration he will let him eſcape, he will ſave him harmleſs, or pay him ten pounds, the conſideration is naught, and the promiſe void: So if one promiſe me ten pounds if I will maintain him in ſuch a ſuit, this is naught, *Co.*10.76.102. *Dyer* 356. But if one be in debt to me, and deliver me goods in pledg for the debt, and a ſtranger promiſe to pay me the debt if I will deliver the pledg; this is a lawful and good conſideration. *Levets* Caſe, adjudged. Unlawful.

If one promiſe to me in conſideration I will ſeal a Releaſe to *I S.* he will pay me ten pounds, and after at his requeſt I ſeal it to *I. D.* in this caſe I cannot bring this Action for the money, becauſe I have not purſued the conſideration. *Trin.* 4 *Jac. B.R. Cranfield verſ. Green.* Not purſued.

To make the promiſe or Aſſumpſit it ſelf good, it muſt have all theſe qualities. As to the promiſe it ſelf.

1. The thing promiſed muſt be ſuch a thing as is lawful: For if the thing promiſed be that which is either evil in it ſelf, as to kill a man, or a prohibited evil, as to foreſtal Corn, or the like, it is no good Aſſumpſit, let the conſideration be never ſo good, *Dyer* 356. *Co.*10.102.

2. The thing promiſed muſt be poſſible to be done; for if one promiſe to do a thing impoſſible, as to go to *Rome* within three days, or the like, this is not good.

3. There

3. There must be certainty in it; for if a promise be of a thing altogether incertain, it is altogether void.

4. It must be serious and weighty; for if it be frivolous and idle, it is void.

A promise to do any lawful thing, as to deliver or to give Corn or other goods, *Plow.* 182. *Fitz. det.* 68. To ear Land, make a house, make or release an estate in land, *Plow.* 308. *Kelw.* 69. 77. *Finches ley* 49. To save a man harmless from a Bond entred into, or the like engagement, *M.* 9 *Jac. B.R.* To stand to an award, *Co.* 5. 78. To keep goods safe, *Old B of Entries, f.* 4. That goods shall come safe to *Dale, Co* 6. 47. From the Lessor to the Lessee at will of a house, not to out him, but to suffer him to enjoy it till such a time. From a Creditor that hath a Judgment for his money, that upon payment thereof he will acknowledg satisfaction, or deliver up the Bond, *Trin.* 38 *Eliz. B.R.* To marry a daughter or kinswoman. To pay an Annuity of ten pounds a year for life, *Pasc.* 9 *Jac. B.R. Collins* Case. Not to molest one upon a Judgment, *M.* 9 *Jac. B.R.* To save the Lessor harmless and without loss by reason of his inhabitation in his house, *M.* 9 *Jac. B.R.* That an Attorney shall retain a Rent he is to pay to his Client for Fees due from his Client to him, *M.* 9 *Jac. B.R. Jarvais* Case. To deliver up a Bond to stand to the award of *I. S.* or pay twenty pounds, *New B. of Entries, f.* 3. And finally, whatsoever (for the matter of it) is good in the consideration, will be good in the promise.

If one lay his Action in consideration of ten pounds lent by him to the Defendant, that he assumed to pay the same to the Plaintiff; this is good. *Brownl.* 2 *part*, 40.

If one having made me a Lease for years, assume that I shall quietly hold it without the let of any person whatsoever, this is a good promise; and disturbance with or without Title, is a breach of it to give Action. *Dyer* 328.

If one in consideration that I will be bound for his appearance, he being arrested on a Recognizance, promise me to appear at the day, and do not, I may have this Action against him, *Adjudg. Trin.* 9 *Jac. B. R. Rolls Case.* And it will not excuse him that a *Certiorari* came to remove the Record; for I must appear notwithstanding.

If one sell me Land for money, and promise to make me an Assurance of it, or put me in possession of it, upon request, by a day, and do not, I may have this Action, *Old B. of Entries, f.* 5. and recover damages. And if I will, I may wave this, and compel him to make me an Assurance of the Land in Chancery, *per* three Justices. *Pasch.* 9 *Jac. B. R. Jolleys Case.*

If one sell me a horse for ten pounds, on condition that I pay him this ten pounds in corn; in this case I must pay him in corn, or he may for his remedy have this Action. *Fitz. Det.* 68.

If one be arrested at my suit for a debt, and make an obligation for the money to pay it at a day to come, but do not deliver, but in consideration of his enlargement promise to seal it upon request; this is good to produce an Action. *Pasch.* 9 *Jac. B.R. Bassets Case.*

To save harmless. If one in consideration I will be bound for him promise to save me harmless, this is a good Assumpsit; and if I be any way troubled, I may sue him upon it by this Action, *Somertons Case.* So for any thing else that I do at his request, *Boynton versus Vaughan, P.* 19 *Jac. B.R Old book of Entries, f.* 11.

If *A.* promise *K.* a woman, that if she marry his kinsman and outlive him, that *A.* will pay her twenty pounds, and she do so, this Action will lie. *Hob. Rep. pl.* 179.

If one promise for good consideration to pay me Ten pounds, or give me a ground such a day, this is certain enough and good; and if one of them be not done at the day, this Action lieth; and before the day, he that is to do it hath the election; but after the day, he to whom it is to be done. *Fitz. Det.* 89. 9 *Ed.* 4. 39.

If a Chyrurgeon for good cause warrant or promise to cure a man, or warrant the cure, or a Farrier a horse, and do not the cure, though he be not negligent, this Action will lie against him: And if he undertake the cure only, and make no warranty, and be negligent, an Action of the Case lieth. *Plow.* 305. *Doct. & Stu.* 105. 17 *Ed.* 4. 25. 5.

If

If a Terre-tenant of Land promiſe to me in conſideration, that I do aſſign to him a Statute I have chargable upon his Land, by way of diſcharge, that he will pay me twenty pounds; this is a good conſideration to produce this Action. But if the aſſignment of it were to be to a ſtranger by the conſideration, *Contra.* Adjudged, *Paſche*, 38 *Eliz. Perrow. verſ. Gray.*

If my debtor who hath Statutes from other men, deliver them to me towards my ſatisfaction, and die, and one that is neither his Executor or Adminiſtrator requeſt me to deliver him the Statutes, and he will pay me the debts; this is conſideration good enough, *Hob. Rep. pl.7.*

If one promiſe to me in conſideration that I will make him a Leaſe [*generally*] that he will pay me ten pounds, this is no good promiſe: For the conſideration is void; for the Leaſe may be a Leaſe at will, and he may avoid it as ſoon as he makes it, *Paſche*, 39 *Eliz. C. B. Burkins* Caſe, adjudged. So if the conſideration be to forbear a Suit, and ſay not how long. So if the conſideration be to relinquiſh my Suit; for I may relinquiſh it, and begin it again preſently, *Paſche*, 39 *Eliz.* in *Lurkins* Caſe. *Sect.* 21. *Certainty.*

If a promiſe be to pay money, and ſay not when, it is good enough, and muſt be paid preſently. So if a promiſe be to make a Leaſe for years, and ſay not when it ſhall begin; this is good, and ſhall begin preſently, *Co.* 10. 76. 102.

If one promiſe to make good a houſe; this is good, and ſhall be taken to repair it, *M.* 21 *Jac. B. R. Keyts* Caſe.

If one ow me money, and another for good cauſe promiſe to make it good to me, this is good, *M.* 21 *Jac. B. R. Keyts* Caſe.

If one promiſe me all that he can recover in ſuch a ſuite, or upon a compoſition upon ſuch a Bond, this is good, *Trin.* 19 *Jac. B. R. Morris* Caſe. And all theſe are certain enough. So if one promiſe to content me for my work, *M.* 17 *Jac. B. R. Griffins* Caſe. So if one promiſe to give me a childes part, this is good; or ſo much as he ſhall give with any childe, this is good; for it may be made good by Averment. *Id certum eſt quod certum reddi poteſt*; for if he give one hundred pounds by his will to another childe, I may recover one hundred pounds of his Executor. *Trin.* 17. *Jac. B R. Bolles* Caſe.

If one ow me twenty pounds by Bill, and I promiſe, to deliver him the Bill, and he promiſe to bring me two ſufficient Sureties, and give Bond for the money by a day, this is a good promiſe on both ſides: For a promiſe is a good conſideration of a promiſe. But if the promiſe be conditional, *contra. M.* 38, 39 *Eliz. Gowers* Caſe, adjudged. See *Brownl.* 1. *part.* 11. And therefore if the agreement between me, and *J. S.* be, that if he deliver twenty broad clothes, or if he make me an aſſurance of ſuch a piece of Land, I will pay him one hundred pounds, in theſe Caſes I cannot be ſued for the money, till I have the things. So if I promiſe to make new pales, if I may have the old pales, 37 *H.* 6. 42. 27 *H.* 8. 34. *Perk. Sect.* 713. *Dyer.* 76. 14 *H.* 8. 20.

If a Leſſee for years aſſign his Leaſe, on condition that the purchaſer ſhall get the good will of the Leſſor, and pay the Leſſee ſo much as *J. S.* ſhall arbitrate; in this Caſe when he hath gotten his favor, and *J. S.* hath arbitrated, he may have this Action for the money, 14 *H.* 8. 20. *Brownl.* 1. *part.* 14.

If one in conſideration that he doth ow me five pounds Rent, on a Leaſe of a Ground for a year, or a Bond, promiſe to pay it to me upon requeſt, it ſeems this is not a good conſideration, *Hob. Rep. pl.* 365. For it is real and certain, and I have debt for my Rent and Bond, and may not have two Remedies. And yet if one, in conſideration he doth ow me five pounds on a Contract, promiſe to pay me ſuch a day, this is good, adjudged. So if one indebted to me on a Bond, or for a Rent, promiſe in conſideration of forbearance of the debt to pay it; in this caſe the promiſe may be good.

If one promiſe to pay, or do a thing which is unlawful, the Aſſumpſit is void. And therefore if one promiſe to do that which to do is maintenance, it is void. But if a Solicitor ſue upon a promiſe for money for ſoliciting a Suit, this is good; for it is lawful, and may be without maintenance, *Hob. Rep. pl.* 72. *Dyer* 356. But to promiſe *Againſt Law.*

miſe to do any thing of that nature which is not maintenance, or a lawful maintenance, is good.

If a Sheriff for ten pounds, promiſe the priſoner that he ſhall eſcape; this promiſe is not good, nor will it give an Action, *Co.* 10. 76. 102. *Dyer* 356.

If *A.* be ſued on a Bond, and I become bail for him, and Judgment and Execution is had againſt me, and the Plaintiff doth promiſe me, ſo as I will pay him, he will aſſign me the Bond and the Debt, and make me a Letter of Attorney to ſue for it in my own name; this is not a good promiſe, for it is againſt Law, being Champerty, adjudged. *Dixons* Caſe, *Trin.* 38 *Eliz. B. R.*

If *A.* and *B.* be Mercers, and they agree that *A.* ſhall ſell to *B.* all his Mercery Wares, and take his ſhop of him, in conſideration whereof, *A.* doth promiſe that he will not ſet up his Trade in the ſame Town; this is a good Aſſumpſit. But if one be bound not to uſe his Trade at all; this is not good, *March.* 77. *pl.* 121. See more Covenant Conditions in the Titles. But a Bond not to uſe his Trade in ſuch a Town, is not good.

If one promiſe an Officer more to do his duty then his juſt Fees, which to take is Extortion, this promiſe is void, *Hil.* 22 *Jac.*

If I owa man One hundred pounds, and promiſe to him, in conſideration he will forbear me ſix moneths, I will give him One hundred pounds; this is naught, though part of it be lawful; for the exceſs is uſury, *Trin.* 20 *Jac. B. R.*

If I arreſt a man, to the end he ſhould engage himſelf to me for money, where none is due, and he do ſo being in priſon, ſo that it be made by Dureſs of impriſonment; this is not good. But an engagement for a due debt by a priſoner for his liberty, is not againſt Law, *Paſche*, 9 *Jac. B. R.*

Incertain. If I promiſe one, ſo he marry my Daughter, to give him as much as I ſhall give with any other Childe; this is good: And if by my laſt Will, I give One hundred pounds to another Childe, he may ſue my Executor for a Hundred pound. *Gloceſter* Aſſizes, 6 *Car. Whitlocks* Juſtice.

Impoſſible. A promiſe to do an impoſſible thing, as to go to *Rome* in three days, or the like, it ſeems is void, and not Obligatory.

Frivolous. If one give me twelve pence, and I promiſe to him in conſideration thereof, that if I do not cauſe him to be whipt to morrow about the Croſs in *Gloceſter*, I will give him five pounds, and he is not whipt; yet no Action will lie for this five pounds upon this frivolous promiſe. See more in *Bargain*, and *Sale*; and *Contract*.

How the pleading in this Action muſt be. What Averment or Allegation is neceſſary in the Declaration, or not.

If one promiſe to pay me ten pound, in conſideration of ſomething to be done by me *in futuro*; if I ſue for the ten pound, I muſt ſet forth and aver that I have done this thing; and till it be done, no Action can be brought for the promiſe: As if I promiſe to another, in conſideration he will forbear his debt till ſuch a day, I will pay him; I muſt aver that I did forbear him till the day: For if in this caſe he ſue for his debt within the time, the Aſſumpſit and Action upon the promiſe is gone, *Hob. Rep. pl.* 128. Otherwiſe it is where one promiſe is the conſideration of another, there nothing but the promiſe is to be ſhewed to maintain the Action, *Curia, M.* 4 *Jac. B. R. Hil.* 38 *Eliz. B. R. Thorntons* Caſe. *Hob. Rep. pl.* 7. 27. 8 *H.* 8. 34.

If one for good cauſe promiſe to do a thing to me in conſideration of another thing to be done by me at ſuch a time, or in ſuch a place; if he ſue upon the promiſe, he muſt aver he did the thing in the conſideration at that time and place, *Brownl. part.* 1. 21. 2. *part.* 137, 138.

If all or part of the conſideration of a promiſe be to ſtand to the arbitrement of *J. S.* or to make a ſurrender, in a ſuing for this promiſe, he muſt ſet forth that he hath performed the award, or made a ſurrender; for it is not ſufficient to ſay, *Quod fuit paratus ſtare, &c.* or, *Quod fuit paratus curſum reddere, M.* 9 *Jac. B. R. Hoſe-boots* Caſe.

If one ſue upon a promiſe for a Childes part, as much as he ſhall give with any Childe, in the Declaration he muſt ſhew how much he did give with a Childe in certain, or it is not good, *Trin.* 17 *Jac. B. R.*

If one ſue upon a promiſe to ſatisfie one [*or to content one*] for a work done, he muſt

muſt ſay in the Declaration how much he deſerved for the work, or it is not good. *M.* 17 *Jac. B.R.*

If I ſell a thing without a price, I muſt in ſuing for it aver it to be worth ſo much.

If one promiſe to deliver me twenty of his ſheep before his flock is ſhorne, if I ſue for this, I muſt aver that the flock is ſhorne, for he hath time to do it till that time. *M.* 9 *Jac. B.B. Cadels* Caſe. *Sect.* 22.

A Tenant at will of a houſe, in conſideration that the Leſſor would ſuffer him to continue in the houſe till ſuch a time, doth aſſume to keep the Leſſor free and indempnified from all loſs and detriment by reaſon of his inhabitation in the houſe, and that for every farthing-worth of hurt he will ſatisfie him two pence, and his ſervant by his negligence ſuffers the houſe to be burnt; this Action will lie, albeit the maſter dwell not there; but in his count he muſt aver how many farthings it came to, and demand two pence for every farthing in a groſs ſum. *M.* 9 *Jac. B. R. Coventries* Caſe. *Demand.*

If an Executor be ſued upon the Aſſumpſit of the Teſtator, the Plaintiff needs not to aver that he hath Aſſets, but it muſt come on the other ſide to be averred if it be not ſo. *Coo.* 9. 90.

The Plaintiff declared that the Defendant, in conſideration that the Plaintiff would be bound for his ſon, aſſumed to ſave him harmleſs from all ſuch obligations as he at the requeſt of his ſon ſhould enter into for him, and ſhewed that he was bound for him ſuch a day *&c.* to *&c.* which obligation he was forced to ſatisfie. And this was adjudged to be a good pleading, though he did not lay any requeſt or notice, for he was not bound to give notice to the father. *M.* 9 *Jac. B. R. inter Somerſhal & Barnaby.* *Notice.*

The Plaintiff declared that *I.S. emiſſet equum* at ſuch a price, and the Defendant *ad tunc & ibidem ratione præmiſſarum* did aſſume to pay the money; this was adjudged to be naught, for the ſale did precede the conſideration. *Paſch.* 9 *Jac. B.R. Farmers* Caſe.

The Plaintiff declared, *quod cum* the Defendant was in debt to the Plaintiff in Twenty pounds for meat, drink and lodging for himſelf and two others, that he did ſuch a day aſſume to pay it to him; this is no good conſideration. *Curia, Steedmans Caſe.* *A.* Executor of *B.* declared againſt *C.* upon a promiſe made to *B.* that *C.* would repay to *A.* all ſuch ſums of money as he ſhould lay out of his own money for cloth bought and delivered to the uſe of *C.* This is a good Conſideration to raiſe an Action, without averring that the cloth did come to his uſe, *Trin.* 9 *Jac. B. R. Moors* Caſe. *A.* ſued *B.* and declared that *B.* was indebted to him Ten pounds for Wheat, Agiſtments and Wares had of the Plaintiff, and in conſideration thereof did aſſume to pay the ſame to the Plaintiff; it was adjudged good and certain enough. But this were not good in an Action of Debt upon the very Contract, for that muſt be more certain, *Hob. Rep. pl.* 8. But to declare thus, That whereas the Defendant was indebted to the Plaintiff Ten pounds, he promiſed to pay it to him, is not ſufficient; for it may be for Rents on Leaſes, or Debts on Eſpecialty, for which no Action will lie upon a new promiſe, *Idem.* And yet upon the conſideration of forbearance of a Debt due for Rent, or on a Bond, this Action will ariſe well enough. *Adjudg.*

If the Plaintiff ſaith that he had a Writ out in ſuch a Term againſt the Defendant for Fifty pounds, and the Defendant knowing of it prayed him to go no further on that Writ, and he would pay him the Fifty pounds on requeſt; this is ſufficient without ſhewing the cauſe of the debt. *Hob Rep. pl.* 278.

A. declared againſt *B.* that he accounted with the Defendant for divers ſums of money due to the Plaintiff from the Defendant, and upon the Account the Defendant was found in arrear Ten pounds, and in conſideration thereof did promiſe to pay the money at a day; this was adjudged good, notwithſtanding he did not ſhew for what the money was due, whether for Wares, money lent, &c. *Hob. Rep. pl.* 16.

A. declared againſt *B.* that in conſideration that he had given him time for three moneths for a Debt of Ten pounds that he owed him, that he would pay the Ten

pounds after verdict; it was adjudged good enough, albeit he did not ſhew for what the Debt was, *Hob. Rep. pl.* 31. Sir *Moyl Finches* Caſe. *M.* 4 *Jac. B. R. Trin.* 9 *Jac. B. R. Deans* Caſe. But where it is grounded on an *Indebitatus Aſſumpſit*, in which Caſe the Debt it ſelf is the conſideration of the promiſe, there the Caſe muſt be averred; for a general count in an Action upon the Caſe, *Quod cum indebitatus fuit*, in ſuch a ſum *ſuper ſe aſſumpſit*, without ſhewing the cauſe of the Debt, is inſufficient; but where there is another conſideration, *Contra*, as here the Forbearance, often adjudged, *Hob. Rep. pl.* 32. *Co.* 10. 77. *Fuller* and *Thorns* Caſe, *Paſche*, 14 *Jac. B. R.* accord.

If one declare againſt an Executor, that whereas the Teſtator was in debt to the Plaintiff Ten pound, the Executor in conſideration thereof aſſume to pay it without ſhewing the cauſe; this is not good, *M. Jac. B R. Ingrams* Caſe; yet ſee the *New Book of Entries*, *f.* 2. And yet if in theſe Caſes the Defendant ſhall in pleading aver there was no cauſe at firſt, *Quere.*

If *A.* in conſideration that *B.* is indebted to *C.* Ten pound, aſſume in conſideration that if *C.* will forbear it till *Michaelmas*, that if *B.* pay it not, he will; this is good without averment of the firſt cauſe, *Hil.* 14 *Jac. B.R. A.* declares againſt *B.* that he bought of *B.* a horſe for Twenty ſhillings, paid in hand, and for Eleven pound more to be paid at the death or marriage of *A.* for which he ſhould become bound with ſufficient Surety by their writing Obligatory. *B.* in conſideration hereof promiſed to deliver the horſe on requeſt; avers that he offered to become bound to him, but doth not ſet forth in what ſum, nor with what ſurety, nor that he did offer to deliver it, being ſealed; and for theſe cauſes after verdict, the Judgment was ſtaid, *Hob. Rep. pl.* 79. 96.

In an Action of the Caſe upon an Aſſumpſit, if the conſideration be Executory, then the Declaration muſt have time and place where it was made, and after it muſt be averred *in facto*, when it was performed accordingly. But if it be by way of Reciprocal agreement, then he may ſay, That in conſideration he hath promiſed to do for the Defendant, the Defendant hath promiſed to do another thing for him; there need no ſuch ſetting down of time, *&c.* and Averment. *Brownl.* 2. *part.* 137.

An Action is maintenable againſt an Executor upon the Aſſumpſit of the Teſtator, without Averment of Aſſets above, for Debts by Eſpecialty, *Brownl.* 2. *part.* 138.

Requeſt or Demand. Notice.

If I promiſe for good cauſe to pay Ten pound to *J. S.* when he ſhall purchaſe White-Acre, he muſt give me notice ere he can ſue. But if it be when a ſtranger ſhall purchaſe White-Acre, it ſeems otherwiſe: For this is as much in the knowledge of the Promiſor, as the Promiſee, *Brownl.* 1. *part.* 9, 10, 13. 46. 64.

If one promiſe for good cauſe to ſave me harmleſs from ſuch an Engagement, and I be ſued I am not bound before I ſue him, to give him notice of it, nor to alleage it in the Count, adjudged, *M.* 9 *Jac. B.R. Somerſhals* Caſe. But if he have promiſed to deliver goods to me upon requeſt, I muſt make an Actual requeſt ere I can ſue for the goods, 13 *Car. B. R.* But if I deliver goods to redeliver upon requeſt, here it ſeems no requeſt is needful. But when the thing promiſed to be done, doth lie as much in the knowledge of the Promiſor, as of the Promiſee, as the death or marriage of a ſtranger, there generally no notice need to be given, *Co.* 7. 29.

If I promiſe for good cauſe to pay a man Ten pound, and ſay not when I ſhall pay it, no demand in this Caſe is needful to be made. If a promiſe be laid in conſideration of a marriage to be had with *J. S.* that the Defendant, if the Womans portion ſhall not amount to Four hundred pound, will make it up ſo much upon requeſt, the Plaintiff muſt aver a requeſt in his Declaration: But it ſeems he need not prove it upon a *Non Aſſumpſit* pleaded. *Gloceſter* Aſſizes, 17 *Car.* *per Baron Henden.*

If a Suit be going on to Tryal, and the Defendant in conſideration that the Plaintiff ſhall not go to trial, and give him a note of the charge, promiſe to pay him at his firſt coming to *Gloceſter*: In this Caſe if he ſue, he muſt aver not onely the forbearance of proceeding, and the giving of the note of charges, but the giving of notice of his firſt coming to *Gloceſter*, *Hob. Rep. pl.* 63.

Sect. 23. If I have Ten quarters of Corn, and I ſell one quarter to *J. S.* to pay me half a year

year hence, after the rate as I ſell the reſt, I muſt give him notice how I ſell the reſt, or I cannot ſue: And this giving of notice muſt be averred in my Action, *Hob. Rep. pl.* 56. otherwiſe it is of an Award.

If I promiſe on good conſideration to pay Ten pound on demand, it ſeems here no demand is needful. But if the promiſe be to do a Collateral thing, as if I promiſe to pay Ten pound lent to another, if he do not pay it himſelf at *Michaelmas* upon demand; in this Caſe he muſt demand it ere he can ſue for it: Therefore in his Declaration he muſt ſet it forth ſo, 12 *H.* 8. 12. 17 *Jac. B.R.*

If I promiſe money to the marriage of my Daughter or Kinſwoman, in this Caſe it ſeems no notice is needful, unleſs the promiſe be penal; as if you marry her, and I do not pay you Twenty pound in three weeks, I will pay you Forty pound: Here the Forty pound muſt be demanded: So alſo if I promiſe a Woman, that if ſhe will marry with my Son, I will give her the one half of my Lands and Goods; in this Caſe it ſeems there muſt be notice given before a Suit be begun, *Old Book of Entries, f.* 4. *New Book of Entries, f.* 2. So alſo if I promiſe a man Twenty pound when he marrieth any Woman whatſoever; in this Caſe alſo he muſt give me notice ere he can ſue for the money.

If one be arreſted for my Debt, and he make an Obligation to me for his delivery to pay the money at a day to come, but doth not deliver it as his deed, and doth promiſe to deliver it upon requeſt; in this Caſe I muſt make a requeſt. And therefore if I make no requeſt till the day of payment be paſt, I am remedileſs at Law, and muſt flie to the Court of Equity, *Paſche*, 9 *Jac. B. R. Baſſets* Caſe by two Judges.

The Plaintiff declared, that in conſideration he would die divers Cloths which he counted to Sixty, that the Defendant did promiſe to pay him for every Cloth Ten ſhillings, and avers he did Dye them all, being Fifty nine Cloths, and that the money came to ſo much: So that Fifty nine was put for Sixty, but after verdict adjudged good, *Hob. Rep. pl.* 120. *What Errors in pleading are fatal or not.*

The Plaintiff declared, that he had ſold to the Defendant ſo many Oats as according to the rate of Fifteen ſhillings nine pence for every quarter, and ſhall amount to Fifty two pound to be delivered at ſuch a time, and that the ſaid Oats after ſuch a rate came to Ninety ſix quarters and ſix buſhels, which the Defendant hath not delivered, *&c.* Which money the Plaintiff was to pay at a day certain: After verdict it was adjudged good, notwithſtanding the miſtake; for the Ninety ſix quarters of Oats after the rate came to Fifty two pound three quarters, *Hob. Rep. pl.* 114. But generally in all ſpecial Actions of the Caſe upon a promiſe, if any ſubſtantial variance be between the laying of the Action, and the Evidence, it will be fatal: Wherefore it is policy in the Plaintiff in all theſe Caſes, to ſuppoſe ſeveral promiſes as neer the matter as he can frame, that he may be ſure in one of them to hit the very promiſe it ſelf, or at leaſt the ſubſtance thereof.

No Traverſe can be of conſideration executed alone; but a conſideration executory may be traverſed alone, *Hob. Rep. pl.* 128. *Traverſe.*

If the Leſſor aſſume to his Leſſee on good conſideration, that he ſhall hold the Land without the let of any perſon whatſoever; this ſhall be taken a let by one that hath no title, as well as by one that hath a title, and either of them will be a breach, and give an Action, *Dyer* 328. *Gambles* Caſe, *M.* 7 *Jac. B. R.* *How an Aſſumpſit ſhall be taken; and what ſhall be ſaid to be a breach of it, or not.*

If I promiſe to another, to whom I ow money, to pay him at *Michaelmas*, in conſideration that he will give me day till then, and he arreſt me in the mean time; this doth not take away the Action, otherwiſe it is, if it be in conſideration, that he will not ſue till *Michaelmas*, *Goldsb.* 146. *pl.* 65.

If my Tenant at Will of my houſe, promiſe upon good cauſe to ſave me harmleſs and indemnified from all loſs and harm, by reaſon of his Inhabitation in the ſaid houſe, and by the neglect of his ſervant, the houſe is burnt; this is a breach to give an Action, *Coventries* Caſe.

If I promiſe to *J. S.* that his goods ſhall come ſafe to *Dale*, and they be arreſted by the way; this is a breach of the promiſe, and Actionable, *Co.* 6. 47.

If one for good cauſe promiſe to make a Feoffment of Land by a day, and before the

the day he Enfeoff another, or grant a Rent-charge out of it; this is a breach of the promiſe. So if he promiſe me Trees out of a Wood, and before the time he ſell them away. So if he promiſe me the delivery of a horſe, and before the day he ſell him to another, *Dyer.* 22. 21 *H.*7. 41. *Co.* 10. 130. *Kelw.*77. 20 *H.*6. 34. *F.N.B.* 99. *k.* And albeit he make the Feoffment, yet this is no good performance, *Old Book of Entries, f.*7. 3 *H.*7. 14. *Fitz.*8. *B.*

If one promiſe to deliver Wares, and he deliver falſe and ſophiſticated Wares; this is a breach of the promiſe. So if he promiſe to make a Surrender of an Eſtate, and he make a Surrender that is not good; this is no performance, but a breach, *Dyer.* 75. 23, 24. *Hill.* 37 *Eliz. B.R. Sleighs* Caſe.

Election. If a promiſe be to do one of two things by a day, till the day be paſt, he that made the promiſe hath the Election. But after the day, he to whom it is made, hath the Election, 9 *Ed.*4. 39. *Co.* 9. 94. 6.

If it be part of the agreement to give a Bond with Sureties, and ſay not what Sureties, nor in what ſum, the Court muſt judge what Sureties, and what ſum, *Hob. Rep. pl.* 79.

If for good cauſe the promiſe be to pay money, and no time ſet, it ſhall be preſently; and if it be to make a Leaſe for years, and no time ſet when it ſhall begin, it ſhall begin preſently, *Co.*10. 77. *Co.*6. 33. But if one promiſe to deliver me goods, or make me a Leaſe, or the like, and no time is ſet; in this Caſe he ſhall have all his life time to do it, except I haſten it by requeſt.

If one promiſe for Ten pound paid him in hand, to build me a houſe; this is a conditional promiſe, and the money muſt be paid ere the promiſe will have virtue to produce an Action, and is not like as where one promiſes to build a houſe, and the other doth promiſe Ten pound, there they are reciprocal, and they have equal remedy.

Sect. 24. If one binde himſelf by promiſe to pay money yearly or quarterly at ſeveral days, upon the breach of the promiſe one day, this Action will lie; but an Action of Debt will not lie upon the Contract till all the days are paſt, 11 *H.* 6.18. *Broo.* 108. *Dyer* 113. *Co.*4.94.

Where a promiſe good may become void by matter *Ex poſt Facto*, ſee *Contract.* For *Pleading*, ſee *Brownl.* 1. *part.*14, 15, 17, 18. 8, 9. 12.

Of an Action upon the Caſe for a Nuſance.

What it is. A Nuſance is where any thing is done by a man upon his own ground, or elſwhere to the unlawful hurt and annoyance of another that is his Neighbor, in his Free-lands, or otherwiſe. And this is either common, when it is or may be a grievance to many, or ſpecial when it is onely or eſpecially a hurt to ſome few, or particular when it is or may be a hurt onely to one particular man, *Old N.B.* 108, 109. *F.N.B* 193.

How many kindes there are.

What ſhall be ſaid a Nuſance, or not; for which, this Action of the Caſe may be had, or not. A Nuſance may be by ſtopping or annoying a mans Water, Way, Light, or Air, by building, diverting, ſtopping, digging, or the like; for remedy whereof the party grieved may have this Action. And therefore if a man ſet up a houſe upon a new Foundation ſo near to my houſe, that thereby he ſtop up my Windows, and take away my light and proſpect, I may have this Action: But if his building be upon an old Foundation, and where there was a houſe before, no Action will lie for this, *Cujus eſt ſolum, ejus eſt uſque ad Cœlum, New Book of Entries, f.* 19, 20. *Co.*9. 55. 5. 10. *Hughs* Caſe. So if a man do over-build my houſe, ſo that his Houſe-eves do drop upon my houſe, and cauſe it to periſh, or trouble my dwelling, I may have this Action, 22 *H.*6. 14. And yet in *Trin.* 42 *Q. Inter Nicholſon & Bradſhaw*, Leſſee for years of a Shop, brought an Action againſt one that was Tenant at Will of a Kitchin over the Shop, for ſuffering it to decay, and to ſpoil the Wares of his Shop, and after a Judgment for the Plaintiff, it was reverſed. See *Brownl.* 1, *part.*4.

The erecting of a Die-houſe, Pig-ſtye, Houſe of Office, Brew-houſe, or Chimney, may be a Nuſance to the Neighborhood; for which, he that is hurt, may have his Action, *Paſche*, 5 *Jac. B.R.*

If

If I have a building beneath, and another man hath a building above me, and I ſuffer mine to decay, ſo as to hazard his, or he ſuffereth his to decay ſo, as to harm mine; in this Caſe each of us may have this Action againſt the other, *Old Book of Entries, f.* 3. *Kelw.* 48, If one ſet up a Pig-ſtye under my houſe, and keep Pigs in it, or a Houſe of Office, Lime-kiln, or Brew-houſe, and uſe it ſo near my houſe, that the ſmell thereof doth annoy me, and hazard my health, or the ſmoke of the Brew-houſe or Lime-kiln deſtroy or hurt my Trees: In theſe Caſes, and for theſe Wrongs, I may have this Remedy, *Co.* 5. 73. 101. *M.* 8 *Jac.* Adjudged. *Aldreds* Caſe. The building of a Brew-houſe, or the keeping of a Chandlers, or a Butchers ſhop by my Neighbor, in a place inconvenient, to the offence of my Garden or Houſe, may be a Nuſance; for which I may have this Action, *Trin.* 13 *Car. B. R.* But if ſuch a man do ſet up his Trade by me, though this be offenſive to me, yet I cannot have this Action, *per Cook* and *Warberton* Juſtices, *M.* 8 *Jac.* And *Paſche*, 5 *Jac. B.R.* If a man have a houſe very near mine, and he ſuffer it to decay, and fall, and throw down ſome of mine; it ſeems I may have this Action for this, *Co.* upon *Lit. f.* 56.

If I have a private way to my houſe or ground, and a man ſtop it or mar it, that I cannot have it in all or part; this is ſuch a wrong, as for which I may have this Action, *Co.* 5. 73. *F.N.B.* 184. But if the wrong be to the Common High-ways; this Action will not lie, but it muſt be puniſhed in a Leet, or ſome other Court. And yet if a Nuſance be done to a Common High-way, whereby I have more ſpecial loſs then another; as if he dig a pit, or lay a block there, and my horſe ſtumble, and I fall and have hurt by it; for this I may have this Action, *Co. ſuper Lit.* 56. *Co.* 9. 55. *Exod.* 21. 33. *Paſche*, 5 *Jac. B.R. Penhams* Caſe. 27 *H.* 8. 26. About ways.

No Action of the Caſe will lie for a Nuſance to a High-way, that is to be repaired by a Pariſh; for then every Pariſh might have it. But if one man by Preſcription be bound to keep, and any man do mar it by any ſpecial Nuſance, he may have this Action, *March.* 136, 137.

A man being drunk rode along a High-way, which was One hundred and ſixty foot in breadth, and in ſome green parcels of the way there were laid pieces of Timber for the uſe of the houſes thereabouts, and the drunken mans horſe ſtumbled at one of theſe, and fell, and hurt him, and he brought this Action, and the Defendant preſcribed to lay his Timber there; and yet it was adjudged againſt him, as Juſtice *Bridgman* ſaid at the Marches of *Wales* in my hearing: It lieth againſt one for ſtopping of my way *totaliter*, ſo that I cannot uſe my Common, *Paſche*, 13 *Eliz.* See *Brownl.* 1. *part.* 4, 6. 142. 197. 208. 231. 2. *part.* 55.

If I have a Water-courſe or Conduit belonging to my houſe or ground, and another man ſtop or mar it by Liming, Tanning, or the like, in part or in all, I may have this Action, *New Book of Entries*, 18. *Co.* 5. 73. *F.N.B* 184. 14 *H.* 8. *pl. ult.* But if the water be a common water, and belong no more to me then to others: In this Caſe I may not have this Remedy, but ſome other; and yet if in this caſe I have any ſpecial prejudice by the thing done, it ſeems I may have this Action, as well as in the Caſe before of a Nuſance upon the High-way. In Waters.

If any one ſet up any Houſe of Office, Lime-kiln, Tan-houſe, or lay any filth ſo near my dwelling, that it corrupteth the Air, and be dangerous and grievous to me, and my Family: I may have this Action, *New Book of Entries, f.* 18, 19. In Air.

If the Commoner be outed or diſturbed in the Common, by drowning, or planting Coneys upon it, or the like, ſo that there is not enough left for him, and he cannot take it according as he ought and hath been uſed to have it, he may have this Action: But if it be ſo ſmall a Treſpaſs that it doth not hurt his Common, but he hath enough beſides; no Action will lie for this, *Co.* 9. 112, 113. 8. 79. 4. 39. *Dyer* 316. In Common.

If a man by building, *&c.* ſtop up my antient Lights of my Houſe, to my prejudice, I may have this Action for my relief, *New Book of Entries, f.* 19. In Lights.

If I have a Mill upon a River, and another man ſetteth up a Mill upon the ſame River, whereby I loſe part of my Cuſtom, I cannot have this Action againſt him for this. And yet if he ſet up a Mill where I by an ancient cuſtom have the grinding of all the Griſt, and none ought to have a Mill but my ſelf; or, if thereby my Water be ſtopt or turned, that it doth not come ſo freely as formerly; in theſe Caſes In ſetting a Mill.

I may perhaps have this Remedy: So if any do break down the Sluces, or throw down the Banks that the Water do not come as formerly, *Old Book of Entries, f.* 10.

In ſetting up a Market. If one levy a new Market without authority, *Ad nocumentum* of my Antient Market, I may have this Action, *M.* 41, 42 *Eliz. Co. B. R. Mayns* and the City of *Londons* Caſe.

Wood-pile. If my Neighbor ſet up a Wood-pile againſt my houſe, upon his own ground, whereby my light or proſpect is hurt, I may have this Action, *Co.* 9. 55.

School. If a Schoolmaſter keep School ſo near to my Study, being a Lawyer, that the Scholars diſturb my Study, I may not have this Action, *Curia, M.* 8 *Jac.*

Pigeon-houſe. So if any man ſet up a Pigeon-houſe that doth hurt by his Pigeons in the Neighborhood, *Co.* 5. *Hill.* 39 *Eliz. Co. B. R.*

Coneys. So if a man plant his own ground with Coneys, and they do Treſpaſs to his Neighbors, whether it be a free Warren, or not; there is no Remedy for the party grieved, but to kill the Coneys upon his own ground, which he may lawfully do, adjudged. *Hill.* 39 *Eliz Co. B. R.*

School. If I have a School, and another Schoolmaſter ſet up a School by me, I cannot have an Action for this, 11 *H.* 6. 64. 47. 22 *H.* 6. 14, 15.

Sect. 25. If the Nuſance be by ſtopping a Way, Water-courſe, or Conduit, or hurting of a Common, and it be wholly ſtopt, or the Common wholly taken away, and he whoſe way, *&c.* it is, be a Free-holder of the thing to which it doth belong; it is ſaid in this Caſe he is to have ſome other Remedy. But if he have onely a Leaſe for years, or a Copyhold eſtate of that to which it doth belong, and it be wholly ſtopt or taken away, or he be a Free-holder, and it be ſtopt or let in part onely: In theſe Caſes the proper Remedy is by this Action, *Co.* 5. 73. 101. 9. 113. *F. N. B.* 184. See more in *Nuſance.*

Of an Action upon the Caſe upon a Trover and Converſion.

What it is. THis Action is a kinde of Action of the Caſe, which a man hath againſt another, that having gotten any of his Goods, doth refuſe to deliver them upon demand, *New Terms of the Law.*

In what caſe it doth lie, or not, For the perſons. It will lie againſt any man that hath had my Goods, and converted them; as if my horſe have been ſold by twenty men, I may bring this Action againſt either of them: And it will lie againſt any one that hath the poſſeſſion of the Goods, though he have them by borrowing onely. *Experientia,* 17 *Car. per Baron Henden.*

For the nature of the thing. This Action will not lie for Wood-growing, *M.* 20 *Jac. B. R.* Nor for things that are *feræ naturæ*; nor for any part of a Free-hold; as for Lead upon the houſe, while it is ſo, but after it is taken off, if it be converted, it will lie for it; nor as is generally held for money at large, as for Ten pound in money; but it will lie for money in a Bag or Cheſt, or for ſo many peeces of Gold of Twenty ſhillings a peece, or ſo many peeces of Silver in certain: And it will lie for any other Goods animate, as Oxen, Horſes, Hens, and the like; or inanimate, as Rings, Carpets, Woods or Trees, cut down, and the like: So for things that are *feræ naturæ*, as Deer, Hawks, and the like, after they are reclaimed.

For the Caſe. If another man get into his hands any ſuch Goods, living or dead, being my Goods, by finding, or otherwiſe, in any Caſe whatſoever, where he hath not a right in property or poſſeſsion to the thing, and he waſte it or convey it away, ſell it, or otherwiſe convert it to his own uſe, or keep it from me; I may have Remedy by this Action. And therefore if I loſe my Goods, and another man finde them; as if he take up my Hawk that is eſcaped, or my Horſe or Beaſt that was ſtraid away; or if a man who is Executor to another, have my Goods that were in the keeping of the Teſtator, come to him amongſt the Teſtators Goods, or a Felon leave my Goods within a Mannor, and the Lords Bailiffs ſeize them, not being waved; or if a man ride my Horſe to an Inn, and the Inn-keeper keep my Horſe from me: In theſe and all ſuch like Caſes, I may have this Action for my Remedy, 12 *Ed.* 4. 8. 12 *H.* 8. 3. 9. 7 *H.* 4. 3. *Dyer* 306. *Co.* 2. 25. 5. 27. 109. *Old Book of Entries, f.* 4. *Litt. Broo. Sect.* 174. 198. 382. 405. *Fincheſley* 181. 186. *Brownl.* 1. *part.* 44.

If

If a man that is a Suitor to a woman, give her in the wooing-time gifts, and they do not go on, but break off, and ſhe refuſe to redeliver theſe goods, it ſeems he may have remedy by this Action for the goods. *Womans Lawyer, f.* 71. *ſect.* 32. *Dame Fitz Caſe, M.* 7 *Jac. B. R.*

But this Action will not lie in theſe Caſes following, *viz.* 1. When he that brings the Action hath neither right to, or property in, nor hath had a poſſeſſion in the thing ſued for; and if he bring the Action upon a poſſeſſion, he muſt ſhew that he was once in the actual poſſeſſion of it. 2. Where the party that hath the goods, hath them by delivery with a Truſt; as where I deliver my goods to a Carrier to carry for me, and he doth keep or convey, and diſpoſe them another way. *Wormwalls Caſe, M.* 9 *Jac.* But another kind of Action of the Caſe doth lie in this caſe. 3. Nor where the party that hath the goods hath a good property in them by ſale, gift, or otherwiſe, as being ſeized for a Hariot, or the like. *N. book of Entries,* 39. 41. *Co.* 8. 15. *Broo.* 405. 193. *Broo. Diſtreſs.* 198. 4. Nor where the party that hath the goods, hath the lawful poſſeſſion of them; as where another man doth bring my horſe into an Inne, and there refuſeth to pay for his meat, and the Inne-keeper detaineth him for his meat, as he lawfully may do till he be paid; or where goods are duly ſeized as a Waif or Eſtray, or the like. *N. book of Entries, f.* 10. 41, *&c. Co.* 8. 147. *Hill.* 14 *Jac. B. R. Adjudg. Robſons Caſe.* 2. Nor as it ſeems for a bare finding or receipt of goods, and a poſſeſſion only without any converſion. And therefore if one deliver another mans goods to me, and I do not convert them, it ſeems this Action will not lie; it ſeems then that the converſion is traverſable. *Dyer* 121. *Finches ley* 186. *per Baron Henden* at *Glouceſter-Aſſizes,* 17 *Car.*

And as to Converſion, theſe things are to be known. 1. To do a lawful act, as diſtrain and impound Cattel, is no converſion; but to work them, is a converſion, *Brownl.* 1 *par.* 5. 2. To deny the things upon demand, is a converſion; but without Requeſt there can be no converſion, and ſo no action. *The Court, Brownl.* 1 *par.* 152. *pl.* 79.

What muſt be proved or averred to make good this Action.

To maintain and bear up this Action, theſe things are neceſſary to be averred or prove d in the Caſe. 1. The Plaintiffs right to the thing. 2. That the Defendant hath or had it. 3. A demand of the goods, and denial; for how elſe ſhall a man that finds goods, know the owner, and to whom to deliver them? *By Serjeant Turner at Lent-Aſſizes at Glouceſter,* 23 *Car.* 4. Some ſay there muſt be a Converſion; and in *Trin* 44 *Eliz. in Com. B.* it was adjudged, that if *A.* deliver a Chain of gold to *B.* and *A.* demand it, and *B.* deny it, and ſay he ſhall not have it till he can recover it, that this was no Converſion. But I take it, the contrary is held and practiſed at this day; and Baron *Henden* at *Glouc.* Aſſizes, 17 *Car.* ruled it, That a demand and a denial is a Converſion; and whatever is ſuch an act for which Treſpaſs will lie, is a Converſion to give this Action of the Caſe on a Trover. 5. And theſe things muſt be ſet forth in the Declaration; but the time of the Converſion is not needful to be ſet forth in the Declaration. *M.* 37, 38 *Eliz. Co. B. Earl of Rutlands Caſe. Goldsb.* 152. *pl.* 79. For pleading in this, See *Brownl.* 1 *part,* 8, 9, 12, 16, 17.

Of an Action of the Caſe for a Conſpiracie or Confederacie.

What it is.

A Conſpiracie ſtrictly taken, is, where two or more perſons do purpoſely and maliciouſly conſpire and labour together falſly and unjuſtly, and without any ground at all to indict another for ſome Treaſon, Felony, or other offence, and after he which is ſo indicted is upon that indictment after a lawful Trial purged and acquitted. In this caſe, and for this wrong, as he may have other remedy, ſo he may have remedy by an Action of the Caſe, wherein the Plaintiff ſhall recover damages according to his hurt. *Co.* 9. 56. *FNB.* 114, 115, 116.

Where and in what caſe this Action will lie for a Conſpiracie, or not, and how.

If two or more falſly and maliciouſly conſpire to indict or appeal another of any offence againſt any Law, and after he that is ſo indicted is acquitted, a Writ of Conſpiracie lies. *FNB* 114, 115, 116. *Co.* 5. 56. And in all Caſes where the practice and procurement is ſuch by one perſon, that if there were more joyned with him, a Writ of Conſpiracie would lie, there a general Action of the Caſe will lie. *FNB.* 116. *L.*

Sect. 26. If one man only falſly and maliciouſly cauſe another to be indicted for Felony, Barretry, or the like, who is thereupon acquitted, an Action of the Caſe in the nature of a Writ of Conſpiracie lieth. This hath been often adjudged; and in this caſe the Plaintiff that brings the Action, muſt be ſure to make it good that it be falſe and ma licious; for the malice is the ground of the Action: For if upon the Trial it doth appear, that either it was forced in a courſe of Juſtice, or there was *probabilis cauſa* for the indictment and proſecution, no Action will lie. *March. f.* 130. 41, 42 *Eliz. Co.B.Sheringtons* Caſe. And in this caſe the Plaintiff need not ſay that he was *legitimo modo acqnietatus*, as he muſt in a Writ of Conſpiracie. *P.*3 *Jac.B.R. Marſhams* Caſe. And if a man do procure another to be arreſted, brought before Juſtices, examined or impriſoned for a Felony, with a plot to vex and diſgrace him albeit he be not indicted for the Felony, it ſeems for this only he may have this Action of the Caſe, *Co.*9.56,57. *Co.*4. 14,15. *F.N.B.* 116,114. And in theſe caſes, and for theſe wrongs, it is better to bring this Action of the Caſe, then to bring a Writ of Conſpiracie, which is a ſpecial Action in the nature of an Action of the Caſe. For in all Caſes where a Writ of Conſpiracie lieth, there muſt be theſe things incident to the Caſe.

1. There muſt be two or more in the plot, for this Writ of Conſpiracie will not lie againſt one, nor againſt a man and his wife (who are but one in Law) unleſs the Writ be that they *ſimul cum* others did it. And hence it is, that if this Suit be begun againſt divers, and all but one are diſcharged of it to all intents, as being acquit by Verdict, hereby he is diſcharged alſo. *F.N.B* 114, 116. 18 *Ed.*4. 1. *Br. Conſpir.*21. But if the Writ be brought againſt two, and the one of them is attainted, and the other doth bar the Plaintiff by a Demur in Law, or one doth appear and plead, and his plea is found againſt him; in theſe caſes the other is not diſcharged, but the Plaintiff ſhall recover, though the other be not attainted. And yet in this caſe perhaps he may refuſe to anſwer without the other; or if all the Conſpirators but one be dead, there the Writ may be had againſt him alone. *F. N. B.* 116, 115. 40 *Ed.* 3. 19. 38 *E.*3.3. 35 *H.*6.14. 24 *H.*6.25.

2. The party that brings this Action of Conſpiracie muſt be indicted, arraigned, and acquitted; for it will not lie for a plot or preparation without an execution: *Non efficit conatus niſi ſequatur effectus. Co* 9.56. *F.N.B.* 114.

3. The proceeding and proſecution muſt be voluntary. And therefore neither this Action, nor an Action of the Caſe in general will lie againſt ſuch men as do proſecute by conſtraint or compulſion; as when men are obliged to it by oath or office, as Juſtices of Peace, or Jurors ſworn to preſent ſuch offences, or Witneſſes called to teſtifie their knowledg of ſuch things, or one doth come into a Court voluntarily and diſcover a Felon; for all this is juſtifiable. 27 *Aſſ. pl.* 12 *Ed.*4. 18. 21 *Ed.*3. 17. 7 *H.*4.31. 35 *H.*6.14. 20 *H.*6.5. *F.N.B.*115. *l. Broo.Conſpir* 4.4.

4. The proceeding muſt be malicious. And therefore if one man do proſecute another upon good ground, as when a Felony is done, and there is ſome cauſe of ſuſpition of that perſon more then another, either by the common fame or otherwiſe; as when a man is robbed, and the next Village upon a Hue and Cry doth make purſuit, and take a man they ſuſpect, and thereupon the party robbed doth indict that man, and he is acquitted; or a Coroner after a murder, ſitting *ſuper viſum corporis*, cannot find out the murder, and then enquiring of the firſt finders of the body, they preſent that *I.S.* killed him, and thereupon *I.S.* is indicted and acquitted; theſe proceedings are not puniſhable by any Action. *Broo. Conſpir.* 4. *Trin.* 9 *Jac. B. R. Wall verſ. Hill.*

5. The charge and accuſation muſt be falſe. And therefore if the Conſpiracie be ſuppoſed to indict a man for murder, and upon his arraignment it is found he killed the man, but the killing was lawful *per infortunium* or *ſe defendendo*, this Writ will not lie. *Fitz.Conſpir.*21. *Stamf.lib.*3.*ch.*12.

6. The party indicted or appealed muſt be *legitimo modo acquietatus, (viz.)* he muſt be acquitted upon his Trial by the Petty-Jury, after Indictment found by the Grand-Jury; or if he bring an Appeal, be Non-ſuit, or the like. And therefore if the acquittal be by a general or particular Pardon, or he is diſcharged by the inſufficiencie

ficiencie of the Indictment, or the party be indicted, and an *Ignoramus* be found upon the Bill; in all theſe caſes this Writ of Conſpiracie will not lie, 9 *Ed.* 4. 12. *F.N.B.* 114. *Co.* 4.45. And yet the laſt Caſe is doubted of ſome, and the contrary is ſaid to be twice adjudged in 41 *Eliz. B.R.* and 20 *Jac.* See 19 *R.* 2. *tit. Brief.* 926. See *Brownl.* 1 *par* 9.

What matter ſhall be ſaid a good bar or plea in this action, or not.

It is a good Plea in Bar to this Action, that there hath been an Accord made between the parties, and the ſame is executed, 21 *H.* 6. 28. So it is a good Plea to ſhew, that the Indictment or Acquital was erroneous, albeit the party indicted did not take advantage of it, *Co.* 9.26. 9 *E.* 4.12. So it is a good Plea to ſay, That there is no ſuch Record as the Plaintiff ſets forth, 9 *H.* 6. 26. So any of the things before may be pleaded, That that which was done, was done by compulſion and *ex officio*, as by Jurors and Witneſſes, or the like, 20 *H.* 6.5. But it is no good Plea to ſay for one, that another is dead, hanging the Writ, 18 *Ed.* 4.1. Nor to ſay, that the Plaintiff was guilty of the Felony whereof he is ſo acquitted: Nor to ſay that the Record is, that the Plaintiff and divers others are indicted beſides the Plaintiff, 9 *Ed.* 4. 23. See *Conſpiracie.*

Of an Action of the Caſe for a Diſceipt.

What it is.

DIſceipt is ſaid to be a Writ, either Original, when it is brought againſt a man for ſome deceit he hath uſed or done; or Judicial, where upon ſome Writ directed to the Sheriff, he doth make a falſe Retorn, and thereby the Defendant doth loſe his Land: In both caſes he may have an Action of the Caſe for his relief; and in the laſt caſe, the act unduly done will be avoided alſo. *New Terms of the Law*, 154. *F.N.B.* 95.

What ſhall be ſaid to be a Diſceipt for which and where this Action lieth, or not. Againſt an Attorney.

If a man make his Attorney in a real Action brought againſt him, and the Attorney by agreement ſuffer Judgment to be given, and the Land be loſt, his Client may have this Action for his remedy. *F.N.B.* 95. *Co.* 6.9. *Old book of Entries*, 2. So if he uſe any falſhood or deceit whatſoever, ſue me for another, or another appear or plead for me without warrant, or if my Attorney in a ſuit for or againſt me ſhall do any thing without warrant, and I be hurt thereby, I may have this Action againſt him, *Co.* 7.1,2. *Dyer* 361.13 *F.N.B.* 98.*k*. So if the Attorney for Plaintiff or Defendant do any way do againſt or beſides his office, *Idem*, 20 *H.* 6.25. 15 *H.* 7.14. *Old book of Entries*, 2.

If I appoint my Attorney to take an obligation for me in my own name, and he take it to himſelf and in his own name, I may have this action againſt him, 20 *H.* 6. 4.25. 3 *H.* 7.14. *Br.* 117. So if it be to buy a Leaſe, and he buy it for himſelf, 3 *H.* 7. 14. 7. 20 *H.* 6.25.

If my Attorney or Counſellor diſcover my Conveyances or other ſecrets which I have ſhewed to him, to my prejudice, I may have this remedy againſt him, 11 *H* 6.18. *Broo.* 108. Or procure himſelf to be retained for the other ſide, *Old book of Entries*, *f.* 2. But if another that is not a Lawyer diſcover my Evidences I have ſhewed to him, *contra.* 11 *H.* 6.18.

Againſt a Sheriff.

If any miſchief come to me in any ſuit between me and another, by the falſe Retorn of a Sheriff, I may have my remedy by this action, *Co. ſuper Lit.* 259. *Co.* 6.9. *F.N.B.* 97,98. *Co* 9.32. *Dyer* 353. *March Rep. f.* 99. *pl.* 169. But if a Judgment be had by default againſt me, being all that time in priſon, and I be ſummoned according to Law, I cannot have this action, *Co. ſuper Lit.* 259.

In perſonating another man.

If in a ſuit or action, another perſon will come in Court, and pretend he is the party to the ſuit, and ſo let Judgment be had, or ſome other prejudice be done to the party himſelf, he may have this remedy againſt him that doth it. As for example, if one purchaſe a Writ out of the Chancery in my name, and upon that Writ a Fine is to be paid to the King; or if I have cauſe to bring an action, and another bring it in my name, and let Judgment go againſt me by Nonſuit, or the like; or if one acknowledg a Judgment, levy a Fine, ſuffer a Recovery in my name, and all this is done without my leave or privity; in all theſe caſes this action lieth for remedy, *F. N. B.* 96, 97, 100. 19 *H.* 6.44. *F.N.B.* So for any other thing a man ſhall do in my name,

and for me in a Court, without my agreement, *Idem. March, Rep. fol.* 48. *pl.*76.

If a Writ be brought againſt two as Executors, and one of them is no Executor, and he that is Executor confeſs the Action, the other that is hurt hereby may have Remedy by this Action, *F. N. B.* 98. 9 *Ed.*4. 15.

If one acknowledge a Statute, Recognizance, or enter into a Bail in my name, if I be hereby damnified, I may have reparations by this Writ, 19 *H.*6. 44. *F.N.B.*100.

By Forgery. If any man forge a Deed in my name, and it be given in Evidence, or made uſe of againſt me, and I receive any hurt by it, I may have my Remedy by this Action, 5 *Ed.*4. 126. 116. *F. N. B.* 99. *k.* But for a forging onely this Action will not lie the ſame.

If one that is not the true Executor or Adminiſtrator get a Statute made to the Teſtator, and come into the Chancery, and ſhew the Teſtament proved, or the Letters of Adminiſtration, and ſo getteth out Writs and hath Execution, the true Executor may have this Writ againſt this counterfeit one. So if he do in the life time of the Counſee ſuppoſing him to be dead, 2 *R.*3. 8.

Sect. 27. Delays in Suits. If a man in a Suit will procure a protection for a year, and do not purſue it accordingly, but remove the ſuit, or do any ſuch act, which by matter *Ex poſt facto* ſhall appear to be but to make delay, the party grieved may have this Action for his relief, *F. N. B.* 97. 20 *H.*6. 1c. *Co.* 5.34. So if he get a Writ of Priviledge as a ſervant to one of the Clerks in Chancery, when in truth he is not ſo, 11 *H.* 6. 8. So if the Eſſoyner caſt an Eſſoyn, and warrant it not at the day, the Demandant that is hereby delaid, may have this Remedy, *Bro. Diſceit.*40.

If I enter into a Statute to pay money by a day, and pay it, and after another get the Statute and ſue it againſt me, I may have this Action againſt him that doth it, *F. N. B.* 100. So if any man ſue me in anothers name without his privity, I may ſue him in this Action, *Fitz. Action on the Caſe* 3. *F. N. B.* 100. 96, 97.

If one procure another to ſue and vex me without cauſe, I may have this Remedy againſt the procurer, *F. N. B.* 98. 116.

If one counterfeit a Letter in my name, and deliver him to my ſervant, and the effect of it is to perſwade him to deliver the counterfeiter money, and my ſervant doth deliver it; in this Caſe I may for my relief have this Action againſt the counterfeiter, adjudged. *Trin.* 7 *Jac. B. R. Tracies* Caſe.

If a Tenant in antient Demeſn levy a Fine of his Land at Common Law, it ſeems the Lord may have this Action, *Plow.*370. *F. N. B.* 98, 99.

In Play. If one that doth play with me, doth uſe falſe Dice and couzen me of my money thereby; I may have this action againſt him, *Co.* 11. 87. *F. N. B.* 95. *New Book of Entries*, 8.

In a Contract or Bargain. If a man ſell me any living or dead thing, as Cattle, Cloth, or the like, and at the time of the ſale he doth warrant it to me good and right, and it be otherwiſe, I may have this Action for my Remedy; and this will lie, albeit I have not paid all the money for the thing bought, *Kelw.* 89. 9 *H.*7. 22. 5 *H.*7. 41. *F. N. B.* 94. *Old N. B.* 50. And if the ſeller ſay he will warrant it, but doth not ſay to me yet this a good warranty, *Paſche*, 3 *Jac. B. R. Curia. Old Book of Entries*, 9.

Upon a Warranty.

If one ſell me any Land, or make me a Leaſe of that wherein he hath no right, I may perhaps have this Action, *Goldsb.* 123. *pl.* 8.

If one ſell me Clothes, and warrant them to be of a certain length, and they be not ſo; I may have remedy by this Action, *F. N. B.* 98. 11 *Ed.*4. 2.

If one ſell me a Horſe, and warrant him ſound, wind, and limb, and he hath ſome ſecret diſeaſe known to the ſeller, and not viſible to the buyer; as if he be ſhoulder-ſhot, or the like; this Action lieth for this, adjudged. *Trin.* 18 *Jac. B. R.* 11 *Ed.*4. 6. 13 *H.*4. 1. But it is held by ſome it will not lie upon a warranty, when the fault is ſuch as the ſeller did not know of it, *F N. B.* 94. But the Books are general, and it ſeems the Law is otherwiſe: So it is ſaid, it will not lie upon the warranty, when the fault is apparent that the buyer may diſcern it by one of his five ſenſes: As when the ſeller doth warrant the Clothes to be Red, and the buyer having ſeen them and they be Blue; or he doth warrant a Horſe to be ſound, and he hath a ſplint, ſpavy, oyl, or is lame, 13 *H.*4. 2. 7 *H.*4. 14. 5 *H.*7. 41. 20 *H.*6. 37. 31 *H.*6. 11. So when

when the warranty doth extend to a thing to come, as that a Horſe ſhall carry a man thirty miles a day, *Fincheſley* 188. So when the warranty is made after the thing is ſold, and is no part of the Contract, and yet ſuch a warranty *Ex poſt facto*, if it be by Deed, may amount to a Covenant, 5 *H.* 7. 41. 11 *Ed.* 4. 6. *F. N. B.* 98. *Paſche*, 3 *Jac. B R*, *Goldſmiths* Caſe. Covenant.

If one ſell me corrupt Victual or Wine, as if he mix Wine and Water, or the like, without any warranty, I may have this Action againſt him for his Deceit, *Kelw.* 91. 11 *Ed.* 4. 6. But if one ſell corrupt or falſe and ſophiſticated Wares, it ſeems no Action of the Caſe will lie upon this ſale without a warranty be made, *Dyer* 75, 76. yet ſee *Kelw.* 89. 7 *H.* 4. 10. 13 *H.* 4. 2. 9 *H.* 6. 52 11 *H.* 6. 22. 19 *H.* 6. 49. *F. N. B.* 88. So if one ſell me an Horſe which is unſound, and I know him to be unſound, without warranty I cannot ſue him for this, *F. N. B.* 94. 31 *H.* 6. *Statham action*, *Sur. le Caſe. pl. ult.* 7 *R.* 2. *Monſtrance de faite* 160. So if one ſell corrupt Wine or Victuals, if the buyer or his ſervant taſte it before-hand, and like and accept it; in this Caſe this Action will not lie, 7 *H.* 4. 16. 13 *H.* 4. 2. Without a Warranty.

If one be about to ſell me a Leaſe, and I tell him that *J. S.* bid me a hundred pound for it, and thereupon he giving credit to my report, is moved to give me one hundred pound for it, and *J. S.* did never bid me a hundred pound for it; he cannot have this Action againſt me for this falſity, for it was his Error to believe it, adjudged. *B. R.* 41 *Eliz.* *Taylors* Caſe.

If one ſell me Land or Goods that are none of his own to ſell, and it is after taken away from me; or I be moleſted about it by the right owner, I may be relieved by this Action, *Co.* 4. 18. 42. *Aſſ.* 8. *Bro. Action of the Caſe*, 85. *Fitz.* 4.

If one ſell me Land, and agree to make me an Eſtate by a day, and before the day he doth make it away, or ſome Eſtate out of it, or charge upon it to another, and then doth make the Eſtate to me, I may have this Action for my relief, 3 *H.* 7. 14. *F. N. B.* 98. 20 *H.* 6. 34. 2 *H.* 7. 12.

The Plaintiff declared that he ſued *D.* The Defendant in an Action of the Caſe for words, and upon not guilty, the Defendant to take away the Plaintiffs credit, gave evidence, that he was a common lyer, and ſo recorded in the Star-Chamber; by reaſon whereof, the Jury gave very ſmall damage, *&c.* It ſeemed to the Court not actionable, *Brownl.* 1. *part.* 2.

If one convey his Land to *J. S.* to that intent, that *J. S.* ſhall convey it to *J. D.* to whom the Feoffor had ſold it, and *J. S.* refuſe to convey it to him, and ſell it to another: In this Caſe, the firſt owner of the Land may bring this Action againſt *J. S.* for his breach of Truſt, *Hughs*, *Rep.* 64.

As for Deceit in breaking of promiſes, we have ſpoken to it before in an *Action of the Caſe* upon an *Aſſumpſit*. See *Deceipt*.

Where an Action of the Caſe will lie for other miſdoings, or not-doings, or not.

THis Action of the Caſe lieth for wilful or negligent Miſ-feaſances or Non-feaſances in all the Caſes following, (*viz.*)

If one ſtop a Ditch or River, or ſet up Flood-gates, ſo as to make the Water overflow and drown my ground adjoyning to it, or ſtop or divert a Water-courſe running to my Mill or Houſe; ſo that I cannot have that benefit by it I was uſed to have; I may have this Action for my Remedy, *Co.* 4. 86. *Dyer* 248. 320. *Co.* 9. 50. *F. N. B.* 88, 89. 21 *H.* 7. 20. *F. N. B.* 92. But if a man ſtop or divert Water to amend a mans Banks or Mills, having by a cuſtom ſuch a liberty and power; this is juſtifiable, and will not bear an Action, 39 *H.* 6. 32. *Bro.* 77.

If one do procure another falſly and maliciouſly to indite me for any offence, or cauſe me to be arreſted, impriſoned, bound over, or arraigned for an offence, without any colour or cauſe of ſuſpition, I may have this Action againſt him for my relief, *M.* 4 *Jac. B. R.* *Marſhams* Caſe, adjudged. *Trin.* 17 *Jac. B. R.* *Olivers* Caſe. *M.* 7 *Jac. B. R.* *Gambels* Caſe: See for this in an *Action of the Caſe* for a *Conſpiracy*. Yet I have ſeen the report of a Caſe, that this Action will not lie, but where the party Indictment.

party indicted is acquitted upon a Trial, *M.* 5 *Jac. B. R. Myn verſus Tailor:* But the contrary is practiſed every day; and therefore I cannot receive that for Law.

If one put ſuch things in the water as do occaſion the drowning of my ſhip, I may have this Action againſt him, *F.N.B.* 92. If my ſheep be paſſing over *Severn*, and one of the paſſengers force one of them into the water, and all the reſt follow and are drowned, I may have this Action; but whether I ſhall have damages for all, or one only, the Jury muſt well conſider of it.

If one put Cats into my Warren amongſt my Conies, it ſeems I may have this Action againſt him, *Old book of Entries, f.* 13. *Mich.* 2 *Jac. B. R.* by two Juſtices.

Sect. 28. Hindring my Execution. If one hinder me of my Execution, as if a Sheriff come to another mans houſe where the goods of the Defendant are, and the door of the houſe being open, another man, not the owner of the houſe, ſhut the door and keep him out, or the owner of the houſe or any other man convey away the goods, and ſo prevent the Execution; this Action will lie for this, Adjudg. *Hil.* 20 *Jac. B. R. Woods* Caſe: *New Book of Entries, f.* 13. But if it be his own houſe, or to defend his own goods againſt the Execution, he may juſtifie it, *Co.* 5. 91.

Executor. If I have a Judgment againſt an Executor, and he do ſecretly and fraudulently make away his goods to prevent Execution, I may have this Action againſt him, *M.* 2 *Car. B.R. Curia.* If an Officer be coming to arreſt a man, or attach his goods at my ſuit, and another man convey away the goods or the perſon, ſo that he cannot do the work, I may have this Action againſt him, *F.N.B.* 102. 21 *H.*7. 40. 18 *Ed.* 3. 3. If a man be arreſted at my ſuit, and another man reſcue him, and ſo he get away, in this caſe I may have this remedy and recover the debt in damage from him, *Hil.* 20 *Jac. B. R. nullo contradicente, &* 7 *Jac. B. R. Hawks* Caſe.

Removing a Diſtreſs. If another mans cattel be on my ground damage feſant, and a ſtranger of his own head remove them, ſo as I cannot diſtrain them damage feſant, I may (as it ſeems) have this Action, *Finches ley* 200. *Co.* 5. 91. So if I be coming to diſtrain my Tenant for my Rent, and he hearing thereof drive away the cattel and prevent my diſtreſs, *Hil.* 20 *Jac. per Juſt Haughton.*

If I have provided wood for a ſpecial purpoſe, as to make Iron, or the like, and a ſtranger take it away, I may have remedy for this Action, *New book of Entries*, 36, 37.

Abuſing a Diſtreſs. If one diſtrain my Kine great with Calf, and by driving they loſe their Calfs, I may have this Action, *F.N.B.* 86. *Brownl.* 1 *part*, 12.

Burning a Houſe. If my neighbor, his ſervant or any other that ſhall come into his houſe by his good will and agreement, ſhall wilfully, or through negligence fire his, and thereby my houſe, I may have relief by this Action, 2 *H.*4. 18. *Exod.* 22. 6. *Old book Entries. f.* 8. But if my neighbor without negligence, and againſt his will, and thereby my houſe is burnt, *contra.* 2 *H.*4. 18. See *Brownl.* 1 *part*, 197.

Menaeing. If one threaten me, my wife, ſervants or children, that he or ſome other ſhall do us ſome hurt, and do afterwards lie in wait to do it, and by this means we be ſo put in fear that we dare not follow our buſineſs, as if my ſervant by this means dare not go abroad about his work, or depart away out of my ſervice, and I have hereby any particular loſs, I may have remedy by this Action. But for a bare threatening, without ſome doing or endeavor, as lying in wait, or the like, no Action will lie, *Co.* 7. 1. *Kelw.* 40. 9 *H.*7. 7.

Dog killing Cattel. If another man hath a dog that hath been uſed to kill cattel, and the owner of the dog hath had notice given him thereof, and this dog happen to kill my cattel, I may have this action againſt the maſter of the dog, *Dyer* 25. *Co.* 4. 18. *Exod.* 21. 29, 35. 36 *H* 6. 6. So there muſt be three things in the Caſe to bear up the action. 1. The dog muſt be uſed to bite. 2. The owner muſt have notice of it. 3. It muſt be his dog when he doth it, *Paſc.* 9 *Jac. B.R. Londars* Caſe. And it was held by Baron *Denham*, and accordingly he gave direction to a Jury, That if *A.* have ſuch a dog, and *B.* take him out with *A.* without his privity, and then he kill my cattel, that I may ſue *A.* for this.

If

If one remove a meer-ſtone, and I be hurt by it, I may have this Action againſt him that did it, *Old Book of Entries, f.* 9. Removing bounds.

If one ſtop Water, and put it out of his old courſe, and by that means it ſurround my ground to my hurt, I may have this Action, *New Book of Entries, f.* 18. Nuſance.

If one take out an Execution upon a Record in any Court, when he knoweth the Record is removed by a Writ of Error into another Court; it ſeems I may have this Action, *Trin.* 39 *Eliz. Co. B.R. Willis verſ. Stroud.* Abuſe of Iuſtice.

If one caſt a falſe Protection, the party delaid hereby, may have this Action, *Trin.* 19 *Jac. B R.* 21 *Ed.*4.

If one ſue me in a Court that hath not juriſdiction of my perſon, or ſue me for a thing whereof that Court hath not juriſdiction; for this unjuſt vexation, I may have this Remedy: As if one ſue me in the Admiralty or Spiritual Court for a thing not triable there, or ſue me in the Kings-Marſhalſey, when neither of us are of the Kings houſe; in theſe Caſes this Action lieth: But if one ſue me in an improper or unjuſt Action, this Action will not lie for this; for here I ſhall have coſts in the ſame Suit for my relief, *Co.*10.76. *Stat.* 2 *H.*4. 11. *Fitz. Eſtoppell.* 18. 10 *H.*6. 13. *Trin.* 3 *Jac. B. R.* Dame *Waterhouſe* Caſe. And yet if one ſue me for Tithes, where I ought not to pay Tithes, which is forbidden by the Statute of 32 *Eliz.*7. I may not have this Action for this, adjudged. *Patridge* Caſe. But if one take a falſe Oath againſt me in a proper Court, whether he come in by or without Proces, and I be prejudiced by it, I cannot have this Action againſt him, *M.* 38, 39 *Eliz. Co. B. R.* Adjudged. *Damports* Caſe. *M.* 18 *Jac. B. R. Eyers* Caſe. *Co.*4. 14. For it is in an ordinary courſe of Juſtice, and an Act of the Court. Suits in improper Courts or Counties. False Oath.

If one ſue me in anothers name, without his privity, though it be upon a juſt cauſe, I may have this Action againſt him; and if I have any ſpecial loſs by it, recover damages accordingly, *March. Rep. f.*48. *pl.*76. For this is Maintenance. For Maintenance.

Where one that is not of a Jury, cauſeth himſelf to be ſworn in the name of one returned of the Jury, and gives his verdict; either party may have this Action againſt him, *March. Rep. f.*81. *pl.*132.

If one hinder the Parſon that he cannot have his Tythe; he may have this Action, *Co.* 2 *part. Inſt* 650.

If one indict another, or ſue an appeal againſt another, in another County, then that wherein he dwells; this Action lieth againſt him for this wrong, *Stat.* 8 *H.*6. *ch.*10. 6 *H.*6. *ch.*1. *Kelw.* 21. So if one ſue me in a Forreign County, and there ſecretly purſue me to an Out-lawry, I having no notice of it; this Action lieth for my relief, *New Book of Entries, f.*42.

If a Prohibition be delivered to a man, to ſtay a Suit he hath againſt me in a Court, and he proceed in that Suit notwithſtanding, I may have this Action, *F. N. B.* 92.

If a man have a Judgment, and have levied goods to pay the Debt upon an Execution, and the Sheriff return that they are in his hands for default of buyers, and the Plaintiff knowing hereof, ſues out a new Execution which the Sheriff doth execute; no Action will lie againſt the Plaintiff for this, *Paſche,* 17 *Jac. Co. B. R. Watrer verſ. Freeman.* So if one be to pay me money at *Michaelmas* on a Bond, and pay it, and after I ſue the Bond, he cannot have this Action againſt me, *Paſche,* 17 *Jac. B.R. per Ch. Juſtice.*

If a Guardian be to ſue for an Infant, and do it not as he ſhould, the Infant may have remedy by this Action, *Dyer* 361. *Kelw.*135. *Broo.*118.

If I be bound to appear in a Court at a day, and before or againſt the day, one cauſe me to be arreſted of purpoſe and malice to prevent my appearance, and to cauſe a forfeiture of my Bond; in this Caſe I may have this Action for my relief, 7 *H.*6. 45. *Fitz* 4.

If a Leſſee for life do make a Leaſe for years, and this Leſſee for years doth commit waſte, for which the Leſſee for life is puniſhed; in this Caſe he ſhall have this Action againſt the Leſſee for years, and recover as much as the Leſſor doth or may recover of him, *Paſche,* 38 *Eliz B.R. Germies* Caſe. So if Leſſee for years of a houſe, Leaſe it for part of the time, and that time expire, the Leſſee continue in poſſeſſion, Between Leſſor and Leſſee, or Lord and Copiholders.

poſſeſſion, and pull down part of the houſe, the firſt Leſſee may have this Action, adjudged, *Trin. 6 Car. B.R.* If the Leſſee will not ſuffer his Leſſor to come into the houſe to ſee if any Waſte be done in it, the Leſſor may have remedy by this Action, *Hil.20 Jac.B.R.* adjudged. See *Brownl. 1 part*,197,329,370.

If the Lord cut down the Copiholders trees without his leave, though he leave the ſhrouds behind him, yet this Action lieth for the Copiholder againſt the Lord, *M. 3 Jac. B.R. Croſs verſ. Abbot*, unleſs the Lord be by cuſtom to have the trees, *& Trin. 17 Jac. per Juſt. Haughton.*

If a Lord cut down a tree whereof the Tenant is to have the lops, *Brownl. 1 part*, 197,231. See more in 142, 197, 208. *2 part*, 55, 331, 332. So of a Copiholder, where the Lord doth cut down all the trees, that he cannot have fireboot, &c. *Brownl. 1 part*, 231.

If I deliver to another cloth to keep, and he keep it negligently; I may have this Action or Detinue againſt him, *2 H. 7. Brownl. 1 part*, 152.

If I be a Baker, and buy Corn of another to deliver me ſuch a day, and he do not deliver it, I may have this Action or Debt for it, by *20 H. 7. Brownl. 1 part*, 79.

If a Tenant at will of a houſe, or his ſervant, or his Leſſee at will, which is his ſervant, do voluntarily burn the houſe, the firſt Leſſor may have remedy by this action, *M. 17 Jac. B.R. per Ch. Juſtice.* But if he ſuffer the houſe by negligence to be burnt, or the trees negligently to be cut down, no action will lie for this, *Co* 5.13. But in the firſt Caſe it ſeems the proper remedy is to be againſt the Tenant at will by a geral action of Treſpaſs, and not by this action; for if he burn, pull down the houſe, or cut trees, the Will is determined, *Dyer* 122. 15 *Ed.* 4.20. *Lit. f.* 15.

If the Leſſor put out the Executors of the Leſſee out of their term, they may have this action, *Co.* 4.18. *F.N.B.* 92.

Diſturbance in way, Iſle-office, &c. If I be hindred in all or part of my Common, private way, or private water, Walk or Foldage, which time out of mind by preſcription or otherwiſe I have good right unto, I may have remedy by this action, *New book of Entries, f.* 9, 11, 14. *Co.* 5.76. 13 *H.* 7. 26. *Co.* 1 *part*, *Inſt.* 56. So if the inhabitants of my Pariſh have by preſcription a watering place, and it be diſturbed, every one of us may have this action, *Finches Ley*,187. 27 *H.* 8. 27. See *Brownl.* 1 *part*, 197, 231.

If one incloſe Land which ſhould lie open in a Manor, in which the Commoners have Common, or eat up the Common ſo that the Commoners have not ſufficient, every Commoner may have this action againſt the Diſturber, *Co.* 9. 113, 11, 54. *F.N.B.* 145. 21 *H.* 7. 40.

Sect. 29. If I have an Office, and another diſturb me in it, that I cannot uſe it, this action is given me for my relief, *6 Ed* 4. 9. *Broo.* 94. *Co.* 9. 50. *F. N. B.* 94. So if one hinder me in my Fair or Market, that I cannot have the Toll, or diſtrain one to come to his Leet that ought to come to my Leet, I may have this action, *Old B. of Entries, f.*5, *New B. of Entries, f.*10. 11 *H.*4.64.

If I and my anceſtors time out of mind have had an Iſle in a Church for ſeats, and funeral of ſuch as die in my houſe, as belonging to my houſe, and the Parſon or any other diſturb me, I may have this remedy, *New B. of Entries, f.* 9.

If one grant me to have hay and ſtraw in his houſe for my two Kine all the winter long during my life, and I be diſturbed of it, it ſeems this Action lieth, *Fitz.* 17.

If a Statute forbid a thing without a penalty, and it be broken, and I have any ſpecial loſs by it, it is thought I may have relief by this Action, *F. N. B.* 90. *Trin. 3 Jac. B.R.*

Eſcape. If a Priſoner eſcape by the Gaolers means, either wilfully or negligently, I may have remedy againſt the Gaoler; and if he go againſt the Gaolers will, and he be forced in this Action to make me amends, he may have this Action againſt the Priſoner for his counter-remedy, 7 *H.*4.14. *Broo.*34.

For ſpoiling my goods. If I deliver Goods to *W.* and he deliver them over to *I.S.* to my uſe, and *I.S.* do impair them, I may have this remedy againſt *I.S.* 12 *Ed* 4.13. *Broo.*96.

If one cancel my Deed, or mar my Goods delivered to him, I may have this Action; and I may have this Action for marring my Deed, albeit the Deed be naught, *Old B. of Entries, f.* 7. *Broo.*382. *M. 9 Jac. B.R. Conſtables* Caſe.

If

If one have my Cattel to keep, and they die by Gods hand, this Action lieth not, nor albeit he promiſe to keep them ſafe, *per Juſt. Bridgman.* But if one have my Cattel to keep, and ſuffer them to die by his negligence, I may have this remedy, 2 *H.*7.11. *Dyer* 12. *Co.*5.14.

If I pledg my goods for money to another, and at the time of paiment of the money I tender the money, and require my pledg, and he will not deliver it, I may have this Action againſt him, *Old B. of Entries, f.*8. *F.N.B.*86. And if they periſh by his default, I may have this Action; but if they periſh by accident without any default of his, I can have no Action for this, *D. & St.*129. *Pledge.*

If one that findeth my goods doth loſe them, or ſuffer them to be impaired by his default, I may have this Action againſt him. But if they be left in a houſe which by chance is burned or falleth, or they be delivered to another to keep who doth run away with them, in theſe caſes it ſeems the Finder is not chargeable for them. But if one find my goods, and they be afterwards hurt or loſt by caſualty without any default of his, no action will lie for this, *D. & St.*38.129.

If one for hire borrow my horſe to ride to *London*, and he ride him further, or ride him out of the way, or forwards and backwards, and forwards again, in and upon the right way; in all theſe Caſes I may for this have this action, and eſpecially there where the horſe is hurt. So if the borrower ride him exceſſively, ſo as to hurt him. So if the borrower put him into an old rotten houſe ready to fall, and the houſe fall down and kill him. So if any one borrow or hire my goods to uſe to one purpoſe, and he uſe it to another; in all theſe caſes this action is given to me for my relief, 12 *E.*4. 8,13. 21 *E.*4. 79. *D. & St.* 129,128. *Co.*8.146. 2 *H.*7.11. But if one that doth borrow my horſe, by hard riding make him very weary only, ſo that he will do no work in a good while after; or if a horſe ſo borrowed die ſuddenly without any default in the borrower, in doing that for which he was hired; or if he put him in a ſtrange houſe which doth caſually fall and kill him, in all theſe caſes no action will lie, *D. & St.* 128,129. *Exod.*22.14,15. 40 *Ed.*3.6. If one lend me a horſe for hire for a time, and he take him from me within the time, I may have this action againſt him, *F.N.B.*86. See *Brownl.*1 *part*, 8, 9, 17. *Upon a Loan.*

If I be Executor to a man, and the goods be in another mans houſe, and I come in time convenient to fetch them away, and he do actually diſturb me, ſo that I cannot have them, I may have this action againſt him. *M.*7 *Jac B.R.*

If one take my beaſts or goods from me, and another take them by force from him, I may have this action againſt the ſecond taker, 12 *E.*4.12.

If I be to have Corn I have ſowed upon another mans Land, and be diſturbed in it, I may have this action. *Finches Ley* 187. *For a diſturbance and detainer.*

If I buy Corn of one, and pay him part of the money, and leave it with him, and pray him to keep it till ſuch a time, and he convert it to his own uſe, I may have remedy by this action; and if the Corn were in bags, I may have alſo a Detinue for it, *Kelw.*77. *Detinue.*

If I leave my goods with one to keep, or I leave them with him, and he take them into his cuſtody without any words, and the goods be loſt or waſted, I may recover the worth of them in this action, albeit he be to have nothing for keeping them: But if when he doth receive them, he receive them with a ſpecial caution and agreement, that he tell the owner he will not anſwer for them, or he will keep them as his own, or keep them as well as he can; in theſe caſes no action will lie unleſs there be an Aſſumpſit, and good conſideration for it in the Caſe, *Co* 4. 83. 5.13. *Exod.* 22. 9, 10, 11. *Kelw.* 77. 12 *E.* 4. 15. 2 *H.* 7. 11. *Co. ſuper Lit.* 89. *Old book of Entries*, 3, 9. *Bailment.*

If a Gaoler uſe me (being his priſoner) extreamly, I may have remedy by this action, *F.N.B.*93. *Gaoler.*

If a Ferriman undertake to carry any thing for me over the water, and by his default it doth take hurt or is ſpoiled in or after the carriage, I may have this remedy againſt him, Adjudg. *Partridges* Caſe. *Ferriman.*

If a common Carrier (although he be but newly a Carrier, or carry but for ſome perſons only, if he carry for money) take any thing for me to carry, and do hurt or *Carrier.*

impair it himſelf, or ſuffer it to be hurt by his apparent negligence, as if he over-load his horſe, and by that means he fall into the water, and ſo it is marred; or he drive his horſes by night, or out of the way, and is thereby robbed, I may have this Action for my relief. And yet a Carrier by a ſpecial agreement in the undertaking of the carriage may avoid the Action. If therefore when he takes them to carry, he ſaith, and agreeth that he will not anſwer them if they are loſt, he ſhall not be charged, as in caſe where he undertaketh them generally, *D. & St.* 139. 28. *Fitz.* 14, 15.

Servant. If my Bailiff that doth keep my Cattel, kill them, or cut down my Trees, or my Butler break my Hamper, or the like; I may have remedy by this Action againſt them, 18 *Ed.*4. 20. 27. *Broo.*99. Or rather by a general Action of Treſpaſs, for by this the privity and truſt is determined, *Co.*5. 13. If my Plough-man that hath the charge of my Plough, drive ſo hard as to kill or harm it, I may have this Action againſt him, 7 *H.*4. 14. *Broo.* 34. If I put a confidence in a man, albeit he come to my goods by my delivery, yet if he be negligent, I may have this Action. As if my Shepherd that I do truſt with my Sheep, keep them ſo careleſly, that they be drowned; or turn ſhabby by his neglect, I ſhall have remedy by this Action, 2 *H.* 7. 1. *Co.* 5. 14. If one undertake to do a work for me, as to ſet plants, or the like, and do it deceitfully, I may have remedy by this Action, *Old Book of Entries, f.*13.

Smith. If a Smith refuſe to ſhooe my horſe, being requeſted, or clie him in his ſhooing of him, ſo that I looſe the uſe of him for a time, I may have this Action againſt him, 14 *H.*7. 21. *Kelw.*40 *F.N.B.* 94.

Tailor. So if a Tailor ſpoil my Garment in the making of it, or a Barber ſhave me with an unwholſome Razor, ſo that my face is hurt, or cut my face with any Razor, I may ſue him in this Action. And ſo for other men that undertake to do work of their calling, and do it amiſs, *F.N.B.* 94. 7 *H* 6. 5. *Old Book of Entries f.*2. 46 *Ed* 3. 19.

Sect. 30. Inn-keeper. If an Inn-keeper refuſe to lodg me, or herbage my horſe when he hath room and may do it, I may have this Action againſt him, and the Conſtable of the Town may (if he will) compel him to receive me, unleſs he can give good reaſons for his refuſal, as that his houſe is full, or I have the plague, or the like, 14 *H* 7. 22. *Kelw.*50. *Dyer* 258. 5 *Ed.*4 2. *Paſche*, 7 *Jac. Curia.* But it ſeems he may refuſe the horſe or goods of any man that will not lie there himſelf, *Paſche*, 7 *Jac. B. R. Walbrooks* Caſe. If I looſe any thing out of an Inn, or common Hoſtry, I may have this Action for my relief againſt the Inn-keeper or Hoſtler; and this Action will lie, albeit the Inn-keeper did at the firſt refuſe me, and albeit the goods loſt were never delivered to the hoſt, or he were never charged with it, and albeit his houſe be full of gueſts, and albeit I kept the Key of my Chamber-door my ſelf, and leave open the door my ſelf, and albeit I be robbed by my Chamber-fellow, if the Inn-keeper placed him with me, *Co.* 8. 32. *F.N.B.* 95. *Dyer* 58. But in all Caſes where this Action is maintainable, theſe things muſt be in the Caſe. 1. The thing muſt be loſt. 2. The perſon to be charged muſt be a common Hoſt, he muſt be one that doth receive ſuch, *Co.* 8. 32. For if one leave his horſe with one that is no common Inn-holder, and it be loſt, he ſhall not anſwer it, *Dyer* 266. 158. And yet if he have but newly ſet up, he ſhall be chargable. 3. The party that loſt the goods muſt be a ſtranger or traveller, and therefore if it be a friend or neighbor that hath loſt it, he ſhall not have this Action, *Co.*8. 32. 4. The thing loſt muſt be gone out of the Inn, the Houſe, or the Stable; and therefore if the owner bid the Hoſtler put his horſe to graſs, and it be loſt there, the owner muſt bear it; but if the Hoſt of his own head, put him out to graſs, and he be loſt, the Hoſt muſt bear it, *Co.*8. 32 5. It muſt be loſt by the negligence of the Hoſtler, or his Servants, as in the Caſes laſt before: If the Hoſt or his man put the gueſts horſe to graſs, without the privity of the gueſt: If a horſe die in the ſtable without any default of the Hoſt or his man, they are not chargable, *Paſche*, 12 *Jac. Co. B.R. Whitakers* Caſe. So if the gueſt be robbed by his own ſervant, or his Chamber-fellow of his own choice, no Action will lie for this, *Co.*8. 32. It muſt therefore appear that the goods came into his hands. 6. The party that doth looſe muſt be a gueſt to the houſe, at the time of the loſs; for if he be a friend invited to lodg all night by the Inn-keeper, he is not chargable for this loſs, *Paſche*, 7 *Jac. B. R. Walbrooks* Caſe. 7. The goods muſt be loſt whileſt the owner is there; for if one leave his

his dead goods with the Inn-holder, and he do not lie there himſelf, and the goods are ſtole, the Hoſt ſhall not anſwer them, *Idem.* And yet if it be a horſe or living thing which is left, by which the Inn-keeper gets, he muſt anſwer it. But if a man leave other goods, as Hats, or the like, and the Hoſt ſaith he will keep them ſafe, and the gueſt come not in many days, and theſe be loſt, he ſhall not be charged. But if the gueſt go away in the morning, and come at night, *Contra*, adjudged. *Brownl.* 1. *part.* 254. And Inn-holders.

If an Officer take Toll of me, where none is due, for my relief herein I may have this Action; *F.N.B.* 94. Officer.

If an Officer of a Court get a priviledge for one, ſuppoſing him to be his ſervant who is not ſo, and is ſued by me, and thereby my ſuit is delayed, I may have this Action againſt him, 31 *Ed.* 4. 22. It is ſaid by ſome, that if a publick Officer whoſe Fee is tendred to him or recoverable by Law, do refuſe to execute his Office, that he is liable to this Action. And therefore if a Sergeant at Law, refuſe to give advice to, or an Attorney to be retained by me, that I may have this Action againſt him; otherwiſe it is of a Barreſter, for he cannot ſue for his Fee: Of this opinion was Juſtice *Bridgman*, 17 *Car.* If a Sheriff, Bailiff, or any ſuch like Officer do miſdemean himſelf in not doing, or neglect, or miſdoing his office, the party hurt by this, may have this Action, eſpecially, if he give him or tender him his Fees before-hand to do it, as if he refuſe a Writ, or have a Writ or Warrant to Arreſt a man, and may do it, and doth it not, the Plaintiff in the Action may have this remedy, *Co.* 9. 60. 5. 89. *Plow.* 48. So if the Sheriff refuſe to retorn a Writ, or make a falſe retorn of a Writ, the party grieved by it may have this Action, 41 *Aſſize, pl* 12. 21 *Ed.* 3. 43. 10 *H.* 7. 23. *Old Book of Entries, f.* 11. *March Rep f.* 99. *pl.* 169. So if an Officer make a falſe Certificate, he that is hurt by it may have this Action, *Co.* 11. 94. Or if the Sheriff refuſe to receive a Writ againſt one he hath in execution, the Plaintiff may have this Action, 41 *Aſſ. pl.* 12. *Co.* 5. 87. So if the Sheriff have a Writ againſt a man at my Suit, and I ſhew him the man, and he do not Arreſt him, I ſhall have this Action, and albeit it be on the Sabbath day when I do ſhew him to him, yet he is bound then to Arreſt him, *Paſche*, 18 *Jac. B.R. per* 3 *Juſtices.*

Smith ſued the Sheriff of *London* for not putting his name to the Return of a *Venire facias*, by which the Judgment was reverſed for Error, and the Plaintiff recovered damages by this Action, *Brownl.* 1. *part.* 3. 12. 50.

If the Sheriff do Out-law a man, and do not proclaim him according to the Statute, 10 *H.* 7. 23. *Broo.* 122. Or if he retorn a man of a Jury that hath a Charter of Exemption, and hath given notice thereof to the Sheriff; in theſe Caſes this Action lieth, 18 *H.* 8. 5. If the Sheriff or his Bailiff enter upon any Franchiſe or Liberty to execute Writs, I may have this Action, but the Arreſt is good, and no falſe impriſonment lieth upon it, *F.N.B.* 95. Falſe Impriſonment.

If the Sheriff ſuffer a man arreſted upon an Execution to Eſcape, the Plaintiff in the firſt Action, may have this Action for his relief, 15 *Ed.* 4. 32. *Co.* 4. 95. *March. Rep. f.* 1. So if the priſoner be reſcued, otherwiſe it is, if it be on a mean Proces. If the Sheriff proceed in his Court after the Cauſe is removed into another Court, this Action lieth, *F.N.B.* 99. If the Sheriff or his Bailiff attach goods, and deliver them back again, the Plaintiff in the firſt Suit may have this Action for his remedy, *F.N.B.* 92. If an Eſcheater had retorned any other thing then what was found by the Jury, 9 *H.* 6. 66. *Fitz.* 6. So if an Ordinary or other Officer doth ſo, the party grieved may have this Action in theſe caſes. But all this (as it ſeems) is to be underſtood of Miniſterial Acts onely; for if they refuſe to do, or do amiſs, or do not their duty in Judicial Acts; it is ſaid this Action will not lie, 12 *H* 6. 3. 2 *R.* 3. 9, 10. 12 *H.* 6. 3. And this difference was agreed by the Court, *M.* 22 *Jac. B.R. Sed quære*, and ſtudy the reaſon of this diverſity. See more of this before in an Action of the Caſe for a Deceit. Eſcape.

If there be a Charge upon any man by reaſon of his Tenure of Houſe or Land, to repair any Bank, Bridge, Gutter, or private way, or the like, and he doth it not, and hereby I have a ſpecial prejudice, I may have remedy by this Action, *Old Book of Entries, f.* 10. Or if one be bound to repair the Sea or *Severn* Banks, and he neglect it, Repair.

and hereby my ground is drowned; I may have this Action, *Trin.* 20 *Jac. B. R.* But in this Case if the decay be by an extraordinary inundation or accident, no Action lieth for this, *Co.* 10. 139.

Suit to a Court. If one that ought to do Suit to my Court, or grinde at Mill, pay Toll in my Fair or Market, or to egist my Land with his Cattel, doth refuse to do it; this Action lieth for my Remedy, 7 *H.* 4. 9. 44. 21 *H.* 7. 16. 22 *H.* 6. 14. *Brownl.* 1: *part.* 204.

For not repairing. If a Lessor do not repair the decays of the housing, having notice, where he is bound to do it, or pay Subsidies, and such things as by Law he ought to do, but suffer it to fall upon the Lessee, or he be prejudiced by it; he may have remedy by this Action, 21 *H.* 7. 12. 22 *H.* 6. 14.

For damage-feasant. If one tack Cattel with me till *Michaelmas*, and the owner suffer them to stay longer, and do not take them away, I may have this Action against him for this injury, 45 *Ed.* 3. 6. 21 *H.* 7.

If one buy my Hay in my Meadow, and do not take it away in time, but suffer it to lie so long as to mar the Grass, I may have this remedy, *Fitz.* 48. So if I set out the Parsons Tithes duly, and give the Parson notice of it, and he do not take it away out of my house or ground in a reasonable time, but suffer it there to my prejudice, I may have this Action for my relief, *Stucklies* Case, *Co. B. R.* 45 *Ed.* 3. 6. *M.* 20 *Jac. Denhams* Case.

For disceipt. If I retain a man to purchase Land for me, and he do it not, but do his endeavor to do it, no Action lieth for it: But if he purchase it for himself, for this I may have this Action, 11 *H.* 6. 18. 3 *H.* 7. 14. 17.

For detaining writings. If I buy Land, and a stranger hath some of the Writings that doth concern the Land, and the vender and I request the Writings, and he will not deliver them, it is thought I may bring this Action, *Old Book of Entries, f.* 5.

Sect. 31. *Mounds.* If one be bound by prescription to make his Hedg next to my ground, and do it not, and thereby other mens Cattel come into my ground, or I am otherwise damnified, I may have this Action for my relief against him that should make the Hedg, *Trin.* 20 *Jac. B. R.* And so for any such like thing which a man is bound to do, as to help Wares out of the Sea with a Crane, or the like, *Old Book of Entries, fol.* 3.

Against a Parson for not keeping a Bull. If the Parson of the Parish be bound by the Custom to keep a common Bull or Boar, and do not, and any of the Parishioners have any loss thereby, he may be righted by this Action, adjudged. *Trin.* 36 *Eliz. Yaldings* Case. *Fitz.* 5 c.

For not saying Divine Service. If one ought to say Divine Service in my private Chappel, and do it not; I may have this Action, *Co.* 5. 73. 22 *H.* 6. 46. But if it be to be said to a whole Parish, no Action will lie for the neglect or omission, *Co.* 5. 73.

Upon a Robbery against a Hundred. If I be robbed in my travel, I may recover damages for my loss of the Hundred wherein I am robbed, by an Action in the nature of an Action of Trespass on the Case, upon the Statutes of 13 *Ed.* 1. 1, 2. 28 *Ed.* 3. 11. 27 *Eliz.* 13. But for the further opening hereof these things are to be known.

Where ever this Action is maintainable, there must be these things in the Case:

1. The party robbed, must with all the speed he can, give notice thereof to, and make Hue and Cry at the next Village (be it in the same or another Hundred, or Countrey) and to some of the Inhabitants dwelling in or near the place where the thing is done. And herein it is most safe for him to give notice to the Inhabitants on that side, which way the Theeves do flie, and to give notice to many of the Neighborhood; and yet see *Goldsb.* 56. 62. the contrary.

2. He must bring his Action for it within a year after the Robbery done, and yet not within forty days after the Robbery done.

3. He must within twenty days next before the Action brought, and Test of the Original Writ, be examined upon Oath before one of the next Justices of Peace of the County, in or neer the Hundred, whether he knoweth any of the parties that robbed him; and if he doth know any of them, then before the Action brought, he must be bound by Recognizance before that Justice effectually to prosecute them.

4. The Robbery must be done in the day time, for if it be done after the night

is

is come; and before the day, no Action will lie for it. And yet ſee *Goldsb.* 56. *pl.* 10. 61. 70.

5. The Robbery muſt be on the High-way, for it lieth not for a Robbery upon me in my Houſe.

6. The Felons muſt be fled, for if any of them be apprehended, although it be by the party robbed himſelf, the Action fails, but purſute without taking will not excuſe the Hundred.

7. It muſt be a Robbery on the perſon; for if a man have tied his Horſe to a Hedg, and be gone aſide to untruſs-a-point, and the while the Thief take away his Cloak-bag, or a Carrier be behinde his Horſes, and not near them, and his packs be robbed before he come; no Action will lie for this.

And as to this point theſe things are further to be known.

1. That if my Servant or Carrier be robbed of my money or goods, I may ſue, but the Servant or Carrier muſt be examined upon Oath; and if he will not be examined, I have no remedy; and in theſe Caſes a man may be a witneſs in his own cauſe, but a man muſt make a very clear proof that he or a Carrier had ſo much money, or ſuch goods.

2. In caſe of the Carrier, if he be robbed of my goods, either he or I may ſue, unleſs the caſe be ſuch as he is not anſwerable, as where he doth take the goods upon a ſpecial agreement to keep them as his own, *&c.*

3. If one of the Robbers be not taken within forty days, it ſeems the Hundred is chargable.

4. If it be done between two Hundreds, both the Hundreds and Franchiſes within them ſhall be charged with it.

5. If it light upon any perſons in particular, they muſt help by way of contribution from the reſt, by the help of the Juſtices of Peace.

6. If any default have been in the following of the Hue and Cry by any other Hundred, the Hundred charged with the Robbery, may recover half their damage again of the Hundred in default, *Co.* 7. 7. *Plow.* 128. 27 *Eliz.* 13. *Trin.* 21 *Jac. Francis Forſters* Caſe, *Dyer* 370. 13 *Ed.* 1. 2. 28 *Ed.* 3. 11.

7. If the man be robbed of the Maſters money, the Maſter may ſue.

8. Though the party robbed, be negligent to purſue, and refuſe to lend his horſe to make Hue and Cry, this will not hinder him of his Action, ſo convenient notice be given.

9. Albeit, the party robbed do not know the Theeves at the time, and take his Oath ſo, and after he come to know them, and ſay ſo; yet this doth not take away his Action.

10. Notice given in the Hundred, five miles from the place where he is robbed, is ſufficient.

11. Notice at one Town, and Hue and Cry at another, is good. *March. Rep.* 10. *pl.* 28.

12. All that live in the Hundred at the time of Execution, ſhall be contributary to the ſame.

13. A Servant to, or a Receiver of anothers money, may alſo ſue the Hundred, as well as the Maſter. *Goldsb.* 24. *pl.* 3. See *Brownl.* 1. *part.* 155.

CHAP.

CHAP. IV.

Of an Account.

Sect. 1. What it is.

IT is a Writ lying where a Bailiff of a Lord, Receiver, Guardian, or other hath received money, or other things of me, or of another for me, for which he ought to render an account, and he doth refuſe to do it; by this means he may be compelled to account, and I may recover not only mine own, but damages alſo if there be cauſe, *Co. ſuper Lit.* 172. *F.N.B.* 116.

Bailiff, what.

By Bailiff here we underſtand a Servant that hath the adminiſtration or charge of lands, goods or chattels, to make the beſt benefit for the owner.

And againſt him this Action doth lie, which he hath, or might have made by his induſtry, his reaſonable charges allowed, *Co ſuper Lit.* 171. *Co.* 4. 30.

Receiver, what

By Receiver here we underſtand him that receiveth money or other things to the uſe of another to render an account, *Co. ſuper Lit.* 171.

Sect. 2. How the Accountant ſhall be charged. For the manner.

In this Action the Plaintiff muſt take great care that he charge the Defendant aright: For he muſt be charged (except it be in caſe of the *Keepers of the Liberties*) as Bailiff, Receiver, or Guardian; for otherwiſe as Apprentice, Surveyor, Comptroller, Reeve or Hayward, he cannot be charged; and therein he muſt be charged as he is. For if he be a Bailiff, the Writ muſt charge him as Bailiff; if a Receiver, the Writ muſt ſay ſo; if both, the Writ or Action muſt ſo charge him, *Co. ſuper Lit.* 172. When the things of which a man doth receive the profits (whether it be Lands or Goods) be incertain, as a Manor, Hundred, or the like, that may be improved, there he ſhall be charged as Bailiff: But where the things (be it profits of Courts, Forfeitures, Iſſues, Fines or Amerciaments) be certain, there he ſhall be charged as Receiver, 9 *Ed.* 4. 40.

If an Heir do ſue his Guardian in Soccage, for the Profits of his Lands taken before his age of fourteen years, he muſt charge him as Guardian; but if he ſue him for any of the Profits after his age of fourteen years, there he muſt charge him as Bailiff; and if he ſue a ſtranger that doth intermeddle with his Land, he muſt charge him as Guardian, *Lit. ſect.* 124. *F.N.B.* 118.

If I deliver another Wares to ſell, and he ſell them to divers perſons and receive the money; in this caſe it ſeems he is to be charged as Bailiff, not as Receiver, 4 *H.* 6. 27. *Broo Account*, 18, 53.

For the matter.

Where a Bailiff doth make a Deputy, yet the Writ muſt be againſt the Bailiff himſelf, *F.N.B.* 19 *b.*

The Bailiff ſhall be charged for the Profits which he hath, or might by his induſtry and care have reaſonably made and raiſed, his reaſonable charges and expences deducted, *Co. ſuper Lit.* 172.

Sect. 3. The method and proceeding in this Action.

In the Suit upon this Writ, if the Defendant cannot avoid it by Plea, Judgment is firſt given, that the Defendant muſt account; and thereupon Auditors are appointed and aſſigned by the Court to hear and examine the accounts of the party, what he hath received, and what he hath laid out; and that being done, to preſent it to the Court; and thereupon there is another Judgment entred, That the Plaintiff ſhall recover this money of the Defendant.

And if the Accomptant be found in arrearages before the Auditors, they may award him to priſon till agreement made with the party. And in this account they muſt allow him his reaſonable allowances and expences: And if the Auditors refuſe ſo to do, or charge him with more then he hath received, then (for his relief) his next friend may have a Writ out of the Chancery, called *Ex parte talis*, which is directed to the Sheriff to bring his body into the Exchequer before the Barons there, with four Mainpernors, there to account before them at a certain day, and to warn the

Ex parte talis, what it is.

the Lord to appear at that day; or if the Plaintiff pleaſe, he may wave this courſe, and bring a new Action of Debt for the arrearages found upon the Account, or he may keep him in Priſon upon their Commitment, till he have paid or agreed. But if when the Defendant doth firſt appear, he deny he is his Bailiff or Receiver, then this Iſſue muſt firſt be tryed; and if it be found againſt the Defendant, the Judgment is, *Quod computet*: and if after that he will not appear, a *Scire facias* is to be had; and if he come not, a *Capias ad computandum*, and upon that an *Exigent*. And if the Defendant appear not upon the firſt Writ, the Plaintiff may have a *Capias*, and *Proceſs* of Outlawry, or he may have a *Monſtravit*, which is an old Writ (now out of uſe) and doth lie where the Bailiff or Receiver hath no Lands whereby to be diſtrained, and doth lie hid, then this Writ was granted to take his body, and this was uſed before any *Proceſs* of Outlawry was given in the Caſe; but after the firſt Judgment, a *Capias ad computandum* only lieth *Stat.* 13 *E.* 1. *Weſt. cap.* 11. *F.N.B.* 117. *Plow.* 393. *Co.* 11. 40. *Stat.* 52 *H.* 3. 24. *Marlb. c.* 23.

Capias ad computandum, where it lieth. *Monſtravit*, what it is.

The Ward may have this Writ againſt his Guardian in Soccage, *Lit.* 124. *F.N.B.* 118. The Executor or Adminiſtrator, upon Accounts to be made to the Teſtator, *Stat.* 13 *E.* 1. *cap.* 23. *Dyer* 23. *Kelw.* 131. The ſucceeding againſt the preceding Churchwardens, 8 *E.* 4. 6. *Broo. Account* 71. But the Pariſhioners cannot bring it againſt the Churchwardens.

Sect. 4. Who may have this Writ, or not.

One Merchant may have it againſt another Merchant, where they occupie their merchandizes and Trade together, *F.N.B.* 117. Alſo one Joint-Tenant, or Tenant in common, in caſe where he doth make his companion his Bailiff of his part, may have this Action againſt him: But if one Joint-Tenant, or Tenant of goods in common, deliver them to a ſtranger, he alone muſt have the Action, *Co.* 11. 89. *F.N.B.* 118.

If a ſtranger take the profits of my wives Land during marriage, and I die; my Executor, and not my wife, ſhall have this Action for the profits, *F.N.B.* 119.

If I deliver one money to keep till after my death, and then to diſpoſe for my ſoul, my Executor cannot recover it by this Action; for as to this money, he is my Executor.

Sect. 5. Againſt whom this Action may be brought or not.

It lieth (as before) againſt a Guardian, Joint-Tenant, Tenant in common, Merchant: But it doth not lie againſt a Joint-Tenant, or Tenant in common, by his companion, unleſs he be made Bailiff for the profits, *&c. Co. ſuper Lit.* 272.

It lieth againſt a man or woman Guardian, Bailiff, or Receiver, *Co.* 11. 89. *F.N.B.* 119.

Joint-Tenant. Tenant in Common. *Baron & feme.*

It lieth againſt the husband, for the Receipt of his wife; againſt the wife and husband, for the Receipt of the wife whilſt ſhe was ſole; but it lieth not againſt a wife without her husband, 4 *E.* 4. 25. *Broo. Account*, 68. 82. *Dyer* 202. 28. It lieth againſt a Body-Politique, as againſt any man, 19 *H.* 6. 5. It doth lie againſt a Servant that hath a command to receive for his Maſter, 19 *H.* 6. 5. It lieth againſt the Keeper of a Park that hath the charge of the Deer, as Bailiff of his Park, 10 *H* 7. 6. Alſo it lieth againſt an Executor or Adminiſtrator, or any other that medleth with the Lands of the King in his caſe; but in the caſe of a common perſon it doth not lie againſt an Executor or Adminiſtrator, *Lit.* 28. *Co.* 11. 84. 90. Nor doth this Action lie againſt an Infant as Bailiff or Receiver, *Lit.* 28. *Co.* upon it, 172. Nor againſt a Diſſeiſor for the profits of the Land, *Co.* 11. 89. upon *Lit.* 72. Nor againſt a Pariſh-Prieſt for Offerings, without ſome agreement, *F.N.B.* 119. Nor againſt a Surveyor, Apprentice, Comptrollor, Reeve or Hayward, unleſs he can be charged as Bailiff or Receiver.

Executors. Infant. Biſhop.

Sect. 6. Where and in what caſe the Action lieth, or nor, but ſome other Action, or none at all. Againſt a Guardian.

The Heir may have this Action againſt his Guardian in Soccage, to compel him to render the profits of the Land to him; but he cannot ſue him till he be fourteen years old. And if a ſtranger that is not a Prochein-Amy, enter upon the Lands of ſuch an Heir before his age of fourteen years, as Guardian to him, in this caſe he may ſue him alſo, and charge him as Guardian in Soccage; and in this caſe it ſeems he may ſue him before he is fourteen years old. But if a ſtranger enter upon an Infants Land without any ſuch pretence, the Infant is to be relieved by an Action of Treſpaſs, and not by this Action, *Lit. ſect.* 124. *Co.* upon it, 89. *F.N.B.* 118. *Dyer* 130. 21. *Doct. & St.* 13.

If

Againſt a Bailiff.

If a man will enter upon my Land upon any pretence to my uſe, and take the profits of it as for me, I may have this Writ, and charge him to account for it. So if a man will take up my Rents as my Bailiff, being ſo appointed by me, I may have this Writ, and charge him to account for them. But if one enter ſo upon my Land before I enter into it, and have the poſſeſſion of it, in this caſe it ſeems this Writ will not lie, *Co. ſuper Lit.* 89, 90. *Dyer* 277.

If a Tenant by *Elegit* of my Land, do make waſte upon the Land, and have received more then his due money, I may call him to an account by this Writ, 12 *E.* 3. 3. And if there be two Joint-Tenants, or Tenants in common of Land, and the one of them doth make the other his Bailiff of his Moity, and he will not anſwer him the profits, he may by this Writ compel him to it, *Co. ſuper Lit.* 172. *F.N.B.* 118.

Againſt a Receiver.

Property.

Countermand.

Detinue.

If I deliver to another Money, Corn or Wares to account for, or to imploy to any purpoſe, as to pay over, to beſtow, or the Wares to give to the poor; or on condition, that if he do ſuch a thing he ſhall have it, otherwiſe that he ſhall redeliver it: In all theſe caſes until the thing be done, the property is in me, and I may countermand it; and if it be not done, and the thing not reſtored to me, I may recover it by this Action, *Dyer* 21. 57. *Plowden* 92. *F.N.B.* 118. But in the caſe of Money, if it be in a bag ſealed, or box locked, the proper remedy is by Detinue, *Broo. Acc.* 52. If one receive Money of another to my uſe, or to pay over to me, and he do not pay it to me, I may have this Action againſt him, and ſo may he that delivered the money to him, *Dyer* 22. 57. 18 *Ed.* 4. 23.

Sheriff.

If a Sheriff levie money on a *Fieri facias* for me, and do not pay it to me, I have this Action to recover it, 13 *H.* 7. 1. *& Curia in Co. Banco. March. f.* 13. *pl.* 33.

Election.

Debt.

If I make a Bill under my hand and ſeal, that I received Twenty pounds of *I S.* to beſtow on Wares, and I do not beſtow it accordingly, in this caſe whilſt I live he may have this Action, or an Action of Debt againſt me at his choice; but after my death, he hath no remedy againſt my Executors but by Action of Debt, *Dyer* 20. 21.

If I deliver to another Goods or Money beyond Sea, to be delivered to me here again in *England* at a certain place, and he deliver it not, I may be relieved by this Action, *F.N.B.* 118. 9.

Executors.

Legacy.

If one deviſe that his Executors ſhall ſell his Land, and out of the profits thereof ſhall give ſuch a ſum to me; in this caſe and ſuch like, where the money is to iſſue out of the Land, I may have remedy by this Writ, and I need not ſue for it as for a Legacie, *Dyer* 151. *& per* three Juſtices.

If the Mortgagee after the paiment of the money by the Mortgager deliver him the money again, the Mortgagee may recover it by this Action, Adjudged, *Mich.* 4 *Eliz.*

If one take upon him to receive my Rents without my agreement, and do not pay them to me, I may recover them by this Action, 4 *H.* 7. 6. *Brook Account* 65.

Election.

Detinue.

If one deliver goods to deliver to me an Infant at my full age, in this caſe when I am of age I may recover them of him in this Action, or a Detinue, at my choice, *Fitz. Detinue*, 53.

Prerogative.

If two Joint-Merchants occupie their ſtocks, goods and merchandizes in common, to their common profit, one of them may have this Writ againſt the other; but then they muſt be both of them named Merchants in the Writ, *Co. ſuper Lit.* 172. And a man could not have touched the Kings lands, or medled with his goods, but he was liable to be queſtioned by this Remedy, and to be called to an account in the Exchequer, though not by this Writ, *Co.* 11. 91.

Privity.

But this action of Account lieth not in theſe following Caſes. 1. Where the party to be ſued claimeth the thing to his own uſe. 2. Where there is no privity between the parties, neither *ex proviſione legis*, called *Privity in Law*, as in the caſe of a Guardian, nor in Deed, by the conſent of the party; as when Goods are delivered to a ſtranger, and not to my uſe, or to be delivered over to me, there is no agreement between the parties: But in the Kings caſe, the Law will ſupply a privity. 3. When he that delivereth the things, hath taken an Obligation for ſecurity of the things delivered. 4. Where the party that hath the things, hath only a bare overſight of them,

as

as a Bailiff of a Plough, Shepherd of Sheep, or the like, *Co.* 11. 93. *Dyer* 114. & 20. 277. *Brook Account* 81. 29. *Co.* upon *Lit.* 272.

If one by wrong enter into my Land, and take the profits thereof, I cannot bring this Action againſt him, *Co* upon *Lit.* 172.

So if I be a Parſon, and a ſtranger take away my Tythes after Severance, I may not have this Action againſt him, but ſome other for lack of privity: By the better Opinion, *M.* 14 *Q. Com. B.*

So if a Term of years be Deviſed to another for life, the Remainder to *J. S.* and the firſt Deviſee is Executor, and he enter, and make his Executor, and die, and he enter and take the profits; in this Caſe *J. S.* cannot bring this Action for his relief, *Dyer* 277.

If a man give me goods by his Will, and his Executor will not deliver them, I cannot recover them by this Action, *Co.* 11. 89.

So neither if Goods of the Teſtator be kept from an Executor, he cannot recover them by this Action, *Co.* 11. 89. And if I deliver another any live or dead Goods to his own uſe, or to any ſuch purpoſe, it ſeems I may not have this Action; but if he keep it, or take it away, I may have an Action of Detinue, and if he harm it, an Action of the Caſe: But if they be delivered to be ſold, and the moſt be made of them, there this Action lieth, *Dyer* 120. 22. 6 *Ed.* 4. 1. *F.N.B.* 118. *B.*

Detinue.

Action of the Caſe.

If a man deliver Ten pound to Merchandize, no Account doth lie for the Ten pound, for this is certain; but for the profits thereof, which is uncertain, it doth lie. So it doth not lie for the arrears of a Leaſe for years, or at will, becauſe it is certain; for uncertain things lie onely in Account, *Brook Account* 81. 8 *H.* 5. 3.

The Auditors are ſuch as are appointed by the Court to hear, and examine the Accounts of a Bailiff or Receiver, that is ſued upon this Writ in the ſame Court; and theſe are either upon the Statute of *Weſtm.* 2. *cap.* 11. and then they are Judges of Record, but then there muſt be two at the leaſt; or one may be an Auditor at the Common Law; and when there is but one, he is ſuch an Auditor, *Co.* 10. 103. 2 *H.* 6. 41. 10 *H.* 6. 24.

Auditors, what they are, and their power.

Such as are Auditors within the Statute, may commit the Accountant to priſon if he be found in arrearages, and do not pay it, but then they muſt do it preſently, and cannot do it afterward; but if the Lord be arrear to his Bailiff, they cannot commit him to priſon; for he doth remain ſtill at the Common Law; yet if the Lord be found in debt to his Bailiff, or one be in debt to his Receiver, they ſhall have their Remedy againſt them, or their Executors after their death, *Co.* 10. 103. 27 *H.* 6. 8. 10 *H.* 6. 24 25. *Plow.* 17.

A Bailiff ſhall have Allowances upon his Account, but a Receiver ſhall have none. If therefore the Bailiff diſburſe any thing for his Maſter belonging to his Office, as pay his quit Rent, or the like; or if he be robbed, or ſuffer loſs by other means without any default in him, it ſhall be allowed him upon his Account; but if he pay his Maſters debts, or lay out any thing elſe, not appertaining to his Office; this will not be allowed him, *Co.* upon *Litt.* 172. 14 *H.* 7. 14. *Plow.* 14.

Sect. 7. *Allowances*, and what ſhall be granted to an *Accountant*, or not.

A Guardian alſo ſhall have an Allowance, as a Bailiff ſhall have, but not a Receiver; and therefore he is not bound to Trade with the money received, *Brook Account* 66.

Some Pleas are in Bar of the Account, and ſome in diſcharge before Auditors; and ſome Pleas will be allowed before Auditors that will not be allowed in Bar of the Account. As to the Account, the Defendant may plead, *Ne unques ſon Receiver ou Bailiff pur Account Render*; or that he was ſued for the ſame cauſe, and adjudged to Account, and Error brought upon the firſt Judgment in another Court, where it is depending, and the like, *Dyer* 21. *Co.* 11. 8. 9 *Ed.* 4. 50. And as to his diſcharge before Auditors, he may plead (if he be not a Receiver) he was robbed, or his diſburſements, or that he hath fully accounted with the Plaintiff himſelf, or the like, *Co* 4. 84. 5 *Ed* 4. 5. And if a new Action of Debt be brought for the arrearages found againſt the Bailiff or Receiver (as it may) the Defendant may plead *Nil debet*, or wage his Law, *Co.* 6. 53. *Stat.* 5 *H.* 4. 8.

Sect. 8. *Pleas* in *Account*, and what may be pleaded, or not.

Sect. 9. The Judgments in an Account.

There are two Judgments upon this Writ: The firſt is, *Quod computet*, which is interlocutory; the laſt is, *Quod querens recuperet verſus defendentem*, ſo much as he is found in arrearages, *& damna occaſione interplacitationis.*

The firſt is to account only, and upon this the Defendant may be outlawed: And then before Outlawry, if he appear and enter into account, and be found in arrearages, the Plaintiff ſhall have a definitive Judgment for the arrearages; and after the firſt Judgment, no abatement can be for any cauſe, but a Diſcontinuance or Nonſuit may be.

The firſt Judgment is but an Award of the Court, like to a Writ to enquire of Damages, and not like to a final Judgment, for there the Action is clearly determined. And theſe two Judgments depend one upon another: For if Judgment be to Account, and the Plaintiff die before he hath accounted, the Executor cannot go on in that ſuit, but he muſt begin again; and no Writ of Error will lie upon the firſt, till after the ſecond Judgment, *Co.* 11.40. *Broo. Account*, 39.33.

For Accomptants to the Lord Protector, ſee *Prerogative-Receivers*; and *Stat.* 4. *H.*6.2. 7 *Ed.*6.1. 6 *H.*4.3. 1 *R.*3.14. where it is ſet forth how they may be called to account, proceeded againſt. See alſo *Debt*, for the Recovery of the Lord Protectors Debts.

CHAP. V.

Of Acts, and Agent, and Patient.

General Rules touching Acts.

1. WHere many join in an Act, and ſome of them might not lawfully do it, it ſhall be ſaid the Act of him only that might lawfully do it, and not of the reſt. As if a Patron that doth ſuffer an uſurpation by ſix moneths, grant an Annuity to *I.S.* till he do promote him to a Benefice, and after he and the Uſurper preſent him to that Benefice, this is the act of the Uſurper in Law, and therefore the Annuity is not determined. So if the Diſſeiſee, and the Heir of the Diſſeiſor that is in by deſcent, make a Feoffment by one Deed, and give Livery, this ſhall be ſaid the Feoffment of the Heir only, and the Confirmation of the Diſſeiſee, *Dyer* 192. *Littleton.*

Eſcrow.

2. The Law regardeth Deeds and Acts more then Words; and therefore if mens deeds and words be repugnant, the Law will operate upon the deeds, and reject the words. As if one make a Deed, and deliver it to the party himſelf as an Eſcrow till certain Conditions, this ſhall take effect preſently by the delivery, *Co.*3.26.

3. The Law doth more favor and delight in ſubſtantial Acts, then circumſtantial: As in pleading, if one plead a Fine levied by a husband and wife, he need not ſhew how the wife was examined, nor before whom it was acknowledged, nor ſuch like circumſtances, *Plow.* 10.

4. The Law doth not require unneceſſary circumſtances: As that Proceſs ſhould be ſent out to command one to appear in Court, that is always preſent in Court, 2 *H.*6.1.

Political / Natural capacity.

5. A man cannot do an Act to himſelf, and be both Agent and Patient, unleſs it be a man that hath a double capacity. Therefore a man cannot preſent himſelf to a Benefice, nor make himſelf an Officer, nor be both Judge, and party to be judged; nor being a Sheriff, ſummon or warn himſelf, nor ſue himſelf. But a Dean and Chapter in the politique capacity, may enfeoff the ſame Dean in his natural capacity, And a man may by way of Retainer do an Act to himſelf; as if he diſſeiſe one of Land out of which he hath a Rent-charge, he may pay himſelf, 13 *H.*8.1, 2. 14 *H.*8.13. *Dyer* 188. 8 *H.*6.29. *Lit.*147.

Agent and Patient.

Retainer.

6. A

6. A man ſhall not be ſuffered to do any thing againſt his own Act.

7. Every mans Act ſhall be expounded moſt ſtrongly againſt him that doth it, *Plow.* 140.

8. When any Act is to be done by agreement between parties, and it is not expreſſed between them by whom, but it is left doubtfully, it ſhall be done by him that hath moſt skill. As if the Condition of an Obligation be, That the Obligee ſhall bring to the Obligors ſhop, being a Tailor, three Yards of Cloth (which ſhall be ſhapen) and the Obligor ſhall make the Obligee a Gown of it; the Obligor, that is, the Tailor, muſt ſhape it, 9 *E.* 4. 4. *Condition of an Obligation.*

9. All perſonal Acts muſt be done by the perſon himſelf, and cannot be done by another, 22 *E.* 4. 34.

10. The Law favoreth all Acts that are done in the right of another; and therefore a man outlawed or excommunicate may ſue as Executor, 21 *H.* 6. 30. *Executor. Outlawed perſon. Excommunicate perſon.*

11. The Law hath much regard to the Original of every Act; therefore it is, that a woman Covert, when ſhe hath but the beginning of a title of Dower by marriage, may bar it by Fine, *Co.* 10. 49. *Fine.*

12. The Act of GOD ſhall prejudice no man. *Neceſſitas non habet legem*, Neceſſity hath no law. *Act of God.*

13. All the Acts of Law are very equal and juſt. *Æquior eſt diſpoſitio legis quàm hominis*, 2 *H.* 7. 5. *Dyer* 29. *F.N B.* 34. *Act of Law.*

14. Acts of Law are of more efficacie then the Acts of the party. *Fortior eſt diſpoſitio legis quàm hominis*, *Co.* 8. 78. 185. 6. 40. The diſpoſition of Law is of more force then that of a man.

15. Acts of Law are more eſteemed then Acts of men; and therefore Parceners that come to the Land by Act of Law, were enabled by the Common-Law to make partition, but not Joint-Tenants, or Tenants in Common, 49 *E.* 3. 15. *Parceners. Partition.*

16. The Law favoreth things executed, more then Acts executory.

17. The execution of all executory things, hath at all times retroſpect to the original cauſe, and it all maketh but one Act, though it be done at ſeveral times. *Cauſa & origo eſt materia negotii*, *Co.* 1. 99.

18. Acts done between perſons, ſhall not prejudice a ſtranger that is not party nor privy to ſuch Act. *Res inter alios actæ nemini nocere debent*, *Co.* 6. 16. (1.) Things among others ought not to prejudice any man; as if a Tenant by an entire ſervice aliens part of the Land, the ſervices ſhall be multiplied, 6 *Rep.* 1. (2.) No Incumbent ſhall be removed by the *Stat. Weſtm.* 2. by 2 *Imp.* an Aſſiſe of Darrein-preſentment purchaſed within ſix moneths, unleſs the Incumbent be named in the Writ, 6 *Rep.* 51. (3.) If a Leſſee grant a Rent-charge to a ſtranger, and after this ſurrenders to his Leſſor, though by the Surrender the Term be extinct, yet this ſhall not hurt the Eſtranger, but that he ſhall have his Rent, 8 *Rep.* 14. (4.) So if *A.* having a Rent-charge, acknowledgeth a Recognizance to *B.* and afterwards *A.* releaſeth the Rent to the Fore-tenant, yet *B* may extend this Rent, 7 *Rep. Lit.* 39. (5.) So if *A.* enfeoff *B.* upon Condition to be void upon paiment of one hundred pounds to the heirs of *B.* *B.* enfeoff *C.* and dieth; then it is agreed between *A.* and the heir of *B.* that *A.* ſhall pay but Thirty two pounds, but yet that One hundred pounds ſhall be paid, and all that ſhall be repaid except Thirty two pounds, whereupon ſuch paiment and repaiment is made, this is no performance of the Condition; for the Eſtate of a third perſon ſhall not be diveſted by Covenous paiments between other parties, 5 *Rep.* 96. *Extinguiſhment Surrender. Condition per forme.*

19. If *A.* make a Leaſe to *B.* ſaying Render Rent generally, this Rent ſhall go to *A.* and his heirs; but if he ſaith Render Rent to *A.* this ſhall not go to the heir, *Dyer* 45. So if *A.* enfeoff *B.* with Warrantie generally, this Warrant ſhall go to the heir of *B.* But if he ſaith with Warrant to *B.* this Warrant ſhall not go to the heir of *B.* *Dyer* 45. *Reſervation expound.*

20. Compulſorie Acts are more favored in Law then voluntary Acts; and therefore if an Adminiſtrator pay Debts, or diſcharge Funerals, this ſhall be good and bind the Executors. In debt for Boarding, the Defendant may make his Law: But if it be by a Gaoler againſt a Priſoner, the Priſoner cannot wage his Law, becauſe he is com- *Compulſorie Acts. Executors. Gaoler. Wager of Law.*

Felony.

compellable to find the Priſoner. Acts that men are forced by neceſſity and compulſion to do, are not regarded: And therefore if a man be made, his hand be held and forced to kill another, this is no offence, *Plow.*19. If a man do an Act *per dures*, it is void and ſhall not bind him, *Idem.* For, Neceſſity doth yield and give place to the Laws of God and man, *Mat.*12. *Exod.*29 1 *King.ch.*21.

Accuſation.

FOr falſe Accuſations and Surmiſes to vex men unjuſtly by Suits in Courts or otherwiſe, theſe things are to be known.

1. No man is to be condemned without due Trial, *Mag. Char.* 29.
2. Nor to be vexed upon any Accuſation, but according to the Law of the Land, 5 *Ed.*3 9. 28 *Ed.*3.3.
3. None may be moleſted by Impriſonment upon Petition to the King and his Council, without Indictment or Preſentment, 37 *Ed.* 3. 18. *Stat.* 25 *Ed.* 3. 4. *Stat.* 5.
4. And any thing thus unduly done, ſhall be void, *Idem.*
5. Thoſe that preferred Accuſations to the King againſt others, and could not make them good againſt other men, were to be ſeverely puniſhed, *Stat.*37 *Ed.*3.18. 38 *Ed.*3.9. 41 *Ed* 3.9.
6. Damages are to be given in Chancery to them againſt whom untrue Suggeſtions are there made, *Stat.* 15 *H.*6.4. 17 *R.*2.6. See *Action, Numb.*10.

CHAP. VI.

Of an Advowſon.

Sect. 1. *Advowſon*, or *Avowſon*, what it is.

Patron, what he is.

AN Advowſon is the Reverſion of a Spiritual Living, or the Right that a man hath to him, and his Heirs for ever, to preſent a Clerk to the Ordinary for a Parſonage, or a Spiritual Benefice, when it becometh void. It is called alſo a *Patronage*, for he that doth preſent the Clerk, is called the *Patron*; for he by our Law is called a *Patron*, that hath the gift of ſuch a Living or Benefice, or one that hath the Advowſon of a Parſonage, Vicarage, Free Chappel, or other Spiritual Promotion: And this Advowſon is either Incident or Appendant, and ſo it doth belong to ſome Manor or Land, or Engroſs, when one hath it alone, and not by reaſon of any other thing. And he that is preſented to ſuch a Parſonage, is called a *Parſon*, and the Living a *Parſonage*; if to a *Vicarage*, a *Vicar*, and the Living a *Vicarage*; and both theſe are the preſent Incumbents of theſe Spiritual Livings. The Vicar is one that hath a Spiritual Promotion or Living, called a *Vicarage*, which was a certain portion of a Parſonage, to be allowed to the Miniſter for his maintenance, and was brought in when Diſappropriations began to be made; and both theſe Livings are ſometimes (but very improperly) called the *Church*; and ſo both theſe perſons in relation to the Patron, are ſaid to be, and are called his *Clerk*. And this grew at firſt by this means, becauſe he that had this gift or power, or his Anceſtors, or thoſe whoſe Eſtate he had, did at firſt build the Church, or elſe endowed it with ſome part of the Revenues belonging to it, or elſe the Church was ſet upon his ground, *Plow.*495. *Dyer* 48. *Co.*1.102. 4.37. 6.39. *Litt.* 119, 120. But it is now of that nature, as a mans other Inheritance, for he may give or grant it by Will or Deed, in Fee for life or years, as he may do any other thing he hath, *Co.*5.56. 15 *H.*7. 8. Or he may preſent a Miniſter to it for once, and then he may grant the next Avoidance (that is) power to another, to preſent to the Church, when it ſhall next become void, *Co.* upon *Litt.* 120. And Voidance is the want of an Incumbent on the Benefice,

Parſon, what he is.
Parſonage, what.
Vicar, what.

Next *Avoidance*, what.
Voidance, what.

fice, which is in Deed, by Death or Deprivation, or by Law, by taking two Benefices, and being uncapable: It is oppoſed to Plenarty.

Plenarty

Sect. 2.

And here we are to know before we go further, That ſome of theſe Spiritual Livings (as they are called) are changed into another nature, which are thoſe we now call *Impropriations* or *Appropriations*; which is ſaid to be the improper taking of Spiritual Benefits by Temporal or Secular men; and is ſaid to be where any Body-corporate or private, hath the right of a Parſonage or Spiritual Benefice in themſelves, and power alſo to take the profits thereof to their own uſe, appointing onely, and allowing a Vicar there to ſerve the Cure. And this at firſt was tollerated onely to Spiritual perſons, ſuch as were able to adminiſter holy things, and for their help to hoſpitality; and at laſt went further, to what we finde at this day; and theſe were made firſt by the Pope, the King and Ordinary; and when the Pope was caſt out, by the King and Ordinary: And at this time, and by this means, Vicars and Vicarages came in; for then a certain portion of the Parſonage was allowed and ſet apart from the reſt, to maintain the Vicar, who was to ſerve the Cure, and the Prior, Prioreſſes, *&c.* they had the reſt. See *Agreement, Numb.* 5. *Plow.* 495. And this might have been, and ſo may yet be diſſolved, and again become Propriate; as if it did belong to a Corporation, which is now diſſolved; or the Advowſon be recovered by an antient Title before the Appropriation; in theſe Caſes the Appropriation is gone: So that, now at this day, we have Lay Parſons and Parſonages (as they are called) and ſo are theſe Impropriators and Impropriations, which are of the nature of other Lay Inheritances. Thoſe that had theſe at firſt were called *Proprietaries*, and *Spiritual Parſonages* and *Parſons*, both theſe *Parſons* are called in our Law *Incumbents*; and theſe alſo, eſpecially ſuch as have the Church by Impropriation, are called *Parſon Imparſonee*, and are ſaid to be perpetually appropriate, *Co.* 11. 10. *Plow.* 49. 6. But we in this place ſhall ſpeak onely of the Spiritual Parſon and Parſonage. As touching which theſe things are to be known.

Impropriation, or *Appropriation*, what it is.

Vicarage, what it is, and how it began.

Agreement

Proprietaries, what.

Incumbents, what.

Parſon imparſonee, what.

1. Every Church Living is to be had and obtained by Preſentation, Collation, Donation, or Election; and he that comes into any Parſonage or Vicarage at this day, muſt come into it by one of theſe means. And in ſome places there is a Nomination alſo (that is) a power that ſome man hath to name a Clerk to the Patron for the Benefice, when it is void; and then he to whom he is named, muſt have preſented him to the Ordinary; and if he had been lett of this, he might have had his *Quare impedit*, *Dyer* 327. 48. Preſentation is the Patrons gift or commendation of the Clerk elected to his Parſonage or Vicarage, by writing to the Biſhop; and this man the Biſhop did uſe to examine and allow, by taking of a Record of his name, which was called *Admiſſion*; and thereupon he did give him Inſtitution by theſe words, *Inſtituo, &c: I appoint thee to ſuch a Benefice, &c.* And then after this, the Archdeacon was wont to put the Miniſter into Poſſeſſion, by delivering to him the Ring of the Church door, ringing of the Bells, *&c.* And until this was done, he was not compleat Incumbent. *Articuli Cleri, ch.* 13. 14 *H.* 7. 28. *Dyer* 326. *Co.* 5. 58. 4. 79. But the Clerk being thus inducted, and in poſſeſſion ſix moneths, this is a Plenarty, and gives ſuch a Title to that Preſentation, that will bar all others in a *Quare impedit*, 21 *Eliz.* 4. 34. *Kelw.* 88. *Co.* 4. 79. 7. 38. upon *Littl.* 344 But this is not to be done at this day. The Collation to a Benefice, was where the Biſhop himſelf did give a Benefice that was of his own gift, by right of Patronage, or that came to him by Lapſe, *Stat.* 25 *Ed.* 3. 6. 1 *Ed.* 4. The Donative is where a Benefice is meerly given and collated by the Patron, without any Preſentation to the Ordinary; and with this, the Biſhop had nothing to do, but the Patron might have diſpoſed it at his pleaſure; and by this way now, moſt Clergy men come into their Livings, *Brownl. Rep.* 1. *part.* 201.

Nomination, what it is.

Preſentation, what it is.

Admiſſion, what it is.

Inſtitution, what it is.

Induction, what it is.

Plenartie, what it is.

Plenarty

Collation, what it is.

Donative, what it is.

Sect. 3.

2. He that hath this Right to preſent to a Benefice, when it doth become void, muſt have preſented within ſix moneths after the Avoidance, or he had loſt his Preſentment for that turn; and then that Preſentment came to the Biſhop of the Dioceſs, who had ſix moneths time to preſent; and if he did not preſent in this time, it was lapſed to the Archbiſhop of that Dioceſs, who had ſix moneths to preſent; and if he lapſed that time, then it had come to the King, who might have preſented at any

Lapſe, what it is.

Plenarty

any time, during his life. But for this, ſee *Co.*7. 27. 4.117. 6.22. 30. *Plow.*49.8. *D. & St.*116. *Dyer*369. *Kelw.*49. And the new Ordinance, by which Patrons are bound to preſent to the Commiſſioners for Approbation of Miniſters within ſix moneths after the Voidance, or elſe it will Lapſe to the Lord Protector, *Ordin. March.* 20. 1653. But if any diſturbance be, and a Suit begun within ſix moneths, and notice hereof in writing left with the Commiſſioners; this will prevent the Lapſe.

3. The Parſon, Patron, and Ordinary, by Common Law, in reference to diverſe Acts and Conſiderations of Law, are Relatives; and they three together might have done any thing with the Parſonage or Vicarage; but now the Law is altered herein, for neither the Clerk Incumbent himſelf, nor he with the Patron and Ordinary, can do any thing to conclude, or hurt his Succeſſor, *Co.*2.44. 8 *Ed.*4.14.

Quare impedit, what it is.

If I have ſuch an Advowſon, and the Parſon Incumbent dieth, and another preſenteth upon me, or before me, and hindreth me, that I cannot take the Fruit of my Preſentment, I may have a *Quare impedit* for my relief. See for this *F. N. B. Plow.* 84 *Co* 10. 130. But if my Clerk be preſented, and in poſſeſſion of the Benefice, and then he is put out; in this Caſe I muſt be relieved by a Writ called an *Aſſiſe of Darreine Preſentment*, *F. N. B.* 36. And both theſe are to recover the Preſentment for this time onely. For if the Right of the Advowſon be in queſtion, it muſt be recovered by a Writ of *Right of Advowſon*; which is, where one hath an Advowſon in Fee, and right to preſent after the death of a Parſon to a Church, and he bring no *Quare impedit*, nor *Darreine Preſentment*, but ſuffereth a ſtranger to uſurpe (that is) to preſent his Clerk, and ſuffer this Clerk to be inſtituted and inducted: In this Caſe he muſt have this Writ of *Right of Advowſon*, *F. N. B.* 34. *Co.* upon *Littl.*344.

Aſſiſe of Darrein preſentment what it is.

Right of Advowſon, what it is.

Uſurpation, what it is.

Jure patronatus what it is.

If two Clerks had claimed by two or more Patrons, and it was in queſtion who was the right Patron, and whoſe Clerk ſhall be admitted, this Writ in the nature of a Commiſſion was granted to enquire thereof.

Spoliation, what it is.

If any difference had been between two Parſons or two Incumbents claiming under one Patron, and the Right of Patronage not in queſtion, this was to be decided in the Spiritual Court, and was called Spoliation, *F N.B.*36,37.

Juris utrum, what it ...

If the Incumbent alien the Land or any of it, his Succeſſor may have a *Juris utrum*, *F.N B.*50.

Brief ab eveſque what it is.

Quare non admiſit, what it is.

This was a Judicial Writ that did lie where one had recovered a Preſentation by a *Quare impedit* or Aſſiſe of Darrein-preſentment to the Biſhop, to command him to admit his Clerk that had recovered it: And if in this caſe the Biſhop had refuſed, he might have had another Judicial Writ called a *Quare non admiſit.*

Sect. 4.

Ne admittas, what it is.

This is a Judicial Writ directed to the Ordinary, and may be ſued out by the Plaintiff or Defendant, to command the Ordinary that he do not admit the Clerk of the other party till the plea be determined, *F.N.B.* 37.

Quare incumbravit, what it is.

This is a Judicial Writ againſt the Ordinary for one that ſueth a *Ne admittas*, and doth after recover in a *Quare impedit*, or *Aſſiſe de Darrein-preſentment*, though it be after the ſix moneths, *F.N.B.* 48.

Vi laica removenda.

If debate be between two Parſons for a Church, and one of them entreth with a greater power of Lay-men and keepeth the other out by force; in this caſe, upon a Certificate of the Biſhop to the Lord Chancellor, he might have this Writ to remove the force, *F.N.B.*

Commendam, what it is.

This is a Benefice which being void is commended to the care of ſome ſufficient Clerk, until it can be otherwiſe provided for of a Paſtor: And of this, he that hath it is only to have the cuſtody and profits for the time, and is revocable at pleaſure.

Union or *Conſolidation*, what it is.

Where the Churches be ſmall, they have had a way to put two of them together, which hath been done by this means. 1. The King did give licence to do it. 2. The Patrons of the Churches having the Fee-ſimple thereof, and of full age, did conſent thereunto. 3. The Incumbents of both Churches, and thoſe of full age, did conſent thereunto. 4. The Ordinary did agree to it. And this was called Union or Conſolidation. See for this *Stat.* 37 *H.*8. *ch.*21. 1 *E.*6. *ch.*9. 6 *H.*7.12. 38 *H.*6.21. And there is a way now for uniting of ſmall Pariſhes and their Churches. See it in the *Service of God.*

The

The Incumbent of a Church might have reſigned or left his Parſonage or Vicarage to the Ordinary which did admit him; and this is called a Reſignation, and is like a Surrender, *Plow.* 498. *Reſignation,* what it is.

The Incumbent was ſometimes for ſome offence deprived and put out of his Benefice; and this was called a Deprivation. See for this, *Co.* 11, 98. *Stat.* 13 *Eliz. ch.* 12. 39 *Eliz ch.* 8. *Deprivation,* what it is.

The Benefice might have been in ſome caſes by the Ordinary ſequeſtred from the Incumbent, and ſo might the profits have been alſo ſequeſtred by him after his death for the profit of his ſucceſſor, *Stat.* 28 *H.* 8. *ch.* 11. This is ſequeſtrable ſtill in ſome caſes; for which ſee *Religion*, and the *New Ordinances.* *Sequeſtration,* what it is.

The greateſt part of all this Law muſt now be gone, the Ordinary being gone, and no other perſon appointed to exerciſe his power, ſave only in the caſe of Probate of Wills and granting of Adminiſtrations.

Diſappropriation is, where a Parſonage impropriate doth become propriate again, which is a thing may happen many ways. For which ſee *Plow.* 497. 501. *Co.* 2. 49. *Diſappropriation,* what.

Ceſſion is, where the Incumbent takes another Benefice being incompatible. For a Church or Benefice preſentative (as every Parochial Church is ſuppoſed to be) might have become void five ways. 1. By Creation, when the Incumbent had been made a Biſhop. 2. By Death. 3. By Reſignation, when the Incumbent in his lifetime had reſigned his Benefice to the Ordinary. 4. By Deprivation, when the Incumbent is by Judgment of Law deprived. 5. By Ceſſion; and ſome call the firſt ſo: But in both theſe caſes the firſt Benefice doth become void. *Ceſſion,* what.

Gleebe or Glebe is that portion of Land, Meadow or Paſture, that is belonging to, and parcel of ſome Parſonages which have ſuch things beſides their Tythes. See more in my *Second Part of the Marrow of the Law, fol.* 9. *Gleebe,* what.

CHAP. VII.

Of Age-Prier.

IT is where any Action is brought by, or againſt an Infant; there upon motion to the Court or plea, by the Infant in the one caſe, or other party, or a ſtranger in ſome caſes, or ſometimes by the Court it ſelf *ex officio*, the Suit ſhall be ſtayed until the full age of the Demandant or Tenant, *Broo. Age in toto. Finch.* 360. *Co* 6. 5. *Age-Prier.*

In moſt caſes where the Heir is ſued for the Land he hath by Diſcent, or for ſomething out of, or concerning that Land wherein he is by Diſcent, and he be an Infant, there upon prayer made he ſhall have his Age allowed him; as in a *Cui in vita*, a Writ of Cuſtoms and Services, a *Ceſſavit*, when the Infant hath the Tenancie by Diſcent; a Writ of *Det.* brought upon an Eſpecialty, as for an Obligation, Statute, or for a *Nomine pœne*; a Writ of Error, if he be Tenant; a Writ of *Ayel*, if the Action were founded on his own wrong; a Writ of *Formedon in Diſcender*, *Co.* 6. 5. 9. 85. 3 *H* 6 46. *Co. ſuper Lit.* 290. *Fitz. Age. Br. Joyntenancie* 27. *Merton cap.* 5. Where *Age* ſhall be granted to him or them who pray for the nonage of the Defendant or Tenant.

But in ſuch Actions where the Infant is ſuppoſed to come to the Land by his own wrong, as if he be a Diſſeiſor; and in ſuch Actions as are found upon the Infants own wrong, as in a *Ceſſavit* of his own ceſſing; and in a *Per quæ ſervitia* againſt an Infant that hath the Tenancie by diſcent; and in a *Formedon* brought againſt the heirs of one that had an eſtate for the life of another granted to him and his heirs, where he is heir by ſpecial occupancie only; and in a *Nuper obiit*, when he claimeth as heir from the ſame Anceſtor; and in a *Partitione facienda*, where they are both in poſſeſſion; and in an Attaint; and in a Writ of *Entry ſur diſſeiſon* to the Anceſtor, if it be freſhly purſued; Where not.

purſued; and in a *Cui in vita*, or *Sur cui in vita*, againſt the Vouchee, being Heir to the Husband within age; *(a)* and in a Writ of Dower, or an Appeal; *(b)* and in a Writ of Execution ſued againſt his Lands, upon a Judgment had againſt his Father: In all theſe caſes he ſhall not have his Age allowed him, neither ſhall the Suit ſtay for that cauſe. And ſo it is for perſonal actions; an Infant may be ſued for a Treſpaſs, and in divers other caſes, for which ſee *Enfant*; and the Suit ſhall not ſtay for his Nonage, *Co.*9.85. *St.*3.*Ed*1.46. *Dyer* 137. *Co.ſup.Lit.*239. *Co.* 6.4. *Dyer* 321.9 *H.*6.6. 10 *H.*4.5. 9 *H.*6.46. *Weſt.*4.46. *(a) Adj. Eppecas Tr.*4 *J.* *(b) Vivecas, M.*7 *J.C.B.*

Where Age ſhall be granted, and ſuit ſtay for the Nonage of the Plaintiff or Demandant.

In all caſes where it may be preſumed to be in favor to, and for the benefit of the Infant; leſt for want of the right and full underſtanding of his Caſe, and the truth of the matter, he be prejudiced of the right deſcended to him, though but a bare Right deſcend: As in all real actions Aunceſtrel of the poſſeſſion of his Anceſtor; and in all caſes where a bare right in Fee-ſimple deſcendeth from any Anceſtor to an Infant, (which right was once in poſſeſſion) there in any action Aunceſtrel brought by the Infant, the Tenant without pleading any Plea may pray the Suit may ſtay, as in a Writ of Right, as Heir to his Anceſtor, and lay the Eſplees to be taken in his Anceſtor: So in a *Formedon* in the Reverter as Heir to the Donor: So if an Infant alien within age, and his Heir being an Infant ſue a *Dum fuit infra ætatem*: So if the Heir within age bring a *Non compos mentis*, the Tenant may pray it may ſtay. And in all actions Aunceſtrel poſſeſſory, as Coſenage, Beſayl, Ayle, &c. where the Anceſtor dies ſeiſed, the Tenant cannot without pleading pray the Suit may ſtay. And in *Waſte*, or *Quid Juris clamat* brought by an Infant, the Tenant plead a Leaſe, without *Impeachment del waſte*, and offer to attorn ſaving his priviledg, and pray the Suit may ſtay, it ſhall ſtay, *Co* 6.3 985. *& ſuper Lit.* 64. *Glouc. cap.* 2.

Where not.

In all caſes where it cannot be preſumed to be for the benefit of the Heir within age to have the ſuit to ſtay: As where the Anceſtor died ſeiſed, and the Land deſcended to the Infant, and he hath entred and took the profits, here the ſuit ſhall not ſtay. And therefore in all real actions poſſeſſory, generally the ſuit ſhall not ſtay for the nonage of the Plaintiff or Demandant: As in a Writ of *Entry ſur diſſeiſon*, of a Diſſeiſon made to the Infant himſelf; in a Writ of Right upon a Deforcement to the Infant himſelf, of the Land he had by diſcent; in *Eſcheat*, *Ceſſavit*, *Droit ſur Diſclaimer*, *Meſne*, in *Formedon in Diſcender*, unleſs ſomething be pleaded againſt him, to which he cannot be party to try it within age: In a Writ of *Entry ſur Diſſeiſon* to the Anceſtor, if freſh ſuit be made to the Anceſtor; and after the Writ brought, the Anceſtor died before Trial could be had. See *Infant. Co.*6.3.9.85. *Weſtm:*1. 46:

Diverſity of Ages.

A man hath by Common-Law for ſeveral purpoſes divers Ages aſſigned to him, *viz.* Twelve years, at which age he may take the Oath of Allegiance in the Torn or Leet. Fourteen years, at which age he may conſent to marriage then, or agree to a marriage before; at which age alſo he being an Heir in Soccage may chooſe his Guardian, and at this age he is counted to be of diſcretion. Fifteen years, at which age the Lord ſhall have aid to make his ſon Knight. Under Twenty one, to be in Ward to the Lord by Knights ſervice; under Fourteen, to be in Ward to Guardian in Soccage; at Fourteen, to be out of Ward of the Guardian in Soccage, and then he may chooſe his Guardian; at Twenty one, to be out of Ward of Guardian in Chivalry. So alſo hath a woman divers Ages aſſigned to her, *viz.* Seven years, at which age the Lord her Father ſhall have aid of his Tenants to marry his daughter: Nine years, at which age a woman may deſerve and have a Dower: Twelve years, at which age ſhe may conſent to a marriage then, or agree to a marriage before: Until Fourteen to be in Ward, and then to be out of Ward: Fourteen years, at which age, if ſhe attained thereunto in the life of her Anceſtor, ſhe ſhall be out of Ward: Sixteen years, to tender her marriage, if ſhe were under the age of Fourteen at the death of her Anceſtor; and at, or after Sixteen years, ſhe is paſt the Lords tender of a husband: At ſeven years of age, not before, ſhe may promiſe marriage to a huſband. See the *Womans Lawyer, f.*52. *Co. ſuper Lit.*78. 34 *Ed.*1. *Stat.*3. *Dyer* 162, 213. *Co.*7.43. 6.67 *Lit.*204. 3 *H.*7.1. 21 *H.* 7.31. *Lit. ſect.* 259. 35 *H.*6.40. But at this day the Law is much changed in ſome of theſe things: For as to Wardſhips of men and women Heirs, they are quite taken away: And the age of a man to

conſent

conſent to marriage, is ſixteen years, and the age of a Woman is fourteen years; and before this time they cannot agree to marriage, *Act. Aug.* 1 *Ed.* 6. 14.

Alſo there be divers ages aſſigned to Men and Women both: As for the committing of Felony, any age of diſcretion which is in ſome ſooner, in ſome longer; and of this the Judge ſhall enquire and judge. Seventeen years, at which age they may take upon them an Executorſhip, or be an Adminiſtrator. Eighteen years, at which age they may make a Teſtament, and make Executors for Goods and Chattels. Twenty and one, which is the full age of Male and Female, and then, and not till then, they may make all manner of Contracts, alienate their Lands and Goods, and in ſome places by ſpecial Cuſtoms ſooner. See *Cuſtom*, *Co. ſuper Littl.* 171. *Doct. & Stu. f.* 113.

Two Juſtices of the Peace in the County, or the head Officer and two Burgeſſes in Cities, *&c.* may appoint any woman of the age of twelve years, and under forty being unmarried, and out of ſervice, to ſerve and be retained by year, week, or day in ſuch ſort, and for ſuch wages as they ſhall think meet; and if ſhe refuſe, they may commit her to priſon till ſhe ſhall be bound to ſerve, *Stat.* 5 *Eliz.* 4.

Counter-plea of Age.

It is when one bringeth an Action, and the Tenant or Defendant either for his non-age, or the non-age of the Plaintiff or Demandant prayeth, that the Suit may ſtay; and thereupon the other replieth, and ſheweth cauſe why it ſhould not ſtay; this reply is called a *Counter-plea* of the Age, *Terms Ley. Counter-plea.* See more in *Infant* and *Weſtm.* 1. *cap.* 46. *Stat. Gloc.* 2. *Weſtm.* 2. 10.

CHAP. VIII.

Of Agreement.

Agreement.

AGreement is the coupling or knitting together of two or more mindes in any thing already done, or to be done. And Diſagreement is the contrary to this, when their mindes are not united, *Plow.* 6. *Terms Ley.*

Aſſent and Diſagreement.

Agreement or Diſagreement is diverſly diſtinguiſhed. For it is either real (*i.*) that which doth concern Lands; or perſonal, (*i.*) that which doth concern other matters: And theſe are alſo either *General* or *Special*: And both theſe are alſo *Expreſs* or *Implied*; alſo *Verbal* or *Actual*; and alſo *Executed* or *Executory*. That which is *Executed* is either *Precedent*, as when goods are ſold for money, and the money is paid; or when the Husband doth agree his Wife ſhall make a Will, and ſhe doth ſo, or elſe it is *Subſequent*. As when one doth diſſeiſe another to my uſe, and after I agree to it; or the Executor doth aſſent to a Legacy given, or the Leſſee agree to the Grant of the Reverſion. That which is *Executory*, is alſo either grounded on certainty, as when the Agreement is to pay ten pounds for ten buſhels of Barley at *Michaelmas*; or elſe it is grounded on uncertainty, as where I do agree with another at a price for all his Wood, if I like it when I ſee it. *Plow.* 6. *Perk.* 45. *Co.* 3. 26. *Stat.* 25 *Ed* 3. 3. 44 *Ed* 3. 37. 18 *Ed.* 4. 15. *Stat.* 26 *H.* 8. 3. 14 *H.* 8. 24.

1. The efficacy and operation of Agreement and Diſagreement.

Agreements of the parties in many caſes will change the courſe of the Law, as the Rule is, *Modus & conventio vincunt legem*; as though a Leſſee for life or years be to have Houſeboot, *&c.* and be not to cut Timber by Law, yet by agreement he may be abridged of the one, or granted the other: Alſo this will help faults and errors in Proces and proceedings of Law, *Juxta illud, Conſenſus tollit errorem*, (*i.*) Conſent taketh away Error. Alſo diſagreement will make a nullity of a thing that before had eſſence; as if a Deed be made to a Feme Covert, and the Husband do after diſagree to it, *Co.* 4. 62. 64. 5. 36. 40. *Co.* 5. 119.

2. What act ſhall be ſaid to be a good Agreement for the benefit or prejudice of them which agree.

Action on the Caſe.

Aſſent to a *Deviſe.*

Agreement to an *Eſtate.*

Deed.

If one promiſe to my Wife, that if I releaſe *J. S.* out of Execution, who is at my Suit; that if *J. S.* do not pay me the money by ſuch a day, he will; and when I hear of it, I do enlarge him, this is an actual or implied agreement, on which I may ground an Action, 27 *H.* 8. 24.

If one Deviſe a Term to *A.* for life, the Remainder to *B.* for all the Term, and make *A.* his Executor and die: And after *A.* the Executor comes to *B.* and intreats him to releaſe all his intereſt in the Term to *A.* and he doth ſo, and *A.* doth accept it: This is an actual aſſent to the Deviſe, *Co.* 10. 52.

If an Eſtate were made in Fee-ſimple or tail to a man and his wife, and he die (*i.*) and he have not diſagreed to it, now this is an agreement in Law, and veſteth the Eſtate in her, and if ſhe after his death enter into the Land, and take the profits: This is an actual agreement, and good to binde her, though ſhe ſay never a word, or do it never ſo ſecretly, *Co.* 3. 26. & 4. 4.

If there be Lord and Tenant, and the Tenant Enfeoff the Lord and a Stranger, and give livery to the ſtranger in the name of both, and after the Lord doth enter and take the profits: This is a good agreement in the Lord, *Co.* 3. 26. 10 *Ed.* 4. 12.

Sect 1. *Husband* and *Wife.*

If Lands be given to the Husband and Wife in tail, and after the Statute of 32 *H.* 8. the Husband alien the Land to the uſe of him and his Heirs, and after Deviſe it to his Wife for life, and die, and after his life ſhe doth enter, claiming onely the eſtate for life: This is a good agreement to bar her of taking or claiming any other eſtate. But if the agreement had been by word onely, it had been nothing worth, *Co.* 3. 26. *Dyer*, 51.

An Agreement as an Attornment, or the like may be good in the abſence of the party for whom it is, *Co* 2. 69.

Husband and *Wife.*

If the Husband and Wife ſell the Land of the Wife for money by word, and after they two levy a Fine to the Vendee and his Heirs: This will binde the Wife without any writing to prove her aſſent or agreement, *Co.* 2. 57.

Infant.

If an Infant a Parcener that hath made diviſion, do after at his full age take the profits of the part allotted to him: This is a good agreement affirming the diviſion, but the taking of the profits of a moyety doth not ſo, *Co. ſuper Littl. fol.* 171.

What not.

If an Infant under the age of conſent for Marriage endow his Wife *ad oſtium Eccleſiæ* without Deed, and after when he is of age of conſent agree to it, yet this agreement will not make the Endowment good, *Perk.* 438.

If an Eſtate be made in Fee-ſimple, or Fee-tail to a man and his Wife, and the Husband die, and the Wife before her Entry ſay ſhe doth agree to her Eſtate, or uſe the like words; yet this will not binde her where ſhe doth demand Dower in a Court of Record, but that ſhe may there wave it, *Co.* 3. 26.

Deed.

If an Obligation be made to my uſe, and being tendred to me, I refuſe it, and after again I agree to it, and will accept it: Now this agreement after will not make the Obligation that was void by my refuſal good again, *Co.* 5. 119.

3. When the Agreement of any perſon is requiſite for the perfection of any thing done.

If a Deviſe be made of any Goods or Chattels, the agreement of the Executor is neceſſary, and the Legatee cannot take the thing deviſed without the aſſent of the Executor, but he will be a Treſpaſſer in ſo doing to the Executor. *Vide Teſtament. Co.* 10. 47. *Plow.* 540.

If a Reverſion be granted of an Eſtate for life or years, or a Rent in being; in moſt caſes it is needful the Tenant for life or years, or the Ter-tenant do agree, elſe the grant is not good, *Vide Attornment. Plow.* 25.

If *J. S.* Diſſeiſe another to my uſe, I am no Diſſeiſor, nor have any Free-hold till I agree to the Diſſeiſon, but he is the Tenant till then: And after I have agreed to it, I am the Tenant and ſeiſed of the Free-hold, 12 *Ed.* 4. 9. *Perk.* 47.

Tenant in *Tail.*

If a Tenant in Tail make an exchange and die, and the Land taken in exchange, deſcend to his iſſue; in this Caſe the agreement of the Iſſue is requiſit, for the exchange is not good till then, 14 *H.* 6. 2.

Husband and *Wife.*

If a Feme Covert make a Teſtament, the Husband muſt agree to it, elſe it is not good, *Co.* 4. 51.

If

If a Feme Covert be an Executrix, ſhe cannot releaſe any Debt or Duty to the Teſtator, without the aſſent of the Husband, *Co.*5. 27.

If any Eſtate in Poſſeſſion or Remainder, or Reverſion by Deviſe, or act executed for life, in Fee, or otherwiſe be made to me, I muſt agree to it, until it be in me, for I may refuſe it, *Doct. & Stu.*119. *b.*

If a Releaſe, Obligation, or Deed be made to me, and delivered to another to my uſe, here there is no need of any agreement to make the Deed good or veſt the things in me: But if I diſagree to it, by this I make the Deed void, *Co.*3. 26. *Dyer* 167. *Br.*5. *Co.*5. 119. *Deed Delivery, where not.*

If an Eſtate be made to a Woman Covert, there needs no agreement of the Husband to veſt the Eſtate in him, 3 *H.*7. 9. *Woman Covert.*

If a Woman hath a Right or Title of Entry into any Land, and ſhe take a Husband, and he enter, here needs no agreement of the Wife to veſt the Freehold in her: So if an Infant have a Right or Title of Entry, and a ſtranger enter to his uſe, the Eſtate is in him without agreement, *Perk.*46,47.

If the Husband and Wife levy a Fine of the Land of the Wife, and the Husband alone declare the uſe; this will binde the Wife, and her agreement to the limitation of the uſes is not needful, *Perk.*2.57. *Husband and Wife.*

If a Feoffment be made to a Woman Covert, her Husband being beyond the Sea, and when he returns, being not content with the Feoffment, he will not ſuffer his Wife to take the profits, nor to continue the Seiſon, but doth himſelf, and alſo cauſeth her to relinquiſh the occupation: Now hereby he ſhall be diſcharged of damages, for the time after his relinquiſhment, if the Feoffor were a Diſſeiſor, *Perk.* 14. 4. What act ſhall be ſaid to be a Diſagreement for the benefit or prejudice of him which diſagreeth.

If there be Lord and Tenant, and the Tenant by Deed Infeoff the Lord and a ſtranger; and give livery to the ſtranger in the name of both, and after the Lord enter; and diſtrain for the Seigniory: This Act doth amount to a diſagreement of the Feoffment, and doth diveſt the Frank Tenant out of the Lord, *Coo.* 3. 26. 12 *Ed.*4. 12. *Deed.*

If Lands be given to the Husband and Wife in Tail, and after the Statute of 32 *H.* 8. the Husband Alien to the uſe of him and his Heirs, and then Deviſe the Land to his Wife for life; and after his death ſhe enter claiming for life onely: This is a diſagreement to the Eſtate Tail, *Co.* 3.26. *Dyer* 351. *Sect.* 2. *Husband and Wife.*

If a Woman Covert have a Joynture made to her after marriage, and after her Husbands death, ſhe brings a Writ of Dower for her Thirds: This is a diſagreement to the Joynture *Co* 4.5.

If an Infant marry *Infra annos Nubiles*, and after before any agreement when he is of age of conſent, he marry another; this is a good Diſagreement, without any words of Diſagreement at all. And it ſeems that Diſagreement, though it be not before the Ordinary is good, and they may not marry elſwhere, but the Ordinary may puniſh it, *Robinſons* Caſe, *Curia.* 7 *Jac. Broo. Gard.*124. *Co. ſuper Littl. fol.*79. *a. b.* *Infant.*

If one Deviſe Land to his Heir in Tail, the Remainder over to a ſtranger, and the Heir enter and diſagree to the Deviſe, and ſay he will have it in Fee, yet he ſhall have but an Eſtate Tail onely, *Plow.*545. *Perk.*569. What not.

If one agree to give me Twenty pounds for a parcel of Wood, if he like it when he ſee it, and when he ſee it, he do like it: Now he cannot afterwards diſagree to it, to make void the Contract again, 18 *Ed.* 4. 15. *Contract.*

If Tenant in *Precipe* agree not in the Countrey: This is not ſufficient to bar the Freehold, 12 *H.* 4. 21. *Br. Surrender* 28. 11 *H.*4. 62. 6 *Aſſ. p.* 2. *Kelw.* 116. *b.* 8. *Rep.*61. 6 *Encounter.* 27 *Aſſ. p.*37. *Br. Surrender* 28. 6 *Aſſ. p.*2. *Precipe*

If Lands be given to a Husband and Wife in Tail, or in Fee, and the Husband dieth, and the Wife doth afterwards diſagree to the Eſtate by words in the Countrey, and ſaith ſhe will not have it, or the like: This Verbal Wayver in the Country, will not deveſt the Franck Tenement out of her, but ſhe may enter when ſhe will after, notwithſtanding, unleſs it be in caſe where ſhe will demand Dower of by the Statute, 27 *H.*8. 10. *Co.*3. 6. Verbal Waiver

If an Eſtate were made to a Man and his Wife, and he die, and the Lord ſuppoſing the Deed.

the Husband to die ſole-ſeized, aſſign the Wife her Dower by word; which ſhe accepted, yet ſhe hath the free-hold of the whole in her; and this agreement ſhall not prejudice her, *Co* 3. 26.

Sect. 3.

If a Feoffment were made to four, and Livery is made to three, in the name of the reſt, and the fourth when he ſeeth the Deed ſaith, That he will not agree to it, nor have any thing in the Land; yet this Diſagreement will not diveſt the Freehold, for his Diſagreement muſt be in a Court of Record. So if a Feoffment be made to the Lord, and a ſtranger by the Tenant, and the Lord by word diſagree to it: This is no diſagreement to diveſt the Eſtate, *Co.* 3. 26 10 *Ed.* 4. 12.

5. Where and in what Caſe the Diſagreement of any perſon is neceſſary for the diveſting of any intereſt, or property.

If an Obligation be made to me, and delivered to my uſe, now if I will avoid it, I muſt diſagree to it when I hear of it. So if a Deed of Gift be made to me of Goods, if I will avoid it, I muſt diſagree to it; and by this the property will be diveſted: So if any Eſtate or an Obligation be made to a Feme Covert, if her Husband will avoid it, he muſt diſagree to it, for it is in him till diſagreement: So if any Eſtate be made to the Husband and Wife, during the Coverture, and ſhe would avoid it after his death; ſhe muſt diſagree to it, then, for till then it ſhall be in her. If an Infant be married *Infra annos nubiles*, and he would avoid it after, it muſt be by Diſagreement, *Co.* 3. 26, 27. *Dyer* 167. & 49. *Perk.* 43. *Co.* 5. 119. 3 *H* 6. 59. *Broo.* 6. *Co.* 6. 22. *Perk* 438.

If the Husband and Wife levy a Fine of the Land of the Wife, and the Husband alone declare the uſes, if the Wife will avoid this or alter the limitation, ſhe muſt diſagree to that Declaration, and make her Diſagreement to appear, *Co.* 2. 57.

6. Where and in what Caſe after Agreement, one may diſagree, where otherwiſe.

Regularly where a man hath once diſagreed to the party himſelf, unto whom the Agreement or Diſagreement is to be made; he can never after agree. But if perſons married within age of conſent do afterwards before that age, by word or writing under their hands, or before their Parents diſagree or marry others; yet after their years of conſent, they may agree again, and make the marriage good. But after Diſagreement at age of conſent, no new Agreement without a new marriage ſhall make it good, 27 *H.* 8. *Robinſons* Caſe. *Curia, p.* 7 *Jac. Co. B. Co. ſuper Litt. f.* 79.

Compoſition.

This is applied to a ſpecial kinde of Agreement, made either between Coparceners (which may be made without writing) as to preſent to a Benefice by Turn, or the like. But it cannot be between Tenants in Common without writing, for in a *Q. Impedit*, the Compoſition muſt be ſhewed; but if once every one have had his Turn according to the Compoſition, then after the Compoſition need not be ſhewed: Or it may be heretofore between the Parſon, and one of his Pariſh, to be diſcharged of paying Tyths for ſomething agreed on, or between the Parſon and Vicar, called ſometimes an Indowment, *Dyer* 29. 194. *Co.* 2, 38, 44, 46, 47. *Co.* 6. 6.

7. How it ſhall be taken.

In the Compoſition between the Parſon and Vicar, uſage is much regarded; for though the Compoſition be, that the Vicar ſhould have Garba, yet if he have never had but Hay, he ſhall have no more now. *Smiths* Caſe, adjudged. If the Compoſition be, that the Parſon ſhall have all the Tyth-Corn, and the Vicar all other Tythes; and one ſow his arable Land with Saffron, the Vicar ſhall have it. *Vicar de Farnhams* Caſe, *Tr. I. Jac. Co. B.* It is commonly held, That if the Vicar be to have the Tyths of all the Crofts in ſuch a place, that yet he ſhall not have the Tyths of the Crofts, parcel of the Parſonage; and if he be to have the Tyths of all the Dove-houſes of the place, yet he ſhall not have the Tyths of the Dove-houſes belonging to the Parſonage. If the Vicar by the Endowment, be to have the Tythe Hay of all the Meadows in ſuch a place, yet he ſhall not hereby have any more but the Tyths of thoſe that were Meadows at the time of the Endowment, and not of thoſe grounds that were made Meadow ſince the Endowment.

By Baron *Draham* a difference was taken, where an Endowment is local, as where the Vicar doth claim to have all the Tyths in ſuch grounds, and he hath always had the Tythe of that place; and it hath never been ſowed, and he have no Tyths, but the ſmall Tyths of the reſt of the Pariſh by the Endowment; yet if it be new ſowed, he ſhall have the Tythe of the Corn: But if he be to have the ſmall Tyths generally, and he hath always had Tyths in ſuch a place, and it was never ſowed, and now it is ſowed with Corn; in this Caſe he ſhall not have the Corn. 8 *Car. & Sarum Aſſiſes.*

CHAP.

CHAP. IX.

Of Aid.

AId is a Subſidy or yielding of help by one to another, unto whom he oweth it, and whoſe caſe calleth for it: And ſometimes it is from an Inferior to a Superior, and ſometimes from a Superior to an Inferior, and ſometimes from one equal to another, *Terms Ley Aid. Finch.* 80. *Aid*, what.

From the Inferior to the Superior. 1. From the Subjects to the Supreme Governor, when he hath need, and that Aid is called *Subſidy* or *Cuſtom*, *&c.* (for which, ſee *Subſidy.*) 2. From the Tenant that holdeth in Soccage to the Lord; and that for two purpoſes, Firſt, To make his Son Knight, which he may do at fifteen years of age, and then he is to have this Aid. Secondly, To marry his Eldeſt Daughter, which he is to have when ſhe is of the age of ſeven years (to wit) of him that holdeth Lands in Soccage to the value of Twenty pound *per annum*, Twenty ſhillings *& ſic pro rat':* Which if the Tenant will not pay, the Supreme Governor or other Lord, may at his Election, either diſtrain him for it, or have a Writ to recover it. But Aid annexed to a Tenure in *Capite*, or in Knights Service, is gone by the late Order. *Stat.* 14 *Ed.* 3. 1. *Co. ſuper Lit. fol.* 91. 162. 25 *Ed.* 3. 11. *F.N.B.* 82. *Co.* 11. 44. See *Lord and Tenant, Chap.* *Sect.* *Sect.* 1. From an Inferior to a Superior.

Reaſonable Aid ſhall be Twenty ſhillings for a whole Knights Fee, and as much for Twenty pound Land in Soccage, and ſo after the Rate more or leſs: If the Father after the Aid levied, die before he marry his Daughter; the Executors of the Father ſhall be charged to the Daughter, for ſo much as he received, or his Heir, if the Executor have not Aſſets. The King alſo was to have this Aid according to this proportion by the Statute: But Tenant by Grand Sergeanty, or Petty Sergeanty, or Copiholders ſhall not pay this Aid. *Weſtm.* 1. 35. 25 *Ed.* 3. 21 *H.* 4. 32.

From a Superior to an Inferior. Firſt, Where the Kings Tenant that held in *Capite*, was impleaded for the Land, or ſomewhat that doth iſſue out of the Land, as Rent, *&c.* Or if any City or Burrough that had any Fee-Farm of the King, had been queſtioned for it; or, where the Kings Bailiff, Purveyor, or Collector, had been queſtioned: In theſe Caſes they might have paid, and had Aid of the King. So where the King had warranted Land: For one cannot Vouch, but in that Caſe muſt have prayed in Aid of the King; but in the Kings Caſe, Aid was always to be prayed before Iſſue joyned, *Co.* 8. 50. 4. 22. 5. 109. 1. 48. 9. 16. *Stat.* 4 *Ed.* 1. 3. *Dyer* 25. Secondly, Where a Tenant for life, years, at will, by Statute, Elegit, or Copy, is impleaded for the Land, or any Rent, *&c.* out of it; then he may pray help, and Aid of him in Reverſion (which may ſometimes be before Iſſue joyned, and ſometimes after.) And then he may come in *gratis*, if he will, or if he will not, then ſhall iſſue forth the Writ called *Somons ad auxiliandum*, which is to compel him to come in, and to plead with his Tenant in the defence of the Land: And if he come not upon the ſecond Writ, then the Tenant muſt go on without him; and if he do appear, and the Tenant and he do not agree, but differ in their Plea, then the Tenant ſhall be ouſted of his Aid, and the Plea of the Tenant ſhall be taken alone, *Co.* 4. 9, 20. 8. 50. 10. 31. 8. 75. 11. 80. *Co.* 9. 31. *Dyer* 256. Thirdly, Where a Bailiff or Servant is queſtioned for what he did in his Maſters ſervice; he may pray, and ſhall have Aid of his Maſter, 14 *H.* 7. 6. 45 *Ed.* 3. 11. *Sect.* 2. From a Superior to an Inferior. *Somons ad auxiliandum*, what.

From one equal to another: As if one after Partition made, be impleaded, and loſe all or part of her Land, by one that hath Title *Paramount*, ſhe ſhall have Aid of the reſt, and ſhall recover according to the rate of the reſt again, *Co.* 4 122. Between Equals.

It is where one bringeth an Action, and the Tenant in his anſwer, prayeth in Aid of another that hath a better eſtate then he; and the Demandant replieth, That he ought not to have Aid of him. This Plea is called a *Counterplea* to the Aid. *Terms* *Counterplea del Aide*, what.

Ley,

Ley. Sta. 25 *Ed.* 3. 7. See the old Statutes. *Stat. de Bigamis, cap.* 1, 2, 3. 14 *Ed.* 3. 14. *Stat.* 7.

CHAP. X.

Of Alleageance.

Allegeance, what it is.

IT is a true and faithful Obedience of the Subject to his Soveraign. And this is incident to every Subject, that assoon as they be born, they do by Birth-right ow this Obedience to the Soveraign Magistrate: Hence the Subjects are called *Liege People. Co.* 7. 4. 6. 5.

How many kindes of it there be.

And there are four kinde of Ligeances. The first is Natural, Absolute, Pure, and Indefinite: And this is that which is originally due by Nature and Birth-right, which is called *Alta Ligeantia*; and the Subject that oweth it is *Subditus natus*. See the excellent Learning of this matter, *Co.* 7. *Calvins* Case.

The second is Acquisit, which is not by Nature, but by Acquisition, as by Denization; and this is either absolute, as the common Denizations be to them and their Heirs, without any limitation or restraint. Secondly, Limitted, as when the King had granted Letters of Denization to an Alien, and to the Heirs-Males of his body. Thirdly, It may be granted upon condition: And this may be effected three manner of ways, 1. By Parliament; 2. By Letters Pattents which is the usual manner; 3. By Conqueſt.

The third is Local, which is made by the Law, and is when an Alien, which is in Amity, cometh into *England*; becaufe as long as he is here, he is within the Supreme Magistrates Protection; therefore he oweth unto him a Local Obedience

at it to the oath of allegiance Look

The fourth is a Legal Obedience, which is called *Legal*, becaufe the Laws of the Realm have prescribed the order and form of it, which is the Oath of Allegeance, which is commonly to be taken in the *Tourn, Leet*, or by every man that is above the age of twelve years, *Co. ſuper Litt.* 68. 8. 172. *b.*

The effect of this *Allegeance.*

And by vertue hereof, they are bound to the Commandment of the Supreme Magistrate, to go any where within the Realm with him, for the defence thereof, without wages, but not out of the Realm without wages: For every Subject is bound hereby to defend him and his Realm, *F. N. B.* 85. *F. Ptotection* 100. 18 *Ed* 3. 8. *Cromp. Jur. f* 84.

Supremacy.

And that which is repugnant, and an enemy to this Allegeance, is the acknowledging and submitting to any Foreign usurped Authority, such as was the Popes sometimes here in *England*. All the Kings Liege people therefore, were to acknowledge and submit to the Kings Supremacy; and to oblige them hereunto, was the Oath of Supremacy Devised, which was as followeth.

Oath of Supremacy.

I. A. B. *Do utterly teſtifie and declare in my Conſcience, That the Queens Highneſs is the onely Supreme Governor of this Realm, and of all other Her Highneſs Dominions and Countreys, as well in all Spiritual as Eccleſiaſtical things or cauſes, as Temporal. And that no Foreign Prince, Perſon, Prelate, State, or Potentate, hath or ought to have any Juriſdiction, Power, Superiority, Preheminence or Authority Eccleſiaſtical or Spiritual, within this Realm. And therefore I do utterly renounce and forſake all Foreign Juriſdiction, Powers, Superiorities, and Authorities; and do promiſe, That from henceforth I ſhall bear Faith and true Allegeance to the Queens Highneſs, Her Heirs and Lawful Succeſſors; and to my power, ſhall aſſiſt and defend all Juriſdictions, Priviledges, Preheminences, and Authorities, granted or belonging to the*

the Queens Highneſs, Her Heirs, and Succeſſors, or united and annexed to the Imperial Crown of this Realm. So help me God, and by the Contents of this Book, Stat. 1 Eliz. cap. 1.

But this Oath, and the Oath of Allegeance, as to a King, are now taken away, and not to be impoſed upon any body, in any Caſe. See the *Act of Parliament, 9 Febr.* 1648.

CHAP. XI.

Of an Alien.

Alien, what.

AN Alien is a Subject born out of the Legeance of our Supreme Magiſtrate, and within the Legeance of another King. And ſuch a one is either *Amy*, *i.* one of ſuch a Nation, as between whom and us there is no War, as now the *French* and *Dutch*; or elſe he is enemy, which is one of ſuch a Nation, as between whom and us there is open War. And he alſo is either *perpetuus*; as all Infidels, betwixt whom and us Chriſtians there is a perpetual War: Or *pro tempore*, as ſometimes the *Spaniſh*, and ſometimes the *French*, *&c.* Or *ſpecialiter permiſſus*, as when an enemy is ſuffered by the Supreme Magiſtrates ſafe conduct to paſs into the Country: And ſuch an Alien-enemy may be, though he be born within this Country; as the Iſſues of enemies born here that hold a *Foite*, or of other Alien-enemies born here, *Terms Ley, Co.* 7. 17, 18.

Who ſhall be ſaid an *Alien* born, or not.

He ſhall be ſaid an Alien that is within the definition aforeſaid. But if an Alien *Amy* come into *England* here, and have Iſſue; his Iſſue is no Alien. So if an Engliſhman go beyond Sea by Licenſe, and have Iſſue there; his iſſue is no Alien. So if one be born under our Dominions, in any other Country, as *Scotland*, or the like; he is no Alien; and therefore in theſe Caſes, ſuch Iſſues may inherit Land, and have all other benefits of any other Heir born in *England*. But if one be once an Alien, no continuance of him here in *England*, though it be from his Childhood, and though he be ſworn in the Kings Leet will make him a Denizen, *Co.* 7. 6. *Stat.* 25 *Ed.* 3. *Stat.* 42 *Ed.* 3. 10. *Finches Ley, f.* 84.

The capacity of an *Alienée* to purchaſe Lands, or gain Goods, or Chattels, and to bring Actions And what thing he may take or enjoy to his own uſe or not.

An Alien that is *Amy*, whether he be an Infidel baptized, or any other, though he be not made Denizen, may by the Common Law, acquire, get, and have by Gift, Trade, or any other lawful ways or means, any Treaſure or Perſonal Goods, as well as an Engliſhman. And if he be a Merchant he may take a Leaſe of a Houſe, and it ſhall be good for that ſpecial purpoſe, but not to his Executors or Adminiſtrators; or being any other, he may take a Houſe for his Habitation; and for theſe things he is capable of, he may have any Action, and the Plea of *Alienée* ſhall be no bar to him. But he is not capable of, neither can he have or enjoy any Eſtate of any Lands or Tenements, or any Chattels real, by deſcent, purchaſe, or otherwiſe; neither can he have a Benefice, if he be a Spiritual man, until he be made Denizen. And if he have any ſuch Eſtate, the Lord Protector will have it by his Prerogative. Neither can he have any Action real, or mixt, or perſonal, concerning Land, but in every ſuch Action, the Tenant or Defendant may plead that he was born in ſuch a place, which is not within the Kings Ligeance, and demand Judgment, if he ſhall be anſwered: Neither can ſuch Aliens ſerve in Juries here *Co.* 7. 1. 16. *Plow.* 483. *Co* 9. 141. *Dyer* 2. 283. *Co ſuper F.* 1. *Stat.* 7 *R.* 2. *cap.* 12 *Terms Ley.*

Alien-Friend.

Alien-Enemy.

But he that is an Alien-Enemy, ſo long as he remains ſo, is not capable of any ſuch benefit that an Alien-Amy is capable of: For if he have any goods, any man may ſeiſe them, and the Lord Protector ſhall have all his Specialties, and any man may kill him by Martial law, *Co.* 7. 17. *Dyer* 2. 12 *H.* 8. 4. And if he do any offence here, he

he ſhall be executed by that Law, *Trin.* 41 *Eliz. Co. B.* And he is held to be an Alien-Enemy, that is ſubject to one between whom and us is open war; and not the ſubject of ſuch a King as hath denied to traffique with us, or hath done to us ſome diſcourteſie. But Ambaſſadors of any King, friend or enemy, have a privilege to come here. See more for *Alien*, the Statutes of 1 *H.*6. *cap* 3.8. 14 & 15 *H.*8. *cap.*2. 32 *H* 8.16.

Denizen, what.

A Denizen is one that hath been an Alien, and doth after become a Subject here; and this may be either by Act of Parliament, or by Letters-Patents: And by this he may be made Denizen in Fee ſimple, Fee-tail, or for life; and it may be conditional, or abſolute, as other things be granted; and then ſuch a Denizen is capable of all other privileges and benefits, for Eſtates of Lands and Chattels real, that a Natural born Subject is capable of, ſave only of Lands by diſcent, which no Alien can be capable of until he be Naturalized, (*i*) endowed with all the privileges of a natural Subject, which cannot be but by Act of Parliament: But he may have Land by purchaſe; and if he die without heir, it ſhall go to the Lord, and not to the King by Eſcheat, *Co.* 7.6,7. 3 *H.*6.55. *Broo.* 22 *H.*8.8. *Co. ſuper Lit. f.*1. See for *Alien-Merchants*, and other *Aliens*, the Statutes of 5 *R.* 2 1. *An. Dom.*1382. 6 *R.* 2. 10, 11 *R.* 2. 7. 1 *H.* 4. 16, 17. 6 *H.* 4. 4. 14 *H* 6 6. 1 *R.*2.9. 3 *H.* 7.8. 21 *H* 8.16. 31 *H.*6.4. 1 *R.*3.9. 14 *H.*8.2. 22 *H.*8,13. 32 *H.*8.16.

Naturalized or *Naturalization*, what.

CHAP. XII.

Of an Alienation, Alimony, Apparel, and Ambodexter.

Sect. 1. *Alienation*, what.

ALienation is nothing elſe but *Alienum facere*, to make a thing another mans, or to put a thing from one man to another: And if it be of Land, as it is moſt commonly underſtood, it is but the tranſmutation of the poſſeſſion: Which may be either by Deed, as by Covenant, Fine, Feoffment, or Recovery; or by Law, as by Deſcent or Eſcheat, *Terms ley. Co.*6.27. & *ſuper Lit. f* 118. And in ſome caſes a man hath power of himſelf ſo to do; and in ſome caſes he cannot do it without the licence and aſſent of another: As one that had held of the King *in capite*, could not have aliened it without the Kings licence: So if any man will now alien Lands in Fee-ſimple to a Houſe of Religion, or to a Body Incorporate, he muſt have the Lord Protectors, and the Lords licence of whom the Land is holden, firſt, or elſe he will forfeit the Land aliened. See *Mortmaine*, *Stat.* 1. *Ed.* 3. *cap.* 12. 15 *R.* 2. *cap.* 5.

Licence of Alienation, when it is required, or not.

If the Lands that had been alienated from one man to another had been of the Kings *in capite*, or if any Honor *in capite* or in Serjeanty by Knights ſervice, or Soccage in chief; in theſe caſes the Kings licenſe muſt firſt have been had, and a Fine paid to him before the Alienation had been made, whether it had been Lands Rent, Meſualty, Advowſon, or a Reverſion that had been ſo alienated, if there be any Eſtate of Freehold that is aliened, to the end that the King might ſtill be ſure of his Tenant; as in theſe caſes following.

1. If there be three Joint-Tenants, and one releaſe to one of his Companions; hereupon a Licenſe muſt be had, and a Fine paid.

2. If any Eſtate be made of ſuch Land in Fee-ſimple, Tail, or for Life.

3. If a Partition had been in the Chancery by the Kings Tenants, and it had not been equal, and after they had altered it.

4. If a Fine or Recovery had been of Land to divers uſes, and eſtates of Freehold had been created by this means, there muſt have been a Licenſe; and ſo muſt it have been, though the uſes and eſtates had been with power of revocation or alteration; but in that caſe if the uſes had been after revoked, there had not needed a new licenſe.

But

But the Tenure *in Capite* being now gone, no Licence is requiſite upon ſuch an Alienation. See *Broo.* 27. 18. 17. 33. 45 *Ed.* 3. 62. 3 *H.* 4. 8. *Br.* 4. 33 *H.* 6. 4. 11 *H.* 4. 33. 43 *Ed.* 3. 6. *Co.* 6. 27. Alſo when Lands are aliened in Mortmain, the Lord Protectors Licence muſt firſt be had, elſe the Lands are forfeit. But Licence for Alienation of *Capite*-Land, is taken away by Parliament, *Order* 24 of *Febr.* 1645.

But of the Lands held of the King in Burgage-tenure, or of any Honor of his, and not *in Capite*, there the Tenant might have aliened without any Licence. So alſo though the Lands be held of him *in Capite*, or otherwiſe as above, if it be in theſe caſes following.

1. When by the Alienation no Freehold is made, but there is only a Leaſe for years made.
2. When there is in the caſe but a bare Releaſe of a Right by way of extinguiſhment, as when it is by a *Fine ſur Releaſe*, *&c.*
3. Where there be three Joint-Tenants, and one releaſe to the other two.
4. Where there is only a Rent granted out of ſuch Land by the Tenant.
5. When there is a new Declaration of Uſes only, *Stamf. Pr. fol* 33. *Broo.* 296. *Co.* 6. 27.

Theſe Licences ſo had from the King as before, muſt have been purſued, elſe the Licence would not help them that did alien: And therefore if the Licence had been to alien the third part, and he had aliened the whole, this Licence was void for all. So if the Licence be to alien the Manor of *Dale*, with all his Lands and Tenements in *Dale*; and he alien by Fine a certain number of acres (as he muſt in Fine) this Licence will not help him. So if the Licence be to alien the Manor of *Dale* rendring Five pounds rent, and he alien the Manor excepting twelve acres rendring Five pounds rent, this variance maketh the Licence inſufficient for this Alienation. And then in all theſe caſes it is an Alienation without Licence, 4 *Ed.* 6. 6. *Br.* 30. 23. *Sect.* 2. Licenſe purſue, or not.

But if the Licence be to alien to *I. S.* and *W. S.* and the Conveyanee is made to them to divers uſes, this is a good Licence, and the Licence need not mention the uſes of a Deed, Fine, or Recovery. So if a Licence be to purchaſe Lands or Tenements, and he purchaſe an Advowſon, this is a good Licence; for an Advowſon is a Tenement, *Co.* 6. 27. *Br.* 35.

Upon this Licence had from the King, the party was to pay a Fine or ſum of money to the King, *viz.* upon the Alienation of ſuch Land as was held of him, or any Honor of his *in capite*, the third part of the yearly value; and for a Licence to alien in Mortmain, the value of three years profit, which is by compoſition to be paid preſently before the Licence be granted, *Stamf. Pr. cap.* 27. 8 *Ed.* 4. 4. *Br.* 82. 205. *Co.* 9. 107. 2. 80. But if there had been an Alienation without Licence by the Kings Tenant, where a Licence ought to have been had, there (though the alienation be good) yet the party muſt ſue out his Pardon from the King, and the King muſt have recompence for this wrong done him, which was a Fine only, which is the value of the Land for the year; and for this the King might have ſeiſed the Land and kept it till he were ſatisfied for his wrong, and till he had ſued out his pardon for it: But heretofore the Land it ſelf was held to be forfeited, *Co. ſuper Lit. f.* 43. 1 *Ed.* 3. 12. *Co.* 6 27. But now all Fines, Licences, Seiſures, and Pardons for Alienation and Charges incident thereunto, are taken away by Parliament Order. For reſtraint of Alienation, *r.* Conditions repugnant. *Fine for Alienation*, what.

Of Alimony.

FOr Alimony, which is maintenance for a Woman caſt off by her Husband, this was recoverable by the Woman againſt her Husband in the Spiritual Court; but now there is no Court will relieve her but the Chancery. See *Chancery*. *Alimony.*

Of Apparel.

Apparel. THe Statute that was made in 24 *H.* 3. againſt exceſs of Apparel is now repealed; ſo that there is now no Common or Statute-Law touching Apparel, but that every one may wear what he will, 21 *Jac.* 25.

Hats and Caps. None may make or work any Felt or Hat of or with any foreign wooll or ſtuff, unleſs he have been firſt Apprentice or Covenant-ſervant to ſuch myſterie of Felt or Hat-making ſeven years at the leaſt, *ſub pœna* of Five pounds a moneth, and the loſs of all the Hats made while he doth ſo work, *Stat.* 8 *Eliz. cap.* 11; & 1 *Jac. cap.* 17.

None ſhall make or ſell any Cap or other thing, or Felts, but only Hats, nor any Cap of any woollen cloth not knit. None ſhall dye any Cap with Bark or Swarf, but only with Copperas and Gall, or with Wood and Madder.

None ſhall thick or full any Cap in any Mill, until the ſame be firſt well ſcoured and cloſed upon the back, and half thicked at the leaſt in the Foot-ſtock.

No Hat-maker ſhall take above two Apprentices at a time, and them not under ſeven years. See for Hat-makers in *Norwich*, 33 *H.* 8. *cap.* 16. 1 *Ed.* 6. *cap.* 6. 5 *Ed* 6. *cap* 7.

Of Ambodexter.

AN Ambodexter is (by our Law) one that being a Juror taketh money to ſay his Verdict of the one ſide, and of the other. For this offence he is to be fined ten times ſo much as he takes, and impriſoned, and never to ſerve on a Jury again, 38 *Ed* 3 12. 5 *Ed.* 3. 10.

CHAP. XIII.

Of an Appeal.

Appeal, what. THis word hath two ſignifications: For ſometimes it doth intend an accuſation or ſuit given to one for ſome wrong done to him, or his friend, againſt the wrong-doer: Of which read *Offences.* And ſometimes it is uſed in our Law, as it is in the Civil Law, for the removing of a cauſe in any Eccleſiaſtical Court from an inferior Judg to a ſuperior, when the Plaintiff or Defendant refuſeth the Judg, and deſireth to have his Cauſe tryed in the higher Court before the ſuperior Judg; and then he is ſaid to appeal, as *Paul* did from *Feſtus* to *Cæſar* the Emperor: And he that doth ſo appeal, is called an Appealant, 24 *H.* 8. 12. 1 *Eliz.* 1. *Co. ſuper Lit.*

Appealant.

In what caſes Appeal may be had or not, and how and before whom.

In all cauſes Teſtamentary, cauſes of Matrimony and Divorces, Tythes, Oblations and Obventions, the party grieved that had cauſe to ſue, provoke or procure any Appeal, might ſo do: But he muſt have it within this Realm, and not elſwhere; and in this manner, *viz.* Firſt from the Archdeacon or his Official, if the matter be there begun, to the Biſhop Dioceſan of the ſame See; and if it be begun before the Biſhop Dioceſan or his Commiſſary, then from them within fifteen days after the ſentence given, to the Archbiſhop of that Province, and there it muſt definitively have been ordered without any further Appeal. And that for lack of Juſtice at or in any of the Courts of the Archbiſhops, or in any of the Kings Dominions, the party grieved might have appealed to the King in Chancery, and there by ſpecial Commiſſioners called the Delegates appointed by the King, the matter ſhould have been determined without further Appeal. And if any ſuch cauſe or matter had in any wiſe touched or concerned the King, the party grieved might have Appeal from any of the ſaid Courts

to

to the Upper-Houſe of Convocation, there to be ended without further Appeal, 24 *H.* 8. 12. 25 *H.* 8. 19. 1 *Eliz.* 1. 32 *H.* 8. 6. But in no caſe may a man attempt or labor to have an Appeal to the Pope, or *Rome*, or any other perſon or place out of the Realm, without great danger: For which ſee *Præmunire*, 24 *H.* 8. 12.

But in caſe of privation of a Preſident of a College, or any ſuch like matter which is a meer temporal thing, and as by Patron, no Appeal lieth upon theſe Statutes. As if the Preſident of *Magdalen*-College in *Oxford* had been deprived by the Biſhop of *Wincheſter* the Viſitor, he could not have had an Appeal to the Delegates; for this is out of the Statutes: But it may be he might have had an Aſſiſe, *Dyer* 209. *P.* 20.

And in all caſes, he that doth ſue an Appeal, muſt purſue the order of theſe Statutes, or his Appeal ſhall be diſallowed, and he ſhall have no benefit by it, *Dyer* 240. *P.* 46.

If a Suit begin before the Admiral touching any Civil or Marine matter, the party grieved may appeal from the ſentence of the Admiral into the Chancery before the King, and he is to delegate Commiſſioners to end it without further Appeal, 8 *Eliz.* 5. 25 *H.* 8. 19.

CHAP. XIV.

Of Apportionment.

Apportionment.

IT is the dividing into parts of ſome thing divideable (and not entire and whole) by reaſon of the diviſion or alteration of ſome other things out of which that did come, or on which it hath dependance, or otherwiſe; as Rents, Commons, Conditions, Contracts, Obligations, Suits of Court, Debts, Covenants, Authorities, Damages: About which all the Queſtions touching Apportionment are moved, *Terms ley. Co. ſuper Lit.* 147.

And theſe things divided or altered which cauſe this Apportionment, are ſo divided or altered ſometimes by the act of God alone, and ſometimes by the act of God and Law together, and ſometimes by the act of Law alone, and ſometimes by the act of the Law and the party together, and ſometimes by the act of the party alone: And by theſe means ſuch Rents Commons, *&c.* that did iſſue out of them, or depend upon them, be ſometimes extinct, and ſometimes ſuſpended, and ſometimes apportioned, and ſometimes continue entire and unaltered, as in the Examples following, *Co.* 10. 128.

1. The act of God and Law together.
2. The act of the Law alone.
3. The act of the Law and party together.
4. The act of the party alone.

Rents and Services ſeverable, Commons, Conditions annexed for Eſtates, may be apportioned. But Conditions of Obligations, Contracts, Suit of Court, and Services entire are not apportionable. So Aſſumpſits, *March* 101. *pl.* 172. 57 *pl.* 61.

2. What things are apportionable, and what not.

A Rent-charge ſhall be apportioned by act of Law, and by act of Law when it is mixed with the act of the party, but not by the act of the party, *Co. ſuper Lit.* 49. & 150.

If I let a flock of Sheep, Horſes, or Land to one for years rendring Rent, and part of the Sheep be killed, Houſes burnt, or Land drowned by the act of God, if ſo be it be without any negligence or default in the Leſſee; here the Rent ſhall be apportioned with reſpect to ſo much as is gone, *Dyer* 56.

3. Where and in what caſe Apportionment may be on Rent or other Services.

If a Leſſee for life make a Leaſe for years rendring Rent at *Eaſter*, and before the Feaſt part of the Land be evicted, and the Leſſor live till after *Eaſter*, and then die; here the Rent ſhall be apportioned, and ſo much abated as is of the Land evicted, *Co.* 10. 126.

If I let Lands or Goods for years rendring Rent, and during the Term a ſtranger

recover part of the Lands or Goods by a good Title; in this Case the Rent shall be abated and apportioned, having respect to what is recovered: As if I be seized of two Acres of Land, one in Fee, and the other in Tail: And I make a gift in Tail, Lease for life or years of both, rendring Rent, and after my death the Issue in Tail avoideth the Gift or Lease for the one Acre, here the Rent shall be apportioned. *Co.* 10. 128. *Dyer* 81. 67. 212. 38. 56. 7 *H.*7. 4. *Co. super Lit.* 148.

If I be seized of two Acres of Land, the one in Borough-English, the other in Gavel-kinde, for years, rendring Rent, and have Issue two sons and die, and the Land go betwixt them (as it must) in this Case the Rent shall be divided between them, *Dyer* 46.

If a Lessee for years or life do surrender part of his Land, or do commit Wast, or make a Feoffment of part of his Land, and the Lessor recover the place wasted, or enter on the Land aliened for a Forfeiture (as he may) or if he enter upon part upon the breach of a Condition: In this Case the Rent shall be apportioned, and he shall pay but *pro rata.* of the Land is left in his hands, *Dyer* 45. *Co. super Lit.* 148. 214.

If my Father purchase part of the Land, out of which I have a Rent-charge, and dye, and that part of the Land descend upon me; in this Case the Rent shall be apportioned, and I shall recover a part of the Rent still, according to the value of the Land: And so it is if the Tenant of the Land make a Gift in tail of part of the Land to my Father, and this descend to me; and so it is also if my Father be Grantee of a Rent in Fee, and I purchase part of the Land charged, and my Father dieth, and the Rent descend to me; and so it is also if the Grantee grant the Rent to the Tenant of the Land and a stranger, the Rent shall be apportioned, and is extinct but for a Moyety, and the Grantee shall have a part of it of the stranger still. And in all Cases where any part of the Land descend to him that hath the Rent-charge, the Rent shall be apportioned. See *Co. super Litt.* 149. *f. Lit. Sect.* 224. 34 *H.*6. 41. *Plow.* 419. *Co. super Lit.* 149.

If a man have Issue two Daughters, and grant a Rent-charge out of his Land to one of them, and dieth, the Rent shall be apportioned: And so if the Grantee in this Case enfeoff another of her part of the Land, yet the one half of the Rent remaineth out of her Sisters part, and after partition shall be revived: So if one have a Son and Daughter, by one Venter, and a Daughter by another, and grant a Rent-charge to his Son in Fee, and he die, and the Rent come to his Sister, and after the Land come between them, *Co super Lit.* 225. 7 *H.*6. 3. 34 *Ass. p.* 15.

If one seised in Fee of Land, take a Wife, and make a Feoffment, and the Feoffee grant a Rent-charge to the Husband and Wife, and after the Husband die, and the Wife is endowed of part of the Land, out of which the Rent doth go: Now two parts of the Rent shall continue and be apportioned, and the third part extinct, *Co.* 9. 135. 20 *Ass. p.* 10.

One having a Rent-charge of Twenty shillings, grants Ten shillings, part thereof, to a stranger; this is a good Grant, and thereby the Rent is apportioned, 9 *H.* 6. *B.* 13. *A.*

One having a Rent-charge of Twenty pounds, releaseth to the Ter-tenant five pounds parcel thereof; this is good. *Old Tenures* 10 *B.*

A. doth lease to *B.* for life, rendring a Rent, and doth after release part of the Rent; this is good. 9 *Ed.* 3. 8. *Br. Release* 83.

Rent-seck which was once Rent-service, is apportionable.

If two Daughters, and Heirs be, and one is full age, and the other not, the Services shall be apportioned, and the Lord shall have the Moyety still, 7 *H.* 6. 3. *Br. Entring* 17.

If one have a Rent-service of Money, or Corn, or Pepper, *&c.* Issuing out of Land and purchase part of it in Fee, the whole Rent is not extinct, but shall be apportioned *juxta valorem terræ*; and so also it is of other Services if they be dividable, but if they be entire and they be valuable as a horse, or the like, then they be gone and extinct; But if it be Homage or Fealty, that doth continue: And if parcel of the Land held by such entire Service come to the Lord by descent; if the Service be

be Suit-ſervice that are annual, that they are extinct alſo; and if they be yearly and valuable as a Horſe, or the like, that they ſhall be multiplied, and not apportioned in neither Caſe: So if the Service be *pro bono publico*, yet they ſhall not be apportioned, but continue entire ſtill. *Co. ſuper Litt.* 143. 149. *Co.* 9. 135. *Co. ſuper Lit.* 149.

If one Leaſe three Acres, rendring three ſhillings Rent, and a ſtranger buy the Fee of one of them, or the Leſſor Deviſe by Will the Fee of one of them, now the Rent ſhall be divided, and the Purchaſor ſhall have ſeven pence of the Rent. So if the Tenant make a Feoffment of parcel of the Land, out of which Rent is to go to a ſtranger: So if the Leſſee or his Aſſignee grant or ſurrender one Acre to the Leſſor; in this Caſe the Rent ſhall be divided, and the Leſſee ſhall pay leſs Rent by ſo much. And this is true, though it be in Caſe of the King, that the Reverſion is his, *Co. ſuper Litt. f.* 149. 148. 147. *Dyer f.* 4. & 5.

If there be Leſſee for years, rendring Rent, and he aſſign his Term to the Wife of the Leſſor, and a ſtranger, the Rent ſhall be apportioned, and the ſtranger ſhall pay half during the life of the Wife, *Plow.* 10.

If one make a Leaſe of two Acres, rendring Rent two ſhillings, on condition, that if he do ſuch an Act, he ſhall have the Fee; now if the Contingent happen, and that he have the Fee of one, then the Rent ſhall be apportioned, *Co. ſuper Littl.* 148.

If the Gardein in Chivalry entreth into the Land of his Ward within age, now is the Seigniory ſuſpended: But if the Wife of the Tenant be endowed of a third part of the Tenancy; in this Caſe the Rent ſhall be apportioned, and ſhe ſhall pay to the Lord a third part of the Rent. *Fitz. Dower* 138. *Co. ſuper Lit.* 148.

If the Tenant give a part of the Tenancy to the Father of the Lord in Tail, the Father dieth, and this deſcends to the Lord; in this Caſe the Rent or Service ſhall be apportioned, and ſo is the Law of a Rent-charge, *Co. ſuper Littl.* 148.

If two Joynt-tenants or Co-parceners be of a Seigniory, and one of them Diſſeiſe the Tenant of the Land, the Service ſhall be divided, and the other Joynt-tenant or Co-parcener ſhall diſtrain for his or her Moyety, *Co. ſuper Litt* 148.

Condition.

Where Land to which a Condition is annexed, is divided by Act in Law, as where part is recovered by an elder title, or part doth deſcend, there the Condition ſhall be apportioned, and ſhall remain to the reſidue, *Dyer* 309. *Co.* 5. 59.

If one be ſeiſed of two Acres of Land of ſeveral natures (*i.*) the one in Fee-ſimple, the other of the Cuſtom of Burrough-Engliſh, and make an Eſtate of them both together on condition, and die, and one Acre deſcend to one Heir, and another to another Heir; in this Caſe the Condition ſhall be apportioned, and both the Heirs ſhall take advantage of it, *Co.* 4. 120. *Dyer* 309.

4. How and in what a Condition may be apportioned.

If a Leaſe be made on Condition, and the Leſſee do Alien part of the Land leaſed in Fee, or commit waſte, and ſo commit a Forfeiture, and the Leſſor enter, or recover it from him; in this Caſe the Condition ſhall be apportioned, and remains with the reſidue: For a Condition may be apportioned by Act of Law, but not by the act of the party, *Co* 4. 120.

Of a *Common.*

If one purchaſe part of the Land out of which another hath Common Appendant; in this Caſe the Common ſhall be apportioned, *Co.* 8. 79. 4. 37. *Dyer* 339.

Apportionment in Common Appendant and Appurtenant.

If one have Common Appendant or Appurtenant to Land, and he fell away part of it; in this Caſe the Purchaſer ſhall have Common *pro rata*, and there ſhall be an Apportionment, *Co* 8. 79. 4. 37.

If he out of whoſe Land the Common is taken, do purchaſe part of the Land, to which the Common is appendant, yet the Commoner ſhall have an Apportionment for the reſidue, *Co* 4. 37, 38.

If one have Common in certain in twenty Acres of Land, and ten of thoſe deſcend to the Commoner; in this Caſe the Common ſhall be apportioned, and he ſhall have Common in the reſidue: But if he have Common *ſans number*, then he ſhall have Common ſo ſtill, *Co. ſuper Lit* 149.

Two

Of *Warranty*, how it may be apportioned by Act of the Law. not by act of parties

Two Joynt-tenants with warranty, the one makes a Feoffment the warranty is not divideable, 29 *Ed.* 3. 70.

If two Joynt-tenants with warranty make partition by writ, the warranty remains by force of the Statute, 31 *H.* 8. For a warranty may be apportioned by Act of Law, but not by act of the party, 38 *Ed.* 3. 20. 48 *Ed* 3. 17. 6 *Rep.* 12. *b.*

Of *Execution.*

If Execution be ſued of Lands upon a Statute, and after the Inheritance of part of thoſe Lands deſcend to the Conuſee, all the Execution is avoided, and there ſhall be no Apportionment; but if the deſcent had been before Execution, *Contra. Co. ſuper Litt. f.* 150.

Of an *Annuity.*

A. grants an annuity of ten pounds a year to *B.* *B.* grants to *C.* five pounds parcel of the ſaid annuity of ten pounds, *A.* ſhall be liable to pay five pounds to *C.* *F. N. B.* 152.

5. How Apportionment ſhall be made. Where and in what Caſe not.

Rent ſhall be apportioned to the value of the Land purchaſed, and not according to the quantity, 18 *Ed.* 2. *Avowry* 218. Adjudged.

If one grant to another a Penſion of twenty pounds yearly, whiles he doth keep him company, to be paid ſuch a day, and before the day the Grantor die; in this Caſe there ſhall be no Apportionment, but the whole Rent is gone, *Co* 10. 128.

Of *Rent-charge* purchaſe part during ſuſpenſion

If I have a Rent-charge iſſuing out of Land, and purchaſe part of the Land, the whole Rent is extinct, and ſhall not be apportioned, but by Agreement of the parties it may be received again: So if I enter upon part of the Land, the Rent ſhall be ſuſpended, and not apportioned, *Co. ſuper Litt. fol.* 147. *Deſſ. lib.* 2. *cap.* 16. 7 *H.* 6. 26. *Bro.* 3.

If there be Lord and Tenant of Twenty Acres of Land by fealty, and twenty ſhillings Rent; if the Tenant make a gift in Tail, a Leaſe for life or years, of parcel thereof to the Lord, in this Caſe the Rent ſhall not be apportioned but is all ſuſpended: But if the Lord purchaſe part in Fee of the Tenant, the Rent ſhall be apportioned, *Co. ſuper Lit.* 148.

If the Leſſor enter upon part of the Land of his Leſſee for life or years, and Diſſeiſe or out him, the Rent is ſuſpended for the whole, and ſhall not be apportioned for any part, 4 *H.* 7. 6. *Co. ſuper Litt.* 148.

If one have a Rent-charge out of Twelve Acres, and releaſe the Rent out of one of the Acres, the Rent ſhall not be apportioned and be chargeable upon the reſt, 34 *Aſſ. p.* 15.

If a Tenant Infeoff his Lord, and another in Fee, the Rent ſhall not be apportioned, but is all extinct, 7 *H.* 6. 3.

If one hold his Land of his Lord by the Service, to render to the Lord yearly at ſuch a Feaſt, a Horſe, a Golden Spur, a Clove, a Gilliflower; If in this Caſe the Lord purchaſe parcel of the Land, the whole Service is gone, and there ſhall be no Apportionment; and ſo alſo is the Law, where parcel of the Land held by ſuch entire Service come to the Lord by Deſcent, there ſhall be no Apportionment; for in ſome caſes the Service doth remain entire, and in ſome caſes it is extinct, *Co. ſuper Littl. f.* 149. *Co.* 8. 105.

If Tenants in Tail, or for life Leaſe part of the Land to others for years, there ſhall be no Apportionment, but the Tenant in Tail, or Leſſee for life ſhall be ſtill charged with the whole Rent, 22 *Aſſ. p.* 52.

If one make a Leaſe for years rendring Rent, and after the Leſſee aſſign over part of the thing leaſed, it ſeems here ſhall be no Apportionment of the Rent, *Dyer fol.* 45.

If one grant a Rent-charge out of two Acres, and after the Grantee recovereth one of the Acres by title Paramont, againſt the Grantor; in this Caſe there ſhall be no Apportionment of the Rent: For if it were true, the whole Rent ſhall iſſue out of the other Acre; if otherwiſe that it were fained, it is all extinct, *Doct. & Stu. l.* 2. *c.* 17. *Co. ſuper Lit.* 148.

If *A.* Enfeoff *B.* of one Acre in Fee on Condition, and *B.* being ſeiſed of another Acre in Fee, grant a Rent out of both to the Feoffer, and *A.* re-enter for the Condition broken; here ſhall be no Apportionment, *Co. ſuper Littl. f.* 148.

If

If one make a Leaſe for years or life, rendring Rent at *Michaelmas*, or twelve days after; and before the laſt day of payment of the Rent, the Land is evicted from the Leſſee; in this caſe ſhall be no Apportionment, for Rent ſhall never be apportioned in reſpect of time. And ſo it ſeems if a Leaſe be for the life of the Leſſee, on condition he ſhall pay Twenty pounds a year at *Michaelmas*, and he die before *Michaelmas*, that the whole Rent ſhall not be apportioned. And ſo if a Tenant for life make a Leaſe for years, rendring Rent at *Michaelmas*, and the Tenant for life dieth, here Rent ſhall not be apportioned, but is all loſt, *Co.* 10. 128. *Opinio Bridgman Juſt. Co* 10. 128.

If I let a flock of Sheep, or Houſes, or Land to one for years rendring Rent, and part of the Flock, Houſes, or Land be ſpoiled by the act of God, and default or negligence of the Leſſee together, here ſhall be no apportionment, but the whole Rent ſhall continue ſtill, *Dyer* 56.

If three Joint-tenants hold by an entire yearly Rent, as of a Horſe, or of a grain of Wheat, and the Tenant ceaſe by two years, and the Lord recover two parts of the land againſt two of them, and the third do ſave his part by tendring his Rent, and giving ſurety, &c. In this caſe the Rent ſhall not be apportioned, but is all extinct, *F. N. B.* 209. *Co. ſuper Lit.* 149.

If a Leaſe be made on Condition that the Leſſee ſhall not alien the land or any part of it without the licence of the Leſſor, and he licence him to alien part; now the Condition is gone of the whole, and ſhall not be apportioned, and he may after alien the reſt without licence, *Co.* 4. 120. *Co* 8. 79. *Co. ſuper Lit.* 215.

If one leaſe three Acres for years or life, rendring Rent upon a Condition, and after ſell the Reverſion of one of theſe Acres; now in this caſe there ſhall be no Apportionment of the Condition, but it is deſtroyed in all. So alſo if the Leſſee let or ſurrender part of the land to the Leſſor. So if the Leſſor enter upon part of the land wrongfully, the Condition is not to be apportioned, but is ſuſpended in all, *Co.* 4 120. *Co.* 5. 54. *Dyer* 308.

If two Joint-tenants be with Warranty, and they make partition without Writ, the Warranty is deſtroyed, *Co.* 6. 12.

If I have Common appurtenant to Land, and purchaſe part of the Land, the Common ſhall not be apportioned, but is all gone and extinct, *Co.* 4. 38. 38. 79.

If *A.* hath Common of Paſture *ſans number* in twenty Acres of Land, and ten of thoſe Acres deſcend to *A.* the Common ſhall not be apportioned, but doth remain entire: And ſo it is of Common of Eſtovers, of Turbary, of Piſchary, &c. *Co. ſuper Lit.* 149.

If Lands be held by ſuit of Court, and it deſcend to Daughters, the ſervice ſhall not be divided, but the eldeſt ſhall do all, and the reſt ſhall contribute; and if the Lord purchaſe part of the Land, the whole is extinct, 40 *Ed.* 3 *Br.* 2.

If a Leaſe for years be made, rendring Rent at four days in the year; this Rent is not ſo entire, but it may be divided, and after the firſt day is paſt, the Leſſor may bring an action of Debt for that Quarters Rent. So alſo if one be to pay money by the Condition of an Obligation or Recognizance, or by a Covenant at ſeveral days; after a Failer the firſt day, the Obligation, Recognizance, or Covenant may be ſued. But upon a ſingle Obligation, or a Contract or promiſe to pay money at ſeveral days, there no Action can be brought for the Debt, until all the days be incurred, and the Debt ſhall not be apportioned, *Co.* 10. 128. *Lit. f.* 117. *F. N. B.* 267. *Dyer* 103.

If the Condition of an Obligation be to pay Four pounds at a day, and at the day the Obligor pay Three pounds, now the Condition ſhall not be divided, but the Obligation is all forfeit as if he had paid no part of it, 20 *H.* 6. 23. *Br.* 1.

If one promiſe me Three ſhillings a week for his Diet and Lodging, and I find him Diet, but not Lodging; this Debt ſhall not be divided, neither can I bring an action of Debt for the Diet, by or upon this Contract, 9 *Ed* 4. 1. *Br.* 2.

If one promiſe to ſerve me a year for Ten pounds, and before the year be expired he

Of a *Condition.*

Sect. 2. Condition

Of a *Warranty.*

Of a *Common.*

Common ſans nombre

Of *Suit of Court.*

6. Where a Debt upon a Specialty or Contract ſhall be divided, and where not.

Contract, how taken.

Obligation

Diet & Lodging

he depart out of my ſervice or die, or I diſcharge him, and he agree to it; now in this caſe the money ſhall not be divided, and therefore he hath no remedy for any part of his money: But if the money were to be paid quarterly, and he overlive the quarter, then he ſhall have the Quarteridg.

If I have land in the right of my Wife, and I ſell twenty Trees upon that land for twenty pounds, and the Vendee cut ſome of them, and my Wife die before the reſt be cut; now in this caſe the debt ſhall not be divided, neither can I ſue for any part of the twenty pounds, but am without remedy, 10 *Ed.*4 18. 10 *H.*6.25. 3 *Ed.*4.6. *Br.*25.

If a Leſſee covenant to pay the Rent, and after ſurrender part of the Land, or be evicted out of part by title Paramount; it ſeems the Rent ſhall not be apportioned, and that the whole muſt be paid ſtill, *Hil.* 7 *Jac. B. Regis.* See more in *Contract*, in *Extinguiſhment.*

7. Contribution. It is where a burthen or charge is to be laid, or ſomewhat had from divers, and one ought to bear it as well as another: But if it is wholly laid upon one, in this caſe *Equality.* the Law (that delighteth in equality) will give him relief againſt the reſt, *Co.* 2. 25. 11 *H.* 7. 12.

If one bind him and his heirs by a Specialty, and die, and his Land deſcend to divers heirs, here they ſhall be equally charged. So likewiſe upon a Warranty where his Land doth after go to divers perſons as heirs, they muſt all be vouched, *Co. ſuper Lit.* 143.

So if one have entred into a Statute, and ſold his Land after to divers, and the Statute is extended upon one, he ſhall have Contribution againſt the reſt: *Ipſæ etenim leges cupiunt ut jure regantur.*

If one hold three Manors by Knights ſervice of divers Lords all of equal value, he cannot deviſe two Manors, and leave the third to deſcend; but he muſt leave a third part of each Manor to deſcend for the benefit of every Lord, *Co.*2.25.

If a Lord of a Manor would approve Common, he cannot take it all out of one Village, and leave it in another, according to the Statute, but he muſt leave it in the ſame, *Co.*2.25.

Sect. 5. In theſe and ſuch like caſes therefore the Law willeth, that there ſhall be a Contribution. And to give relief in ſome of theſe Cauſes, are the Writs of *Contributione facienda, & de onerando pro rata portionis:* which Writs are of great affinity, the one ſeeming to be the *Genus* of the other. (See more for *Apportionment*, in *Contracts, ſect.* 7. *Rent, ſect:* *Common, ſect.* 5. *Condition, numb.* 15. *Services, ſect.* 6. *Debt.*)

Contributione facienda. De onerando pro rata portionis. The firſt being defined to be, *A Writ that lieth in caſe where more are bound to one thing, and one is put to the whole burden.* And the laſt, *A Writ that lieth where one is diſtrained for a Rent that ought to be paid by others proportionally with him.* So that it ſeems the firſt doth lie in moſt or all caſes where the latter doth lie, but not *è contra. Terms of the Law, F.N.B.*234.

Where the firſt lieth or not, and where Contribution ſhall be made or not. If Tenants in common or Joint-tenants hold a Mill *(pro indiviſo)* and equally take the profits thereof, the Mill falling to decay, and one or more of them refuſing to contribute towards the reparation thereof, the reſt ſhall have this Writ to compel them, *Fitz. N.B.*162. *Marlb. cap.*3.

If there be three Coparceners of land that have ſuit to the Lords Court, and the eldeſt perform the whole, then may ſhe have this Writ to compel the other two to a Contribution of the Charge, or to one of them, if one only refuſe. *Wens.*

Where one only ſuit is required for land, and that land being ſold to divers, ſuit is required of them all or ſome of them by diſtreſs, as intirely as if all were ſtill in one; here he may have remedy againſt the reſt, *Old N.B. f.*143.

If many are infeoffed of any land, for which ſuit ought to be done, *&c.* Now if they agree among themſelves, that one of them ſhall make the ſuit, and the reſt ſhall be contributory, and the one doth the ſervice, and the reſt do refuſe to contribute; in this caſe he may have this Writ, and therein he muſt make mention of the agreement; and if there be no agreement, and one be charged for the reſt with all the ſervice, he may have this remedy, *Lit.*162.*c.*

If

If a Charge come upon a Hundred or Tything, and it be laid upon one alone, it ſeems he may have his remedy by this Writ, *Fitz. Avarie* 191. *New Terms of the Law*, 99. *b.*

If Dower of the Tenant voucheth the Heir in Ward to three ſeveral Lords, each of them ſhall be equally charged, *Co.* 3. 14. *a.*

If two, four, or more men be ſeverally ſeiſed of Land, and they all joyn in a Recogniſance, in this Caſe. If the Conuſee extend the Land of any of the Conuſers allone, he may have Contribution; for all ought to be equally charged, and not one alone without the reſt, *Idem Co.* 3. 14. *a.*

If Judgment be given againſt two Diſſeiſors in Aſſiſe for the Land and damages, and one Diſſeiſor dieth, the Execution ſhall not lie onely on the ſurviving Diſſeiſor, but the Heir and the Diſſeiſor ſhall be equally charged, and Execution ought not to be Awarded againſt the ſurviving Diſſeiſor, *Idem Co.* 3. 13. *b.*

See more of this in Statute, *Numb.* Where the Land of one is charged by a Statute, he ſhall have Contribution againſt the reſt. But if two be bound in an Obligation, and one of them be charged with the whole, the other ſhall not have Contribution, unleſs it be by ſpecial cuſtom as in *London*, *Old Book of Entries*, *fol.* 261. 126.

If a man hold ten Plough-Land, and by Fealty, and twenty ſhillings Rent of the King, and the Tenant let one Plough-Land to one man, another to another in Fee, and ſo the reſidue to others, and the Kings Officers diſtrain one of them for all therein, now he may have this remedy againſt all the reſt. So if the Kings Tenant have aliened to divers, and hath ſome of the Land in his own hands, and he be diſtrained for all; if he did alien by the Kings Licenſe, he ſhall have remedy againſt the reſt, *F. N. B.* 235. *a.*

And if a man that holdeth one hundred Acres of Land ought to repair a Bridge, by reaſon of his Tenure of theſe one hundred Acres, now if he alien in Fee twenty of theſe Acres to one, and twenty to another man, and after one of them alone is diſtrained to repair this Bridge, upon a Preſentment made of it; in this Caſe he may have a ſpecial Writ, directed to the Kings Officers, that they ſhall not diſtrain him, but according to the rate of the Land he hath, *Fitz. N. B.* 235: *B.* See more in *Taxes* and *Rates.*

CHAP. XV.

Of Arbitrement.

Arbitrement. IT is an *Award*, *Determination*, or *Judgment*, which one or more doth make at the requeſt or agreement of two or more, for and upon ſome Debt, Treſpaſs, or Controverſie between them; for the ending and deciding of which, the parties have choſen and authoriſed them as Judg or Judges. It is a Judgment given by ſuch as are elected by the parties unto the Controverſie, for the ending and pacifying of the ſaid Controverſie according to the *Compromiſe* and *Submiſſion*, and agreeable to Reaſon and Conſcience. And therefore they are called *Arbitrators*, Judges indifferently choſen by the parties that have power to give a definitive ſentence in the matters of difference; and this *Award* or *Sentence* is called a *Judgment.*

Arbitrators.

This doth differ from an *Accord* herein onely, that this is made by the parties themſelves, and that by the mediation of Friends.

The difference and agreement between Arbitrement and an Accord.

2. This is no Plea to an Action upon the things accorded, if the thing awarded be not done, for there be means to compel the doing of it; but that is a good Plea to any Action brought upon any thing put in *Arbitrement*, though the thing awarded

be not done; if there be means to compel him to it, that was awarded to do it, 19 *H.6.* 37. *Plow.* 11. *Kelw.* 121. *Dyer* 75.

Umpire, what. An *Umpire* is the ſame in effect with an *Arbitrator*: *Judex honorarius, non à lege datus, ſed ab iis qui litigant electus qui totius rei habet poteſtatem ad arbitrandum non ex lege & ſtricto jure, ſed prout ipſe æquum eſſe exiſtimet.* And he is by the parties to order the matter, if the Arbitrators cannot agree, or do not make the Award by the time ſet.

Submiſſion or Compromiſe, what. A Submiſſion or Compromiſe, *Compromiſſum eſt ſimultanea illa partium promiſſio, qua ſua ſponte ad alicujus boni viri arbitrium ſuam remittunt Controverſiam:* And this is ſometimes in writing (which alſo may be made by the parties reciprocally, or to the Arbitrator) as by Obligation, Recognizance, Covenant, *&c.* or by word onely, and both theſe are ſometimes abſolute, and ſometimes conditional, as if the Award be made by a day, *&c.* and ſometimes general of all matters, and ſometimes particular of ſome one or more matters. And this is alſo expreſs, or implied: For in an *Obligation* or *Aſſumpſit* to abide an *Award* is an implied ſubmiſſion, and upon a bare ſubmiſſion, an Action may be brought if the *Award* be not performed, if it be to pay money, *&c.* *Co.* 10. 131. 5. 78. 20 *H.6.* 18. *Brown* and *Dennigers* Caſe. *Trin.* 18 *Jac.* *Cyprian Salters* Caſe, *p.* 9.

Sect. 1. 1. The fruit and effect of Arbitrement. The fruit and effect of an Arbitrement is this; That if it be a good and binding Arbitrement, and any thing be given or awarded for any wrong done in recompence, and it be either paid or performed; or if it be ſuch a thing for which the party to whom it is awarded, hath means to come by it, or ſome thing in amends for not performance of it, as where there is an Obligation or Aſſumpſit to perform it, it is an Extinguiſhment of the wrong and controverſie thereabout; ſo that the cauſes of Suit before, *Tranſeunt in rem judicatam*, inſomuch, That if the party ſue again for any of thoſe matters, whereupon the Award hath been made; that Award being pleaded to it, will be a bar to him in his Suit: As if he ſay, That they ſubmitted to the Award of *J. S.* for that matter alone, or that with others; and that *J. S.* awarded him to pay ſo much money ſuch a day, and that the day of payment is not yet come, (for an Arbitrement that one of the parties ſhall pay money, doth give an Action for the money:) Or if it be paſt, then that he paid, or at leaſt tendred the money at the day (for ſo he muſt ſay.) But if the party pay not the money, then is the other party reſtored to his firſt Action; yet ſo as it is at his election, to have an Action upon the Award, or to ſue upon the firſt cauſes; but if payment be made, the firſt wrong is altogether determined by the Award. And if the Submiſſion be by Obligation, and the Award be, that one ſhall pay the other money, the party may have an Action upon the Obligation, or upon the Award at his choice, 21 *Ed.* 4. 41. 33 *H.6.* But if there were a Submiſſion, and no Award, or an Award that is not good in Law, which is all one with no Award, or there be onely a bare Submiſſion without Bond or Aſſumpſit, and the Award be to do ſuch a thing as for which the party to whom it ſhould be done hath no remedy, being a collateral thing as to make a Feoffment, *&c.* or any thing elſe but payment of money: In theſe Caſes the party ſhall not be barred in any Suit upon the matters put into Compromiſe; neither will any Action lie for the not performance of ſuch an Award. *Ex nuda ſubmiſſione non eritur actio:* But if the Submiſsion be by Obligation, or an Aſſumpſit, and a Collateral Act be awarded to be done, and it be not done, the Obligation is forfeit, or the money promiſed to be paid by Aſſumpſit, if it were not performed, may be recovered, 6 *H.7.* 1. 11. *Plow.* 6. 49 *Ed.* 3. 3. 20 *H.6.* 41. 9 *Ed.* 4. 51. 6 *H.7.* 11. 8 *H.6.* 25. *Dyer* 75. *Co.* 5. 78. 5 *Ed.* 4. 7. 16 *Ed.* 4. 9. 9 *Ed.* 4. 51. 20 *H.6.* 12. 40. 5 *Ed.* 4. 7. 8 *H.6.* 25. 16 *Ed.* 4. 8. 49 *Ed.* 3. 3. 33 *H.* 6. 2. 4 *H.6.* 1. 21 *H.7.* 28. 9 *Ed.* 4. 44. *Plow.* 6. 5 *Ed.* 4. 47. 19 *H.6.* 38. 19 *H.6.* 38. 20 *H.6.* 9. 5 *Ed.* 4. 7. 9 *Ed.* 4. 44. *Co.* 5. *Samons* Caſe.

But ſome hold that an Action lieth in ſome Caſes for non-performance of an Award upon meer Submiſsion, although it be to perform a Collateral Act as to make a releaſe, and he ſhall declare upon a mutual promiſe to perform the Award, 20 *H.* 6. 20. *A.* 10. *Rep.* 131. *A. Trin.* 18 *Jac.* *B. B. le Roy*, *Broom* and *Doning*. *Co.* 8. 98.

The

The Award of a Perſonal Chattel, as if an Award be that *J. S.* one of the parties ſhall have a Horſe in queſtion between them, doth alter the property, and give it to *J. S.* ſo that *J. S.* may have an Action of Detinue for it: And ſo alſo it ſeems it doth of a Chattel real; but in real matters which concern Free-hold, an Arbitrement can neither give a Title, nor binde a Right, *Dyer* 183. 21 *H.7.* 29. 14 *H.* 4. 19.

An Arbitrement can give no Title concerning Free-hold, nor bind a Right.

But if the Award that is made be faulty in any of the particulars following, or there be never any Award made, then for not performing ſuch a part of the Award, as is not good; no Action will lie upon the Obligation or Aſſumpſit to perform it, neither doth the Award in that Caſe where it is defective produce any effect; for no Action will lie upon it, *Co.* 10. 131. *Hains verſus Honywood, M.* 4 *Jac.*

The Husband may ſubmit himſelf to an Award for himſelf and his Wife, for the Goods and Chattels he hath in the Right, and by reaſon of his Wife; and this will binde the Wife, 21 *H.*7.29. 13 *H.*4. 12. 10 *H.*6.14.

What perſons may ſubmit to an Award, and what ſhall be ſaid to be good Submiſſion in any Body's Law, and what not.

If an Infant binde himſelf to perform an Award by Bond, the Bond is void. So if a ſtranger binde himſelf, that an Infant ſhall perform an Award: the Bond is void, *March.* 111. *pl.* 189. & 141. *pl.* 215. For an Infant cannot ſubmit to an Award, nor any body for him, *March.* 111. *pl.* 189.

If divers have done a wrong to one, and one of theſe, and he to whom the wrong is done may ſubmit to the Award, and if an Award be made, the others that were no parties to the Submiſſion, may take advantage of it to extinguiſh the wrong, 7 *H.*4. 31. 20 *H.*6. 12.

A Submiſſion to an Award by a Deputy, as if the one party himſelf, and a Deputy for, and in the name of the other ſubmit to an Award; this is a good Submiſsion, and the Award that ſhall be made upon it will be good, *Dyer* 270.

If divers be parties to the Submiſsion, and one ſubmit at one time, and another at another time, it ſeems this is not a good Submiſſion; but they muſt ſubmit all at one time, 4 *Juſt. Bridg.*

If the Submiſſion be of all Actions, Cauſes of Action are not contained within this, *Co. ſuper Littl.* 285.

But if the Submiſſion be of one thing, within it may be included any thing incident to that thing; and of it an Arbitrement may be made within this Submiſſion, 8 *H.*6. 18. 19 *Ed.*4. 1. 5 *H.*7. 22.

How a Submiſſion ſhall be expounded.

If the Submiſſion be by Obligation with Condition to perform the Award, ſo as it be delivered *utrique eorum* before a day: Now by this it muſt be delivered to each of the parties, elſe it is not ſufficient, *Br. Condition*, 46.

Though a Submiſſion be by word or writing, and be naked, or cloathed and joyned with an undertaking by Obligation or Aſſumpſit, yet before the Award be made, it may be countermanded, and the Arbitrators diſcharged of the work, but with theſe differences.

Countermand of a Submiſſion, where it may be, and where it ſhall be good, and where not.

1. That where there is a naked Submiſſion by word, that may be revoked by word; but if it be in writing, the countermand muſt be by writing, for it muſt be *eodem modo*, as the Submiſſion is.

2. If the Submiſſion be naked, and either of the parties countermand it, and diſcharge the Arbitrators, the other hath no remedy againſt him: But if he undertake by Eſpecialty, or Aſſumpſit to abide the Award of *J. S.* and do countermand, and revoke it; though the Revocation be good, yet he is ſubject to Suit on the Eſpecialty or Promiſe, for he hath broken his promiſe.

3. In both, and all theſe Caſes, where the party will have his Submiſsion revoked, he muſt give notice of his minde therein to the Arbitrators. But if there be two or more of the one ſide that do ſubmit to the Award, one of them cannot revoke the Submiſſion without the reſt, eſpecially if it be by Deed, *Co.*8. 81. *Fitz. Arbitr.* 21. *Co.*5. 78. 21 *H.* 6. 30. 5 *Ed* 4. 3. 8 *Ed.* 4. 10. 8 *Ed.* 4. 12. 10. 28 *H.* 6. 6. 21 *H.*6. 30.

5. The duty of Arbitrators, and how they ought to demean themſelves.

When the parties have ſubmitted themſelves, the Arbitrators may either refuſe to meddle with it, or accept the burthen of it: And if they will accept it, the parties are to notifie their Controverſies to them, or elſe they are not to take any notice of it

(but they cannot enjoyn any oath to Witneſſes, and yet may take any evidence that any man will voluntarily by oath confirm) after they have underſtood the cauſe, and heard the parties and matters fully, they muſt make their Award *Secundum allegata & probata*, and they muſt do this themſelves; for they cannot transfer their power to another, or make Deputies, (for an Award ſo made will not be good) becauſe they are Judges of the matter by conſent. After they have made the Award, if by the Submiſſion it be provided for, that it ſhall be publiſhed or notified, then it muſt be done, and ſo done as the Submiſſion is; as if the condition be, that it ſhall be by writing themſo: if to all the parties, then ſo it muſt be, and till then it is no good Award. But if it be left to the diſcretion of the Arbitrators, and no order be taken by the Submiſſion for the publication of it, the Arbitrators are not bound (but in honeſty) to notifie it, and the parties are bound to take notice of it; but if one be to do a thing that depends upon another thing firſt to be done by the other party, he muſt have notice of this, 8 *Edw.* 4. 10. 47 *Edw.* 3. 21. *Co.* 5. *Samons* Caſe, 8 98. 8 *Ed.* 4. 11. 8 *Ed.* 4. 21. 1 *H.* 7. 5. *Plow.* 218. *Co.* 4. 82. 5. 103. 8. 82. 8 *Ed.* 4. 21. 20 *Ed.* 4. 8.

If the Submiſſion be, that the Award ſhall be delivered to the party, *&c.* before a day if he deſire it, if he deſire it not, he muſt take notice of it at his peril, 8 *Ed.* 4. 18, 21.

If divers of the one ſide, and divers of the other, ſubmit themſelves to the Award of divers, the Arbitrators may make an Award for matters between them joyntly, and for matters between them ſeverally; and they may make an Award between ſome of the one part, and ſome of the other, and not meddle with the reſt, unleſs the Submiſſion be ſo, as they muſt meddle with all or none: For an Arbitrator may proteſt againſt medling with ſome parcel, and make an Award of the reſt, if the Submiſsion will warrant it, and an Award made of that parcel which is within the Submiſsion, is good, 2 *R.* 3. 18. 21 *H.* 7. 29. *Plow.* 289. 22 *Ed.* 4. 22. 19 *H.* 6. 6.

6. What Matters are Arbitrable, and what not.

The moſt proper matters for Arbitrements, are perſonal wrongs, and uncertain duties, as Treſpaſſes, and the like: But moſt things may be referred to Arbitrement, as differences about Land, and Eſtates therein: Chattels real or perſonal, choſes in Action, Reckonings, Accompts, and the like. *Dyer* 183. *Co.* 5. 78.

Sect. 3.

But Arbitrators cannot diſpoſe of Land by their Judgment (as the Chancery and a Judgment at the Common Law can do) yet they may Award, that one party ſhall enjoy it, and the other not diſturb him; or, that the one ſhall give the other a Bond for quiet enjoying, or the like. And if there be any Eſpecialty or Aſſumpſit, to perform the Award, and he do not; he may ſue upon it. Freehold is not arbitrable. 9 *H.* 6. 60. *B Kelw.* 99. *b.* 21 *Ed.* 3. 26. 14 *H.* 4. 18, 19, 24. *Br. Abridgement*, 5. 30. 8. *Rep.* 137. *a.* 3 *Ed.* 3. *Waſte* 5. Contrary to *Dyer* 242. *b.* 14 *H.* 4. 19. *a.* *per Skren*, 8 *R.* 2. *Annuity* 55. 12 *Aſſ. pl.* 25. 12 *Ed.* 3 *p.* 24. And for Chattels they may diſpoſe them, and give the property or intereſt to one or another as they pleaſe.

1. Debts due for expence about buſineſs are arbitrable. 2. So alſo it ſeems is a Debt on a Contract or damage certain, being joyned with Treſpaſs, or other things uncertain; and all theſe are arbitrable, before any ſuit begin or after. A debt on a Contract alone ſeems alſo to be arbitrable. See *Co.* 8. *Baſpolis* Caſe, *f.* 97. (1) *Adjudge Sower verſus Bradford*, 37 *Eliz. Co. B.* (2) *Finches Ley* 181.

And therefore if a man demand five pound for divers buſineſſes that he hath done for another; this is a matter arbitrable, adjudged. *Trin.* 37 *Eliz. B. R. inter Sower & Bradfield.*

Some Books ſay in ſome of theſe Caſes, the Submiſſion muſt be in writing, or elſe the Matters are not Arbitrable. Quere, how and what is meant by that.

But Debts certain due by Bond, or Bill, or Covenant, or on a ſimple Contract alone which is certain, are not arbitrable: Nor Debts upon arrearages of account before Auditors; nor things that are not in *Rerum natura*, at the time of the Submiſsion, though they after happen; nor Freeholds, Annuities, Waſte, Detainment of Charters, or the like; yet ſo as before on Penalties or Aſſumpſits, to perform ſuch Awards they be bound, or elſe muſt pay the money, 43 *Ed* 3. 16. *Dyer* 51. 6 *H.* 4. 6. 4 *H.* 6. 17. 10 *H.* 7. 4. 9 *H.* 6. 60. 14 *H.* 4. 18. *Co.* 5. *Samons* Caſe.

But

But matters of Commonwealth, or of Marriage, it ſeems are not arbitrable at all, *Weſt. Symb. f.* 146.

In every Arbitrement theſe five things are requiſite as incidents, *Dyer* 217. 19 *Ed* 4. 1. *Co.* 10. 137. 10 *H.* 7. 4.

7. Incidents to an Arbitrement.

1. Matter of Controverſie, and that muſt be Arbitrable.
2. A good Submiſſion of the parties to the Award.
3. Parties to the Submiſſion.
4. Arbitrators.
5. An Award; and if either of theſe be wanting, it can be no good Award.

Where and in what Caſes Arbitrements ſhall be void, and for what cauſes.

Obſerve therefore, for the defects and faults of Arbitrements whereby they loſe their force and become void; ſome of them are in ſomething going before the Award it ſelf, and ſome of them in the Award it ſelf, and ſome of them in ſomething coming after the Award it ſelf, or *ex poſt facto*.

Before: As where either the perſons are not able to ſubmit, as Feme-Coverts, or the like; or have not ſubmitted, as when the Award concerneth ſtrangers, not privities nor parties, or the things referred, are not things that lie in Arbitrement, and there is no collateral ſecurity to bind the parties to perform it; or the ſubmiſſion be not legal; or being legal, it is determined by revocation before the Award made, *Co.* 4. 1. *Kelw.* 99. *Co.* 5. 78. 8. 98. 10. 131. 17 *Ed.* 4. 5. 12 *H.* 7. 5. 19 *H.* 6. 36. 13 *H.* 4. 12. 8 *Ed.* 4. 10. 20 *Ed* 4. 8.

The common faults of Arbitrements.

In the Award it ſelf: As when either the Arbitrators purſue not the Authority given, by the ſubmiſſion; or they award ſomewhat to be done to, or by a ſtranger; or the Award is incertain, or there is an apparent wrong, and they give no ſhew of ſatisfaction; or the Award is made all for one ſide, and nothing for the other, and it imply ſome wrong to him done alſo; or they award a thing the party hath no means to come by; or the Award is not final and definitive; or the Award is of a thing impoſſible or unlawful, or of a thing apparently unreaſonable, or it is imperfect or inſenſible.

After: When ſome due circumſtance is not obſerved after; as publication or notice of the Award, according to the ſubmiſſion, or the like. For all or any of theſe cauſes, an Award may become void. As for examples:

Before the Arbitrement.

If one ſue for a Debt upon a Record or Specialty, and this be put to Arbitrement; and an Award is, that he ſhall pay all or ſome part of it: This is no good Award, for the matter is not arbitrable. See the Anſwer of this Queſtion, in the four firſt Queſtions before: *What perſons may ſubmit. Countermand. The duty of Arbitrators. Matters Arbitrable.* 10 *H.* 7. 4.

In the Arbitrement it ſelf for uncertainty.

If there be divers Treſpaſſes referred to Arbitrement, and the Award is, that the one ſhall make the other amends, and ſay not what; this is a void Award, 8 *Ed.* 4. 11 39 *H.* 6. 9.

If an Award be, that one of the parties ſhall enter into an Obligation with Condition to do any thing, and ſay not of what ſum the Obligation ſhall be, or that one ſhall give a Releaſe to the other, and ſay not what Releaſe, *Co.* 5. *Samons* Caſe. See *March* 18. *pl* 42.

For want of privity in ſuch, by whom or to whom to be performed.

If the Husband only do ſubmit, and the Award be, that he and his Wife ſhall do, have or take any thing; the Award as to the Wife is void, and ſo is it if it were of a ſtranger, any other beſides his Wife. As an Award, that one of the parties and the Arbitrator, or any ſtranger ſhall do an act, is void as to the Arbitrator: So an Award, that the party and his wife ſhall enjoy the Land in queſtion, or that either party ſhall make a Feoffment, or pay money to a ſtranger, is ſo void as to the ſtranger, that for not doing theſe things by or to the ſtranger, no Action will lie. An Arbitrement, that one of the parties ſhall do a thing wherein the Aſſiſtants of others that are ſtrangers, and whom he hath no means to compel thereunto, is not good for ſo much as concerneth ſuch ſtranger. An Award, that each party ſhall pay Five ſhillings for writing the Award to the Clerk; and it was agreed void, *Brownl.* 2 *par.* 100. *Co.* 10. 131. *Kelw.* 45. 18 *Ed.* 4. 28. *Co.* 5. 78. 19 *Ed.* 4. 1. 28 *H.* 6. 13. *Trin.* 9 *Jac. Tydderlies* Caſe, *Banco Regis.* 17 *Ed.* 4. 15. 5. 18 *Ed* 4. 22. 19 *Ed.* 4. 1.

When a ſtranger is by the Award to do ſomething, this is void for this cauſe alſo, becauſe

because it is out of the Submiſſion. *See the laſt Diviſion.* 19 *Ed.* 4. 1.

For that which is not contained in the Submiſſion, or in purſuance of the authority.

The Arbitrement that is made of a thing that is not contained within the Submiſſion, is void: As if the Submiſſion be for all Actions perſonal, and the Award be made of and about Actions real; *& ſic è contra.* So if the Submiſſion be on a Condition (which is uſual) as when the Condition is to ſtand to an Award, ſo as it is to be made by a day certain, or be in writing, or under Seal, and delivered by a day, and the Arbitrators make it after the day, or do it not ſo as before, this Award is void. So if the Submiſſion be for all matters between them until the tenth of *May*, and they award that a Releaſe ſhall be given of all Actions until the twentieth of *May*, this is a void Award. So if *A.* on the one ſide, and three others of the other ſide ſubmit to Arbitrement for all actions and demands between them, and the Award be made of ſome matters between them three of the one ſide only, this is not good. (2.) So if the Submiſſion be of all cauſes depending between them *ab initio mundi*, *&c.* and the Award be of all cauſes *à principio*, omitting *depending*, this is void. So if a Submiſſion be to four, and three of them make the Award. But if the Condition of an Obligation to ſtand to Award, be to ſtand to the Award of four, ſo as the Award of the ſaid Arbitrators or any three of them be made *&c.* In this caſe an Award made by any three of them is good. So if the Submiſſion be of divers particulars, with a Condition: For as an Award be made of the premiſſes, *&c.* if all the differences, or ſome be made known, and they do not make an Award of as much as is notified. But if the Condition were for all matters, or between divers perſons; and ſome matters only, or all between ſome of the perſons only are notified, an Award of them alone is good. And if the Submiſſion be of divers things in particular, without any ſuch conditional reſtraint or concluſion, an Arbitrement upon any of them is good *Vide plus ſupra & infra*, 7 *H.* 6. 40. 19 *H.* 6. 36. 36 *H* 6. 11. *Pl.* 306. 9 *Ed.* 4. 44. 8 *H.* 6. 18. *p.* 9 *Jac. B. Regis*, *Scots* Caſe, *Dyer* 242. *Co.* 8. 92. *Co.* 10. 132. *v. leli: ſule Marg.* 2 *R.* 3. 18. 36 *H.* 6. 8. (2) Adjudg. *Hayns*, *Perkins*, *Armiſteed.* Adjudg. *verſ.* Caſe, *B. Regis.* *Co.* 8. 98. *Dyer* 216. *Cyprian Sallows* Caſe, *P.* 9 *Jac: B. Regis.*

If the Submiſſion be by Deed, and a time ſet, and the Arbitrators meet and prorogue it to a time after the day, and then do it. this is not good; but if it were without Deed, it ſeems otherwiſe. And if they make an Award one day, and after before the time make another; or make part one day, and part another, before the time ſet; or part before the day, or part after: In theſe caſes, without a new Submiſſion, theſe Awards are not good. But if they meet and agree only, and at another day within the time make the Award, this is good, 49 *Ed.* 3. 9. 22 *H.* 6. 52. 33 *H.* 6. 28. 39 *H.* 6. 12. 8 *Ed* 4. 10. 19 *Ed.* 4. 1.

If the Submiſſion be of all ſuits and Controverſies then depending, and the Award is made of a Controverſie not in ſuit, this is good. *Per Curiam*, *B. R. M.* 10 *Car.*

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For that it is not ſatisfactory.

If the Arbitrement do not import ſatisfaction of the wrong that is put in Compromiſe, it is not good. As for Examples:

If the differences be about arrearages of Account, and this be referred, and the Award is, that the party in arrearages ſhall account: So if the Award be, that becauſe one of the parties had the goods of the other, that he ſhall redeliver them. But if by that redelivery, the party to whom may have ſome ſpecial benefit, then the Award is good enough. So an Arbitrement, that one party ſhall have one part of the thing in queſtion, and the other the other part, (*c*) if it be Debt in queſtion, and the Award be, he ſhall pay part of the debt. (7) So if an Award be, that one that is ſuppoſed to have done a treſpaſs, ſhall do his Law, and then be quit and diſcharged. (8) So if the Award be, that in recompence of the wrong, the parties ſhall entermarry. (9) So if the Award be, that one of the parties ſhall do ſuch an act ſuch a day, and the day be paſt before the Award finiſhed, *Fitz.* (2) *Arbit.* 27. (3) 12 *H.* 7. 15. 45 *Ed.* 3. 16. (4) 2 *H.* 5. 2. 14 *H.* 4. 14. (5) *Fitz. Arbit.* 19. (6) 15 *Ed.* 3. 16. (7) 46 *Ed.* 3. 17. (8) 9 *Ed.* 4. 44. (9) 3 *Ed.* 4. 11. 8 *Ed.* 4. 22.

For that it is made of one part only.

So if a Suit be put in Arbitrement, and the Award be, that the Plaintiff ſhall not proceed, or ſhall be Nonſuited, or the like; it ſeems theſe are not good Awards,

19 *H.* 6.

19 *Hen.*6. 36. *Plow.* 11. 5 *Hen.*7. 2. 21 *Hen.*7. 28. 36 *Hen.*6. 15. *Co.*8. 98. 7 *Hen.*6. 40.

An Arbitrement, that one ſhall pay money to the other, and then the other ſhall releaſe all Actions, is good.

If between the Garniſher and the Plaintiff in a Detinue, the Award be that the Garniſher ſhall go quit of all quarrels and ſuits, had by the Plaintiff againſt him, and nothing be ſaid for the quarrels of the Garniſher had againſt the Plaintiff. So if all matters be referred between two, and the Award be, that the one party ſhall go quit of all Actions, that the other hath againſt him, and ſay nothing of the Actions he hath againſt the other; theſe are not good Awards. And yet if a man demand five pound of *B.* for buſineſſes he hath done for him, and this be referred to Arbitrement, and the Arbitrator Award that *B.* ſhall pay to *A.* four pound in full ſatisfaction of the ſame debt, and no more; this is a good Award. *Sower verſus Bradfield*, adjudged. *Trin.* 37 *Eliz. B. R. Co.* 8. 98. 7 *H.*6. 40.

If an Award be that one party ſhall pay ten pound to the other, and doth not ſay for what, or that the other ſhall go quit for the like; this is not good, and no Averment *per Juſt. Berkley, R. R.* 11 *Car.*

A. was indebted to *B.* and they both died. The Heir of *A.* for good conſideration aſſumed to the Adminiſtrator of *B.* that he would pay to the Adminiſtrator the debt; and for not payment according to the Aſſumpſit, the Adminiſtrator brought an Action, and then they ſubmitted to the Award of *C.* and became bound; and to the other, to ſtand to the Award accordingly; ſo that the Arbitrator make his Award of all matters, and controverſies between them, before ſuch a day. *C.* the Arbitrator before the day recited the Aſſumpſit, debt, as aforeſaid, and ordered, That the Heir ſhould pay the Adminiſtrator ſo much money, and publiſhed; and an Action of the Caſe was brought upon this Award, and Judgment given for the Plaintiff. *Brownl.* 2. *part. Co.*8. 98.

For want of means to obtain the thing.

If the Award be, that one of the parties ſhall have Land out of anothers hands, this is void; for this order doth not give the Frank-Tenement: But yet *ſecundum quid*, onely, for if there be any Bond or Aſſumpſit to perform the Award, and it be not performed; yet one may ſue upon the Bond or Aſſumpſit, *Plow.* 11. 20 *H.*6. 52. 5 *Ed* 4. 7. 19 *H.*6. 36.

An Arbitrement, that the parties or either of them ſhall do ſomething by the advice of the Arbitrators, or one of them, is not good, 19 *Ed* 4. 1.

Not definitive or final, or by words.

An Award, that if one of them will wage his Law, he is not guilty of the Treſpaſs, that then he ſhall go quite, and the other ſhall releaſe to him, is not good: So if the Award be, that the parties ſhall abide the Award of others, or of the Arbitrators themſelves at another time, or ſhall do as another ſhall ſet down, or the like: So alſo if an Award be, that the Plaintiff ſhall be Non-ſuit, it ſeems this is not good, for he may then begin again, 46 *Ed.*3 17. *Co.*5. 78. 47 *Ed.* 3. 20. *Plow.* 11. 19 *H.*6. 36.

If a Submiſſion were to Arbitrators, and after to an Umpire, and the Arbitrators make an Award of parcel, and the Umpire of the reſt; this is not good, unleſs the Submiſſion were ſo made, that the Umpire might make an Award of any part of it, 39 *H.* 6. 10.

An Award cannot be made part at one time, and part at another, 39 *H.*6. 12. *a.* 8 *Ed.*4. 10. *b.* 19 *Ed.*4. 1. *a.*

If the Arbitrators make an Award between the parties one day, they cannot make another Award between the parties another day, 22 *H.*6. *b.* 52. *a.*

So if the Award be made, but of part of that which is referred; as if the Reference be of nine Articles, and the Award be made but of ſix of them; this is void, *Goldsb.* 125. *pl.* 14.

For that it is not made of all that is referred.

If a Debt of Twenty pound be in queſtion, and the Award is, the party ſhall pay more then the debt, is not good, 9 *Hen.*7. 16. *Keble.*

Unreaſonable.

So if it be that one ſhall releaſe the Surety of the peace to *W. S.* and in truth there be no ſuch matter, 21 *Ed.*4. 40. 9 *Ed.*4. 44. 39.

An Award, that either of the parties ſhall releaſe to the other all Actions till the

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day of the Award, is unreasonable and void; for then the Obligation or Assumpsit will be released also, that was made to perform the Award: So divers before for their unreasonableness in other particulars, are void, *H.* 6. 10. 21 *H.*7. 28.

Impossible. An Award that the one shall release to the other such a Suit he hath against him, when as in truth he hath no such Suit in being, 20 *Ed.*4. 38.

Against the Law. An Award that one shall rob another, or disseise him of his Free-hold, or the like, are void.

Incertain, or imperfect. If a Submission be of al. the Lands descended, and the Award is of White-acre and Black-acre, an Averment may be, that this is all the Land descended; and by this the Award may be good. *per Just. Berkley*, 11 *Car. R. B.*

After the *Award*, or by *Matter, ex post facto.* If the Submission be made with Condition, so that the same Award be notified to the parties, or some of them by a day, and the Arbitrement be well made; but it is not after published or delivered according to the tenor of the Condition, then is the Arbitrement void, and the Publication must be as the Condition is: If by such a time, or under Seal, *&c.* then it will not be good, unless it be so done: But if the Condition were so, that it be delivered to the parties before a day *petentibus hoc*, here they are not bound to deliver it till it be desired: If the Submission be by divers of both sides, Proviso it be delivered to the parties, or one of them: If he deliver it not to some, or one of them, the Award is void; but if he deliver it to any, or either of the one, or the other side, it is a good Award. So if the Submission be by two, so that the Award be delivered to either, or *utrique eorum* before *Michaelmas*, and it be delivered but to one, it is not good. See this question before above in the Negative question. 8 *Ed.*4. 21. 11. 1 *H.*7. 5. *Dyer* 218. 37 *H.* 8. *Br. Cond.* 46.

Where not. Before the *Award*.

Privity. An Award that a thing shall be done by the advice of a stranger that is not party, or privy to the Award, is good enough, 8 *Ed.*4. 11. 14 *Ed.* 4. 1.

An Arbitrement that the party shall do a Judicial act, is good, though it cannot be done without the help of strangers, 19 *H.*6. 38. 19 *Ed.*4. 5. 5 *H.*7. 22.

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Being contained in the Submission or Pursuance of the Authority. If the Submission be of things personal, and the Award is, that one of the parties shall do an act, that is, of a thing real in satisfaction of the personal wrong, *& sic è contra*: So if the Submission be of one thing, and the Arbitrement of any thing incident to, or depending necessarily upon that thing, it is good. So if the Submission be of all Actions real and personal, and the Award be onely of matters personal, or of the matters real, it is a good Award; for so much especially, if no other matters were notified to them. But in that case, if the words or manner of the Submission be Conditional, that the Award must be of all matters or none, there it may be otherwise: So if the Submission were of the Right, Title, and possession of Land, and the Award be made of the possession onely, and nothing said of the Right; yet it is good for so much. So if *A.* on their side, and three others on the other side, do submit to the Award of *W.* and he do Award some matters that are between the three and *A.* joyntly; or matters that are between any of the three and *A.* this is a good Award: So if a Submission be of all Suits, and the Award be, that the one shall release to the other all Suits, Debt, *&c.* except one Obligation in particular; this is a good Award: So if there be divers Suits and Controversies about Tythe, and other matters between two, and they submit these to Arbitrement, and he Award that all Controversies between them shall cease, and the one shall pay to the other twenty pounds in recompence of all wrongs; this is a good Award for the Tythe, adjudged. *Ingram versus Web, Trin.* 18 *Jac. B. R.* And if the difference is between a thing severable, and a thing entire, as the making of a Release in the Case *Supra*; for there if the Award exceed the Submission, it is void for all: So if *A.* and *B.* 1 *Maii* submit themselves to *J. S.* for all matters from the beginning of the world unto the date of the Submission; and in *June* following they make an Award, that *A.* shall pay to *B.* ten pounds, *&c.* and that *B.* shall make him a general Release, and that this shall be an end of all matters between them from the beginning of the world, until the date of the Award; this is a good Award, adjudged; but if other matters be shewed in pleading to be between the parties, between the date of the Submission, and the date of the Award, *Contra.* 9 *Ed.* 4. 44. 8 *H.*6. 18. 9 *H.*7. 15. 7 *H.*6. 40. 36 *H.* 6. 11. *Co.*8. 98. *Dyer* 216. 19 *H.*6. 6. *Br.* 2 *R.*3 18.

36 *H.*6.

36 *H.* 6. 8. *Br. p.* 9 *Jac. Sallows* Caſe: *Lee verſus Pain, Hill.* 14 *Jac. Co B.* 43 *Eliz. Co. B. Barns* Caſe.

If an Award be, that he that hath done the wrong, ſhall give the other a Quart of Wine, or ever ſo little recompence for the ſatisfaction of the wrong, it is good enough: So where divers of the one party, and the other ſubmit, and the Award is, that one of the one ſide, ſhall pay to another of the other party ſo much, and give nothing to, or from any of the reſt; this is good enough: So an Award, for that the wrongs are equal from either party to the other, therefore either of them ſhall go quit againſt the other; ſo if it be that either of them ſhall releaſe to the other; ſo if it be, that either party ſhall go quit againſt the other; and the one ſhall pay the other ſo much, becauſe his wrongs he did were more; ſo if two have ſuits each againſt other, and they be referred, and the Award is, that they ſhall each of them be Nonſuit, or diſcontinue their ſuits, and not ſue again for thoſe matters, or enter a Retraxit, are good, 43 *Edw.* 3. 33. 9 *Edw.* 4. 44. 22 *Edw.* 4. 25. 19 *Hen.* 7. 37. *Fitz. Arb.* 9. 9 *Edw.* 4. 44. 10 *Hen.* 6. 4. 20 *Hen.* 6. 19. 5 *Hen.* 7. 22. *Fitz. Arb.* 9. *Satisfactory.*

An Arbitrement, that one ſhall releaſe to the other all his right in the Land in queſtion, is good; if it appear by the Award, that he to whom the Releaſe was made, were in poſſeſſion of the Land, 9 *Ed.* 4. 44. 21 *Ed.* 4. 40.

If the Controverſie referred, be about a debt of ten pounds due by a Contract, and the Award is, that he ſhall pay forty ſhillings coſts, it is good; for hereby he is diſcharged of the debt that doth pay it. So if divers Treſpaſſes done by one of the parties be referred, and the Award be, that he that hath done the Treſpaſs, ſhall pay ten pounds for the Treſpaſſes, and ſay nothing of the other, this is good; for hereby the other is diſcharged of any Action for thoſe Treſpaſſes: So if the Award be, that whereas one of them hath received twenty ſhillings of the other, and hath done him divers Treſpaſſes, as alſo the other hath done to him divers Treſpaſſes, that the one therefore ſhall pay to the other his twenty ſhillings, and that they ſhall go quit one againſt another: So where divers matters be of both ſides, when the Award is, that they ſhall be friends, and all Controverſies and Matters ſhall ceaſe, and the one ſhall pay the other twelve pence: So if there be divers of both ſides, and the Award is, that one, or ſome onely ſhall pay to one, or ſome onely of the other ſide, *Co.* 8. 98. 22 *Ed.* 4 25. 20 *H.* 6. 19, 12. *Goles* Caſe, 7 *H.* 4. 31. *M.* 8 *Jac.* 20 *H.* 6. 18. 10 *H.* 6. 4. 19 *H.* 6. 6. Of the one part onely.

If an Award be, that one ſhall levy a Fine, make a Feoffment, enter a Retraxit by Nonſuit, or diſcontinue his Action, or make defaults in a *precipe quod reddat*: In all theſe Caſes, though the concurrence of the Acts of others be neceſſary, yet it ſeems the Awards be good, 5 *H.* 7. 22. Means to make or obtain the thing.

If a ſtranger had drawn an Award before, and the Award be, that the parties ſhall perform that Award, it is good. 8 *Ed.* 4. 10. 39 *H.* 6. 10.

If the Arbitrators meet, and commune one day of the Award, and make it after another day at a new meeting, within the time given them, this is good; but they cannot meet, and make a part of the Award one day, and meet after, and make the other part another day; it ſeems this is not good, 39 *H.* 6. 12. 8 *Ed.* 4. 10. 19 *Ed.* 4. 1. 3 *H.* 4. 1.

Award that the parties ſhall be bound, or ſhall make aſſurance by advice of Council, or that an Action ſhall be ſued between the parties by advice of *A.* is good. 18 *Ed.* 4. 22, 23. 8 *E.* 4. 1, 4.

If the Arbitrement be, that the party that hath done the wrong ſhall pay a greater ſum in value then the wrong is that he hath done; this Award is good. 8 *Ed.* 4. 21. *Reaſonable.*

An Arbitrement, that one ſhall give the other a thing he hath not, is good, if it be to be had, and he muſt provide it. 19 *Ed.* 4. 1. 9 *H.* 7. 16.

An Arbitrement, that one of them ſhall give ſecurity for the performance of a thing to be done, is reaſonable and good, 8 *H.* 6. 18. 19 *H.* 4. 1.

An Award that the one party ſhall pay to the other ten pounds, and releaſe to him all Treſpaſſes, and that the other ſhall releaſe to him again is good, yet he cannot compel him to releaſe; but he may ſue him or the Bond, or Aſſumpſit, 20 *H.* 6. 18. *Sect.* 8.

After the *Award*, or for *Matter, ex post facto.*

If one be bound to ſtand to the Award of four of all Actions, *&c.* So that the ſame be made in writing, and delivered ſuch a day by the Arbitrators, or any three or two of them: If any two of them deliver it, it is good enough, *Sallars* Caſe.

If the Submiſſion be with Condition, ſo that the Award be delivered before ſuch a day, and the Arbitrators deliver it by word of mouth, it is a good Award; but if the Condition had been, that it ſhould have been delivered in writings, *Contra.* And if in this Caſe the Award be made in one County, and delivered in another, yet it is good enough, *Dyer* 218. 5 *H.* 7. 7.

If the Submiſſion be by divers on both ſides, with Condition that the Award be delivered to the parties, or one of them. If the Arbitrators deliver it to both, or all of one ſide, or to one of either ſide, it is good enough, *Dyer* 218.

If the Submiſſion be with Condition, that the Award be delivered before *Michaelmas*; if it be delivered the laſt day before after Sun-ſet, it is good enough, adjudged. *Parkers* Caſe. *M.* 37, 38 *Eliz. Co. B.*

8. The Expoſition of an *Award*, and how it ſhall be taken.

Though an Arbitrement be a Judgment, yet it is not like to other Judgments that are taken more ſtrictly; for this ſhall be taken according to the intent of the Arbitrators, if the intent will ſtand with Law, elſe the parties ſhall perform it according to theſe words; in ſuch ſenſe as they will agree with Law, 17 *Ed.* 4. 3. 21 *Ed.* 4. 39. 19 *H.* 6. 36.

If an Award be, that one ſhall pay to the other twenty pound at *Michaelmas* next coming, provided, that for ſecurity the Extents and Leaſes ſhall remain in force: And if he pay not the twenty pounds at the day, nor put in ſecurity ſuch as the Plaintiff ſhall like of, then the Leaſes and Extents ſhall remain in force. This is an abſolute Award for the money, and the words (nor put in ſecurity) ſhall refer onely to the ſaving of the Leaſes, adjudged. *Dightons* Caſe. *M.* 2 *Jac. B. Regis.*

How an *Award* ſhall be performed.

The parties are bound to do all that they can to perform their Award, and it muſt not be done in part onely, but part may be at one, and part at another time, 21 *Ed.* 4. 39. 8 *Ed.* 4. 10. 6 *H.* 7.

If the Award be, that the one ſhall pay to the other ten pound for all wrongs, and then that the other ſhall releaſe all Actions, *&c.* Now in this caſe the other ſhall not be bound to releaſe, till the other pay him the money; and ſo in all like caſes, when another is to do an act before the party is to do his act; if the other do it not, he is excuſed. But if the Arbitrement be, that one ſhall pay money, and that the other ſhall releaſe without any ſuch reference of time, then or the like; either muſt perform his part at his peril, 21 *Hen.* 7. 28. 10, 36 *Hen.* 6. 15. 5 *Edw.* 4. 7. 21 *H.* 7. 28.

If no time be ſet by the Award for the doing of a thing, the party ſhall have a reaſonable time to do it, 20 *Ed.* 4. 8. 21 *Ed.* 4. 41.

If a thing be ordered to be done, which may be done two ways, in one whereof the concurrence of a ſtranger is neceſſary, in the other it may be done by the party himſelf; it ſhall be done that way in which the party may do it himſelf, 21 *Edw.* 4. 40.

If an Award be that one ſhall make and ſeal a Bond or Releaſe, *&c.* He that is to do it, muſt get it made, and muſt ſeal it at his peril, *Brown* and *Donugors* Caſe, *Trin.* 18 *Jac. B. R. Co.* 5. 77. In Margent.

Requeſt.

The Defendant was to pay to the Plaintiff upon Award eight pounds or three pounds, and coſts of Suit expended in ſuch an Action, between the Plaintiff and Defendant, as ſhould appear by a note under the Attorneys hand of the Plaintiff, *&c.* In this Caſe the Plaintiff is not bound to cauſe his Attorney to give notice thereof, or make tender of the note to the Defendant, but he ought to ſeek the Attorney, and requeſt it, *March.* 108. *pl.* 186. *&* 156. *pl.* 225.

If Arbitrators Award one party to pay to the other money, and ſay not what day, he muſt pay it without demand at his peril, *Goldsb.* 63.

9. Where an *Arbitrement* is a good plea, and where not.

Arbitrement is a good plea in all Actions perſonal, though the Submiſſion be not by Deed; ſo alſo to all Actions that are grounded on an Eſpecialty, when no certain duty doth accrew by the Deed *tempore confectionis*; but a wrong and a default ſubſequent, together with the Deed, gives Action to recover damages, as upon a Covenant

to

to repair; or that he hath power to Leaſe a Term, and ſuch like. *Co.* 6. 44. 14 *Ed.* 4. 18. *Co.* 9. 60.

It is a good plea alſo, in an Action of Debt on a Leaſe for years, or on a Contract; alſo in an Account of a Receipt *per auter mayne*; alſo in a *Forger de faux faits*; alſo in a Raviſhment *de gard*; alſo in mixt Actions, if the Submiſſion be by Deed: And in all ſuch Actions, wherein an Accord with ſatisfaction is a good plea; alſo it is ſaid an Arbitrement is a good plea in an Action upon the Statute of Laborers; alſo in a Writ of Annuity, if the Submiſſion be by Deed, *Broo. Arbitr. Dyer* 75. 26. 19 *H.* 6. 36. 14 *H.* 4. 24. 6 *H.* 4. 6. *Fitz. Arb.*

But in Debt upon an Eſpecialty, or Arrearages of Account before Auditors, or in a Controverſie grounded on matter of Record: In all real and mixt Actions, Arbitrement is no good plea, *Co. b.* 44. *B. R.*

How an Arbitrement may be pleaded.

He that pleadeth an Arbitrement, muſt ſhew that he hath performed his part, and how, and wherein; or that he tendred, and the other refuſed, for this will excuſe, or ſay he is ready to perform it: And if divers things be to be done on the one part, in ſome of which the Award is void, and thereupon other things are to be done by the other ſide; if he ſhew he hath performed the Award, ſo far forth as it is good, the other muſt perform his part; and he that will ſue upon an Award, muſt ſay he hath done all that is to be done on his part, and wherein in particular the other hath broken the Award, *Co.* 10. 131. 7 *H.* 4. 31.

10. Accord and Concord. What Agreement ſhall be an Accord and what ſhall be a ſufficient Accord and good Bar in Action.

It is ſometimes taken for an agreement between two or more, that intend the levying of a fine of Lands one to another, how and what manner the Lands ſhall be paſſed (for which ſee *Fine.*) But here it is taken for an Agreement between two or more, to ſatisfie and make amends to another for [illegible] offence done to him; which being performed accordingly, though he give not the [illegible] part of the damage, it is a Bar in any Action brought for the ſame offence: And this is either Abſolute and Executed, or Executory. That which is executed, is ſuch an Accord as is performed according to the Agreement. Executory is that which is not yet done, but agreed onely to be done, *Plow.* 5, 6. *Dyer* 356. 39.

The Qualities of a good Accord.

To the making of a good Accord that may be a Bar in an Action for any wrong done, theſe things muſt concur.

1 The thing given and received, muſt be valuable, and ſatisfactory, a charge to the giver, and a benefit to the receiver.

2 It muſt be perfectly and compleatly finiſhed and executed, and ſatisfaction made according to the Agreement before any Action brought.

3 It muſt be in the life time of him that did the wrong.

4 The party to whom the wrong is done, muſt accept the Amends according to the Agreement; for it ſeems notwithſtanding the Accord, he may refuſe it, and Tender of Amends without an Acceptance thereof is no plea in any Action, but being accepted is: For as wrongs and injuries cauſe diſcord and variance, and beget Suits; ſo by an Accord between the parties, this may be recompenced, and this recompence begetteth peace. *Dyer* 356. 6 *H.* 7. 11. *Fitz. Accord.* 4. *Dyer* 75. 17 *Ed* 4. 2. *Co.* 9 79. 5 *Ed* 4. 7. *Old Books of Entries, f.* 6. *Dyer* 356.

In a forger of falſe Deeds, If the Defendant give to the Plaintiff a Pottle of Wine in ſatisfaction of the Treſpaſs, and he agree to it; this is a good Accord, and a Bar in the Action, 19 *H.* 6. 29. *Fitz. Bar.* 26.

If divers do a Treſpaſs, and one make a good Accord, this will diſcharge, and be a Bar to all the reſt, *Co.* 9. 79.

If a ſtranger, as one of the Parents or Friends of the Treſpaſſor, give the Amends in recompence: It ſeems this is as good, as if the party himſelf did give it. *Barre* 165.

In Detinue for a Cheſt and Charters therein, by the delivery of the Plaintiff: The Defendant pleads an Accord, that he ſhould keep the Cheſt until the Plaintiff come to *Briſtol*, and there it ſhall be opened: And if any Deeds be there that do concern a houſe, of which the Plaintiff had Enfeoffed the Defendant, that he ſhall keep it ſtill, and ſaith, That he never came to *Briſtol*, and it was awarded a good Concord. But *Quere. Fitz. Accord.* 2. 7 *Ed* 4. 23.

If one be amerced for a private Nuſans or Treſpaſs done to the Lord in his Leet, and he receive the Amercement, though it be Extortion, and he could not have recovered it; yet it ſeems, if he after bring an Action for this Nuſans, this acceptance of the Amercement may be pleaded in bar, *Fitz. Bar.* 187. 222. *Br. Treſpaſs*, 195. 61, 66.

Sect. 10. What not. For default of the value.

If one plead, that whereas there were divers Treſpaſſes committed by each of them, one upon another, and by mediation of Friends, they agreed one ſhould go quite againſt the other; this is no Plea, neither will it bar in the Suit: So in an Entry on the Statute of *Richard*, That the Plaintiff ſhall re-enter, and have his Land in peace, and that he ſhall deliver him the writings that he hath, that do concern the Land, *Dyer* 356. 16 *Ed.* 4. 8. 9 *Ed.* 4. 19. *Fitz. Accord.* 3.

So if it be in Treſpaſs for Goods taking, and the Defendant plead an Accord made, that he ſhould have his Goods again, 9 *Ed.* 4. 19. 30 *H.* 6. 4.

So if it be, that the Defendant ſhould do his endeavor to make the Plaintiff, and another who was at odds with him, agreed; or (as it ſeems) to ſhew that he did make an Accord between him and the ſtranger, unleſs he ſhew withal, that he was at ſome charge to do it, *Fitz. Accord.*

For default of Execution.

If the Defendant plead an Accord, that he muſt make Windows, and pay ten pounds at a day to come; and he ſet forth, that he hath made the Windows, but he doth not ſet forth that he hath paid the ten pounds; this is no bar; 6 *Hen.* 7. 10.

In Treſpaſs, the Defendant pleaded an Accord to pay ſix pence to the Plaintiff, and to give him counſel when he ſhall require it; this is no good plea, 17 *Ed.* 4. 2.

Tender of money without payment, is no good plea in bar of any Action, *Old N. B f.* 122.

If the Accord be between the parties, and be executed by the Heir or Executor of the Treſpaſſor; this is no bar where any Action may lie againſt the Executor, *Dyer* 356.

For other cauſe.

In a Writ of falſe Impriſonment, the Defendant ſaith, That it was agreed between the Plaintiff and him that he ſhould bring the Defendant to ſuch a place, which is the ſame impriſonment, and it ſeems this was no good plea, *Fitz. Bar.* 14.

11. In what Actions Accord ſhall be a good plea.

In all Actions wherein an Arbitrement is a good plea in Bar, an Accord executed is a good Bar: As in all perſonal Actions founded on a wrong, wherein damages onely are to be recovered; as in Actions of Treſpaſs, and upon the Caſe, *Sur Aſſumpſit*, or otherwiſe, Attaints, Appeal of Maytime, Covenants to repay, or the like: Maintenance, Conſpiracy, Waſte in the Tenuit, Forger of Faits, Raviſhment of Gard, Debt upon a Contract: In all Actions alſo wherein Chattels real or perſonal are to be recovered, as *Ejectione Firmæ*, *Quare ejecit infra terminum*. Waſte againſt a Leſſee for year, Detinue of Goods or Charters, which concern Freehold; and in all Actions wherein the wrong is ſuppoſed to be *Vi et armis*, and wherein *Capias & Exigent* doth lie at Common Law, *Co.* 6. 44. *Dyer* 76. *Old Book of Entries*, *fol.* 6. 19 *H.* 6. 52. *per Curiam*, *Trin.* 7 *Jac. B. Regis*, *Co* 4. 1. 13 *H.* 7. 20. *Co.* 9. 78. 6. 44. 40 *Ed* 3. 25. 35 *H.* 6 6. *Brownl.* 2. *part.* 128.

In all Actions real for any Freehold or Inheritance, or mixt, as Aſsiſe or Waſte in the Tenet; this is no Bar (but in ſome Caſes where certain Statutes make it a Bar, as in a Joynture) and therefore an Accord with ſatisfaction is no plea in thoſe Actions: So likewiſe in all Actions founded on a Record, or a Specialty, as an Obligation, or Debt on a Leaſe for years, or in an Account before Auditors, but where it is founded partly on a Record or Specialty, and partly on a Deed; there it will lie as in Attaint, and ſome of the Caſes above, *Co.* 9. 79. 4. 16, 44. 13 *H.* 7. 29. 10 *H.* 7. 4. 13 *Ed.* 4. 5. See *Liver. Condition* 181. *Debt.* 122.

Where an Accord or Agreement, to take one thing for another, ſhall binde, where not.

If one be bound in a Statute or an Obligation to do a Collateral Act, as to make a Feoffment, Account, or the like; here an Accord with Execution for any other thing as money, or the like, is no plea to ſave the Forfeiture of the Obligation: But if the Condition of the Deed, by the Original Contract of the parties, be to pay money, there by agreement between the parties, any other thing may be given in ſatisfaction of it, whether the money in the Condition be a Collateral ſum, or parcel of the Obligation, *Dyer* 1. *Co.* 9. 79. 12 *H.* 4. 23. 9 *H.* 7. 4. See *Agreement*, *Acceptance*.

If

If one be bound in two hundred quarters of Corn, in condition to pay twenty pounds, the Obligor may by agreement between them pay him a Horſe for it: But if the condition were to pay fifty quarters of Corn, he cannot give money, or any other thing in ſatisfaction of it by an Accord to ſave the Obligation, *Co.* 7. 9.

CHAP. XVI.

Of Artificers, Tradeſmen, and Arrow-heads.

THeſe are ſuch, whoſe Calling and Imployment is, and doth conſiſt eſpecially or chiefly of their bodily labor. As the Calling of Tanners, Shoo-makers, Girdlers, Sadlers, Cord-wainers, Laborers, Butchers, Brewers, Bakers, Glaſiers, Lime-burners, Brick-makers, Tile-makers, Plummers, and ſuch like, which are called Crafts, Feats, Trades, Myſteries; or Occupations, which are oppoſed to thoſe Imployments, wherein the minde is chiefly occupied; as the Imployment of a Divine, Lawyer, Phyſitian, and the like, which are called Profeſſions, *Stat* 2, 3 *Ed* 6. 15.

Conſpiracy de Artificers.

No Butchers, Brewers, Bakers, Cooks, Poulterers, Coſtermongers, or Fruiterers, ſhall conſpire, promiſe, or ſwear, that they ſhall not ſell their Victuals but at certain prices, *Stat.* 2, 3 *Ed* 6. 15.

No Artificers, Workmen, or Laborers, ſhall ſo conſpire, promiſe, or ſwear, not to do any work but at certain prices; nor to do that another hath begun or not to do more then ſo much work by the day, or not to work but at certain hours, *Stat.* 2, 3 *Ed.* 6. 15.

The puniſhment of this.

He that tranſgreſſeth either of theſe Branches, ſhall ſuffer for the firſt offence ten pounds; or if he pay not that within ſix days after conviction, twenty days impriſonment, to be kept with Bread and Water: For the ſecond offence twenty pound, if he pay it within ſix days after conviction, or elſe the puniſhment of the Pillory. And for the third offence forty pound, if he pay it within ſix days after conviction, or elſe the puniſhment of the Pillory, and the loſs of one of his Ears and to be ever after taken infamous, for his ſayings or depoſitions. And if it be the Company or Society of Victualers that offend herein, and the greater part of them be preſent at, or do conſent to the conſpiracy, their Corporation ſhall thereby be diſſolved.

Who may puniſh this.

All Juſtices of Aſſiſe, and Peace, Majors, Bailiffs, and tewards of Leets, may hear, and upon proof, by witneſs or confeſſion, puniſh theſe offences, *Idem.*

Where Tradeſmen may work, or not.

Such as have been Apprentices, and may exerciſe their Trades in one place, may work in any place, unleſs the Orders and Ordinances of the place (as in divers Corporations they do) hinder them. And if thoſe extend onely, and will reſtrain (as it ſeems) to ſuch as are dwelling within the Corporation, and not ſtrangers; for ſtrangers cannot be let to work there, if any man will retain and hire them. See the Statutes of the 2, 3 *Ed.* 6. & 3, 4 *Ed.* 6. 10.

Of Arrow-heads.

1 ALl Heads for Arrows, and Quarrels, muſt be well boiled or brazed, and hardned at the points with Steel, in pain to forfeit them, be impriſoned and be fined at the Kings pleaſure.

2 Theſe Arrow-heads muſt be marked with the proper mark of the Maker:

3 Juſtices may puniſh defects herein, *Stat.* 7 *H.* 4. 7.

CHAP.

CHAP. XVII.

Of Aſſets.

Sect. 1. *Aſſets*, what.

ASſets is in two kindes, either Intermains, which is where one dieth indebted, and maketh his Executors: Or dieth *inteſtate*, and the Executors or Adminiſtrators have ſufficient in Goods or Chattels, or other profit, to pay his debts, or ſome part thereof. Theſe Goods or Chattels are called *Aſſets Intermains, (i. e.)* Enough in their hands; and they ſhall be chargable for ſo much as they have come to their hands by any Creditor, or Legatee: And if they waſte it, or loſe it; or pay Debts or Legacies, in any other order then the Law doth ſet down, they muſt anſwer it out of their own Eſtate, *Terms Ley, Co.*6. 46. *Dyer* 271. Or it is by Deſcent, and that is alſo in two kindes, 1. Where a man bindeth himſelf and his Heirs, by ſome eſpecialty or writing to do ſomething, and die leaving Land in Fee-ſimple, to deſcend to his Heir: In this caſe he ſhall be charged for his Land, to perform this as far as the Land will extend upon a Suit. And if he take not care in his pleading, he may be charged for his own Land, that he hath by any other means. 2. It is where a Man hath Land in Tail, or in the Right of his Wife, and alieneth the ſame with Warranty, leaving as much other Land in Fee-ſimple to deſcend to his Heir. Now this will be a Bar to the Iſſue in a *Formedon*, or a *Sur cui in vita*, whereby elſe they would have recovered the ſame Land, *Broo.* 199. 42 *Ed.* 3. 10. *Co.* 5. 34. 8. 52. In both theſe caſes, this is ſaid *Aſſets per* Deſcent in the Heir, *Quod tantundem valet.*

Sect. 2. *Quotuplex.*

Aſſets therefore is either Intermains, or by Deſcent. Intermains alſo is in *fait. i. e.* When one hath enough indeed in his hands; or in Law, *i. e.* When though he hath it not indeed, yet the Law doth charge him as if he had it. By Deſcent is either to charge him on a Deed, or to Bar him in an Action, *Stat.* 33 *H.* 8. 19.

Where and what ſhall be ſaid Aſſets to an Heir, to bar him in an Action, or not.

That Aſſets that muſt make a Lineal Warranty, a Bar muſt have ſix qualities.

1. It muſt be Aſſets, *i.* of equal value or more at the time of the Deſcent.
2. It muſt be by Deſcent, and not by purchaſe or gift.
3. It muſt be Aſſets in Fee-ſimple, and not in Tail, or for another mans life.
4. It muſt Deſcend to him as Heir from the ſame Anceſtor that made the Warranty.
5. It muſt be of other Lands or Tenements, Rents or Services valuable, or other profits iſſuing out of Lands or Tenements, and not Perſonal Inheritances, as Annuities, or the Reverſion of the ſame Land, or the like.
6. It muſt be in Eſtate or Intereſt, and not in uſe or right of Actions, or right of Entries; for they are not Aſſets, until they be brought into poſſeſſion; and when it hath all theſe qualities, it is a Bar, though the Iſſue have done the ſame away by Alienation: But then the Iſſue of the Iſſue ſhall not be barred. But if the firſt Iſſue were barred in a *Formedon*, and then after alien the Aſſets, then the Iſſue of the Iſſue is bound alſo, *Co. ſuper Littl.* 374. 4 *Ed.* 3. *Gard.* 63. *Fitz. Aſſets* 4. 43 *Ed.* 3. 9. 7 *H.* 6. 3. 11 *H.* 4. 20. 24 *Ed.* 3. 47. *Co. ſuper Littl.* 384. *Perk. Sect.* 270. *Dyer* 139. *Plow.* 110. *Co.* 3. 78. 10. 38.

If a Rent in Fee-ſimple iſſuing out of the Land of the Heir, deſcend to him whereby it is extinct; yet this is Aſſets. And for this purpoſe, in Judgment of Law, hath continuance. And therefore, if the Father be Tenant in Tail, and ſeized of a Rent-charge, iſſuing out of the Lands of the Son in Fee, and diſcontinue the Land tailed with a Warranty; this Rent deſcending ſhall be ſaid Aſſets, *Fitz. Aſſets* 5. *Co.* 3. 31. *Fitz. Recovery in value* 17. *Co. ſuper Littl.* 374. *Perk. Sect.* 270.

A *Seigniory* in *Free-Almoigne* is no Aſſets, becauſe it is not valuable; and ſo alſo of a Seigniory of Homage and Fealty. *Fitz Meſne* 7. *Regiſter* 293. *Co. idem.*

An

An Advowſon is Aſſets, and it ſhall be recovered after the rate of twelve pence for every pound or mark the Church is worth, *Co. ſuper Littl.* 374.

If the Tenant in Tail maketh a Leaſe for life, or gift in Tail rendring Rent, and the Reverſion deſcend; this is no Aſſets to bar. *Non poteſt adduci exceptio ejuſdem rei, cujus petitur diſſolutio, Fitz. Gar.* 35. *Co. ſuper Littl.* 384. 20 *Ed* 3. 221.

All the Lands, Tenements, and Hereditaments, that do deſcend to the Heir immediately from his Anceſtor, that made the Specialty in poſſeſſion, or in Reverſion after any Eſtate for life or years, ſhall be Aſſets in the hands of the Heir; but no Execution ſhall be of the Reverſion, till the Tenant for life be dead: Alſo Rents and Services that are valuable, and Tyths and an Advowſon are Aſſets, *Dyer* 373. *Perk.* 348. *Co. ſuper Littl.* 374. *D. & St.* 111. *a. Trin.* 42. *Q. C. B.*

Where and what ſhall be ſaid *Aſſets* to an Heir, to charge him in an *Eſpecialty*, or not.

If a Manor deſcend to the Heir, and after a Tenancy Eſcheat; this Tenancy ſhall be Aſſets, becauſe it comes in lieu of the Services, 6 *H.* 4. 1.

If the Heir enter into Land for a Condition broken, this Land ſhall be Aſſets in his hands. And if one ſeized of Land in Fee, make a Leaſe for years on Condition, That if his Heirs pay ten pound, the Leaſe ſhall be void, and the Heir do after pay the ten pound; it ſeems, that not onely the Reverſion after the Leaſe, but the whole Eſtate of the Land ſhall be Aſſets in the Heirs hands, *Broo. Aſſets* 8. *Opinio Bridgman Juſt. Co. ſuper Littl.* 159.

If one and the ſame man have an Eſtate Tail in Land, and the Reverſion after; this Reverſion in his Heir by deſcent, ſhall be Aſſets. So if an Eſtate be made to *A.* for life, the Remainder to *B.* in Tail, the Remainder to the right Heirs of *A.* this is a Fee-ſimple in *A.* and therefore will be Aſſets in the Heir of *A.* *Co.* 6. 42. *Co. ſuper Littl. fol.* 54. *Finches Ley* 73.

But a Copihold of Inheritance of Land, or a Freehold deſcendable, ſhall not be Aſſets to charge an Heir in Debt, upon a Bond made by the Anceſtor, *Co.* 4. 42. 10. 98.

Perſonal Inheritances, as Annuities, and the like, or ſuch as are not valuable, as Services in Frank-Almoigne, or of Homage and Fealty, though they do deſcend in Fee-ſimple, are not Aſſets in the Heir. So neither is a Reverſion of Land after an Eſtate Tail in another perſon, any Aſſets in the Heir, *Co. ſuper Littl.* 374. *Broo. Aſſets* 26. *D. & St.* 76. *Co.* 6. 42.

An Eſtate Tail that comes to the Heir by deſcent, is no Aſſets to charge him upon any Eſpecialty of any of his Anceſtors, *Dyer* 124.

The Lands and Tenements in Fee-ſimple deſcended, are not Aſſets neither, if they be *bona fide*, aliened and ſold away before the Writ purchaſed againſt the Heir, upon the Eſpecialty, though the Heir do after repurchaſe them again before the Writ brought, *Dyer* 124. *Broo.* 27.

What ſhall be Aſſets in the hands of Executors or Adminiſtrators. See *Executors*. And ſee more of this here in *Heyre Devaſtavit, Extinguiſhment and Warranty.*

CHAP.

CHAP. XVIII.

Of Aſſignees, Aſſiſe of Bread, &c: Attachment and Attaint.

Aſſignee, what the kindes.

THe word Aſſignee, doth ſometimes ſignifie the perſon to whom a thing given or granted, ſhall be afterwards granted or conveyed by him that hath the thing. And ſometimes the perſon to whom a thing is to be done, that is not done at the firſt. And in both theſe ſenſes, they are either in Fait or Deed, which are thoſe Aſſignees that are indeed appointed to receive the thing; or in Law, which are ſuch as are named by Law, to have or do the thing as Executors. For the knowledge whereof take theſe Caſes.

1 If one Covenant to do a thing to *J. S.* or his Aſſignees, or to *J. S.* and his Aſſignees by a day, and before the day *J. S.* die; in this Caſe it muſt be done to his Aſſigns, if he before the day name any Aſſignee, otherwiſe it muſt be done to his Executor or Adminiſtrator, which is an Aſſignee in Law, 27 *H.*8. 2.

2 If one make a Leaſe for years, and grant that the Leſſee and his Aſſignees, ſhall have twenty load of Wood yearly; in this Caſe he to whom the Leaſe is aſſigned is Aſſignee. So if one make a Feoffment of Land to *J. S.* and warrant the Land to him, his Heirs, and Aſſigns, and he aſſign over the Land; in this Caſe the Aſſignee may take the benefit of it, and vouch upon the Warranty. So if I ſell a Horſe on condition, that if I pay forty ſhillings to the Vendee, or his Aſſigns; in this Caſe his Aſſignee is he to whom he ſhall ſell the Horſe.

3 Where I am bound with condition to make a Feoffment to one and his Aſſigns; in this Caſe the Aſſigns are ſuch as he ſhall name to me, and to them muſt I make this Feoffment. See for theſe things, *Plow.* 287, 288. *Co.* upon *Littl.* 210. *Perk. Sect.*100.

4 Grantees of Reverſions ſhall have like advantage againſt Farmers and Leſſees (by Action onely) for any Covenant in the Deed, as the Leſſors their Heirs or Succeſſors might. What Aſſignees ſhall take advantage by this, ſee *Covenant. Numb.*8.

5 What Aſſignees may take advantage of a Warranty, is to be ſeen in Warranty. *Numb.*12.

6 The Remedy of Entry, in caſe a man be put out of his Land, taken in Exchange, doth not go to an Aſſignee. See for this in *Eſchange*, *Numb.*2.

7 A Feme ſole conveys a Term in Truſt, and marries, and then the Husband aſſigns it away; in this Caſe, the Truſt doth paſs, but not the Eſtate. *March.* 88. *pl.* 141.

Of the Aſſiſe of Bread, and other things.

Aſſiſe of things, what

ASſiſe, this word hath many ſignifications in our Law; but in this place it ſignifieth nothing, but the ſetting down and regulating of the price, and quantity of Bread, and Beer, and other things to be ſold.

For the Aſſiſe of Bread and Beer, ſee *Stat.* 51 *H.*3: *Ordinance of Brewers, cap.*2, 5,6. Two Statutes, *Incerti temporis, Crumpt. Jur.*225. 12 *Ed. cap.*6. 3 *H.*8. 8. See *Clerk of the Market.*

And for the Aſſiſe of Fuel, 43 *Eliz.* 14. 7 *Ed* 6. 7. See *Quantity.* For Paper, Parchment, Tile, Timber, Leather, Lead, Hops, Beef, Cheeſe and Butter, Herrings, Salmons, Eels, Wool, Hemp, Sugar, Spice, Iron, Glaſs, Linnen-cloth, how it ſhall be meaſured and accounted, ſee *Dalt. Juſt. of Peace*, 185. See *cap.*29.

Of an Attachment.

TO attach, in our Law, is to take hold by commandment or Writ of a mans perſon or goods: If it be applied to the perſon, it doth not differ at all from an Arreſt. So an Attachment is ſometimes to take the perſon of a man, and ſometimes to take his goods, and ſometimes to take both together. In the one ſenſe it is ſaid, a man may attach a Cow, or that a man may be attached by a Cow, or by an hundred Sheep. *Attachment and Attach, what.*

There is an Attachment of Privilege; and it is in two caſes: Either to give power to arreſt a man in a place privileged; Or it is to arreſt a man by virtue of his Office and Privilege to come into that Court to which he himſelf belongeth, and in reſpect of which he is privileged. And there is an Attachment to arreſt a mans perſon for ſome Contempt to a Court, or other miſdemeanor. For which ſee *Contempt*. *Attachment of priviledg, what.*

There is a Proceſs alſo called a Forein Attachment, which is uſed to attach the goods of Foreiners found within any Liberty, for a Debt due to another man. Alſo there is an Attachment uſed in the Forreſt-Courts; and there is a Reattachment, which is a ſecond Attachment of him that was formerly attached, and diſmiſſed the Court without day. *Forein Attachment, what.* *Reattachment, what.*

Of an Attaint.

IT is a Writ that is given to relieve a man that is hurt by a falſe Verdict. As if in a Civil cauſe, after another be pleaded to Iſſue, a Jury of twelve men, thereupon impannelled, give a Verdict againſt their Evidence given unto them therein, ſhew themſelves to be partial, and thereupon Judgment is given; then the party that is hurt and grieved by the Judgment, may have this Writ againſt the other party, (whether he be Plaintiff or Defendant in the firſt ſuit) and againſt the Jurors or ſuch of them as be then living; and then it ſhall be tried by twenty four ſufficient Gentlemen of the Countrey, whereof twelve at the leaſt muſt be of the Hundred where the Land lieth, whether the Verdict be true or falſe, after the ſame Evidence was given which was given to the Petit Jury, (for no more, nor no other Evidence may be given to this laſt Jury then was given to the firſt;) and if it be well done, or ſo much as is well, ſhall be affirmed. But howſoever, if the grand Jury newly choſen do affirm it, though it be falſe, the party hath no remedy. And if the twelve Jurors be found guilty, then Judgment ſhall be given that the firſt Judgment ſhall be reverſed, and the party reſtored to what was given from him thereby; That the party for whom the firſt Verdict was given, ſhall be fined and impriſoned; That the Jurors for the firſt Verdict ſhall forfeit each of them twenty pounds apiece, if the matter were above forty pounds; if under, then one pound: And then are they called Attainted, and accounted as perjured and defamed, and they for ever diſabled to ſerve in any Jury, or give in Evidence in any Cauſe in any Court of *Record* again. But if the Petty-Jury be acquitted by the Grand-Jury, and they do adjudg as the firſt, then ſhall the Plaintiff in the Attaint not only loſe the Land, and be fined, impriſoned and ranſomed at the Kings pleaſure, but alſo pay damages to the parties moleſted; and although the matter be never ſo falſe, yet is there no remedy after this in Chancery nor elſwhere, *Cromp. Jur.* 49. And if it be the Plaintiff in the firſt Action that brings the Attaint, and he have Reſtitution, then he hath his Title and Action as before. *Forteſcue, cap.* 26. *Broo.* 242. 18 *Ed.* 4. 9 *Broo. Attaint in toto. Dyer* 202. *Old N.B.* 111. *Fitz. N.B. Attaint. Stat.* 23 *H.* 8. 3: 15 *H* 6. 8. *A.D.* 14. 36. 5 *Ed* 3. 6. 28 *Ed.* 3. 8. 3 *H.* 5. 5. 11. 11 *H* 6. 4. 13. *B.* 2. *cap.* 18. *Kelw.* 130. *Det.* 5. *f.* 37. *Dyer* 53. 173. 235. 301. 212. *Co. ſuper Lit.* 294. *Attaint: what* *The trial and proceedings therein.*

Theſe Writs are ſeldom put in ure: For, Gentlemen will hardly be drawn to appear to this end; and when they do, unleſs the corruption be very apparent, they will not attaint them: and if they do, the Judg is not willing to give ſentence, but deferreth; and then if the parties agree, or die, the Attaint ceaſeth.

This word hath alſo another ſignification; for when a Judgment is given againſt

any man in Treaſon or Felony, then he is ſaid to be attaint or attainted. For which ſee *Attainder.*

What perſons may have an Attaint, and where not, and againſt whom.

Any one that is hurt by the falſe Verdict, whether he be party to the firſt Suit, or not, may have this Writ; and if the Verdict were about a matter of Land, then this remedy runneth commonly with the Land, ſo that any party or privy ſhall have it; as an Heir or Executor, or he in Reverſion on a Recovery againſt the Tenant for life or years, *Dyer* 1. *Co.* 11. 5. 18. *Kelw.* 119. *Co.* 3. 4. *Stat.* 9 *R.* 2. 3. *Co. ſuper Lit.* 294.

If a Treſpaſs be done by divers, and one have pleaded to Iſſue upon a Declaration againſt him, and the Jury upon the Trial have aſſeſſed unreaſonable Coſts; the other Treſpaſſers may bring an Attaint, for they be bound by thoſe Damages, *Co.* 11. 5. *F.N.B* 10. *Co.* 10. 119.

If Treſpaſs be againſt two, and Damages exceſſive, they may join in Attaint, *Co* 11. 43.

But ſuch a one as is neither party nor privy to the Suit, may not have this Writ; neither can the King, or an Informer have this Writ, *Kelw.* 119. *Plow.* 439. *Broo* 479.

Where it lieth, and where not.

And this Writ lieth againſt parties or privies, Heirs, Executors, and any other for the moſt part that hath the thing that was recovered by the firſt Judgment, *Dyer* 2. 1.

It lieth in all real, perſonal, and mixt Actions, in caſe where any material falſhood is found, though there be ſome truth found with it. As in real Actions, where in a Writ of Entry the demand is of twenty acres, when he ſhould have but ten, and the queſtion be about the quantity, and they find he diſſeiſed him of twenty acres: If they find a man guilty of many Treſpaſſes, when he is guilty but of one; or give exceſſive Damages in a Treſpaſs, or the like. But it lieth not on a falſe Verdict given upon an Enqueſt of Office; nor for any falſhood found, when the thing found is out of their charge and impertinent to the iſſue; nor upon any falſhood in a Writ of Right; nor upon any thing found in a *Quare impedit de plenitudine ex cujus præſentatione, ſi tempus ſemeſtre tranſierit,* and about the value of the Church by the year, *Co.* 644. *Weſtm.* 1. 37. 1 *Ed.* 3. 6. 28 *Ed.* 3. 8. *Dyer* 30. *Co.* 11. 6. 10. 119. 11. 13. *Dyer* 134. *Kelw.* 119.

Attaint lieth after the death of many of the Petty-Jury, 2 *H.* 4. 18. *a.* 16 *Ed.* 3. *Judgment* 109.

Attaint lieth not where Judges increaſe Damages for the ſame, 3 *H.* 4. 4. *a.*

Attaint lieth not upon an Enqueſt awarded to enquire of Waſte, 7 *H.* 6. 38.

Pleas in Attaint.

There be divers Pleas may be pleaded to this Writ, as a Releaſe, Arbitrement, Accord, and the like; alſo, That all the Jurors be dead but one. But one cannot plead another Attaint depending, Joint-tenancie, or that the Plaintiff is a Feme-Covert. *Non-tenure* is no plea for the firſt Tenant; but if he enfeoff a ſtranger, the ſtranger may plead it, *Co* 6. 44. *Dyer* 5. 75. *Broo* 8. 11. See the Statutes hereof, *Weſtm.* 1. *cap* 37. *Stat. de Attinctis.* 1 *Ed.* 3. 6. 5 *Ed.* 3. 6, 7. 28 *Ed.* 3. 8. 34 *Ed.* 3. 7. 9 *R.* 2. 3. 13 *R.* 2. 18. 11 *H.* 6. 4. 15 *H.* 6. 5. 11 *H.* 7. 21. 23 *H.* 8. 3. 37 *H.* 8. 5.

CHAP.

CHAP. XIX.

Of Attorny.

AN Attorny is a ſubſtitute or ſervant that is ſet or appointed in the turn, ſtead, or place of another, to do any buſineſs for him. And he is of two ſorts. 1. Publique and by Record, as are the conſtant and general Attornies at Law, in the Courts of Record. *Qui vicem gerit Clientis apud Judicem*, whoſe Warrant from his Maſter is, *Ponit loco ſuo talem Attornalium ſnum.* He alſo is general, or ſpecial. And the other is an Attorney that is private or by Deed, is ſuch a one as is made and appointed now and then for any particular buſineſs, and upon any ſpecial occaſion, who are ſo then only at that time, and in that thing. And in both theſe caſes, when any thing is done by another as an Attorny, it is as if he did it by himſelf: *Qui per alterum facit, per ſeipſum facit. Co ſuper Lit f.* 51, 52. *Stat.* 7 *R.* 2 *cap* 14. 7 *H.* 4. 13. See for ſuch Attornies, *Stat.* 4 *H.* 4. 19. 18 *Weſtm.* 2. 10. 33 *H.* 6. 7. 3 *Jac.* 7.

Attorny.

Warrant of a publique Attorny.

The private Attorney is commonly made and appointed by Letters, or a Deed of Attorny, which is uſually called a Warrant of Attorny, which is a Writing or Inſtrument, authorizing the Attorney to do that for him that doth make him his Attorny, that he would have him to do. And their duty then is to purſue their Authority; from which if they vary, they make all they do void and of no effect. For which ſee *Authority, & infra.*

Sect. 1. The making and office of a private Attorny.

The publique Attorney is to be made, appointed, and ſworn by the Judges of the Courts wherein they be Attornies, and they ought to chooſe and appoint none but men of Learning and Virtue, and ſuch as have been brought up in the ſame Court, or otherwiſe well practiſed in ſolliciting Cauſes, and have approved themſelves able and honeſt therein; and for miſdemeanors, they may remove, or otherwiſe puniſh them by their diſcretion. And then he is choſen by the Client, who makes his choice amongſt the Attornies made by the Court, of which he will, and he may make his Attorny in general, for all matters to do and receive for him; or ſpecial, in one or ſome particular matters or things. *Stat.* 4 *H.* 4. *cap.* 18. 3 *Jac.* 7. 7 *R.* 2. 14. 7 *H.* 4. 12.

Warrant of a private Attorny.

By the Common-Law, all that were commanded to appear by the Kings Writ, were to appear in perſon, and then after appearance the Judges were uſed to allow them an Attorny: But if the Judges and Court were not ſuch as did not hold plea by Writ, they could not allow him without a Writ of *Attornato faciendo*; and the Juſtices in Courts of Record and elſe, would not ſuffer any to appear by Attorny, whether he were Plaintiff or Defendant, *Co.* 8. 56. *F. N. B.* 26, 27. *Stat.* 20. *H.* 3. 10.

Where and in what caſes one may have and retain a publique Attorny, and where not without a Writ out of the Chancery, or other allowance.

But at this day in moſt caſes where one doth ſue, or is ſued, he may make his Attorny without Writ of Allowance from the King; as in Debt, Treſpaſs, Formedon, Account, Appeal of Murther, or Death, in Suits in a Hundred, Tything, County, Wapentake, or Court of the Lord; in a Plea to the return of a Reſcous by the Sheriff, *Dyer* 361. 5 *H.* 4. 8. *Glou. cap.* 3. *Merton capio, Weſt.* 2. *cap.* 10. 3 *H.* 7. 1. *Dyer* 212.

In an Information or Suit upon a Penal Statute, the Defendant being a Denizen may appear by Attorny of the Court, and ſhall not be compelled to put in Bail, *Dyer* 346. 9. 29 *Eliz.* 5.

Denizen upon information upon penal Stat. may appear By Attorney

In a Writ of Aſſiſe, Attaints, *& juris utrum*, after the Tenants have once appeared, he may make his Attorny to ſue for him if he will, 3 *Ed.* 1. 41.

Aſſize

If any perſon be outlawed or waved, and is ſo impotent as he is not able to come in perſon to reverſe it; this being examined and found by the Judges, they may in

their diſcretion allow him an Attorny; but not in the caſe of a Writ of *Capias ad ſatisfaciendum*, 7 *H.* 4. 13.

In Pleas of Treſpaſs in the County-Court, where an Appeal lieth not; the Defendant may make an Attorny, 6 *Ed.* 1. 8.

Any of the Petit-Jury, Defendants in Attaint, may appear and anſwer by Attorny, 23 *H.* 8. 3.

But in a *Præmunire*, the party may not appear by Attorny, without a ſpecial Writ, notwithſtanding he be a Lord of the Parliament, *Stat.* 14 *H.* 4. *cap.* 14. 9 *Ed.* 4. 2.

It ſeems that by this Writ which is called *Attornato faciendo*, the King may command the Juſtices to allow an Attorny to the party, Plaintiff or Defendant, in any Action or Cauſe; and the Juſtices muſt allow him, as in a *Quid juris clamat*, againſt a woman great with child, or any impotent perſon; or in priſon, the Defendants may have a Writ to allow of an Attorny directed to the Judg, *F.N.B.* 25. *l. Dyer* 175. *Dyer* 135. *p* 15.

By a Writ out of the Chancery, or other allowance.

They which ſhall depart the Realm with the Kings licence, upon requeſt to the Chancellor, he with advice of the Juſtices may grant to them to make their General-Attornies to make anſwer, do and receive for them in any caſe or matter, *Stat.* 7. *R.* 2. *cap* 14.

Every Free-man which oweth Suit to the County, Tythings, Hundred, and Wapentage, or to the Court of his Lord, may freely make his Attorny to do thoſe ſuits for him: And this muſt be allowed him upon a Writ of *Attornato faciendo*, 20 *H.* 3. 10. *Fitz. Attorn.* 106. *F.N.B.* 156.

Sect. 2.

But in Writs of Entry and Right, the Juſtices will not admit of any Attorny on the Tenants ſide unleſs he come in and acknowledg him before ſome Juſtice, or have a Writ out of the Chancery to teſtifie it, *F.N.B.* 26.

And a *Retraxit* cannot be entred in a Court by an Attorny, but the party muſt appear in perſon and do it, *Co.* 8. 58.

Where and what things may be done by Attorny.

Moſt things that a man may do by himſelf, he may do by another: as, make a Feoffment or Leaſe, or the like; make Livery of Seiſin, Entry, Claim, Demand of Rent, or the like, or pay money: One may receive money, take Livery of Seiſin, take a Deed, take a Copihold-eſtate by an Attorny; alſo one may revoke an Adminiſtration, ſurrender a Copihold-eſtate, ſue for Debts, and ſuch like by Attorny, *Co.* 9. 75. *Dyer* 283. *Br.* 89. *Co. ſuper Lit. & Lit. ſect.* 153. 14 *H.* 4. 1.

What by a naked authority cannot be done by an Attorny.

But if one have a naked authority only, coupled with a confidence, as Executors that have power to ſell Land have, he cannot do this by Deputy or Attorny. So if one have only a particular power and authority in reſpect of ſome ſpecial intereſt; as if there be Tenant for life, the Remainder in tail, and the Tenant for life hath power to make a Leaſe for one and twenty years, this cannot be done by Attorny: So if there be a ſpecial cuſtom in a Manor, that the Tenants may ſurrender to any two of the Tenants out of Court, this cannot be done by Attorny, unleſs the Cuſtom will warrant it, *Co.* 9. 75, 76.

What perſonal things cannot be done by Attorny.

Alſo there be ſome perſonal things that cannot be done by Attorny, but muſt be done by ones ſelf; as the doing of Homage, Fealty, Suit of Court, or the like, 7 *H.* 4. 19. *Co. ſuper Lit. Co.* 9. 75.

None but ſuch as are honeſt and skilful, and have been accuſtomed to ſollicite, or have been trained up in the practice of the Courts where they are to be Attornies, ought to be admitted by the Judges into that Office; and any one of thoſe Attornies that are allowed by the Court, may be Attorny for his Client, whom the Client will chooſe, 4 *H.* 4. 18. 3 *Jac.* 7.

No Steward, Bailiff, or Miniſter of Lords of Franchiſes which have Retorns of Writs, ſhall be Attorny within the Franchiſe or Bailiwick in any Plea, whereof he is or ſhall be Officer or Miniſter, 4 *H.* 4. 19.

Any perſon almoſt may be a private Attorny, or do a thing for another, yea, ſuch as might not do ſuch a thing for themſelves; as an Infant, Feme-Covert, perſon Attaint, Excommunicate, Outlawed, a Vilain, an Alien. A Feme-Covert may be an Attorny to deliver Seiſon to her Husband, *& ſic è contra*: And he in Remainder

mainder

mainder may be an Attorny to deliver Seiſon to the Leſſee for life, *Co. ſuper Lit. fol.* 52.

The duty and office of an Attorny.

They muſt demean themſelves honeſtly and juſtly according to their Office and Oath, not moving nor exciting men to Suits, eſpecially forein and untrue ones, for ſmall treſpaſſes and little offences, and ſmall Debts, whoſe Actions are triable in Courts-Baron, 4 *H.*4.18. 3 *Jac.*7. 39 *H.*6.7.

Publique.

If he have given any Fee to any Serjeant or Counſellor at Law, or any ſum of money to Clerk or Officer, in any Court of Record at *Weſtminſter* for Copies, he muſt have a Ticket ſubſcribed with the hand and name of the ſame Serjeant, Counſellor, Clerk or Officer, witneſſing how much he hath received, and at what time; and he muſt give a true Bill to his Client, or ſome for him, of all other charges concerning the Suits, which they have for them ſubſcribed with his own hand and name, before ſuch time as he ſhall charge his Client with any of theſe ſame Fees or Charges, 3 *Jac.*7.

He muſt enter his Warrant of Attorny on Record, the ſame Term the *Exigent* is awarded, under pain of Forty ſhillings for every time: And the ſame Term he pleads to iſſue being for the Debt, or before, or elſe he is to forfeit ten pounds, and be further puniſhed by the diſcretion of the Judges of the Court, *Stat.* 18 *H.*6 9. 32 *H.*8.30. 18 *Eliz.* 13.

And they muſt not make any ſuit in a forein County, nor willingly begin untrue and forein ſuits, 39 *H.*6 *cap. ult.*

They muſt not willingly delay their Clients ſuits for gains, nor demand in their Bils any other ſums of money or allowance on his Accounts of any money which he hath not laid out or diſburſed; and if he do, his Client may have an Action againſt him, and ſhall recover treble damages, and the Attorny ſhall be put out of his Office for ever, 3 *Jac.*7.

Sect. 3.

They muſt not admit any other to follow any Suit in their name: If they do, each of them, the Attorney and Sollicitor, forfeit twenty pounds apeece, and the Attorny is to be put out of his Office for ever, *Stat.* 3 *Jac.*7.

They muſt not be Under-Sheriffs, Sheriffs Clerks, nor Receivers, nor Sheriffs Bailiffs whilſt they be Attornies; and therefore if they take upon them any ſuch Office, they muſt ceaſe that while and diſcontinue the practice of an Attorny, *Stat.* 1 *H.*5.4.

Private.

If a private Attorny do any thing, he muſt do it in the name of his Maſter for whom he doth it, and not in his own name: As if he have power to make Leaſes for years, it muſt be done in his name from whom he hath his power, unleſs there be ſome neceſſity to the contrary; as where an Executor hath power to ſell Lands, they muſt do it in their own names; or it be in ſome ſpecial caſe, as where the Authority is ſo given, that he may do it by himſelf or a Deputy: But if the Authority be indefinite, and he do the thing in his own name, all is void that he doth, *Co* 9. 76. *Curia, Underhils* Caſe, *M.*7 *Jac. B. Regis.*

The power and authority.

Alſo ſuch Attornies muſt take care to purſue the Authority given them, expreſſed by the Deed and implied by the Law, *Co. lib. Inſtit.* 1 *par. fol.* 52. See for this, *Feoffment.*

Publique.

He may bring an Action of Debt for the Charges expended, and his Fees againſt his Client; or if he be dead, againſt his Executor or Adminiſtrator: But he muſt then firſt give a Note of the Charges to his Client, in manner as is above ſet forth, *Stat.* 3 *Jac.*7.

They may not meddle in the Sheriffs office, and execute the office, or practiſe as Attornies at one time, *Stat.* 1 *H.*5 4.

Private.

Such an Attorny cannot do more then his Maſter: *Derivativa poteſtas non poteſt eſſe major primitiva.* And therefore the Attorny of one that is diſſeiſed cannot make a Claim of from the Land, if the Diſſeiſee himſelf durſt to have gone to the Land. The Bailiff of a Diſſeiſor ſhall not ſay, that the Plaintiff never had any thing in the Land, for the Maſter himſelf might not ſay ſo, 24 *Aſſ. p.*4. 2 *Ed* 4.16.

The

Warrant of Attorny. Publique.

The Warrant for the publique Attorny is, *Ponit loco ſuo talem Attornatum ſuum*: And this ought to be entred carefully by the Attorny. See the Statutes *ſupra el ſtat.* 18 *H.*6.9. *el* 32 *H.*8.30.

The Husband may make an Attorny for his Wife, and ſhe cannot diſavow him, 33 *H.*6.43

Private.

The Warrant of the private Attorny is made by an Inſtrument or Writing, *ut ſupra.*

The Principal in an Obligation may give a Warrant of Attorny for the reſt for appearance; and this is as good as if the reſt did give Warrant for themſelves, *Dyer* 361.

CHAP. XX.

Of an Attornment.

1. What.

AN Attornment is the agreement of the Tenant to the grant of the Seigniory, or of a Rent, or the agreement of the Donee in tail, or Tenant for life or years, to a grant of a Reverſion, or of a Remainder made to another. As where the Lord, or one that hath a Rent out of Land, doth grant over his Seigniory or his Rent to another; or one that hath a Reverſion or a Remainder after an eſtate for life or years, doth ſell or give the ſame away to another: In theſe caſes the Tenant of the Land muſt have notice of this ſale or gift, and of the alteration of the party to whom he muſt attend in his ſervices, and he muſt give his conſent to the ſame gift or grant, or elſe generally the ſame is not good. And this yielding of conſent is called an Attornment; and it is either actual, or verbal, or actual and verbal both. *Co. ſuper Lit.* 309. *Terms of the Law. Plow.* 25. *Lit. ſect.* 551.

2. The kinds.

That which is actual, is either implied and in Law, or expreſſed and in Fait. Of all which there are divers Examples hereafter following.

3. The effect of it.

The end, effect or fruit of this Agreement, is to perfect a Grant, and to make a good Conveyance of an Eſtate: For where this is needful, no Rent nor Reverſion will paſs without it; neither can the Grantee of the Seigniory, Rent or Reverſion, bring any action of Waſte for waſte done in the Land, nor diſtrain for any Rent or Service upon the Land before this is done. But this is but a bare aſſent, and therefore it ſhall not nor will enure or work to paſs any Intereſt, to make a bad Grant good, to enfranchiſe a Vilain, nor to give a man a Tenancie by diſſeiſin, intruſion, or abatement, neither ſhall it work by the way Eſtoppel. And therefore if a man gain a Rent iſſuing out of Land by Coherſion of Diſtreſs or otherwiſe, and the Tenant of the Land attorn to him, this will not amend his eſtate. But otherwiſe a Grant and the Attornment of the Tenant do as effectually paſs the Freehold and Inheritance of the Reverſion of Land, as a Feoffment and Livery of Seiſin of Land doth paſs the Poſſeſſion of Land. *Lit. ſect* 551. *Co. ſuper Lit.* 302. *Lit. Bro. ſect.* 267. 129. 379. 39 *H.*6.24. *Co. ſuper Lit.* 323. 315. *Lit. ſect.* 6. 8.

Eſtoppell

4. Where and in what caſes the Attornment of the Tenant is neceſſary, or not; and how, and to what intents.

In moſt caſes where the Grantee hath means to compel the Tenant to attorn, there the attornment of the Tenant is at leaſt to ſome purpoſes needful. For howſoever it be true, that if a Seigniory, Rent, Services, Reverſion, or Remainder be granted by Fine, in this caſe the Rent, Seigniory, &c. doth paſs, ſo as the Grantee may enter for a Forfeiture upon the alienation of the Tenant being Tenant for life, years, by Statute or *Elegit*, or upon an Eſcheat of the Tenant; or ſeiſe a Ward or Heriot, if it happen before any Attornment be made. And if the Reverſion of a Leaſe for years be granted by Fine, and the Leſſee be ouſted, and the Leſſor diſſeiſed, the Conuſee may have an Aſſiſe; and therefore as to all theſe purpoſes the Attornment

ment of the Tenant is not needful. But the Grantee, his Heir, or Aſſignee cannot diſtrain the Tenant for Rent, or bring any Action that doth lie in privity between him and the Tenant, as Waſte upon a waſte done by the Tenant, Writ of Entry *ad communem legem*, or *in caſu proviſo*, or *in conſimili caſu* upon the alienation of the Tenant, Eſcheat upon the dying of the Tenant without Heirs, or Ward upon the death of the Tenant his Heir within age, or Writ of Cuſtoms and Services, until he have the attornment of the Tenant; and therefore as to all theſe purpoſes the attornment of the Tenant is neceſſary. And hence it is that the Conuſee of a Fine hath means appointed him by the Law to compel the Tenant to attorn; for in caſe where the Lord doth grant his Seigniory to another, and the Tenant will not attorn, the Conuſee, before the Fine be ingroſſed, may have a Writ called a *Per quæ ſervitia*, and thereby compel him to attorn. And in caſe where a man doth grant a Rent to another, and the Tenant of the Land out of which the Rent doth iſſue will not attorn, the Conuſee of the Rent may have a Writ called *Quem redditum reddit*, and thereby compel him to attorn. And in caſe where a man doth grant a Reverſion or a Remainder of his Tenant for life to another, and the Tenant will not attorn, the Conuſee of the Reverſion or Remainder may have a Writ called a *Quid juris clamat*, and thereby compel the Tenant for life to attorn. And if the Conuſee of the Fine die in theſe caſes before he have the attornment of the Tenant, his Heir, albeit he come to the thing deſcended by act of Law, yet ſhall be in no better caſe then his anceſtor was. And if the Conuſee of a Fine, by which he hath a Reverſion granted to him, before he hath gotten the attornment of the Tenant, bargain and ſell the Reverſion by Deed indented and inrolled, the Bargainee ſhall be in no better caſe then the Bargainor was. And if a Reverſion be granted by Fine, and the Conuſee before attornment enter and make a Feoffment, and the Leſſee reenter; in this caſe the Feoffee cannot diſtrain for the Rent. And yet if there be Lord, Meſne and Tenant, and the Meſne grant the Services of his Tenant by Fine to another in Fee, and after the Grantee die without Heir, and by this means the Services of the Meſne eſcheat; in this caſe the Lord may diſtrain for them without any attornment of the Tenant, *Lit. ſect.* 579, 580, 581. *Co.* 6. 68. *Co. ſuper Lit.* 309, 314, 320. *Old. N. B.* 170. *Co. ſuper Lit.* 252. *Idem. Idem. Co. ſuper Lit.* 310. *Co. ſuper Lit.* 321. *Co.* 6. 68. *Lit ſect.* 584, 583.

Per quæ ſervitia.

Quem redditum reddit.

Quid juris clamat.

In theſe following caſes, Attornment in Law or in Deed is abſolutely and to all intents neceſſary, *viz.* Where one doth make a Leaſe for life or years to one, and after doth grant the Reverſion or Remainder after the ſame Leaſe ended to another by Deed in Fee-ſimple, Fee-tail, for life or years; in this caſe the Leſſee for life or years muſt attorn. So where the Lord doth grant his Seigniory, or the Services of his Tenant by Deed in Fee-ſimple, or otherwiſe in Fee tail, for life or years to a ſtranger; in this caſe the Tenant muſt attorn. So where the Lord of a Manor doth make a Feoffment of his Manor; in this caſe the Services of the Tenants will not paſs without their attornment. So if another man have a Rent-ſervice, Rent-charge, or Rent-ſeck iſſuing out of my Land, and he doth grant this Rent to a ſtranger; in this caſe I muſt attorn to this grant to the ſtranger. And if in theſe caſes the Tenant do not attorn, the grant of the Reverſion &c. is meerly void. *Co.* 2. 66. *Lit. ſect.* 551, 567, 571. *Co. ſuper Lit.* 316. *Lit. ſect.* 551. *Co. ſuper Lit.* 315. *Perk. ſect.* 636. *Co.* 6. 68. *Doct. & Stu.* 55. *Lit. ſect.* 553. *Co. ſuper Lit.* 312. *Lit ſect.* 572.

If a Reverſion be granted after an Eſtate of a Tenant by Statute-Merchant, Staple, or Elegit, or after an Eſtate that any one hath until debts be paid, or the like; in theſe caſes theſe Tenants muſt attorn, or this grant will not be good, *Co. ſuper Lit.* 315.

If one make a Leaſe for years of Land rendring Rent, and after he doth grant the Reverſion to another for years, to begin after the death of the Grantor; in this caſe it is needful that the Leſſee for years in poſſeſſion do attorn to make this grant good: But if one make a Leaſe of his Land to one for Ten years, and after make a Leaſe of it to another, To have and to hold from the end of the ſaid term of Ten years for the term of Twenty years; in this caſe it ſeems it is not needful that the firſt Leſſee do attorn, but that the grant is good enough without it, *Co.* 2. 35. *Lit. Br. ſect.* 198. *Dyer* 307. *Co. ſuper Lit.* 312. *Lit. Br. ſect.* 151. 379. *Br. Attor.* 59. *Dyer* 26. *Lit. Br.* 349.

If

If one make a Leaſe to another for twenty years, and he make a Leaſe over to a third for ten years rendring a Rent, and then doth grant the Reverſion to a ſtranger; in this caſe it is needful that the Leſſee for ten years do attorn: But if the Leaſe for ten years be made without any reſervation of Rent, *contra*. For it is a rule, That where there is no Tenure, Attendancie, Remainder, Rent or Service to be paid or done, there Attornment is not neceſſary. And hence it is, that where one doth grant Common of Paſture appendant or appurtenant, or Eſtovers out of Land, that there needs no Attornment of the Tenant to make this Grant good. And if a Rent or Common be granted to one for life, and after the Reverſion of it be granted to another; that in this caſe there need no Attornment to make this ſecond Grant good. And if one make a Leaſe to one for ten years, and then make a Leaſe to another for twenty years; in this caſe the ſecond Leaſe is good for the ten years to come after the firſt ten years ended, without any Attornment of the firſt Leſſee. And ſo it was agreed in *M.* 37, 38 *Eliz. B.R.*

If a Lord exchange the ſervices of his Tenant with another for Land; in this caſe the Attornment of the Tenant by whom the Service is to be done, is neceſſary to perfect this Exchange, *Perk. ſect.* 249, 259.

If there be Lord and Tenant in Fee-ſimple, and the Tenant doth make a Leaſe to another man of the Tenancie for life, and the Lord doth grant the Seigniory to the Tenant for life in fee; in this caſe the Tenant in Reverſion muſt attorn to the Tenant for life upon this Grant of the Reverſion, or the Grant is not good, *Lit. ſect.* 562.

If I be ſeiſed of a Reverſion after an Eſtate for years, and I grant it to the uſe of my ſelf for life, and after to the uſe of another and his heirs in Fee, and after I grant my Reverſion for life to another; in this caſe it is needful that the Tenant for years attorn to this Grant, *Hil.* 8. *Jac.*

If a Leaſe be made to *I. S.* for his life, and afterwards another Leaſe is made of the ſame Land to *I.D.* for his life; in this caſe it ſeems that *I. S.* muſt attorn to this ſecond Grant, or that the Grant will not be good, *Dyer* 118.

An Eſtate of a Seigniory cannot be gained by a Diſſeiſin, Abatement, or Intruſion without an Attornment. And therefore if one diſſeiſe another of a Manor which is part in Demeſne, and part in Seruices, the Services are not gained until the Tenants attorn, *Lit. ſect.* 587.

In all caſes for the moſt part where there is no means provided by Law to compel the Tenant to attorn, there their Attornment in Law or in Deed is not neceſſary, unleſs there be ſome ſpecial default in the Grantee. *Quod remedio deſtituitur, ipſa re valet ſi culpa abſit*, *Co.* 6. 68. *Lit. ſect.* 580, 583, 586. *Co. ſuper Lit.* 321. 314.

And therefore an Attornment is not neceſſary in theſe caſes following, *viz.* Where one doth grant a Rent, Reverſion, Remainder, Service, or Seigniory to another by way of Deviſe by a laſt Will and Teſtament, or by Letters-Patents from the King, or where ſuch things are granted by matter of Record from a Subject to the King, *F.N.B.* 121. *m.*

So when the thing granted doth paſs by way of uſe, and doth veſt by force of the Statute of Uſes: As if one that is ſeiſed of Land in Fee, doth make a Leaſe of it for life or years to *I.S.* and after levieth a Fine, or doth covenant to ſtand ſeiſed of the Reverſion of this Land, (or of the Land it ſelf, which is all one) to the uſe of another, or doth bargain and ſell the Reverſion in Fee, or for years; in theſe caſes the Tenant need not to attorn, *Co.* 6. 68. *ſuper Lit.* 321. 2. 35.

But if *A.* grant a Reverſion to *B.* to the uſe of *C.* and the Deed is not inrolled, or the uſe ariſe not upon conſideration of blood, &c. in this caſe if the Tenant do do not attorn, the Reverſion will not paſs. *Agreed in the Court of Wards, Hil.* 18 *Jac.*

If one by a Common Recovery ſuffered, grant a Reverſion to the uſe of himſelf, his wife, or children; in this caſe there needs no attornment of the Tenant by the Statute of 7 *H.* 8. 4. *Calvins* Caſe, *Paſch.* 7 *Jac. B.R.*

So where one doth come to any ſuch thing by title or Seigniory paramount, as by Eſcheat, Surrender, or Forfeiture, or by Deſcent; in all theſe caſes, and the reſt before,

before, the Attornment of the Tenant is to no purpoſe, neither to paſs the thing as to the Eſtate, nor to make a privity to diſtrain or bring action of Debt. And therefore if there be Lord, Meſne and Tenant, and the Meſne grant the ſervices of his Tenant by Fine to another in Fee, and after the Grantee dieth without heir; in this caſe the ſervices of the Meſnalty ſhall come to the Lord paramount, and he may diſtrain for them, or bring any Action that lieth in privity for them without any Attornment. So if Leſſee for life of a Manor ſurrender his Eſtate to the Leſſor, there needs no Attornment of the Tenants of the Manor to make this Eſtate to paſs. So if the Reverſion of a Tenant for life be granted to another in Fee, and the Grantee die without heir, ſo that the Reverſion eſcheat; in this caſe the Lord may diſtrain or bring any action of Waſte, &c. without any attornment. So if a Reverſion deſcend to an heir from his anceſtor; in this caſe it will veſt in the heir without attornment, and attornment in this caſe is not neceſſary. So if the Conuſee of a Statute Merchant extend a Seigniory or Rent for debt, the Seigniory or Rent ſhall be veſted in him without any attornment of the Tenant, *Littl. ſect.* 583. 5 *H.* 7. 18, 19. *Co. ſuper Littl.* 321.

So in all caſes when the thing doth move by act of Law: As if a Leaſe for years rendring Rent, be aſſigned for Dower, or granted by *Elegit* for the moyetie upon the Execution, *Brownl. Rep.* 1 *par.* 33. 2 *par.* 291. And ſo alſo it is where a Manor or Reverſion of Copiholds is granted, the attornment of the Copiholder is not neceſſary, *Brownl.* 1 *par.* 179.

If a Copiholder in Fee make a Leaſe for years by licence of the Lord rendring Rent, and after ſurrender the Reverſion to the uſe of *I. S.* in this caſe it ſeems an attornment of the Tenant is not needful, but *I. S.* ſhall have the Rent without any attornment, *Per tres Juſt. Trin.* 4 *Jac. B.R.*

If one grant the Reverſion of Copihold lands for life or years, or grant the Seigniory of Copihold lands of inheritance; in theſe caſes there needs no attornment of the Tenants to make the grants good. And ſo alſo is the Law for an Eſtate at will by the Common Law, *Curia M.* 37, & 38 *Eliz. B.R. Co.* 2. 35. *ſuper Lit.* 311.

If a Leaſe be made to one for life, the Remainder to another in tail, the Remainder over to the right heirs of the Tenant for life, and the Tenant for life doth grant his Remainder in Fee; in this caſe there needs no Attornment of the Tenant in tail, but the Remainder will paſs by the Deed preſently without any Attorment at all, *Lit. ſect.* 578.

If one leaſe for life the Remainder for life, and after the Leſſor releaſe all his right in the Land to him in Remainder for life; in this caſe there needs no Attornment of the Leſſee for life to perfect this Releaſe, *Lit. ſect.* 575.

If two Joint-tenants or more make a Leaſe for life rendring Rent, and one of them doth releaſe the Rent to the other; in this caſe there needs no Attornment to make the Rent to paſs, *Lit. ſect.* 574.

In all caſes where the Grant is in the Perſonalty, there needs no Attornment. And therefore in Grants of Annuities which do charge the Perſon of the Grantor only, and not his Land, there needs no Attornment; and in all caſes where there is an Attornment in Law, there needs no Attornment in Deed. Agreed in *Curnocks* Caſe, *M.* 3 *Jac. Co. B.*

Tenant for life muſt attorn upon a Fine levied by Tenant in tail, *Goldsb.* 5. *pl.* 9.

If there be Lord, Meſne, and Tenant, and the Lord grant the Fee of the Seigniory; in this caſe the Meſne, and not the Tenant muſt attorn, *Lit. ſect.* 555.

If one make a Leaſe for life, and then grant the Reverſion for life, and the Leſſee attorn, and after the Lord grant the Seigniory; in this caſe it ſeems the Grantee, and not the firſt Leſſee for life muſt attorn, *Co. ſuper Lit.* 319.

If there be Lord and Tenant, and the Tenant make a Gift in tail, or Leaſe for life of the Land, and after the Lord grant the ſervices to a ſtranger; in this caſe the Tenant for himſelf, and not the Tenant in tail or for life muſt attorn: For it is a Maxim in Law, That no man ſhall attorn to any Grant of any Seigniory, Rent, Service, Reverſion, or Remainder, but he that is immediately privy to the Grantor.

5. By whom an attornment may and muſt be made, or not.

But to the Grant of a Rent-ſeck or Rent-charge, iſſuing out of ſuch Land as before, the Under-Tenant in Tail, or for life, and not immediate Tenant himſelf muſt attorn, *Littl. Sect.* 554, 556. *Co. ſuper Littl.* 311.

If there be Tenant for life, the Remainder in Fee, and the Lord grant the Services to a ſtranger: In this Caſe the Tenant for life, and not him in Remainder, muſt attorn, *Littl. Sect.* 556.

If there be Tenant for life, the Remainder in Tail, and he in the Reverſion after their Eſtates doth grant his Reverſion to a ſtranger: In this Caſe, if either of them need to attorn, it muſt be the Tenant for life, *Idem.*

Husband and Wife.

If a Woman that hath a Husband be to attorn, the Husband may and muſt do it for her, and the Attornment of the Husband for the Wife, whether it be expreſſed or implied, will binde the Wife, *Co. ſuper Littl.* 312. *Littl. Sect.* 558.

If one make a Leaſe for years of Land, the Remainder for life, and after the Leſſor doth grant the Reverſion: In this Caſe, the Tenant for life or years, either of them may attorn, *Littl. Sect.* 571. *Co. ſuper Littl.* 316, 317.

If a Rent-charge be iſſuing out of Land, and the Tenant be diſſeiſed of the Land; in this Caſe the Diſſeiſor muſt attorn. But in caſe of the grant of a Rent-ſervice, the Diſſeiſee may attorn if he will; for the privity is between the Lord, and the Diſſeiſee onely, *Co. ſuper Littl.* 312.

If a man make a Leaſe for life to *J. S.* of Land, and after grant a Rent-charge out of it to *J. D.* and after he grant over this Rent to another; in this Caſe the Leſſor, and not *J. S.* muſt attorn, *Idem.*

The Tenant in Dower, after ſhe hath aſſigned over her Eſtate, and not the Aſſignee muſt attorn to the grant of the Reverſion; and yet ſome hold that the Aſſignee alſo may attorn. The ſame Law is alſo of the Tenant by the courteſie; but it is not ſo in other Caſes; for if the Reverſion of Leſſee for life be granted, and Leſſee for life aſſign over his Eſtate, the Aſsignee and not the Leſſee muſt attorn, *Co. ſuper Littl.* 316. 8 *Ed.* 4. 10.

If Leſſee for life aſsign over his Eſtate upon Condition, and then the Reverſion is granted; in this Caſe the Aſsignee, and not the Leſſee for life, muſt attorn, *Co. ſuper Littl.* 316.

If a Tenant in Fee-ſimple, that ought to attorn to a grant of a Seigniory, or Rent, die before he make an Attornment, his Heir muſt attorn, and an Attornment made by him is good. So if he grant away his Land before he make Attornment, his Grantee may attorn, and an Attornment made by him, will be good enough, *Co. ſuper Littl.* 315. *Perk. Sect.* 231.

If a Lord of a Manor, make a Leaſe of his Manor for life or years, and the Free-holders and others do attorn to the Leſſee, and after he grant away the Reverſion of the Manor to a ſtranger; in this Caſe the Leſſee for life or years muſt attorn, and this will binde all the Free-holders, *Co. ſuper Littl.* 311.

If there be Lord and Tenant by Homage, Fealty, and Rent, and the Tenant is diſſeiſed, and then the Lord granteth the Rent to another; in this Caſe the Diſſeiſor and not the Diſſeiſee muſt attorn; but if he grant the whole Seigniory, the Diſſeiſee may attorn, *Idem.*

Infant. Non compos mentis.

A voluntary Attornment where it is needful, may be made by an Infant, or one that is deaf and dumb, (who may do it by ſigns.) But one that is *non compos mentis*, cannot make an Attornment, *Brownl.* 2. *part.* 84. 1. *part.* 46. *Co. ſuper Littl.* 315.

6. To whom an *Attornment* may and muſt be made; or not.

The Attornment muſt always be made to the Grantee of the Reverſion, Rent, *&c.* according to the Grant, whether the Attornment be expreſs or implied. But if divers do take by the Grant, the Attornment may be made to one of them, and this ſhall avail the reſt; as if a Reverſion or a Rent be granted to two or more, and the Tenant attorn to one of them; this is good to veſt and ſettle the thing granted in them, all according to the Grant. And if a Leaſe be made by Deed of a Reverſion to *A.* for life, the Remainder in Fee to *B.* and the Tenant attorn to *A*; this is a good Attornment to ſettle the Remainder in *B.* But if the Tenant attorn to *B.* during the life of *A*, this is not good for *A*; howbeit if the Tenant for life die before the

the Attornment be made; in this caſe the Attornment may be made, and this ſhall be ſufficient to perfect the Grant of the Remainder to *B.* *Co. ſuper Littl.* 310, 312. 20 *H.* 6. 7.

If I grant a Reverſion to one man, and before the Attornment of the Tenant had to perfect the Grant, he doth ſell this Reverſion to a third man; in this caſe the Tenant may attorn to the ſecond Grantee, and this will make the grant good to him. But if the Attornment be made to both the Grantees, it is void for Incertainty, *Co.* 6. 68. 11 *H.* 7. 12.

An Attornment may as well be made to *Ceſtuy que uſe* of a Reverſion, as to the Grantee of the Reverſion himſelf. And it ſeems it muſt be made to him, and not to the Grantee of the Reverſion. For it was agreed in the Court of Wards, *Hil.* 18 *Jac.* That if a Reverſion be granted to *B.* to the uſe of *C.* that the Attornment muſt be made to *C.* and not to *B.* who is but an Inſtrument, *Co. ſuper Littl.* 310. *Hardings* Caſe.

7. When and at what time the *Attornment* muſt be made.

In all Caſes regularly where Attornment is neceſſary, it muſt be made in the life time of the parties Grantor and Grantee, or Exchangor or Exchangee, for if either of them die before the Attornment be made, the grant or exchange is void. And therefore if a Manor be granted, and Livery of Seiſin be given upon the Demeſns thereof, and one of the Tenants die before Attornment be made by him, his Tenement will not paſs, and the Grant, as to that part, will be void; for in this caſe all the Tenants, but Tenants at will, muſt attorn. And albeit the Grant of the Reverſion be to begin at a day to come, and after the death of either of the parties; yet muſt the Attornment be made in the life time of the parties, or otherwiſe the Grant will not be good. And yet an Attornment may be made after the death of the Tenant by his Heir, and after the Conveyance of the Tenant by his Aſſignee, *Co.* 1. 151. *ſuper Littl.* 310. *Littl. Sect.* 551. *Perk. Sect.* 263. 231. *Co. ſuper Lit.* 315. 2. 35.

If a Leaſe be made of a Reverſion, to begin at a day to come; in this caſe the Attornment may be made before or after the day, ſo it be made in the life time of the parties, *Co.* 2. 35.

If one grant his Reverſion of White-acre or Black-acre, and the Tenant attorn to the Grant, before the Grantee have made his Election, which Acre he will have: this is a good Attornment, *Co. ſuper Littl.* 310.

If a man grant his Reverſion by Deed to one, and after and before the Tenant do attorn, he levy a fine or make a Feoffment of the Land to another; in this caſe it ſeems the Attornment after comes too late: But if the fine or Feoffment be but of part of the Land granted before in Reverſion; in this caſe the firſt Grant after Attornment, ſhall be good for the reſidue. And if a Woman ſole grant a Reverſion, and after and before Attornment ſhe marry with a ſtranger, and after the Tenant attorn; in this Caſe the Attornment comes too late, for the marriage is a Countermand of it. And if a Reverſion of an Eſtate for life or years be granted, and the Grantor before Attornment doth confirm the eſtate of the Tenant for life or years, and ſo change the Eſtate, and after the Tenant attorn; in this caſe the Attornment comes too late, *Co. ſuper Littl.* 309, 310. 8. 82. 4. 61. *Kelw.* 163.

8. The manner of making an *Attornment.* And what ſhall be ſaid a good *Attornment*; or nor.

To the making of a good Attornment, where it is needful divers things are required.

1. It muſt be made by the perſon that ought to make it.
2. It muſt be made to the perſon that ought to take it.
3. It muſt be made in time convenient.
4. If it be an expreſs Attornment, the Tenant muſt firſt have notice of the Grant of the Reverſion, Rent, *&c.* to which he muſt attorn; but otherwiſe it is of an Attornment in Law, for there notice in all caſes is not neceſſary.
5. And it muſt be done in that manner the Law doth preſcribe.

And for this it is to be known, that it may be made by words or by Deeds, and without any writing, or by Deed or Writing (and this is the ſafeſt way to do it.) And any words written or ſpoken by the Tenant, that do import an aſſent

and Agreement to the Grant of the Reverſion, Rent, *&c.* in ſuch manner as the ſame is made after notice given to him of the Grant, whether it be in the preſence or the abſence of the Grantee of the Reverſion, Rent, *&c.* will make a good Attornment in Deed. And therefore, if the Tenant after knowledge of the Grant, uſe theſe words following, or any others to the like effect, to the Grantee, *viz.* I do attorn, or turn Tenant to you according to the Grant; or, I become your Tenant; or, I agree to the Grant; or, I am well content with the Grant; or, God ſend you joy of it: Theſe are good expreſs Attornments, *Co. ſuper Littl.* 309, 310, 315. *Littl. Sect.* 551. *Plow.* 344.

And if the Tenant after knowledge of the Grant, pay, do, or deliver all, or any part of the Rent, or Service, before, or at the time when the ſame is due, to the Grantee, or give a peny, or farthing, an Ox, or a Knife, or any ſuch like thing, or any other valuable thing, in the name of Attornment, or in the name of Seiſin of the Rent; this is a good expreſs Attornment, and that Attornment which is made by words and Deed, or ſign both, is the beſt; for that doth leave a more deep impreſſion in the minde of the Witneſſes. But if one have a Rent-charge iſſuing out of my Land, and he grant it to a ſtranger, and I give him an Ox to put him in poſſeſſion of the Rent; it ſeems this is no good Attornment. See *Brownl.* 2. *part.* 51. *Littl. Sect.* 563. 551. 513. *Co. ſuper Littl.* 315. 49 *Ed* 3. 15.

If a man grant his Reverſion of my living to *J. S.* and his Bailiff that doth uſe to gather his Rents, ſaith to me, That *J. S* hath bought it, and I muſt hereafter pay my Rent to him, and I tell him I am glad of it; this is a good Attornment. And that albeit it be in the abſence of *J. S.* *M.* 2 *Car. In the Court of Wards. Co. ſuper Lit.* 310.

And it is not material whether the ſtranger know of the Grant or not, ſo the Tenant know of it. And an Attornment made to the Lords Steward in the Court in the abſence of the Lord is a good Attornment. For it is ſufficient if the Tenant have notice, that he attorn to the grant in the preſence of any whomſoever. Tenant for life was, the Remainder in Tail, he in the Remainder granted his Remainder; the Tenant for life having notice of the Grant, ſaith to a ſtranger in his abſence, That is the party, I am well pleaſed that the Grant is made to him; it was adjudged to be good. *Curia B. R. Hil.* 11 *Car. B. R. Hiltons* Caſe.

If a Reverſion be granted to one for life, and after the ſame Reverſion be granted to him for years, and the Tenant attorn to both the Grants at once; this Attornment is void for Incertainty. So if one grant his Seigniory to *J. S.* Biſhop of *London*, and his Heirs, by one Deed, and grant the ſame to *J. S.* Biſhop of *London*, and his Succeſſors by another Deed, and the Tenant attorn to both Grants at once; this Attornment is void for Incertainty. So if a Reverſion be granted to two ſeveral perſons, by ſeveral Deeds, and the Tenant attorn to both the Grants at one time; this Attornment is void for Incertainty, and neither of the Grants are perfected by the Attornment in theſe Caſes. The implied Attornment which alſo doth amount to an expreſs Attornment is made divers manner of ways. For if the Tenant after notice of the Grant of the Reverſion pay his Rent to the Grantee, or ſurrender his Eſtate to the Grantee, or pray in aid of the Grantee, or accept a Grant of the Reverſion or Remainder from him that hath it; this is a good Attornment in Law. But if the Tenant after the Grant of the Reverſion, not having notice of the Grant, pay his Rent to the Grantee as a Receiver, Bailiff, *&c.* this is no good Attornment. And therefore if the Bailiff of a Manor ſhall purchaſe the Manor, or the Reverſion of one of the Tenements and the Tenant not knowing of this purchaſe, pay his Rent to him as he was wont to do; this is no good Attornment in Law. So if a man ſeiſed of a Seigniory levy a fine of it, and then taketh back an Eſtate in Fee, and the Tenant having no notice of all this, doth pay his Rent to the Conuſor as he was wont to do; this is no good Attornment in Law, to perfect either of theſe Grants, *Co. ſuper Littl* 310. 11 *H.* 7. 12. 14 *H* 8. 15. 34 *H.* 6. 41. *Co. ſuper Lit.* 312. *Calvins* Caſe, Adjudged. *Paſche*, 7 *Jac. B. R. Co. ſuper Littl.* 309. *Co.* 2. 67. *Dyer* 302.

If there be Lord and Tenant, and the Tenant let the Land to a Woman for life, the

the Remainder in Fee, and the Woman doth take a Husband, after the Lord doth grant the Services to the Husband in Fee; in this case this Acceptance of the Deed by him that ought to attorn, is a good Attornment in Law. So if in this case the Tenant Lease to a man for life, the Remainder over, and the Lord grant the Services to the Tenant for life, and he accept thereof; this is a good Attornment in Law, *Littl. Sect.* 558, 560, *&c.*

If the Lord by Deed grant his Seigniory to the Tenant of the Land, and to a stranger, and the Tenant doth accept of this Deed; this is a good Attornment in Law, to extinguish a moyety, and to vest the other moyety in the other Grantee. So if one make a Lease to *J. S.* for life, and after confirm his Estate, the Remainder over to *J. D.* and the Lessee for life, doth accept of the Deed of this Confirmation and Grant; this is a good Attornment in Law, and doth vest the Remainder in *J. D.* *Co. super Littl.* 313. *Co. super Littl. Sect* 573.

If there be Lord and Tenant, and the Tenant take a Wife, and after the Lord doth grant the Services to the Wife, and her Heirs, and the Husband doth accept of the Deed of this Grant; this is a good Attornment in Law, *Littl. Sect* 559.

If the Conusee of a Fine of Services sue a *Scire facias* to have Execution of the Services, and hath Judgment to recover; this is a good Attornment in Law, *Littl. Sect.* 564.

If a Woman grant a Reversion to a man in Fee, and after marry with the Grantee; this is a good Attornment in Law to perfect this Grant made to the Husband, *Co. super Lit.* 310.

If a Lord grant his Seigniory, and there be twenty manner of Services, and the Tenant with what intent soever it be, pay or perform in Deed any parcel of the Services to the Grantee; this is a good Attornment in Law for all the Services, *Littl. Sect.* 563.

If I be seised of Land in Fee, and make a Lease for life or years of it, or it be extended by a Statute or Elegit, and then I make a Feoffment of this Land, and give Livery of Seisin upon it, and so put out the Tenant, and after the Tenant (or one of the Tenants, if there be many) re-enter; this is a good Attornment in Law. And so also it seems is the Law, if the Lessee for life recover in an Assise. But if a man make a Lease for life, and then the Lessor grant the Reversion for life, and the Lessee attorn, and after the Lessor enter and make a Feoffment in Fee, and so disseise the Lessee for life, and then the Lessee re-enter; this is no good Attornment in Law by the Grantee for life. And if the Conusee of a Reversion by fine disseise the Lessee for life, and make a Feoffment in Fee, and the Lessee re-enter; this is no good Attornment in Law to the Feoffee to enable him to distrain, *&c.* *Littl. Sect.* 576, 577. *Co. super Littl.* 319. *Dyer* 212. *Co.* 6. 68 5. 113.

If one grant the Reversion of a Lease of a term of years and before any Attornment made, the Lessee for years doth grant his term to the Grantee of the Reversion; in this case this is no good Attornment in Law to make the Reversion to pass, *Hil.* 8 *Jac.*

If one have Land, and a Rent issuing out of other Land, both in one County, and he grant both by Deed, and give Livery of Seisin of the Land, in the name both of the Land and of the Rent; this is no good Attornment in Law to make the Grant of the Rent good, *Perk. Sect* 231.

If Lessee for life or yeers, subscribe his name as a witness to the sealing and delivery of the Grant of the Reversion made by the Lessor to a stranger; this is no good Attornment in Law, for he may do this, and not have notice: But if he have notice of the Grant, and then put his hand to it; this is an Attornment, *Curia. B. R. Hil.* 11 *Car. So was it held in* Brokenbury *and* Martials *Case.* 5 *Eliz.*

If a Reversion be granted of two Acres, or for forty years, or if Services be granted, and the Tenant doth attorn for one Acre, or for part of the forty years, or for part of the Services; this shall extend to all, and is a good Attornment for both the Acres, all the forty years, and all the Services. And that albeit the Tenant say expresly, it shall be good but for a part, and not for the whole; and so also it is of an Attornment in Law. And therefore if the Grantee by fine of Services sue a

Attornment to part of the Grant good for the whole.

Scire

Scire facias, to have Execution of any part of the Services, and have Judgment to recover any part, or a Leſſee of three Acres ſurrender one of them to the Grantee of the Reverſion of all the three Acres; this is a good Attornment for the whole. But if one attorn for part of the Land, or for part of the Services in caſe of the Grant of a Reverſion of Land, or the Grant of Services, and have no notice of the Grant of any more; this Attornment is not good for any part, but void for all, *Co.* 2. 68. *ſuper Littl.* 297, 314, 309. *Littl. Sect.* 564.

Attornment to one good to others.

If a Seigniory, Reverſion, or the like, be granted to two or more, and the Tenant after notice thereof, doth attorn to one of them; this is a good Attornment to perfect the Grant to both or all of them. But if one die before Attornment, and the Tenant attorn to the Survivor or Survivors; this ſhall not avail the Heir of him that is dead, but it is good to perfect the Grant to the Survivor or Survivors, to whom it is made, *Co. ſuper Littl.* 297. 2. 68. 67.

If a Reverſion be granted to Husband and Wife, and the Tenant attorn to the Wife in the abſence of the Husband; this is a good Attornment to perfect the Grant to them both. But if a Reverſion be granted to two men, and the Tenant have notice onely of a Grant made to one of them, and he attorn to him onely; this Attornment is void, and not good to perfect the Grant to either of them, *Calvins* Caſe. *Paſche*, 7 *Jac. B. R. Co.* 2. 68.

Attornment by one good for others.

If two Joynt-tenants be for life, or years, and the Reverſion of their Eſtate is granted to a ſtranger, and one of them attorn to the Grant of the Reverſion; this is a good Attornment for both of them. The like Law is for Tenants in common. *Co.* 2. 66, 67. *Littl. Sect.* 566. But if *A*, *B*, *C* and *D*, be Leſſees for years, and *C* and *D* be outlawed, ſo as they forfeit their parts to the King, and the King become Tenant in common with *A* and *B*. and after the Reverſion is granted to a ſtranger, and *A*, *B*, *C* and *D* attorn; this is no good Attornment to perfect the Grant of the Reverſion; for *C* and *D* cannot attorn, and the Attornment of *A* and *B* for the King and themſelves, is not good, 6 *Car. In the Lord* Brook's *Caſe in the Court of Wards.*

9. Who ſhall be compelled to attorn; or not; and where.

Attornment made by the Husband, is good for the Wife; whereof ſee before at *Numb.* 5.

In all Caſes for the moſt part where Attornment is needful, the Tenant whether he be Tenant in Fee-ſimple, for life, years, by Statute, Elegit, or as Executor until Debts be paid, ſhall be compelled to attorn. And albeit the Tenant be an Infant, and come to the Land by purchaſe or deſcent, yet may he be compelled to attorn, but then in this caſe his Attornment ſhall not prejudice him; for when he is of full age he may diſclaim, or ſay he doth hold by leſs Services. *Co.* 6. 68. 9 84. *ſuper Littl.* 315.

If there be Tenant in Tail of a Reverſion, and he grant this over to a ſtranger; in this caſe the Tenant in poſſeſſion may be compelled to attorn. But if the Reverſion upon the Eſtate of the Tenant in Tail, or upon the Eſtate of the Tenant in Tail, after poſſibility of Iſſue extinct be granted, ſuch a Tenant may not be compelled to attorn; and yet ſuch a Tenant may attorn *gratis* if he will. And the Aſſignee of the Eſtate of ſuch a Tenant in Tail after poſſibility, *&c.* is compellable to attorn. And if one make a gift in Tail, the Remainder in Fee, and the Seigniory, or a Rent-charge iſſuing out of the Land, is granted in Fee by Fine; in this caſe the Tenant in Tail may be compelled to attorn, *Co. ſuper Littl.* 316, 318.

In all caſes, for the moſt part, where Attornment is not needful, there is no means to compel the Tenant to attorn. And therefore the Tenant cannot be compelled to attorn to him that comes to a Reverſion or Remainder by Eſcheat, Forfeiture, *&c. Co.* 6. 68. *ſuper Littl.* 318.

If one grant his Reverſion of Land in Mortmain without a Licence, the Tenant may not be compelled to attorn, until there be a Licence had from the King, *Co. ſuper Littl.* 318. 3. 86.

Alſo it is a general rule, that when the Grant by Fine is defeaſible, there the Tenant ſhall not be compelled to attorn. As if an Infant levy a Fine, this is defeaſible by Writ of Error during his minority, and therefore the Tenant ſhall not be compelled

pelled to attorn. So if the Land be holden in ancient Demeſn, and he in the Reverſion levieth a Fine of the Reverſion at the Common Law; the Tenant ſhall not be compelled to attorn, becauſe the Eſtate that paſſeth is reverſable by a Writ of Deceit, *Co. ſuper Littl.* 318. 3. 86.

10. How an *Attornment* ſhall enure and be taken.

If the Grant be abſolute, and the Attornment be on condition; yet this ſhall enure according to the Grant. So if the Attornment be but to part of the things, or part of the time granted; this ſhall enure to perfect the Grant for all. So if the Attornment be made but to one of the Grantees, it ſhall enure to the reſt. So if the Attornment be made to the particular Tenant, it ſhall enure to him in the Remainder to perfect his Eſtate alſo, *Co. ſuper Littl.* 309, 310. 297. See before.

If the Eſtate of the Tenant be with a priviledge annexed, as without impeachment of waſte, or the like, and the Tenant attorn generally without any ſaving of his priviledge, if the Attornment be *gratis* and voluntary, whether it be an Attornment in Law, or in Deed; this ſhall not enure to extinguiſh his privilege: But if the Attornment be made by the Compulſion of a Writ in this manner, and without this ſaving, he hath loſt his privilege for ever, *Co. ſuper Littl.* 320.

If a Reverſion, *&c.* be granted to two ſeveral men one after another, and he that hath the latter Grant, get the Attornment of the Tenant to his Grant, before the other; in this caſe this ſhall enure to perfect the latter, and the firſt Grant now cannot be made good, *Co. ſuper Littl.* 310.

If a Reverſion be granted to a Man and Woman unmarried, and before Attornment made they entermary, and then the Tenant attorn; in this caſe they ſhall have the Eſtate by Moyeties, *Idem.*

11. How an *Attornment* ſhall relate.

An Attornment as to the Party-Grantor ſhall have relation to the time of the Grant, to make the thing to paſs out of the Grantor *ab initio*, albeit it be made many years after the Grant; and therefore all acts done by him, after the time of the Grant, and before the Attornment to the prejudice of his own Grant, as granting of Rents, entring into Statutes, or the like, are void, as to the Land to charge it: And hence it is, that if a Reverſion be granted to an Alien, and before the Attornment of the Tenant, he is made Denizen; in this caſe the King upon Office found, ſhall have the Land; and yet it ſhall not ſo relate as to make the Tenants chargable to the Grantee for any mean Arrearages, or for any waſte in the Lands, from the time of the Grant to the time of the Attornment. But in reſpect of a ſtranger it ſhall not relate at all. And therefore if two Deeds be of a Reverſion at ſeveral times, and he whoſe Deed was made laſt, gets Attornment firſt, the Reverſion doth paſs to him; and though the other get Attornment afterwards, yet this will not help him by relation; and albeit the former grant of the Reverſion be in Fee, and the latter for life onely, yet the Law will be all one in both caſes. *Idem.*

CHAP.

CHAP. XXI.

Of Audita Querela.

Audita Querela.

IT is a Writ lying where one is bound in a Statute-Merchant, Staple, or Recognizance, or where Judgment is given only for Debt or Damages, or the party in Execution, and he hath a Releaſe or ſome other ſufficient Diſcharge for all or part of the duty, but hath no day in Court to plead it, nor means to make uſe of it, then he may have this Writ to relieve himſelf, *Co. ſuper Lit.* 290. *Dyer* 56. *Finches* Caſe, 14 *Fitz.* 23.

And this ſometimes is to be brought againſt the Proſecutor himſelf, and ſometimes againſt him and others that ought to bear part of the burthen with him, *Kelw.* 25. *Br.* 38.

If it be brought before Execution by the party or his Heir or Executor, the party may have a *Superſedeas* to ſtay Execution upon a Surmiſe of good cauſe for the *Audita Querela*, and upon Bail given to proſecute and ſtand to the Judgment of the Court: But when the party is in priſon, it ſeems there is no Bail put in till the Conuſee anſwer in the *Audita Querela*: But after Execution done, it ſeems no *Superſedeas* lieth. And the Proceſs beſides are before Execution, a *Venire facias* with an *Alias*; and then if he come not in, it ſeems that the party that is in priſon, upon motion may be diſcharged: And a *Diſtringas*; and upon a default after appearance and a Plea pleaded, a *Diſtringas ad audiendum Judicium*; for by ſuch default Judgment ſhall be given againſt him: And after Execution, the Proceſs is a *Scire facias*, when the party is in priſon on a *Cap. ſat.* But when he cometh in *gratis, contra. Dyer* 339. 22 *H.* 6. 56. 2 *H.* 7. 12. 25 *H.* 6. 34. 43 *Ed.* 3. 28. 12 *H.* 4. 6. 15. 15 *Ed.* 4. 5. *Fitz.* 5. 6, 7.

It ſeems alſo that a ſtranger, as he that is a Purchaſor of Land of a Cognizon of a Statute, ſhall not have a *Superſedeas*. See *Fitz.* 8. 19.

And if one Purchaſor ſue to have Contribution of another, and that other have a Diſcharge by Releaſe, a *Scire facias* ſhall go againſt the Cognizor that made the Releaſe, to try that Deed, *Fitz.* 19.

And in caſe where a man puts in Bail, he ſhall not be diſcharged of his Bail, but muſt continue it, until the Suit by the *Audita Querela* be determined; for though the Plaintiff preſent not after the appearance of the Debt, yet the party muſt continue in priſon or ſtand upon Bail, *Fitz. Aud. Qu.* 2.

If a man be Nonſuit in one *Audita Querela*, yet he may have another; but he ſhall have no *Superſedeas* to ſtay Execution in the ſecond, as he may in the firſt, *Fitz.* 11.

Againſt whom it lieth.

This Writ lieth againſt the Ter-tenant, without naming him Party or Privy, *F. N. B.* 104. *c.* 12 *H.* 4. 16.

If an Obligee have Judgment againſt an Heir of the Obligor, and his Land in extent, and the Obligee aſſign his Eſtate to a ſtranger, and after the Heir get a Releaſe from the Obligee of this Judgment, he may have this Writ againſt the Aſſignee, Adjudg *Flower* and *Elgars* Caſe, *Paſch.* 7. *Car. B. R. Co.* 4. 430. 3. 44.

In what caſe this Writ lieth to avoid a Judgment or Execution.

In all Caſes where this remedy is given, there are theſe three Incidents in the Caſe.

1. There is a charge and burthen come, or coming upon him that is to have it;
2. It is ſuch as by Law he ought to be diſcharged of in all or in part.
3. It is in ſuch a caſe where he hath no other remedy to relieve himſelf. As in all theſe Examples following:

Sect. 1.

(a) If a Judgment be againſt me, or Judgment and Execution, and the Plaintiff make me a Releaſe in Fact, and I be releaſed in Law, ſo as the ſame or any part of it is releaſed, and yet he ſueth Execution. *(b)* So if a Widow of a Copiholder in Fee,

Fee, that claimeth Dower by the Cuſtom of a Manor, recover the ſame in the Lords Court, and Fifty pounds in damages, where in truth there is no ſuch cuſtom, and the recovery is erroneous; the party grieved may have this remedy to prevent Execution, and to be reſtored to his damages if they be taken, (*a*) 36 *H.*6 24. *Plow.*72. *Dyer* 286. 20 *H.*7.30. *Co.*8.152. *Dyer* 50. (*b*) *Co.*4.30.

So if Executors have ſued and recovered by Judgment, after the Teſtament is revoked and annulled, in this caſe the party againſt whom the Judgment is, may get it certified by the Biſhop, and then have an *Audita Querela* againſt the Executors, *Co.*8.144. *Dyer* 203. *p.*73.

So if one be in Execution, and the Sheriff or the Plaintiff deliver him out and ſet him at liberty, and after take and impriſon him again, he may have this remedy; for by this the Debt is diſcharged, *Co.*8.21.

So if one have a Judgment againſt a Sheriff upon an Eſcape, and after the firſt Judgment, from the Execution whereof the Eſcape was, is reverſed for Error, the Sheriff may have relief by this Writ; but till it be reverſed, though there be Action, he cannot. So if the party be taken after the Judgment reverſed, *Co.*8.142.

So if in a *Detinue* for a Statute, the Defendant prays Garniſhment, and the Plaintiff recover againſt the Garniſhee by an Erroneous Judgment, and thereupon the Defendant deliver the Statute to the Plaintiff, and he hath Execution after the Garniſhee reverſe the Iudgment; it ſeems though Execution cannot be avoided, yet the party may have this Writ, *Co.* 5. 90.

So if one have a Judgment againſt two Joint-treſpaſſors, and one is taken, and he is ſatisfied by him, and after ſue to have Execution of the other, he may be relieved by this Writ, *Trin.* 3 *Jac. B. Regis.*

So if one have Judgment againſt two, and one is taken in Execution, and releaſed or diſcharged by the party, the other ſhall have the advantage thereof, *Monk* againſt *Brown*, *P.* 40 Q. *Com. B.*

If he that is in Execution purchaſe a Manor, to which the Plaintiff is a Vilain regardant, wherein there is a Diſcharge in Law, he may have this Writ, *Fitz.* 19.

If an Obligee have a Judgment and Land extended of the Heir, and aſſign it over, and after the Aſſignment releaſe to the Heir; in this caſe he may have this remedy againſt the Aſſignee, *Flowers* Caſe, *P.*7 *Car. B. R.* Adjudg. *M.* 36. & 37 *Ed.* 2. *Co. B.*

If the Conuſee of a Statute or Recognizance purchaſe part of the Land the Conuſor had at the time or after, and another another part, and the Conuſee ſue the Execution on the other Purchaſor, he ſhall have this Writ to diſcharge him altogether; for in this caſe he ſhall not have Contribution, or any part of him, *Charnock verſ.* Sir *Tho. Gerrard.*

If after the *Scire facias* ſued upon the Statute, the Conuſor get a Releaſe from the Conuſee of all or part of the Debt, and yet he go on to ſue Execution; the Conuſor may have this remedy: For if it be before the *Scire facias* ſued that he had the Releaſe, he might have pleaded it, *Finch* 114. *Dyer* 50. *p.*6.

If one enter into a Statute that hath ſome defect in him, and is not good, and yet the Conuſee ſue Execution, the Conuſor hath this remedy.

Or the ſame be voidable by ſome Law, as if the ſame were made upon an Uſurious Contract, or the like.

Or there were a Defeaſance upon it, which have been kept, and he notwithſtanding hath ſued Execution upon it.

Or the Statute were delivered up (which is a Releaſe in Law) and the Conuſee happen to come by him again, and ſue upon him, *Dyer* 35. *Corſlet verſ.* Sir *Rowland Lacy*, *P.*7 *Jac. B. Regis.* *Dyer* 297. *Br. Co.* 31. 43 *Aſſ. p.*18. *Br.* 29. 22 *Aſſ. p.*44.

If the Conuſor after Execution tender the money due upon the Statute to the

Conuſee, and he refuſe it; or part were paid at the day, and he tender the reſt in Court, *Fitz.4. & in toto.*

If a Conuſee on a Statute after Execution of Body and Land, purchaſe parcel of the Land of the Cognizor, or part of it deſcend to him, he may have this Writ to diſcharge his Body of Execution, *Plow.72.*

If the Statute were delivered to a ſtranger to keep till certain condition, and he deliver him the Conuſee, or he recover him by Covin from him, before the Conditions performed, he may have this Writ, *Fitz.15,16.*

If the Statute were entred in *per dures*, it ſeems by this it may be avoided by an *Audita Querela*, *Fitz.927.*

If one binde himſelf and his Heirs by an Eſpecialty, and the party Obligee ſue the Heirs, and recover of them, and then after ſue the Executors for the ſame cauſe; or *E converſo* after he hath recovered againſt the Executors, ſue the Heirs; the Heir or Executor may have this Remedy, for he cannot plead it in Bar. So if a Leſſee Covenant for him and his Aſſigns to repair the Houſes, or otherwiſe; and after he hath aſſigned away his Eſtate, he remains liable to an Action of Covenant ſtill; ſo as the Leſſor may ſue either: If he ſue and recover againſt one, and then ſue the other, he may have this Remedy, *Plow.439. Dyer Broo.74.*

If divers be bound by an Obligation or other Eſpecialty, *Conjunctim & diviſim*, and the Obligee hath Judgment and Execution, and is ſatisfied the debt of one, and yet after ſue another: Now this other in this caſe may be relieved by this means, *Co.5.87.*

So if in the interim between the Verdict and Judgment, the parties have put themſelves into Arbitrement for the Suit, or the Defendant hath gotten a Releaſe from the Plaintiff, and yet the Plaintiff ſueth Execution notwithſtanding, for after the Verdict he cannot plead it; but there it ſeems Judgment muſt be given before the Writ brought, 21 *H.7.33.* 11 *H.7.10. Fitz.7.13,*

So if one have had once Judgment and Execution for a thing, and then ſue for the ſame cauſe, and recover again, *Br. 25. 9 Ed.4.50.*

So if one take any Goods from me by any delivery, and another take them from him; if one of us ſue him, and recover for them (as we may both) and then the other ſue, he ſhall be relieved by his, 5 *H.7. 15. Dyer* 232.

For *Nonage.* If an Infant have entred into a Statute, he may avoid it whiles he is in his minority by this means, but after he cannot: And the courſe to avoid it, is, when he is in priſon, for ſome of his Friends to have this Writ to the Juſtices, and thereupon a Writ to the Sheriff to bring the Infant into the Court to be ſeen by the Judges; and then if they adjudg him within age, he ſhall be diſcharged out of priſon, after Proces ſent to warn the Conuſee to come into the Court, *Fitz. 26.*

To have *Contributions.* If one alone be charged, or about to be charged upon a Judgment, Statute, or Recognizance, and others ought to contribute, or bear part of the burthen, he may have relief by this Writ. As if one enter into a Statute, and after ſell his Land to divers Purchaſors: Or a Judgment be had againſt a man, who doth leave his Land to divers Heirs; or one binde him and his Heirs by an Eſpecialty, and leave his Land to deſcend to divers Heirs: If one of the Purchaſors in the firſt caſe, or one of the Heirs in the laſt caſes be charged alone, he may have this Writ againſt the reſt. And if any one of them have a Releaſe, or other good diſcharge, this (as it ſeems) will diſcharge all the reſt. See more in *Contribution and Statute.* 48 *Ed.3.5. Fitz.38. Co.3. 44.12. Co. 6.13. Fitz.3. Au. Querela.*

Where not. If one have ſuch a Releaſe of the Judgment, or Duty, as by Law is not ſufficient to bar the Execution; in this caſe he ſhall have no benefit by this Writ. The ſame Law is if it be to diſcharge a Statute, *Broo.37.*

To avoid a *Judgment* or *Execution.* If one have good matter of diſcharge, and have a day and time to plead it in Bar, and do not, as when a *Scire Facias* is ſued out upon a Judgment, and the party have then a Releaſe, or other matter of diſcharge, and do not plead it; now he ſhall not afterwards have any relief by this Writ: But if he had no warning of the *Scire facias*, then he may have this Writ, as when the Sheriff returns him *Nichil. Finch* 114. *Fitz.25.*

If

If a Priſoner eſcape againſt the will of the Sheriff and party, and the Sheriff take him again, he cannot have this Writ, for the taking is lawful, *Co.* 3. 44. 8. 141.

If one have a Judgment againſt a Sheriff upon an Eſcape, and there be Error in the Proceeding of the Suit wherein the Judgment is, but the Judgment is not reverſed, yet the party can have no remedy by this Writ, until the Judgment be reverſed for Error, *Co.* 8. 142. *Sect.* 3.

If one be outlawed after Judgment, and impriſonment upon a *Capias Utlagatum*, and the Sheriff doth let him go at liberty, and the Plaintiff taketh out another *Capias Utlagat* againſt him, upon which the Sheriff doth return *Non eſt inventus*, and the Defendant finds Error in the *Exigent*, upon which by ſentence of the Court it is annulled: After the Plaintiff takes Execution of the firſt Judgment, in this caſe the party cannot have this Writ; but if the *Exigent* had been well awarded, *contra. Co.* 8. 142.

If an Adminiſtration be granted to one, and he ſueth a Debtor, and hath Judgment, and after another covenouſly ſueth out an Adminiſtration to him and the firſt Adminiſtrator, and he alone releaſeth to the Debtor, yet he ſhall not diſcharge himſelf by this Writ, for the Releaſe was not good, *Dyer* 339. *Co.* 6. 19.

If a Conuſee purchaſe part of the Land of the Conuſor before Execution, and after ſue Execution, the Conuſor ſhall have no remedy by this Writ, for the Statute is not hereby diſcharged, *Plow.* 72. To avoid a *Statute*.

If the Sheriff in Execution of a Statute deliver the Lands of a ſtranger in Execution, as ſome of the Lands which were in the hands of the Cognizor the time the Statute was made, or after: Now he ſhall not have relief by this Writ, but by an Aſſiſe, *Fitz. Aud. Qu.* 6.

If a Conuſor of a Statute ſurmiſe, or that the Conuſee and he have agreed, and that the Conuſee hath delivered him the Statute for an Acquittance, and becauſe he hath him not to ſhew cancell'd, the Conuſee or the *Corporalis* hath counterfeited the Statute, and ſo doth ſue Execution; this is no good cauſe to maintain the ſuit: But if he had the Statute to ſhew cancelled, then it ſeems this ſuit were maintainable, *Fitz.* 9. 10. 22.

If one that is ſued by the King get a Charter of Pardon, or any Releaſe in the mean betwixt the Verdict and the Judgment, and after the Judgment is had, he cannot have relief by this Writ, but he may plead it after Judgment, 11 *H.* 7. 10. To prevent a *Judgment*.

After a ſuit is begun, and ſo far gone, as there is no time to plead, it ſeems no *Audita Querela* lieth until the Judgment be given, *Fitz.* 13.

If an Infant have entred into a Statute, and be ſued upon it after he is of full age, he ſhall not then have any remedy by this Writ, *Dyer* 231. For *Nonage*.

If one after he hath entred into a Statute or a Recogniſance, do convey away ſome of his Land to divers perſons, but keep ſome in his hands, and the Conuſee ſue Execution only upon the Land that he hath in his hands againſt him, or his Heir after his death; in this caſe neither he nor his Heir ſhall have this Writ to have Contribution of the Purchaſors: But if Execution had been ſued upon one of the Purchaſors, he might have had him againſt the reſt. See more in *Statute*, *Co.* 2. 91. *Dyer* 322. To have *Contribution*.

CHAP. XXII.

Of an Averment.

Averment, what it is.

AVerment in this place is taken for an affirmation or denial of ſomething that doth not appear, which one doth offer to prove, and being allowed to him ſhall be put to Trial, *Terms of the Law.*

Sect. 1. In what caſe an Averment may be had, and how, or not, upon or againſt a Deed.

For anſwer to this Queſtion, theſe things are to be known.

1. That any Averment may be had upon a Deed in writing, to alter, qualifie, or abridg the operation of it, if there be any apt words in the Deed whereupon to ground it. As if a Deed be to *A.* the ſon of *B.* and he hath two ſons of that name, or a Grant be of the Manor of *S.* and he have two Manors of that name; in theſe caſes an Averment will lie, which Son, or which Manor was intended by the Deed. But no ſuch Averment can be againſt the words of a Deed. And therefore if the Eſtate limited by Deed were to *I. S.* and his heirs, you ſhall not be admitted to ſay the meaning of it was, that it ſhould be to him and the heirs of his body. So one may not aver upon a general Releaſe, that it was intended it ſhould reach only to ſome particular: And yet if the firſt words be general, and joined to particular words, and reſtrained all to a particular, *contra.* So when a Deed is ſaid to be delivered in one place, you may not be admitted to ſay it was delivered in another place: And when a Deed doth expreſs a Conſideration, you may not aver that there was no Conſideration given. *(a)* So if a Leaſe be made without impeachment of waſte, you may not aver that it was intended or agreed that he ſhould not do waſte, *Co.* 8. 155. 5. 68. *Clarks* Caſe, 155. *Plow.* 7. 31 *H.* 6. *Dyer* 169. *(a) M.* 8 *Jac. Curia.*

Of another conſideration.

2. A man may aver a Conſideration upon a Deed that is beſides, but not that is againſt the expreſs Conſideration of the Deed, *Co.* 1. 176. 11. 24. *Dyer* 146.

Sect. 2. Of another uſe.

3. No Averment lieth of another uſe againſt, or beſides the expreſs uſes of the Deed. But where there is no uſe expreſſed, or where uſes are expreſſed, but they are doubtfully and incertainly expreſſed; in this caſe an Averment ſhall be admitted, and may ſerve for addition or explication. So alſo it will be admitted to reconcile a Fine, and the Indentures to lead the uſes thereof, *Co.* 2. 75.

addition or explication

4. When a Deed is utterly and altogether ſo uncertain, that it is void for incertainty, no Averment ſhall be admitted to make it good. And therefore it is, that a limitation of an Eſtate of Land by Deed to two perſons *& hæredibus, (i.)* to the heirs, and doth not ſay to their heirs, or to the heirs of one of them, is void. And ſo is a grant of goods to one of the ſons of *I. S.* and he have divers ſons, no Averment ſhall be admitted which of the ſons is meant, *Co.* 8. 155. 11 *Ed.* 4. 2. 22 *H.* 6. 15.

void for incertainty not averment will make it good

5. If an Eſtate be made to a woman that hath a husband, before or after the marriage, by Deed or Fine for her life; in this caſe it may be averred to be made for her Jointure, albeit there be another Conſideration expreſſed, *Dyer* 146. *Co.* 4 4.

Jointure

6. If a peece of ground be antiently called by one name, and it is of late turned to Tillage and called by another name, and it be granted to me by this new name; in this caſe an Averment ſhall be admitted, That it is all one thing; and this will make it good, *Dyer* 37. 44.

For this Averment againſt, or upon a Record, theſe things are to be known.

Sect. 3. Upon or againſt a Record.

1. That no Averment ſhall be admitted of any thing that is againſt or beſides a Record, or any thing that is within it. And therefore if a Recogniſance taken before a Juſtice of Peace do mention that it was taken at *Dale*, you may not aver that it was taken at *Sale*, and not at *Dale*, though it be true that it was ſo. For this cauſe a man ſhall not be ſuffered to ſay, a Verdict is falſe. But ſuch an Averment as may ſtand with the Record, may be admitted. And therefore if a Fine and Inrolment be both

in

in one Term, an Averment, That the Fine was before the Inrollment ſhall be received, *Co.*10. 92. *Plow.*493. *Dyer* 311. *Plow.* 434. 2. An Averment lieth of Uſes upon a Fine, or Common Recovery. So if a Fine be levied to *A.* the ſon of *B.* and he hath two ſons of this name; or a Fine be levied of the Manor of *D.* and he that doth levy it, hath two Manors of that name; an Averment lieth, which Son or Manor is intended, *Co.*8. 155. *Uſes.*

2. Where a Fine is levied upon a Grant, and render, no other uſe can be Averred, but what is expreſſed within the Fine, *Dyer* 311.

3. Hence it is, that no Averment may be received againſt ſuch Certificates, as are a Definitive Tryal of the thing certified; as when the Biſhop did certifie Excommunication, Baſtardy, or lawful Marriage, *&c. Broo.* 332. *Coo:*7. 14. 9 31. But an Averment doth lie, and ſhall be received againſt a Certificate, which is onely to give Information, and in the nature of a Tryal. So it will lie againſt a Certificate, upon a Commiſſion out of any Court. So it may be received againſt the Certificate of Commiſſioners that affirm a Man to be a Bankrupt, *Co.*7. 14. 8. 121. Againſt a Certificate.

4. The ſame Law is for a Retorn, if it be ſuch a Retorn as is a Definitive Tryal of the thing retorned, no Averment lieth againſt it. As the Retorn of a Sheriff upon his Writs, the Retorn of the Major, Aldermen, and Sheriffs of *London*, upon a Writ of *Habeas Corpus* ſent to them, and the like. But if it be ſuch a Retorn as is not Definitive, as upon a *Reſcous*, or the like; in theſe caſes an Averment may be had, and upon this it may go to Tryal. So alſo if it be a Retorn to endanger a mans life, or his Inheritance; an Averment may be had againſt it, *Dyer* 348, 177. So alſo it lieth againſt the Retorns of the Bailiffs of Franchiſes, ſo that the Lords be not prejudiced in their Franchiſes thereby, *Stat.* 1 *Edw.* 3. 3. *Goldsb.* 139. 129. *pl.* 23. Upon a *Retorn.*

For the Averment againſt a Will, or Adminiſtration, or againſt, or upon any thing within it; theſe things are to be known. *Sect.* 4. Upon, or againſt a Will, or Adminiſtration:

1. That an Averment lieth againſt a Teſtament, or Letters of Adminiſtration, although they be under Seal of the Court; and it ſhall be tryed by the Country.

2. Any Averment may be upon a Will, or any part of it that may help to expound a Will; and of ſuch a thing as may ſtand with the Will, and may be collected out of the words thereof. As if a Man have two Sons of one name, and one of them long abſent, and thought to be dead being the eldeſt; and he give his Land to his Son, in general, and the eldeſt is alive; in this caſe an Averment doth lie, That it was intended to the yongeſt, and not to the eldeſt Son; and upon a Tryal the Jury may finde it ſo, *Co.*8. 31, 41. *Plow.*277. *Dyer* 244.

3. But an Averment will not lie of any thing that is againſt, or beſides that which is expreſſed in the Will; nor of any thing that cannot be gathered to be the minde of him that made the Will, by the words thereof; nor of any thing that doth not cohere with the Will, eſpecially if the Deviſe be about Lands. And therefore if one Deviſe to *A.* and the Heirs of his body, the Remainder to *B.* and the Heirs Males of his body, on condition, that he or they, or any of them ſhall not Alien, *&c.* In this caſe no Averment ſhall be taken to prove by Witneſſes, that it was the intent of the Deviſor to include *A.* within this Condition, by the words, *He or they, &c.* So neither can an Averment be taken, that the intent was to give it to another, beſides the Deviſee, *Co.*5. 68. 4. 4:

An Averment may be had againſt any part of the Rolls, or Records of County Courts, Hundred Courts, or Courts Baron; as that there is no ſuch Record, or it is not ſo as it is certified, 34 *H.*6. 42. 9 *Ed.*4. 4. *Sect.* 5. Againſt *Court Rolls*, or upon it.

If the matter contained in an Award, and the matter contained in the Submiſſion, do not agree; it will hardly be ſupplied by Averment, *Dyer* 242. 52. Upon an *Award.*

No Averment or Proof is to be admitted againſt Common Preſumption of Law; as that when any Acquittance is made of the laſt Rent, that yet there was more Rent then behinde, *Co.* upon *Littl.* 373. Nor againſt common Reaſon, as that Land doth belong to a Meſſuage, *&c. Plow.*170. Againſt *Common Preſumption*, or *Reaſon.*

An Averment may be of an uſe upon any Feoffment, Fine, or Common Recovery. See for this and the reſt, more in my Book of *Common Aſſurances, Chap.*3. *Numb.* 4. Of an *Uſe* upon a *Conveyance.*

Chap.

Chap. 10. *Numb.* 5. *Chap.* 14. *Numb.* 4. *Chap.* 23. *Numb.* 5, 6. *Chap.* 24. *Numb.* 4, 5, 6.

Where *Averment* is neceſſary, or not.

If the Defeaſance of a Recogniſance be dated before the Recogniſance; if in this caſe uſe be made of it, it muſt be averred to be delivered, at or after the time of the Recogniſance entred into, *Perk. chap.* 147.

The Executor of a Grantee of a Rent, or Reverſion, Expectant upon an Eſtate for life, cannot Avow his deſires without Averment; that the Arrearages incurred after the death of the Tenant for life, Adjudged.

But things that are apparant, or neceſſarily intendable by Law, need not be Averred. *Manifeſta non probatione indigent, quod conſtat clare non debet verificare. Co.* 11. 25. *Plow.* 8.

See more of *Averment* in *Actions of the Caſe*, throughout; in *Contract*, throughout.

CHAP. XXIII.

Of Anceſtors.

Sect. 1.

Anceſtors, what.

ANceſtors are our Forefathers, or Predeceſſors that went before us, who in relation to them, are called their Succeſſors. But this word in the Law, hath ſpecial relation to ſuch a Succeſſor as is an Heir alſo to his Predeceſſor, and is eſpecially applied to Inheritances that diſcend from one man to another.

Action-Auncestrel, what.

An Action-Aunceſtrel, is ſuch an Action as is brought when as a ſtranger hath entred upon him after the dying, ſeiſed of his Anceſtor.

Aile, what.

It is a Writ which lieth where Land deſcendeth from the Grand-father to his Nephsw, the Son or Daughter of the Son of the Grand-father, the Father being dead, before any Entry made by him; and one that hath no right abateth, (*i.*) Entreth, then the Heir may have againſt him this Writ, *New Terms of Law.*

Beſaile, what.

It is a Writ that lieth where Land deſcendeth from a Great Grand-father, or Grand-mother, and a ſtranger entreth firſt, and keepeth out the Heir, then he may have againſt him this Writ, *F. N. B.* 231.

Coſinage, what.

It is a Writ, and lieth where the Great Grand-father, the Grand-fathers Father, or other Couſin dieth, ſeiſed in Fee-ſimple, and a ſtranger abateth, (*i.*) Entreth into the Lands, then the Heir may have againſt him, or his Heir (if he be dead) or his Alienee, or againſt whomſoever after, that cometh to the Lands, *Terms Ley.*

Sect. 2.

Mort-Dauncester, what.

It is a Writ, and lieth where the Father, Mother, Brother, Siſter, Uncle, or Aunt die, ſeiſed of Land in Fee-ſimple, and a ſtranger entreth into before the Heir, then he may have this Writ, *Terms of the Law.*

Nuper obiit, what.

It is a Writ, and lieth where a Man hath many Heirs, either Daughters that be Parceners, or Sons in Gavelkinde, and dieth, ſeiſed, and one entreth into all, and keepeth the other out; in this caſe, he or they, that be kept out, may have this Writ againſt the Coheir that is in, *Terms of the Law.*

Rationabili Parte, what.

Rationabili Parte is a Writ, and lieth where an Anceſtor was once ſeiſed, and made a Leaſe for life, and dieth, and after the Leſſee for life dieth; ſo that the Anceſtor did not die, ſeiſed of the poſſeſſion, but of the Reverſion, and one of the Heirs entreth into all, and keepeth out the reſt, then he or they that are kept out, may have this Writ. *Terms of the Law.* See more hereof in my ſecond Part of the *Marrow of the Law*, *Pag.* 192.

CHAP.

CHAP. XXIV.

Of Ancient Demeſn.

Ancient Demeſn is a certain Tenure, or holding of Land in the nature of Soccage of divers Manors within this Countrey, which are entred in *Doomſday* Book in the *Exchequer*, under the Title of *Terra Regis*. *Terms of the Law*. *Ancient Demeſn, what.*

Burrow Engliſh is a kinde of Tenure in the nature of Soccage, whereby ſome Burroughs of the Kingdom, do hold of the King or ſome other great Lord, paying onely a certain Rent, *F.N.B. 6*. *Burrow Engliſh, what.*

Gavelkinde is a Tenure, and holding of certain Land in *Kent*, in the nature of Soccage, where by their Cuſtom they have many Privileges that men elſwhere have not. *Terms of the Law*. See for theſe three things in my Second Part of the *Marrow of the Law*, *pag* 19. *Gavelkinde, what.*

This came from *Gavelkinde*, and it is a ſpecial and ancient kinde of *Ceſſavit* uſed in *Kent*, where the Cuſtom of *Gavelkinde* is. By which the Tenant forfeits his Lands to the Lord, of whom they were held, if he with-hold his Services. *Fitz. Ceſſavit*. 60. *Gavelet, what.*

This is a Writ, lying where the Lord diſtraineth a Tenant in *Ancient Demeſn*, for other Services then are due, then he may have this Writ to prohibite him, *F.N.B. 14*. *Monſtraverunt, what.*

CHAP. XXV.

Of Avowry.

Avowry is where one doth diſtrain another for Rent, or other cauſe, and the party diſtrained, ſueth a *Replevin* againſt the taker, and then he doth in his Plea the lawful taking of them, ſhew why he took them; this is called an *Avowry*, *Co.* 9. 135. *Weſtm* 2. 2. *Sect. 1. Avowry, what.*

Replevin is, where a man diſtraineth another mans Goods and Chattels, then the party diſtrained upon giving ſecurity to the Sheriff, or his Deputy, that he will purſue the Action and retorn the Beaſts again, if the taking ſhall be judged lawful, may have this Writ to the Sheriff. And if it be in a Franchiſe, the Sheriff may ſend to the Bailiff of the Franchiſe to do it, *Terms of the Law*, *Co.* upon *Littl.* 145. See *Stat. Marlb.* 21. *Weſtm.* 2. 2. *Replevin, what.*

Gage Deliverance is, where one hath ſued a *Replevin*, and yet hath not the Goods delivered, and the other avoweth: Now he may ſhew this in pleading, That the Defendant is ſtill poſſeſſed of the Goods, and pray, that he may put in pledges for the Deliverance, which when they come to Iſſue, or Demurrer ſhall be granted him, and then a Writ ſhall go to the Sheriff to deliver them. But where the Avowant doth claim property in them; this is not grantable. *Terms of the Law*. *Finch.* 120. *Gage Deliverance, what.*

Retorno Habendo is, a Writ that lieth after a *Replevin* is brought, the Plaintiff maketh default, being non-ſuit, before Declaration, or the like, or Judgment is given againſt him; then he that diſtrained the Beaſts, may have this Writ, and thereby have the Beaſts delivered to him again. *Terms of the Law*. *Dyer* 41. *Retorno Habendo, what.*

Withernam is, a Writ lying where one doth diſtrain, or the owner after the Diſtreſs taken, *Withernam, what.*

Sect. 2. taken, doth Eſloyn the Cattle, or carrieth them out of the County, or keep them in ſome Caſtle; ſo that the Sheriff cannot make a *Replevin* or *Retorno Habendo* (as the Caſe is.) In this Caſe the party grieved, may have this Writ to the Sheriff, commanding him to take ſo much of the parties own Goods who hath done this, inſtead of them. And he may take the *Poſſe Comitatus*, and break it, and replieve them. *F. N. B.* 73.

Second *Deliverance* and *Retorn Irrepleviſable*, what.

This Second Deliverance is, a Writ lying where one doth remove a Plaint out of the County-Court or Court-Baron, by *Pone* or *Recordare*, into the Common-Bench, and after the Plaintiff in the *Replevin* is non-ſuited before any Avowry made; this notwithſtanding the party that diſtrained, may have again the ſame Diſtreſs by this Writ, which is onely to revive the firſt Suit, and the Defendant cannot have a Recaption in this caſe, for a double Diſtreſs; and after this Writ had, and tryal thereupon, or that the Plaintiff be again Non-ſuit before Declaration Retorn Irrepreviſable, muſt be awarded to the Avowant.

Recaption, what.

Recaption is a Writ lying where a man is diſtrained for any Service, and hanging this Suit, he is diſtrained again for the ſame cauſe; in this caſe, albeit it be for Services due, after the firſt Diſtreſs, yet he cannot diſtrain again till the firſt Suit ended, and if he do, the party grieved hath this Remedy.

Proprietate Probanda, what.

Proprietate Probanda is a Writ lying where the Sheriff is coming to make a *Replevin*, by Writ or without Writ, before or after *Gager de Deliverance*, and the party who diſtraineth, doth claim ſome property in them; ſo that the Sheriff can go no further in the *Replevin*, till this point be decided, which muſt be by this Writ. But for all this, and the reſt within this Chapter, See in my Book of the *Marrow of the Law*, 1 *Part. Chap.* 35. And ſee *Diſtreſs* in this Book.

CHAP. XXVI.

Of Authority.

1. *Authority.*

IT is a power to do ſomething; and this power in ſome Caſes is by the Common Law: As power is given to a man to enter orderly into an Ale-houſe or Inn; to demoliſh Houſes in a City, to prevent the increaſe of a Fire, or to fortifie it in a time of Siege. And in ſome Caſes it is by the Statute Laws; as power is given to a Tenant in Tail, or in right of his Wife, to make Leaſes for three lives, or one & twenty years: So power is given to a Tenant in *Capite* to Deviſe two parts in three parts of his *Capite* Lands, *Dyer* 36. 12 *Ed.* 4 8. *Perk* 191. *Co.* 1. 111. 173. *Plow.* 290. *a.* So to Arreſt in divers Caſes; for which ſee *Impriſonment*.

This power alſo is ſometimes given by one man to another. And this is ſometimes by word, and ſometimes by writing; that which is by writing, is either by Precept, Writ, Warrant, Commiſſion, Letter of Attorney, Proviſo in a Deed to make Leaſes, revoke Uſes, or the like. See the *Examples*.

2. The Nature of it.

The nature of this is ſuch, 1. That it is not grantable over by him that hath it. 2. It muſt be ſtrictly purſued. 3. It dieth with the parties, and doth not go to Executors; for which, ſee the Caſes beneath, *Co.* 81. 46.

3. Licence.

This hath much affinity with the former; for it is defined to be, A leave and liberty to do, or commit ſomething that otherwiſe ought not to be done; or omit ſomething that otherwiſe ought to be done, but now by this means is become lawful and juſtifiable, and may be pleaded in defence and excuſe of the Commiſſion or Omiſſion, if the party be queſtioned for it. And it is diſtinguiſhed and regulated much like to the former, and therefore the Rules and Caſes of one, are in many caſes appliable to the other; this therefore is alſo ſometimes ſaid to be given by the Law:

As

As for a Traveller to enter into an Inn or Ale-houſe; a Leſſor to enter into the Houſe leaſed, to view the Reparations and Decays; and ſometimes it is given by the party, by one man to another; and that ſometimes in writing, and ſometimes by word onely.

And both theſe ways it is ſometimes general, and ſometimes ſpecial. There ſeems then no real difference between Authority and it, but that they may be (as they ſeem to be) confounded and taken one for another: Howſoever, Licence is moſt commonly applied to an act done, that otherwiſe had been unlawful; and by this the party that did it, is excuſed, but Authority to acts that are lawful, which thereby are juſtified by the doer; and this in ſome caſes is more compulſory then the other. *Bro. Treſpaſs* 97. *Co.* 11. 11. 9 *Ed.* 4. 4. *Bro. Licence* 79. *Fitz. Treſpaſs* 92.

Diſpenſation.

The Licences that are had from the Lord Protector, eſpecially thoſe that are to privilege a man from the danger of a Penal Law, are called *Diſpenſation*; for a Diſpenſation is a kinde of Licence to tranſgreſs, or exemption from the danger of a Penal Law, which the Lord Protector in ſome ſpecial caſes, to avoid inconvenience, by his Prerogative doth and may give or grant to ſome perſon. Alſo the Licences of Eccleſiaſtical Perſons that were ſomewhat of this nature, and they had it by a derivative Prerogative from the King, were ſometimes called by this name. But the moſt proper and peculiar term to ſet forth this kinde of Diſpenſation is a Faculty, which is defined to be a privilege or eſpecial Power or Licence granted unto a man by favor, indulgence, and diſpenſation to do that which by the Law otherwiſe he could not do: As to eat fleſh upon the days prohibited; to hold two or more Benefices, or the like. And that Diſpenſation which is granted to a Clerk, that being uncapable, is made capable, and *de facto* admitted to it, is called a *Perinde valere*, which name it had from the words which make the faculty as effectual to the party diſpenſed with, at the time of the Admiſſion: And for the granting of theſe Faculties, there was a ſpecial Officer appointed under the Arch-Biſhop of *Canterbury* called the Maſter of the Faculties, *Co.* 11. 86, 88. *Stat.* 25 *H.* 8. 21.

Perinde valere.

Maſter of the Faculties.

An Authority given by the Sheriff to his Bailiffs to arreſt, is good, though it be an Authority derived out of an Authority. An Authority or Power however ſet up, if it be unlawful, is not good. And therefore in 16, 17 *Car.* 11. it is enacted, That no new Court that hath the like, that the High Commiſſion pretended to have, ſhall be hereafter erected. And that all ſuch Juriſdictions, and all Acts, Sentences, and Decrees made by colour thereof, ſhall be utterly void.

A Verbal Authority from a Juſtice of Peace to any man, to apprehend another to finde Sureties for the Peace, when he is there preſent, and doth break the Peace before him, is good.

What Authority ſhall be ſaid to be good.

The King in ſome caſes may authoriſe a man to do a thing, which is *Malum prohibitum* onely, and not *Malum in ſe*, 1 *H.* 7. 3. 3 *H.* 7. 15. 11 *H.* 7. 11, 12. *vide infra.*

malum prohibitum, malum in ſe

Where a Juſtice of Peace by word, commands one being preſent to arreſt another, which is alſo in his preſence, this is good, and is reputed as an arreſt made by the Juſtice himſelf, 14 *H.* 7, 8, 9.

Arreſt.

In Caſe of Ryotors, a Juſtice of Peace may by word, command his ſervants to arreſt them in the abſence of the Juſtice, 14 *H.* 7. 9, 10.

Grant.

A man that hath his Authority by Record, cannot grant it over without writing, unleſs it be to arreſt a perſon that is preſent; as in the caſes before, 10 *H.* 7. 17.

Sect. 1.

An Authority given by a Bailiff to another Bailiff to arreſt a man, is not good: So if one have a power to make Leaſes, and grant it to another, this is not good: For regularly, neither Licences nor Authorities are grantable over. *Poulton de Pace* 19.

What not.

A Verbal Authority onely from a Sheriff to arreſt a man, is not good. 9 *Rep.* 69. Whether it be to a Bailiff errant, or other ſpecial Bailiff. *Fitz. Faun. Impriſonment* 3. *Kelw.* 86. 14 *H.* 7, 8, 9.

A Verbal Authority onely from a Juſtice of Peace to arreſt a man that is abſent, is not good. *Wodden verſus Booker, M.* 13 *Jac.*

A Verbal Authority onely to ſurrender the Leaſe for years, is not good, though he deliver him the Leaſe alſo. *Sleigh verſus Bateman, Hil.* 17. *Eliz. B. R.*

To make or take *Livery of Seiſin.*

A Verbal Authority to deliver Seiſin, is not good without writing: Neither is an Authority in writing, to deliver Seiſin after the death of either of the parties good, for it is againſt Law, *Co. ſuper Littl.* 52.

An Authority given to another to do that which he himſelf cannot do, is not good. *Quod per me non poſſum, non per alium. Co.* 11. 87.

A Verbal Authority by a Juſtice of Peace to a Gaoler, whereby a Priſoner is ſent to Gaol, it ſeems is not good. It is ſafe for Juſtices of Peace to ſend their Warrant in writing, and therein to inſert the cauſe of the commitment. *Wodden, vide Baker.*

An Award that the parties ſhall obey the Arbitrement of an other, is void; for power cannot be aſsigned, 8 *Ed.* 4. 19.

A Verbal Authority to receive Seiſin, is not good without Deed, *Co. ſuper Littl.* 48.

Arreſt.

If a *Capias* be directed to the Sheriff to arreſt a man which doth dwell within a Franchiſe, the Bailiff of the Franchiſe cannot arreſt him without a Warrant from the Sheriff in writing, *Vide Commandment infra.*

6. When an *Authority* is well purſued, or not.

Although it be a rule of Law, that every Authority that is given by Act of Law, or act of the party, muſt be ſtrictly purſued, or elſe it is ſaid to be done without Authority; yet when more is done, or when it is done by more perſons then be in the Authority; in many caſes it is good enough, and it ſhall be ſaid a ſufficient purſuit of the Authority notwithſtanding: As whereby the Statute of 32 *H.* 8. the Tenant in *Capite* hath power to Deviſe two parts in three parts of his Land; yet if he Deviſe all, it is good for two parts. An Aſsignment of Debt was to the Queen, provided, That if the Lord Treaſurer, or the Barons of the Exchequer, or any two of them do revoke, *&c.* And after three Barons do revoke it, this is good. *Omne majus continet minus, Plow.* 393.

If a greater number of perſons do a thing then are appointed by a Statute (unleſs the Statute do purpoſely reſtrain the number) it ſeems it is well enough done, as where more do ſit in the Star-chamber, then are mentioned in the Statute of 3 *H.* 7. 1. *Quando plus fit quam fieri debet, videtur & id fieri quod fieri debetur.*

Power to make Leaſes.

If a Statute give power to make Leaſes, ſo as they do not exceed three lives, or twenty one years (as the Statute of 32 *H.* 8. is.) In this caſe, if one Leaſe for two lives, or for ninety nine years, if three lives ſo long live, this is a good purſuit of the Authority: But if the word of the Statute be, that they ſhall make Leaſes for three lives, or twenty one years; in this caſe, a Leaſe for twenty years, or two lives is not good, *Co.* 6. 33, 35. 8. 70.

If one make a Leaſe for life, and a Letter of Attorney to deliver the poſſeſsion to the Leſſee, and the Attorney deliver poſſeſsion to the Attorney of the Leſſee; this is a good purſuit of his Authority. *Finches* 66.

If a Deed be made of two Acres, and a Letter of Attorney to deliver Seiſin in both *Secundum formam chartæ*, and the Attorney enter into one Acre onely, and give Seiſin *Secundum formam chartæ*; this is a good purſuit of the power, and a good Livery for both, and that though he did not deliver it to one in the name of both: So when a Feoffment is to two or three, and the Warrant to give Livery ſo, and he do it to one *Secundum formam chartæ*; this is good to both, and yet the abſent party may wave the Livery, *Co. ſuper Littl.* 52.

If one Deviſe his Land to his Executors to be ſold, and one of them die, the ſurviving Executor may ſell it, *Co. ſuper Littl.* 181.

If a *Venire Facias* be ſent to four Coroners, to impannel and retorn a Jury, and one of them die, and the Survivors execute it, it is good. *Idem.*

If the Sheriff upon a Writ make a Warrant to four Bailiffs joyntly, or ſeverally to arreſt, and two or three of them arreſt the party; this is a good purſuit of the Authority, *Paſc.* 45 *Eliz. B. R. King* and *Hobbs.*

Sect. 2. To Claim.

If one give another an Authority to make a claim, and he come to any part of the Land, and there make claim, *&c.* in the name of his Maſter, *&c.* this is good. So if the Maſter ſay to his Servant, that he dares not come to the Land, or any part of

of it, to make his claim, *&c.* And that he dare approach no neerer to the Land, then ſuch a place called *Dale*, and command his Servant to go to that place, and there make his claim for him; this is good, although it may be the Servant durſt to have gone further. So if a man be ſick, and not able to go out of doors, and have cauſe to enter, and he command his Servant to go to the Land, and make his claim for him; and the Servant fearing, *&c.* dareth not go to the Land, but goeth as near as he can or dare, and there claimeth for his Maſter; this is good. *Impotentia excuſat legem. Littl. Sect.* 433, 434.

And for the moſt part it is true, where a man doth that which he is authoriſed to do, and more; there it is good for that which he had Authority to do, and void for the reſt, *Co. ſuper Littl.* 252.

And therefore if a Letter of Attorney be to make Livery to one, and he make Livery to two; it is good to him to whom the Warrant extends, and void to the other, *Perk.* 39. *a.* To make *Livery of Seiſin.*

So if it be to make Livery of Warrant, and he makes Livery of Warrant, and Bargain; it is good for Warrant. *Ibid.*

If a Letter of Attorney be to deliver Seiſin to two, and one of them dieth, and he makes Livery to the other; it is good to him for the whole, *Ibid.*

If a Letter of Attorney be thus. I make *A.* and *B.* my Attorney and Attorneys for me, and in my name to enter on the Land, and there to deliver the writing as my Deed, ratifying and confirming whatſoever my Attorneys, or either of them, ſhall do concerning the premiſſes, and one of the Attorneys doth, and it was held good by two Judges in 11 *Car. B. R.*

Regularly when a man doth leſs then the Commandment or Authority committed to him, there (the Authority being not purſued) the Act is void, unleſs it be in ſome ſpecial Caſes, *ſupra.* So where he doth it otherwiſe, then his Authority doth direct him; and therefore an Authority cannot be apportioned: As where the Statute of 32 *Eliz.* 34. doth give a man power, that is ſeiſed of Soccage and *Capite* Land, to Deviſe or diſpoſe two parts for the benefit of his Wife, *&c.* And a man being ſeiſed of two Acres of *Capite* Land, and one in Soccage, diſpoſe his two Acres to ſuch purpoſes: Now he cannot Deviſe the other Acre at his death, and if he do, it is void. *Co. ſuper Littl.* 258. *Co* 3. 34 2. 26. *Apportionment.* When not.

So likewiſe is the Law for the power of Commiſſioners upon the Statute, 13 *El.* 7.

If two Attorneys have a joynt power to do any thing, and one alone doth it in the name of the other, and him; this is not good. As if a Letter of Attorney be made to two joyntly to take Livery of Seiſin, and one of them doth take it; this is void. *Co.* 5. 94, 95. *& ſuper Littl.* 49. *b.*

If an Authority be given to three, to do any thing joyntly or ſeverally, and two of them do it in the abſence of the third; *Norths* Caſe, *M.* 4 *Jac. B. R.* Or one of them and a ſtranger do it; this is not good, *Co.* 5. 90. *Dyer* 61.

If one willeth that *A*, *B.* and *C.* his Feoffees ſhall ſell his Land; and one of them die, and the Survivors ſell it; or if he willeth it ſhall be ſold by the advice of *A.* and *A.* die, and they ſell it without advice; this is not good. *Dyer* 177. 190. 214.

If in the Star-Chamber, the Chancellor, Treaſurer, and Gardian of the Privy-Seal, or two of them, had not taken with them a Temporal Lord, a Biſhop, and the two Chief Juſtices, according to the Statute of 3 *H.* 7. 1. Their Judgments had not been good, 3 *H.* 7. 1. 8 *H.* 7. *p. ultimo.* 16. 233.

If one Auditor commit a man that is an Accomptant to priſon, upon the Statute of *Weſtm.* 2. *cap.* 12. This is not good nor warrantable, *Plow.* 394.

If a Commiſſion be to eight perſons joyntly to hear and determine, ſeven of them cannot do it, *Ibid.*

If a Warrant be to an Attorney to deliver Seiſin generally, and he do it in view; this is no purſuit of the Authority, and therefore void, *Co. ſuper Littl.* 52.

If a Writ be to the Sheriffs of *London* to do any thing, and one of them be dead, the other cannot execute it.

If any Authority be to deliver Seiſin to *V.* or *S.* and to make Livery to *V.* and *S.* This is not good, nor purſuant of the Authority, 11 *H.* 7. 13. *Feoffments, B.* 6. 43.

If I command one to make a Feoffement in my name in *Latine*, according to a Copy ſhewed him, and he make it in *Engliſh* or *French*; this is not good, 10 *H.* 7. 9.

Felony. If one Sheriff be commanded to hang a man, and he behead him; this is not good, but Felony in the Sheriff, 35 *H.* 6. 38.

A. is diſſeiſed of Bargain and Warrant, *A.* makes a Warrant of Attorney to *B.* to enter in both, and to make, Livery there, if *B.* enters in Bargain onely, and make Livery *Secund. Form. Chart.* It is a void Livery, *Co. ſuper Littl.* 52. *a.*

If a Letter of Attorney be to make Liveries after the death of a ſtranger, and he makes Livery in his life, it is void, 40 *Aſſ. p.* 38.

If a Letter of Attorney be to deliver Seiſin to *H.* upon condition, and the Attorney deliver it abſolute, this is void, 11 *H.* 4. 3. *a.*

If a Letter of Attorney be abſolute, and the Attorney delivers Seiſin upon condition, this is naught, 12 *Aſſ. p.* 24. Adjudged.

7. Where an *Authority* is revocable, and when it ſhall be ſaid to be determined, and when not.

All Authorities for the moſt part are revocable, and may determine by the Act of God, (*i.*) the death of him that gives it, or the death of him to whom it is given; or the Act of the party that doth give, (*i.*) when he doth actually revoke it himſelf before the thing be done. And therefore if an Authority be given to two or more joyntly to do a thing, and one of them die, nay in this caſe the Authority is determined. And if I deliver money, or other thing to *J. S.* to deliver over, or to give away, and before it be done, I forbid him to deliver; in this caſe his Authority is determined, *Dyer* 190. *Co.* 5. 90. *Dyer* 190.

But if there be an intereſt coupled with the Authority, there it will not, nor can be countermanded by any ſuch Act of God, or the party: As where one doth Deviſe his Land to his Executors, until his ſon be of full age, and that they ſhall ſell it; in this caſe they, or ſome of them die, yet the reſt may ſell it, and ſo in all like caſes.

If one make two Executors, and Deviſe that his Land ſhall be ſold by his Executors, and one of them die, it ſeems the other cannot ſell; otherwiſe it is where an intereſt is deviſed alſo.

If one make a Letter of Attorney to two to give Livery, and one of them die, the other cannot do it; no more then where an Office of Stewardſhip is granted to two men, can one of them execute it, *Goldsb.* 2. *pl.* 4.

So where an Authority is once executed, it cannot afterwards be revoked by any means *Dyer* 210. 24. *Perk.* 105. *Co.* 5. 90. *b.*

An Authority alſo may determine by other Accidents: As if an Adminiſtration be granted to me during the minority of four Infants, and one of them become of full age, it ſeems in this caſe the Authority is determined, *Co.* 5. 9.

Sect. 3. *Notice. Countermand.*

See more of this point in *Countermand*; and note that always in caſe of Countermand of Authority, there muſt be notice, otherwiſe the Countermand is not good. And therefore if a Factor, Attorney, or the like, or any other Arbitrator or Commiſſioner, have a Countermand made them, whereof they have no notice; this doth not determine their Authority, *Co. ſuper Littl.* 55. *b.* *Co.* 8. 82. 21 *H.* 6. 29.

1. *Commiſſion.*

It is the Warrant or Letters Patents from the Lord Protector, teſtifying, that one or many have ſome Authority in a matter of Truſt committed to their charge: As to hear and determine any Cauſe or Cauſes, to examine Witneſſes, Purvey, and take up proviſion for him, or the like. And they that are thus truſted, and in Authority, by vertue of this Commiſſion, are called *Commiſſioners*, *Terms of the Law*, 11 *H.* 4. *cap.* 28.

Quotuplex.

8. Where Commiſſions are grantable, and what things may be done by Commiſſion, or not. By Common Law.

And ſome of theſe are to hear and determine offences, and other matters, and require no Retorn. And ſome are to enquire, or examine, and to certifie what is found, and they muſt be retorned. And ſome are to ſeiſe Lands, Goods, *&c.* *Stat.* 4 *H.* 4. *cap.* 9.

By the Common Law, Commiſſions are grantable in divers caſes, and almoſt in any caſe by thoſe Courts, that proceed by that courſe of Examination of matters by Commiſſions: Alſo all the great Officers, Judicial and Miniſterial of the Realm, are made by Commiſſion. By this means, are and may Treaſons, Felonies, and other offences be examined, diſcovered, heard and determined. By this means may be, and

are

are Oaths, Conuſance of Fines, Offices found, Subſidies and Fifteenths be taxed, and many other things be done as occaſion ſhall require, as to examine Witneſſes, take Anſwers, and the like, *Bro. Commiſ. in toto, Stat.* 35 *H.* 8. 2. 2 & 3. *Pl. & M.* 1. 10 *R.* 2. 1.

But Commiſſions may not be granted againſt Law, as to take and impriſon mens bodies, to enter upon their Lands, or take their Goods without order of Law, and if any ſuch be granted, they are void, and do create no Authority, *Bro. Commiſſion.* 3. 15. *Juſt.* 6.

By Statute Laws alſo, Commiſſions are grantable in divers caſes, and divers things may and are to be done by Commiſſion. As the finding of Offices after the death of the Kings Tenant, *Stat.* 1 *H.* 8. 8. By Statute Law.

To enquire of the employment of Lands or moneys, that have been given to publick and charitable uſes, and to ſet down orders for it, 43 *Eliz.* 2, 4.

To examine parties and witneſſes for any ſums of money, that have been gathered for Houſes of Correction, or Stocks to ſet poor on work, and to get it into their hands, 39 *Eliz.* 4.

To hear and determine Policies of Aſſurances made amongſt the Merchants, 43 *Eliz.* 12.

To enquire of miſdemeanors of Purveyors in taking of Proviſion, 36 *Ed.* 3. 4.

To enquire of a Riot that hath been done, and the neglect of the Juſtice of Peace, and Sheriff therein, 2 *H.* 5. 8.

To enquire of Servants that imbezel their Maſters Goods after their death, and to make Proclamation that they appear and anſwer it, 33 *H.* 6. 1.

Alſo a Commiſſion may be had to grant Licences, and Faculties in ſome caſes, 25 *H.* 8. 21.

Alſo Commiſſions may, and muſt be had to determine Appeals from the Admirals Court, 25 *H.* 8. 19.

Alſo to hear and determine Offences done upon the Sea, 28 *H.* 8. 15.

And Treaſons done beyond the Seas, 35 *H* 8. 2. 5 *Ed.* 6.

And to hear and determine Offences confeſſed before the Council, 33 *H.* 8. 23, & 11.

And to enquire of the Account of the Officers and Accomptants of the Lord Protector, which they have made in the Exchequer, whether the ſame be right or no, 6 *H.* 4. 3.

And to enquire, hear, and determine of all matters, againſt true and ſafe Conducts upon the main Sea, 2 *H.* 5. 6.

For Reformation of Weers and Banks, and to prevent the inundation of great Waters; a Commiſſion may be had out of Chancery, called the *Commiſſion of Sewers*, *Co.* 10. 138. Commiſſion of Sewers.

The form whereof, and all that doth concern it, and the execution of it, See in *Stat.* 6 *H* 6. 5. 8 *H.* 6. 3. 23 *H* 6. 9. 23 *H.* 8. 5. 3 & 4 *Ed.* 6. 8. 13 *Eliz.* 9.

Alſo Commiſſions are grantable, and have been made and had. To enquire and compound for firſt Fruits. To enquire of the value of each living Spiritual, and the deductions and payments out of the ſame. And to enquire of *Chantry* Lands. And to end Suits for ſmall debts in the City of *London*. *Stat.* 5 *Eliz.* 1. 26 *H.* 8. 3. 26 *H.* 8. 3. 1 *Ed* 6. 13. 3 *Jac* 15.

But no Commiſſions of general Inquiries within Seigniories ſhall be had or ſued forth, *Stat.* 34 *Ed* 3. 1.

No Commiſſions ſhall be granted by Temporal Judges, to enquire of the proceedings by Spiritual Judges, *Stat.* 18 *Ed.* 3. 6.

All the Commiſſions for the great Offices of the Realm, are made by the Lord Protector under the Great Seal of *England*. So all Commiſſions of *Oyer* and *Terminer* of the great Offences by the Common Law. And ſo all other Commiſſions to examine Witneſſes, take the Cognizance of a Fine, or to do any other matter for the furtherance of Juſtice in any matter whatſoever comes in the Lord Protectors name, though it be grantable by the Court, where the matter is depending *Ex Officio*. See the *Commiſſions*. 9. By whom they muſt be granted, or not.

All

Sect. 4.

All the Commiſſions come in the Lord Protectors name: The Commiſſions for finding of Offices come out of the Chancery: The Chancellor of the Dutchy of *Lancaſter*, for the Lands within the Dutchy, under the Seal of the Dutchy: The Lord Chancellor under the great Seal of *England* doth grant Commiſſion for charitable Uſes. The Lord Chancelor of *England* doth grant the Commiſſion out of the Chancery to enquire of the money gathered for the Poor; ſo alſo he doth that for the policy of Aſſurance: The Commiſſion againſt Purveyors is granted, as other Commiſſions are, out of the Chancery; and ſo alſo is the next about Riot: The Commiſſion againſt Servants for goods of their Maſters imbezeled, is granted by the Lord Chancellor, with the advice of one of the chief Juſtices, and chief Baron, or two of them: The Commiſſion for granting of Faculties is granted as other Commiſſions are granted; ſo likewiſe the Commiſſion to determine Appeals: In all the three caſes of the tryall of Offenders, the Commiſſion is granted by the Lord Protector, as other Commiſſions are: The Commiſſion to examine the Accompts of his Officers, it ſeems is to come out of the Exchequer: And the Commiſſion for ſafe Conducts is granted by him and the Admirall. *See the Stat. before Co.* 9. 71. *a.*

10 To whom they may, and muſt be granted, or not. And who may be Commiſſioners.

The Commiſſions for the great Offices, and for Oyer and Terminer of Officers, are grantable to any perſon that is not diſabled by ſome ſpeciall Law, to whom it pleaſe the Lord Protector: And other Commiſsions out of the Courts in their ordinary proceedings, are grantable to whomſoever the Courts will appoint, *Stat.* 3. *Jac.* 5. *See Stat.* 42 *Ed* 3. 4.

Any may be Commiſſioners, unleſs by ſome Statute they be reſtrained. In caſe of finding of Offices, none may be Commiſſioners, but ſuch as have forty Marks *per Annum* of Land: In the Commiſſion for charitable Uſes, the Biſhop of the Dioceſs if there be any, and his Chancellor, and other ſufficient perſons whom the Lord Chancellor ſhall name, ſo that there be four at leaſt: In that for the enquiry of Money gathered for ſtocks to ſet the Poor on work, whomſoever the Lord Keeper will name may be Commiſſioners: In that for the policy of Aſſurances, the Judg of the Admiralty, the Recorder of *London*, two Doctors of the Civill Law, two common Lawyers and eight grave Merchants, or any five of them, muſt be Commiſsioners, and may execute it: In the Commiſſion againſt Purveyors, one of the Lord Protectors houſe, and two others ſufficient men, ſhall be Commiſſioners, and any two of them, and they may execute it: In the Commiſsion to enquire of the Riot, &c. any may be Commiſsioners whom the Lord Protector or his Chancellor will appoint: The Commiſſion or writ againſt Servants is to the Sheriff of the County: In the Commiſsion for granting of Faculties, two ſpirituall Prelats or others the Lord Protector ſhall name, muſt be Commiſsioners: In the Commiſsion for tryall of Appeals, there muſt be ſuch Commiſsioners as the Lord Protector will name: In the Commiſsion for tryall of Offenders: in the firſt caſe it muſt be to the Admirall, his Lieutenant or Deputy, and three or four ſuch as the Lord Chancellor ſhall name: And in the ſecond and third caſe, to ſuch perſons as the Lord Protector ſhall appoint: The Commiſsion to examine the accompts of Accomptants, is grantable to whom the Lord Protector, or his Barons of the Exchequer will name: And the commiſsion for ſafe Conducts, may, and muſt be granted to the Conſervator of the Truce, and to two men learned in the Law, *See the ſtatutes before.*

All Commiſsions to enquire of Articles, ſhall be made to the Juſtices of the one Bench or the other, or Juſtices of Aſsiſe, or of the place, and other worthy men of the Country, *ſtat.* 42 *Ed.* 3. 4.

In every Commiſsion of the peace for Gaol-delivery, there muſt be two men of the Law of the County-Commiſsioners to deliver the priſoners, *ſtat.* 17. *R.* 2. 10.

11. The power authority and duty of ſuch Commiſſioners ſo made. Charitable Uſes.

The power of Commiſsioners is to do what by their Commiſsion they are commanded to do, and therein alſo is included authority to doe all that without which that other thing cannot be done: And their duty is firſt to receive the Commiſsion, and then to execute it; and therein to purſue the authority and direction of the Commiſſion, and faithfully to perform the effect of it; and then to make a due and a true Certificate or Return thereof when the Commiſsion doth ſo require: But if the Commiſsion be againſt Law, the Commiſsioners are not bound to accept or obey it;

vide

vide ſupra. And if they doe any thing they have not authority for by their Commiſſion, it is void, and for ſo much it is as if no ſuch Commiſſion were, *Coo. ſuper Littl.* 157 *b. Coo.* 2. 25.

The authority of Commiſsioners by ſtatute Laws, is ſuch as the ſtatutes give them, and their duty ſuch as the Statutes preſcribe: As in the caſe of finding of Offices, they are to ſit in open places, and let every man to give evidence that will: In the caſe of charitable Uſes, they muſt by a Jury, and all other ways they can, having the parties and witneſſes before them, labour to ſearch out the matter, and ſet down Orders for the employment of the Gift, and certifie their doings in Chancery; and if any be grieved by their Order, he muſt complain there: In the laſt caſe of charitable Uſes, they may compell by Attachment of their Goods or Bodies, any to accompt, they ſhall ſuſpect to have any ſuch Sums in their hands, and force them to pay to them what they finde by ſale of their Goods, or impriſonment of their Bodies. In the caſe of Aſſurances between Merchants, they may hear and determine the matters, and for that purpoſe call, and compell the parties and their witneſſes before them, and impriſon them who will not obey their Orders; and if any be grieved by their Order, he muſt complain in Chancery: In the caſe againſt Purveyors, they may and muſt examine their doings, and puniſh their faults: In the caſe of the Riot and neglect of Officers, they are ſpeedily to enquire of the Riot, and of the neglect of the Juſtices or other Officers in their duties, and to certifie the ſame into the Chancery: In the commiſsion againſt Servants for imbezeling, the Sheriff is to make open proclamation according to the direction of the ſame Commiſsion, and to return the ſame: In the Commiſsion for granting of Faculties, they may and muſt grant Faculties under their Seal, in ſuch manner and order as the Archbiſhop ought to grant them: In the caſe of Appeals, they are to hear, and definitively to determine them: In the caſe of Tryall of Offenders, the Commiſsioners are to proceed againſt the Offenders by Indictment, arraignment, and ſuch an Order of Tryall as by Law in ordinary caſes is uſed: In the Commiſsion for to examine the accompts of Officers, they muſt enquire, and certifie to the Court the Receipts and Disburſements: In the commiſsion of ſafe Conducts, the Commiſsioners may, and muſt hear and puniſh all Offences great and ſmall, done againſt the Truce and ſafe conducts upon the main Sea, out of the body of any county. *See the ſtatutes before.* *Sect. 5.*

Commiſsioners in divers caſes have power to make Bargains, Sales, Feoffments, and Leaſes of other mens Lands, and their acts therein are good and binding. For which ſee *ſtat.* 13 *Eliz.* 7. 2 *&* 3 *Phil. & M. cap.* 1. 1 *Ed.* 6. 14. 23 *H.* 8. 2. 5 34 *H.* 8. 4. 43 *Eliz.* 2. 3. 4.

The faults of Commiſsioners in generall, are the omiſsion or commiſsion of any thing againſt their duty ſet down before: 12. Their faults and puniſhments.

1. To refuſe a Commiſsion being ſent unto, and offered them, unleſs it be in caſe where a man is authorized by a ſpeciall Law to refuſe it, as the ſtatute of 1 *H.* 8. 8.

2. To do any thing againſt or beſides the contents thereof, or to neglect to doe any thing commanded and required by it.

3. Not to retorn or certifie it when it is executed, and where the nature of it is ſuch as it doth require a Retorn, *Co.* 2. 17. 25. 8 *Co.* 9. 77. *ſtat.* 7 *H.* 4. 11. *ſo was it held in* 2 *Jac. B. R. ſtat.* 4 *H.* 4. 9. 1 *H.* 8. 8. 7 *H.* 4. 11.

If a Commiſsioner to examine witneſſes, will not ſuffer a witneſs to declare the whole Truth of matter pertinent to the queſtion, and purſuing the Interrogatory; or if after he begin to examine, he have ſecret conference with the party, and take new direction from him: or before publication diſcover to either party any thing which is depoſed on either ſide: or take gifts to encline to either ſide; or retorn not the true Depoſitions: or make not return of them at all: All theſe, and ſuch like, are miſdemeanors puniſhable, *Co.* 9 71. 40 *A. St.* 33. *F. N. B.* 110. *Moors caſe,* 2 *Jac. B. R.* Depoſition. Examination.

And for all theſe defaults and miſdemeanors in Commiſsioners, where by the Law there is no certain puniſhment ſet down, the Offenders were puniſhed by Fine and Impriſonment in the Starchamber; or in ſome caſes in the ſame Court out of which the commiſsion did iſſue: And where they do exceed their authority, in moſt caſes they

they may be puniſhed, ſo as if no ſuch commiſsion were made, *Coo. 9. ſtat.* 4 *H.* 4. 9. *Moor* verſus *Foſter.*

For Actions of Treſpaſs, or ſome other Action (as the caſe is) may be brought againſt the Commiſſioners, and ſuch as act under them, as if no ſuch Commiſſion had been granted. So men have been ſued, that have acted under the Commiſsion of Bankrupts, under the Commiſsion to Juſtices, to hear and end matters of Tithes, if they keep not within their compaſs, and act in an Arbitrary way.

But where any Statute doth ſet down any certain puniſhment, there the offender muſt bear that alſo: As a Commiſsioner to finde an Office, if he have not forty Marks *per annum* of Land, loſeth twenty pound. And if he ſit in ſecret places, or hinder the free giving of evidence, he loſeth forty pound, and ſo of others. 2 *Jac. B. R. Stat.* 1 *H.* 8. 8. 25 *H.* 8. 10.

13. When a Commiſſion ſhall be ſaid to be determined, or not. By a new Commiſſion.

A Commiſsion that is well made and granted, may determine and become void by divers means and ways: As ſometimes by the granting of a new Commiſsion, and that may be when it granted to the ſame perſons; or when it is granted to others: As if a Juſtice of the Common Pleas be made Juſtice of the Upper Bench, though it be but for one time, and he ſurrender it the morrow after, the former Commiſsion is determined: But if ſuch a Juſtice be made Chief Baron, Juſtice of *Oyer* and *Terminer*, or of Gaol-delivery; this doth not determine the Patent. *Littl. Broo. Sect.* 498. *Stat.* 13 *Eliz.* 9.

If the Lord Protector grant to a Major and Communalty, and their Succeſſors, to be Juſtices in ſuch a place, and after grant to others to be Juſtices there; or if the latter Commiſsion be granted to ſuch as are dead, or it be void for any other cauſe; in theſe caſes the former Commiſsion doth continue: But if the latter Commiſsion be granted but to one, and the firſt to four; or it be onely *hac vice*, it doth determine the former Commiſsion, *Litt. Broo. Sect.* 569.

If a Commiſsion of *Oyer* and *Terminer* be granted to ſome perſons, and after a Commiſsion of Gaol-delivery is granted to others, this latter doth not determine the former, for theſe may ſtand together; but when the latter is contrary to the former, the former is determined. As if there be a Commiſsion of the Peace, is granted to ſome, and after another Commiſsion of the Peace granted to others; this doth determine the former: But in all theſe, and ſuch like caſes, there muſt be notice, *Litt. Broo. Sect.* 474. 509. and *Broo. Commiſſion* 2. See *Notice.*

Notice.

By *Superſedeas.*

If a Commiſsion be granted to ſome perſons to do a thing, and before execution, another doth come to countermand this; this is a *Superſedeas* to the firſt, if there be notice given of it, and whatſoever the Commiſsioners do upon the firſt, is void. And it ſeems the Lord Protector may determine an Authority given by a Commiſsion under the Great Seal by a Privy Seal. Alſo he may at his pleaſure by a Writ of *Superſedeas* out of the Chancery, determine any ſuch Commiſsion, and diſcharge the Commiſsioners, *Broo. Commiſ.* 13. *Juſt.* 24. *Stat.* 13 *R.* 2. 2. 23 *H.* 8. 5.

By death of the King.

By the death of the King, all Commiſsions and Patents of Officers, who were made onely by Patent, and had but a naked Authority, did determine, and were at an end; but ſuch Officers as are made by Writ, and ſuch as are ſo by grant: As if the King had granted to a Major and Commmunalty, and their Succeſſors to be Juſtices; it ſeems theſe Patents do not determine, for in the laſt caſe it is not revocable. 4 *Ed.* 4. 44. *Littl. Broo.* 509.

By default of Adjournment.

If the Juſtices ſit by Commiſsion, and do not adjourn it, the Commiſsion is determined, *Littl. Broo. Sect.* 509.

By acceptance of a Dignity.

If one be the Lord Protectors Steward by Commiſsion, to keep his Courts, and after be made Juſtice; this doth not determine his firſt Patent: Yet if a man be Foreſter by Patent, and after be made Juſtice of the ſame Foreſt; this latter Patent doth determine the former. *Broo. Offices* 47.

If the Lord Protectors Remembrancer in the Exchequer be made of the Barons there; it ſeems this doth not determine his Patent before, *Dyer* 197. 47.

Sect. 6.

But if a Commiſsion of the Peace be granted to *J. N.* and others, or *J. N.* be Juſtice of the Bank, and after he is made Knight; this doth not determine the Commiſsion, nor his Authority, or Office in either caſe: So if a man learned in the Law, be

be put in Commiſſion, and after he is made Serjeant at Law; yet he doth remain in his Authority. *Littl. Brook, Sect.* 295. 509.

If any being Juſtices of Gaol-delivery, Aſſize, or the Peace, or be in any other of the Lord Protectors Commiſſions and fortune to be advanced to the dignity of Duke, Archbiſhop, Marqueſs, Vicount, Baron, Biſhop, Knight, Juſtice of the one Bench, or of the other, Serjeant at Law, or Sheriff, their former Commiſſion ſhall continue notwithſtanding. 1 *Ed.* 6. 7. *Dyer* 205. & 209.

For other Commiſſioners, (*i.*) all the Officers of the Realm, and others. See *Officers, Courts, Purveyors, Bankrupts, Fines,* and other Titles.

This word is diverſly applied, for ſometimes it is applied to the Mandat of the Lord Protector, as in 14 *Ed.* 3. 14. The Juſtices ſhall not delay to do right and Law for any Commandment that ſhall come to them from the King, unde the Great or Privy Seal, but ſhall proceed notwithſtanding By which Mandat, the King of his meer motion caſteth a man into priſon, and ſometimes to the Mandat of Juſtices: And this is either abſolute (*i.*) when of their own Authority, Wiſdom, and Diſcretion, they commit any man to priſon for a puniſhment; or Ordinary, when they commit one rather to be ſafely kept then for puniſhment; and in this laſt caſe the party committed is bailable. But this word doth moſt commonly ſignifie the offence of him that willeth another man to do any thing contrary to Law, as Murther, Theft *&c.* And is alſo frequently applied to any Commandment whatſoever; and ſo in many caſes it ſerveth to give and make an Authority. *Crompt. Jur.* 91. 6. *Terms of the Law. Stamf. Pleas of the Crown. f* 72, 73.

14 *Commandment* or *Mandat.*

To make a Commandment good to Warrant the doing, or excuſe the not doing of a thing; theſe things muſt concur.

15. Where a Commandment ſhall be ſaid to be good or not, and how. In reſpect of the manner.

1. He that doth it muſt have power in the thing.

2. The thing commanded to be done muſt be lawful.

3. The Commandment muſt be given in that manner, and order that Law requireth, 2 *H.* 7. 14.

A Verbal Commandment in moſt caſes is ſufficient, and as good as a Commandment in writing, unleſs it be in ſome ſpecial caſes: As where it is given and made by a Corporation (for which ſee *Corporation*) or where the Sheriff doth make Warrant to a Bailiff of a Franchiſe, or other Bailiffs to arreſt a man: And ſome ſuch other ſpecial caſes, whereof ſee ſome in Authority, *ſupra: Fa. Impriſonment* 3. *Subpœna* 1. 13 *H.* 7. 17. *Broo. Treſpaſs* 288. *Dyer* 102. 83. 3 9. 12.

Verbal Commandment

In reſpect of the matter commanded, or perſon commanding, *&c.* To excuſe the doing of ſomething, otherwiſe unlawful.

Any thing (for the moſt part) that a man may do by himſelf, he may do by another, and therefore the Commandment to do ſuch a thing is good, and may be obeyed without danger: As to enter into or claim Land, ſeize Goods, demand Rent, or the like: Arreſting of mens Bodies, attaching of their Goods, or the like, and this Commandment will excuſe them: But if the thing commanded be unlawful, as when one doth command another to kill a man, or to ſeize another mans Goods: Theſe are unlawful, and therefore ſuch Commandments will not countenance ſuch actions. And therefore if one doth command another to kill a man, or diſſeiſe a man, or do a Treſpaſs, both he that gives, and he that obeyeth the Commandment, ſhall be puniſhed as all alike guilty. (See *Paticeps Criminis.*) See *Dyer* 102. 83. 173. 15. *Kelw.* 89. 2 *H.* 7. 14. *Doct. & Stu.* 18.

By Magiſtrates and Officers that have power, a man may be commanded to arreſt mens Bodies, Goods, *&c.* As if the Sheriff in doing of Execution commandeth me to help him; or an Officer to help keep the Peace; or a Juſtice of Peace to arreſt Ryoters, or the like; theſe are good Commandments, and theſe all men muſt obey, or expect puniſhment for their refuſal: And if I command my ſervant to impound another mans Cattle, or drive them out of my Ground, I may command another to cut down my Trees upon mine own ground; theſe are good Commandments, and may be obeyed without danger of puniſhment; for this Commandment ſhall excuſe, *Fitz. Faun. Impr.* 3. *Treſpaſs* 253. *Avowry* 260. *Broo Treſpaſs* 53.

If I have a Warrant or Commiſſion to Purvey for the Lord Protector, I may command another to do it, and it ſeems good. *Fitz. Bar.* 259.

Purvey

If I being an Executor command another to ſeiſe the Goods of the Teſtator, and after

Entry. &c. Seiſure.

after I refuſe, and another doth adminiſter, yet the Commandment is good, and will excuſe him againſt the Adminiſtrator. *Fitz. Adminiſtr.* 2. If I have cauſe to enter into, or make any Claim to any Lands, I may command any other to do it: And in this caſe, and ſuch like of things done by another, the rule is, *Qui per alium facit per ſeipſum facit.* And in the caſe of Entry, any man where the Entry is lawful, may of his own head, in the behalf of him that hath right of Entry, although he be an Infant that hath the cauſe of Entry, without any Commandment enter for him. 10 *H.*7. 12. 9.

Claim.

Entry.

Infant.

The Commandment of an Infant in moſt caſes is void, but he may at full age agree to a thing done before, which is *tantamount*, for the Rule is, *Omnis ratibitio mandatum æquiparat:* If he in Reverſion command the Tenant for life to dig Clay or Gravel in the Land of the Tenant: This will not warrant nor excuſe him, if I bring an Action of Waſte for it. *Perk.* 3. 2 *H* 7. 14.

If I ſuſpect a man for Felony, and command another to arreſt him; it ſeems this is not good, unleſs I be a Juſtice of Peace. See *Falſe Impriſonment. Br. Falſe Impr.* 14.

Sect. 7.

If I command one to take the Goods of *J. S.* and *J. S.* die, and make me his Executor; in this caſe I may ſue him for the taking of theſe goods, and my Commandment will not excuſe him: So that as in the caſe before, matter *Ex poſt facto* would not make a good Commandment void; ſo here it doth not make void Commandment good, 2 *H.*7. 14.

And ſo generally where an Authority had by a Commandment is good, there the Commandment is good, *Et ſic è contra.* See *Authority, ſupra*

To excuſe the not doing of ſome thing that otherwiſe ought to be done, or the like.

If a Leaſe be made of a Houſe on Condition, that the Leſſee ſhall not ſuffer any Woman great with childe to abide in the houſe ſix moneths after warning given: Now if the Leſſor contrary to this Condition, command the Leſſee to ſuffer her there, he is not to obey it; for though he do it by his Commandment, yet it will uot excuſe him: So if one be bound to me in an Obligation, with Condition to pay me money at a place and day, and I command him not to go there, to pay the money, if he do not, he forfeiteth his Obligation; but if I in this laſt caſe, or the Leſſor in the firſt caſe, uſe any violence to keep him from coming thither, or to keep the Woman in this houſe, this will excuſe. *Fitz. Bar* 162. *Covenant* 31. *Kelw.* 60. If one be bound to pay me Rent on his Leaſe, and I command him to repair, and lay out ſome of the money, yet he muſt pay me the whole Rent, and this Commandment will not excuſe him. But *Fitz. Bar* 65. *Fitz. Bar* 45. If one be bound in an Obligation with Condition to pay me money at the day, and I command him he ſhall not pay it to me; or that he ſhall keep it for money I ow him, it is ſaid this will excuſe him, and will be a good Plea in Bar to an Action upon the Obligation: So if I command him to pay it to another, to whom I ow money, ſome ſay this will excuſe. But then I muſt plead payment to him by the hands of that other. *Kelw.* 60 *b. Perk.* 145. *Broo. Condition* 181.

16. Where he that doth a thing by Commandment of a Judg or Officer ſhall be excuſed, though the thing be wrongful, or not.

Where a Court hath Juriſdiction of the Cauſe, and doth proceed *inverſo ordine*, or erroneouſly, there the party that doth ſue, and the Officer that doth execute the Proces or Precept is excuſed: As if a *Capias* come out of the Common Pleas, and there is no Original; or a Sheriff ſend a Precept to a Bailiff, and hath no Writ; or a Juſtice of Peace make a Warrant to arreſt a man that is not indicted. But if the Court have no Juriſdiction of the matter, and all the proceeding is *Coram non judice*; here the Precept will not excuſe, but it is as if there were no Proces: And ſo it is if there be an Appeal of death in the Common Pleas, or a *Capias* come out of a Court Baron, or the like. *Co.* 10. 76. *Plow.* 394. *Kelw.* 66.

Juriſdiction.

Quotuplex.

It is the lawful power and authority to execute and miniſter Laws; or the extent of the Authority of every Court. And this is either Eccleſiaſtical (*i.*) that which is limited to certain Spiritual and particular caſes, and the Court wherein theſe cauſes are handled, is called *Forum Eccleſiaſticum* which is governed for the moſt part by the Civil and Canon Laws; or elſe it is Secular and general, and the Court wherein theſe cauſes are handled is called *Forum Seculare*, which is governed by the Common and General Law of the Realm. And for the deciding of all Controverſies, and diſtribution of Juſtice within the Realm, the Law hath provided theſe two diſtinct Juriſdictions, which it doth take care alſo to preſerve and keep diſtinct and entire; and therefore it taketh order, they ſhall keep their bounds, and that one ſhall not incroach

croach upon another. It doth not therefore permit the Temporal or Secular Courts to meddle with Spiritual matters; nor the Spiritual Courts to meddle with Temporal matters. If the Temporal Court meddle with Spiritual matters, as matter of Divorce, or Marriage, or the like, the Defendant in the ſuit may in ſome caſes in the beginning of the ſuit, take exception thereunto, and deſire of the Court that he may not be ſuffered to proceed in that matter which is not within their Juriſdiction, and thereupon it ſhall be ſtaid; or if it go further, the proceeding is afterwards avoided as erroneous. And if the Spiritual Court meddle with Temporal matters, the party grieved may have a Prohibition out of the Secular Court, and by that means ſtop their proceeding there; for which look *Prohibition*. And in ſome caſes, both the party that doth prefer the Suit, and the Judge of the Court that doth receive and allow it, be in danger of a Premunire; for which, ſee *Premunire*. *Co. ſuper Lit. 96. a. b.* 44 *Ed.* 3. 5. *Crompt. Jur* 100. *Fitz. & Broo. Juriſdiction in toto.* 18 *Ed.* 3. 6. *Co.* 10. 76. *Doct. & Stu. cap.* 55. *& cap.* 31. 5 *Ed.* 4. 6.

The Secular Courts have alſo their limits which they muſt not paſs. And therefore if a Suit be begun in one Court, the Conuſance whereof doth properly belong to another; the party ſued by exception in time may abate the ſuit and ſtay the proceeding there. And in ſome caſes although he do not ſo, yet is the proceeding erroneous, and may be afterward for error avoided. And in ſome caſes one of theſe Courts do by Writs or Commandments in the nature of Prohibitions, ſtop the proceeding in another. See *Broo. & Fitz. Juriſdiction in toto. Stat.* 13 *Rich.* 2. 2.

And in ſome caſes it doth fall out, that albeit, the Court have Juriſdiction of the matter, yet by reaſon of ſome Plea the Defendant hath pleaded, it is ouſted of the Juriſdiction, and cannot proceed. As if in the Court of a Corporation, the Defendant plead a Forein Plea that cannot be tried there. See *Court* and *Officers*.

Licence, what.

A Licence is much of the nature of Authority, and the Rules of both, have much affinity.

18. The nature of a *Licence*, and how it ſhall be taken.

For as of Authority, ſo of Licence: There is a Licence in Deed, and a Licence in Law. The Law gives one leave to go into an Inn for his refreſhing. If a Butcher buy a Calf, the Law gives him leave to take him out of the Cloſe where he is, but not to drive the Cow out of the Cloſe. By Baron *Denham* at *Gloceſter* Aſſiſes, 1654. And therefore for this he muſt have Licenſe by Deed, or he will be a Treſpaſſer. 1. For Regularly a Licence is not grantable, nor tranſmiſſible, it is a thing of a perſonal nature, it doth for the moſt part die with the perſon. 2. It is ſubject to Revocation, eſpecially if it be in matter of pleaſure. 3. It muſt be ſtrictly purſued, eſpecially if it be in matter of pleaſure; for if I Licence one to hunt in my Park, walk in my Orchard, or eat at my Table, he muſt not bring any other with him: But if it be in matter of profit, it is more largely. And therefore if one Licence me to go over his ground with my Plough, or to cut down a Tree in his ground; in this caſe I may take as many with my Plough, as is needful, and as many to cut and take away the Tree as is requiſit. And if a man exceed in a Licence given by Law, he is a Treſpaſſer *ab initio*, and ſo ſhall be puniſhed, but not ſo in caſe of a Licence given by one man to another, for there he ſhall be puniſhed for the exceeding onely. *Co.* 8. 146. 22 *Eliz.* 447. 21 *Ed.* 4. 75. *Broo. Licence*, 25. 13 *H.* 7. 13.

19. What things may be done by *Licence*, and what not, By *Diſpenſation*.

It is a general Rule, that the King by his Prerogative may diſpence with a Penal Law when the forfeiture is popular, or given to the King alone, *Propter impoſſibilitatem prævidendi de omnibus particularibus*; but this is limitted to *Malum prohibitum* onely, and doth not extend to that which is *Malum in ſe*. In all ſuch caſes therefore, and where the Statute it ſelf doth not take this Prerogative from the King, and conclude him to grant any ſuch Licence; the Lord Protector by a grant with a *non obſtante*, may make that lawful to a man by his Licence, that otherwiſe were unlawful and a Treſpaſs. Hence it is that the King may Licence a man to coyn money without offence, and he that hath ſuch a Licence, may then do it lawfully. So alſo to tranſport Corn, Wool, *&c.* albeit Tranſportation be in general prohibited. See *Tranſportation*. *Co.* 11. 86, 88. *Dyer* 54. 17. 11 *H.* 7. 11. *b.* See divers preſidents in *Writ* 362, *&c.* *Sect.* 2. *Phil.* and *Mary*, 5. *Eliz.* 5 *Eliz.* 6. *Ph. & M.* 14.

The Lord Protector alſo may grant a Licence to do any thing, which by the expreſs *Sect.* 8.

words of any Statute he is enabled to do. As he may Licence any of his own Chaplains to have plurality of Benefices of his own gift, and to be *Non reſident, &c.* by the tatute of 21 *H.*8. 13.

The Lord Protector may alſo Licence the doing of Acts prohibited by the Common Law, as to depart out of the Realm, *&c.* 176. *p.*30.

Or an Officer to neglect his Office, *&c.* *Co.*9. 102.

malum in se

But if the thing be *malum in ſe*, for the doing or not doing, whereof the Licence is granted; as if it be to kill a man, or to do a Nuſance, or to break a Recogniſance for the Peace, or the like; this will not ſerve to excuſe the doer thereof from blame, or free him from puniſhment, 11 *H.*7.11. *Co.*11. 88.

malum prohibitum

So if the thing be but *malum prohibitum* onely, yet if the King be reſtrained by the Statute it ſelf, and there be expreſs words therein, that his diſpenſation ſhall not be granted; or if it be, that it ſhall be void; in this caſe the Lord Protectors Licence will not help: And ſo it is in the Statute of 33 *H.*8.6. againſt Shooting. See the *Statutes.*

Egyptians &c

And of 1 *Eliz.* 2. *Phil. & Mary* 4 againſt *Egyptians*; and of 21 *H.*8. 13. againſt plurality of Benefices; and of 1 *Jac.*22. againſt Tanners, *&c.* In all which caſes, no Licence or Diſpenſation will help any breach or tranſgreſſion of any branch of the ſaid Statutes.

Void exemption

So if the Lord Protector diſpence with the breach of a Statute before it is made, this is void. As if he grant a Licence to tranſport Bell-mettal, notwithſtanding any Statute hereafter to be made, and a Statute be after made, this Licence will not diſpence with, nor excuſe the breach of the Law; but if it be in a thing that doth concern the King alone, As if he grant a man ſhall be free from all Cuſtoms and Taxes, *&c.* this may be a good Exemption, *Dyer* 52. 1.

good exemption

By Faculty.

A man may have a Licence to eat fleſh on days prohibited, to hold two or more Eccleſiaſtical Livings, the Son to ſucceed the Father in a Benefice, or any ſuch like thing as this; and in ſuch caſes where they have been uſed to be granted, and which is not contrary nor repugnant to the Word of God. *Stat.* 21 *Jac.*13. 25 *H.*8. 21. 3 *Eliz.*5. 1 *Jac.*27.

But a man may not have a Licence to do any thing which is *malum in ſe*, or contrary to the Word of God; as to commit Adultery, live in Inceſt, break a lawful Oath, and the like, ſuch as the Pope did heretofore grant: But all ſuch Licences are void; nor to allow any thing expreſly reſtrained by any Statute: As to diſpence with any other Pluralities of Benefices, and *non reſidence*, then ſuch as is tolerated by the Statute of 21 *H.*8.13.

Pluralities 21 H8. 13.

By others Licences.

By Licence from the Lord Chancellor, any man may convey Butter and Cheeſe to any other place beſide the Staple, by the Statute of 3 *H.*6.4.

practise Physick

By Licence a man may practiſe Phyſick and uſe Surgery in *London*, and within ſeven miles thereabouts, by the Statute of 3 *H.*8. 11.

Cottages

By Licence of the open Seſſions, a man may continue a Cottage againſt the Statute of 31 *Eliz.* 7.

By Licence a man that is a houſholder, and hath lived three years in the County, may be a Drover of Cattle, Badger, Lader, Carrier, Buyer, Seller, or Tranſporter of Corn, Grain, Butter or Cheeſe; and by apt and ſpecial words in ſuch a Licence, may buy any Corn out of an open Fair or Market to ſell again, and buy Cattle where they have uſed, and ſell them again forty miles from thence, or more, at any Fair or Market, at reaſonable rates: But without Licence no man may do ſo. *Stat.* 5, 6 *Ed.*6. 14. 5 *Eliz.*12.

By Licence, Knights of the Parliament or Burgeſſes, may depart, but not otherwiſe, by the Statute of 6 *H.*6. 13.

By Licence, a Soldier may depart from his Captain, but not otherwiſe; for then it is Felony, by Statute of 18 *H.*6. 19.

poor people to travel to Bath &c

By Licence, poor people of any place, may travel to *Bathe* or *Buxton*, but without ſuch Licence they may not by Statute, 39 *Eliz.* 4.

Seamen

So alſo by a Teſtimonial and a Licence of the Juſtice of Peace, next to the place where a Sea-faring man landeth, that hath ſuffered Ship-wrack, he may beg the next way

way home, keeping the way and time ſet him by the Juſtice of Peace, 39 *Eliz. cap.* 4.

But no Licence to beg in any other caſe, unleſs they be made by the King himſelf, will excuſe Soldiers, Marriners, or any going to the *Bath* or *Buxton* to beg: Neither may Tinkers, or petty Chapmen be licenced to wander up and down, and uſe their Trade in the Country, by Statutes of 39 *Eliz.* 4. 5, 6 *Ed.* 6. 21. 22 *H.* 8. 12. 2, 3 *Phil. & Mary*, 5.

By Licence any man may ſell Ale as a common Ale or Beer-ſeller, and not otherwiſe, by Statutes of 5, 6 *Ed.* 6. 25. 4 *Jac.* 4.

Any man that may juſtifie the ſhooting in a Gun, by the Statute of 33 *H* 8. 6. may by Licence in writing, authoriſe his Servant to carry ſuch a Gun to be amended. So a Maſter may Licence and allow his Servant to play at any unlawful game, with him and in his company without danger of the Statute of 33 *H.* 8. 9. 20. What a man muſt plead in ſome Caſes of *Licence*, and how.

And regularly by the Common Law, I may by Licence of another man do, or not do any thing to or touching his Body, Lands, or Goods; for the doing or not doing whereof, he might otherwiſe have an Action of Treſpaſs of the Caſe, Waſte, or the like againſt me; as impriſon his Body, Wife, or Servant, ſuffer Eſcapes, kill his Cattle, break his Houſe, ride his Horſe, impound his Cattle, or go over his Ground with Horſes, Wayns, Carts, or otherwiſe, kill his Game in his Park, or the like, depart out of his Service, and the like; and this Licence will excuſe me, if he ſue me for it: But then I muſt take heed I plead it, and do not plead not guilty. *Broo. Licence in toto. Co.* 11. 48. *Fitz. Bar.* 81, 89. 253.

By Licence of the Lord a Copiholder may alien for longer time then one year, although ſuch alienation without Licence would be a Forfeiture of his Eſtate. See *Copihold.*

But if the Omiſſion or Commiſſion be *Malum in ſe*, prejudicial to the Commonwealth, or to others, or a thing out of my power; in theſe caſes Licence will not excuſe, nor make the thing lawful. And therefore if a man Licence me to kill him, or cut off his arm, or a Lord will Licence a Parſon that is bound by Tenure to ſay Divine Service, not to ſay it, a Steward that is bound to keep Law-day not to keep it; it ſeems all theſe Licences are void: So if my Parker Licence one to kill my Game, or my Shepherd Licence one to kill my ſheep, or I having a Reverſion of Land, Licence a ſtranger to take the Profits, or cut down the Trees, this is void; for this is more then I can do my ſelf. *Broo. Licence* 20. *Fitz. Bar.* 83. *Curia, M.* 18 *Jac. B. R.* *Sect.* 9.

See much of this queſtion in the laſt Diviſion. And when the Kings Tenant that holdeth of him in *Capite* would alien, he muſt have the Kings Licence. See *Alienation.* 21. Where a *Licence* is neceſſary, and where not.

A Licence from the Biſhop, or one of the Univerſities, was needful for him that would Preach, or teach School.

He that would make a Warren, muſt have the Lord Protectors Licence for it.

An Appropriation cannot be made without Licence. See *Advowſon.*

An Alienation in *Mortmain*, cannot be without Licence from the Lord Protector. See *Mortmain.*

A Biſhop could not be choſen without the Kings Licence, called *Conge Deeſlier.*

An Elect Suffragan Biſhop could take no profit of, or have any juriſdiction by his See, but ſuch as had been given him by Licence of the Archbiſhop, or Biſhop of the Dioceſs. See *Suffragan.* 26 *H.* 8. 14.

In caſes of Diſpenſation with Penal Laws, none but the Lord Protector may grant the Licence: And he may not give liberty or power to another to diſpence with others, or to give Licence or Toleration to do or uſe any thing againſt any Statute or Common Law, or make any Warrant for ſuch Diſpenſation, or compound for the Forfeiture of any Penal Law; neither may he grant or promiſe the benefit of any Forfeiture that ſhall be due upon any Statute, before Judgment be thereupon had, and if he do, all ſuch Grants ſhall be void, 21 *Jac.* 3. 22. Who may give or grant the *Licence*, and who not. *Diſpenſation.*

In all caſes where the Archbiſhop or any other Biſhop, might have granted Licences, it ſeems the Lord Protector himſelf may do the ſame immediatly: But the Archbiſhop *Faculties.*

biſhop of *Canterbury*, or his lawful Deputy, or Commiſſary: And in ſome caſe where he did deny him, ſome other Biſhop might; and in this caſe the party may, and if the cauſe be great, muſt have the confirmation of the Lord Protectors Broad Seal, 25 *H.*8. 21. 28 *H.*8. 16.

And in caſe of neceſſity of ſickneſs, the Biſhop of the Dioceſs, or Parſon or Vicar of the Pariſh, may give Licence for the eating of any fleſh beſides Beef, Veal, Mutton, or Bacon; but unleſs it be in caſe of neceſſity, the Licence is not good, 5 *Eliz.* 5. 1 *Jac.*27.

But neither the Pope, or any other may give or grant any ſuch Diſpenſations; neither may any ſue for them from the Pope, under a great penalty. See *Premunire* and *Treaſon.* 25 *H.*8.21.

Other *Licences.* The Licence for Butter and Cheeſe, muſt be made and had from the Lord Chancellor: The Licence to practice Phyſick and Surgery from the Biſhop of *London*, or Dean of *Pauls*, with the advice of three of the Doctors of Phyſick there: The Licence for the continuance of a Cottage from the Juſtices of the Seſſions; the Licence for Drovers, and the reſt, muſt be by the general and open Seſſions, and three Juſtices hands to it; the Licences of Knights and Burgeſſes of the Parliament, muſt be from the Parliament, and muſt be enrolled there; the Licence of the Soldier muſt be from the Captain; the Licence of the poor that travel to *Bath* or *Buxton*, muſt be by the two next Juſtices; the Licence of the Seafaring-man to beg who hath ſuffered Shipwrack, muſt be by the next Juſtice of the place where he landed; the Licence to ſell Ale or Beer, muſt be by the open Seſſions of the Peace, or by two Juſtices of the Peace, whereof one muſt be of the *Quorum*: And the reſt of the Licences muſt be made by the perſons before ſet down. See the *Statutes* before.

The Licences to excuſe at Common Law, muſt be made from the party himſelf, whom the thing doth concern, or ſome other under him: For if my Wife or Servant do by my appointment, Licence a man to do any ſuch thing, it is as good as if I did it, and ſhall be pleaded as my Licence: As if I bid my Tenant give the Hawks there to whom he will, and he Licence a ſtranger to take them, this is a good Licence: And my Bailiff may Licence one to ride my Horſe, milk his Kine he hath in cuſtody, or the like. But none other perſon may give any ſuch Licence in any of theſe caſes. *Fitz. Bar.*36. 10 *Ed.*4.4. 12 *H.*7.25. *Fitz. Treſp.* 125.

23. How and in what manner the *Licence* ſhall be made. The Lord Protectors Licence or Diſpenſation is, and muſt be always by Patent under one of his Seals, *Dyer* 54. 17.

The Archbiſhop muſt have granted his Faculties under his Hand and Seal by writing, and in ſome caſes (as before) the Kings Confirmation was requiſit. So if any Biſhop had granted any Licences, it muſt be in writing under their Hand and Seal. See the *Statutes* and *Caſes* above.

If the Licence be made and given by a Corporation, it muſt be in writing, and cannot be by word onely. See the *Statutes.*

If it be made upon a Statute, it muſt be according to the Statute: As that which the Maſter doth give his Servant for the carriage of a Gun, muſt be in writing: But that which is given to the Servant, to Licence him to play at unlawful games with his Maſter, may be by word. All the reſt of the Licences upon all the Statutes it ſeems muſt be in writing.

And in all the caſes at Common Law of Omiſſion and Commiſſion, for the moſt part a Verbal Licence without any writing, is ſufficient. *Co.* 9. 99. *Fitz. Bar.* 30. 89.

Sect. 10. But if a Licence be to take Common, as if I have Common Apprender in another mans Ground, and I Licence another man to take this; or if a Licence be claimed, as annexed to an Eſtate of Inheritance, it muſt be by Deed, and cannot be by word; or if it be to have a thing for life, as if I claim a Licence from a man to go over his Ground, during our lives; it ſeems this is not good without writing. 22 *H.*6. 52. *Dyer* 281. 19.

24. When a *Licence* ſhall be ſaid to be purſued, and when not. The Licence in Law is then purſued, when we do as much as the Law doth authoriſe, and no more: As for a man to go into an Inn, and there to behave himſelf orderly; for him that hath a Reverſion to go into his Land, and view it, and be gone;

gone, *&c.* But if a man that goeth into an Inn or Tavern, ſhall then take away a Bowl with him, or break the windows, or the like: Or the Leſſor that comes to view the reparations of the houſe ſhall break the windows, or ſtay there all night: Or one that diſtraineth Cattel, Kine, or Oxen, ſhall milk the Kine, or labor the Oxen: Or if it be Corn, if he threſh it out: Or if a Commoner that hath power to take his Common, ſhall cut down the Trees upon the Common: Or a Purveyor that taketh Cattel by vertue of his Commiſſion, ſhall afterwards ſell them; in all theſe caſes he doth exceed the power or leave the Law doth give him, and therefore the Law doth judg all that he doth unlawful, *Bro. Licence* 17. *Co.* 8.146. *Perk. ſect.* 190. *Licence* in Law

The Licence of the party is then purſued, when he that hath it doth what he had Licence to do, and no more, and in ſome caſes when he doth leſs then that. As if the Lord licence his Tenant to alien for twenty years, and he alien for three years, this is good. But if a Lord licence his Tenant to alien from Michaelmaſs laſt for twenty one years, and he alien it from Chriſtmaſs next for twenty one years, this is an exceeding of the Licence, and a forfeiture of his Eſtate. *Bro. Licence in toto. M.* 37 *Eliz.* 38 *Eliz.* Adjudg. *Trin.* 36 *Eliz. Co. B. Jackſons* Caſe, 13 *H.* 7.13. *Licence* in deed by the Party.

If I licence a Nobleman to walk in my Garden, or hunt in my Park, and he come there with a reaſonable company of Attendants, this is no exceeding, but a purſuit of the Licence. So if I licence a man to go with his Plough over my Cloſe, or to cut down a Tree, there he may take a reaſonable company to do it. So if I licence a man to take two Horſes out of my Stable, and he do take but one, this is a good purſuit.

So if I licence any man to kill a Buck in my Park, and he take a reaſonable company to do it, this is a good purſuit of the Licence.

But if I licence another to ride my horſe three miles, and he ride him four miles: Or I licence him to take my black or white horſe, and he take both: Or I licence an ordinary mean man to hunt in my Park, and he take other company with him: Or I licence a man to go into my houſe to fetch ſomewhat there, and he takes away ſomewhat elſe, or breaks the windows, or the like: Or I licence one to go into my Cloſe, and deliver the Cattel there to *I. S.* and *I. S.* go into the Cloſe alſo: In all the firſt caſes it is an exceeding in them that had the Licence, and in the laſt by *I. S.* And therefore they are all puniſhable accordingly for the exceeding only, *Bro. Licence* 17. *Fitz. Treſpaſs* 139.242. 18 *Ed.* 4.14. *Action.*

All Licences for the moſt part (be they made by King or ſubject, word, or deed) are revocable, ſo that if either the party doth countermand it, or either of the parties dye, it is determined. But herein there are differences taken between Licences of pleaſure, and Licences of profit; and Licences for a time certain, and Licences for a time uncertain. For generally all Licences of pleaſure onely, as to hunt or walk, *&c.* are revocable, and by any act whereby an Authority is countermanded, will be determined; and ſo likewiſe if it be a Licence of profit, as to dig clay in my ground, or to take the profits of my ground, if there be no certainty in the time of the granting of the Licence, or if it be granted onely during his pleaſure that doth grant it, this will alſo determine as the former. But if the Licence be of matter of profit, or be mixed therewith, and be for a time certain, then no countermand in Deed or Law will determine it, for then in many caſes it doth amount to a Leaſe for a time certain, which cannot be recalled, neither will death determine it. If a Licence therefore be made in writing to go over a mans ground during both their lives, it ſeems this is not revocable, *Broo. Licence*, 7.9.15. *Per Inſt. Glom.* 9. *Jac.* 25. Where a *Licence* is revocable, and when it ſhall be ſaid to be determined, or not.

If the King grant Licence to Alien land held of him, and after dye before it be done, it ſeems the Licence is determined; but if he grant Licence to Alien in Mortmain, or grant a Licence to a man to go beyond Sea, and ſtay there for a certain time ſet down in the licence, or to ſtay there for all his life, or the like; in theſe caſes, the death of the King will not determine the licence. But in other caſes the Kings Licence may be determined by the act of God, or the King himſelf, as other mens: *Dyer* 92.*p.* 17. 54 *p.* 27. 92.*p.* 17. 217.*p.* 22. 176.*p.* 30. *Diſpenſation. Treſpaſſes.*

If I Licence a man to cut down Trees, or to do any other thing that may be done by Other *Licences*

by Licence, and before it be done, I forbid him to do it, or he die, or I die, or if I be a Woman, I take a Husband; in theſe caſes the Licence is determined. But if I give a man leave to come into my houſe (as *rigore juris*, I muſt, if his coming into my houſe, be lawful;) and when he is in, I bid him go forth, if it be ſuch a tempeſt, or there be any ſuch caſe that he cannot go forth without danger, he may ſtay a little while, and ſo long he may juſtifie as the neceſſity doth laſt. 39 *H.* 6.7. 20 *Ed.*4.4. 13 *H.*7.13.

So if I Licence one to leave a Rick of Hay in my Cloſe, until he can conveniently take him away, and after I ſell the Cloſe to a ſtranger; this is a determination of the Licence, and the Purchaſer may put in his Cattle, and eat it up if it be not fenced, without giving him notice, Adjudged. *Hill.* 17 *Jac. B R. Shirel Wibs* Caſe.

And in all theſe caſes where the Licence is determined, the act is done without Licence, and then the party that doth it, is an offender, and may be puniſhed as if ſuch Licence had never been made.

But if an Eſtate be made for life, or years, or condition, that the Leſſee ſhall not Alien without Licence of the Leſſor in writing, and he by his Deed in writing do grant a Licence to Alien, and after die, or revoke it by his own act before the Alienation; yet this is not determined, neither is this Licence revocable, for it differeth from all the caſes before; and this Licence is of another nature.

CHAP. XXVII.

Of Badgers and Drovers.

Badgers and *Drovers.*

BAdgers are thoſe that buy Corn or Victual in one place, to carry into another. And Drovers are thoſe that buy Cattle in one place, to ſell in another place. Touching whom theſe things are to be known.

1. None may be a common Badger or Drover, or take that courſe that is not a married man and houſholder thirty years old, or above; and being ſo, that is not licenced, in pain of five pounds.

2. This Licence muſt be in open Seſſions of that County, where he dwelt three years before, under the Hands and Seals of three Juſtices, at leaſt, (one of the *Quorum*) And this Licence ſhall be in force but for one year, from the date of it; and all other Licences are void.

3. The Juſtices may, if they will, take Recognizances of them, that they ſhall not foreſtal, ingroſs, *&c.* See *Chap.* 40.

4. But a Badger duly licenced, may notwithſtanding, 5 *Ed.*6.14. againſt ingroſſing, *&c.* ſell and deliver, in open Fair or Market, within one moneth after the buying thereof, to any Victualler or other perſon, for the proviſion of their Houſes, all ſuch Corn, Butter, or Cheeſe, as any ſuch perſon ſhall buy of them.

5. And yet unleſs he hath ſpecial words in his Licence ſo to do, he may not buy Corn out of a Market or Fair.

6. But they muſt take heed of foreſtalling, *&c.* in their buying and ſelling. Drovers alſo may buy Cattle in ſuch places where they have uſed to buy Cattle, and ſell the ſame again. See the Statutes of 5 *Eliz.*12. 13 *Eliz.*25.

7. If a Drover go with his Cattle on the Lords day, he loſeth twenty ſhillings. 1 *Car.* 1.

CHAP.

CHAP. XXVIII.

Of Bailment and Delivery.

Sect. 1. 1. *Bailment.*

IT is the delivering of things to another, whether Writings, Goods, or Stuff, either to be redelivered to him that delivered it, or to be kept by the other, to his uſe, or to be delivered over to a ſtranger, *Terms Ley. Perk.* 712.

And this is ſometimes upon Condition (*i.*) to be redelivered when money is paid, and ſomething is done, and then it is a Pledge; and ſometimes it is ſimple without any Condition, then called a *Simple Bailment*, (*i.*) when one receiveth them to keep for another; whether it be for the Bailor to redeliver him again (in which caſe he may retake them without requeſt) or for a ſtranger to deliver them over to him (in which caſe before the delivery over, the Bailor may countermand and require the Goods again; and if the Bailee refuſe to deliver them, he may have an Account, for the property is not altered.) And this Delivery is alſo ſometimes to imploy, as when he hath the things delivered to uſe to anothers profit, as to ſell, *Meliori modo quo poterit.* In which caſe, if he ſell it for twelve pence, though it be worth a hundred pounds, and he might have had more, yet is the Bailor without Remedy, 5 *H.* 7. 18. *Finches Ley en Anglois*, 179. 1 *Ed.* 5. 2. 41 *Ed.* 3. 2. *Co. ſuper Littl.* 286.

Note, that whereſoever I may have a Detinue for Goods, I may juſtifie the taking of them where I finde them: Sheaves of Corn to *B.* to deliver over to *C.B.* threſheth them, *A.* may ſeize the Corn threſhed, as it was reſolved in 38 *R. B. Roy*; for *B.* by his threſhing may not alter the property of *A. Littl. Sect.* 498.

2. *Detinue*, what.

It is a Writ that lieth where a man hath Goods or Cattle of mine, either by finding, or by my Delivery to him, to keep or deliver over, and he doth refuſe to redeliver them, or to deliver them over according to appointment, and detaineth, or hath loſt or miſ-imployed them; then by this Writ I may recover the thing it ſelf, if it be to be had, or if not, damages for the thing and the detaining, 14 *Ed.* 3. 2. *F. N. B.* 138. *Co. ſuper Littl.* 286.

The *Judgment* thereupon.

In this Action the thing demanded muſt be ſo certain, as it may be known and diſtinguiſhed from others; for the Judgment is to recover the thing in kinde detained, with damage for the Detainer; or if the thing cannot be had, then damages both for the thing and Detainer alſo; or if it be to be had, it is at the election of the Plaintiff, to have the thing it ſelf, or damages for it, 18 *Edw.* 4. 23. *Kelw.* 64. 3 *Hen.* 6. 43. 39 *Hen.* 6 44. *Dyer* 331. 22.

3. Where, and for what things it lieth, & where not.

This Writ lieth for any perſonal Goods or Cattle that is valuable, and whereof and wherein one may have a property: As for Cattle, Cloath, Houſhold-ſtuff, Money in Bags or Cheſts, Corn in Sacks, Charters or Writings, Loads of Wood, Tuns of Oyl, or the like, *Dyer* 22. 1 *Rich.* 3. 2.

But it lieth not for Money out of a Bag, or Cheſt, or Corn out of a Sack, becauſe it cannot be diſtinguiſhed, 12 *H.* 8. 5.

In all Caſes where this Writ may be had, theſe things muſt be in the Caſe:

1: The thing muſt be of that nature, as for which this Writ may be had, *vide ſupra.*

Where and in what caſe it lieth, and may be brought.

2. He that brings this Writ, muſt have right to, or a property in, the thing demanded, at the time of the Writ brought, or be chargable over for it to ſome other.

3. The thing demanded muſt have been once in the cuſtody of him that is to be charged.

4. This cuſtody and poſſeſſion muſt continue, and not be removed by an Act of Law, as of *Seiſure*, or the like, *Co.* 11. 89. 27 *H.* 8 33.

If I deliver Goods to one, to deliver to *J. S.* and before they are delivered to *J. S.* I do

For Goods and Chattels.

I do forbid the delivery of them, and require them, and he refuſe to deliver them to me, I may have this Action, 1 *Ed.*5. 5. 5 *H.*7. 18.

If Goods be delivered to one to my uſe, or to be delivered over to me, and the party do refuſe to deliver them to me accordingly; I may have this Remedy, 5 *H.*7. 18. *F. N. B.* 38. 21 *Ed.*45.

If Goods belong to me by Cuſtom, as a Harriot, Heirlooms, or as *rationabilis pars bonorum*, and they be withheld or eſſoined from me, after the death of my Tenant or Anceſtor, I may recover them by this Writ. *Kelw.* 184. 8 *H.*7. 10. *Plow.* 90. 39 *Ed.*3. 6,9.

If I buy Cloth, or other Goods of one upon a good Contract, and he keep it from me, and will not deliver it; I may have this Writ. *Dyer* 30. 203.

If a Woman have Goods as Executrix, and her Husband continue the poſſeſſion and die, and his Executor keep the Goods, ſhe may have this Writ againſt him and recover them. *Dyer* 331.

If I deliver one my Goods as Pledge, and at the day the money is tendred, or thing done, and yet the party refuſe to re-deliver it to me; in this caſe I may recover it by this Writ. *Co.*4. 84. 29 *Aſſ. p.*28.

If I leave my Goods with another man to keep, and he take them into his houſe, although he be to have no recompence for the keeping of them, yet he muſt anſwer them; and I may recover them by this Writ. *Co.*4. 84. 29 *Aſſ p.* 28.

If one finde my Goods and have them in his cuſtody, I may recover them by this Writ. 39 *H.*6. 2. 12 *Ed.*4. 8. 27 *H.*8. 13.

If I deliver my Goods to *J. S.* and he deliver them to *W. S.* it ſeems I may have this Writ againſt either of them, and recover them. 12 *Ed.*4. 8.

If Goods be given in free marriage to a man and woman, who are after divorced; in this caſe after the Divorce, ſhe may recover the Goods by this Writ. *F. N. B.* 139.

If I deliver one a Box of money to keep faſt locked, or otherwiſe made faſt; or deliver or lend a man my Horſe to ride, or deliver a Tailor my Cloth to make a Garment, or deliver Goods to a Common Carrier, or my Horſe to a Common Hoſtler. And the party break the Box, and uſe the money, or ride my Horſe further, and do not re-deliver him, or the Tailor ſpoil, ſell, or mar my Cloth, or the Carrier loſe, or ſpoil my Goods, or the Common Hoſtler abuſe or detain my Horſe. In all theſe caſes for the Detainer I may have this Writ; and for any voluntary abuſe done to the thing delivered, an Action of the caſe alſo. *Co.*4. 95. 18 *Ed.*4. 23. *D. & St.* 102. 2 *H.*7. 11. 12 *Ed.*4. 8.

For *Charters.*

If a man keep my Charters from me which concern the Inheritance of my Land, if I know the certainty of them, and what Land they concern; or if they be in a Bag ſealed, or a Cheſt locked, though I know not the certainty of them, I may recover them by this Writ: And herein it is policy, if I can, to declare of one Charter in ſpecial, for then the Defendant, ſhall not wage his Law. 41 *Ed.*3. 2. 8 *H.*6. 18. 3 *H.*6. 19. 9 *H.*6. 18. *Co. Juper Littl.* 286. *Co.* 1. 2. 4 *H.*7. 7.

As if Lands be given to me, and *J. S.* and my Heirs, and he die, and another get the Deed, I may have this Writ againſt him: So if one be out-lawed that is an Obligee, the King may have this Writ for the Obligation. So if the Tenant in Tail give away the Deed of Intail, and die, his Iſſue by this Writ ſhall recover the Deed. 38, 39 *Eliz.* 2. *B. R. Kelw.* 8. *Socks* Caſe.

Where and in what caſe not.

If I deliver one Money, or Coyn, or any ſuch like thing, which cannot be known nor diſcerned from other of the ſame kinde, and it be not in a Bag, Box, or Cheſt; this Writ lieth not in this caſe, but rather an Account. *Dyer* 22. 29. 12 *H.* 8. 3. 6 *Ed.*4. 11.

For Goods and Chattels.

If one take my Goods or Cattle by wrong as a Treſpaſſor, or diſtrain them for Rent, or for Damage-feaſant, I cannot have this Writ for this. *Co.*11. 89. *Broo. Detinue* 24.

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If one deliver Goods to me, and I bid him take his Goods again, and he refuſe to do ſo, and thereupon I diſtrain them Damage-feaſant, he cannot have this Writ againſt me. 43 *Ed.*3. 21.

If

If a man take Cattle of mine upon his Paſture, and there they die or be ſtoln; in this caſe I ſhall not have this Writ: But the opinion of Juſtice *Hutton* at *Sarum* Aſſizes, 21 *Jac.* was, That if they be ſtoln, the owner of the Paſture muſt anſwer them; of which I muſt doubt, *Quere* therefore. See *Co.* 8. in *Caleis* Caſe, by Juſt. *Bridgm.* 7 *Car.*

If a man take any Goods of mine in a ſpecial manner (*i.*) to keep as he keepeth his own, or the beſt he can, or if they be loſt that it ſhall be at my peril, and they be ſtoln from him, he ſhall not anſwer them, neither doth this Writ lie; or if he bring this Writ, the Defendant may plead this in Bar, *Co.* 4. 84. 3 *H.* 7. 4.

If I finde Goods, and I ſell them, or they be ſtoln from me before Action brought, there it ſeems this Writ will not lie, but that an Action of the Caſe, *Trover* and *Converſion* will lie, 27 *H.* 8. 13.

If I deliver one a Coffer locked, and ſomething be taken out of it, if I keep the Key my ſelf, I ſhall not have this Writ; but if the whole Coffer be taken away, there it ſeems I ſhall have this Writ, at leaſt for the Coffer, *Co.* 4. 83.

If a Bailiff of a Sheriff diſtrain a mans Beaſts in *Withernam*, and after do deliver them to the party from whom he took them, or otherwiſe; this Writ lieth not for him for whom they were diſtrained, *Broo. Condition* 34.

If the nature of the Goods be altered, as if it be Leather and made into Shoos, or if Parchment and Paper, and made into Writings; no Detinue will lie for it, *Per Juſt. Fenner, M.* 38 *Eliz.*

If a Woman great with Childe by her deceaſed Husband, keep the Charters from his Daughter and Heir, that do concern the Land, whilſt ſhe is ſo with Childe; this Writ lieth not againſt her, 41 *Ed.* 3. 11.

If two Executors be, and one deliver an Obligation to the Debtor, and die, the other doth ſurvive, cannot recover it again by this Writ: So if a Tenant in Fee-ſimple give away his Deed, his Heir cannot recover him by this Writ. So it ſeems if one Leſſee for years, give away his Leaſe, that his Companion is remedileſs, and yet nothing doth paſs by the gift of the Leaſe, *M.* 38, 39 *Eliz. B. R. Relſock verſ. Nicolſon.*

4. Where, and what matters are Pleas good in Bar to this Action, or not.

It is a good Plea in Bar to ſay, That the things were delivered to be delivered over to another, and that he did deliver them accordingly, if there were no Countermands; and ſo it ſeems it is, though the delivery over were after this Writ was brought. 5 *H.* 7. 18. *F. N. B.* 138. 12 *Ed.* 4. 8.

If the Detinue be brought for a Horſe lent, it is a good Plea to ſay, That the Horſe was ſick of divers diſeaſes at the time of the delivery, and that he died thereof before any requeſt was made for re-delivery. 21 *Ed.* 4. 55.

It is a good Plea to ſay, That he delivered or offered to deliver the thing for which the Suit is, before the Writ brought. 12 *Ed.* 4. 8.

It is a good plea to ſay, That after the party delivered the Goods, he gave them to the party to whom they were delivered. 21 *Ed.* 4. 55. 12 *Ed.* 4. 8.

It is a good plea to ſay, That after the Goods taken and delivered, the party that delivered them was out-lawed, and the Goods ſeiſed for the King, or that they were taken in Execution. 12 *Ed* 4 8.

If the Writ be againſt a Tailor, it is a good plea to ſay, That the party would not pay him for making his Garment. If againſt an Hoſtler, to ſay, That he would not pay for his Horſe-meat, for they may juſtifie the detaining till payment. 5 *Ed* 4. 2.

If the Writ be for Goods that were pledged, and that the party would not deliver; it is a good plea to ſay, They were ſtoln before the money tendred, or the time of redemption: But if the money were tendred at the time, and the party refuſed to deliver them, and after they are ſtoln; this is no good Plea. *Co.* 4. 24. 20 *Aſſ. p.* 8.

If the Writ be brought for Goods found, it is a good Plea to ſay, he delivered away the Goods before the Writ brought, and hath not the poſſeſſion of them, 27 *H.* 8. 21.

If the Action be brought for goods delivered, to be re-delivered, or delivered over to another; it is a good plea to ſay, He took charge of them ſpecially (*i*) to keep as his own, *&c. vide ſupra*, and that they were afterwards ſtoln: So if he take *Sect.* 3.

charge of them generally: So if they were Cattle at Paſture, it is a good Plea to ſay they died, or were ſtoln, *vide ſupra, Co.*4. 84. 10 *H.*8. 21.

If a man have Goods of mine in his Houſe, in a Coffer, and *J.* keep the Key, and they be ſtoln, it is a good Plea that *J.* had the Key, *vide ſupra.*

If *A.* bail Goods to *B.* generally to be kept by him, and *B.* takes them without having any thing for them; if the Goods be ſtoln from him, he ſhall not be charged in a Detinue, 29 *Aſſ.*28. 3 *H.*7. 4. *b.* 10 *H.* 7. 26. *a.* *&* *Acc. per Juſt. Dodd. H.* 16 *Jac. B. R. Entr.* 4. *Rep.*83. *b. Doct. & Stu.*13. *a.*

Garniſhment. It is where a Detinue is brought for Charters, and the Defendant ſaith, they were delivered to him by the Plaintiff, and another upon certain Conditions; and therefore he prayeth that the other may be warned to plead with the Plaintiff, and ſhew whether the Conditions be performed, yea or no: And hereupon a *Scire facias* ſhall go forth of the Court, to warn him to come into the Court for this purpoſe; and this is called *Garniſhment*: And when he cometh, he ſhall plead with the Plaintiff, and this is called *Enter Pleader*: And then upon the *Enter Pleader*, if the Garniſh cannot bar the Plaintiff, the Judgment ſhall be given againſt the ſaid Defendant for the Deeds, and againſt the Garniſhee for the damages, and ſo ſhall the Execution be likewiſe; and if the Garniſhee made Default, the Plaintiff ſhall recover the Writings againſt the Defendant, but no damages, and a Diſtreſs ſhall go forth againſt the Defendant to require him to deliver the Writing; and if Judgment be given againſt the Plaintiff, the Garniſhee ſhall recover Damages: This word alſo is taken in another ſenſe; for which ſee 2 *Ed.*3. 17. *Terms Ley. Co.*5. 90.

6. Where and how a man ſhall be charged for another mans Goods delivered to him, or not.

If a man lend me Money, Corn, or ſuch like thing, he cannot expect the ſame again, but the like, or ſo much: But if one lend me a Horſe, or the like, he muſt have the ſame again reſtored; and if the thing be uſed to any other purpoſe, or otherwiſe then to that end, for which I borrowed it, he may have an Action of the Caſe againſt me for it, though the thing be never the worſe: But if the thing borrowed be loſt (though it be not by any neglect of mine) as if I be robbed of it, or it be impaired or deſtroyed by my neglect, albeit I do put it to no more ſervice then I borrowed it for: As if I put a Horſe I have borrowed in an old rotten houſe ready to fall, and it doth fall and kill him; in theſe caſes I muſt make them good: But if ſuch Goods delivered to me, periſh by the act of God in the right uſe of them; as if I put a Horſe I have borrowed in a ſtrong houſe, and it fall and kill him, or it die by a diſeaſe, or by the default of the Owner, without any neglect of mine; in this caſe I ſhall not be charged with them. And if any man deliver me his Goods to keep, and I take them, I muſt anſwer for them, and ſee them ſafely reſtored; and if they be ſtoln, or as it ſeems burnt or drowned by inevitable Accidents, albeit I do neither undertake to keep them ſafe, nor promiſe to reſtore them: And if a man deliver Goods to a Carrier for hire, and he be robbed of them, yet he muſt anſwer the Goods: But if a man deliver Goods as a pledg, and they be ſtoln before tender of the Money; he that had them for a pledg, ſhall not anſwer for them, but after tender of the Money he ſhall, 5 *Germ. lib.*2. *c.*38. 2 *H.*7. 11. 2 *Ed.* 4. 5. *Co.*4. 38. *Co. ſuper Littl.* 89 *a.* 29 *Aſſ. p.*28.

CHAP.

CHAP. XXIX.

Of Bakers, Brewers and Victualers.

IN *London* the Fiſhers, Butchers, Poulterers, be they Aliens or Denizons, may ſell to whom they will: But the Major and Aldermen may redreſs the faults of them, as they do of the Bakers, Brewers, and Vintners. And all Vintners, Victuallers, Fiſhers, and others that come with Victuals to the City of *London*, ſhall be under the Governance and Rule of the Major and Aldermen there. 31 *Ed.* 3. 10. 7 *Rich.* 2. 11. 6 *Rich.* 2. 10.

Victuallers ſhall have reaſonable gains according to the diſcretion and limitation of the Juſtices, and no more. 13 *Rich.* 2. 8.

Butchers, Fiſhers, Regrators, Hoſtilers, Brewers, Bakers, and all others that ſell Victuals, ſhall ſell their Victuals at a reaſonable price, as the prices of the time go; and having reſpect to the diſtance and place, whence the ſame came, under pain to forfeit double ſo much as he taketh exceſſively. And Majors and Head-officers muſt enquire and puniſh it; and if they be negligent, they ſhall be puniſhed by the Juſtices. 23 *Ed.* 3. 6.

The Aſſiſe of Bread and Beer, (*i.*) that proportion and rate of payment for it which is reaſonable, and ſet down, is to be kept, and the breakers thereof to be puniſhed by the Common Law; and he that doth break it, is to be puniſhed; and when the Law appointeth a corporal puniſhment, it muſt not be changed for a fine or ſum of money. And Majors and ſuch Head-officers of Towns, *&c.* are to look to ſearch and view, and puniſh the breach thereof, 51 *H.* 3. 51. 13 *Rich.* 2. 8. 12 *Ed.* 4. 8.

Hoſtilers or Inn-holders that dwell in any City Corporate or Market Town, where is a Common Baker that doth ſell, and hath ſerved the Trade ſeven years, ſhall not make Horſ-bread in their Hoſtern without; but Bakers muſt make it, and the Aſſiſe muſt be kept, the weight reaſonable. And the prices of their Hay, Horſ-bread, and Provender, ſhall be reaſonable, having reſpect to the places adjoyning; and they muſt take nothing for their Litter, under pain to ſuffer the firſt time a fine, ſecondly, a moneths impriſonment, thirdly, Pillory, and fourthly, to be forejudged for keeping an Inn. And Majors, Juſtices, and Stewards of Leets, may hear and puniſh theſe offences, 21 *Jac.* 21.

Upon Complaint of Inhanſing of prices of Victuals, the Lords, Chancellor of *England*, Treaſurer, Preſident of the Kings Councel, Privy Seal, Steward, Chamberlain; and all other Lords of the Kings Council, the Treaſurer, and Comptroller of the Kings Houſe, the Chancellor of the Dutchy of *Lancaſter*, the Kings Juſtices of either Bench, the Chancellor, Chamberlains, under Treaſurer, and Barons of the Exchequer, or ſeven of them at the leaſt, whereof one of the firſt four Lords to be one, may ſet down prices how it ſhall be ſold, in groſs, or by retail, and to ſet forth Proclamation thereof in the Kings Name, under ſuch pains as they think fit; and he that ſhall not ſubmit thereunto, ſhall forfeit the penalty appointed by the Proclamation, 23 *H.* 8. 4. Rates for Proviſion.

Alſo Juſtices of Peace, Majors, Bailiffs, and ſuch Officers may Tax and Rate as they have been uſed to do. And if Brewers ſell their Ale or Beer at other Rates, then they ſet down, they forfeit for every Barrel ſix ſhillings, half a Barrel three ſhillings four pence, Firkin two ſhillings, *&c.* 23 *H.* 8. 4. Juſtices of Peace. Rates for Beer and Ale.

No Brewer of Ale or Beer to ſell, ſhall uſe the Trade of a Cooper, or making Veſſels, but the ſame ſhall be made by Coopers, under pain to forfeit three ſhillings four pence for every Veſſel ſo by him made. The Coopers alſo that make Barrels for Ale and Beer muſt make them of Seaſonable Wood, and mark them, and of ſuch Contents,

Contents, and ſell them at the prices in the Statute of the three and twentieth of *Henry* the Eighth, *cap.* 4.

If Victuallers, as Butchers, Bakers, Fiſhers, *&c.* ſell any Victuals that is corrupt or unwholſome for mans body, or Bakers and Brewers ſell at unreaſonable prices, or keep not the Aſſiſe, they are puniſhable in the *Leet* for it. And if a Victualler refuſe to ſell his Victuals, being offered ready money for it, as much as he demands; this (it ſeems) is puniſhable there alſo. See *Leet.*

No Hoſtler, Brewer, or other Victualler, may take other mens Goods, under colour of Letters Patents for Purveyance, when it is for their own advantage. See 28 *H.*6. 20. 2, 3 *Phil. & Mary*, 6. *Purveyors* and *Patents.*

Victuallers may buy Butter and Cheeſe, and ſell it again in their houſes, notwithſtanding the Statute of 3 *Ed.*6. 21. for *Brewers.* 31 *Eliz.*2,8.

CHAP. XXX.

Of a Bankrupt.

Sect. 1. *Bankrupt*, what it is.

A Bankrupt is ſuch a one that doth uſe the Trade of Merchandiſe by way of Bargaining, Exchange, Bartry, the Viſance, or otherwiſe ingroſs, or by ſeeking his living by buying and ſelling, or that makes a Trade of buying and ſelling, and gets his living thereby, or one that doth uſe the Trade of a Scrivener, receiving other mens Money or Eſtate into his hands or cuſtody; if he ſhall depart the Realm, begin to keep his houſe, or otherwiſe abſent himſelf, or take ſanctuary, or ſuffer himſelf to be arreſted willingly for any debt, or other thing not grown, or due for Money delivered, or Wares ſold, or any other juſt or lawful cauſe, or good conſideration or purpoſe; or if any ſuffer himſelf to be Out-lawed, or yield himſelf to priſon, or depart from his dwelling houſe, to the intent or purpoſe to defraud or hinder his Creditors of their due debt, or willingly or fraudulently procure himſelf to be arreſted, or his Goods, Money, or Chattels, to be attached or ſequeſtred, or make any fraudulent Grant or Conveyance of his Lands, Rents, Goods, or Chattels, to the intent, or whereby Creditors may be defeated or delayed the Recovery of their Debts: Or ſhall by himſelf or others, by his procurement, get any Protection, other then ſuch as are lawfully protected by Privilege of Parliament, or ſhall prefer to the Lord Protector, or any of his Courts, any Petition or Bills againſt their Creditors, to deſire or endeavor to compel them to take leſs then their juſt and principal Debts, or to get longer time of payment then is upon the original Contract; or being indebted to any one a hundred pounds or more, ſhall not pay or compound for the ſame within ſix moneths after it ſhall be due, and the party arreſted, or within ſix moneths after an original Writ brought, and notice thereof given to him, or left at the houſe where he laſt dwelt, or being arreſted for debt, ſhall lie in priſon two moneths or more for that, or any other arreſt or detention of priſon for debt; or being arreſted for the ſum of one hundred pounds or more, juſt debt, ſhall after eſcape out of priſon, or get out by putting in common or hired bail, he ſhall be accounted a Bankrupt. And the Lord Chancellor may grant a Commiſſion for the ſale of ſuch a perſons Lands and Goods, and the commitment of his perſon to priſon, and to ſee the Debts paid as far as the Eſtate will go.

And for the farther opening and clearing of theſe Statutes, theſe things are to be known,

1. A Brewer that brews his own Beer, and utters it to his own gueſts in his houſe, is no Bankrupt: So a Farmer that doth buy and ſell Cattle, is not a Bankrupt; nor is he that doth buy and ſell Land within the ſenſe of the Statute. So neither is an Inn-holder as an Inn-holder, but happily if an Inn-holder buy and ſell all that he ſpends, and hath it not of his own, he may be within the Statute.

2. It

2. It is ſaid, That he that liveth by buying or by ſelling, and not by both, ſhall not be accounted within the Statute.

3. It is ſaid, That every buying and ſelling, will not bring a man within this Statute. But he that ſhall be reputed a Bankrupt within this Statute, muſt be ſuch a one as doth get the greateſt part of his living by it, and doth live chiefly or altogether by it. *Sect. 2.*

4. Such Creditors onely as do come in and make known their Debts to the Commiſſioners, and not ſuch as ſhall obſtinately refuſe, or careleſly neglect, ſhall have benefit by theſe Statutes, *Vigilantibus & non dormientibus ſubveniunt Jura Co.* 2. 26. And yet if certain Creditors ſue a Commiſſion forth, and after within four moneths, or more, and before the diſtribution. Other Creditors come in and make known their Debts, and tender their parts of the charge; they muſt be admitted to have a part with the reſt of the Creditors.

5. But if any diſtribution be made of any part of the Eſtate, the Creditors that come after this is done, come too late. *Rugles* Caſe. *Hobb. Rep. pl.* 374.

6. Any ſale of Lands or Goods by the Bankrupt, before his trading, is without queſtion good; ſo before he becomes in debt. And ſo alſo (it ſeems) it is for all that he doth, before he begins to appear a Bankrupt; otherwiſe all that ever he hath done is avoidable; and who ſhall Trade in ſafety with any man? *Criſps* Caſe. *March. Rep. f.* 34.

7. Copihold-Land may be ſold; and if a man purchaſe Land after the time of his trading, and his being in debt fraudulently in the name of his Wife, or his Children; this will be liable to Sale. But if it be purchaſed before he becomes a Merchant, it ſeems otherwiſe; and therefore the caſe was this, *A.* purchaſed Copihold to him and his Son for their lives, the Remainder to his Wife in Fee, and after this becomes a Merchant and a Bankrupt; it was adjudged that this Land cannot be ſold. *Criſps* Caſe.

8. If a man be a Merchant, and not in debt, and he purchaſe for another, or give to another, and there be no fraud in it to deceive the Creditors; this is good. *March Rep. f.* 34.

9. If the Commiſſioners do not make an equal diſtribution to all that do come in and make known their debts, and deſire relief; all their doings will be as without authority, and void. *Co.* 2. 26. And the party grieved may upon a queſtion in Law, alleage, That he is not Bankrupt, albeit the Commiſſioners have found him ſo; and upon a traverſe it ſhall be tried.

See for theſe things, and for the authority and proceeding of the Commiſſioners, and the reſt that doth concern this point, my *Second part of the Marrow of the Law, Page* 267. And the Statutes of 13 *Eliz. cap.* 7. 1 *Jac. cap.* 15. 21 *Jac. cap.* 19. 34 *H.* 8. *cap.* 19.

CHAP.

CHAP. XXXI.

Of Bargain and Sale, and of Contracts.

1. *Bargain* and *Sale*, what.

THis word Bargain and Sale, doth ſignifie the transferring of the property of a thing from one to another, upon valuable Conſideration. And herein onely it doth differ from a Gift; that this may be without a Conſideration, or Cauſe at all, and that hath always ſome meritorious Cauſe moving it, and cannot be without it. This word alſo is ſometimes applied to the Aſſurance or Conveyance, whereby this is done, and made, which is called a Deed of Bargain and Sale; for this may be done with writing, or without writing. *Terms of the Law. Plow.* 301.

The kindes.

And ſometimes this is, and may be of Lands, Tenements, and Hereditaments; and to this the term is moſt properly applied: And then it is ſaid to be, where a Recompence is given by both parties to the Bargain. As where one doth Bargain, and ſell his Land to another for money; in this caſe the Land is a Recompence to the one for the money, and the money to the other for the Land. And this now alſo is become one of the Common Aſſurances of the Nation; ſo that ſuch an Aſſurance may now be averred to be fraudulent within the ſtatute of 27 *Eliz.* as well as any other Aſſurance. A Rent may be reſerved upon it, or a Condition made by it, as well as by any other kinde of Aſſurance. And ſometimes this is, and may be of movable things, as Trees, Corn, Graſs, Oxen, Kine, Houſhold-ſtuff, and the like, the property whereof is, and may be altered by this kinde of Conveyance, as well as by Gift or Grant.

Fraud.
Rent.
Condition.
Perſonall

Contract, what.

And this kinde of Bargain and Sale, is that which is commonly called a Contract: Which largely taken, is an Agreement between two or more concerning ſomething to be done, whereby both parties are bound each to other, or one is bound to the other. But ſtrictly it is; the Buying and Selling of ſome perſonal Goods, whereby the property is altered. *Plow.* 301. *Co.* 2. 35, 54.

Bargainor.
Bargainee.

And in the Caſes of Bargain and Sale, he that doth ſell is called the Bargainor, and he to whom the Sale is made, is called the Bargainee.

The kindes of *Contracts.*

Theſe Contracts are of divers kindes; for ſome of them are in Fait or Expreſs, and ſome of them are in Law, or implied thoſe in Fait, are ſome of them Abſolute, and ſome Conditional. And both theſe alſo are ſometimes in writing (of which ſee in *Leaſes*, *Obligations*, and *Covenants*,) and ſometimes by word onely: And theſe alſo are ſometimes accompanied or clad with a Conſideration, and have *Quid pro quo* in them, which is the material cauſe of the Contract, when ſome Recompence in Fait or in Law is given, which maketh it binding, and actionable. And ſuch a Contract is defined to be a Covenant or Agreement with a lawful Cauſe or Conſideration; for an Agreement concerning perſonal things, is a mutual aſſent of the parties, and ought to be executed with a Recompence, or otherwiſe to be ſo certain as to give Action, or other remedy for Recompence. And ſometimes they are alone, and without conſideration, and then if it be by proof, and not in writing under Hand and Seal, it is defined to be *Nudum pactum*, a naked Covenant, (*i.*) When there is no Conſideration or Cauſe, but the Covenant it ſelf, *Ex quo non oritur actio*, out of which no Action ariſeth. They are alſo real (*i.*) When they are about, and concerning Land: As when a Leaſe is made of Land for years, for Money, or Rent, or I covenant to make a Leaſe of my Manor for twenty pounds to be paid me. And ſometimes perſonal, (*i.*) When they are of, and about a perſonal thing: As when one doth ſell an Horſe for money. They are alſo executed as an Accord with ſatisfaction (which ſee in *Accord*) or they are executory; as when ſomething is to be done or paid at a day to come; and this is an Aſſumpſit. For which ſee more in *Aſſumpſit. Finch.* 451. *Dyer* 336. 27 *H.* 8. 15. *Plow.* 30, 140. 30. 8. *Co.* 4. 44.

Nudum Pactum.

Real

Perſonal

Accord

Aſſumpſit.

Plow.

Plow. 138. *Br.* 458. *Pl.* 1. *Dyer* 30. 14 *H.* 8. 19. Some of them also are simple and absolute; some conditional and with reference.

Those that are Contracts in Law, or implied, are such as do not arise from the special Agreement of the parties, but are made by the Act and operation of Law. As where an Ostler giveth my horse meat, or a Tailor maketh my garment; that the one shall be paid for his meat, and the other for his work: And therefore the one may keep the horse, and the other the garment, till they be paid, if they will; or deliver him, and bring his Action. So where another findeth my goods, he is chargeable to me by reason of his possession. So he that receiveth money to my use, or to deliver over to me, is chargeable as a Receiver. So if one entreth into an Infants or anothers land, and take the profits, he is chargeable as Bailiff. So if a *Liberate* be delivered to the Clerk of the Hamper who hath Assets in his hands, an Action of Debt lieth against him. So it doth upon every Judgment. So if a man come into an Inne or Tavern, and call for Victual, Wine or Beer: And in this case some hold, the Inn-keeper or Taverner may detain the body of the man until he pay his shot, (But I much doubt this.) And so it was agreed in *Trin.* 3 *Jac. B.R. Finches Ley*, *f.* 180. Sect. 1. Imployed

The effect of this is to transfer the Property; and this it will as effectually do, as any other kind of Conveyance whatsoever. And therefore the Bargainee of a Reversion, howsoever he may not have benefit of a Condition upon the demand of a Rent, without giving notice of the Bargain and Sale to the Lessee: And howsoever if a Conusee by a Fine of a Reversion, before Attornment of the Tenant, bargain and sell the Reversion to *B.* that *B.* cannot distrain for this Rent, until he can get an Attornment of the Tenant; yet the Bargainee shall have benefit of a Condition as an Assignee within the Statute of 32 *H.* 8. And it seems he may vouch by force of a Warranty annexed to the Estate of the Land, because he is in partly in the *Per*, and partly in the *Post*; *Co.* 8. 94. 5. 113. 3. 62. 4. The effect of it. *Assignee.* *Condition.* *Distress.*

All things (for the most part) that are grantable by any other way from one man to another, are grantable, and may be transferred by way of Bargain and Sale from one to another. And therefore Lands, Rents, Advowsons, Commons, Tythes, Profits of Courts, and the like, may be granted by way of Bargain and Sale in Fee-simple, Fee-tail for life or years. And all manner of Goods and Chattels, as Leases for years, Wardships, Cattel, Corn, Houshold-stuff, Wood, Trees, Merchandizes, and the like, are grantable by way of Bargain and Sale. But it seems Estovers and such like things *de novo*, and that have not essence before, are not grantable by way of Bargain and Sale, as they are by way of Grant or Lease; and therefore that a Bargain and Sale of such things is void, 6 *Jac. B.R.* Adjudged, 21 *H.* 6. 23. 5. Of what things a Bargain and Sale may be, or not.

If one do bargain and sell his Land to me for money, to have and to hold to me generally, and do not say to me and my heirs; by this I have but an Estate for life, and no more, *Co.* 1. 87. and upon *Lit.* 10. *Dyer* 169. 6. How a Bargain and Sale shall be taken. Of Lands.

If one in Consideration of Ten pounds paid by me, doth bargain and sell his Land to me and my heirs, To have and to hold to me to the use of the Bargainor for life, the Remainder in tail to me, the Remainder to the right heirs of the Bargainor, this *Habendum* in this case is void, and I and my heirs shall have the Land for ever, *Dyer* 155. *Use.*

If one in Consideration of Ten pounds sell me Land for the Term of Twenty years, and doth not say when this Term shall begin; in this case it shall begin presently. *See more in Exposition of Deeds, Chap.* 63. *in toto. Co.* 6. 33.

If any Estate of Freehold or Inheritance be made of Land by way of Bargain and Sale, the same must be made by a Writing or Deed indented, and cannot be made by word of mouth only, as a Lease for years, whether it be created *de novo*, or be in *esse* before, may be. But Lands in *London*, by a special Proviso within the Statute, may be bargained and sold by word of mouth without any writing. The Brother was Tenant in tail, the Remainder to his Sister in tail; the Brother by Deed, which was indented in parchment, but made in the first person, and no mention of Indenting in the Deed, and was inrolled within the three moneths, and after Livery of Seisin 6. What shall be said a good Bargain and Sale, and what things are requisite to make such a Bargain and Sale, or not. Of Lands.

was made, it was adjudged a good Bargain and Sale, and that the Land ſhould paſs ſo, and not by way of Feoffment, and therefore no Diſcontinuance to the Sifter, *Stat.* 27 *H.* 8. 16. *Co.* 8. 94. 7. 40. 2. 36. *Brownl.* 2 *part*, 291.

Diſcontinuance.

2. The very words *Bargain* and *Sell*, are not neceſſary to a good Bargain and Sale; for words equivalent will ſuffice to make Land paſs by way of Bargain and Sale. And therefore if a man ſeiſed of Land in Fee, do by Deed indented, and by the words *Alien* or *Grant*, ſell them to another; or if ſuch a man Covenant to ſtand ſeiſed of his Land to the uſe of another, and theſe Deeds are made in Conſideration of money, and the Deeds be after enrolled; theſe will amount to good Bargains and Sales. And if a man by a Deed indented and inrolled, in Conſideration of Ten pounds paid to him, by the words *Demiſe* and *Grant*, paſs his Lands to another for Twenty years, this is a good Bargain and Sale, *Co.* 8. 94. 7. 40. 2. 36. *Brownlow*, 2 *part*, 29.

3. There muſt be ſome good Conſideration given, or at leaſt ſaid to be given for the Land. And therefore if *A.* [for divers good Conſiderations,] or [in Conſideration that the Bargainee is bound for the Bargainor, and for divers other good cauſes,] or [for divers great and valuable Conſiderations] bargain and ſell his Land by Deed indented and enrolled to *B.* and his heirs, *Nihil operatur*, it worketh nothing. But if in theſe caſes in truth there be money, or other good Conſideration given, albeit it be not expreſſed upon the Deed, the Bargainemay aver it, and being proved, the Bargain will be good. And if the Deed make mention of money paid, as in Conſideration of an Hundred pounds, or the like, and in truth no money is paid, yet the Bargain and Sale is good; and no Averment will lie againſt this, which is expreſly affirmed by the Deed. And if the Deed mention and ſay, [for a certain ſum of money,] or [for a certain competent ſum of money,] theſe are good Conſiderations.

Averment.

4. There needs no Livery of Seiſin or Attornment in this caſe: And therefore if one bargain and ſell a Reverſion by Deed indented and enrolled for good Conſideration, the Reverſion will paſs without any Attornment of the Tenant. And if it be only a Leaſe for years of a Reverſion that is granted, there needs no Attornment nor Inrolment. And ſo it was adjudged in *Smalmans* Caſe, *Hil.* 7 *Jac Brownl.* 2 *part*, 291. Where the Caſe was: A man made a Leaſe for life rendring Rent, and after the Leſſor by Indenture, for Fifty pounds, demiſed and granted the Reverſion, To have from the day of the date for Ninety nine years, rendring a Rent alſo, which was leſs then the firſt Rent: It was agreed good by way of Bargain and Sale, and that the Reverſion and Rent did paſs without Attornment.

Livery of ſeiſin. Attornment.

And in caſe of a Bargain and Sale, the Bargainee is in actual poſſeſſion before any Entry, ſo that the Leſſee may attorn to the Grant of the Reverſion, as hath been Ruled in *Mittons* Caſe, *Mich.* 18 *Jac. in Cur. Ward*, by the two Chief Juſtices and the whole Court. And yet I think he hath not ſuch a Poſſeſſion, as to bring any Poſſeſſory Action for Treſpaſs, or the like, until an actual Entry. For where the Statute of 27 *H.* 8. of Uſes provides, that the Actual Poſſeſſion ſhall be adjudged according to the Uſe; yet it ought to have a Circumſtance which is requiſite by the Common-Law, *viz.* an Actual Entry indeed. But there muſt be an Inrolment of the Deed in caſe where any Freehold doth paſs: For it is provided, That no Lands except in ſome Corporations only) ſhall paſs from one to another by any Deed whereby any Eſtate of Inheritance or Freehold ſhall be made or take effect, in any perſon or perſons, to be made by reaſon only of any Bargain and Sale thereof, except the ſame be made and done by Writing indented, ſealed and enrolled in one of the four Courts, (the Chancery, Kings Bench, Common-Pleas, or Exchequer,) or elſe within the ſame County or Counties where the Lands ſo bargained and ſold do lie, before the *Cuſtos Rotulorum*, and two Juſtices of the Peace, and the Clerk of the Peace of the ſame County or Counties, or two of them at leaſt, whereof the Clerk of the Peace to be one: And the ſame Inrolment to be within ſix moneths next after the ſame Writing or Deed is dated.

Treſpaſs.

7. Inrolment, where neceſſary, and how it muſt be done.

And this Statute was made in the ſame Parliament, wherein the Law of transferring of Uſes into Poſſeſſion was made, to the end that mens Lands might not ſuddenly

and

and privately paſs upon payment of a little money in an Alehouſe, or the like. And herein theſe things muſt be obſerved.

1. The Inrolment upon ſuch a Deed, as to make this Eſtate to paſs, muſt be in Parchment; for an Inrolment in Paper is not good.

2. The Deed inrolled muſt be Indented; for if it be but Poll, the Eſtate will not paſs.

3. It muſt be inrolled within ſix moneths of the Purchaſe or Sale. And this Account muſt be, 1. From the date, and not from the time of the delivery of the Deed. 2. After twenty eight days to the moneth, and no more. 3. The day of the date to be taken excluſive, and for none of the days of the ſix moneths. And yet if a Deed be inrolled the ſame day it bears date, it is good. 4. If it be inrolled any part of the laſt day of the ſix moneths, it is ſufficient. And thus the Deed may be inrolled within the ſix moneths, *Brownl. Rep.* 1 *par.* 33. albeit either of the parties die within the time. And if the Deed be not thus inrolled, it is of no force at all. So that if one bargain and ſell his Land to me, and the Trees upon it; in this caſe albeit the Trees might have been ſold alone by Deed without Inrolment, yet now being not inrolled, becauſe the Sale is not good for the Land, it ſhall not be good for the Trees alſo. And no ſubſequent Act will help in this caſe: For if one by words of *Bargain* and *Sell* only, without any other words in the Deed, grant a Reverſion, and the Deed be not inrolled, and after the Tenant doth attorn; hereby nothing doth paſs, neither ſhall it enure as a Confirmation. But yet this muſt be noted, That in ſome caſes where a Deed will not enure by way of Bargain and Sale for ſome of the cauſes aforeſaid, it may enure to ſome other purpoſes, *Dyer* 90. *Co.* 7. 40. 8. 94. 5. 112. *St.* 27 *H.* 8. 16. *Co.* 5. 1.

But a Bargain and Sale may be made of Goods and Chattels without any ſuch ſolemnity as before: For it may be by word, as well as by writing; with, or without any words of *Bargain* and *Sell*, as well as by thoſe words; by a Deed poll, as well as by a Deed indented; and that without any Inrolment at all, and without any delivery of any part of the things ſold, or of any piece of money (as the manner is) in the name of Seiſin. Of Goods and Chattels.

But in this caſe alſo ſome reſpect is to be had unto the cauſe and conſideration of the Bargain, as well as in the caſe of the Bargain and Sale of Lands For howſoever perhaps in the caſe of a Grant or Bargain, and Sale of Goods or Chattels by Deed in writing, the Conſideration is not material; and that if a man do by his Deed under his hand and ſeal bargain and ſell Timber-trees or any other thing, without any Conſideration at all, the ſame may paſs well enough: Yet if the Contract be by word, or by Writing ſealed and not delivered, if there be no Conſideration, or no good Conſideration of it, it is of no effect at all. And therefore if a man by word of mouth ſell to me his Horſe, or any other thing, and I give him, or promiſe him nothing for it, this is void, and will not alter the property of the thing ſold. But if one ſell me an Horſe, or any other thing for money, or any other valuable Conſideration, and the ſame thing is to be delivered to me at a day certain, and by our Agreement a day is ſet for the payment of the money, or all or part of the money is paid in hand, or I give Earneſt money (albeit it be but a penny) to the Seller, or I take the thing bought by Agreement into my poſſeſſion, where no money is paid, Earneſt given, or day ſet for the payment: In all theſe caſes there is a good Bargain and Sale of the thing, to alter the property thereof; and in the firſt caſe I may have an Action for the thing, and the Seller for his money; in the ſecond caſe I may ſue for, and recover the thing bought; in the third I may ſue for the thing bought, and the Seller for the reſidue of the money; in the fourth caſe, where Earneſt is given, we may have reciprocal remedies one againſt another; and in the laſt caſe, the Seller may ſue for his money. Property altered.

If *A.* ſell Cloth to *B.* for ten ſhillings, and *B.* takes away the Cloth againſt the will of *A.* in this caſe *A.* ſhall have an Action of Treſpaſs againſt *B.* And if *A.* ſell Cloth to *B.* for ten ſhillings, in his election to make it a Bargain, or not, and if he will he may keep his Cloth till the other pay him; and if *A.* ſay nothing, but doth ſuffer *B.* to take it away, he may make it a Bargain if he will, and bring an Action of

Debt for his money. If I offer money for a thing in a Market or Fair, and the Seller agree to take my Offer; and whiles I am telling the money as faſt as I can, he doth ſell the thing to another; or when I have bought it, we agree that he ſhall keep it until I can go home to my houſe to fetch the money; in both theſe caſes, eſpecially in the firſt, the Bargains are good, ſo as the Seller may not ſell them afterwards to another; and upon the payment and tender, and refuſal of the money agreed upon, I may take or recover the things, *Dyer* 218. *Co.* 11. 48. *Plow.* 308. *Dyer* 29. 30. 14 *H.* 8. 19. 9 *H.* 7. 21. 10 *H.* 7. 6. 21 *H.* 7. 6. *Plow.* 432.

8. How Contracts about Goods or Chattels ſhall be taken.

In theſe Contracts the Law doth not ſo much reſpect the form of words, as the ſubſtance of the Agreement, and the minds of the parties, *Kelw.* 87. 27 *H.* 8. 14. And therefore,

If one ſell Tods or Pounds, Buſhels, Yards, Ells, or Pearches of any thing, it ſhall be accounted, meaſured and reckoned according to the Cuſtom of the Country and place, and not of the Statutes, or of any other Country, *Plow.* 140. 41.

If the Bargain were for Twenty Pieces, and ſay not of what, it ſhall be expounded of Twenty pieces of Gold of Twenty ſhillings a piece, by common intendment. If a Contract be made for Twenty Barrels of Ale, or for Ten Pottles or Cups of Wine; the Buyer ſhall not have the Barrels alſo in the firſt, nor the Pottles or Cups in the next caſe: But if the Bargain were for Firkins of Wine, there it ſeems he ſhall have the Firkins alſo. If it were for an Hogſhead of Wine, he ſhall have the Hogſhead, *Com.* 86. *a. Bro. Contract* 4. 27 *H.* 8. 276.

If one agree with another to make him a Leaſe for years indefinitely, and ſay not when it ſhall begin, it ſhall begin preſently, *Co.* 6. 33.

If one for Ten pounds promiſe to make good ſuch an Houſe by a day, this is a good Contract, and it ſhall be taken that he ſhall repair it. So if one owe me Twenty pounds, and I ſay I will ſee him, and *I. S.* prayeth me to forbear till Michaelmas, and he will make it good to me, *Ket. verſ. Michel. M.* 21 *Jac. B. R.*

If one ſell all his Trees in ſuch a Wood, and it is agreed that the Vendee ſhall not cut them until Michaelmas, and in the interim Hawks do breed in the Wood, it ſeems the Vendor, and not the Vendee ſhall have the Hawks, 27 *Aſſ.* 29. *Co.* 11. 58. *q. Semble, deeall* contrary.

If one leaſe Land excepting the Trees, and Herons or Hawks breed in the Trees; now in this caſe the Leſſor ſhall have them, not the Leſſee, and ſo alſo the Acorns of the Trees, 14 *H.* 8. 1: *Kitch.* 264.

9. How Contracts in Writing ſhall be taken.

In Contracts and Agreements that are in Writing under hand and ſeal, as Bills, Bonds or Covenants, the Cauſe or Conſideration is not material; for whether it be with, or without Conſideration, it bindeth the party, and an Action may be brought upon it, (unleſs it be in caſe of Bargain and Sale of Land, as before) As if a Carpenter by Writing delivered under his hand and ſeal, promiſe to build an Houſe, or to pay another Twenty pounds, although there be no Conſideration for it. (*a*) But if it be a Writing under his hand only, and not ſealed and delivered, it bindeth no more then a bare verbal promiſe: So alſo if it be ſealed, and not delivered, *Plow.* 308, 309. 11 *H.* 8. 4. 33. *Dyer* 90. 336. 21 *H.* 7. 43. *Fitz. Debt* 126. *Plow.* 309. *Br. Act. ſur le caſe*, 40. (*a*) *Trin.* 18 *Jac. B. R. per Curiam.*

10. Where it is, what makes a perfect Parol-Contract, upon which an Action may riſe, or the Property of the thing be altered. *Communication.*

Theſe things only ſeem to be neceſſary to the making of a good and binding Contract, ſuch an one as to produce an Action.

1. That the perſon contracting be not diſabled for Infancie, Coverture, or the like.

2. That there be a good Conſideration, (called) *Quid pro quo*, in the Agreement.

3. That the Contract be conſummate and perfected: For if there be only a parly, and no perfect agreement, that is no ſuch Contract as on which to ground an Action, and it is called a Communication. But if it be about the Sale of any thing to alter Propriety, a fourth thing is requiſite, That the Seller have an ownerſhip in the things ſold, or power to ſell them; or elſe that they be truly and without Covin ſold in a Market overt. For which ſee *Property*. *Co.* 5. 83. *Plow.* 302. 479. *Dyer* 98. For the opening whereof, take theſe Caſes following.

If

If I make a Leaſe for years to another, and he in conſideration hereof promiſe to pay me a ſum of money in groſs, or a Rent by the year; this is a good Contract, upon the failer of performance whereof I may have this Action; and for the Rent, I may have an Action of debt every year, *Lit. Br. ſect.* 452. *Fitz. Debt.* 129.

If I ſell a man my Land for Twenty pounds to be paid me on a day certain; in this caſe after the day, if the money be not paid, I may have an Action for the money, though the Land be not aſſured, for he may compel me to make an Aſſurance, 3 *H.*7. 14. 2 *H.*7.12.

If one in conſideration of a Pint of Wine promiſe to aſſure me of Land by a day, and do not, I may have Action, and that this is a good Conſideration: But in this caſe it is probable the Jury will give but ſmall damages. Adjudg. *Friends* Caſe, *Trin.* 7. *Jac. B.R.*

If *A.* be in debt to me, and deliver goods to *B.* to pay it, I require it of *B.* and he pray me to forbear it three weeks, and he will pay me; this is a good Contract, on which an Action will lie. *Williams* Caſe, *M.* 7 *Jac. B. R.*

If I promiſe to one, if he will marry my daughter, kinſwoman or ſervant, that I will pay or give him Twenty pounds, or Twenty pounds with my daughter in marriage, and he do ſo; now he may recover this Twenty pounds on this Agreement, and ſue for his money in the Temporal Court. And this is done daily, notwithſtanding all the Opinions to the contrary. *Plow.* 305. *Fitz. Prohib.* 2. 22 *Aſſ. p.* 70. 45 *Ed.*3. 24. 14 *Ed.*4 6. 15 *Ed* 4.32. 17 *Ed* 4.5. *Sect.* 4.

If I promiſe money to a Phyſitian to cure a poor man, or to a Labourer to amend an High-way; this is a binding Contract, on which Action will lie in reſpect of the nature of the works. 17 *Ed.*4.55. *Doct. & St.* 105. *Plow.*305.

If a Ter-tenant of Land promiſe to do a thing to me that have a Recogniſance, wherewith his Land is chargeable, in conſideration that I do aſſign to him the Statute by way of diſcharge; this is a good Contract and Conſideration on which Action lieth. But if the Aſſignment of it were to a ſtranger, that were not good, for it is Maintenance. Adjudg. *Paſch.* 38 *Eliz. Fitz. Barrow verſ. Green.* *Maintenance.*

If one be in Debt to me Twenty pounds by Bill, and I promiſe to deliver him the Bill, and he promiſe me to bring two ſufficient Sureties, and give Bond for the money by a day; he may ſue me, and I him, and there needs no Averment of the performance of the one ſide to enable the ſuit: And ſo in all ſuch like reciprocal Promiſes. But if the Promiſe were conditional, *contra*, Adjudg. *M.* 38, & 39. *Eliz. Gower verſ. Capper.* *Averment.*

If I buy an Horſe of another for Corn, it is a good Contract, and I muſt pay ſo much Corn as is agreed upon, and not money. *Fitz. Debt* 68.

If one promiſe to me Ten pounds, when I have done ſuch a work; now this is a good Contract, and when I have done the work, I may ſue for the money, *Plow.* 5. 44 *Ed.*3.22.

If a Contract be to pay for a thing Five pounds, or a Gown ſuch a day, this is good; and if one be not paid at the day, an Action may be had: And before, and at the day, he that is to pay hath election; but after he to whom it is to be paid, 9 *Ed.*4.39. *Fitz. Debt* 89. See *Election.* *Election.*

If a man take my money, and promiſe in conſideration thereof to build me an Houſe by ſuch a day, this is a good Contract, and I may ſue for breach of it, *Kelw.*69.

If I be ſeiſed of Land in Fee, and make a Leaſe thereof for life, and after in conſideration of a certain ſum of money demiſe and grant the ſame Land to another for Fifty years, to begin preſently; this is a good Contract, and Bargain and Sale to paſs the Reverſion and the Rent, *Co.*8.94. 2.35.

If one make a Leaſe for years in conſideration of a Rent, there is in this *Quid pro quo*, and the Conſideration is good on both ſides to raiſe an Action, *Kelw.*69.

If I lend one money, and thereupon he enfeoff me of Land, and by Agreement I am to have the profits of the Land till he pay me my money; this is a good Contract, and it ſeems I can bring no Action for the money whiles I have the Land, *Fitz. Debt* 100.

If

If I agree with another to give him ſo much for his Horſe as *I.S.* ſhall judg him to be worth; when he hath judged it, the Contract is compleat, and an Action will lie upon it; and the Buyer ſhall have a reaſonable time to demand the Judgment of *I.S.* and if *I.S.* die before Judgment, the Contract is determined, *Plow* 6. 14 *H.*8. 19. But then it ſeems the Horſe muſt be delivered, or money paid, ere the Property will alter, or Action lie for the money.

So if an Agreement be, that the Buyer ſhall go and ſee the thing, and if he like it ſhall give ſo much for it; and he, when he ſeeth it, doth once declare his liking of it, and thereby his Bargain is perfect, he cannot afterwards diſagree to it; and then Actions will ariſe on both ſides, 18 *Ed.*4. 16. And if he once diſlike it, hereby the Contract is determined, 18 *Ed.*4. 16.

If the Contract be to pay part of the money preſently, and the reſt at a day to come, and the Seller give him time till that day to refuſe it; in this caſe, if he agree before the day, the Contract is compleat, and reciprocal Actions will lie for the things and money, *Dyer* 99.

If the Agreement be, that he ſhall ſee the thing; and if he like it when he hath ſeen it, for ſo much money he ſhall have it; in this caſe when he hath paid the money, and agreed to have it at the rate, the Contract is perfect, and Action will lie, 17 *Ed.* 4. 1.

If a Contract be made for Twenty Buſhels of Corn at a price, and that the Buyer ſhall pay for them as he doth fetch them; this is a good Contract, and the party muſt pay for it as he doth fetch it, or the Seller may refuſe to deliver it, *Dyer* 30.

If the Contract be to have for Cattel ſold Ten pounds, if the Vendor do ſuch a thing, elſe Twenty pounds; this is a good Contract and certain enough, and Actions will lie accordingly, *Perk. ſect.* 712. 714.

If I ſell one Wares for Twenty pounds, to be paid when they are delivered; this is a good Contract; and when they are delivered, and not before, the Action will riſe, *Fitz. Debt* 56.

Sect. 5. If I ſell a thing to another, and no price is agreed upon, and he take the thing into his hands, yet the Contract it ſeems is good; and if it be Wine, or any ſuch like thing, the certain price whereof is known and ſet by Law, the Seller may ſue for ſo much money in certain. But in other caſes he muſt in his Action ſurmiſe that he promiſed to pay as much as it was worth, and aver it was worth ſo much in certain, *Trin.* 3 *Jac. R.R.*

Incertainty.

Parſon. *Retainer.* If a Parſon agree with me, I ſhall keep my own Tythes this year; if this be after I have ſown my Corn, this Contract is good. So ſome ſay, if a Parſon contract with me by word for the keeping back of my own Tythes for three or four years, this is a good Bargain by way of Retainer: But if we agree for the Tythes of another man, though but for one year, it is not good but by a Deed, *Brownl.* 2 *par.* 11. But ſome hold, that if the Contract be before the Corn is ſowed, or for more years then one, that this is not good. And this ſeems to be agreed, and to be good Law; That a Contract made by word of mouth with a Pariſhioner, for the keeping back of his Tythes for ſo many years as he ſhall be Parſon, is not good: And the Contract with the Pariſhioner is not good but by way of Retainer, *Brownl.* 2 *part*, 11. & 17.

If one bargain and ſell his Land, and the Trees upon it, but the Deed is not inrolled, and the Land doth not paſs, in this caſe the Trees will not paſs neither, *Co.* 11. 48. If a Tenant in Fee-ſimple for good conſideration ſell his Trees upon the Land, the Sale is good, and the Buyer may cut and take them away, although the Seller be dead. But otherwiſe it is of a Tenant in Tail; for there the Buyer muſt cut them in the life-time of the Seller, or he cannot take them after his death, *Co.* 11. 50. *Perk. ſect.* 58.

If I ſell my Horſe to one firſt, on condition that he pay me Five pounds at a day, and before the day I ſell him to another; this ſecond Contract, it ſeems, is void, albeit I be not paid my money, and I do afterwards ſeiſe my Horſe again, *Plow.* 432.

If

If a Contract be for any thing at a price, but withall it is agreed that the thing muſt be delivered to the Buyer at ſuch a time and place; this is a good Contract to alter Property, if it be delivered accordingly, *Fitz. jurans defaite*, 144. And ſo if it be to give ſo much as *I.S.* ſhall ſet down, when he doth ſet down, and the thing is delivered, the Property is altered, 14 *H.*8.20. So if it be that he ſhall ſee it, and if he like it, and take it away, he ſhall give ſo much, and he take it away. And ſo in all ſuch like caſes the Law is alike, 18 *Ed* 4.16. *Dyer* 99.

If two lay money on a Wager, and put it into the third mans hands, he that wins it may have it, and he that loſeth it hath no remedy for his money again. *Agreed at* Sarum-*Aſſizes*, 9 *Car.* And if a Contract be about a Horſe-race, if it be certain, it may be good and binding: But the Law doth not favour ſuch vain ſports, nor the Contracts that are made about them. *By Baron* Thorp, *at* Glouceſter-*Aſſizes*, 1654.

If one owe me Twenty pounds, and I buy of him Goods to the value of Five pounds, and it is agreed he ſhall keep up this Five pounds towards his Twenty pounds; it is ſaid this is no good Contract, nor pleadable in bar, if he ſue me for the Five pounds, *Fitz. Debt* 56. *Quære.*

If one promiſe me that I ſhall retain a Rent I owe him, for money he is to pay me; it ſeems I cannot plead this in bar to the Rent, but I may bring my Action upon the Promiſe, if there be Conſideration for it, *M.* 9 *Jac. B.R. Jarvis* Caſe.

If the Contract be to pay part of the money preſently, and the reſt at a day, and the Seller gives him leave to refuſe until ſuch a day: Now if he agree before the day, the Contract is compleat, and reciprocal Actions lie for the things and the money, *Dyer* 99.

If an Agreement be made in this manner between *I.S.* and my ſelf, That if he deliver me Twenty pounds worth of Clothes, or aſſure me ſuch a piece of Land, that I ſhall pay him Twenty pounds: Now this is good, and after the performance of the Condition (though not before) he may have an Action for the money. So in the like caſes: As if I promiſe to make new Pales, ſo I may have the old, 33 *H.* 6. 43. 27 *H.* 8. 34. *Perk. ſect.* 713.

If a Leſſee for years leaſe over his Land, on condition that the Leſſee ſhall get the favor of the Leſſor, and pay ſo much as *I.S.* ſhall arbitrate: This is a good Contract; and when he hath gotten his favor, and the other hath arbitrated how much, the Contract is perfect and binding, 15 *Ed.*4 2. *Dyer* 76. 14 *H.*8.20.

If the Agreement be, that the Buyer ſhall go and ſee the thing, and if he like it he ſhall give thus much for it, This is good; and when he ſeeth it, and doth once declare his liking, the Bargain is perfect, he cannot diſlike it, 18 *Ed* 4.16.

If one ſell Cattel upon condition, that if the Vendor do ſuch a thing, he ſhall have Twenty pounds for them, elſe but Ten pounds; this is a good Contract, and the ſame will be more or leſs, as the Condition is, or is not performed, *Perk. ſect.* 712. 714.

If I buy Wares of one for Twenty pounds, to be paid to him when he delivers it me, it is a good Contract; but if he never deliver it, I ſhall never pay for it, *Fitz. Debt* 56.

If I lend one money, and thereupon he enfeoff me of Land, and by Agreement I am to take the profits of the Land until he pay the money; this is a good Contract, and it ſeems I cannot recover the money whilſt I have the Land, *Fitz. Debt* 100.

If a Contract be for an Horſe at a price, but withall that the Seller ſhall bring and deliver him at ſuch a place, This is a good Contract; but this muſt be done alſo, or the Action will not riſe, *Fitz.* 144.

A Contract may be bad and void, either for ſome defect in the Cauſe and Conſideration, or for default in the Promiſe it ſelf. In the Cauſe, when either there is none, or no good Conſideration, (*i.*) when there is no benefit to the party to whom, nor prejudice, loſs or trouble to the party by whom the Contract is made; for then it is but *Nudum pactum*, a naked Covenant. Or when the Cauſe and Conſideration is unlawful.

Sect. 6.

2. In

1. In the Promiſe it ſelf it may be defective, either for uncertainty, *(i.)* when it is either altogether uncertain, or elſe ſo uncertain, as it cannot by any means be made certain. Or when it is imperfect, *(i.)* when it is only in inchoation, and but a Communication only, and not perfect and compleat. Or it may become void by matter *Ex poſt facto*. In either of theſe a Contract may become void, as in the Examples following. *Co.* 10. 102, 76. *Dyer* 356. 17 *Ed.* 4. 4. 9 *H.* 7. 21. 10 *H.* 7. 6.

Nudum pactum.

If I promiſe to pay another Twenty pounds, becauſe he is my Kinſman or Acquaintance; he can have no Action upon this, for it is *Nudum pactum* only, *Plow.* 309. 302. So if I contract with my Son, that becauſe he is of my blood, I will give him Ten pounds; this is *Nudum pactum*.

If one buy of me an Houſe, or other thing for money, and no money is paid, nor Earneſt given, nor day ſet for payment, nor the thing is delivered; here no Action lieth for the money, or the thing ſold, but I may ſell it to another if I will, for it is but *Nudum pactum*, a naked Covenant, *Plow.* 309. 302. 11 *H.* 4. 33.

If one promiſe to give or do to another ſomewhat for that which is paſt, as becauſe he hath builded an Houſe, or becauſe he hath let his Friend have Wares, or becauſe his Friend doth owe the other money, That if he do not pay him, he will; this is but *Nudum pactum*. This hath been often adjudged, *Doct. & Stu.* 105.

If I promiſe to one, That in conſideration he will deliver me Twenty crowns, I will deliver them to him again; this is a Promiſe upon which no Action will lie, unleſs he had delivered them to me firſt, and thereupon I had promiſed to redeliver them. *Adjudg.*

If I promiſe to one without any cauſe to give him Twenty pounds to make his Houſe anew, or towards his loſſes by fire, or the like; this is ſuch a Promiſe as will not yield an Action, 17 *Ed* 4. 4. *Plow.* 308.

If *I. S.* owe me Ten pounds, and another comes to me and tels me he will be my Pay-maſter for the Ten pounds, and pray me to take him for Debtor, and nothing is given by me for this; now no Action will lie for this, *Fitz. Debt* 126.

If I promiſe to another, in conſideration that he will make me a Leaſe generally, to do ſuch a thing; this is but *Nudum pactum*; for he may make me a Leaſe at will, that may end as ſoon as it begins; *Paſch.* 39 *Eliz. Co. B. Lurkings* Caſe, Adjudg.

If one promiſe to me in conſideration that I will relinquiſh my Suit, to do ſuch a thing; this is no good Conſideration, for he may relinquiſh it, and begin again, *Paſch.* 39 *Eliz.*

malum in ſe malum prohibitum

If the Cauſe of the Promiſe be to do an unlawful thing, as either that which is *malum in ſe*, or *malum prohibitum*, (*i.*) Evil in it ſelf, or evil forbidden, there the Contract is void: But if part of the Conſideration be lawful, and part unlawful, there it may be good: But if it tend wholly to Maintenance, or the like, it is all naught, *Co.* 12. 102. *Dyer. Onleys* Caſe, *Churches* Caſe, *Paſch.* 7 *Jac. B. R.*

If I come into the Market, and ask the price of any thing, and the Seller ſet a price, and I go home to my houſe to fetch the money as faſt as I can, and he ſell it the while; now in this caſe I have no Action for this, neither was the Property changed, for the Sale was not perfect, 14 *H.* 19.

If one bargain and ſell his Land, and the Trees upon it; but the Deed is not inrolled, and ſo the Land doth not paſs, nor the Trees will not paſs neither, *Co.* 11. 48.

If I ſell and deliver my Horſe to one firſt, on condition that he may pay me Five pounds at a day for him, and before the day I ſell him to another; this ſecond Contract, it ſeems, is void, although I have not my money paid, and I ſue him again, *Plow.* 432.

If I prize Wares, and the Tradeſman ſay ſo much; now the Bargain is not perfect until the money be paid, unleſs a day be agreed, it is imperfect and void until then, 17 *Ed.* 4. 1.

If the Promiſe be to do a thing either *malum in ſe*, or to do a *malum prohibitum*, *(i.)* Evil in it ſelf, or Evil forbidden, (although the Conſideration be good) or to

do

do any thing contrary to Law, it is void and will not bind, no more then where the Conſideration is naught; for Law will not work with ſuch unlawful Contracts. (See more in *Obligations* and *Covenants.*) Alſo a Contract that is Uſurious, is againſt Law and void. See for this *Uſury.* *Co.* 10. 102. *Dyer* 356.

A Biſhop hath the Firſt-fruits of the Clergy within his Dioceſs; and if a Parſon pay him part, and promiſe him the reſt by a day, but doth not pay it; the Biſhop can have no Action, becauſe the thing is meerly ſpiritual, *Co.* on *Lit.* 162. *b.*

Sect. 7. Biſhopp Parſon

If an Agreement be between another and me for ten pounds for ſuch a parcel of Wood, if he like it when he ſeeth it, and he when he ſeeth it doth diſlike it; now by this the Contract is become void, and he cannot after by his liking make the Agreement good, 18 *Ed.* 4. 16.

If an Agreement be between me and another, that one ſhall go and ſee my Corn in ſuch a place, and if he like it when he hath ſeen it, for ſo much money, that he ſhall have it: Now the Contract is not perfect, until he hath paid the money and agreed to take it at the rate. See more of theſe matters in *Aſſumpſits,* 17 *Ed.* 4. 1. and *Agreement* and *Properties.*

If one make a Leaſe for years rendring Rent, and the Leſſee be evicted by title Paramount, the Contract is diſcharged, and he ſhall pay no Rent: So if the Leſſor had nothing in the Lands at the time of the Leaſe, the Leſſee may plead it and avoid the Rent, *Bro. ſect.* 52. 135. *Lit. ſect.* 8.

11. Where a Title Paramount Contract is extinct or determined, or not.

If one ſell an Horſe or other Wares for money to be paid at a day, and before the day the true Owner thereof take his Horſe or Goods, the Debt is not diſcharged, but the Seller may have an Action to recover the money notwithſtanding, *Finches Ley, f.* 45. *Co.* 3. 22. *a.* 18 *Ed.* 4. 6 *a.*

If one have a Debt due to him by a Contract, and he do after take an Obligation for it, or any part of it; now hereby the whole Contract is determined. So if he ſue upon the Contract, and recover and get a Judgment, the Contract is determined, ſo if he ſue upon the Contract, and recover, and get a Judgment; the Contract is determined, 3 *H.* 4. 17. *Co.* 5. 45. 9 *Ed.* 4. 54. *Dyer* 21. *F. N. B.* 121.

If I be an Artiſt, and one promiſe me Ten pounds to teach him in ſuch an Art ſeven years, and I die before the money paid or ſeven years expired; now the Debt is gone, 21 *Ed.* 3. 11. But if I take a Writing indented only, or indented and ſealed alſo, of a Contract made to me, but it is not delivered and made an Eſpecialty, this doth not determine the Contract. So if a Debt on a Contract be due to me, and I take an Obligation from a ſtranger (and not from the party) for it; this doth not determine the Contract. So I take an Obligation from the party, and it be void, or it become void by matter *ex poſt facto,* this will not determine the Contract, *Dyer* 130. *Fitz. Debt* 68. 3 *H.* 4. 17. 21 *H.* 7. 5.

If I contract with *I. S.* that if he lay me into my Cellar three Tuns of Wine before *Michaelmas,* that I will bring into his Garner twenty Quarters of Wheat before *Chriſtmas,* and before the days they agree to diſſolve the Contract, this doth determine it; but after the firſt day of the two days is come, it cannot be diſſolved, but it may be releaſed by word or deed. And ſo of all ſuch like Contracts.

If one promiſe me Eight pounds to teach him in my Art ſeven years, and he pay me the money, or give ſecurity to pay it by a day, and I die before, yet the money muſt be paid, and it ſeems the other hath no remedy, 21 *Ed.* 3. 41. See more in *Apportionment, ſect.* 4.

12. Where a divisible Contract may be divided, or not.

A Contract cannot in any caſe be apportioned, but either the duty muſt be all paid, or all loſt. As if a Leaſe be made yielding Rent, and the Leſſor enter upon part of the Land leaſed, the whole Rent is ſuſpended. And if a ſtranger enter by title Paramount upon a part of the Land only, the whole Rent ſhall remain, 9 *Ed.* 4. 1. *Bro.* 52.

Sect. 8. Husband &c.

If the Husband ſell the Trees upon his Wives Land, and the Vendee take part of them, and after before he take the reſt ſhe die: Now though he cannot take the reſt of the Trees, yet he muſt pay all the money upon the Contract. But if a day were ſet to cut them, and not before, and ſhe die before the day, there if he had cut part of the Trees, he ſhould not pay any of the money, 18 *Ed.* 4. 6. *Bro. Contract* 26.

If one make a Leaſe for years, and ſell Goods, all by one Contract, for one ſum of money, and the Goods be took away from him before the money be paid, yet the Buyer muſt pay all the money. So if one ſell two Horſes for Ten pounds, and one Horſe is the Horſe of another mans, and he take his own again, he muſt pay the whole Ten pounds, (but he may have remedy againſt the Seller.) *Et ſic fuit opinio Juſt. Dodd. Tr.*14 *Jac. B.R.* 7 *H.* 7. 4. *Bro. Contract, ſect.* 52. 135. *Lit. Bro.* 12 *H.*8. 13. 9 *Ed.*4. 1.

If an Abbot had made a Contract for Goods, and part of the Goods had come to the uſe of the Houſe, and part not, yet the Succeſſor was chargeable with all, 38 *H.*6. 28. *a.*

If a Bond be made to ſecure money lawfully lent, and money upon Uſury, it is void for all. See more in *Apportionment, numb.*4.

13. Where one ſhall be charged or bound by the act of another, and where not. *Husband and Wife.*

If a Feme-covert do ſell the Goods of her Husband by authority precedent from him, or if he do afterwards agree to it, or it ſeems if he do not diſagree to it in his life-time; this ſhall bind the Husband. *Qui tacet, conſentire videtur.* So if ſhe buy any thing by any authority general or ſpecial, or without any authority, if it be for her neceſſary Apparel, the Husband ſhall be charged, (*Vide Baron & Feme.*) But if ſhe buy Goods for her Husband, or to his uſe, without his authority general or ſpecial, he ſhall not be charged for it (although it be ſpent in his houſe,) unleſs he do afterwards agree to it, 27 *H* 8. 25. 21 *H.* 7. 40. 20 *H* 6. 22. *Old N. B.* 62. So where ſhe is uſed to buy and ſell for the Husband, or the things ſold be things fit for the Wife to ſell, as Butter, Cheeſe, Milk, Eggs, and the like, the Contract is good.

Servant.

If I give my Servant authority to buy for me, or he be my common Baily and buy for me, I ſhall be charged, though they never come to my uſe, and though I never have notice of it, 21 *H.*7. 4. *F.N.B.*120 *g.* See *Maſter and Servant.*

If a Purveyor, Clerk of the Market, or other that taketh up for the King, buy any thing for the King; after he hath made his Accompt to the King and is allowed, he may be ſued and charged for it, but not before, unleſs he made a promiſe to pay for it, for then he may be charged before his Accompt, 11 *H.*4. 28. 2 *H.*4. 28.

14. What ſhall be ſaid a good Bar in Debt upon a Contract, and what not.

If a Servant buy for his Maſter, and promiſe to pay the Seller, and do not, the Seller may charge him in an Action of the Caſe; and if he had an authority from his Maſter, he may charge him in an Action of Debt. Arbitrement is a good Bar in Debt upon a Contract, 4 *H.*6. 17. 6.

So a Bond made by the Debtor to the Creditor for the Debt, or any part of it; for by this all the Contract is determined, *Dyer* 21. *b. S. N. Br.*121. *M.*3 *H.*4. 17. *b.* 11 *H.*4. 79. *b.* 9 *E.*4. 50. *b.* 29 *H.*8. *Br. Contract* 29. 21 *H.* 7. 5. *b.* 6 *Rep.* 45. *a.* Otherwiſe if the Bond were made by a ſtranger, 29 *H.*8. *Br. Contr.*29. *Goldsb.*155. *pl.*84.

A Judgment had upon the Contract, is a good Bar in Debt upon the Contract, although Execution be not done, *Dyer* 21. *b.* 39 *H.*6. 34 *b.* 9 *Ed.*4. 54.

To an Action of Debt upon a Contract, payment is a good Plea, 41 *Ed.* 3. 7. *a.* by *Thorp. Br. Debt* 29. 9 *H.* 6. 9. *b.* by *Paſton.* But yet by 1 *H.* 5. 6. *b. per Cur:* 40 *Ed.* 3. 24. *b.* 41 *Ed.* 3. 7. *a.* by *Candiſh.* 46 *Ed.* 3. 6. *a.* Payment is no good Plea in ſuch caſe, without ſhewing an Acquittance.

And *Martin* in 9 *H.*6. 9. *b.* ſaith accordingly, becauſe (ſaith he) he may wage his Law.

If the Plaintiff hath brought an Action of Debt upon the Contract, and hath been barred by Wager of Law, and now he brings an Action of the Caſe for the ſame Debt, the Defendant may plead this, and bar the Plaintiff, *Fitz. tit. Action ſur le Caſe,* 105.

If I be bound to you to pay you a certain ſum of money, and a ſtranger deliver you a Horſe by my aſſent for the debt, this is no ſatisfaction. So if I be indebted on a ſimple Contract, and a ſtranger make an Obligation for this debt, this doth not determine the Contract, *Brownl.*57. *pl.*14.

CHAP.

CHAP. XXXII.

Of a Barretor.

A Barretor or Common Barretor, is a Common Mover or a Common Stirrer up or Maintainer of Suits, Quarrels or Parts, either in the Courts or out of the Courts in the Country. And in the Courts, either of Record, or not of Record, as the Country Court, Hundred Court, or other ſuch like Courts: And out of Courts it is three ways. *Barretor, what.*

1. In diſturbing of the Peace; ſecondly, in taking or detaining of poſſeſſions of Houſes, Lands, or Goods in queſtion, either by force, or ſubtilty, and deceit, and uſually in the ſuppreſſion of right, and truth. Thirdly, by falſe Inventing, and ſerving of Calumnies, Rumors, and Reports, to make Diſcord, and Debate between Neighbors.

The puniſhment of ſuch a perſon may be by Articles or Information upon Oath before one, or more Juſtices of the Peace; and hereupon he may be bound to the Good-behavior, or he may be indicted for it at an Aſſizes, or Seſſions, and there fined for it at the diſcretion of the Judges, or Juſtices of the Peace, before whom he is found guilty of it. And for this ſee *Co.* 8. 36, 37. and *Littl.* 308. *Weſtm.* 2. 36. And my Book of *Juſtice of Peäce.* *The puniſhment of it.*

CHAP. XXXIII.

Of Baſtardy.

A Baſtard is one that is born of any Woman, ſo as his Father is not known by order of Law, and he is called *Filius populi*: *Co.* 8. 102. 6. 65: *Super Littl.* 244. *Baſtardy.*

Cui Pater eſt populus, Pater eſt ſibi nullus, & omnis:
Cui Pater eſt populus non habet ipſe Patrem.

Mulier is one lawfully begotten and born: And this word is uſed always in compariſon with, or oppoſition to a Baſtard, to ſhew the difference between them: For, *Filius natus vel filia nata ex juſta uxore appellatur in legibus Angliæ filius mulieratus, ſeu filia mulierata. Co. ſuper Littl.* 243. *b.* *Mulier.*

If a Woman have a Childe before the Eſpouſals (by whomſoever it be) it is a Baſtard, for that is born out of lawful marriage: And if the Childe be begotten by him that doth afterwards marry her; yet it is in Judgment of the common Law a Baſtard, but this the Church doth hold legitimate. *Stat.* 20 *H.* 3. 9. 1 *H.* 6. 3: *Co. Super Littl.* 244. *Where, and what Iſſue ſhall be counted a Baſtard.*

If one marry his Coſin, *Infra gradus maritagii*, and have iſſue by her, and after they be divorced in their life time, their Iſſue is a Baſtard. 48 *Ed.* 4. 28. *Broo. Sect.* 48.

If a Man or Woman marry a ſecond Wife or Husband, the firſt being living, and have Iſſue by that ſecond Wife, or Husband, ſuch Iſſue is a Baſtard. 39 *Ed.* 3. 14. 7 *H.* 4. 9. 18 *Ed.* 4. 26. *Where not.*

If one marry a Woman, and die before night that he lie with his Wife, and ſhe have a Childe after, it ſeems it ſhall be accounted his Childe, and Legitimate. See the *Engliſh Lawyer.* 117.

If a Woman elope with a ſtranger in Avowtry, and hath a Childe, her Husband being *infra quatuor mariat*; this is legitimate, and ſhall inherit his Land when he dies, 44 *Ed.*3. 10. 7 *H.*4. 10.

No Deviſe made after the death of the Father and Mother, can make the Iſſues Baſtards. *Broo. Baſtard* 23. 39 *Ed.*3. 32.

If a Woman elope from her Husband, and live in Avowtry, her Husband being beyond the Sea, that he cannot come at her, and ſhe have Iſſue in this time, it ſeems this is a Baſtard: But by the Common Law, if the Husband be within the four Seas (*i.*) within the juriſdiction of the King of *England*; if the Wife have Iſſue, no proof is to be admitted to prove the Childe a Baſtard, unleſs there be an apparant impoſſibility in the Husband of Procreation, as if he be but eight years old, or under the age of Procreation; for in that caſe, ſuch Iſſue is a Baſtard, albeit he be born within marriage, 43 *Ed.*3. 19. 7 *H.*4. 9. 7 *H.*5. 9. 44 *Ed* 3. 10. 1 *H.*6. 7. 19 *H.*6. 17. *Coo. ſuper Littl.* 244.

If a Childe be born within the uſual time, which is within the tenth Solary moneth, (accounting the moneth thirty days) after a mans death; it ſhall be reputed a *Mulier*, and the Childe of him that is dead; but if not, it ſhall be reputed a Baſtard, unleſs the Woman be married to another Husband; but the moſt natural time is eight and twenty days, nine Solary moneths and ten days; which is forty weeks, but ſome come ſooner, and ſome ſtay longer, as occaſions be; and therefore it is held by the Doctors of Phyſick, that any day in the tenth Solary moneth, the firſt or laſt, is natural enough. But the breeding and travail is ſometimes longer or ſhorter, according to the weakneſs or ſtrength of the Mother, or Childe, or other matters, *Coo. ſuper Littl.* 123. *Arſops* caſe, *M.* 17 *Jac. R. B.*

This Caſe was: The Husband died the three and twentieth day of *March*, after his death his Wife (being known a leud Woman) was in travail five weeks, and in the midſt of her travail, was turned out of doors, ſo that ſhe was not delivered until the fifth day of *January*, which was one and forty weeks, yet was adjudged that this Childe was legitimate, *Arſop verſus Botrel*, *M.* 17 *Jac. B. R.*

But if the Iſſue be born within a moneth, or a day, after marriage, between parties of full, lawful age; the Childe is a legitimate Iſſue, and no Baſtard, albeit it be apparant it was anothers Childe, and not his that married the Woman; and he muſt Father him; for whoſe is the Cow, his is the Calfe, 18 *Ed.*4. 28. *Co. ſuper Litt.* 244. If a marriage be *infra gradus maritagii*, and they have Children, and one of them die, and after a nullity and divorce is made of the ſaid marriage, yet the Iſſue between them are no Baſtards, but *Muliers*, 39 *Ed.*3. 32. *Broo. ſect.* 48.

If a Divorce be well made of a former marriage, *cauſa precontractus*, and either of the parties marry again, and upon this ſecond marriage have Children; theſe Children are legitimate, and not Baſtards, *Co.*4. 29.

All Children that are born beyond Sea, whoſe Parents at the time of their birth be of the Faith and Legiance of the King of *England*, ſhall be legitimate, and have the ſame advantages as others born within the Realm, 25 *Ed.* 3. *de natis ultra mare*: *Dyer* 224.

A Baſtard the Elder and *Mulier*. Where poſſeſſion of the Elder Iſſue which is a Baſtard, dying ſeiſed, makes his Son his Heir, where not, and although the yonger Son occupy the Land with the elder.

If one have a Son or a Daughter by a Woman before marriage (which is a Baſtard) and after he marrieth the Woman, and they have another Son or Daughter (which is a *Mulier*) and the Father die ſeiſed of Land, the ſecond Son or Daughter ſhall have this Land, and not the Baſtard; and if the Baſtard enter upon it, the *Mulier* may out him: But if the Baſtard ſhall enter firſt, claiming as Heir to his Father, and ſhall occupy the Land all his life-time without any entry, or continual claim made by the *Mulier* all the life-time of the Baſtard, and he have Iſſue and die ſeiſed of ſuch Eſtate in Fee, and the Land diſcend to his Iſſue, and his Iſſue entreth, *&c.* In this Caſe the *Mulier* which is lineal, as alſo the Collateral Heir is remedileſs, and the Iſſue of ſuch Baſtard ſhall have it, notwithſtanding the *Mulier* be an Infant, or Feme Covert, and notwithſtanding the Iſſue of the *Mulier* enter before the Iſſue of the Baſtard; and notwithſtanding the Iſſue of the Baſtard endow the Wife of the Baſtard, and notwithſtanding the Baſtard after his entry, enter into Religion, and thereupon the diſcent be, and notwithſtanding the diſcent be of Rents, Services, Reverſions, expectant upon

upon Eſtates in Tail; whereupon Rents are reſerved, *Littl. Sect.* 399, 340. *Co. ſuper Co.* 17 *Ed.* 3. 15. 20 *Ed.* 3. 16. 14 *H.* 4. 9.

But if the *Mulier* do make continual claim during the Baſtards liſe; or if the *Mulier* do once enter, and be after diſſeiſed by the Baſtard, or if the Baſtard die without Iſſue, and the Land Eſcheat, or if the entry of the Baſtard were by a ſtranger, without any commandment, precedent, or aſſent ſubſequent of the Baſtard; in theſe caſes the *Mulier* is not barred. *Co. ſuper Littl.* 243, 244.

If one have Iſſue two Daughters, and one is a Baſtard, and the other is a *Mulier*, and they enter and occupy together all their lives, and the Baſtard die ſeiſed; the Law will adjudge the moyety in her Heir, *Co. ſuper Littl.* 214.

A Baſtard may purchaſe Land, or buy and ſell Goods or Chattels, as another man may: Alſo he is capable of Land by Deviſe from his Father, or any other, by that name whereby he is commonly called, *Perk. Sect.* 48. 505.

What things a Baſtard ſhall have, and of what he is capable, where not.

But he cannot inherit Land as Heir to his Father, neither can any inherit Land as Heir to him, but one that is Heir of his body; but it will rather Eſcheat, *Littl. Sect.* 401. *Fitz. B.* 20.

If he be a Baſtard born in Adultery or Inceſt, it ſeems he is not capable of any benefit from ſuch Inceſtuous Parents, more then for neceſſaries onely, *Swinb. in Wills.*

What acts a Baſtard may do, or not do.

It ſeems he may do all Acts as give, or grant, or ſell his Lands, Goods, or Chattels, by act executed in his life, or by his Will at his death, as any other man may, by the name whereby he is commonly called; but he cannot bring a Writ of Detinue, or the like, as Heir to any man, *Perk. Sect.* 16. *Co.* 6. 65. 35 *H.* 6. 9.

Baſtardy is pleaded and alledged ſometimes generally (*i.*) when one ſaith that another is a Baſtard, but ſheweth not how, or ſpecially (*i.*) when he doth ſhew how: In the firſt caſe it was to be tryed by the Certificate of the Biſhop, albeit the Iſſue were born beyond the Sea; and this had bard the parties, and all others: But if the Biſhop had certified he is a *Mulier*, this was examinable and traverſable. In the ſecond caſe, when it is pleaded, it is to be tried by the Country, not by the Biſhop. For which, ſee the Statutes of 9 *H.* 6. 11. 40 *Ed.* 3. 39. *Plow.* 4. 25 *Ed.* 3. *de natis ultra mare.*

Pleading and tryal of Baſtardy.

What perſon ſhall be reputed the Father of a Childe.

If one marry a Virgin with Childe, and it be born during the Eſpouſals, he muſt Father it, let it be whoſe it will: And if ſhe be a Widow, and with Childe viſibly by her firſt Husband at the time of his death, and take another Husband, and be delivered during the next Eſpouſals; in this caſe it ſhall be reputed the Childe of the former Husband: But if ſhe were ſo privily with Childe at the time of her latter marriage, as it cannot be diſcerned, it ſhall be reputed the Childe of her latter Husband, if by poſſibility of nature, it may be ſo, 21 *Ed.* 3. 19.

If *A.* marry *B.* and die, and within ten days after his death ſhe do marry *C.* and hath Iſſue *D.* eleven days after the uſual time of forty weeks, from the death of *A.* this ſhall be reputed the Childe of *C.* and not of *A.* So it ſeems if the Childe come eleven days before the uſual time, it ſhall be reputed the Childe of *C.* not of *A.* 18 *Ed.* 1. *Com. Bedf.* Caſe, *R.* 13. *B. R.*

The puniſhment of Baſtardy.

Baſtardy is an offence againſt the Spiritual Law, and therefore was puniſhable in the Spiritual Court: It is alſo offence againſt the Common Law, and puniſhable in the Temporal Courts; and two Juſtices of Peace, whereof one to be of *Quorum* that are next to the place where the Baſtard is born, may examine the matter, and puniſh the parties offending according to their diſcretion: And if it be a Baſtard that may charge the Pariſh, the Juſtices may ſend the Mother to the Houſe of Correction: As alſo for the keeping of the Baſtard to diſcharge the Pariſh where it is born, and to charge the Mother and reputed Father: And if they refuſe to obey the Order made by ſuch Juſtices, or to give good bail to perform the ſaid Order, or to appear at the next quarter ſeſſions, they are to ſend them to Gaol, there to abide without bail or Mainpriſe. 18 *Eliz.* 3. 7 *Jac.* 4. 3 *Car.* 4.

It is murder in a Woman to conceal the death of her Baſtard unleſs ſhe prove by one witneſs (at leaſt) that it was ſtill born. 21 *Jac.* 17. See Juſtices Office in my Book.

CHAP. XXXIV.

Of Books, Images, and Printers.

Importation.

IN this, theſe things are to be known.

1. That none may buy to ſell again any Books Printed, ready bound in Boards, Leather, or Parchment from any place beyond Sea; nor buy of any but Denizens, Printed Books brought from beyond Sea by Retail, but in Groſs onely.

2. The Lord Chancellor, Lord Treaſurer, and the two Chief Juſtices, or any two of them may ſet the prices of Books. 25 *H.*8. 15.

3. No Imported Books ſhall be Landed any where, but in *London* Port. *Act.* 20 *Sept.* 1649. 7 *Jan.* 1652.

4. None may bring in here any Scandalous or Seditious Book under pain of five pound. *Ibid.*

5. None may bring in from beyond Sea any Engliſh Bible, Pſalms, or Book, or part of any Book formerly Printed here; nor Binde, Stich, or put to ſale any ſuch Book, upon pain of loſs, and forfeiture thereof, and of ten ſhillings a Book. *Ibid.*

Popiſh Books and Images.

6. None may bring from beyond Sea, nor Print, Sell, or Buy any Popiſh Primmers, Ladies Pſalters, Manuels, Roſaries, Popiſh Catechiſms, Miſſals, Breviaries, Portals, Legends, and Lives of Saints, Printed or Written in any Language: Nor any other Superſtitious Books written in the Engliſh Tongue. But Popiſh Books and Images muſt be taken away. And Juſtices may ſearch the Houſes of Popiſh Recuſants for them. 3 *Jac.* 5.

Directory, Common-Prayer Book.

7. The Book of Common Prayer may not now be uſed, but the Directory muſt be uſed in Church Service. See the *Ordinance, Aug.*23. 1645.

8. All Primmers uſed in the times of the Kings, are to be ſuppreſſed, *Act July* 24. 1651.

9. None may demiſe, or let, or being within his diſpoſe, ſuffer to be held or uſed, any Houſe, Vault, Cellar, or other Room whatſoever, for a Printing-houſe; but before he let it, he muſt give notice thereof to the Maſter or Wardens of the Stationers for the time being thereof, *Sub pena* five pound. This they muſt enter into their Regiſter Book, *Sub pena* five pound.

10. No Joyner, Carpenter, or other, ſhall make any Printing-Preſs, Rolling-Preſs. Nor any Smith forging Iron-work for a Printing-Preſs; nor any Founder caſt any Printing Letters for another; nor any perſon Import from any part beyond Sea, into this Country, any Printing-Preſs, or any ſuch Letters, but he muſt firſt acquaint the Maſter and Wardens of the Company, for whom the ſame work is to be done, under pain of five pound. This the Maſter and Wardens muſt enter in their Regiſter Book, under pain of five pound.

11. No Printers nor Printing, ſhall be but in *London*, and in the two Univerſities, *York*, and *Finsbury*, under pain of twenty pound, and to have all their Printing-Preſſes, Letters, and Materials defaced, and be for ever diſabled to be a Maſter Printer, and owner of a Printing-Preſs.

12. None may Print, but ſuch as have ſerved ſeven years with ſome lawful Printer in *England*.

13. Then he muſt uſe the Trade in his own houſe, not elſwhere, under pain of forty pound.

14. They muſt in every thing they Print, in the Title-page of each Book, prefix the Authors own name, with his quality and place of Reſidence, or at leaſt the Licenſers names, where Licenſes are required; and his own name and place of Reſidence at length, under pain to forfeit for the firſt offence ten pound, and to have all the

the Printing Materials defaced; and for the ſecond offence, to be diſabled from any more Exerciſe of his Trade of Printing.

15. None ſhall Print or Reprint out of the two Univerſities, any Book, or part of any Book legally granted to the ſaid Company of Stationers, for the relief of their poor, without the Licenſe and conſent of the Maſter, Wardens, and Aſſiſtants of their Companies.

16. None ſhall Print or Reprint any Book or Books, or part of Book or Books, which ſhall be duly entred in the Regiſter Book of the Company, for any particular Member of the ſaid Company, without the Licenſe and conſent of the owners thereof.

17. None may counterfeit the Name, Mark, or Title of any Book, belonging to the ſaid Company, or particular Members.

18. Nor ſhall any perſon Binde, Stitch, or put to ſale any ſuch Book or Books, upon pain of forfeiture of the ſum of ſix ſhillings and eight pence, for every Book Printed, Stitched, Bound, or put to ſale contrary hereunto.

19. None may ſell News-Books without leave of Parliament, or ſome appointed by them.

20. To Print, publiſh, or utter, or cauſe to be Written, Printed, publiſhed or uttered any Scandalous or Libellous Books, Pamphlets, Papers or Pictures, under pain of ten pound, or impriſonment forty days, or until he pay the money. The Printer to forfeit five pound, and be impriſoned twenty days until he pay it; to have his Preſs and Implements of Imprinting, broken and ſeiſed. The Book-ſeller and Stationer forty ſhillings, or be ſo impriſoned ten days, or pay the money; and he that buyeth it, and doth not within four and twenty hours give notice of it, and of the party that ſold it, to a Juſtice of Peace, under pain of twenty ſhillings.

21. Such Haukers and Sellers, and the like, as go with Scandalous News in Ballads, and the like, are to forfeit the Books and Ballads, and be by the Conſtable carried to the Houſe of Correction to be whipt as Common Rogues, and the Keepers muſt take them and whip them; or if no Houſe of Correction be, then to the Conſtable of the place to be whipt there by him as a Rogue.

22. That no Drifats, Packs, Maunds, Cheſts, or Fardels of Books, be permitted by the Officers of the Exciſe or Cuſtoms, to be opened or conveyed away, before notice given to, and view made by the Maſter and Wardens of the Company, or ſuch as they ſhall appoint, ſo they do it within eight and forty hours after notice given (the Lords day and days of Humiliation excepted) *Sub pena* five pound. And this the Officers muſt do, under pain of five pound to be forfeit by them. See *Act July* 24. 1651. 20 *Sept.* 1649. 22 *Nov.* 1650. 5 *Jan.* 1652.

23. For turning the Law into Engliſh. See *Act.* 22 *Nov.* 1650.

CHAP.

CHAP. XXXV.

Of Boatmen and Bargmen.

FOr this theſe things muſt be known.

1. Overſeers of them are to be in *Thames*, between *Graveſend* and *London*.

2. They muſt order Watermen, ſet down their names, and overſee their Boats.

3. Allow one of two that Row in Boats.

4. No ſingleman, but one that hath been in ſervice, is to be a Waterman.

5. Their Boats muſt be of ſuch a length and breadth.

6. They may not take more for their Fare, then is ſet down.

7. No man hinder their paſſage on *Severns*, or require money of them for their paſſage.

8. The Watermen may take Apprentices, or Servants.

9. They may not Tranſport Offenders into, or out of *Wales*, or Corn to the Ships. 2, 3 *Phil. & Mary* 16. 9 *H.*6. 5. 23 *H.*8. 12. 19 *H.*7. 18. 1 *Jac.*16. 1, 2 *Phil. & Mary* 5.

CHAP. XXXVI.

Of Braſs, Latten, Copper, Pewter, Bell-Mettal and Burning.

Braſs, Pewter, Latten, Copper, and Bell-Mettal Tranſportation.

FOr this thing all theſe things are to be known.

1. None may carry away, or convey by Water, or otherwiſe, any Braſs, Latten, Copper, Bell-Mettal, Panmettal, Gun-Mettal, nor Shroff-Mettal beyond Sea, under pain to forfeit the double value thereof; neither may it be carried by Sea from one part of the Land to another, before the party hath given Bond to the Cuſtomer of the place, where it is carried by Sea, to diſcharge it at that place within the Realm, where he pretendeth to carry it. See the Statutes of 23 *H.*8. 7. 2, 3 *Ed.*6. 37.

Making a Merchandiſing of it.

2. No Pewterer, or Braſier, may ſell or change any Pewter or Braſs, new or old, at any place, but in open Fairs or Markets, or in their own dwelling Houſes, unleſs the Buyers deſire it; otherwiſe *Sub pena* ten pound for every default. *Stat.* 19 *H.*7. 6.

3. All Pewter and Braſs Veſſels, caſt and wrought, muſt be of good Mettal, ſuch as they are bound to caſt in *London*, under pain to forfeit that which is not ſo caſt; and the Ware that is hollow muſt be made after the Aſſize they are bound unto in the City of *London*; and the maker of the Ware muſt ſet his mark upon it, under pain to forfeit the Ware, that is otherwiſe. 5 *H.*8. 7. 25 *H.*8. 9.

4. None may uſe any falſe Beams or Weights about the ſelling and buying of Pewter and Braſs, *Sub pena* twenty ſhillings. And if the party cannot pay the money, he muſt be put in Stocks and on the Pillory. *Ibid.*

5. Majors and Juſtices, may and muſt appoint a ſearcher in every place to look to theſe things. *Ibid.*

5. None may buy or take by Exchange for other Wares, any Wares made of Tin, as Platters, Diſhes, Sawcers, Pots, Baſons, Flagons, Goblets, Salts, Salt-ſellers, Spoons, under pain to forfeit the ſame, and the value thereof alſo. 25 *H.*8. 9.

7. No

7. No ſtranger born may work any Pewter or Tin, neither may a Pewterer teach his Trade in a foreign Country. See the Statutes at large, 33 *H.*8.7. 2 *&* 3 *Ed.*6.37: 4 *H.*8.7. 19 *H.*7.6.

Of Burning.

FOr Burning, theſe things are to be known.

1. It is Felony to burn a Dwelling-houſe, or a Barn full of Corn, or any Outhouſe adjoining to ſuch Houſe or Barn. See *Brown.* But to burn a Frame of an Houſe, is not Felony now, 37 *H.*8.6.

2. To burn any Heaps of Wood prepared for Coals, Billet, or Talwood, is not Felony, but a great Treſpaſs, for which a man ſhall pay treble damages to the party wronged, and forfeit Ten pounds to the Lord Protector, 37 *H.*8.6.

3. If my Neighbor, his Servant, or any other that ſhall come into his houſe by his good will and agreement, ſhall wilfully or through negligence burn his houſe, and thereby my houſe is burnt, I may have relief againſt him for this loſs by Action of the Caſe: But if it be by Gods hand, and without negligence, it is otherwiſe, 2 *H.*4. 18. *Brownl.* 1 *part*, 197.

CHAP. XXXVII.

Of Butchers.

FOr Butchers, theſe things are to be known:

Butchers. Buying and ſelling of Cattel.

1. No Butcher or other may buy any Cattel in a Market or Fair, and ſell them again alive in the ſame Market or Fair during the time thereof, under pain to forfeit the double value thereof: Neither may they buy any Oxen, Steers, Runts, Kine, Heifers, Calves or Sheep, and ſell the ſame again alive under pain of forfeiture of the Cattle, *St.*3. *&* 4. *Ed.* 6. *c.*10. 3 *Car. ch.*4.

2. Butchers muſt kill no Beaſts within any walled Town, or *Cambridg*, 4 *H.*7. 3.

3. But there is now no Law in force to reſtrain Butchers from killing a Calf weaned before two years of age, or from buying Cattel out of an open Fair or Market, or from killing of Calves between the tenth day of *January* and the firſt of *May*; for thoſe Statutes are ended.

4. If he ſels Swines fleſh mezeled, or dead of the Murrain: For the firſt offence amerced; the ſecond, Pillory; third, Impriſonment and Fine, &c. See *St.* 24 *H.*8.9. 1 *Jac.*22. 21 *Jac.*8. 31 *Ed.*1. *Stat. of Bakers and Brewers.* See *Cattel.*

CHAP. XXXVIII.

Of Butter and Cheeſe, and Cable-Ropes.

Butter and Cheeſe.

AS to this, theſe things are to be known.

1. None but Victuallers and Inholders, for their Houſe-proviſion, may buy to ſell again any Butter or Cheeſe, unleſs he ſell the ſame again by Retail, *i.* a Weight of Cheeſe, or a Barrel of Butter, or a leſs Quantity, in open Shop, Fair or Market, and not in groſs, under pain to forfeit the double value thereof, *Stat.* 3 & 4 *Ed.* 6. *Chap.* 11. 21. 14.

2. None may get into his hands any Butter or Cheeſe to ſell again, by unlawful ingroſſing, 5 *Ed* 6. 21. *Jac.* 22.

3 But the Traders of Butter and Cheeſe, Cheeſemongers and Tallow-chandlers that have been ſeven years of the Trade, within the City of *London* and the Liberties thereof, may notwithſtanding the ſaid Statutes buy and ſell again in open Shop, Fair or Market, 21 *Jac.* 22.

4. None may tranſport Butter and Cheeſe. See *Tranſportation. St.* 2 & 3 *P.* & *M.* 5.

5. A Weight of Cheeſe ſhall be 32 Cloves, and every Clove 7*l.* 9 *H.* 6. 8. See more in *Stat.* 10 *H.* 6. 3. 21 *Jac.* 22. 5 & 6 *Ed.* 6. 14.

Of Cable, Ropes and Halters.

Cables, Ropes and Halters.

None may make Cables, Halters, or other kind of Cordage of any old or overworn ſtuff, which ſhall contain above ſeven inches in compaſs; nor Tar any Cordage of ſuch old and overworn ſtuff, being of leſs aſſiſe, and after ſell the ſame, 35 *Eliz.* 8.

No great Cables, Halters, Ropes, and other Tackling for Ships ſhall be made within five miles of *Burport* in the County of *Dorſet*, nor Hemp ſold which ſhall grow within five miles of that Town, in any place, but in the Town it ſelf, *Stat.* 21 *H.* 8. *ch.* 12.

CHAP. XXXIX.

Of Capacity and Incapacity.

Capacity, or *Ability.* Perſonable.

Diſability, or *Non-ability.*

IT is an aptneſs or power to do, or have and receive, or retain ſomething: As where one is able to give or grant, have or take Lands; or to ſue, or be ſued. And the perſon that is ſo capable, is ſaid to be perſonable, inabled to grant, give, or take a thing granted or given. And this is oppoſed to Diſability or Non-ability: which being taken largely, is defined to be an Incapacity, Incapability, or Impotencie of ſome perſons for ſome cauſes, to have and enjoy ſome benefit, or do ſome act which another might have or do. As where one is not able, or not able but after ſuch a manner to give or grant, have or take Lands; or to ſue, or to be ſued.

abſolute diſability

And in this ſenſe Diſability is ſometimes Abſolute; as of an Infant, Man attainted of Treaſon or Felony, or the like, who are utterly diſabled by any way or means to make any Conveyance of their Lands, but that it may be avoided by ſome body. So the

the ſon of ſuch a perſon attaint is utterly diſabled by any means to inherit any Land from that father. And ſometimes it is *ſecundum quid* only; as that of a Feme-covert, who cannot give or grant but by Fine, and is only diſabled to give or grant by Deed: And that of the King, who is diſabled to give or grant, or take or receive any thing but by matter of Record: And that of a Clergy-man that hath a Benefice of Eight pounds *per annum* in the Kings Books, who is uncapable of another, unleſs he be firſt qualified according to the Statute.

Sect. 1.

It is alſo diſtinguiſhed into Diſability particular or perſonal, and temporal, as that which reacheth not unto any other perſon, and is but for a time only: And perpetual or univerſal, as that which reacheth to others, and is for ever. And this is cauſed ſometimes by the act of God, as in caſe of the non-ability of an Ideot, and the like; and ſometimes by the act of the Law, as in caſe of the diſability of an Alien or a Monk: And ſometimes by the act of the party, as when he is attaint of Felony or Treaſon: And ſometimes by the act of a ſtranger, as in caſe of the diſability of an Heir by the Attainder of the Anceſtor, *Terms of the Law*, *Kitch. fol.* 214. *Plow.* 27. *Fitz. N.B.* 35. *Co.* 11. 77. 4. 127. 7 *H.* 7. 7. 26 *H.* 8. 1. *Co.* 8, 10. *St.* 33 *H.* 8. *c.* 29. 5 & 6 *Ed.* 6. *c.* 13. *Co. ſuper Lit. f.* 3.

But Diſability is taken ſometimes more ſtrictly, for an Exception taken againſt the Plaintiff or Demandant upon ſome cauſe why he cannot commence ſome Suit in Law, and the Defendant ſaith that the Plaintiff is not able to ſue an Action, and demandeth Judgment if he ſhall be anſwered. And this is alſo ſometimes Abſolute, and ſometimes *ſecundum quid* only. And briefly there are ſix cauſes of this Non-ability: As if he be, 1. An Outlaw. 2. Condemned in a *Premunire*. 3. Profeſſed in Religion. 4. Excommunicate. 5. A Vilain. 6. An Alien. But in the laſt caſe the diſability is only in real actions, and not in perſonal actions, *F.N.B.* 35, 95. *Terms of the Law.*

Note, perſons capable are of two ſorts:

1. Perſons natural created of God, as *J.S.* and *J.D.* &c.

2. Perſons incorporate or politique, created by the policie of man: And theſe be of two ſorts. 1. Sole. 2. Aggregate of many. And theſe alſo are of perſons capable, as Mayor and Commonalty, Dean and Chapter: Or of perſons uncapable, as Prior and Covent, *&c.* And ſome men have capacity to take, but not to hold; and ſome to take and hold, or not to hold at the election of them or others; and ſome to take and to hold both; and ſome neither to take nor hold; and ſome ſpecially diſabled to take ſome particular thing, *Co. ſuper Lit. f* 2.

Sect. 2.
Where a man ſhall be ſaid to be able to do or receive a thing or not, but he ſhall be ſaid to be diſabled or uncapable, and how.

If an Alien purchaſe Land in fee for life or years, after Office found, the King will have it, for the Alien is not capable of it to retain it, though he be able to purchaſe it: But ſuch a perſon is capable of having and retaining both, a houſe for his habitation; and therefore he may purchaſe and hold ſuch a thing. See for this *Alien*. *Co. ſuper Lit. f.* 2.

If a man commit Felony or Treaſon, and be attainted thereof, and after Attainder he ſell any of his Lands or Goods, this is void, for he is diſabled: And if he do it before Attainder, any ſale of his Goods or Chattels is good againſt all men; but if he make any ſale of his Lands, that may be avoided by the King or Lord to whom it doth belong by the forfeiture, but it is good againſt all others. And if a man commit Felony, and after purchaſe Land, and then is attainted; now though he were not diſabled to purchaſe, yet he is to hold, for the Lord will have it by Eſcheat. And if a man be attainted of Felony, yet he hath capacity to purchaſe to him and his heirs, though he cannot hold it, for in this caſe the King ſhall have it preſently. See *Creon. Co. ſuper Lit.* 2. 49 *Aſſiſ.* 2. 49 *Ed* 3. 11.

A Felon. Attainted.

A ſole Corporation.

A ſole Corporation, or Aggregate of many, either Eccleſiaſtical or Temporal, may grant or give away that they have in moſt caſes, as perſons Natural may; but they have not capacity to hold and retain Lands, as ſuch perſons may, without ſpecial licence from the King: And yet ſuch Corporations may purchaſe; but after they have purchaſed Lands, the Lord may enter and have it. See *Mortmain*. *Co. ſuper Lit.* 2. *b.*

Vilains. Vilains and Bondmen may do and receive as other men, ſave only againſt the Lords; for if they purchaſe Lands, or buy Goods, their Lords will have them. See *Vilains. Co. idem.*

Infants or Minors. An Infant or Minor, one under the age of Twenty one years, cannot give or grant away any thing they have, but it will be void or voidable. But ſuch a one, without the conſent of any other, hath capacity to purchaſe, and at his full age he may agree to it, or diſagree, and wave it without any cauſe ſhewed. See more of this in *Infant. Co. idem.*

Ideots. An Ideot, or man of non-ſane memory, cannot give or grant away any thing he hath, but it will be void or voidable: But ſuch a one hath capacity to purchaſe without conſent of any other, and himſelf cannot wave it; but if he die in his madneſs, or after his memory recovered, without agreement thereunto, his Heir may wave it without any cauſe ſhewed. See more in *Ideot. Co. idem.*

Hermaphrodites. An Hermaphrodite may give or grant, take or purchaſe as another perſon may do, according to that ſex which prevaileth, *Co. idem, & 3.*

A Baſtard. A Baſtard may grant or give, purchaſe or take, as another perſon may do, after he hath gotten a name by reputation, by that name ſo gotten. See more in *Baſtard.* But if a Leaſe be to *A.B.* for life, the Remainder to the eldeſt Iſſue-male of *I.S.* and the Heirs males of his body, and *I.S.* have a Baſtard, this Iſſue is not capable within this limitation. *Co. idem & 3.*

Perſons deformed, &c. Perſons deformed, having humane ſhape. Lepers, Deaf, Dumb, and Blind men, it ſeems may take and give as other perſons may. See more in *Fait. Co. 3.*

Grants void by incapacity of the Grantees. No perſon but one qualified and fitted is capable of an Office: And therefore if the King grant an Office that doth concern the Adminiſtration of Juſtice or the Kings Revenue, or if he grant a Judicial Office to one in Reverſion, or a Stewardſhip be granted to an Infant; theſe Grants are void, for they are or may be incapable, *Co. 3 b.*

Some are capable of things to ſpecial purpoſe to give or grant, and not to uſe; ſo the King is capable of an Office, *Idem.*

Such as buy Offices or Benefices, are uncapable thereof. See *Offices, Advowſons,* and *Simony.*

Where a man ſhall be ſaid to be able to ſue or to be ſued, and where not, but he ſhall be ſaid to be diſabled, and how. Women covert may ſue or be ſued, but their husbands muſt be joined with them. See *Baron and Feme.*

Ideots, and men of Non-ſane-memory, may ſue or be ſued; alſo ſuch as be deaf and dumb.

Infants alſo may ſue or be ſued, and are not diſabled: But if he ſue, he muſt ſue by *Prochein amy*; if he defend, it muſt be by his Guardian.

A Vilain. A Vilain is diſabled to ſue his Lord in any real or perſonal Action; but he may ſue any other beſides his Lord, *Co. ſuper Lit. 127 b.*

A perſon outlawed. An Outlawed perſon is diſabled to ſue any Action againſt any man in any Court of Law or Equity; but it ſeems any man may ſue him, *Co. idem 128.*

An Alien-Enemy and Amy. An Alien-Enemy is diſabled to ſue any Action real or perſonal: An Alien-Amy to ſue any real Action; but a perſonal Action he may ſue, *Co. idem.*

Attaint in Premunire. A man that is attainted in a *Premunire,* may not ſue in any Action, *Co. ſuper Lit. 129.*

A man profeſſed in Religion. A man that is profeſſed in Religion, cannot ſue or be ſued, *Idem 232.*

A perſon excommunicate. A man that is Excommunicate, is diſabled to ſue in any Court any Action whatſoever, unleſs the Excommunication were by the Defendant himſelf, *Idem 134.*

A man that is convict Recuſant, is diſabled to ſue whiles he doth ſo continue. See more in *Stat. 3 Car. 2.* and of *Recuſants.*

Sect. 3. How long ſuch Diſabilities ſhall continue. But note, that all theſe Diſabilities continue only whiles the ſame Impediment doth continue. For after Infranchiſement of the Vilain, Reverſal or Pardon of the Outlawry, Pardon in the *Premunire,* Dearraignment of the party Profeſſed, and Abſolution of the Excommunication, the Diſability is gone, and the party may ſue as another man: Alſo during that time he may ſue in the right of another, as an Executor or Adminiſtrator; ſo the Vilain may ſue his Lord, and the reſt in the caſes before. And therefore a Mayor and Commonalty in their Politique capacity may have an

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Action, though the Mayor be outlawed, *Co. ſuper Lit.* 128. 12 *Ed.* 4. 12.

And in a Writ of Error to reverſe an Outlawry, Utlary in that Suit or any other ſhall not diſable him in that caſe, *Co. Idem.*

Alſo Outlawries in *Cheſter* and *Durham* are not Diſabilities to ſue at the Court at *London:* See more in other places.

CHAP. XL.

Of Captives, Caſtle, and Cattel.

FOr Redemption of Captives, and preventing their taking in time to come, See the Act, *March* 26. 1650. 16 & 17 *Car.* 24.

of a Caſtle.

Caſtle, what.

A Caſtle doth ſometimes ſignifie a ſtrong Houſe or place of defence; and ſometimes it doth ſignifie one or more Manors, *Co.* upon *Lit.* 5. For this,

1. What Purveyance, and in what manner ſhall be made to victual a Caſtle. See *Stat.* 9 *H.* 3. 19. 3 *Ed.* 1. 7.

2. What is to be, and by whom, for the erecting, maintenance and uſing of ſeveral Caſtles, Fortreſſes and Bulwarks, See *Stat.* 4 *H.* 8. 1, 2 *Ed.* 6. 16. 2 & 3 *P. & M.* 1. 28 *Ed.* 1. 7. 4 *H.* 4. 31. 33. 13 *R.* 2. 15.

Caſtlelain was ſometimes taken for the Owner or Captain of a Caſtle, who ſometimes alſo was called the Conſtable of the Caſtle. *Caſtlelain*, what

Caſtle-guard is a Tenure or Impoſition laid upon ſuch as do dwell neer a Caſtle, towards the maintenance of ſuch as keep Watch in the Caſtle, which was a kind of Knights ſervice. For this, *Caſtle-guard*, what.

1. Who ſhall be bound to this Tenure, and for what time he may be diſcharged thereof, See *Stat.* 9 *H.* 3. 20.

2. The Tenants of the Caſtle of *Dover* that hold by this Tenure, are to pay their Rents at the Exchequer yearly, *Stat.* 33 *H.* 8, 18. See *Weſtm.* 17 *Ed.* 3.

Of Cattel.

FOr Cattel, theſe things are to be known.

1. None may buy any Cattel, and ſell them again alive, until he have fed them five weeks in his own houſe or ground, or where he hath Common, under pain to loſe the double value thereof, *Stat.* 5 & 6 *Ed.* 6. 14.

2. None may buy any Cattel but in open Fair or Market, nor may he ſell the ſame again any where in the ſame Fair or Market, under pain to forfeit the double value thereof, 3 & 4 *Ed.* 6. 19.

3. Any perſon may buy Oxen, Steers, Runts, Kine, Heifers or Calves, for their proviſion for Houſhold, Teem, or Dairy, or otherwiſe, in any Fair or elſwhere as they pleaſe, 3 & 4 *Ed.* 6. 19.

4. Spiritual perſons may not buy Cattel to ſell again, but in ſome ſpecial caſes, 21 *H.* 8. 13.

5. Drovers that buy and ſell Cattel, muſt be licenſed, and how. See *Chap.* 27. *b.*

6. Any man may keep upon his own Lands or Liberties of Foldage that he hath, any Eſtate in uſe, or poſſeſſion of Inheritance, or for life, as many Sheep as he will. But Farmers and Renters of great Farms may not have or keep at one time above Two thouſand Sheep, (120. to be accounted to the Hundred) of all ſorts, beſides Lambs *Sheep.*

Lambs under a year old, under pain to forfeit Three ſhillings four pence for every Sheep, unleſs it be Sheep for the proviſion and expences of their houſes: Or where one is made Executor, or is married to a Wife, where the Teſtator hath left, or Wife had more then Two thouſand Sheep; and there they muſt diſpoſe of the overplus by the ſpace of a year: Or where Sheep are given to a Child by Will, and the Will is, they ſhall be kept for him, 25 *H.* 8. 13. See in the Statute an Order for the Fold-courſes in *Norfolk* and *Suffolk*.

7. He that doth keep above an hundred and twenty Sheep the moſt of the year upon his own ſeveral incloſed grounds, (and not upon Commons fit for Milch-Kine) ſhall, ſo long as he ſhall keep and feed them, for every ſixty Sheep keep and feed yearly one Milch-Cow, and for every Hundred and twenty Sheep ſhall raiſe yearly one Calf, under pain to loſe Twenty ſhillings for every moneth he ſhall not keep ſuch Cows, and for not raiſing every year a Calf, *Stat.* 2 & 3 *Ph.* & *M.* *ch.* 3.

8. And he that ſhall keep and feed upon his Paſtures above twenty Oxen, Runts, Shrubs, Heifers, or Kine, ſhall for every ten Beaſts keep and feed yearly one Milch-Cow, and for every twenty ſo kept ſhall raiſe yearly a Calf, under the pain aforeſaid. But the Sheep and Cattel men keep for proviſion of their houſes, are not to be reckoned amongſt the number.

9. The Statute of 2 & 3 *Ph.* & *M.* 3. ſhall alſo extend to Grounds, which ſince the ſaid Act have been or ſhall be made ſeveral, *St.* 7 *Jac.* 7.

CHAP. XLI.

Of Cauſes and Effects, Certainty and Incertainty.

Cauſes and Effects.

THE Law in moſt caſes hath much reſpect to the cauſe, original, and foundation of things; and in ſome caſes none at all. As if one whiles that he is a ſervant have an intent to kill his Maſter, and after depart out of his ſervice, and then kill him, this is Petty-treaſon by Relation. So if a man *de non ſane memorie* give himſelf a deadly wound, and after come to himſelf again, and die by that wound, he ſhall not be a *Felo de ſe*. So if a Covenant be to make a man a Leaſe for years, and the Covenantee die before the Leaſe be made, and then the Leaſe is made to his Executors, this ſhall be accounted Aſſets. *Cauſa & origo eſt materia negotii.* And for this cauſe it is, that an Outlawry in Felony, is a Forfeiture of a mans Land: And ſo it is not in Treſpaſs; for albeit the not appearing be the next cauſe of both, yet in the firſt cauſe they do differ, *Co.* 1. 99. *Plow.* 292. *Co.* 2. 91.

Felo de ſe.

Aſſets.

Tythe.

If Timber-trees that are not titheable become rotten and dry, *non portans fructum nec folia in æſtate, nec exiſtens macie minus*; yet their privilege doth remain, and they are Tythe-free ſtill. So if an Eſtate in tail become an Eſtate in tail after poſſibility of iſſue extinct, yet many of the Privileges annexed to the firſt Eſtate remain ſtill. And hence appeareth, that effects do ſometimes continue when their cauſes are gone. But for the moſt part theſe Rules hold, *Sublata cauſa tollitur effectus, & ceſſante cauſa ceſſabit effectus*: As when a Guardian in Soccage dieth, the Wardſhip of the Infant ſhall ceaſe, and not go to his Executor; So if one give Land or Goods with his Daughter or Kinſwoman in Marriage, and after they are divorced, now ſhe ſhall have all the Goods again that are not ſpent. So if one enter into Religion, and make his Executors, and after be arraigned, he ſhall have the Goods again that remain.

Gardeine.

Husband and Wife.

Office.

If the King grant an Office at will, and alſo Forty pounds Fee to him for his life, *pro Officio illo*: In this caſe if he put him out of the Office, the Fee ſhall ceaſe.

If a Rent be granted for a Way, ſtop the Way, and the Rent ſhall be ſtopped.

If

If an Annuity be granted *pro conſilio*, or *pro ſervitio impendendo*; if the Counſel or the Service be withdrawn, the Annuity is determined.

It is not a principal challenge to a Juror, that he hath married with the Mother of the party, if ſhe be dead without iſſue; for the cauſe of favor is removed. *Challenge.*

If one give a man a wound the firſt of *May*, and the King the ſecond of *May* pardon to him all Felonies and miſdemeanors, and the third day of *May* the party dyed of this ſtroke; by this Pardon the Felony is diſcharged. But yet, *Sublata una cauſa, ſi alia remanet, non tollitur effectus.* *Pardon.*

In caſe of Soccage-Tenure, whereas in times paſt the Tenants did uſe to ear the Demeans of the Lord with their Ploughs, the which ſervice was afterward changed into an Annual Rent by conſent of the Lord and Tenants; in this caſe notwithſtanding the Lord do alien his Demeſns, and have no Land to plow, yet the Tenants ſhall pay their Rents yearly to the Lord.

Where one doth hold by Rent for Caſtle-guard, although the Caſtle fall, yet the Rent doth remain. And albeit the Religious Houſes be diſſolved and ſuppreſſed, yet the money that is paid in lieu of Proxies by the Owners of thoſe Houſes remain, *Co.* 11.81.48,49. 1.98. *Plo.* 293. *Dyer* 13. *Co. ſuper Lit.* 204 208. 5 *Ed.* 4.8. *Dyer* 76. 9 *Ed* 4 20. 15 *Ed.* 4. 14. *Dyer* 2. *Davis Rep.* 1. 13 *Ed.* 4.10. 14 *H.* 7.2. *& l.* 101. *Davis Rep.* 3. *Co.* 4.88.

A. leaſeth White-acre to *B.* for life, *B.* doth make waſte; *A* doth grant the Reverſion to *C.* *B.* doth attorn: *A.* cannot have an Action of Waſte, becauſe the Reverſion in reſpect of which it is given, is out of him. So if there be Lord and Tenant, and the Tenant alien in *Mortmain*, and then the Lord grant the ſeigniory to a ſtranger, and the Tenant attorn; in this caſe the Grantor ſhall not enter for the *Mortmain* (albeit it be within the year,) becauſe the Seigniory in reſpect of which the Entry is given, is out of him, *Perk. ſ.* 20. *Waſte.* *Mortmain.*

Of Certainty and Incertainty.

CErtainty is the plain, cleer, and diſtinct ſetting down of things, and is ſaid to be the mother of Repoſe; and is oppoſed to Incertainty, (*i*) when a thing is ſo ambiguouſly and doubtfully ſet down, as one cannot tell how to take or underſtand it; and this is ſaid to be the mother of Contention. And this Certainty is of three ſorts. *Certainty and Incertainty.*

1. To a common intent; and that is ſufficient in a Bar in pleading, which doth defend the party and excuſe him; and this is ſufficient in Deeds.

2. To a certain intent in general; and this is required in all Counts, Declarations, Replications, and Pleadings of the Plaintiff, and Indictments to convince the Defendant.

3. To a certain intent in every particular: And this the Law doth altogether reject; for *Nimia ſubtilitas in jure reprobatur, & talis certitudo certitudinem confundit*, *Co.* 5 121. *Plow.* 25.

The Queſtions of *Certainty* and *Incertainty* grow upon Records; as Writs, Counts, Pleas, Replications, Verdicts, Offices, Returns, Fines, Recoveries, and ſuch like: And Writings; as Feoffments, Gifts, Grants, Leaſes, Wills, and the like, and Tenures, Warranties, and other things. But in all theſe things this Rule is admitted; *Id certum eſt, quod certum reddi poteſt.* And therefore if one leaſe his Land in *W.* rendring Rent for every Acre twelve pence; this is a good Render enough, for this may be made certain. So if one hold his Land of his Lord, to ſheer all the Sheep depaſturing in the Lords Manor, this is a good Tenure, for here is a certainty in an uncertainty, *Plow.* 6. 7 *Ed.* 3.8. *Co. ſuper Lit* 96.

A convenient Certainty is required in Writs, Declarations and Pleadings, and eſpecially in Writs, more then is in Writings: For if a Writ be abated for Incertainty, the Plaintiff may have another Writ; but if his Deed be avoided for Incertainty, he cannot have a new Deed at his pleaſure, *Co.* 11 25. *Co.* 5. 121. *Dyer* 84. *When, and what Certainties requiſite; and where Uncertainty will hurt or defeat.*

If the King grant by Patent *Cognizans de Pleas*, and ſay not *ubi*, nor *coram quo*, this is it ſeems void for Incertainty, *Br. Patent* 100. *In Record.*

If

In a Verdict. If an Action of Debt be brought againſt Executors and they plead they have fully adminiſtred, &c. and the Jury find they have enough in their hands, and ſay not to what value; this Verdict is void and inſufficient for Incertainty, 40 *Ed.* 3. 15. *Co.* 9 74. *b.*

In Writings. Writings are ſometimes void for Incertainty in all, ſometimes in part only; and ſometimes not, but the Incertainty may be holpen and made certain by Averment or other means. And this Incertainty is ſometimes in perſons, and ſometimes in things; as in a Grant, in the perſon of the Grantor, or Grantee. In the thing granted, either in reſpect of the place where it is, the quantity or quality of the thing, or name whereby it is called; ſometimes in the eſtate, ſometimes in the time, ſometimes in the manner. As if *I.S.* by the name of *I.* (without any Sir-name) do grant, or give, or take by this name, this is void by Incertainty: So if the party be named by his Sir-name only, without any Chriſtian name. So if a Grant be, *To the Church-wardens of* S. without any more; or, *to God, to Church, or Poor*, or to three or four of a Pariſh, not naming them; or to one of the ſons of *I. S.* and he hath many ſons; or to him that ſhall be the firſt ſon of *I.S.* and he hath then no ſon; or to the Monks of ſuch an Abbey; or to *I.S.* or *I.D.* in the disjunctive: All Grants made after this faſhion are void for Incertainty, *Perk. ſect.* 39. *&c. Plow.* 6. *Co.* 8. 155. *Perk. ſect* 54, 55, 56. See *Deed.*

If I grant to one ſo much Wood in ſuch a place, as I can ſpare, or can be ſpared; or if I have a Wood of an hundred acres, and grant to one ten acres of it, and do not ſay where, or what part of the Wood: Or if I have a Manor, and grant the ten acres out of the Manor, but do not ſay where: Or if twenty Tenants hold of me by the Rent of twelve pence apeece, and I grant ten ſhillings to perceive out of theſe Tenements, or ten ſhillings parcel of the twenty ſhillings: Or if I grant a Corody or Eſtovers, and ſay not where, nor what in certain; or if I grant Land, and ſay not in what County nor Pariſh: In all theſe, and ſuch like caſes, the Grant will be void for Incertainty, *Dyer* 91 281. 9 *H.* 6. 12. 9 *Ed.* 4. 11. *Finches Ley* 13.

If I give a Horſe to *I.D.* being preſent, and ſay to him, *I.S.* take this, and his name is *I.D.* this is a good gift, notwithſtanding this miſtake and miſcalling. But ſo it had not been, if I had delivered it to a ſtranger to the uſe of *I. S.* when I meant *I.D.* So if I ſay to *I.S.* Here I give you the Ring with the Ruby, and deliver it with my hand, and the Ring bear a Diamond, and no Ruby; this is a good gift. And ſo had it been by word or writing, without the delivery of the thing it ſelf, if I give the Ring with the Ruby, and have none ſuch, but one with a Diamond. But I doubt this laſt Caſe.

If I grant to two men *& haredibus*, and do not ſay [to their heirs:] And if I be poſſeſſed of a Term of years, and grant all the reſidue of my Term which ſhall be to come at my death: In all theſe caſes it is void for Incertainty, *Co.* 1. 55. *Kelw.* 108. *Plow.* 520. *Bro.* 417.

3. When not, but may be holpen by Averment or Election. It is not neceſſary one ſhould ſet down the Certainty of a thing in pleading, when either it is not poſſible ſo to do, or it is a thing out of his knowledg, or unto which he is a ſtranger that doth plead it, or of which in common preſumption he can have no certainty, *Plow* 128. *Co.* 4. 89.

If a Fine be levied to *I.S.* the ſon of *W.S.* and he have two ſons of that name; this may be holpen by Averment, and is good enough.

In Writings. If the King by his Letters-Patents grant to another all the Manors and Advowſons that did belong to the Priory of *H.* or all the Manors and Advowſons that were *I.S.* which were attaint, &c. Theſe be good Grants, although it be not ſet down in what County it lie, 22 *H.* 6. 20. *Co* 9. 47.

If the Duke of *Buckingham* by that name be Grantor or Grantee in a Grant, this is good and certain enough, without any Chriſtian or Sirname, *Perk ſect.* 36.

If the name of the Father be *I.S.* and the name of the Son *I.S.* alſo, and one of them grant by the name of *I.S.* without any addition or diſtinction, this is good enough, *Perk ſect* 37.

If an Abbot had granted by the name of his Foundation, this had been good.

If a Grant be to the Biſhop of *Worceſter*, without any more, this is good enough, *Perk ſect* 45.

If

If one grant to the firſt ſon of *J. S.* without any more addition, and *J. S.* have two ſons, this is good enough, *Perk. ſect.* 54.

If an Eſtate be granted to *J. S.* the Remainder to him that ſhall come the next morning to *Pauls*: If *J. S.* the Grantee do live til then, and one do come there that is capable, this is a good Remainder, and certain enough. So if the Remainder hath been limited to him that *J. S.* ſhall name within three days, if he do name, this is made certain, *Perk. ſect.* 36.

If a Leaſe be made to a husband and Wife for One and twenty years, the Remainder to the Survivor of them for One and twenty years: Or a Gift in Tail be made to the Husband and Wife, and the Heirs of the Survivor of them; this is good enough, *Co.* 1 c. 51.

If one grant his Manors of *A.* and *B.* and ſay not in what County or Pariſh; or leaſe all his Land in the Pariſh of *A.* and ſay not in what County; or leaſe or grant all his Land deſcended to him from his Father, with more; or grant another a Robe, or a Rent of Twenty ſhillings, or one of his Horſes in his Stable (having many there) or Twenty Loads of Aſh, or of Oak in ſuch a Wood; theſe Grants are good enoug, and may be made certain by Election. So if one grant to another ſo many Trees in his Wood as *J. S.* ſhall ſay may be ſpared, *Co.* 9. 47. *Plow.* 191. *Co.* 2. 37. *Dyer* 91.

If I make a Leaſe to another for ſo many years as *J. S.* ſhall name, this is good, after he hath named. So if I make a Leaſe to begin after the Surrender, Forfeiture or other determination of a former Leaſe, this is certain enough. So if I make a Feoffment to one of Two acres of Land, *Habendum* the one for life, the other in tail, this is good enough, *Plow.* 6. *Co.* 6. 36. 8. 56. *Co.* 2. 37.

If one bind himſelf in an Obligation to pay me all ſuch money as his Brother oweth me; this is certain enough, for that by Reference and Averment it may be made certain, *Morgan verſ. Johnſon*, *B. R. P.* 39 *Eliz.* See *Deed.*

CHAP. XLII.

Of the Chancery.

Sect. 1. *Conſcience or Equity, what it is.*

Conſcience or Equity (as our Law takes it) is ſaid to be *Tacitum animi infallibileque facti noſtri judicium, à communi juſtitiæ formula quam Deus inſculpſit omnibus hominibus productum, per quod accuſatur res mala, & defenditur bona.* And this being aided and aſſiſted by the Laws of God, Nature, Nations, Reaſon, and our Country, is the Rule by which they go and proceed in their Courts of Equity, to allay, qualifie, and temper the rigor, ſeverity and ſharpneſs of the Common-Law in ſome ſpecial caſes: Wherein, if it be ſtrictly obſerved, it will fall out to be *ſummum jus*, and conſequently *ſumma injuria.*

In theſe caſes there are Courts of Equity appointed; and amongſt theſe eſpecially the *Chancery*, which is the chief Court, *Weſt. Symb. lib.* 2. *Doct. & Stu. in toto.*

Sect. 2. *Chancery, what it is.*

The *Chancery* is defined to be, A Court of Equity or Conſcience, moderating the rigor of other Courts that are more ſtrictly bound to the Letter of the Law, 3 *Ed.* 4. 15. 19 *Ed.* 4. 2. In this Court the Lord Chancellor or Lord Keeper was, now the Commiſſioners of the Great Seal are chief Judges: And herein they,

and in their abſence, the Maſter of the Rolls, do make Orders and Decrees. And under theſe there are many other Officers belonging to this Court; as the twelve Maſters in ordinary, which are Aſſiſtants, the ſix Clerks, Examiners, Serjeant at Arms, and others: Theſe Commiſſioners keep the Great Seal, and ſeal all Writs and Patents, *Plowden, fol.* 213. *Crompton, Juriſdiction of Courts.*

Sect. 3. Of the power of this Court in the general.

This Court is ſaid to have a twofold power. Ordinary, as in caſes of Traverſe, Endowment of a woman, *Scire fácias*, to repeal Patents, and the like; and herein the Court is limited and confined to the Rules of the Common-Law, *Cary's Rep.* 50. 71. And Extraordinary and unlimited, which is in caſes of Equity, wherein relief is to be had by a Suit here in a way of Bill and Anſwer: And it is by the power of this Court, that Commiſſions of Charitable Uſes, Bankrupts, and Sewers are iſſued forth: Alſo here in ſome ſpecial caſes, a *Superſedeas* or *Subpœna*, or Privilege is granted to diſcharge a man out of Priſon: A *Subpœna* may be had to force Witneſſes to appear in other Courts, that have no power to call them in to teſtifie their knowledg; as in *London*, when the man lives within its Juriſdiction, *Car. Rep.* 37. 43, 44. So here ſometimes, and in ſome caſes, Commiſſions have been granted to examine Waſtes; To prove a Child legitimate; To ſet out meet ways for paſſages; To prove Cuſtoms; To examine Witneſſes *in perpetuam rei memoriam*, *Tot. in toto. Car. Rep. in toto.*

Caſes of Equity

By way of Bill and Anſwer it will give relief in many caſes againſt, beſides, and beyond the Rules of the Common-Law, in ſuch like caſes as theſe: As to enforce others to contribute to a Charge by the Common-Law put upon one alone, to the which others ought in Equity to contribute a part, *Tot.* 41. To relieve one againſt a man that hath falſified and broken his Truſt with him. To relieve one againſt a man that holds him to extremity, upon an Engagement: As when the Engagement is unreaſonable, diſhoneſt, impoſſible, diſcharged, voluntary, and without any conſideration; gotten by practice, fraud or force, or the like. To relieve one againſt the extremity of a Forfeiture, *Tot.* 26, 27. To enforce the performance of an Agreement, to which by Law a man cannot be compelled, *Tot.* 4 69. To have the Tuition of a Child that doth belong to him, *Car. Rep.* 96, 97. To force an Enrolment of a Deed, if need be, *Car. Rep.* 97. To recover a liberty of common Fiſhing, or the like; and upon every Interruption, and an Affidavit thereof, an Attachment may be had, *Car. Rep.* 104. To reſtrain other Courts that take upon them a greater Juriſdiction then they have, and to remove the Suit into this Court, which may be by a *Certiorare*, *Car. Rep.* 60. 56. 48. 65. 68. 73. 74. 82. 84. 85. 89 90. 92. 95. 96. 97 99. 102. 109. 137. To ſtay the proceedings of other Courts, when they are unjuſt, *Car. Rep.* 73. To enforce obedience to the Decrees of the Provincial Councils, Court of Requeſts, and ſome other Courts, when by contumacie they are diſobeyed. To reduce the general Cuſtoms of a Manor to a certainty between the Lord and Tenants, or the Tenants themſelves, *Car. Rep.* 21. To recover and ſettle Land or Money given to charitable or pious uſes, and miſ-imployed, *Tot.* 27, 28. To force a man to give his wife Alimony, *(i.)* Maintenance, *Tot.* 93, 94. To force Creditors to take a reaſonable Compoſition of their Debtor, he being diſabled, *Tot.* 47. To aſcertain and ſtint Common, *Tot.* 36, 37. To aſcertain and ſet out a way, *Tot.* 23. To aſcertain, to diſtinguiſh a mans Land when it is compounded and confounded with another mans, *Car. Rep.* 16. eſpecially when it is to pay Debts, or the like, 14 *Jac.* So when Free-land or Copihold-land are confounded, it will diſtinguiſh; or if it be loſt, give a recompence for it, *Pickerings* Caſe, 5 *Car.* To aſcertain the Fines of Copiholders, *Tot.* 49. To force an Action to be tryed in any County, *Tot.* 1. To force Executors or others that have money in their hands, there to lie long to give ſecurity or intereſt for it, *Tot.* 6. To examine the Probate of a Will, eſpecially if the Will concern Land, *Tot.* 139. To recover a Legacie, or force the performance of a Will, *Tot.* 24. To recover Tythes in Kind, or money for it in ſome caſes, *Tot.* 68. 184 185. To recover ones Land, Debt or Duty, although he have loſt Conveyance or Writing, by which he ſhould make his Title to it, or otherwiſe be without remedy at Law for it, *Tot.* 81. 6. To force a man that hath taken money for Land, aſſured by defective Conveyance, to make theſame perfect and good, *Tot.* 14. 3. 42.

To

To force a Tenant to attorn to perfect an Aſſurance. To force a man to prove payment of money, agreed and acknowledged to be given upon a Sale of Land, *Tot.* 15. *Dyer* 59. And in theſe and ſuch like caſes this Court doth always, or for the moſt part give relief.

Alſo in ſome other ſpecial caſes this Court doth exerciſe a power: As to prevent a Diſinheritance of an Heir, or reſtore it, *Tot.*42.81. Avoid an Extinguiſhment or Suſpenſion of Rent or Common, *Cromp. Jur.* 49, 50. *Tot.*42.188.137. Prevent an Occupancie, *Hunts* Caſe, 17 *Jac Tot.*187. Avoid the Bar of an Action, by the Statute of 21 *Jac.* of Limitation, *Tot.*53.179. Order an Executor to pay a Debt out of courſe, *Tot.*53. Make Incloſures of Land and Grounds that are common: Give relief againſt the turning of a Water-courſe from a Mill, ſo as there be any ſpecial circumſtance in the caſe, otherwiſe it is very ſhie and tender of making Orders in them. But if the ſubſtance of the Suit by Bill and Anſwer, be to overthrow an Act of Parliament made for publique peace and repoſe; or to overthrow a fundamental point of the Common-Law; or to overthrow and take from other Courts their peculiar Juriſdiction, or the like: In ſuch caſes regularly this Court doth not give relief, *Tot.*47. *Cromp. Jur.*45. So likewiſe if it be ſuch a caſe as wherein the Plaintiff hath his remedy at Common-Law for the very ſame thing, he ſhall not be relieved here. But if one promiſe to aſſure me Land for twenty pounds, I may either ſue at Law for damages, or here for the Land it ſelf So for a Nuſance, where the Law gives me damages, I may ſue here to have the Nuſance removed, or the thing it ſelf reſtored, 21 *H.*7.41. *Cary's* Caſe,20.53.11. And yet there may be ſome ſpecial circumſtances in the caſe which may make the Court retain it, *Cary's Rep.* 71. If the Suit be grounded on a Will Nuncupative, Leaſe-parol, or long Leaſe, to avoid Wardſhip, or to eſtabliſh Perpetuities, or to defeat Purchaſers, or for Brokage or Rewards to make Marriages, or for Bargain at Play or Wagers, for Eargains for Offices againſt the Statute of 2 *Ed.*6. or upon Contracts for Uſury or Simony; or if it be for Land not worth Forty ſhillings a year,or for any thing elſe under the value of Ten pounds; theſe are regularly diſallowed here: And ſometimes upon notice taken hereof by the Court, upon Motion or upon Affidavit only, before the Cauſe comes to hearing, it is diſmiſſed: But if not, when it comes to hearing it is diſmiſſed, *Cary's Rep.* 7, 8. 27. 24. 76. Yet circumſtances may make theſe retainable; as if the Suit for ſo ſmall a matter be for the Poor of a Pariſh, or the like, *Cary's Rep.*103.

Statute of Limitation

Nuſance

poor

And in theſe caſes the matter being heard upon the Bill and Anſwer, and the proofs of Witneſſes, the Judges are (without any regard to form or miſpleading, ſo as the truth *viis & modis* may be diſcovered) to ſentence it according to Equity and Conſcience. But we ſhall deſcend to particular illuſtrations hereof.

All perſons able in Law to ſue or be ſued, may ſue, or be ſued here: And for this ſee *Chap.* 3.

Sect. 4. By and againſt what perſons, and in what Caſes relief may be had in Equity, or not. 1. In reſpect of the perſons for or againſt whom it is to be had. Infant.

Relief may be, and is often given againſt,or for an Infant in this Court. As touching which matter theſe things are to be known Firſt, as to Suits againſt an Infant,

1. An Infant was compelled to anſwer to a Bill in this Court, *Hares* Caſe *H.*3 *Jac.* and *Mores* Caſe, 11 *Car. Tot.* 108,109,95,97. And being but twelve years old, was bound by a Decree here, 37 *Eliz. Wadhams* Caſe; and upon a Review decreed again, *Cromwels* Caſe, *M.* 7 *Car. Tot.*70. And was committed to the *Fleet* for diſobeying a Decree, 12 *Eliz. Tot.*108.139.

2. The Court may alſo, if it pleaſeth, appoint an Infant defendant a Guardian to defend his Suit, *Cary's Rep.*38.

3. A Copihold was ſurrendred to the uſe of an Infant, to the Infant, to pay an Annuity to another at his full age, which he refuſed: It was decreed he ſhould pay it and the arrears thereof, *Sawyers* Caſe, 9 *Eliz. Tot.*107.

4. *Young* purchaſed Lands in the name of *Maſon*, in truſt for himſelf and his heirs, and dies, not declaring any determination of this Truſt, procures *Maſon* to convey it to him, being of Kin; he conveys it to Infants; *C.* ſues here as next heir, and the Court agrees, that if the benefit of the Truſt did belong to *C.* that it ſhall be decreed to him during the Minority, and then that the Infants ſhall convey it, *Cary's Rep.*30.

Tailed Land. 5. A mother conveyed her Leaſe to her ſon in truſt, and after the ſon conveyed it to his children Infants; and it was decreed againſt the father and children, becauſe done without any conſideration, *Tothill* 98.

6. The Lord *Morley*, between the date and ſealing of the Conveyance of Land ſold, paſſed it to an Infant; and it was decreed againſt the Infant and him both, 36 *Eliz.* Lady *Ruſſels* Caſe, *Cary* 30. 81.

7. The Father being Tenant in Tail, ſels his intailed Land, and leaves as much Free land to deſcend to an Infant; the Court ordered, when he comes of age, to pay the money given for the Land, according to his Fathers Will, or elſe that the Purchaſor ſhall have the Free-land, *Tothill* 184.

8. It ſeems he may be here compelled to give a Diſcharge of money due to, and received by him, *Rayners* Caſe, 13 *Car. Tothill* 109.

9. One made an Infant Executor, to prevent the payment of his Debts; and he was ordered by the Court to pay them notwithſtanding, *M.* 9 *Jac. Tothill* 108.

Agreement. 10. An Infant in ſome ſpecial caſes may here be concluded by his Agreement: But regularly, if an Infant be twenty years of age, and make a Contract never ſo much to his advantage, the Court will not conclude him; nor will the Court decree againſt him by his conſent, or the conſent of his Parents, but in ſome ſpecial caſes upon the merit of the Cauſe, *M.* 8 *Car.* in *Chancery*, *Tothill* 109. 95. As a father was about to convey ſome of his Land to his younger ſon, and his eldeſt ſon promiſed to give the younger ſon an hundred pounds to forbear it; in this caſe the eldeſt ſon being an Infant, was ordered to ſtand to it. See *Stiles* Caſe, 2 *Car. Tothill* 95.

11. A Surrender was made of a Copihold by an Infant, to the uſe of *J. S.* for money paid, and no help could be had here, *Hughs* Caſe: *Tothill* 180.

12. If I take Bonds for my money in my childrens name that are Infants, I may releaſe the Debts, and this Court will allow it, and forbid any Suit upon them, *Simonds* Caſe: *Tothill* 26.

For an Infant. Secondly, As to Suits by or for an Infant. 1. He ſhall have the ſame Relief upon a Breach of Truſt, Fraud, or the like, in this Court, as another man may have, notwithſtanding his Minority, *Tothill* 108. 2. He may ſue by himſelf, or by his Prochein-Amy or Guardian, as the Court will give leave and order, *Woods* Caſe, *Hil.* 2. *Car. Tothill* 9.

Husband and Wife, Woman-covert. Relief may be, and is often given here againſt, or for a woman that hath a husband; as touching which theſe things are to be known. Firſt, as to Suits againſt her,

Sect. 5. *Againſt her. Anſwer. Decree, Commitment.* 1. She ſhall be compelled to anſwer with, or without her husband. *Batſons* Caſe, 14 *Car. Mores* Caſe, 11 *Car.* and *M.* 5 *Car. Palmers* Caſe, *Caryes Rep.* 100. 101. *Tothill* 95, 96. eſpecially if he be out of the Land, *Tothill* 97. 140. And ſhe will be bound by the Decree of this Court, *Weſt deans* Caſe, *Tothill* 93. and may be committed till ſhe do obey it, *Stywards* Caſe, *Tothill* 92. *Weſt-deans* Caſe, *Tothill* 93.

2. The husband ſold Lands and Debts which were due to the wife before coverture, and took Wares for it; he dyed, ſhe ſurvived, and he releaſed the Debts; it was ordered againſt her, *Tothill* 91.

3. The husband and wife were ordered to levy a Fine, and perfect Aſſurances, *Tothill* 93. 6. The husband was ordered to give ſecurity, that the wife ſhould releaſe her right to Land, *Tothill* 92.

Agreement. 4. An Agreement in ſome caſes will here be ordered to conclude her, *Stiles* Caſe, *Hil.* 2 *Car. Tothill* 97. 95. where the merit of the cauſe requireth it. As if a man have two Tenements of his wives Land, and they agree with the Tenant, That if he will ſurrender one, he ſhall have three lives in the other; and he doth ſo, and the husband die; the wife was ordered to make it good, *Irelands* Caſe, 37 *Eliz. Tothill* 91. But regularly it is otherwiſe: And therefore where ſhe hath Land with other Co-heirs, and ſhe with the conſent of her husband agree to take One thouſand pounds to releaſe her right; the Judges did certifie, ſhe was not to be concluded, *Trin.* 7 *Jac. Dockwrays* Caſe, *Tothill* 98. Yet, 10 *Jac. Randals* Caſe was, That a ſingle woman did agree, and after her marriage ſubſcribed her name with her husband to a latter Agreement, and was concluded by this latter by the Courts Order, *Tothill* 96. But in *Slaters* Caſe, 37 *Eliz. Tothill* 92. ſhe and her husband did article to forgo her

Jointure

Jointure for other recompence; and a Decree was made thereupon (but without her consent) in her husbands life-time; and after his death the Court would not bind her to this Agreement, *Tothill* 92.

Truſt barred. Fine.

5. A Leaſe of Land was made to friends to her uſe, to begin after her husbands, and they two levy a Fine of the Lands; this will bar them in Equity, *Trin.* 15 *Car. Liſters* Caſe, *Tothill* 84.9: *A.* made over his Leaſe for years to the uſe of *C.* his wife; after he and his wife ſold the Land, and levied a Fine of it to *D.* The Court ordered, that the Purchaſor ſhould enjoy the Land againſt the wife after her husbands death, 2 *Car.* One was ſeiſed of Land to the uſe of a *Feme-ſole,* who after took a husband, and the husband ſold the Land; the wife had the money, and ſhe and her husband deſired the Feoffee in truſt to convey it, and he doth ſo: Yet it ſeems this Court will not bar her of the Land after her husbands death. The Court ordered the husband and wife to levy a Fine of mortgaged Lands ſetled in her, Lord *Griffins* Caſe, 4 *Car.* To bring in Evidences, *Kings-College* Caſe, 4 *Eliz.* Forbid her to make Waſte, *Tothill* 92. 10. One did convey Land to the husband in truſt, and he took the profit, and left it with his wife, and ſhe marry again: They two were ſued here, and yet neither as Executor nor Adminiſtrator to a firſt husband, *Arklands* Caſe. *Tothill* 106.

For a woman.

As to Suits by and for her,

Alimony.

1. In ſome caſes ſhe may ſue her husband, as for Alimony and Maintenance, where they be parted: But ordinarily in other caſes ſhe may not ſue her husband, nor her husband ſue her, *Simpſons* Caſe, *Tot.* 94. 97.

2. She hath been allowed to ſue without her husband, and without his privity, eſpecially he being beyond the Sea, *Tot.* 95. 94. 97. The woman and her husband agreeing to part upon difference, and he giving her a ſum of money for her livelihood, which was put into a friends hand for her; ſhe was allowed to ſue alone for this without her husband, *Cary's Rep.* 87.

Deviſe by her husband.

3. She was admitted to ſue here for a Duty releaſed by her husband gone beyond Sea, *Farewels* Caſe, 32 *Eliz.* and *Bakers* Caſe, 5 *Car. Tot.* 95. As for her Jewels, 13. Earl of *Derby's* Caſe, *Tot.* 96. And yet ſhe having goods ſhe pretended to be her *Paraphonalia,* the husband deviſed them, and it was here allowed to be good, and ſhe remedileſs, *Davenports* Caſe, 5 *Car. Tot.* 79.

Paraphonalia

4. If a woman had goods at the marriage, and the husband doth uſe and diſpoſe them all his life-time, and then giveth them away, or make an Executor; this Court it ſeems will give her no relief, albeit he leave never ſo great an eſtate beſides; unleſs they be goods ſet apart and preſerved for her livelyhood, by ſome agreement, or the like. *Tothil.* 55.

Deviſe by her

5. A woman divorced from her husband *Cauſa frigiditatis,* ſued here for her portion her father being alive, and recovered it, *Barrows* caſe *Tot.* 81.

Wife deviſe by will

6. The wife being parted from the husband, and having an eſtate to her ſelf, was allowed by the Court to deviſe it by her will, *M.* 15. *Car. Tot* 97. *Georges* caſe.

Truſt how ordered between husband and wife.

7. If a *feme ſole,* being poſſeſſed of a term, granted it over, or a term be granted by another to her own uſe, and then ſhe taketh a husband, and dyeth; in this caſe the Court ruled it to go to the Executor or Adminiſtrator of the wife, and not to the ſurviving husband. *Paſch.* 32 *Eliz. Withnams* caſe in *Chancery, Coo.* upon *Litt.* 351. Where the caſe was, *A* being poſſeſſed of a term, granted upon a marriage to be had between him and *K S,* to *J. S* her brother, to her uſe; and after marriage *A* dyeth; and ſhe marrieth again, and then ſhe dyed; *J. S* the brother took out Adminiſtration of her goods, and got the Leaſe, and the ſecond husband ſued him in this Court for the Leaſe, but the Court would not relieve him, *Withnam verſ. Waterhouſe.*

8. *A.* being poſſeſſed of a Leaſe for years, granted it to *B.* and *C.* to the uſe of *A.* and his wife; and after *A.* granted away all his Intereſt to a ſtranger, and the Court would not order it againſt the wife, *Dyer* 369. *Cromp. Jur.* 65.

9. *A.* conveyed her Leaſe for years to Leſſees in truſt, to the uſe of her daughters and children lineally: *A.* had a daughter by one husband, who had iſſue, and it dyed, and the husband alſo; then ſhe marries again; then the Leſſees in truſt convey the Leaſe to the mother and her ſecond husband, and diſcharges the truſt; ſhe gives it to her

her husband, and the heir ſued for it: It was ordered, that the husband, and not the heir ſhould have it, *Baskerviles* Caſe, *Tot.* 95.

10. A widow being about to marry, to prevent her husbands diſpoſal of the Land, conveys it to friends in truſt, who with the husband do ſell it for valuable conſideration, and ſhe ſued here: Decreed that the Purchaſor ſhould reconvey it to her, but ſhould firſt deduct all his diſburſments, *Fitzjames* Caſe, *Tot.* 43.

A Feme-ſole. A ſingle woman, widow or maid, may ſue and be ſued here as another body; wherein take theſe Caſes.

Dower. 1. A widow of a Tenant *in capite* ſued here for her Dower, and had a Commiſſion to ſet it out, *Wilds* Caſe, 25 *Eliz. Tot.* 82.

2. But no woman ſhall recover Dower of a Truſt here, *M.* 2 *Car. Kemps* Caſe, *Tot.* 99.

3. When ſhe cannot tell who is Tenant to the Land, ſhe may ſue, albeit her Writ of Dower lieth at Law to diſcover the Tenant, to know againſt whom to bring her Action, *Tot.* 99.

4. *A.* convey Land to *B.* and his heirs, to the uſe of him and his heirs in truſt, for *C.* and his heirs, (*B.* having then a wife) *B.* die, and his wife ſued for Dower of the Land: *C.* ſued againſt her for relief here, but it was denied; yet the wife of *C.* ſhould not have had Dower in this caſe, for a woman ſhall have no Dower of a Truſt. *Herns* Caſe, *Tot.* 99. So *A.* delivers *B.* Five hundred pounds to put to uſe for him, and *B.* doth buy Land with it, and makes *A.* believe it is for him and in his name, but it was in his own name: *A.* it ſeems ſatisfied herewith, *B.* dieth, and his wife ſueth to be endowed of the Land; and the Court could give *A.* no relief againſt this Suit, *Trin.* 6 *Car.* In the Court of Requeſts, if a woman-Executrix ſubject to a *Devaſtavit*, marry a husband, if he have not to ſatisfie, he ſhall be impriſoned by order here, *Cary's Rep.* 24. A Copiholder, it ſeems, may not be ſued for the Land without the Lord, *Cary's Rep.* 57.

Heir. An heir alſo here in ſome caſes ſhall ſue and be ſued further then the Law bindeth him; as in theſe caſes.

1. An heir of an Eſtate in Tail having Lands in Fee deſcended from the Anceſtor, in lieu thereof is bound by Decree to repay the Purchaſe-money, or let the Purchaſor have the Free-land, *Pierces* Caſe, 8 *Jac. Tot.* 184. The mother and ſon bought tailed Land of *Hearl*, Anceſtor to the Plaintiff; ſome of the money due on a Bond which is loſt: The Court thought fit to charge the mother and the ſon, becauſe of the Land in their poſſeſſion, *Hil.* 1 *Jac. Cary's Rep.* 25.

2. A dumb man was ordered to anſwer here, 14 *Car. Tot.* 40. And yet 22 *Eliz.* a man both ſenſleſs and dumb, was ordered not to anſwer, *Tot.* 92. It is then to be ordered according to his capacity.

3. The father ſold his intailed Land, and ſuffered a Recovery, but had little for them; it ſeems the Heir may compel the Purchaſor here to give the worth, *Tot.* 182.

Agreement: 4. The father articuled for Land, the ſon no party, but conſented to it, and it was agreed againſt him, *Pools* Caſe, *Trin.* 4 *Jac. Tot.* 69.

5. A Deed not enrolled was decreed againſt the Heir of the Land, *Tot.* 55.

6. The father conceiving his Land to be Freehold, gave part of it to a younger ſon, and it fell out there was an old ſleeping Deed of Intail; and yet it was ordered the younger ſon ſhould have it, *Pountneys* Caſe, *Tot.* 54.

Executors. Executors may charge or be charged in Equity further than the Law doth charge: wherein firſt as to Suits or Acts by them, take theſe things.

For them. 1. Here they may ſue one another, *Tot.* 8.

2. One of them may ſue an Executor of an Executor, if he have gotten the Eſtate into his hands, *Brereton's* Caſe, 6 *Jac. Tot.* 87.

3. Two Executors be, one doth diſagree; the act of the other ſhall bind in Equity, as it doth in Law, *Bacons* Caſe, *Tot.* 87.

Againſt them. Secondly, as to Suits againſt them, take theſe things.

1. One Executor alone without the reſt may be ſued here; but he ſhall be charged for no more then he hath, *Harbuge* Caſe, 35 *Eliz. Tot.* 86.

2. An

2. An Executor ſhall be bound by a Decree againſt the Teſtator, *Hil.* 5 *Car.* *Decree.*

3. He muſt pay Coſts adjudged here againſt the Teſtator, if he have Aſſets. *Coſts.*

4. He ſhall not be charged here for a Treſpaſs done by the Teſtator, *Hollands* *Treſpaſs.*
Caſe, *Tot.* 87.

5. Nor may he be compelled here to give Bond to perform the Will, without ſpecial cauſe be ſhewed; as that he is decayed in his Eſtate, or hath broken the Truſt already in ſome particular, or the like, *Browns* Caſe, 37 *Eliz. Tot.* 86.

6. He may here be ordered to pay a Debt by Word, before a Debt due by Specialty, *Tot.* 53.

One Jointenant, or Tenant in common, may here have relief againſt another. See *infra.* *Tenants in Common.*

The father may have relief againſt his own ſon, in caſe of breach of Truſt for a Leaſe, *Paſch.* 1597. *Domers* Caſe. The Caſes wherein relief is to be had in this Court, follow. *Jointenants.*

A Uſe or Truſt was, and ſtill is, either of Land, or of Goods; and both theſe are either expreſs or implied. *Sect. 6. Upon a Truſt or Confidence: Of Lands.*

A Uſe or Ttuſt of Land, was a Truſt repoſed in another, that he ſhould ſuffer him that did truſt, to take the profit of it, and he that was truſted was to diſpoſe the Land according to the direction of him that truſted him. As when a Feoffment was made to *J.S.* and his heirs, to the uſe of *W.S.* and his heirs; heretofore *I.S.* had the eſtate and property of the Land, but *W.S.* had, or was to have the profits in honeſty and equity. So if one had agreed with *W.S.* for a piece of Land for twenty pounds paid, and had no aſſurance; yet the equity of the Land was in the Contractor.

The uſe of Goods is, when one man hath them in truſt for another. The uſe of Goods or Lands expreſſed is, when the Truſt or Uſe is expreſſed between the parties, upon the making of the Eſtate implied, when it is not declared upon the Agreement, but left to the conſtruction of Law: As if I bargain and ſell my Land, levy a Fine, make a Feoffment, or ſuffer a Recovery of my Land without money, and no Uſe expreſſed, this in Law is to my own uſe; but if it be for money, it ſhall be to the uſe of the Bargainee, Conuſee, Recoverer or Feoffee: And if it be without conſideration, that I conveyed my Land by Feoffment to *J.S.* to have and to hold to him and his heirs, to the uſe of his heirs; in this caſe *J.S.* and his heirs hath the Uſe in Law, *Co.* 1.121: *ſuper Lit.* 271, 272. *D. & St.* 95. *Co.* 2.58.9.11. *Dyer* 18.146.

A Uſe at the Common-Law, before the Statute was made, was, and where that Statute doth not take place, is nothing but a meer Confidence and Truſt collateral to, and diſtinct from the Land annexed in privity of Eſtate, and to the Perſon touching the Land to this purpoſe, that *Ceſtuy que uſe* ſhould take the profit of the Land, and the Feoffee or Ter-tenant that was truſted ſhould make Eſtates and otherwiſe diſpoſe of the Land, as the *Ceſtuy que uſe* in his life or at his death by his laſt Will and Teſtament ſhould direct and appoint: And if he made no diſpoſition, then that it ſhould go to the Heir. So that the Feoffee had the Freehold, or the ſole property of the thing in him, and *Ceſtuy que uſe* had neither *jus in re*, nor *jus ad rem*; (for if he, againſt the will of the Feoffee, had entred into the Land, he had been a Treſpaſſer) but a bare confidence or truſt, for which the *Ceſtuy que uſe* had no remedy but in Chancery upon breach of the truſt, and there to have the Feoffee impriſoned until he perform the truſt according to the Order of the Court. And theſe Uſes to ſome purpoſes were reputed in Law as Chattels, and therefore were deviſable by Will; and to ſome purpoſe, as Hereditaments, and a kind of Inheritance, of which there was a *poſſeſſio fratris, &c.* And to ſome purpoſes neither Chattels nor Hereditaments, for they were not eſteemed Aſſets in the Heir or Executor. *The nature of it.*

And to every of theſe Uſes there were two inſeparable incidents: Confidence in the Perſon, and Privity in the Eſtate, expreſſed by the parties, or implied by the Law. And when either of theſe failed, the Uſe was either gone for ever, or ſuſpended for a time at the leaſt. And therefore if the Feoffee to Uſe upon good conſideration had enfeoffed another of the Land that had notice of the Uſe, the Uſe had been gone for ever; becauſe howſoever here was a Privity of Eſtate, yet here was no Confidence in the Perſon. But if the Feoffment had been without Conſideration to ſuch a one; *Incidents of it.*

in

in this caſe the Uſe had remained ſtill, becauſe the Law did imply a notice. So alſo it ſeems the Law was, when it was made in conſideration of Marriage only. And if a Diſſeiſor, Abator, or Intrudor had come to the poſſeſſion of the Land whereof the Uſe was, albeit he had notice of the Uſe, yet the Uſe was ſuſpended during their poſſeſſion, and they ſhould not have been ſeiſed to Uſe as the Feoffee was; for they come not to the Land in the *per*, but in the *poſt*. And if a Lord by Eſcheat, Lord of a Vilain, or one that had entred for Mortmain, or that had recovered in a *Ceſſavit*, *&c.* had come to ſuch Land, and had notice of the Uſe, the Uſe had been gone for ever; for theſe came to the Land in the *poſt*, and above the Uſe: And the Tenant in Dower and by the Courteſie ſhould not be ſeiſed to Uſes in being; for all theſe wanted Privity of Eſtate. And if there had been Tenant for life, the Remainder in Fee to the uſe of another, and the Tenant for life had made a Feoffment in Fee to one that had notice of the Uſes, this ſecond Feoffee ſhould not have ſtood ſeiſed to the firſt Uſes. So if the Husband had made a Feoffment in Fee of the Land of his Wife upon Conſideration, and without any Uſe expreſſed; the Wife ſhould not have had a *Subpœna*, becauſe the Feoffee was not in Privity of Eſtate of the Wife. And if *Ceſtuy que uſe* for life or in tail, the Remainder in Tail, with divers Remainders over in Uſe, had made a Feoffment to one that had Notice, he ſhould not have been ſeiſed to the firſt Uſes, *cauſa quæ ſupra.*

But to open this a little further, we are to know, that by the ſtatute of 27 *H.* 8. 10. the Uſe or Truſt, and the Poſſeſſion of Lands for the moſt part, are now at this day united: And in all ſuch caſes where they are united, and the Uſe executed by that Statute, the *Chancery* doth not meddle, but ſend men to Law. And ſuch is this, where one ſeiſed of Land in Fee, doth convey it to the uſe of one and his heirs, or heirs of his body, or for life, or to the uſe of one of his Executors and Adminiſtrators for years.

But there are ſome Uſes and Truſts ſtill that are not executed by the Statute; and theſe remain as they were before, and are in the conuſance and order of the *Chancery*: As where Lands are conveyed without Conſideration in Fee-ſimple, after this manner; That the Feoffee and his Heirs ſhall take the profits, and deliver them to the Feoffor and his Heirs; or that the Feoffee ſhall account and give the profits to the Feoffor; or that the Feoffee ſhall convey the Land to the Feoffor or to his Heir at his age of twenty one years: Or where it is conveyed to *J. S.* and his Heirs, on confidence that *J. S.* ſhall alien it to whom the Feoffor, or to whom *W. S.* ſhall appoint, or the like: Or where the Lands be conveyed to certain Uſes expreſſed, and there to other ſecret Uſes agreed upon between the parties: So where Land is conveyed without Conſideration to one and his Heirs, without expreſſing any Uſe or Intent; this is to the uſe of the Feoffor; who may diſpoſe of it as he pleaſeth. But if it be to any intent certain, as to take back an Eſtate with Remainders to others, &c. here he cannot change it.

Where Leaſes for years in being before, are granted over in uſe or in truſt: As a Leſſee for years of Land grants it over to *A.* and *B.* and their Aſſigns, to the uſe of the Grantor and his Wife, for the term of their two lives; Or if one be ſeiſed of Land in Fee, and he bargain or ſell it, or make a Leaſe of it to another in truſt, and for the benefit of a third perſon: Theſe and ſuch like Uſes and Truſts are not within, nor executed by the Statute, but they remain as they were before the Statute. For, all the State is in the party truſted; and the Grantor, or he to whoſe uſe the Grant is, hath nothing but a Uſe, for which he hath his remedy only in *Chancery*, where all theſe matters are determinable. For it is a rule, That as the Queſtions of Uſes and Truſts that are within the Statute, are to be decided and ruled by the Judges of the Common-Law; ſo all other Queſtions of Uſes and Truſts that are out of the Statute, are to be ruled and decided by the Judges of the Chancery, *Co.* 1. 134. *Dyer* 369, 356. *Cromp. Jur.* 65. 58, 59. And the Judges in Chancery, in ruling theſe Uſes, do proceed much after the Rules they went by in the regulating of Uſes at the Common-Law, before the Statute. It is needful then we give you a taſte of theſe.

For this then, we are to know, that before the Statute theſe were the Laws of Uſes.

1. The

1. The Feoffor was to take the profits of the Land; and he might have diſpoſed it in his life time, or at his death to whomſoever he pleaſed; and his friends in truſt were to ſettle it accordingly, or be enforced to it by *Subpœna* in this Court: And if he did not diſpoſe it, the uſe was to go to his Heirs; and if he had died without Heir or diſpoſition, it ſeems the Feoffees ſhould have had the Land.

2. If the firſt Feoffee had conveyed it to a ſecond Feoffee to the ſame uſe, or to a ſecond Feoffee that had notice of the uſes; in theſe caſes the ſecond Feoffee had it to the ſame uſes. But if the Feoffee had ſold it *bona fide*, or conveyed the Land to one that had no notice of the uſes; in theſe caſes the uſe had been gone, and he to whoſe uſe it was, remedileſs for the Land.

3. A Bruit of a truſt, or ones ſaying there was a truſt to another, I being about to buy the Land, becauſe he would not have me buy it, it ſeems is not ſufficient: But a Suit about it, and proof of it in *Chancery*, is ſufficient notice to him that ſhall buy it.

4. If the *ceſtuy que uſe* had appointed the Land to be ſold by his Feoffees, to pay his Debts, the Creditors might have compelled the Feoffee to ſell it; If he in his life time, or by Will at his death, had appointed them to convey it to *J. S*; *J. S.* might have compelled them to it, and ſo their Heirs.

5. The Feoffees (if any occaſion had been) were to bring or defend any Action for the Land, and to plead ſuch Pleas as the Feoffors ſh ould appoint, or be inforced in *Chancery* to it.

6. If the Feoffee die, and the Land deſcend to his heir, the party to whoſe uſe, as it ſeems, had no remedy againſt him.

7. If the Feoffee or Donee to uſe, ſell to one that knows of the uſe, the *Subpœna* ſhall go againſt them both, otherwiſe againſt the party truſted onely, who muſt make a recompence for the breach of truſt, if the Land be gone. And ſo where the party truſted had releaſed to a Treſpaſſor that knew of the truſt; or a Statute or Bond was made to *A.* to the uſe of *B.* and *A.* releaſe to the Obligor privy to the truſt; the *Subpœna* ſhall be againſt them both, albeit ſome hold the contrary.

8. The Feoffor could not have diſpoſed it, or medled with the profits in Law, without the Feoffees leave.

9. If *ceſtuy que uſe* had been attainted of Felony, the Lord could not have remedy by *Subpœna* for his Eſcheat.

10 If the *ceſtuy que uſe* had made no diſpoſal, or had been barred by the corruption of Blood, it ſeems the Feoffee might have rerained the Land for ever to his own uſe.

11. The Feoffees of the Feoffor, deſired it were to do any Act with the Land for the good of the Feoffor, and if he require him to make any Eſtate to another, he muſt have done it: And if the Feoffor had appointed them to convey to *A.* for life, the Remainder to *B*; if *A.* had refuſed, he muſt have conveyed to *B.* the Remainder, for *B.* might have compelled him thereunto in *Chancery*: But ſuch Requeſts were to be made in writing, and could not be made by a Meſſage, or upon deſire by word onely.

12. If one had had four Feoffees of his Land in truſt, and had ſold it to *J. S.* and told two of them, that his Will was that all four of them ſhould convey it to *J. S.* and they two notified his Will to the other two; the firſt two did Enfeoff *J. S.* the other two refuſed, as they might, without ſomewhat under his hand to prove his Will: The Feoffor after ſold the Land to another, and required the other two Feoffees to Enfeoff it; it was ſaid this ſecond ſale was the beſt. The Feoffees in truſt might have given allowance to neceſſary Officers, as Stewards, Bailiffs, and Receivers, and had allowance thereof upon their Account, but could not grant Annuities to their Council, *&c.*

13. The Equity and uſe of the Land, being to go according to Conſcience, the *Subpœna* for Relief herein in this Court is given accordingly.

Theſe were the general Rules by which Uſes at Common-Law were guided, and much

after this are uſes not executed by the Statute, and Truſts of Lands and Goods ordered and guided at this day, as may partly appear in the caſes following.

1. Of Inheritance and Freehold.
2. Of Chattels.
3. Of Goods.

2. In reſpect of the Caſe. Caſes of Uſes and Truſts out of the Statute of *Uſes*, and otherwiſe under the Survey and Order of this Court onely.

Of Inheritance and Freeholds.

If I without conſideration Enfeoff one, and his Heirs of Land, to the intent that he ſhall take the profits thereof and deliver to me and my Heirs: Or to the intent he ſhall account to me and my Heirs for the profit thereof; or to the intent he ſhall re-convey it to me and my Heirs; or to my Heir at Twenty one years old; or to the intent that he ſhall alienate it to *J. S.* and his Heirs, or to whom I ſhall appoint; or I convey it to certain uſes expreſſed: But there are other ſecret uſes agreed upon between us. In all theſe and ſuch like caſes, which are out of the Statute of Uſes, this Court, if any complaint be, will order the parties truſted to perform the truſt.

Sect. 7. Of *Eſtates of Freehold.*

But for the opening hereof further, take theſe caſes

Firſt, If I without any conſideration bargain and ſell my Land by Indenture to one and his Heirs, to the uſe of another and his Heirs (which is a uſe upon a uſe) it ſeems this Court will order this. But if it were in conſideration of money by him paid; here it ſeems the expreſs uſe is void, both in Law and Equity. And if a Woman in conſideration of Four hundred pounds paid her by her ſon bargain and ſell her Land by Indenture to him and his Heirs, to the uſe of her ſelf for life, and after of the Heirs of her ſon; in which caſe by Law, the Fee-ſimple is to the ſon preſently, and the uſe for life to the Mother void; nor is there (as it ſeems) any relief for her in this Court in a way of Equity, becauſe of the conſideration paid: But if there were no conſideration given, *Contra*, *Dyer* 169. 55. *Cromp. Jur.* 55. 155. *Tothil* 188. 99. And yet if I Enfeoff *A.* in Fee of my Land, without any conſideration to the uſe of *A.* and his Heirs, upon truſt that he ſhall alien it to whom I ſhall appoint, and I do make no appointment: In this caſe *A.* ſhall hold it to him and his Heirs for ever, diſcharged of truſt, *Cromp. Jur.* 58, 59. And if I Enfeoff *B.* and his Heirs to the uſe of *B.* and his Heirs, in truſt for *C.* and his Heirs; it ſeems *C.* may be relieved here.

Secondly, If I deliver one money to buy Land for me, and he buy it for himſelf; I ſhall here recover the Land bought, or the money I delivered to him, *Cromp. Jur.* 48. So if I deliver one money to put out for me, and he buy Land with it in his own name, and tells me it is for me, and in my name, and I agree to it; the Court will order me the Land. If I give one money to purchaſe Land therewith to him and his Heirs, and to ſuffer one to take the profits thereof during my life, and he keepeth the profits from me; I ſhall be relieved here.

Thirdly, If I purchaſe Land with my money, and buy it in mine own, and a friends name, to prevent my Wife of Dower out of it, and my friend being requeſted, refuſeth to releaſe his right in the Land to me; I may compel him to it in this Court, *Cromp. Jur.* 54, 55. *Caſtlings* caſe. *Fitz. Account* 23. *Youngs* caſe.

The Defendant confeſſed the truſt was ordered upon notice to convey it accordingly at the Plaintiffs charge, *Caries Rep.* 67.

Sale to pay a mans debts.

Fourthly, A voluntary conveyance was made to friends in truſt, to the uſe of the mans own children, with a Remainder over; the Feoffor being indebted much money, the Court enabled him to ſell part of it to pay his Debts, *Grants* caſe, *Tothil* 42.

Jointenancy.

Fifthly, If Land be conveyed to *A.* and his Heirs, in truſt for *B.* and *C.* and their Heirs, and *B.* by his will deviſeth his part of it; in this caſe the Court would not decree this Deviſe; but held that the truſt was to go joyntly as the Intereſt in Law doth, 6 *Car.* in *Chancery.*

So a man grants an Eſtate in truſt to friends, to the uſe of three Daughters and their Heirs; The Court ordered all to the Survivor, *Barrows* caſe, 10 *Car. Tothil* 84.

Sixthly,

Sixthly, *A.* enfeoffed *B.* in Truſt, and after he by Deed in which *A.* is a party, makes a bargain and ſale to *J. S.* to the uſe of *A.* for life, the Remainder to *W. S.* in Tail, the Remainder to *J. S.* in Tail, but is not enrolled; *A.* dies, *W. S.* dieth without iſſue, *B.* giveth out Speeches to *J. S.* that he hath no eſtate in the Land, and that if he will have any made good, it muſt be by him; whereupon *J. S.* being afraid, accepted of an Eſtate for his own life onely from him; And after ſued in *Chancery* to have the Eſtate in Tail, executed according to the Truſt; and it was denied, and ſaid he had concluded himſelf, and that otherwiſe *B.* ſhould have been ordered to execute the State, *M. S. Car. Southwels* caſe in *Chancery.* *Imperfect Deed.* *Acceptance.* *Covenant*

Seventhly, If one Enfeoff me of Land, to the end, that I ſhall Enfeoff *J. S.* thereof, and I convey it away to another without his privity; if he do afterwards agree to this, it ſeems he is remedileſs, *Tothil* 186, 187.

Eighthly, If one that hath Land in Truſt, convey it to one that hath notice of it, and he convey it to one that had no notice of it: In this caſe it ſeems he that had no notice is ſeiſed to the firſt uſes, *Tothil* 186. *Pills* caſe.

Ninthly, If one convey his Land to friends in Truſt, and after ſell the Inheritance, The Truſt in Equity goes to the Purchaſor, Decreed, *Tothil* 44. 10. *A.* intending to purchaſe a long Leaſe of *B.* and the Reverſion of *C.* be, to avoid latter incumbrances, purchaſed the Leaſe in a friends name, and the Reverſion in his own name, and after made a Feoffment of the Land, with Livery of Seiſin, to the uſe of himſelf, for life, and after of his firſt ſon, and then he granted his term (which was in his friend) to a ſecond ſon; in this caſe the Court would not ſettle the uſe of the Leaſe upon the ſecond ſon; but ſeemed it ſhould go with the Inheritance, otherwiſe Purchaſers ſhall never be ſecured.

Tenthly, If a man had been Enfeoffed to the uſe of a woman *ſole*, who taketh a husband, and they both for money had ſold this Land to *B.* and the money had been paid to the wife, and ſhe and her husband had prayed the Feoffee to make the Eſtate to *B.* after her husband died; the wife in this caſe had Relief here, for it was Decreed that all ſhe did was for fear of her husband, 7 *Ed.* 4. 14. *Fitz. Subpœna* 6. So then now, if a Feoffment be made to one and his Heirs, to the uſe of him and his Heirs, in Truſt, for a woman *ſole*; Equity it ſeems will rule it after the ſame Rule.

Eleventhly, If one ſell his Land to *B.* for Twenty pound at this day, and this is with confidence that it ſhall be to the uſe of *A*; in this caſe *A.* ſhall have no Remedy here, becauſe there is an expreſs conſideration, *Dyer* 109. And yet if the Land be worth more then the money given by a great deal, it ſeems to me reaſonable, that for the overplus the *Chancery* ſhould order it according to the intent: But Regularly it ſeemeth ſuch a conſideration in an Indenture is not examinable, unleſs there be ſome fraud in it.

Twelfthly, If Land be mortgaged to *A.* and *B.* and *A.* onely pay the money, and the intention is, that *B.* ſhall take nothing; in this caſe *B.* ſhall be compelled to Releaſe to *A.* 27 *Eliz.* in *Caries Rep.*

Thirteenthly, If one purchaſe Land for me with my own money in his name in Truſt, that I may enjoy it during my life, and after that it ſhall go to a charitable uſe, and I after Repeal it and give it by Will to another, the charitable uſe it ſeems, is gone in Equity, *Littletons* caſe, *Caries Rep.* 29. If I make a Feoffment to the uſe of my Will, I may diſpoſe this at my pleaſure afterwards: But if it be to uſes according to Articles annexed, it is otherwiſe, *Caries Rep.* 29. A Copihold was ſurrendred to the uſe of *J.* S. to the intent, that he ſhould pay an Annuity to a third perſon, the which he refuſed; the Court ordered him to pay it, with all the Arears. *Tothil* 107. If I purchaſe Lands in the name of another and his Heirs, and die without declaring the uſe, and of my kin procure him to convey the Land to him and his heirs, and he convey it to others, and my next heir ſue, and the benefit of the truſt is made appear to belong to him; the Court will order it to him, *Caries Rep.*

If I be ſeized of Land in Fee, and convey it to *J. S.* and his heirs to the uſe of *W. S.* his Executors and Adminiſtrators for Twenty years, or for any other number of years; in this caſe the uſe will be executed within the Statute. But in caſe where *Of Chattels real, and Terms of years.*

where I be poſſeſſed of a Term of years in being, and grant it to friends, to any uſes and purpoſes in truſt; this is out of the Statute of *Uſes*, or orderable in *Chancery* onely: Where, if the truſt be broken, I muſt have remedy. But for the further opening hereof, take theſe caſes.

First, One poſſeſſed of a Term in years, conveys it to Friends in truſt, to the uſe *A.* for life, and after of the Heirs-males of his body; in this caſe, the Court Reſolved and Ordered, That *A.* ſo long as he hath an Heir, may diſpoſe it; and that an Intail of a truſt of, or out of a Chattel, is not good: But a Remainder, in Tail of a Truſt, may be ordered in Equity, the Judges agreeing to it, *Tattons* Caſe, 7 *Jac. Tothil* 83.

Executors. The General Truſt of an Executor, is to pay Debts and Legacies, and for the ſurpluſage, to account to the ordinary *ad pios uſus*: But if he have any ſpecial Gift in the Will, then he may have it to a ſpecial uſe. But for the truſt of Executors, ſee in other Sections, *Caryes Rep.* 21. *Henry* Earl of *Darby* conveyed certain Leaſed Lands in truſt to *Doughty* his Servant, for payment of his Debts; and upon mediation of an end of Controverſies between the Daughter of *Ferdinand*, Eldeſt Son of *Henry* Earl, and *William* his Yonger Son, now Earl. It was Ordered and Agreed, That *William* the now Earl ſhould pay all his Fathers Debts; whereupon *Doughty* conveyed theſe Leaſes to *William*, and after the Creditors ſued him in *Chancery*, but had no relief, and were ordered to purſue their Remedy againſt Earl *William*, *Hill.* 1 *Jac. Caryes Rep.* 25. The Suit was to be relieved on a Leaſe made to the Defendant in truſt, to the uſe of the Plaintiff; the which appearing, it was ordered, That the Plaintiff ſhould enjoy the Land againſt the Defendant, and all claiming under him that had notice of the truſt, and if the Leaſe were ſold to ſuch as had no notice of the truſt, then that the Defendant ſhall pay to the Plaintiff ſo much money as the Leaſe was worth, *Rook ver. Staples*, 21 *Eliz. Caryes Rep.* 76. The Plaintiffs wife conveyed away her Eſtate to the Defendant her Son, before marriage, and after the Defendant conveyed it to his children: In this caſe the Court conceiving it to be done without any conſideration, did Decree it for the Plaintiff, againſt the Defendant and his Children, *Povyes* Caſe, *Tothil* 98. A Widow being about to marry, to prevent her Husbands diſpoſal of her Leaſes, made them over to Friends in truſt, after marriage he and they for good conſideration ſold them; his wife after his death ſued here, and had relief for them againſt the Purchaſor, but diſburſements were allowed. *Fitz-James* caſe, *Tothil* 43. A *Feme-ſole* was poſſeſſed of a Term to her uſe onely, and ſhe took a husband, and then died; the Court ordered it to the Executor or Adminiſtrator of the wife againſt the husband, *Paſche*, 32 *Eliz. Withnams* caſe. So *A.* being poſſeſſed of a Leaſe for years granted it to *B.* and *C.* to the uſe of *A.* and his wife, and during the marriage *A.* granted away all the Intereſt to a ſtranger; the Court would not order it againſt the wife, *Dyer* 69. *Cromp. Jur.* 65. *A.* being poſſeſſed of a Term, granted it upon a marriage to be had between him and *K. S.* to *J. S.* her Brother, to her uſe, and after marriage *A.* dieth, and ſhe marrieth again, and then ſhe died, *J. S.* took out an Adminiſtration and got the Leaſe; the ſecond husband ſued for it here, but could not be relieved, *Co.* upon *Littl.* 351. See before *Sect.* 5.

Of Chattels Perſonal or Goods. If I deliver Money or Goods, or cauſe a Statute, Bond, or other Eſpecialty, to be made to another, to my uſe, or to any purpoſes or intents in truſt, and he perform not the truſt: I may compel him to it, or to give me recompence for the breach of the truſt here; and therefore if he diſpoſe the Money or Goods to his own, or any other uſe then I appointed, or will not diſpoſe it according to my minde, or releaſe or diſcharge the duty; my remedy is by *Subpœna* in this Court: And if in theſe caſes, the Goods or Money be taken from him, or he have any injury in them, he muſt ſue for Remedy, and I may compel him to it here, 7 *Ed.* 4. 14, 29. 11 *Ed.* 4. 8. *Cromp. Jur.* 43. 62, 65. *Broo. Feoffment* 60. for the opening whereof, take theſe caſes.

First, If I deliver Money or Goods upon any conſideration to *B.* and *C.* for a marriage-portion for *K.* and to deliver to her at her day of marriage, and I do after countermand the Delivery, or *B.* and *C.* will not deliver them to her; it ſeems ſhe may inforce them to it here: But if the Delivery be voluntary and without any inducement and conſideration, *Contra*, *Dyer* 44. *Cromp. Jur.* 54. *Dyer* 49.

Secondly,

Secondly, Two hundred marks were delivered to *A.* to keep, and to deliver to *B.* to keep, and to be delivered to *A.* when he ſhall require it, and after the death of the owner, to deliver it to his Executors or Adminiſtrators: *A.* delivers it to *B.* and takes Bond for it, and then he makes an Executor, and dieth: In this caſe the Executor may in this Court compel *A.* to ſue *B.* for this Money, if he refuſe to do it.

Thirdly, If an Obligation be made to another to my uſe, and it be forfeit, and he will not ſue; I or my Executor may compel him to it in this Court, *Broo. Conſcience* 10. 2 *Ed.* 4. 2.

Fourthly, If a Statute be made to *A.* and *B.* to the uſe of *A.* alone, and the Conuſor get a Releaſe of it from *B.* alone; in this caſe *A.* ſhall have Remedy here againſt them both, as ſome ſay againſt *B.* onely, and not againſt the Conuſor, as others ſay, 11 *Ed.* 4. 8. 5 *Ed.* 4. 7. *Caryes Rep.* 14, 15.

There is now by the new Ordinance for the Regulation of the *Chancery*, Provided, That no Relief be given here upon any Truſt or Agreement, made or declared after the Five and twentieth of *March*, 1655. Concerning Lands, or any other thing in the Realty, unleſs it be contained in writing, and ſo averred in the Bill, ſave in caſes where the poſſeſſion hath gone along with the party claiming the Truſt. *Article* 44.

Upon a *Bargain, Agreement or Promiſe*; and how it ſhall be taken and performed.

Sect. 8. About Land.

One may here have Relief againſt a man upon his Promiſe and Agreement, further then by the Law he can have: For opening whereof, know theſe things.

Firſt, If I for Money purchaſe and contract for Land, with, or without writing, and have paid all, or any conſiderable part of the Money, or have given ſecurity for it, or am any way engaged to pay the money, or it be by way of Exchange for other Land, the which he hath entred upon; but I have no aſſurance of the Land: I may here compel the ſeller, or if he be dead, his Heir, or Executor, or Deviſee, if he did deviſe it, that hath the Land, to aſſure the Land according to Agreement. And if the ſeller ſell away the Land to another, that had notice of the firſt Contract with me, I may have my *Subpœna* againſt them both, 24 *H.* 7. 41. *Cromp. Jur.* 44, 45. *Tothil* 24.

Secondly, Articles of Agreement were briefly drawn between two, and their hands to it, for the ſale and aſſurance of Land for Money; the ſeller refuſed, and upon complaint here, was ordered to make the Aſſurance according to the Agreement; the manner of the Aſſurance referred to a Maſter of the *Chancery*, *Chivars* caſe. *Hill.* 4 *Car.*

Thirdly, A Suit was here upon a Parol-Agreement, to execute an Aſſurance of Land upon a Marriage-Agreement, the caſe being thus: *A.* ſuitor to *B.* the Brother of *A.* comes to *B* and tells her, That if ſhe will marry his Brother, he will aſſure her of Twenty pounds a year Land for her Joynture, and ſhe did marry him, and after he refuſed: It was Decreed in this Court and the Court of Requeſts both, That he ſhall be compelled to it.

Fourthly, It was ſaid by *Glanvile*, that heretofore the *Chancery* did not uſe to Decree Parol-Agreements for Aſſurance of Land; but it is now otherwiſe, for where there is any execution of it by payment of all, or any conſiderable part of the Money for the Land, there it doth Decree it: And where the Agreement is for ſelling Land by writing, albeit it be not ſealed, or any earneſt given, or money paid; yet this Court doth uſe to Order the Party to aſſure the Land accordingly. Otherwiſe it is where the Agreement is for any other thing but Land. And in 19 *Jac.* in *Briggs* caſe, *B. R.* a Prohibition in this caſe was denied to the Council of the Marches of *Wales*, upon a Suit there to have Land aſſured upon an Agreement, becauſe however it be, he hath Remedy at Law by Action of the Caſe; yet this is for damages onely, and cannot force him to aſſure the Land: And in all caſes Regularly, where Articles are under Hand and Seal, for the aſſuring of Land for Money, the Court here doth uſe to Order it to be done according to the Agreement.

Fifthly, But it ſeems the Law is not in all points, as Maſter *Glanvile* before ſaid; for in *Hill.* 9 *Car.* In the *Exchequer*, one ſued by Engliſh Bill upon a Parol-Agreement, to have Land aſſured, and ſhewed, That he had provided Two thouſand

thouſand pounds, the purchaſe Money, to his great loſs, *&c.* and the other refuſed it, and to aſſure the Land; in this caſe, the Court would not Decree the Aſſurance of the Land, but Decreed he ſhould pay the Plaintiff damages for his loſs. So in 13 *Car. Olivers* caſe, The Agreement was to convey the Land as Council ſhould adviſe, the Paper-book drawn, agreed, and to be ingroſſed, and then the ſeller refuſed to proceed; in this caſe, the Court would not Decree it to be done, becauſe no Articles nor Money paid, but a bare Parol-Agreement. And yet ſome ſpecial circumſtance may make this binding; and therefore a Verbal-Agreement between Lord and Tenant, becauſe the Tenant was an Ancient Tenant, and hath been at charge in building, was Decreed, *Kings* and *Hunts* caſes, *Tothil* 65, 66.

Sixthly, *A.* Covenant with *B.* upon the marriage of his Daughter, to levy a Fine of the Land to *D.* and the Daughter being dead, and ſome Money unpaid, *A.* ſold away the Land to others; in this caſe, he was Ordered for a Hundred Marks, to make the Eſtate good, *Tothill* 47, 48. *Mich.* 8 *Car. Pages* caſe.

Notice. Seventhly, A Suit was in this Court upon a Parol-Agreement to aſſure Land, and the Agreement was Eighteen years before, and the Suit was againſt Purchaſors that came in upon valuable conſideration (to wit) the buying in of Mortgages, and paying of Debts and Fines and Proclamations, and Five years time without Claim were paſt; in this caſe, albeit it did appear, that the Purchaſor had notice of the Agreement, yet it was diſmiſſed by the Court to the Law; and in theſe and ſuch like caſes, where an Action lieth at Law, the Purchaſor, or Party to whom the Promiſe is made, may uſe that and wave his Remedy in *Chancery*, 21 *H.* 7. 43.

Nudum pactum. Eightly, If I and another man make an Agreement about any thing by word onely, and it hath *quid pro quo* in it, and I have no witneſs to prove it, I may ſue him here, and put him to anſwer it upon his Oath: But upon a *nudum pactum* there is no more Remedy to be had in Chancery, then is at the Common-Law, 8 *Ed.* 4. 4. *D. & St.* 12. 154.

Ninthly, If it be agreed by Indenture of Feoffment of Land between me and another, That the Feoffee ſhall pay Ten pounds to a ſtranger by a day, or Ten pound a year; otherwiſe, that the ſtranger and his Heir ſhall enter on the Land; or that the Land ſhall be conveyed to a ſtranger, or the like: in theſe caſes the ſtranger for not payment, cannot enter by Law. But ſome ſay the Feoffee may be compelled in this Court to execute the Eſtate according to the Agreement, *D. & St.* 94. But if by Agreement there be a condition to give a Re-entry to a ſtranger; this is not good in Law, nor will this Court execute it, for it is againſt a principle of Law, *Cromp. Jur.* 50. *D. & St.* 100, 101. *Cromp. Jur.* 49. Nor is the Feoffer when he doth enter, bound in conſcience to give the Land to the ſtranger.

Tenthly, If I by Deed poll, and not by Indenture, make a Feoffment in Fee, Gift in Tail, or Leaſe for life, the Remainder over in Fee rendring a Rent; this Reſervation is not good in Law: But I ſhall have Remedy upon the Equity of my caſe in this Court, *D. & St.* 2. 19.

Eleventhly, A Bill was preferred here, ſuppoſing Ten ſhillings paid, and Two thouſand pounds to be paid for Land, to have the Lands aſſured, and upon a Demurrer it was over-ruled, becauſe it may be to prepare for an Action of the Caſe: But it ſeems in this Caſe the Court would not decree the Aſſurance, *Trin.* 38 *Eliz. Williams* caſe, *Tothil* 72.

Twelfthly, If any Agreement have been made by writing for the aſſuring of Land, or any thing elſe, and the writings are loſt; the party grieved muſt have his Remedy in this Court.

Thirteenthly, If I make a Leaſe of Mills for years, excepting the profits thereof for my life; this exception is not held good in Law; yet it is thought I may have it allowed in Equity, becauſe of the intent, *Cromp. Jur.* 64.

Fourteenthly, If a woman *ſole* take a conſideration for a Leaſe of Twenty one years, and then marry, and ſhe and the husband make the Leaſe promiſed; after the Leſſee doth ſurrender, and take a new Leaſe for another Twenty one years; the husband dies: In this caſe the wife is not to enjoy the reſt of the firſt Leaſe, becauſe

cauſe the Surrender was voluntary, *Caries Rep:* 21.

Fifteenthly, One for Seven thouſand pounds, whereof not a peny was paid, and yet an acquittance given thereof by the Feoffor, enfeoffed one in Fee of his Land, but took the profits thereof all his life; in this caſe the Feoffee ſhall not have this Land in Equity; and if he do go about to take it, the Feoffor ſhall be relieved here againſt him, *Dyer* 169. *Cromp. Jur.* 153.

Sixteenthly, The Cuſtoms of a Mannor were in queſtion between Lord and Tenants, and Tenant and Tenant, and a general Agreement made by Deed indented and enrolled here, and a Bill to eſtabliſh it, and nothing could be found but the Deed: And yet the Court would not alter it, albeit it was objected the Lord was at the time of Agreement Tenant in Tail, and ſome of the Tenants Infants and *Femecoverts*, *Caries Rep.* 22.

Seventeenthly, If one enter into a Statute to *J. S.* who doth afterwards by Indenture of Agreement, promiſe and agree with the Conuſee, that in caſe the Conuſor did fail of payment, execution ſhould be done upon ſome certain Land onely: In this caſe, if after he ſhall ſue execution upon any other Lands, the party grieved may have relief here, and compel him to perform his Agreement, and have an Injunction alſo if he deſire it, *Pulverteſts* Caſe, *Caries Reports* 37. *Injunction.*

Eighteenthly, The Plaintiff ſued to be relieved on a promiſe for a Leaſe of Lands and to ſtop a way; and exception was taken to the Bill becauſe the Defendant had Remedy at Law and not allowed. So to remove a Nuſance or the like; for at Common Law nothing can be recovered but damages; but this Court may order the thing it ſelf to be done, *Caries Rep.* 20. 53.

Nineteenthly, The Plaintiffs Bill was, that he leaſed a houſe to the Defendant, and did Covenant to repair it, and then the Defendant did Covenant to keep it ſo, and that the Defendant, as well to make the Plaintiff break his Covenant, as to free himſelf from his Covenant, did interrupt and threaten the workmen ſo, that they durſt not go on, and ſo the houſes are decayed, and the Plaintiff without remedy; the Defendant demurred, pretending the Plaintiff had remedy by Law; but was overruled and put to anſwer, *Caries Rep.* 59.

Twentithly, A Bill was brought upon a Promiſe by word, for leave to dry clothes in a Garden, and was diſmiſſed for the ſmallneſs of the thing, 21 *Eliz. Hambies* Caſe, *Caries Rep.* 76.

One and twentithly, The Bill prayed Relief againſt the Defendant as Brother and Heir, for that the Plaintiff had paid to his deceaſed Brother Thirty four pounds for a Leaſe, and he died before it was made, and therefore deſired his Leaſe or the money, and was Relieved, *Caries Rep.* 77.

Two and twentithly, One Joyn-tenant promiſed the other, lying on his death-bed, he would not take advantage of the ſurvivorſhip, but ſuffer him to diſpoſe of it by his Will, by which he deviſed part for the payment of his Debts, and the Survivor was ordered to make the Eſtate accordingly, *Caries Report* 81. *Jointenant.*

Twentithirdly, The Plaintiff bought of the Defendant the Reverſion of a Copihold, which he could not enjoy, as was confeſſed by the Defendants Anſwer; Ordered by the Court to ſhew cauſe why he ſhould not repay the money back again, which he had received on the bargain, *Caries Rep.* 93.

Twentifourthly, Upon the hearing of the Cauſe, it appeared that the Suit was to be relieved upon a Promiſe made by the Defendant to the Plaintiff, to ſurrender a Leaſe upon the payment of a hundred marks; and becauſe the matter was meet for the Common-Law, it was diſmiſſed, *Caries Rep.* 95. 97.

Twentififtly, Bailiffs of a Town promiſed a Leaſe; the Court upon this, would not give Relief againſt any of their Succeſſors, but againſt the ſame perſons, as common perſons, upon the promiſe, *Caries Rep.* 103. *Bayliffs of a town*

What Agreement made by an Infant, or a Woman-covert will binde here. See before *Sect.* 4.

If

Sect. 9. Upon a Miſpriſion in a Conveyance of Land or other Deed.

If any miſtake be in a Deed, that it be not made according to the intent and agreement of the party; it may be holpen here. For the opening whereof take theſe Caſes.

1. If part of the Land bought and ſold, be left out of the Deed, or the word Heirs, being in Fee-ſimple, or the like, be omitted; and the conveyance be made upon good conſideration; this Court will rectifie it. See after for this, *Caries Rep.* 16, 17. Dean and Chapter of *Briſtow* made a Leaſe, miſtaking the name of the Corporation; and the Court held that for Leaſes made for reaſonable time, and upon good conſideration, there ſhould Relief be given here, *Caries Rep.* 32. The Leſſee in the Leaſe, was not named in the Premiſſes of the Leaſe, but in the *Habendum* onely; Decreed to be good: And being referred to the two chief Juſtices and chief Baron, was by them certified to be good in Law, *Butlers* caſe, 22 *Eliz.* *Caries Rep.* 88.

2. A man by Bill here ſuppoſed, that he had conveyed more Land by the Deed, then was intended and agreed; in this caſe, becauſe it appeared the Defendant was a Purchaſor upon unvaluable conſideration, the Court would not relieve the Plaintiff, *Cliffords* caſe, 4 *Jac.* in *Chancery.* And yet ſee a caſe where more Lands paſſed by a Fine, then was intended, and the party relieved here by the Judges conſent, *Caries Rep.* 20.

Grant of a Term.

3. But if one poſſeſſed of a Term, grant it to one for life or in tail, and after to another for life or in Tail; in theſe caſes, where by Law it ſeems the firſt will take all; no relief ſhall be neither in Law, nor in Equity to him in Remainder: But if it were a Deviſe, after this manner it would go in Law and Equity according to the intent, *Cromp. Jur.* 64. *Plow.* 520. 539. *Dyer* 74. 253. 277. *Co.* 8. 95. 10. 47. So if I have a Term of years and grant ſo much thereof as ſhall be to come at my death; it ſeems this grant is void in Law and Equity. But if it had been by Will thus deviſed, relief might have been in Equity at the leaſt, *Cromp. Jur.* 63.

Intail of a Term.

Deviſe.

4. Miſtakes in the making of a Bond, in either of the parties names, may be holpen here, *Colſtons* caſe, *Tothil* 27.

Bond

Power to make Leaſes.

5. If a Power be reſerved to make Leaſes by a Covenant without a Tranſmutation of poſſeſſion; no help can be here, becauſe it is void in Law: And if it be upon a Change of poſſeſſion, and the Power be not preciſely followed; that is doubtful, and rather more ſtrong againſt help; for then the Eſtate works, and the power gone, and upon Wills no help, *Caries Rep.*

6. If one be bound to me for money, and the ſame day after the ſealing of the Bond, I give him a Releaſe for other things, and by miſtake, whereby this Bond alſo is releaſed: In this caſe I may be relieved here, and ſhall recover the money notwithſtanding, *Tops* caſe, *Tothil* 27.

7. *Haddon* the Husband was ordered to procure his Wife to levy a Fine, and to enter into a new Bond of Five hundred pounds, becauſe the old Bond was worth nothing, by the miſtake of the Writer, 10 *Jac.* *Tothil* 140. See more *Section* 8. before.

But now by the new Ordinance for the Regulation of the *Chancery*, it is provided, That no Relief ſhall be there upon any Averment of any other intention of the Parties, to a Deed made after the Five and twentieth day of *March*, 1655. other then what doth appear in the Deed it ſelf. *Article* 45.

Sect. 10. Upon a Defective Aſſurance of Land, to enforce the perfecting of it.

If a Conveyance for Land be defective, and the Eſtate not well executed to the Purchaſor, according to the intent of the Parties, for lack of words ſufficient in the Deed, or for lack of Livery of Seiſin, Attornment, Inrollment, or the like; and there were a good conſideration given for the Land: In theſe caſes the Purchaſer may compel the party, in whoſe power it is to perfect the Eſtate, to do it; and this he muſt do in this Court, *D. & St.* 85. *Plow.* 302. *Tothil* 44. 48. 182, 183. 138.

For the further opening whereof, take theſe Caſes.

1. If I for money ſell Land to one, and the word Heirs is left out in the *Habendum*, I ſhall be compelled to amend it; and ſo when leſs is granted then was intended; and ſo for any other miſtakes, *Caries Rep.* 16, 17. A Meſſuage was demiſed

(*cum*

cum pertinentiis only: And becauſe ſundry Lands had been occupied therewith for the ſame Rent, and by Leaſe of the ſame words; the Lord Chancellor *Bromley* and the Judges ordered it ſhould all paſs, though perhaps they will not paſs in Law by theſe words. But it ſeems in ſuch like caſes it is very conſiderable in Equity, what the value of the Land is, and what money is given: For if the Houſe with the Appurtenances be ſufficient for the money, unleſs the intent of the parties were to grant the whole, it ſeems to me reaſonable that no Extent ſhould be made further then the Law makes.

2. The Anceſtor takes money for a Leaſe, and dies before it is made; the Heir muſt make it good, or repay the money, *Car. Rep.* 77.

3. If I buy a Rent *de novo* for money, and take a Grant of it by Word without Deed, (which is not good) I may compel him here to make me a Deed of it, *Doct. & Stu.* 86.

4. If one for money ſell me Land by Deed, but Livery of Seiſin is omitted; I may compel him afterwards to do it by the help of this Court. And if one for money ſell me Land in two Counties, and have given me Livery only of the Land in one County; this Court will order him to make Livery in the Land in the other County; or pay back part of the money, *Cromp Jur.* 49. *D. & St.* 37. *Car. Rep.* 17.

5. So regularly, if a Conveyance be imperfect for lack of Attornment of the Tenant, the Tenant ſhall be compelled to attorn by the power of this Court. And ſo it was in *H.* 3 *Car.* *A.* was Leſſee for twenty one years, and leaſed to *B.* for ten years, rendring Rent: *A.* without the privity of *B.* did grant the Reverſion to *C.* and *B.* refuſed to attorn, and *C.* thereupon ſued *B.* in Chancery, to compel him to attorn; and in this caſe it was decreed by the Maſter of the Rolls, with the aſſent of the Maſters of the Chancery, That he ſhould attorn and pay the arrearages; Juſtice *Whitlock*, then Aſſiſtant, being utterly againſt it; and of his opinion were the two Chief Juſtices, Chief Baron, and Juſtice *Dodridg*: But they all agreed, the parties themſelves to the Aſſurance may be compelled to make Livery. And it hath been often denied here to compel him to attorn, who is at liberty by Law; eſpecially where the party quarrelleth at the Tenants Eſtate, or entreth into part of the Land, or hath covenanted for recompence in caſe of Not-attornment, *Car. Rep.* 4. *Higham contra Lad.* The party before Livery of Seiſin, and before Aſſurance perfected, ordered to be perfected, *Paſc.* 7 *Car. Tot.* 129.

6. But in all theſe caſes, if the Conveyance be made without any good conſideration, this Court will not give relief. And therefore if a Rent be granted without Deed, and nothing is given for it; or a Reverſion is granted, and nothing is given for it; the Grantor cannot be enforced to perfect it, *Cromp. Jur.* 49. *Doct. & Stu.* 37.

7. An Eſtate was made by Covenant, not good by Law, and ordered here to be made good, *Princes* Caſe, 40 *Eliz. Tot.* 85.

8. A Deed not enrolled was decreed againſt the Heir of the Land, but agreed it ſhould not bind any other Eſtate challenged by Survivorſhip or otherwiſe, *Pawles* Caſe, 14 *Car. Tot.* 55.

9. The Defendant would have avoided an Eſtate for lack of Livery of Seiſin, and the party grieved complained here; and it appearing he had quietly enjoyed it twenty five years, it was decreed he ſhould quietly enjoy it without Livery of Seiſin, *Bydens* Caſe, 17 *Jac. Tot.* 54.

10. *A.* demiſed a Manor, excepting the Court-Baron and Perquiſites, &c. which Exception in Law is void. If the Leſſee in this caſe refuſe to do ſuit to the Court, the Chancery will compel it, becauſe of the intent, *Car. Rep.*

If I contract for goods, and have any wrong in it, that the party doth not perform with me; if I give *quid pro quo*, that there be a good conſideration in it, I may have remedy here: But if there be no conſideration in it, *contra.* Wherein take theſe Caſes.

Upon a Promiſe about Goods or Debts. *Nudum pactum.*

1. If one promiſe me Ten pounds for a Treſpaſs he hath done to me, no remedy is given me for this in Law, nor here in Equity, *D. & St. l.* 2. *c.* 24.

2. So if one promiſe, without good conſideration, to make me a Watch, I cannot compel him to it here, *Cromp. Jur.* 49.

3. The ſon made a general and voluntary promiſe, without any conſideration, no advancement coming to him by his father, to pay his fathers Debts; and upon a Suit here it was diſmiſſed, *Alexanders* Caſe, 7 *Car.*

4. The Obligee agreed with the Obligor to give him day for the Debt, and he ſue him or a Surety before the day; in this caſe he may be relieved here, and it ſeems by Injunction, 9 *Ed.* 4. 41.

Injunction. Sect. 11. Upon an extremity uſed on a Mortgage or Statute, Bond or other Engagement.

If one that hath any Engagement of me by Feoffment, Mortgage, Statute, Obligation or otherwiſe, take me upon any advantage upon any ſtrict condition or agreement, and uſe extremity towards me; I may be relieved in this Court, where he will be compelled to accept of Reaſon. For the opening whereof take theſe Caſes following.

In a forfeiture of Land. Mortgage.

1. If I make a Feoffment to another, upon a Condition to be done by me, and I do not perform it, and thereby loſe the Land, I am remedileſs in Chancery, *D. & St. l.* 3. *ch.* 33. But if I convey Land to another only as a Mortgage, and for a Security for money he doth lend me; in this caſe, albeit the time of Redemption be paſt, yet upon the paying of the money, intereſt and damage, I may have my Land again, at any time, by Decree of this Court, *D. & St. l.* 3. *ch.* 33. And in 8 *Car.* in Chancery, between *Coxwell* and *Gardner*, Sir *Robert Rich* ſaid, that it was the conſtant courſe of this Court, That if *A.* mortgage Land to *B.* for a Hundred pounds, and the Land is more worth, and it be forfeit; that *A.* notwithſtanding this may aſſign it to *C.* to ſatisfie this debt, or mortgage it to another to ſatisfie this debt, or deviſe it to his children: And in theſe caſes *C.* the ſecond Mortgagee, or children, ſhall by Order here, upon payment of the money, intereſt and charge to *B.* his Executor, &c. have it decreed againſt them. *Experientia, Higates* Caſe, 14 *Car. Tot.* 78.

2. And yet when it hath continued long, as twenty years or upwards, this Court will not eaſily give back the Land. And if the Mortgager make a Feoffment of it to a ſtranger, and ſo extinguiſh the Condition, unleſs it be to the end to pay the debt, the Feoffee perhaps may not have this advantage, *Car. Rep.* 53. And in 39 *Eliz. Crowthers* Caſe, *Tot.* 79. the Plaintiff being Heir to Lands in Tail, and likewiſe deviſed to him by his mothers father, and theſe being mortgaged, and redeemed by a ſtranger, having ſold it again, with the conſent of the father and mother, could not be relieved here.

Heir to Land entailed.

But now by the new Ordinance for the Regulating of the *Chancery*, there are ſome Alterations made: For thereby it is provided, *(i.)* from and after the ſaid five and twentieth day of *March*, One thouſand ſix hundred fifty and five, no Relief ſhall be given in *Chancery* on a Mortgage after three years forfeiture, or unleſs the Suit be commenced within one year after the Entry and poſſeſſion of the Mortgagee continued, except upon ſome new Agreement between the parties themſelves in Writing, and except in caſes of Infancy, Coverture, *Non ſanæ memoriæ*, or beyond Seas: In which caſes the perſons concerned ſhall commence their Suits within two years after the Diſability removed, or in default thereof ſhall be debarred from any Relief afterwards. And in caſe of ſuch new Agreement, the like Rule to be obſerved, after the time by ſuch new Agreement limited ſhall be expired, *Art.* 49.

In caſe of Mortgages to be made from and after the five and twentieth day of *March* aforeſaid, where the Mortgagee is in poſſeſſion by Recovery at Law or otherwiſe, he ſhall not (except by ſpecial Agreement in writing) be put to accompt for the yearly profits accrued after ſuch his Entry, before the Suit for Redemption be commenced; but the ſame ſhall belong to, and be retained by him without accompt, if by his Anſwer, or at the Hearing, he ſhall elect to take the ſame in ſatisfaction of the Intereſt of his money whiles he had the poſſeſſion, except the Mortgager ſhall rather elect to be concluded by the Mortgagees Examinations upon Interrogatories concerning the profits by him received, *Art.* 50.

That ſuch Mortgagee, before the Mortgager be admitted to redeem, ſhall be paid his whole Principal money with damages, and his full Coſts incurred before his

his entry, and alſo after the Suit commenced, to be taxed by the chief Clerks upon a Bill of Coſts; wherein, and in all other caſes of Mortgages to be made from and after the time aforeſaid, the Mortgagee ſhall be charged (in caſe the Lands be let to Tenants) with no more then what he did, or might fairly have received without fraud or his own wilful default: And where the Lands are unlet, and kept in his own hands, with no more than four fifth parts of the true yearly value. But if after ſuch Entry any caſual profits by Fines upon Copiholds, Wood-ſales, or otherwiſe ſhall be received by the Mortgagee above the yearly Revenue of the Lands mortgaged, then the ſame ſhall go in abatement of Principal and Intereſt due before ſuch Entry. Provided, that where in the caſes aforeſaid an Account ſhall be, all lawful Taxes and neceſſary Diſburſements and Allowance ſhall be allowed to the Mortgagee, *Art.* 51.

That where upon a Bill exhibited by a Mortgagee to enforce Redemption, or to have the Eſtate abſolute, a Decree paſſeth, and is ſigned and enrolled, the time thereby limited for the payment of the Mortgage-money with damages ſhall not be enlarged without conſent of parties in writing, *Art.* 52.

That no Injunction be granted to ſtay the Mortgagee from his Suit at Law till the final hearing of the Cauſe, except it be only to reſtrain the Mortgagee from the making of Waſte upon the mortgaged Land, *Art.* 30.

3. A Purchaſor of Land, *bona fide*, ſubject to a Recognizance, and the Heirs of the Recognizor or Obligor ſhall have relief againſt a Penalty alſo.

4. A Copiholder in Fee ſurrendred to the uſe of one and his heirs, upon condition of Redemption; after this he writes down his Debts, and doth will part of his Land ſhall be ſold to pay his Debts: After his death one of the Creditors doth pay the money at the day of Mortgage; yet the Surrender was enrolled, and another Creditor ſued him and the Heir here, and had a Decree that the Land ſhould be ſold to pay the Debts, and if any remained it ſhould go to the Heir, 4 *Eliz. Car. Rep.* 7.

5. *A.* ſold Land to *B.* that was his Heirs, and mortgaged other Land, to the end the Heir ſhould aſſure it when he came of age, before when *B.* dyed without any Heir known: In this caſe the Mortgager, to avoid danger, had relief here; where it was ordered, the Heir ſhould convey the Land to two of the Six Clerks, there to remain till the Heir be known, *Cuttings* Caſe, *Car. Rep.* 29.

So Leſſee for years rendring Rent, and two men ſtrive for the Reverſion; upon a Bill againſt them, and payment of his money Court according to his Leaſe, he had an Injunction to forbid them both to trouble him, *Car. Rep.* 46, 47. But regularly this Court doth give relief againſt them that take advantage upon any ſtrict Condition, for undoing the Eſtate of another in Lands, upon a ſmall or trifling default.

6. If the Conuſee of a Statute extend the Land in the hands of one of the Purchaſors, and ſpare all the reſt, he may be compelled to do it on all, *Car. Rep.* 111, 112.

7. If one grant a Rent-charge out of all his Land, and after ſell it by parcels to divers perſons, and the Grantee force one only to pay it; he may here be relieved, and force the reſt to contribute, and the Grantee to take no more of him then his proportion: But then he muſt make all that are chargeable with the Rent Defendants, and put them to ſhew cauſe, if they can, why they ſhould not contribute, *Car. Rep.* 2. 23. 92. *Contribution.*

8. When the Conuſee upon a Statute, or Plaintiff on a Judgment, hath received ſatisfaction; the Plaintiff or Conuſor, his Heirs, Executors or Adminiſtrators, or a Purchaſor charged or chargeable by it, may force him, his Executors or Adminiſtrators, if he be dead, to acknowledg ſatisfaction on the Judgment, or to deliver it up. And if Statutes be very ancient, this Court will force the Owners of them to deliver them up without ſatisfaction. And ſo the Court will force the delivery up of old Bonds, *Tot.* 178, 179. *Car. Rep.* 45, 46. *Statutes. Judgment.*

9. If a man have received the money due from me upon a Statute, and yet the Statute lies againſt me; in this caſe it hath been ſaid, I ſhall not have remedy here,

becauſe it is a Record againſt which no Averment lieth. But it ſeems the practice is otherwiſe, and there is as much Equity for this as in caſe of another Engagement, *Cromp. Jur.* 43. 22 *Ed.* 4. 6. *D. & St.* 23. *l.* 1. *c.* 12.

The Plaintiff had an Execution for Three hundred pounds, and was ordered here to take it out only for One hundred pounds, *Car. Rep* 51.

Obligations. Bills. If I have paid my money on an Obligation with a Condition after the day, or a ſingle Obligation at the day and according to Law, and have no Acquittance for it; or have at or after the day, or otherwiſe ſatisfied it, and he hath accepted it and is ſatisfied, and yet he keeps the Bond, &c. and refuſeth to give me a Diſcharge: In theſe caſes I, or my Executors &c. after my death, may enforce him, his Executors &c. after his death, in this Court to diſcharge it, and deliver up the Engagement, 22 *Ed.* 4. 6. 7 *H.* 7. 11. *Caryes Rep.* 74. 11 *H.* 7. 14. *Tothill* 26, 27.

10. If I have forfeited a Bond, and am in danger to have a great Penalty recovered of me thereby, I ſhall have relief here: As in caſe where one doth his beſt to pay money at the day, and by being robbed, or ſome other miſchance is let, and he tenders it in a ſhort time after: So where part of the money is paid, and yet the whole Engagement lieth, and the party that hath it doth refuſe to deliver it up, or to receive the reſt of his money, being tendred ſhortly after the day, or acknowledg what is paid, &c. *Car. Rep.* 1. 22 *Ed.* 4. 6. *D. & St.* 23. *Cromp. Jur.* 43. So where the Bond is to do any thing elſe, and the thing is done, and Condition performed, *Car. Rep.* 45, 46. So where one hath a double Security of me for a ſingle Debt, as a Bond and Goods in pawn, or the like; I ſhall here force him that hath it to deliver up one of them, *Cromp. Jur.* 43. 16 *Ed.* 4. 9. *Tot.* 26, 27.

11. If I be bound as a Surety with another for a Debt, the which he hath paid, or he hath paid part of it, and hath a further day given him for the reſt, or by agreement hath a further day, or he is releaſed of the Debt, or the Creditor hath agreed with him to take ſome other ſatisfaction: In all theſe and ſuch like caſes I may have advantage of this, and be relieved in Chancery, 6 *Ed.* 4. 41. *Cromp. Jur.* 44.

12. If my Scrivener that doth uſe to put out and receive my money, receive my money at the day, I having the Bond, and will not deliver it up, I may compel him in this Court, *Hunts* Caſe, *Hil.* 22 *Jac. Tot.* 175.

13. If one enter into a Bond, or any other Engagement for money unlawfully gotten, as at Dice or Cards or to procure a Marriage, or on a Simoniacal Contract, or upon a Cheating Contract, or the like; here is the place to be relieved againſt it, and have it took up or cancelled, *Tot.* 24, 23.

So if I have given an Engagement for that which is nothing worth, neither gain to me, or loſs to him; as for Debts, things in Action not recoverable, or the like, *Cromp. Jur.* 45. 44. *Car. Rep.* 17. 37 *H.* 6. 12. *Tot* 23. 26. 27.

A. had a ſon he intended to preſent to the Church of *Dale*, and he being ſickly preſented *C.* for the preſent, taking Bond of him of Six hundred pounds to reſign upon requeſt: *C.* is inſtituted and inducted; after the ſon of *A.* becomes healthy, and *C.* is required to reſign; he refuſed; his Bond is ſued, and coming into this Court for relief, it was denied to him, and the Bond agreed to be good in Law and Equity, *Trin.* 6 *Car. Wood* and *Berries* Caſe in Chancery, *Tot.* 26, 27. But if one make a Bond not to marry without conſent of his friends, it ſeems this is not good, and the Obligor will be relieved here, *Tot.* 26, 27.

14. One *Harris* and *J. S.* two young men, needing money, came to one *King* to borrow One hundred pounds of him; who would not lend them money, but told them he had a Cabinet which he would lend them, and this coſt him but One hundred and eleven pounds; and this he lent them, and took a Bond of them to pay him Four hundred pounds for it five years after if *King* did live ſo long: *Harris* died, *King* died; the Executor of *King* ſued the Bond againſt the other young man, who complained here, and it was decreed that the Executor ſhould recover but One hundred and eleven pounds upon this Bond, and no Coſts nor Damages, that the

Suits

Suits in Law ſhould be ſtayed, and the Bond delivered up to be cancelled, 6 *Car.* in Chancery.

15. If I have entred into an Engagement, and had a Releaſe of it upon good cauſe, and have loſt it, I ſhall have remedy here: But it ſeemeth otherwiſe, if the Debt be by matter of Record, 22 *Ed.* 4. 6. *D. & St. l.* 1. *c.* 12.

It hath been ſaid, if money be paid on a ſingle Obligation, and the Obligor hath no Acquittance for his money, that he ſhall not be relieved here, *Car. Rep.* 17. But I take it, the uſe of the Court is otherwiſe at this day, and that the Obligee ſhall be here forced to deliver up the Bill.

16. If money be paid upon the Redemption of a Mortgage by Indenture without taking any Acquittance, it ſeems the Mortgagee muſt bring in the Indenture to be cancelled here, *Car Rep* 17.

17. The Plaintiff and his Father were bound to the Defendant in Five hundred pounds, to ſtand to the Award of the Lord Chief Juſtice; who ordered, That the Plaintiff who had the Reverſion in fee, and the Father who had the Eſtate for life, ſhould make ſuch Aſſurance as the Defendant ſhould reaſonably deviſe: The Defendant tendred an Aſſurance to the Father to be ſealed, who being old and blind deſired time to adviſe with his friend: The Plaintiff ſealed, and his Father afterward did offer to ſeal; and then the Defendant ſaid he did not care for his ſeal, but he put the Bond in ſuit upon the Fathers refuſal, and it was ſtaid by Order of this Court, *Car. Rep.* 105.

But it is now provided by the new Ordinance for the regulating of this Court, That no Relief ſhall be here againſt a Bond for paiment of money only, and entred into after the Five and twentieth day of *March*, One thouſand ſix hundred fifty five, *Art.* 43.

Nor may any Injunction be had in any caſe, but by Motion in open Court, and upon the merits of the cauſe. But the Defendants taking of a Commiſſion, or ſitting of an Attachment, is not ſufficient ground for an Injunction, *Art.* 27.

Injunction.

And if in any of theſe caſes, the party to whom ſuch Engagement is made, make uſe of it in any Court by way of Suit againſt him that entred into it, he may in this Court by Injunction ſtay his Suit there, and ſhall have the matter ordered here as in Equity is fit to be done, *Tothill* 23. *Sucklins* Caſe, 11 *Car.* 24.

Sect. 12. Againſt the extremity of a Forfeiture in other caſes.

For the clearing of this Point, ſee it in theſe following Caſes.

1. If there be Tenant for life, the Remainder over, and the Tenant for life doth give way to the ſuffering of a Common-Recovery, which *rigore juris* is a Forfeiture of his Eſtate; in this caſe he may be relieved here, as was done in *Staffords* Caſe, 10 *Car. Tot.* 184.

Of Lands.

2. If I convey my Land on Condition to be done by me, unleſs it be in the caſe of a Mortgage before, and I fail, I am remedileſs. So if I be a Leſſee for life or years, and make a Feoffment of the Land, and forfeit it; in theſe caſes if the Lord take advantage of it, there is no help for me in Chancery. So if I do commit Waſte, and the Land be recovered from me, *D. & St.* 176. 20 *H.* 6. 3. 21 *H.* 7. 7. 10 *Ed.* 4. 6. 4 *H.* 6. 24.

3. *Hil.* 9 *Car.* In Sir *Edward Hungerfords* and *Wilſons* Caſe in Chancery, it was held, That a Leſſee ſhall have relief in Equity, or the Grantee of the Reverſion againſt the Leſſor that doth enter for a Forfeiture on the Land for not payment of the Rent: And yet if the Leaſe whereby the Rent is reſerved be a diſhoneſt Leaſe, as gotten of the King by a falſe Surmiſe, or the like, *contra. Car Rep.* 32.

4. If a Leſſee for years of Land, upon a Condition of Forfeiture for not payment of Rent, make divers Under-Leaſes, and after by Agreement between him and the Leſſor he makes a Forfeiture, and the Leſſor enter, and then makes a new Leaſe to the Leſſee for years; in this caſe the Under-Leſſees and Tenants may have relief here againſt the Leſſor and Leſſee upon this practice, *Cromp. Jur.* 64, 65.

5. If a Lord enter upon a Copiholder for a Forfeiture by the Copiholder, it

it ſeems the Copiholder is remedileſs in Law and Equity both, *Co.* 4. 24.

And yet a Copiholder within age was admitted, and his cuſtody committed to the Mother; and her Under-tenant did waſte, and being preſented, the Lord ſeiſed it for the forfeiture, and held it many years, and died, and his Heir held it; and yet the Copiholder had an Order for it here till it were recovered by Law, *Littons* Caſe, *M.*41,42. 42 *Eliz. Car. Rep.*6.

And ſo where a Copiholder took Timber without leave of the Lord, and imployed it upon the Copihold, albeit this *rigore juris* be a forfeiture, yet the Copiholder was holpen in this Court, *Tot.*46.

The Father committed a Forfeiture, the Son was admitted; this was not allowed as a diſpenſation with the Forfeiture, in Equity, as was ſaid; and yet agreed, That if the Lord had ſeiſed a Heriot after the Fathers death, that this had been a diſpenſation with the Forfeiture in Equity. *Smiths* Caſe, *Clarks* Caſe, *Tot.*45.

6. An Eſtate in Tail was here ordered to be cut off, contrary to a Proviſo in a Deed, only to make a Jointure, and then the Remainder to be ſetled as before, and that no forfeiture ſhould be hereby, *Baylies* Caſe, 38 *Eliz. Tot.*82.

Of Goods.

7. If my goods be taken as Felons goods, upon a forfeiture for Felony, or as a Waif, Eſtray, Deodand or Wreck; or be forfeit upon an Attachment, by my not appearing in a Court; in theſe caſes there is no relief to be had in Equity for me. So upon an Outlawry in any Action, albeit it be upon an unjuſt cauſe, and I have no notice of it, yet I am remedileſs: But if there be any undue practice in it, haply I may have ſome remedy againſt the Plaintiff in this Court, *D. & St. l.*2. *c.*3. 20 *H.*6.3. 21 *H.*7.7. 35 *H.*6.27.

Sect. 13. Againſt the injuries of other Courts of Juſtice.

If any other Courts of Juſtice, by their over-nice and ſtrict obſervation of the Rules of Law, do me injury, I ſhall have relief here. For which know theſe things.

Judgment.

1. If there be any extremity uſed upon a Judgment had againſt me in another Court for money or Land, this Court may not vacate the Judgment, but may order the Perſons as it ſhall ſee cauſe in Equity And ſo was it reſolved notwithſtanding the Statute of 4 *H.*4.23. upon a ſpecial Debate by the Kings command, 14 *Jac.* But in caſes tending to overthrow of Judgments had in other Courts, this Court neither may, nor will examine or revoke them: For if ſo, there will be no end, and this will render them invalid, 37 *Ed.* 3. 14. *Dyer* 20. 27 *H.*8.15. *D. & St. lib.*1. *ch.*18. *Car. Rep.* 74, 75.

2. If one make an Obligation in one County, and the Obligee ſue in another, and there recover it; it is ſaid the Defendant may have the Plaintiff here, and ſhew that by that he loſt the advantage of pleading ſome truth, by which he might have avoided the ſuit, 9 *Ed.*4.15. *Cromp. Jur.*42.

3. If two Copartners bring a *Q. impedit*, and one count falſe, by Covin between him and the Defendant; I having damage thereby, may ſue them both here, 6 *Ed.*4. 10. *Cromp. Jur.*43.

4. If a Fine be reverſed in a Court, by inſpection and proof of Witneſſes, for Nonage, and in truth he is of full age, it ſeems relief may be here: And if the Conuſor after Reverſal ſell the Land to another, the *Subpœna* will lie againſt Buyer and Seller both, *Dyer* 261.301. *Cromp. Jur.*66.

5. If one have Land in antient Demeſn in execution upon a Statute, and do after recover it there by a fained Recovery, the party grieved that cannot falſifie there, may be relieved here, *Cromp Jur.*45.6.

6. If a Suit be againſt me in any other Court, upon an unreaſonable Engagement, I may have relief here by Injunction. See *Sect.* 12. before, and *Injunction* at *Sect.*

7. If a Fine or a Recovery be paſſed in the proper Court, and thereby a juſt Claim paſt, little hope of Relief is here, unleſs there be ſome notorious practice in it; for in theſe caſes the Court is very tender.

8. If another Court entertain a Suit for Tythes not tytheable, Prohibition lieth here, *F.N.B.*41.

The

The Heir entring into his Fathers houſe, had of his goods worth five ſhillings, and the Defendant ſued a Bond of Five hundred pounds againſt the Heir, as Executor of his own wrong: And proving he ſold or gave away the goods, a Verdict paſſed for the whole Five hundred pounds; which appearing by the Certificate of the Juſtices of Aſſiſe, an Injunction was granted to ſtay all Proceedings in this Action, and to forbid any new Action, till the Court have determined the matter, *Car. Rep.* 49.

The Plaintiff had a Judgment for Three hundred pounds, and was ordered to take Execution but for Two hundred pounds, *Car. Rep.* 52. A Debt upon a ſingle Bill ſatisfied, and the Bill not delivered, was ſued, and Execution gotten, and the party relieved here, 21 *Eliz. Owens* Caſe, *Car. Rep.* 74.

If one ſue here to be diſcharged of a Legacie, and after the Defendant did ſue for it in the Spiritual Court, this Court granted an Injunction, *Car. Rep.* 73. *Legacy*

If one man do unduly get a Judgment in the name of another, Relief may be had here, *Car. Rep.* 76. And ſo in all ſuch like caſes, where any conſiderable circumſtance of Equity is in the caſe; otherwiſe it will be diſmiſſed, *Car. Rep.* 76.

The Plaintiff deſired relief againſt an Obligation of One hundred pounds, with an inſenſible Condition put in Suit; for that the Plaintiff being deſired by the Defendant to ſeal a Releaſe, he deſired time only to be adviſed thereof, which the Defendant would not yield to, but hath put the Bond in ſuit, though no ways damnified, and now is ready to ſeal it, and an Injunction was granted, *Car. Rep.* 78. *Injunction.*

If one ſue for Tythes of Land not tytheable, it ſeems relief may be had here, *Car. Rep.* 79. *Tythes*

A drunken man ſued for words ſpoken in his drink, ſought for remedy here, but could have none: *Qui peccat ebrius, luat ſobrius. Car. Rep.* 93.

The Plaintiff ſought to be relieved upon an Obligation of Three hundred pounds, which he entred into to make a Jointure to his wife, in conſideration of One hundred ſeventy four pounds promiſed to him by the Defendant in marriage, which was never paid to him: In this caſe an Injunction was ordered, *Car. Rep.* 112.

The Defendant pleaded *Non eſt factum* to a Bond of Four hundred pounds, and it paſſed with the Defendant. The Plaintiff preferred his Bill, ſuppoſed he had promiſed payment after the Verdict, and it was received, 35 *Eliz. Suttons* Caſe, *Tot.* 137. *Non eſt factum*

But now by the new Ordinance, no Injunction is to be granted in any of theſe caſes before the Hearing of the Cauſe, to ſtay any Suit at Law; but upon matter confeſſed in the Defendants Anſwer, matter of Record, or in Writing under hand and ſeal produced in Court, *Art.* 28. Nor may any Injunction be granted after Plea pleaded at Law, or Rules given, to ſtop a Trial at Law, or any Pleadings or Proceedings preparatory to a Trial, *Art.* 29.

Sect. 14. Upon the hard dealing of the Landlord againſt the Tenant a Copyholder.

If the Lord of a Copihold-Manor deny to do right to his Tenant a Copiholder, according to the cuſtom of the Mannor; the Tenant may compel him to it by the help of this Court. Wherein take theſe things.

1. If the Copiholder will put out his Tenant, that payeth and doth his ſervices; or if he ſurrender in Court to the uſe of another, and the Lord refuſe to admit him to whoſe uſe the ſurrender was made; or will not keep Court for the benefit of his Copiholder; or exact uncertain Fines, they being certain; a *Subpæna* lieth.

2. So if he will not admit him upon a Deſcent.

3. So if he be ouſted of his Copihold, and the Lord will not hold a Court whereat he may ſue for his Right.

4. So in caſe of a falſe Judgment, upon a Petition to the Lord to redreſs it.

5. So to compel him to grant a Licence to let it.

6. A woman Copiholder for life, the Reverſion is granted to two for their lives, *cum poſt mortem vel forisfacturam* of the woman it ſhall happen, and ſhe take a huſband that doth ſurrender to the firſt in Reverſion, who is admitted and dieth; and after the next deſireth admittance, and could not have it, but the Lord entreth as an Occupant, as he might, and the husband and wife were willing to ſurrender to him in Reverſion for life; and the Lord refuſing to keep a Court, or leave the poſſeſſion, was ordered to do both in this Court, *Tot.* 3. 44, 45. *Car.* 3. *Dyer* 264. *Fitz. Subpæna* 21. *Kitch.* 82, 89. *F. N. B.* 12. *Cromp. Jur.* 51, 53.

7. Lands

7. Lands that had gone for Copihold of Inheritance, allowed here till they be recovered by Law, *Tot.*44,45.

8. A Copihold granted by the Lord at a Court held out of the Manor, made good againſt the Lord by Decree of this Court, *Tot.*45. *Marks* Caſe.

9. *Mich. Eliz.* in Chancery, the Defendant would not admit the Plaintiff this Copihold, under pretence that he had forfeited it by cutting Trees; but he was ordered to do it, becauſe he could not prove the cutting was by his directions, *Tailors* Caſe, *Tot.*140.

10. The reaſonableneſs of a Fine upon a Surrender ſhall be judged here; a years value of the Land was allowed good, *Car. Rep.*54.

11. The Court compelled the Lord to admit his Tenant, a Copiholder, to ſue at Law without any forfeiture, *Tot.*3. And yet ſee before *Sect.*12.

12. But if the Lord enter upon a Copiholder for a Forfeiture by breach of the Cuſtom, no relief is to be had here in this caſe, *Co.*4.24. *F.N.B.*12.

13. *Stone verſ. Whitmore, Hil.*1649. The Plaintiff ſued the Defendant to compel him, being Lord, to take the Plaintiffs Fine, which he pretended was certain, and to admit him; the Defendant demurred, becauſe it did belong to Law; but it was overruled, and the Lord ordered to keep Court and ſet the Fine, and then that a Trial be at Law, but the Coſts ſuſpended till the Trial were paſt: For the Plaintiff had no means in Law to compel the Lord to keep Court, &c.

14. A cuſtom to pay an incertain Fine at every alienation of the Lord, will not be admitted here; otherwiſe it may be to pay it at the death of the Lord. But a cuſtom to pay Fine incertain at the death or alienation of a Copiholder, may be good, and will be allowed here, *Car. Rep.*7.

15. But this Court doth not order for all Tenants in general, nor for any longer time than the preſent, except it be by agreement between the Lord and Tenants, which if reaſonable is here decreed, *Car. Rep.*27.

Sect. 15. For the Surety againſt the principal Debtor or Creditor.

For this, take theſe Caſes.

1. If I be Surety for another to pay money, or to do any other thing, and he doth it not, but ſuffer me to be damnified by it: In this caſe I may here, if I have no remedy at Law, compel him to diſcharge me, *D. & St. lib.*1.

2. If I be bound with *A. B.* to pay money at a day, and he is bound to ſave me harmleſs, and at the day I pay the money, and then ſue my Counterbond, he may avoid this Suit at Common-Law; but in this Court I may compel him to pay me the money again, *M.*31,32 *Eliz. Cromp.*43,44. in Chancery.

3. If the principal Debtor and the Creditor will by agreement without my privity that am the Surety, continue the Debt after the firſt day of payment, when I do ſuppoſe it to be paid; in this caſe the Court will compel the Creditor to take his relief of him, and diſcharge me, my Heirs, Executors, &c. *Miles* Caſe, 5 *Car. Hares* Caſe, 10 *Jac. Sanders* Caſe, 10 *Jac. Tot.*181.

4. If the principal Debtor have Lands deſcended, and his Heir have conveyed them in truſt, I may here compel the ſale of them to pay the Debts, *Tot.*182.

5. If he aſſign Debts, which be things in Action, to me, I may recover them here, *Tot.*182.

Sect. 16. Upon a Deteiner of my Lands, Deeds or Goods, to diſcover and recover them.

If a man hold my Land from me, I may ſue him here, and ſuppoſe he doth keep my Evidences from me alſo, and put him to ſet forth by what title he doth claim it; wherein are theſe things.

1. If I have occaſion to bring an Action for the Land, and cannot tell the Tenant, I may ſue the Occupier here, and he muſt ſhew what he or any other claimeth to his knowledg, that I may know who to ſue; yet ſome doubt of this. The Defendant held over his Term; the Court put him to ſhew what time his Leaſe was, *M.* 6 *Car. Tot.*183.

So the Conuſee of a Statute did here force the Leſſee for years to ſet down all the particulars of his Leaſe, to ſee whether it were extendible or not, 11 *Car. Tot.*183. *Tot.*20. *Creſwels* Caſe, *Tot.*99. *Car. Rep.*16.

If one detain from me my Evidences, and they be not in any Box or Cheſt locked, and I know not the certain Contents of them, ſo as to bring an Action at Law for them,

them, I may recover them here. For explanation, take theſe Caſes.

1. *Wrights* Caſe, *circa* 28 *Eliz.* in Chancery one did exhibit his Bill for Evidences of Land, and made himſelf a title to the Land, and the Defendant made himſelf a title alſo, and juſtified the detaining of them; and it was referred to a Tryal at Law for the title, and ordered, That he ſhould have the Evidences with whom the Verdict paſſed, *Cromp. Jur.* 44. *Caries Rep.* 16.

2. If the Heir happen to get Writings, that by Law do belong to him, but in Intereſt to the Executor; or the Executor get writings that by Law do belong to him, but in Intereſt to the Heir, as Bonds or Statutes for the ſecuring of the Land of the Heir, or the like: In theſe caſes they may enforce the delivery of them here, *Broo. Oblig.* 18. 68. *Chattel* 6.

3. If one be bound in a Bond to me for money, and he hath gotten the Bond; I may ſue here for the Bond, and for the money without the Bond, *Weſt.*

If one have any other goods of mine, and I cannot tell what they be, I may ſue for them, to Diſcover and Recover them in this Court, 39 *H.* 6. 16. And if I have loſt my goods, and cannot tell who hath them; I may here ſuppoſe any man to have them, and put him to diſcover on his Oath, whether they have or know of them; and albeit the caſe be ſuch that I may by a Suit at Common Law recover them, yet I may here in this Court, for preparation to that Suit force the poſſeſſor to make, and ſet down an Inventory of them, *Cromp. Jur.* 45. If Lands be given by one Deed ſeverally to two men, he that hath the Deed ſhall be compelled here to ſhew it, for the defence of the others Title, 9 *Ed* 4. 41. If the King had granted to me all the goods of *A* attainted by Felony, and I know not the certainty of them; yet I may compel any man that hath them, to make an Inventory of them in this Court, 36 *H.* 6. 26. where Deeds do concern as well the Defence of the Title of the Tenant for life, as of him that poſſeſſeth the Deeds, being to him in Reverſion or Remainder; in this caſe it is uſual for this Court to order them to be brought into the Court, *Caries Rep.* 19. So in ſuch like caſes, where the Land is yet in queſtion, or the Court hath not determined who ſhall have it, *Caries Rep.* 52. 18 *Eliz.* The Plaintiff ſued for Tokens he had delivered to the Defendant, when he was a Suitor to her; ſhe confeſſed part of them in her hand, which the Court forced her to deliver forthwith; and for the reſt, that the Plaintiff left them againſt her will, and ſhe delivered them to a friend of the Plaintiffs that dealt between them; and for that, ordered that he take his Remedy againſt the friend, *Caries Rep.* 55. Where the Court doth ſee cauſe, it will force the Defendant to bring the Writings in Court, by a *Ducens tecum*, *Caries Reports* 67. 43. 52. 53.

For this, take theſe caſes.

1. This Court would not change an Eſtate in Fee, depending on an Eſtate in Tail, *Tothil* 84. *Sect.* 17. About an *Eſtate* in *Tail.*

2. An Eſtate in Tail was Ordered to be cut off, againſt the Proviſo of a Deed, onely to make a Wife a Joynture, and to ſettle the reſt as it was before, *Bailies* caſe, 38 *Eliz. Tothil* 82.

A. deceaſed, late Father to the Plaintiff, did give the Land Intailed to the Father of the Defendant, reſerving forty pound Rent to him and his Heirs, after granted twenty five pound, part of the Rent, to the Plaintiffs for their lives; the Defendants Father did Attorn and pay the Rent to the Plaintiffs, till two years before his death, after the Iſſue in Tail refuſed, but was ordered here, *Caries Rep.* 92.

A Father being Tenant in Tail of Land, ſells this Land, and leaves as much free Land to diſcend to his Heir in Tail; in this caſe it was ordered that the Heir ſhall repay the money paid by the Purchaſor, according to the Fathers Will, or elſe the Plaintiff ſhall have the Fee-ſimple, Ruled, *Pearces* caſe, *Tothil* 183, 184.

In this Court a man ſhall have Relief for the recovery of his Land, Debt, or Duty, where by Law he hath none. For the knowledge whereof take theſe things. *Sect.* 18. About the way of *Recovery* of *Land*, a *Debt*, or *Duty.*

1. If I have a good Title to Land, but have loſt my conveyance, I may recover my Land in this Court, *Caries Rep.* 24. *Goſlets* caſe. The Plaintiff ſued to have

his Leaſe, and ſuppoſed it to end at *Lady-day*, 1604. had it Decreed; and after, finding the Leaſe, it did not end till 1605. after he moved he might continue the Land till 1605; but it would not be granted without a new Bill, *Caries Rep.* 25.

Rent. 2. If I have a good title to Rent, but no means to gain it, as if it be a Seck, and I have had no Seiſin of it, or another Rent, and I have not had any Attornment of the Tenant, or the Rent is by ſome accident without any recompence for it diſcharged, or the like, I may recover it here. So if it hath been uſually paid, but I can ſhew no Deed of it, *Tothil* 171, 172. 77. 173. And yet ſome ſay in the caſe of lack of Seiſin of a Rent, I ſhall have no remedy here, *Co. upon Littl.* 159. So the Lord Keeper and Judges, *M.* 1596. *Caries Rep.* 5. But a man poſſeſſed of a Leaſe for years Deviſed a Rent out of it, without clauſe of diſtreſs, and made his Wife Executrix, ſhe married, and ſhe and her Husband ſold the Leaſe; in this caſe the Court Ordered the Recompence to be made by the Executor, and would not charge the Land, 9 *Jac. Wats* caſe, *Tothil* 77.

Executor.

Eſpecialty loſt. 3. If one ow me money on an Eſpecialty, and I have loſt it, or cannot come at it, yet if I can prove it, I may recover my money here, *Caries Rep.* 25.

Error 4. If I ſue for, and recover a Debt at Common-Law, and for Error it is Reverſed in the Exchequer-chamber, I may after notwithſtanding recover it here. *Cuttings* caſe, 40 *Eliz. Caries Rep.* 8.

Limitation. 5. In ſome caſes, albeit I be gone in point of time by the Statute of Limitation, 21 *Jac.* by not ſuing for it in time; yet I ſhall have relief here, eſpecially when it hath been demanded within the time; or when it is given and directed to be paid by Will, *Tothil* 178. 179. 53.

Elegit 6. An Elegit being returned and filed, and the time thereof elapſed, and yet the Plaintiff unſatisfied his Debt; he was relieved here, and the Elegit revived, *Tothil* 179.

Extent 7. This Court will order the Lands extended to be delivered to the Plaintiff in execution, and at the value it is found, *Tothil* 178.

8. If the King had given Forfeit-goods to *A.* he might have recovered it here, 39 *H.* 6. 26.

9. But if Lands be extended by a Jury much under value, and there be no practiſe in the caſe, it ſeems no remedy is to be had here; for the Debtor may help himſelf by payment of the money, *Cromp. Jur.* 55. 15 *H.* 7. *Dupleys* caſe. And if a Defendant hath waged his Law in an Action, and thereby the Plaintiff is barred, or a Grand Jury in an Attaint do finde with the *Petit* Jury, though never ſo much againſt Truth, and a man have twenty witneſſes to diſprove it, this Court will not give Relief, *D. & St.* 31. *Cromp. Jur.* 49.

Bar in Action Final.

For this obſerve theſe caſes.

Sect. 19. About a *Deviſe* and how it ſhall be taken and performed in *Equity.*

1. The meaning of a Will is to be performed, and will be ordered here, *Cobs* caſe, *Tothil* 141.

2. An Averment of a Will not allowed by Law, will be received here, to have the intent performed, *Tothil* 188, 189.

3. Lands Deviſed to two, to be equally divided betwixt them and their Heirs, Agreed and Ordered here to be a Tenancy in Common, and the Survivor denied to have all, *Tothil* 79.

4. Doctor *Ford*, by his Will deviſed his Land to his Wife in theſe words, (*Non per viam fidei Comiſſa*) for which his Son might ſue her; but hoping that if his Son grew thrifty, that at her death ſhe would leave the Remnant of theſe Leaſes to him; ſhe married *Greyſal*, and before marriage he did write to her that ſhe ſhould diſpoſe theſe Leaſes at her death, after marriage he ſells the Leaſes; the Son ſues here, but had no relief, *Caries Rep.* 22, 23.

The Plaintiffs Father, ſeiſed of Land in Fee, by a *Nuncupative* Will deviſed three hundred pound out of his Land, to be paid to raiſe portions, two hours before his death, and becauſe the Father had diſ-inherited him of other Land, the Court freed him of this payment, 13 *Jac. Samburns* caſe, *Tothil* 184.

The Plaintiffs Father did fully reſolve that he ſhould have the Leaſe, make a kinde of Deviſe of it to him, divers times ſay that he had given it to him, the Defendant

that

that had the Leaſe, ſay and proteſt, as he was a Chriſtian man, he ſhould have it, offered an Agreement, and to give him two hundred pound for the Leaſe; it was Decreed he ſhould have it, *Redmans* caſe, 28 *Eliz. Tothil* 69. A Deviſe void in Law, by reaſon of a miſ-recital of a Grant, and lack of Attornment, Decreed here to be good, *Bacons* caſe, *Tothil* 79. A breach of a condition upon a Deviſe, was here holpen againſt the Heir, *Serjeants* caſe, 39 *Eliz. Tothil* 77. If there be a great overplus of Eſtate, and no diſpoſal thereof by the Will; this Court doth Order it to the Teſtators Kinſfolk, and to charitable uſes, *Breretons* caſe, 6 *Jac. Tothil* 87. A Deviſe of money to a woman, if ſhe would be divorced from her husband, was decreed good, without Divorce, *Tenants* caſe, 6 *Jac. Tothil* 78. If one poſſeſſed of a a term, Deviſe it to another beſides the Executor, and he have not Aſſets to pay debts and ſell it, there is no relief to be had here: But if he have enough beſides, and yet ſell it, the Legatee ſhall have relief here againſt him; and if the buyer did know of the Deviſe, the *Subpœna* ſhall go againſt them both, but the Court will not avoid the ſale; before the ſale haply the Court will not avoid the ſale, but before the ſale happily the Court will prohibit it, *Plow* 539. 519. See more in *Section* nine before. If *A.* and *B.* be bound joyntly and ſeverally to *C.* in a Bond of a hundred pound, and *C.* gives to *A.* all the debts he owed him; *C.* died, and his Executor ſued *A.* for the debts. *A* complained for relief here; in this caſe the Lord Keeper doubted upon the manner of the Deviſe onely, being clear, that if the debt had been from *A.* alone, he would have relieved him, 6 *Car.* in *Chancery*. If one give his Leaſes to his wife, thus hoping that if his Son be towardly ſhe will leave them to him, but not that he may ſue her, and before her ſecond marriage he promiſed to leave them to him; yet after the marriage he ſold them, and no remedy could be had here, *Caries Rep.* 23.

A Legacy was recoverable here; but by the new *Ordinance* it is provided, it ſhall be ſued for at Common Law. Enquire how and where, and what the practice and experience is.

On this, obſerve theſe caſes.

Firſt, If Leſſee for years Demiſeth parcel of the term to another, and after, covinouſly, forfeit his Leaſe for a condition broken, and then take back the Land or Leaſe again; in this caſe the Leſſee of parcel ſhall be relieved here, 1 *Ed.* 4. 4. *Cromp.* 64, 65. *Caries Rep.* 18. See *Section* 12. before. Upon a Fraudulent practice to avoid a *Leaſe.*

Secondly, If one enter into a Statute in my name, it ſeems I cannot avoid it here, but I ſhall have remedy by a Writ of *Deceipt*; but if he be of my name alſo, I may againſt this avoid it by Plea, *Caries Rep.* 22.

If, before the Statutes of *Fraud*, the Debtor had made a Deed of Gift of his Goods, to defraud his Creditors, and continued the poſſeſſion of them, and took Sanctuary and died there, his Executors having the Goods might be chargable here, 16 *Ed.* 4. 9. *Caries Rep.* 18. To avoid a *Debt.*

If one buy Goods of me for money, and after, being a begger, and purpoſing to defeat me of my Debt, gives the Goods to one *J. S.* but uſeth them all his life time and dies, and then his wife kept them; ſhe married, and her husband kept them; in this caſe *J.* it ſeems may here ſue the husband and wife upon this Covin: For they cannot be charged by Law as Executors of their own wrong, becauſe the Goods were the Goods of *J. S.* in Law, 16 *Ed.* 4. 9 *Cromp. Jur.* 62, 63.

2. If one ſue for Land, and the Defendant, hanging the Suit, make ſecret conveyances of the Land; this Court will order him to diſcharge the Land thereof, *Tothil* 108.

3. If a Scrivener appointed to draw a Deed of a Farm, and all the Land belonging to it, makes it of purpoſe of the Farm *cum pertinentiis*, and after gets a Grant of it himſelf, to avoid the Deed; this Court will avoid this, *Harbins* caſe, *Tothil* 99. To avoid a *Convey. nce.*

4. If I be a ſimple man, and another cunningly procures me to convey my Land to him for nothing; albeit he ſell it to Purchaſors, and a diſcent be caſt, yet this Court will order the reaſſuring of the Land, *Lewis* caſe, *Tothil* 42, 43. To get a man's Land from him.

5. If Goods be given to defraud Creditors, in ſuch a caſe as the gift be not

avoidable by the Statutes, poſſibly the Party may be relieved here, *16 Edw.* 4. 9.

Fraud upon *Fraud.*

6. If a Debtor will colude with ſome of his friends to deceive his Creditors, and his Friends break their truſt with him; it ſeems this Court will not give relief in this caſe, *Fallere fallentem non eſt fraus*; and yet ſometimes the Court, in this caſe hath ordered the Goods, ſo conveyed by Fraud to the Creditors, *Caries Rep.* 13.

7. If a copy of Court-Roll be indirectly entred, the party wronged may have Relief here; and albeit the Homage finde the Copy true, yet this will not hinder Relief, *Caries Rep.* 55. If one ſell Land, and before the Aſſurance made, convey it to another that knoweth of the ſale, it will be holpen here. So if he convey it to another that hath notice, *Caries Rep.* 82. So if he convey it to any of his children, *Tothil* 107.

Upon falſhood in Fellowſhip.

If two Executors be, and one of them releaſe the Debts (as he may) and there be not enough beſides to perform the Will; in this caſe the other Executor may ſue him in *Chancery*; and if there be *covin* between him and the Debtor, the *Subpœna* may be had againſt them both, 4 *H.* 7. 4. *Cromp. Jur.* 106. 11 *Ed.* 4. 2.

Sect. 20.

Executor.

Uſe.

And if one be bound to two in an Obligation, to the uſe of one of the two onely, and the other releaſe the Debt (as he may by Law) he to whoſe uſe it is, may have relief here, and againſt them both, if the Debtor were privy to it, 7 *H.* 7. 11. If two have any Commodity of Land or Goods together as Jointenants, or the like, and one of them take, or ſell all from the other: In this caſe, if it be in caſe where he hath no remedy by Law, as in ſome caſes of Merchants that are Partners, and in ſome others; the party grieved may have remedy here, *D. & St.* 12. 175. *Cromp. Jur.* 49. And yet in *Caries Rep.* 21. it is ſaid, That if one Jointenant take all the profits, the other ſhall have no remedy, except there be an Agreement or Promiſe of Account. If two Copartners or Jointenants joyn in a *Q. Impedit*, and the one of them plead covinouſly; this Court will compel him to joyn with the other in the Plea or Preſentment. So if Lands be given ſeverally, by one Deed to two men; he which hath the Deed, ſhall be compelled to ſhew it for the defence of the others title, *9 Ed.* 4. 41. *Caries Rep.* 15.

Jointenants.

Executors.

One Executor ſued another, ſuppoſing that divers Goods were left with them to be delivered to children at their full age; and the truſt and charge being joynt, which may ſurvive, he deſires they may give Bond one to the other, that they, or if they die, their Executors ſhall pay the children their Portions when they come of age; and it was thought fit to be decreed, *Caries Rep.* 79. Two are made Executors to the uſe of children, one of them gets the Eſtate into his hands, makes a Teſtament, and gives in Legacies as much as this, and all the reſt of his Eſtate, and dies; his Executor was ordered here, firſt of all, out of all the Eſtate, to ſatisfie this Eſtate of the firſt Teſtator, *Wray* Chief Juſtice caſe, *Caries Rep.* 86, 87.

Sect. 21.

To have Prohibition to ſtop an injury.

Waſte.

In ſome caſes where an injury is done to me, the which is continued and increaſed, I may ſtay it here by a prohibition; as in caſe of ſome Waſtes, by cutting down of Woods, or ploughing up of Grounds; wherein take theſe things.

Firſt, A Prohibition was granted here to ſtay the ploughing of ancient Paſtures by the Tenant thereof, *Tothil* 52.

Leaſe without impeachment of *Waſte.*

Secondly, The Leſſee of an Eſtate diſpuniſhable of Waſte, was here prohibited to deſtroy the houſes, *Morgans* caſe, *Tothil* 92. At another time to do Waſte in Woods and Houſes, *Kings* caſe, 4 *Car. Tothil* 82. And the Leſſee of ſuch a Tenant was here forbidden to do Waſte, 11 *Jac. Tothil* 82. And a Biſhop made a Leaſe before the firſt of Queen *Elizabeth*, without impeachment of Waſte, which was confirmed by the Dean and Chapter. And the Leſſee cut Timber, and it being moved here, the Lord Keeper ſaid, becauſe the Biſhop was puniſhable for Waſte; therefore he would forbid it, otherwiſe not. But he did not forbid the ſale of what was cut, *Trin. 6 Car.* The Biſhop of *Sarums* caſe.

Timber.

Thirdly, Leſſee for life the Remainder for life, the Remainder in Fee and the firſt Leſſee for life doth Waſte; in this caſe, albeit he in Remainder in Fee hath no remedy by the Common-Law; yet he ſhall have a Prohibition to reſtrain him from doing more Waſte, *Cromp. Jur.* 48, 49. *Caries Rep.* 20, 26. Tenant in Tail

after

after poſſibility of Iſſue extinct, ſhall not be reſtrained, *Doct. & Stud. Lib.* 2. *chap.* 3.

Fourthly, Birch-Trees in ſome Countries agreed to be Timber-Trees, and here forbidden to be cut down, 8 *Jac. Tothil* 86.

Fifthly, If the Leſſee of a Copiholder dig Gravel, or cut Trees, or the like, which is not Waſte in the Copiholder; yet he may be reſtrained, *Caries Rep.* 63.

Sixthly, Two houſes adjoyning being upheld by one main Wall ſtanding upon the Freehold of either party, and one of them hath neceſſary Rooms ſtanding upon the others Kitchen, and he went about to pull down his under Rooms, which would be the ruine of the upper Rooms; an Injunction was granted to ſtay it till examination of the matter, *Caries Rep.* 90.

Sect. 22. About an *Inclosure.*

This Court doth order Incloſures of Common Grounds, when it is for common good; wherein take theſe caſes.

1. It hath ordered Colledges, and the Perſon of a Church to agree hereunto, *Tothil.*

2. Becauſe Lands have been incloſed thirty years together by conſent of moſt of the Pariſh; it was ordered ſo to continue, *Pigots* caſe, 4 *Jac.* And yet in 2 *Car.* in *Ingrams* caſe, the Court would not binde a man that did not agree to it.

3. *M.* 22 *Jac. Trigs* caſe. The Court would not decree an Incloſure, becauſe it was a Depopulation, and the Plaintiff refuſed to give the Defendant amends for his common.

4. If any prejudice be to the High-ways, or any converſion of Tillage into Paſture, or ſuch like publick prejudice by the Incloſure; this Court will not order it, *Tothil* 109, 110, 111.

5. The Defendant once agreeing after diſagreed, was ordered to ſtand to his firſt Agreement, *Foxes* caſe, 13 *Car.*

Deeds how to be proved here.

A Releaſe was pretended to be loſt, and it was depoſed it had been ſeen; but this not allowed for proof, unleſs he would ſwear, that he had ſeen it ſealed and delivered; it is not ſufficient to ſay he ſaw it after it was a Deed: And no Deed is to be allowed here, unleſs it be produced, or the Execution thereof proved, *Caries Rep.* 31.

Sect. 23. *Accompt.*

A Bill was brought againſt Executors to the Father, who was Guardian in Soccage for the profits of the Land which he had received of his Wives Childes Land, and the Plaintiff did aver they had Aſſets, and the Defendants demurred, becauſe they were not privy to the Account, but were ordered to anſwer, *Caries Rep* 54. The Suit was for certain Rents, Fines, and Woodſales, received by the Defendants Teſtator during the Plaintiffs minority, and it appeared, That if the Plaintiff had made good proof he had been relieved: A Commiſſion was therefore awarded by conſent, *Caries Rep.* 114. And yet in the caſe of *Fleetwood*, 21 *Eliz.* it was ordered, That if the Plaintiff did charge the Defendant by the Bill, for the Iſſues and Profits meerly by way of Account, then that the Defendants ſhould not anſwer: But if they were charged by way of promiſe, then that they ſhould anſwer, *Caries Rep.* 114. But it ſeems the practice is otherwiſe. This Court regularly will not make a void Award good: But ſome uſe it will make of it for Evidence and Advice, eſpecially when an Award is final and reaſonable, as to all the matters in difference between them; and ſometimes it will Decree the very things themſelves contained in the Award; and then eſpecially, when the parties hands are to it, ſhewing their Agreement to it, *Tothil* 16. And therefore a Suit being for Land about a Cuſtom, and both parties agreeing, that the Judges of Aſſize had made an Award in it; it was decreed, that both parties ſhould perform it, and that either party ſhall have Injunctions one againſt the other, *Burtets* caſe, 2 *Eliz. Caries Rep.* 47. and 19 *Eliz.* The Plaintiff ſued to have an Award made by certain Arbitrators indifferently choſen to be performed; for performance whereof, both parties were bound one to other: One part whereof was, That if any difference ſhould after ariſe, the ſame Arbitrators ſhould end it; and the Court ordered the Bill ſhould be retained, *Barkers* caſe, *Caries Rep.* 57. And 19 *Eliz.* there was a Suit to have an Award in writing, made by the Lord Chief Juſtice, and under his hand and the hands of the parties decreed; and the party was called by Proces, to ſhew why it ſhould not be ſo, *Wakefields* caſe, *Caries Rep.* 64.

Award.

And

And where an Award is good, there this Court will order the performance of it, and grant Injunction as occaſion ſhall be to ſtay Suits againſt the meaning thereof, *Caries Rep.* 106.

No Tenant by Elegit or Extent, ſhall be forced to account here for more then the extended value upon any Statute, Recogniſance, or Judgment, unleſs the Suit be begun within a year after the Extent be executed, and poſſeſſion delivered, and enjoyment thereupon accordingly, except in caſe of Infancy Coverture, *Non ſane memorie*, or being beyond Sea; and in theſe caſes within a year after the impediment removed. *Ordinance for Regulating the Chancery*, *Art.* 53.

Under value. A Suit was brought here, and becauſe it was for ſix pounds onely, it was diſmiſſed, *Marbers* caſe, 21 *Eliz.* *Caries Rep.* 83.

Another in the ſame year being for five pounds for Fiſh, was diſmiſſed, *Richards* caſe, *Caries Rep.* 100.

So another being for a Rent of ten ſhillings by the year onely, was diſmiſſed, *Knightons* caſe, 21 *Eliz.* *Caries Rep.* 80.

So alſo another the ſame year was diſmiſſed, becauſe the Land ſued for, was not worth forty ſhillings a year, *Townlies* caſe, *Caries Rep.* 74.

So another was diſcharged the ſame year, becauſe it appeared to be for nothing but a liberty to dry Cloaths upon a Parol-Agreement onely, *Hambies* caſe, *Caries Rep.* 76.

And in that year alſo was another Suit in this Court for a Hawk and certain Evidences, ſuppoſed to be in the hands of the Defendant, and the Court obſerving that the Evidences were put in for a colour onely, diſmiſſed it, *Glaſiers* caſe, *Caries Rep.* 82. And yet if it be under value, and for the poor of a Pariſh, the Court will hear it, *Caries Rep.* 103.

Jointenants. This Court will not order, That the Survivorſhip of Jointenants ſhall not hold place according to Law. And yet two Jointenants were, and one of them did promiſe the other upon his Death-Bed, not to take advantage of the Survivor, but to ſuffer it to go to the payment of the others Debts, and thereupon he Deviſed part of it to pay his Debts: And this was Decreed, and that the Survivor ſhould make the Eſtate accordingly. *Springs* caſe, 21 *Eliz.* *Caries Rep.* 81.

And in *Mich.* 7 *Car.* Two Joint-Purchaſors were, and one of them Deviſed his part for payment of his Debts, and it was ordered here, *Mathers* caſe, *Tothil* 79.

But if two Joyntenants be, and they cannot agree upon the Preſentment to a Church, but ſuffer a Lapſe; there is no remedy here, *D. & St. L.* 2. *ch.* 33.

Two Jointenants, Siſters, of a Leaſe for years, they marry, one of them dieth, the other claimeth the whole by Survivorſhip; and the Husband of her that is dead ſued here, and pretended, That there was ſome ſecret Act done in her life, by which the Joynture was ſevered, but the Court would not order the Defendant to Anſwer it, *Caries Rep.* 9.

Ne exeat Regno. If one have my money, and I perceive him going out of the Land, I may by Suit ſtay him here till he have given me ſecurity to pay me, upon the

the Statute of the Fifth of *Richard* the Second, *Ch.* 2. *Cromp. Jur.* 64: *Tothil* 136.

This Court doth not give Remedy in Criminal things, nor in caſe of Miſdemeanor, as for Perjury, Forgery, or the like; and yet for Miſdemeanors done in this Court, it will give relief, and puniſh the offenders, as in caſe of Perjury in this Court, miſ-carriage of a Commiſſioner in examination of witneſſes, or any practice here by a Suit, examination of witneſſes or otherwiſe, *Caries Rep.* 56, 63, 68, 72, 75, 90, 99. 56. 68. For *Miſdemeanor.*

This Court is the proper place for a Woman being turned off by her Husband, to recover Alimony againſt her Husband, and it can be done no where elſe. But a Legacy by the new Ordinance is not to be ſued for here, but at the Common Law. See the *Ordinance for the Regulation of the Chancery.* But enquire the practiſe, and what Action at Law ſhall be framed for a Legacy, and how. Alimony

Alſo Relief lieth here in divers other caſes, As

If I be Leſſee for life or years, and a ſtranger do waſte againſt my will, whereby I am liable to a Suit and loſs of treble damages therein, and I bring my Action of Treſpaſs, and recover treble damages againſt him, as I may, and after it hapneth that he in Reverſion, before he ſueth me, dieth, ſo that now the Action againſt me is gone; in this caſe the Treſpaſſor ſhall have Relief here, to have again his treble damages, *D. & St.* 34. *Cromp. Jur.* 49. *Caries Rep.* 2. *Treſpaſs. Treble damage.* treſpaſſor

If Tenant for life, or in the right of his Wife, forfeit Iſſues which come upon the Land after his death; the owner of the Land it ſeems will not be relieved here in Equity; for this is for advancement of execution of Juſtice, *D. & St.* 38. *Cromp. Jur.* 49. *Iſſues.*

So, if one ſued for Land here, and it appeared the Defendant had been in poſſeſſion a hundred year, and it was diſmiſſed, *Caries Rep.* 110. poſſion

A Man married a Co-heir, and had children by her that are dead, and he ſued here to be Tenant by the Courteſie, the Land being conveyed to them and their Heirs joyntly, and the Court refuſed to Decree it here, *Cowleys* caſe, 2 *Jac.* So the continued poſſeſſion of the Baſtard *eigne* ſhall prevail in Conſcience, as well as in Law, againſt the *Mulier puiſne*, *D. & St.* 154. *Caries Rep.* 5. So, if one have waged his Law to my Action of Debt againſt him, though never ſo falſly, I can have no remedy in this Court. *Sect.* 24. *Ux Courteſie.* Baſtard eigne Mulier puiſne wager of law

A Leaſe is made of a Houſe and Wood, wherein it is covenanted that the Leſſee ſhall have Houſ-boot and Fire-boot, by which is underſtood, that he is not to have to any other purpoſe, but that they belong to the Leſſor; and in this caſe the *Chancery* doth uſually help him to it, leaving ſufficient for the Leſſor, *Caries Rep.* 18. To cut down Trees.

One *Pool* was bound to *C.* a Merchant, in a Statute; after *B.* lent *Pool* five hundred pound to buy a Mannor, the which he did with this money; and within four days after the Purchaſe, made it over to *B.* for the ſecurity of his five hundred pound. After *C.* ſued Execution of the Statute, and had the Mannor in Execution: *B.* ſued here to be relieved in Equity but was denied, *Cromp. Jur* 63. Upon an Engagement.

If one was ſeiſed of Copihold Land in Fee, and had two Daughters, by two Venters; the Daughters entred and took the profits divers years together, without doing Fealties or paying Fine, or any admittance by the Court, and the eldeſt dieth without iſſue: But it was here Decreed, upon this poſſeſſion, That the Collateral Heirs of the eldeſt, and not the ſiſter of the half blood, ſhould have the Land, and it was ſaid, That the poſſeſſion was Seiſin ſufficient without admittance, to make the Heir inheritable, *Dyer* 292. *Cromp. Jur.* 53. The Copi-holder had a Daughter by one Woman, and a Son by another Woman, and he died, his Son within age, who by the Lord was committed to the Mother, who entred, and then the Son died before his admittance, by paying Fine or Fealty, and the Daughter ſued in *Chancery* to be admitted, but was denied; for it was ſaid the Mothers poſſeſſion was his poſſeſſion, *Dyer* 242. *Copiholders. Poſſeſſio ſororis* in a Copiholder. poſſion Seign ſufficient without admittance to make Heir inheritable Poſſeſſion of the Mother for her Heirs Collateral.

A Man may at this Court recover damages for the profits of his Land kept away, in *Damages.*

in ſome ſpecial caſes, and for ploughing up his Grounds, cutting down his Trees and other Waſtes, in many caſes where none may be recovered by Law, *Tothil* 6. 51, 52. But where one hath Right or Title to Land, for which he can recover no damages for the mean occupation thereof, albeit he may Recover the Land there; Regularly, no Remedy can be had here, *D. & St. Lib.* 1. *ch.* 19.

Sect. 25. *Releaſe with Warranty to Bar a Diſſeizor.*

If the Collateral Anceſtor of the Deviſee do releaſe to the Diſſeiſſor, by his procurement, and die; this Warranty will Bar, albeit they know right to be in the Diſſeiſee, and intend to Bar it, and this is remedileſs, *Cromp. Jur.* 55. *D. & St.* 154.

And if I have two Sons, and the eldeſt go beyond Sea, and is ſuppoſed to be dead, and I die, and the yonger Brother entreth and alieneth the Land with Warranty, and die without Iſſue of his body, leaving no Aſſets to his elder Brother, who is his Heir, and he do after return, he ſhall have no Remedy here, he is barred in Law and Equity, *Doct. & Stud. chap.* 39. *Littl. Sect.* 704, 705, 707.

Waſte.

If one hold my Land by Covenant, and do make Waſte in it, I may be relieved againſt him here, *Tothil* 188.

If there be two voluntary Deeds, uſually the Court doth Decree the firſt; but if the laſt be for payment of Debts, it doth Decree that Deed, *Tothil* 54.

Highway Awarded.

One ſold a piece of ground, wherein was a High-way, and did not except it; but it was ordered here to continue as before, *Nowels* caſe, *M.* 3 *Car. Woottens* caſe, 10 *Car. Tothil* 70.

The Contents of a Mannor being in queſtion, it was referred to a Jury to finde as it had gone by uſual reputation ſixty years paſt, *Caries Rep.* 24.

Parcel.

Parcel or not Parcel was Decreed here, and the Land lying intermixt, and not to be diſtinguiſhed, Ordered to be ſet out, notwithſtanding the Defendant under the general words of his Deed, had long enjoyed it, Dean of *Windſors* caſe.

Eſtoppel.

Every *Eſtoppel* in Law, is not an *Eſtoppel* in Conſcience. For, if a lawful Heir and her ſiſter, a Baſtard, had ſued out Livery together, the lawful Heir might have had Remedy here, *D. & St.* 34.

In theſe and ſuch other like caſes, where no ordinary Remedy is given by the Common Law, Relief may be had here, and no where elſe, by way of Bill and Anſwer: But in caſes where there is an ordinary and clear Remedy for any injury by the Common Law, this Court will not meddle with it, 39 *H.* 6. 26. 7 *H.* 7. 11. as in divers of the caſes before.

Ways. Commons.

And therefore in caſes of Titles of Commons, Ways, or upon Cuſtoms, Preſcriptions or the like, no Relief is to be had here. And yet in *Wentworths* caſe, 2 *Eliz.* A Fold, Courſe, or Common of Paſture, was Decreed, *Caries Rep.* 46.

Alſo in this Court one ſued for Common of *Turbery* and Paſture, and the Defendant Demurred, and was over-ruled, *Caries Rep.* 64.

Alſo in this Court one may ſet out or aſcertain a Common, or ſet out the Bounds of a Way, *Caries Rep.* 83. *Tothil* 48, 49.

Sect. 26. *Cuſtoms.*

A Bill allowed for a Title of Common, to examine Witneſſes, and upon Publication to go to Law, 39 *Eliz. Throckmortons* caſe.

Nor can one ſue in this Court for Debt upon a Bond or Bill, Treſpaſs, Slander, or the like, or to avoid a fraudulent Deed made to deceive Purchaſors or Creditors; nor ſue to prevent a Woman of her Dower, becauſe her Husband was *de non ſane memorie* at the time of the marriage; for in theſe caſes the Common Law giveth Remedy: Nor to have the penalty upon a Penal-Statute, by way of Information, 39 *Eliz. Cowards* caſe. *Tothil* 18. *Caries Rep.* 57. And yet ſome circumſtances, as lack of Witneſſes, or the like, may make theſe caſes fit for the *Chancery*, *Tothil* 10. 39 *H.* 6. 26. 7 *H.* 7. 11. *Cromp. Jur.* 65. 44. *Tothil* 189.

And this Court hath ſometimes Decreed theſe things, as 6 *Eliz.* there was a Decree that the Tenant ſhould pay his Rent, and do his ſervice, and the Arrears thereof, *Caries Rep.* 52.

And

And in cases tending to overthrow a Maxim or Fundamental point of the Common-Law, this Court is tender, and will not admit any suit in it. And therefore if a man *de non sane memorie* make a Deed, he himself shall not be received here to avoid his own Deed, *Co.* 4. 127.

To avoid a mans own Deed.

And yet a man may have relief here against his own Deed, be it Fine, Feoffment, Release or otherwise, in case where it was unduly procured by practice, fraud or force, or without any consideration at all, *Tot.* 42, 43. *Cromp. Jur.* 53. *Dyer* 169. See *Sect.* 8. before, *Tot.* 170, 171, 178.

Actio personalis.

If a man do a personal wrong, and die, the party wronged is remediless both in Law and Equity, *Co.* 4. 127. And hence it is, that if my Goods be sold in a Market overt, and the Property altered, I shall have no remedy in Equity, *D. & St.* 40. 7 *H.* 7. 12.

Sale of goods in a Market.

Fine by a Feme-covert. *Sect.* 27.

If a woman levy a Fine with fear, and by a kind of compulsion, and so is barred, she hath no remedy in Law or Conscience, *D. & St.* 5.

To have a Re-entry.

If a Lease be made rendring Rent with a clause of Re-entry, the Rent is behind, and the Lessor die before any demand made thereof; in this case his Heir may not enter in Law, nor will this Court enable him so to do, *D. & St. c.* 20. *l.* 1. And hence it is, that if a Tenant in tail after possibility of issue extinct commit waste, no remedy can be had against him here, no more than in Law, *D. & St.* 2. *ch.* 3. If a man have a Wife an Inheretrix, and her Father dyeth, and he maketh all the speed he can to make his Entry, but his Wife dyeth before he can do it; in this case he cannot be Tenant by the courtesie, but for this he is remediless in Law and Equity both, *D. & St. l.* 2. *c.* 15.

Waste.

Tenant by the Courtesie.

Heir.

If a father leave his son and heir a great Debt, and Assets in Land to pay it; he cannot avoid it in Law nor Equity, *D. & St. l.* 2. 49. And if a man make a Lease of Land to a man and his wife, rendring a greater Rent then the Land is worth, and the husband die, the wife may choose whether she will meddle with the Land. So if it come to Executors, they may refuse it if they have not Assets besides; and this Court will not compel them to occupy the Land and pay the Rent, *D. & St.* 121, 122. And yet in some of the cases of this nature, sometimes some circumstances make it properly examinable in this Court.

Husband and Wife.

Executors.

Sect. 28. Fine.

So also it is in cases tending to overthrow Acts of Parliament made for the publick good and general Repose of the People: In these cases this Court will not easily admit of a complaint. And hence it is, that regularly it doth not give relief to a man that is barred by a Fine with Proclamation, and no Claim or Common-Recovery, *D. & St.* 40. 155. 33. So that a woman that was a Feme-covert when she levied the Fine, cannot come here and say she did it for fear, *D. & St.* 155. *Car. Rep.* 5. And in this case also the case may be fit for Equity in some cases, as of a Fine levied by an Infant, or the like.

By the new Ordinance for Regulating of the *Chancery*, it is provided,

1. That no Decree be made here against an Act of Parliament. *Art.* 47.
2. That none shall sue here for a Legacie, *Art.* 48.
3. That no Relief be given here for that which a man may recover at Common-Law, unless it be to have the thing in kinde, where it cannot be had in Law, *Art.* 46.

in Specie

4. Nor may any Injunction be had now of course, but upon the merits of the cause, *Art.* 27.

Recovery.

A Devise was of the Heirs third part of Lands *in capite*, and the Court decreed it against the Heir: But it was afterward reversed as an erroneous Decree for the cause aforesaid, the Case appearing in the Decree it self, *Pasch.* 16 *Jac.* Sir *Henry Roswels* Case.

And in the cases of this nature also there do fall out some circumstances also which make them fit to be examinable in Equity, and in such cases they are received here. And therefore where an Act of Parliament hath been taken one way for a time, and after is taken another way, Relief may be in Equity for cases arising before the alteration.

And in all theſe, when a Plaintiff doth exhibit a Bill tending to any ſuch purpoſe as before, if it appear to be ſo in the Bill exhibited, the Defendant may demur to it and caſt it out of Court by diſmiſſion; if it appear to be ſo in the end of the Caſe when it comes to Trial, then the Court will caſt it out. And if in the interpleading by Bill and Anſwer they fall upon an Iſſue in Law, as Will or no Will, or the like, the Court doth uſually ſend it to Law to be tryed.

The manner and method of proceeding in ſuits by Bill and Anſwer in this Court.

In the Courts of the Common-Law, the Judges do proceed *ſecundum poteſtatem ordinariam*; but in this Court the Judges do proceed *ſecundum poteſtatem abſolutam*. And yet in this Court there is a twofold Power: Firſt, ordinary, which is in caſes of Traverſe, Recognizances, Partition, *Scire facias*, to repeal Patents, Extents, and the like; in all which they are to proceed according to the Rules of the Common-Law, and ſo it is a Court and Law. Secondly, They have another power that is more arbitrary and unlimited; and this is uſed by Bill and Anſwer: And in the exerciſe of this laſt power, the common method and proceſs is, firſt of all to call the Defendant in by a *Subpœna*, which is the firſt Writ, and is to require the Defendants appearance in this Court by a day, and under a pain, to make anſwer to the Complaint of the Plaintiff.

But for this and the Proceeding in this Court, See my Firſt Part of the *Marrow of the Law*, in *fol.* 656. unto the end of the Book. And ſee the new Ordinance of the Lord Protector and his Council, made the 22 of *Auguſt* 1654. and what Alterations be made thereby in the Proceedings and the Fees.

CHAP.

CHAP. XLIII.

Of Charge and Diſcharge.

1. *Charge.*

IT is an Act done by a man, binding him, or that which is his to the performance thereof, and making him, or it, or both ſubject thereunto. See *Rent-charge.*

Charge and *Diſcharge.*

Note, that Lands may be charged divers ways, as by Grants of Rent out of it, by Statutes, Judgments, Conditions, Warranties, and the like; and may be divers ways diſcharged again. For all which ſee much in other Titles. *Lit. ſect.* 648. *& Co. ſuper Cro.*

2. Where and in what caſe a charge ſhall be good in its Creation, and by what means Lands may be charged, and what Eſtates ſhall be liable to charge, and how long, where not.

And it is a Principle, That every Land in Fee-ſimple may be charged in Fee by one way or other, *Lit. ſect.* 648.

Where a Grant of Land will be good in reſpect of the parties, Grantor, Grantee, Thing granted, or the manner of the Grant, there a Charge upon the ſame Land will be good alſo: As if any Body Corporate or Politick, Dean and Chapter, Mayor or Commonalty, or the like, charge their Land by their Common-Seal, and common conſent, it is good. So if the Patron, or Parſon and Ordinary, or in time of Vacation the Patron and Ordinary charge the Land by their Grant, this would have bound the Land by the Common-Law: But in caſe where a Grant of the Land it ſelf would be void or voidable in reſpect of the parties, Grantor, Grantee, or thing granted, or the manner of the Grant, there a Charge upon the ſame Land will be void alſo, and the Land ſhall never be ſubject to it. As if an Infant, Feme-covert, Dean without his Chapter, Mayor without his Commonalty, or the like, grant a Rent out of their Land, this is void: But a Dean or Mayor in ſuch caſes may charge their own perſons, and their own Lands they have in their own right. So if one grant a Rent to a perſon uncapable; or if one by his Deed grant a Rent out of Land to which he hath no right nor poſſeſſion; or if he have the poſſeſſion, yet hath no right; or if he have right, yet hath no poſſeſſion, this will not charge the Land, albeit the party do after get a Right to it, or the Poſſeſſion and the Right come together, *Perk. tit. Grants*, 14 *H.* 8. 10. 5 *H.* 5. 8.

Sect. 1. *Abeyance*

Where the right of Fee-ſimple is perpetually by Judgment of Law in Abeyance, without any expectation to come in *eſſe*, there he that hath this qualified Fee *concurrentibus his quæ in jure requiruntur*, may charge the Land, and this Charge is good; as in the caſe of the Charge of Parſon, Patron and ordinary before the Statute. But where the Fee is in Abeyance, and may come in *eſſe* every hour, there it cannot be charged till it come: As if a Leaſe be made for life, the Remainder to the right Heirs of *I. S.* the Fee-ſimple cannot be charged till *I. S.* be dead, *Co. ſuper Lit.* 343.

Lands intailed alſo may be charged in Fee, if the Eſtate-tail be cut off by Fine or Recovery: For if a Tenant in tail grant a Rent-charge, and after ſuffer Recovery, levy a Fine, or make a Feoffment, this Charge ſhall be always good againſt the Recoverer, Conuſee, or Feoffee: And ſo if he make a Leaſe. And ſo alſo in ſome caſes where the Eſtate doth continue: As if a Diſſeiſor make a Gift in tail, and the Donee in conſideration of a Releaſe by the Diſſeiſee of all his Right to the Donee, granteth a Rent-charge to the Diſſeiſee and his Heirs proportionable to the value of his Right, this will bind the Iſſue in tail. So if *A.* deviſe Land to *B.* and his Heirs of his body, the Remainder to *C.* on condition that *B.* ſhall grant a Rent-charge out of it to *D.* in Fee, and *B.* grant the Rent accordingly, this is good to bind the Eſtate-tail and the Remainder alſo, as was adjudged in *Dutton & Iviane's* Caſe, *M.* 15 *Jac. B. R.*

If a man have a moveable Inheritance, as in a great Meadow, two Acres by diviſion or election every year by Cuſtom, ſo that one year he hath it in one place, and an-

other in another; this may be charged well enough, and the Charge will follow the Land, *Co. ſuper Lit. fol* 4 *a.* 343 *b.*

Donor & Donee

When all thoſe that have Intereſt in the Land joyn in the Grant of a Rent, ſo that the Grant is made *Concurrentibus his quæ in jure requiruntur*, the Grant is good for ever: As if at the Common-Law, Donor and Donee in tail had joyned in a Grant of a Rent, and the Donee die without Iſſue, the Donor ſhall hold the Land charged. So if the Mortgagor and Mortgagee join in the Grant of a Rent-charge, and after the Mortgagor enter for the Condition broken, yet the Rent doth continue. So if a Diſſeiſor or his Heir grant a Rent-charge, and the Diſſeiſee confirm it, this is now unavoidable when he doth recover the Land. So if Feoffee on Condition grant a Rent-charge in Fee, and the Feoffor confirm, and after the Condition is broken, and the Feoffor enter he cannot avoid the Rent. So if Leſſee for life charge the Land with a Rent in Fee, and the Leſſor confirm it, this is a good Rent for ever, albeit the Confirmation be made after the Tenant for life. So if Tenant for life on Condition grant a Rent-charge in Fee, Leſſor confirm the Grant, the Condition is broken, the Leſſor doth enter, *Co.* 1. 147. 149. 10. 49. *Co. ſuper Lit.* 300. 121. 301. 14 *Aſſ. pl.* 14. 14 *Ed.* 3 *Aſſ.* 109.

Mortgagor and Mortgagee.

Feoffor & Feoffee

Leſſor & Leſſee

If one have a Poſſeſſion and an ancient Right, and he grant a Rent-charge, this ſhall iſſue out of both. And therefore if Tenant in tail leaſe to *A.* for life, and after he grant a Rent-charge to *B.* *A* dies; he ſhall not avoid the Charge. So if *A.* Tenant in tail infeoff *B* on Condition to the uſe of *A.* in Fee; *A.* acknowledg a Statute, which by the Statute of 1 *R.* 3. *c.* 5. is extended, (*A.* having then but a Rent and a Condition;) the Condition is broken, by which the Feoffment is avoided, and he ſeiſed of the Intail again, yet *A.* ſhall not avoid the Extent. And ſo if he had granted a Rent-charge, *Co.* 2. 14. *Co.* 1. 147, 148. 11 *H.* 7. 21.

Rent charge

Remaind. or Reverſion

He that hath but a Remainder or Reverſion of Land, may charge it, and the Charge is good in reſpect of the Poſſibility, and the Diſtreſs ſhall faſten on the Land when it comes in Poſſeſſion, *Co.* 5. 2. 1. 62. and not before, *Bro. Charge*, 11. 30.

Reverſion expectant

And therefore he in the Reverſion expectant upon an Eſtate for life. may charge the Land. And if *A.* leaſe to *B.* for years, and after *A.* doth grant the Reverſion to *C.* rendring Rent; *A.* cannot diſtrain during the Term *per Moyle*, but *per Danby & Nedham.* If the Beaſts of *C.* come upon the Land, *A.* may diſtrain them; but *Moyle al contra*, but by him, if *C.* pay the Rent once to *A.* if it be a year after, *A.* may have an Aſſiſe. *Bro. Diſtreſs* 48. but after the Term is ended, *A.* may without queſtion diſtrain for all the Arrearages, *Co* 5. 2.

Heir

If *A.* leaſe to *B.* for life, and then grant a Rent-charge to *C.* *A.* die, *B.* being his heir, in this caſe *B.* ſhall hold the Land diſcharged during his life; but otherwiſe it is if he had purchaſed the Land, *Per Nedham*, 9 *Ed.* 4. 18.

Rent.

If *A.* leaſe to *B.* for life, *A.* charge the Land, *A.* doth diſſeiſe *B.* in this caſe *A.* ſhall forthwith hold the Land charged, 5 *H.* 5. 10.

If the Leſſor grant a Rent charge, and the Leſſee ſurrender, the Leſſor ſhall forthwith hold the Land charged, *Bro. Charge* 10.

If *A.* be Tenant by Elegit, and *B.* having the Reverſion doth grant a Rent-charge out of it, and after *B.* doth releaſe or confirm to *A.* for life; in this caſe *A.* ſhall hold it ſubject to this charge, 31 *Aſſ. pl.* 13.

A. being Tenant for life, the Remainder to *B.* in fee, or the Reverſion to him in fee, *A.* doth grant one Rent-charge out of the Land, and *B.* doth grant another Rent-charge, *A.* ſurrender: In this caſe *B.* ſhall hold the Land charged with both the Rents *Co.* 9. 107.

Seiſ. 12.

If one have divers Eſtates in Land, he may charge or grant them, *Dyer* 10.

Copyhold

If a Lord grant a Rent out of his Manor in which are Copiholds, and after one of the Copihold-eſtates fall into the Lords hand, and after this is granted away again according to the cuſtom; now it ſeems the Charge ſhall not light upon this which is ſo granted away, but upon the reſidue of the Manor. Yet ſee *Dyer* 271. *Co.* 4. 24. 64.

If one grant a Rent-charge out of Land that is in Leaſe for years or life, it will faſten

faſten upon the Land as ſoon as by any means it come into the hands of the Grantor, and not before But it may be the perſon of the Grantor may be charged before: *See before.* And he that is in Poſſeſſion, and he that is in Reverſion or Remainder of the Land, may both charge the Land, but the charge of the Tenant in poſſeſſion ſhall be preferred, 5 *H.*5.8 *Co.*2.137. *Dyer* 10.

If one Jointenant grant a Rent-charge out of his Land he holdeth in Jointenancie, the beaſts of any of the other Jointenants ſhall not be diſtrained, neither ſhall they be charged hereby; but the beaſts of the Grantor may be diſtrained upon the Land: But if the Grantor ſurvive the reſt of his companions, all the Land is chargeable; but if he die before the reſt, all the Land is diſcharged. So if one Joint-tenant enter into a Statute, or ſuffer a Judgment, his part only ſhall be extended and ſubject to the charge whiles his companions live: But if he ſurvive, then all ſhall be in Execution, unleſs his companions did ſever the Jointure in their life-time; and if he die before his companions, yet the Execution is not diſcharged of his part, 7 *H.*6.1. *Perk.* ſ.183. 11 *H.*6.33. *Bro. Charge* 39. *Execution* 148. *Co. ſuper Lit.*184. 13 *H.*7.22. *F.N.B.*20.

If a Mayor alone, or a Dean alone, will charge the Land they have in common with the Corporation, none of the Corporation ſhall be charged, nor the Land, but the perſon of the Dean or Mayor himſelf.

If four be bound in a Statute or Recogniſance, and one die, the three that ſurvive ſhall not be charged with all, but thoſe three with the Heir of the fourth together equally, 29 *Aſſ. f.*37.

If two be bound jointly in an Obligation, and one die, or be outlawed, it ſeems the other ſhall be charged with the whole. So if two be Accountants, and one die, or be outlawed: So if two warrant Land, and the one hath nothing to render in value, it ſeems the other muſt anſwer all. But if two men make a Feoffment in fee with Warranty, and the one die, the Feoffee cannot charge the Survivor only, but the Heir of him that is dead alſo, *Bro. Jointe.*5.16.21. 9 *Ed.*4.24. *Co. ſuper Lit.*386. 3.14. 19 *H.*6.55.

If a man ſeiſed of Lands in fee, and poſſeſſed of a Term for many years, grant a Rent out of both for life, in tail, or in fee, with clauſe of Diſtreſs out of both, this Rent doth iſſue only out of the Freehold, and the Lands in Leaſe are only charged with a Diſtreſs: But if it had been granted only out of the Lands in Leaſe, then that Land had been charged during the Term, if the Grantee live ſo long, *Co. ſuper Lit.*147. *Co.*7.23.

If one have divers Eſtates in the Land, and grant or charge it, this ſhall go out of all his Eſtates. As if *A.* be Tenant for life, Remainder to *B.* in tail, Remainder to *A.* in fee, and *A.* grant a Rent-charge and die, *B.* dieth without iſſue, the Heir of *A.* ſhall be charged. So if *A.* be Tenant for life, Remainder to *B.* in tail, Remainder to *A.* in fee, and *A.* acknowledg a Statute and die, and *B.* die without iſſue, the Heir of *A.* ſhall be charged, as was held in *Pethowſe* and *Cranes* Caſe, *M.*36 *Q.* 37 *Q. Co.B.* So if *A.* be Tenant for life, Remainder to *B.* for life, Remainder to *A.* in fee, and *A.* makes a Feoffment; in this caſe all his Eſtates paſs, 24 *E.*3.70. *Bro. Dove* 55. So if *A.* Tenant in tail, the Remainder to him in tail, levy a Fine, all his Eſtates paſs and are barred, *Co. ſuper Lit.*372. So if *A.* be Tenant for life on condition to have fee, *A.* leaſe to *B* for years, *A.* perform the Condition, yet he ſhall not avoid the Leaſe for years. So of a Rent. But otherwiſe it is in caſe of the King, *Co.*7. *Parl.*2.14.

A man makes a Leaſe for years rendring Rent, and after grants the Reverſion for life, to which Grant the Leſſee for years attorns; the Grantee acknowledgeth a Statute, and after ſurrenders his Eſtate; the Conuſee extends the Statute, and diſtrains for the Rent, and it was adjudged good, *Brownl. Rep.*2 *par.*97.

3. Where and in what caſe a Charge good in its creation ſhall after be defeated and determined, and the Land diſcharged.

Regularly, when the Eſtate is gone upon which the Charge is, the Charge is determined and defeated. As for examples:

If one be ſeiſed of Land, and take a wife, and after grant a Rent or Common out of the Land, or enter into a Statute, and it be extended during the Husbands life, and after he die, and the wife is endowed of a third part of the Land charged by ſuit; now by

by this the Charge is determined as to that third part, and that part is diſcharged of it. But if one have three Manors, and charge them all, and die, and ſhe accept of one of them, ſhe ſhall hold two parts of it charged, *Co ſuper Lit.* 349. *F.N B.* 150. *a.* 17 *Ed.* 2.

If a man have a Term of years in Land in the right of his wife, and he grant a Rent-charge out of this Land and die; now by his death the Charge is determined, and the wife ſhall hold it diſcharged: But if he ſurvive his wife, the Charge is good during the Term, 9 *H.*6. 52. 7 *H.*6. 1. 9 *H.*6. 52.

By alteration of the Tenant of the Land to be charged.

If a Tenant in tail grant a Rent-charge out of the entailed Land, (unleſs it be in ſuch a ſpecial caſe as is above) and then die, the charge is determined, and the Iſſue ſhall hold it diſcharged: So ſhall the Donor alſo, if the Tenant die without iſſue, and the Land revert to him. And although the Iſſue after his entry make a Feoffment, and take back a new eſtate, yet the Charge doth not revive, 12 *H.* 4. 7. 44 *Ed.* 3. 21. 14. *Aſſ. Brow. Charge* 20.

If one deviſe that his Executors ſhall ſell his Land, and the Heir after his death enter and charge the Land, and then the Executors do ſell it; now the Charge is defeated, and the Vendee ſhall hold it diſcharged, 14 *H.*8. 10.

If a Feoffee or Leſſee on Condition charge the Land by a Grant or a Statute, and after the Condition is performed, and the Feoffor or Leſſor re-enter; now he ſhall avoid this Charge, for the Land is diſcharged of it, *Perk. ſect.* 840.

Sect. 3. If a Diſſeiſor charge the Land he hath by Diſſeiſon, and after the Diſſeiſee re-enter or recover the Land; now the Diſſeiſee ſhall hold it diſcharged, and is not ſubject to the Charge of the Diſſeiſor, *Co.* 11.

If a Leſſee for life or years make a Feoffment in fee, and ſo commit a forfeiture, and after the Feoffee charge the Land by Grant, Statute or otherwiſe, and then the Leſſor enter for the forfeiture: Now in this caſe the Charge is gone, and the Leſſor ſhall hold it diſcharged. So if a Leſſee do waſte and cauſe a forfeiture, and after the Waſte and before the Recovery of the Land charge it, and after the Leſſor recover it; the Leſſor ſhall avoid his Charge, *Lit. ſect.* 476. *Perk. ſect.* 844.

If the Husband charge the Land he hath in fee in the right of his wife, and after he and his wife levy a Fine of this Land; now the Conuſee of the Fine ſhall hold it diſcharged, and the Charge is determined, *Co* 1. 66.

If there be Tenant in tail in poſſeſſion, the Remainder in tail or in fee to *I.S.* and *I.S.* grant a Rent or otherwiſe do charge the Land, and after the Tenant in tail in poſſeſſion ſuffer a Recovery of the Land; now hereby all the charges by him in Remainder are defeated, *Co.* 1. 61.

By other matter *Ex poſt facto.*

If one charge his Land with a Rent, or Statute, and after make a gift of it in Tail, and the Tenant in Tail make a Feoffment of the Land to the Grantee of the Rent, or him that hath the Statute extended, and the Iſſue recover the Land in a *Formedon:* Now it ſeems this Iſſue may avoid this charge, becauſe it was once extinct. For the charge of Tenant *in tail*, See *Eſtates* 19 *H.*6. 45.

By *Remitter.*

If a Tenant in Tail maketh a Feoffment to his Heir inheritable by the Tail, being within age, and after being of full age (living his Anceſtor) he charge the Land, and after the Tenant in Tail dieth: Now the Land is hereby diſcharged, and he ſhall avoid his own Grant, becauſe he is Remitted: So if the Heir of the Diſſeiſſee do Diſſeiſe the Deſſeiſor, and grant a Rent charge, and then the diſſeiſed dieth; the Grantor ſhall avoid his own Grant for the ſame reaſon: So if the Father Diſſeiſe the Grandfather, and granteth a Rent charge, and dieth, now the Entry of the Grandfather is gone, if he die, the ſon ſhall avoid the charge by the Remitter. *Littl. Sect.* 660. *Co. ſuper Cro.*

4. Where and in what caſe, not but the charge ſhall remain notwithſtanding the Alteration of the Tenant.

If a Tenant in Tail charge the Land, and after levy a Fine or ſuffer a Recovery of the Land to his own uſe; this doth confirm the charge, and it ſhall continue: But if he ſell the Land away by Fine, or Recovery, it ſeems the Conuſee or Recoveror ſhall hold it diſcharged, *Co* 1. 61.

If Tenant for life charge the Land, and then Enfeoff him in Remainder; in this caſe he ſhall hold it charged during the life of the Tenant for life, and no longer; for this is a Surrender. *Brow. Charge* 6.

If

If a man have an Office of skill for his life, to which there is a houſe belonging, and he chargeth the houſe with a Rent during his life, and after he commit a forfeiture, yet the Charge ſhall continue during his life; for he that takes Land by advantage of a Condition in Law, muſt take it with his Charge, *Co. ſuper Lit.* 234.

If one have a Leaſe for years or life, of Land, and grant a Rent out of the Land, and after ſurrender his Eſtate, and determine them; yet the Charge ſhall continue as long as the Eſtates ſhould have endured, if they had not been ſurrendred, *Dyer* 10. *Perk. ſect.* 844. *Co.* 1.67.8.145.

If one make a Leaſe for years or life, and after grant a Leaſe out of the Land, and after the Leſſee for years ſurrender, the Leſſor cannot avoid this Charge: But now it will take effect preſently, otherwiſe it will not take effect until the Leaſe be determined, 5 *H.* 5.8. 38 *Ed.* 3.4.

If one Joint-tenant charge the Land, and after releaſe to his companion and die, the Survivor ſhall hold it charged: But if it had come to him by Survivorſhip, *contra. Co.* 6.76.

If a man ſeiſed in Fee-ſimple that hath a wife, make a Feoffment in fee on condition and die, and the Feoffee on condition endow the wife of a third part, and ſhe charge this, and after ſurrender or grant her Eſtate to the Feoffee on condition: Now he cannot avoid this, but muſt hold it charged during her life, *Perk. ſect.* 822.

If there be Tenant for life, the Remainder in tail, Remainder in fee to the Tenant for life, and the Tenant for life charge the Land and die, and the Tenant in tail die without iſſue; now the Heir of the Tenant for life cannot avoid this Charge, but the Land will be charged, 5 *Ed.* 4.2.

If the Kings Tenant charge his Land, with or without the Kings licence, and after the Land come to the King by Attainder or Eſchear, or the like: Now in this caſe the King muſt hold it charged, and cannot avoid the Charge, 3 *Aſſ. p.* 1. *ſtat.* 2 *Eliz. P. & M. cap.* 8.

If Tenant for life charge the Land, and after make a Feoffment to a ſtranger, or doth Waſte whereby it is forfeit and recovered; here he in Reverſion muſt hold it charged during his life. And if the Leſſee grant one Rent, and he in Reverſion another; now he muſt hold the Land ſubject to, and charged with both Rents, but the Grant of the Leſſee for life ſhall be preferred, 50 *Ed.* 3.6. *Co.* 1.67. *Dyer* 10. *Co.* 9. 107. *Co.* 10.49.

If the Husband and Wife during the Coverture grant a Rent by Fine out of Land, and after his death ſhe is endowed with part of it; now ſhe muſt hold it charged with the Rent.

If there be Tenant in life, the Remainder in tail to *B.* the Remainder in tail to *C.* and Tenant for life, and *B.* levy a Fine *ſur grant*, and render of Rent to the Tenant for life, and after *B.* the firſt Tenant in tail die without iſſue, and the Land go to *C.* he muſt be charged ſtill with this Rent to the Tenant for life, *Co.* 1.76.

If Tenant in tail make a Leaſe for life, and he grant a Rent-charge out of the Reverſion, and after Tenant for life dieth, whereby the Grantor becometh Tenant in tail again, and the Reverſion defeated: Yet the Rent-charge is good and doth continue againſt him, but not againſt his iſſue, 11 *H.* 7. 21. *Co. ſup. Lit.* 349.

If aſſent be iſſuing out of a Mill or Houſe, and the Mill or Houſe fall, yet the Charge doth continue upon the Soil, 9 *Ed.* 4.20. *Co.* 1.113. 10.48.

In all caſes when any Executory thing is created by Deed, there ſomething by conſent of all perſons, parties to the creation of it, may be by their Deed defeated and diſcharged: And therefore by a defeaſance of all, the Covenant that doth create a future power of Revocation, as the power it ſelf created may be defeated. And therefore Warranties, Rents, Charges, Recognizances, Annuities, Covenants, Leaſes for years, Uſes at Common-Law, and ſuch like things, may by mutual conſent be avoided: And every right, title, and intereſt *in præſenti* or *futuro*, by the inquiry of all that have the right, may be barred and extinct. See Caſes, *Co.* 10.49.

He that hath Land in extent upon an Execution upon a Statute-merchant or Judgment, aſſign over his intereſt, and after releaſe to the Conuſor, or to him againſt whom

How a Charge may be diſcharged.

whom the Judgment is had, this doth diſcharge the Execution, 24 *Co. B. Moor & Moons* Caſe. So if he acknowledg ſatisfaction, *B. Weſton & Eliners* Caſe; or in this caſe the party may have an *Audita Querela* againſt the Aſſignee, as was adjudged in *Flower & Elgars* Caſe, *Paſch.* 7 *Car. B R.*

For the Diſcharge and Indempnity of thoſe which ſerved in the Wars, ſee *Act* 19 *Septemb.* 1650. *May* 21. 1647.

Taxes and Rates.

Taxes and Rates, are the appointing and ſetting down how much every one ſhall pay and be charged with, *Stat.* 43 *E. c.*3.

Maimed Soldiers and Mariners.

The Juſtices of the Peace at the Seſſions muſt ſet a Rate or Sum upon every Pariſh to be paid weekly, towards the relief of ſick, hurt and maimed Soldiers and Mariners; but no Pariſh muſt be rated above ten pence, nor under two pence weekly; and if there be fifty Pariſhes in the County, not above ſix pence a week: And this ſum ſo taxed ſhall be yearly aſſeſſed by the agreement of the Pariſhioners within themſelves, or in default thereof by the Churchwardens and Petty-Conſtables, or the more part of them, or in default thereof by the Juſtice of the Peace next to the Pariſh: And if the party taxed refuſe to pay the money taxed, the Churchwardens and Petty-Conſtables, or either of them, or in default of them the ſaid Juſtice may levy it by ſale of his goods. See more in *Treaſurer:*

The Churchwardens and Overſeers of every Pariſh, or the greater part of them, may by advice of two Juſtices raiſe weekly, by Taxation of every mans Land within the Pariſh, money, and charge men towards the Relief of the Poor: And every man muſt pay according to that Rate, or complain at Seſſions for relief, *St.* 43 *Eliz. c.*2. See more in *Poor.*

Priſoners of the Kings Bench and Marſhalſey.

The Juſtices of the Peace at the Seſſions muſt ſet down what muſt be paid by every County quarterly towards the Relief of the poor Priſoners in the *Kings-Bench* and *Marſhalſey*, and ſuch Hoſpitals and Alms-houſes as ſhall be in the ſaid *Kings-Bench* or *Marſhalſey*, and in the ſame County; and it muſt not be leſs then twenty ſhillings out of every County yearly to each of the ſaid Priſons. Which ſums ratably to be aſſeſſed upon every Pariſh, the Churchwardens of every Pariſh muſt collect and pay to the High-Conſtable of the Diviſion. So that it ſeems this Taxation muſt be made by agreement between the Pariſhioners amongſt themſelves; and that if any refuſe to pay, that upon complaint the Juſtices of the Peace at their Quarter-Seſſions may compel him: And if any be over-rated, that he muſt be relieved there, *Stat.* 43 *Eliz. cap.* 2.

Priſoners of the Common-Gaol.

The Juſtices of the Peace at their Quarter-Seſſions may rate and tax every Pariſh in the County weekly as they think fit, ſo as it exceed not three pence a week every Pariſh, towards proviſion for the Relief of Priſoners in the Common-Gaol. And every Sunday the Churchwardens muſt levy it, and pay it quarterly to the Head-Officers of every Hundred or place, to be paid in at the Quarter-Seſſions. And this alſo it ſeems muſt be taxed upon the Inhabitants by agreement amongſt themſelves, or elſe by Order of the Seſſions, *St.* 14 *Eliz. c.*5.

Chepſtow-Bridg.

Four Juſtices (whereof one of the *Quorum*) may tax the Counties of *Glouceſter* and *Monmouth*, according to their diſcretion, for and towards the Reparations of *Chepſtow* Bridg, and every Hundred muſt pay according to the Rate. But they muſt rate every man in particular by Agreement, or by Order of the Seſſions, *St.* 3 *Jac. cap.*23.

Such Juſtices alſo may rate the Inhabitants of any Towns or Villages neer unto any decayed Bridg on the High-ways, when it is not known who ought to repair it; and the perſons ſo taxed muſt pay it accordingly. See *Stat.* 22 *H.*8. *cap.*5.

Church.

The Rates for the Church are to be made by the Churchwardens, and the greater part of the Pariſh preſent, after ſolemn notice given in the Church, upon every Inhabitant and Occupier of Lands in the Town or place, for money towards the Reparation of the Church, and other matters belonging thereunto, and according to that Rate men muſt pay, or they will be compelled to it. See *Churchwardens, Co.* 5. 67.

Sewers.

How men ſhall be taxed and rated for the reparation of the Sea-banks, See *Commiſſion of Sewers.*

The

The Rates of Subſidies and Fifteenths are to be made according to the Statutes whereby they are granted, if they ſet down any Order of Taxing; otherwiſe according to the ancient uſe. See *Subſidies, Stat.* 9 *H.*4. *cap.*7. 1 *Ed.*3.6. See more of this in my *Juſtice of Peace* Book, *chap.*27. Subſidies and Fifteens.

CHAP. XLIV.

Of Charters.

Charters are Writings, Deeds, Evidences and Inſtruments made from the King or any other man to another, upon ſome Eſtate paſſed or conveyed between them of Lands or Tenements: ſhewing the place, name, and quantity of Lands; the Eſtate, Time, and manner of doing of it; the Parties to the Eſtate delivered and taken; the Witneſs preſent at the ſame Time, with other Circumſtances. The word *Charter* doth uſually ſignifie the Kings Patent; which ſee in *Patents, Terms ley, Co.* 1.1. 34 *H.*6.1.

And theſe are ſome of them called Principal, ſuch as do concern the Title of the Land, and are the chief ſtrength thereof; and others are ſaid to be Acceſſary, *(i.)* ſuch as concern the Poſſeſſion only, as Court-Rolls, and ſuch like, *Co* 1.1.

To whom they belong, and what perſons ſhall have them.

Charters are the ſinews and ſtrength of mens Inheritances: And therefore for the moſt part, he whoſe poſſeſſion is made by them, ſhall have them; and they are as Incidents or Concomitants to the Land, to go and paſs with it. As a man ſeiſed of Lands in Fee in Poſſeſſion or Reverſion, and hath divers Charters, Deeds and Evidences, ſome with Warranty, and ſome without, and maketh a Feoffment in Fee without Warranty: Now the Purchaſor ſhall have all the Charters, Deeds and Evidences, as incident to the Land, and though they be not granted by the Deed; *Ratione Terræ*, to the end he may the better defend the Land it ſelf, having no Warranty to recover in value, and the Feoffor being not bound to warrant, hath no uſe of them. So if there be a Warranty in the Deed, if there the Feoffor grant the Deeds, there the Purchaſor ſhall have them alſo. So alſo if the thing ſold be ſuch a thing as doth lie in Grant, as Common, Rent, &c. if the Sellor or Grantor doth never grant the Charters that do concern the Land, and although there be a Warranty in the Deed, yet the Purchaſor ſhall have all the Deeds that do concern the Land.

Warranty in Deed

But if that a man be ſeiſed of Land in Poſſeſſion or Reverſion, and have divers Charters, ſome containing Warranty, and ſome not, and he make a Feoffment of this Land, and warrant it to the Feoffee and his Heirs, ſo that he is bound to render in value, and there are no words of Grant of the Charters in the Deed: Now in this caſe, foraſmuch as the defence of the Title is at the Feoffors peril, therefore he ſhall keep all the principal Evidences that are material for the maintenance of the Title of the Land; as all the Deeds which comprehend Warranty, whereof he may take advantage, and ſuch as may ſerve him to deraign the Warranty paramount, and ſuch like. But ſuch as are acceſſory only, which concern the Poſſeſſion, and not the Title, thoſe the Feoffee ſhall have: As if *A.* enfeoff *B.* with Warranty, and *B.* enfeoff *C.* with Warranty, though *C.* may vouch *A.* upon the firſt Warranty, yet he ſhall not have the firſt Deed; and yet if in this caſe a ſtranger have them, the Feoffee may recover them againſt him. So if *A.* enfeoff *B.* with Warranty, and *B.* enfeoff *C.* by the word *Dedi*, (which implieth a Warranty for life of the Donor) *B.* ſhall keep the Charters during his life, but his Heir ſhall not keep them afterwards, *Co.* 1. 144. 3 *Ed.*3. 11 *Ed.*3.17. 19 *H.*6.65. 34 *H.*6. *Co.*11.50. 10 *Ed.*4.9. 18 *Ed.*4.14. 6 *H.*7.3. 6 *H.*7.33. *Co.* on *Lit. f.*6.

Eſcheat

If a Lord come to Land by Eſcheat, he ſhall have all the Charters belonging to the Land ſo eſcheated to him, *Co.*1.1. Such Charters as belong to the Anceſtor, the Heir ſhall have, though he hath no Land by deſcent, *Co.*1.1.

Heir

Joyntenants

If one make a Feoffment to two, and the Heirs of one of them, and deliver all the Charters and Deeds to him that hath the Fee-ſimple of the Land, and he happen to die before his Companion; now his Heir ſhall keep all the reſt of his Evidences, except the Deed of Feoffment, which the ſurviving Jointenant is to have, *Co.*1.2,3: 4 *H.*6.1.

Joyntenant

If two Jointenants be in by a defeaſible title, and a Releaſe is made to them, and one of them die; now the Survivor ſhall have that Releaſe, and all the reſt of the Writings, *Co.*1.2. 21 *H.*7.33. 6 *H.*7.3.

Joynt-feoffees

Diſſeiſors

If a Feoffment be made to two without Deed, and the Writings be delivered to one of them, now the other ſhall not have them from him. So if I releaſe to my two Joint-Feoffees, and I releaſe to them both, and deliver the Deed to one, the other, though he ſurvive, ſhall not have it.

If I releaſe to two Diſſeiſors, and deliver the Deed to one, the other ſurviving ſhall have it. If the Diſſeiſee releaſe to the Diſſeiſor, and he make a Feoffment of the Land, the Feoffee ſhall have the Releaſe. But if a Feoffment be made to two without Deed, and the Evidences that do concern the Land are delivered to one, the other ſhall not have them, 34 *H.*6.1. 6 *H.*7.3.

CHAP. XLV.

Of Chattels.

1. *Chattels,* what.

The kinds.

CHattels or Cattals are all Poſſeſſions of Goods moveable and unmoveable, except ſuch as are in nature of a Freehold, or parcel of it. And theſe are either Real or immoveable, which are ſuch as do not immediately appertain to the Perſon, but either to ſome other thing by way of dependance, as a Box with Writings of Land, the Body of a Ward, the Fruit of a Tree, or the Tree it ſelf upon the Land, or are iſſuing out of things immoveable, and of a more real nature; as Leaſes for years, at will, Wardſhips, the Eſtates of Gardeins in Chivalry, which hold the Land for the double or ſingle value, the Eſtates of Tenants by Statute-Merchant, Staple or Elegit, and Grants of the next Advowſon: Or elſe they are perſonal and moveable, (*i.*) ſuch as are moved by others; as Money, Plate, Gold, Silver, Jewels, Utenſils, Houſhold-ſtuff, Debts, Wood cut, Corn Emblements, Hay, and the like: Or ſuch as move themſelves, as Cattel, and the like. And therefore called Perſonal, either becauſe they are ſuch as do immediately belong to the perſon of a man, as an Horſe, &c. or becauſe being deteined from a man, he hath no means to recover them but a Perſonal Action. And therefore are ſaid to be Moveable, becauſe one may move them, and make them to follow a man from one place to another. And all theſe one may deviſe by Will; or if he die, they ſhall go to his Executors or Adminiſtrators.

Sect. 1.

perſonall action

Perſonal Action. *Deviſe. Executors.*

Thing in Action.

Perſonal things alſo are either quick and living, as Beaſts, Fowl, and the like; or dead, as Money, Gold, Silver, or the like: The living alſo are either tame, or wild. Both theſe kinds of Chattels alſo are either in Poſſeſſion, as when one hath his Ward or his Goods in hand: Or in Action; which is, where one hath not the thing it ſelf, but an Action to recover it; and then it is called a Choſe in Action. *Terms ley, Stamf.pr.cap.*16. *Stat.*1 *Eliz. cap.*2. *Co. ſuper Lit.f.*42.118. *Plow.*192. *Dyer* 277.5. *Co.*465.3.12: *Perk.ſect.*60. *F.N.B.*128.

Chattels are not ſo much regarded in Law, as Inheritances and Freeholds; nor Chattels perſonal ſo much eſteemed as Chattels real: And therefore it is they will ſo eaſily veſt in a man, and deveſt again; and deveſt, and veſt again: For, *De minimis non curat Lex*, (*i.*) The Law regardeth not ſmall things. Hence it is that no *Precipe* will lie againſt a Leſſee for years, that hath only a Chattel, for the baſeneſs of his Eſtate, *Co.* 8. 95. *Dyer* 25. 163. 298. 30, *Co* 8. 171 *Plow.* 418. 2. How they are regarded in the Law.

If a Leaſe for years be made on Condition, that if ſuch an Act be done it ſhall be void; it will be made void without Re-entry, 24 *Ed.* 3. 54. 8 *Ed.* 43. *Re-entry. Void.*

A Traitor or Felon, after the offence done, and before conviction, may ſell any of his Chattels real or perſonal, *bona fide*, to maintain himſelf. And an Officer of the King that is an Accountant, may ſell any of his Chattels *bona fide*, after he is become an Accountant and Debtor to the King, and the Kings debt will not reach it. They will veſt in the King where they be forfeit, and the Kings Officer may ſeiſe them without any Office found. *Felon.* *Accomptant.*

If an Obligation be made to two, and one of them releaſe the whole Debt to the Obligor, the other is without remedy: But in caſe of Inheritances and Freeholds, the Law is otherwiſe.

Chattels will eaſily veſt and deveſt: As if one that doth hold Land *in capite* doth mortgage it, and the Mortgager die, his Heir being within age, and the King ſeiſe the Body and Land, and after the day the Mortgager redeem the Land and re-enter; now the Wardſhip is loſt again. So if he make a Feoffment to the uſe of the Feoffee and his heirs, until the Feoffor ſhall pay to the Feoffee or his heirs an Hundred pounds; and that upon, and from the day of payment of the Hundred pounds, the Feoffee and his Heirs ſhall ſtand and be thereof ſeiſed to the uſe of the Feoffor and his heirs, and that then and thenceforth the Feoffor ſhall re-enter, &c. and the Feoffee die, his heir within age, and after the money is paid, the Kings title to the Wardſhip is defeated, *Dyer* 369. *a.* *Dyer* 298. *b.* 3. Where a Chattel lawfully veſted, ſhall after be deveſted and defeated; where not.

A Wardſhip happened to the Biſhop of *Durham*, by a Tenure of him *in capite*; and before any ſeiſing by him of Body or Land, the Biſhoprick became void, and a new Biſhop is made: It is adjudged, that the Executors or Adminiſtrators of the Predeceſſor, as a Chattel-veſt, and not the King nor the ſucceeding Biſhop ſhall have this Wardſhip. But if a Biſhop ſeiſe a Ward after it happen, and die, his Executor ſhall have him, *Dyer* 277. 2 *H.* 4. 19. 7 *H.* 4. 41. 44 *Ed.* 3. 42. *F. N. B.* 143. *e.* *Executor.*

If one give his goods to his daughter in marriage, and after they are divorced, the wife ſhall have again the goods that are not ſpent, *Dyer* 13. *a.* *Husband and Wife.*

If a Waſte by a Guardian in Chivalry be found againſt him, whereby he loſe the Cuſtody of the Land by the Statute of *Marlb. cap* 4. yet the Marriage is not deveſt, but he may ſtill maintain a Forfeiture of Marriage. So if Entry be for *Mortmain*, a Ward veſt ſhall not be deveſt, but the Abbot ſhall have the Marriage, &c. *Dyer* 25. *b.*

The husband and wife are Joint-tenants of a Term for years, and the husband kill himſelf; now in this caſe all doth ſurvive unto the wife, until the Office be found for the King upon the forfeiture, and then it goeth all from her unto the King, *Plow.* 262. Forfeiture of a *Felo de ſe.*

If one recover by an erroneous Judgment, and preſent to a Benefice, or enter into the Perquiſites of a Vilain, and after the Judgment is reverſed by Writ of Error; theſe Collateral things that are executed, ſhall not be deveſted, *Co.* 8. 142. *b.*

If an erroneous Judgment be given in Debt, and the Sheriff by force of a *Fieri facias* ſell a Leaſe for years of the Defendants, and after the Judgment is reverſed for Error; now in this caſe the Term ſhall not be reſtored, but only the money made of it: But if the Execution be by *Elegit*, and upon it the Sheriff do by Inquiſition extend a Term of the Defendants, and deliver to the Plaintiff in the ſuit, and after the Judgment is reverſed; in this caſe he ſhall have reſtitution of the Term it ſelf, *Co.* 8. 142, 143. *a.* Adjudg. in *Paſch* 15 *Jac. B. R. Buckhurſt* and *Mayo.* *Sheriff.* *Elegit.* *Reſtitution.*

And if a Sheriff by force of a ſpecial *Capias ut Lagatum*, ſeiſe Goods, or Chattels, and ſell them, and after the Utlary is reverſed; here the party alſo ſhall be reſtored to all his Goods and Chattels in kinde, *Co.* 8. 143.

If the King do Knight a Ward, that is in cuſtody of his Guardian, by reaſon of a Tenure in *Capite*, or Knights ſervice; now hereby the Wardſhip of the Body is Deveſted, but he ſhall hold his Lands, and have the value of the marriage, *Co.* 6. 74, 75.

If a man be Out-lawed, and the King give away ſome of his Goods, and after the King pardon him, and reſtore him to his Goods. Now the Goods given between the Out-lawry, and the Pardon ſhall not be Deveſted, nor that Gift avoided by the Pardon, *Broo. Reſtitution* 18.

If a man die ſeized of *Capite* Land, and it deſcend to his Brother and Heir, an Infant, and the Lord ſeize the Ward, the Wife of the Tenant being privily with childe of a Son, and after the Son is born. Now the Brother ſhall be out of Ward, but if the Son die, then he ſhall be in Ward again. *Broo. Gard.* 119.

4. What things ſhall be reputed as Goods and Chattels, and the Executors ſhall have after the death of the Teſtator, and what Actions accrew to them for ſuch things.

If there be a Preſentment to a Church, happen to a Tenant in Tail, and he die before he preſent; now his Executor, not the Iſſue in Tail ſhall preſent, for the Chattel is not Deveſted: So if a Termer have a Preſentment, which doth happen during the Term, though he doth not preſent, yet he ſhall have it. See more in the next *Queſtions* following, and in divers other Titles, *F.N.B.* 34. *a. B. Perk. Sect.* 97.

If a Parſon, Vicar, Maſter of Hoſpital, or any Body Politick, be poſſeſſed of any Goods or Chattels, in their own right, and die; theſe are Chattels that ſhall go to their Executors or Adminiſtrators, nor to their Succeſſors, *Co.* 4. 65. *Perk. Sect.* 58.

If a Leaſe be made for years, or a Wardſhip, or the next Advowſon of a Church, or Covenant for payment of money, or the like be granted, or an Obligation made to me, and to my Heirs; yet in all theſe caſes I have this as a Chattel, and it ſhall go to my Executor, and not to my Heir. So if any ſuch thing be made, or granted to me and my Succeſſors, my Executors ſhall have it; and if the Heir or Succeſſor get the Deed, the Executor may recover him for them, *Littl. Sect.* 740. 14 *H.* 4. 24. 34 *H.* 6. 27. *F.N.B.* 120. *Broo. Oblig.* 18. 68. *Fitz. Accomp.* 56.

Executors.

Charters.

If I have a Box, or Cheſt, or Trunk full of Writings at my death, and the ſame is open, not ſealed, or locked: Now this ſhall go as Goods to my Executor; but if it were ſealed or locked, as incident to the Writings, it would be the Heirs, whoſe the Writings be, 22 *Ed.* 4 7. 3 *H.* 7. 15.

If Charters be pledged to me for money, or granted to me, and I have no Land that they do concern, it ſeems this is in the nature of a Chattel, and my Executor, not my Heir, ſhall have them: But all ſuch Charters as concern my Inheritance, ſhall go with my Heir, and the Land it ſelf they do concern, 21 *Ed.* 4. 18, 19. 8 *Ed.* 4. 3. *F.N.B.* 137. *Bro. Chattel* 12.

Heir.

Trees.

If one ſeized of Land, make a Feoffment of it to me (excepting the Trees) and after Grant or Leaſe the Trees to me for years; or if one make me a Leaſe of Land for ten years, and after make me a Leaſe of the Trees for twenty years, to begin when the ten years are ended: In both theſe caſes, I have the Trees in the nature of a Chattel, and they ſhall go to my Executors after my death, *Co.* 4. 63.

Timber.

If there be a Leſſee for years, or life, of Land, whereon Timber doth grow, or Houſes be, and the Leſſor, Leſſee, or a ſtranger cut down any of the Timber, unleſs it be where the Leſſee doth cut where the Law doth allow him; in this caſe the Leſſor ſhall have this as a Chattel, which ſhall go to his Executor after his death: So alſo if the Houſes or Trees be proſtrate by the act of God, and if the Leaſe for years, or life, be a Leaſe made without impeachment of Waſte; in which caſe the Leſſee is to have the Timber and Trees in the caſes before, the Leſſee hath them as a Chattel, which ſhall go to his Executor, *Co.* 4. 63. 11. 81, 84.

If a man that hath the Fee-ſimple of Ground, whereon be Trees growing, ſell me all or ſome of the Trees, and I die, or he, and I before they be cut, or I ſell the Land, excepting the Trees; in the firſt caſe my Executor, in the laſt caſe his Executor ſhall have them in the nature of Chattels, albeit they be not cut down, *Co.* 11. 50. *Perk. Sect.* 58.

If

If one be poſſeſſed of a Term of Land, and Deviſe it to *A.* for life, the Remainder to *B.* for life, whereby *B.* hath onely a poſſibility; now if *B.* die, his Executor ſhall have this poſſibility in the nature of a Chattel, *Co.* 8. 55. 10. 47. *Poſſibility.*

So much of my Wives Apparel, as is neceſſary and convenient for her condition, and ſtate, as her Goods, ſhe may diſpoſe at her death, or take after my death; but the reſt, as my Goods, ſhall go to my Executor, 33 *H.*6. 31. *Wife.*

If a Feoffment, Gift in Tail, or Leaſe for life be made, by one rendring Rent, and the Rent is behinde, and I die; or a Rent be granted out of Land to me, in Fee for life, or years, and it be not paid to me in my life time, it ſhall go to my Executors in the nature of a Chattel. 32 *H.*8. 37. *Dyer* 375. *Co.*4. 48, 49. *Sect.* 3. *Rent.*

If a Rent be granted to me, my Heirs, and Executors, during the life of *J. S.* and for one half year after: Now this half years Rent, after my death, ſhall go as a Chattel to my Executor. *Curia, M.* 7 *Jac. Co. B. Walls* caſe. *Vide* 238

If one ſeized in Fee, make a Leaſe for years, rendring Rent, and deviſe this Rent to a ſtranger by years, and the Deviſee die; now it ſeems the Executors, and not the Heir of the Deviſee ſhall have it as a Chattel, *Dyer* 5, 6.

If one poſſeſſed of a Term, deviſe the Land to *A.* for life, the Remainder to *B.* Now this is a Chattel (though it be but a poſſibility) in *B.* which if he die, his Executor ſhall have it; but if it be a remote poſſibility, where an eſtate is to be reduced to a certainty by a contingent precedent, and it doth not reſt in the Teſtators life time, it is otherwiſe. *Co.* 8. 51. 10. 47. *Prices* caſe, *Trin.* 10 *Jac. B. R.* *Poſſibility.*

If any perſon that is Tenant for their own, or anothers life, make a Leaſe to me for one hundred years; this is a Chattel, which ſhall go to my Executors, and is in Judgment of Law, but a Leaſe for ſo many years, if he, for whoſe life it is held, do live ſo long, *Co.*7. 12.

Where by the Statute of *Weſtm.* 1. the Lord ſhall have the Wardſhip of his Heir-Female, being of the Age of fourteen years, at the time of the death of her Anceſtor for two years, if he die within the ſame two years, his Executors ſhall have it, 27 *H.*8 3. *Co* on *Littl.* 79. *Ward*

If a man make a Feoffment in Fee, upon condition, that the Feoffee ſhall pay an hundred pounds to the Feoffer, his Heirs, or Aſſigns (or his Heirs, Executors, or Adminiſtrators) at ſuch a time: Now in theſe caſes the Executor ſhall have this money as a Chattel, if it be paid by the Feoffee. *Co.* 5. 96, 97. *Fitz. Condition* 8.

If a man grant to me the two next preſentations of the Church of *D.* theſe are Chattels; and if I die, my Executors ſhall have them, 34 *Hen.* 6. 27. *Broo. Chatt.*

If a Parſon have an Annuity in Fee, in the right of his Church, and it is behinde, and the Parſon die, the Executors, and not the Succeſſor, ſhall have theſe Arrearages as a Chattel. *F. N. B.* 120.

If a man ſeized of Land, and poſſeſſed of a ſtock of Cattle, Leaſe it to others for years, and the Leſſees Covenant to pay an hundred pound by the year to the Leſſor, or his Wife, their Heirs, or Aſſigns, during the Term, and an hundred pound at a day, for a marriage portion of his daughter, and die; now the Wife, and after her death, her Executor, not the Heir of the Leſſor ſhall have this Rent, *Dyer* 275, 276.

If a man make a Leaſe for life, rendring Rent, and die; now the Executor, not the Heir ſhall have the Arrearages of Rent, due in the life time of the Teſtator, *Dyer* 375. *Co.*4. 50. *Fitz. Executors* 112. 98.

If there be in a Cheſt, or Box, wherein are Writings (which appertain to the Heir *ut ſupra*) Plate, or any other Goods; theſe do belong, and ſhall go to the Executor, and not to the Heir. *Fitz. Execut.* 111.

If a man finde Treaſure, the owner whereof is known, and he die before he have it, yet the Executor of him whoſe it is, ſhall have it. *Fitz. Corone* 446.

If I be Out-lawed, and my Goods forfeit, and die, and my Executor reverſe the Utlary for Error; now he ſhall have all theſe Chattels, and Goods that were ſo forfeit. *Forfeiture.*

If

Sect. 4.

If I being Guardian, do indow a Woman that hath title of Dower out of the Land, and after I die, my Executor ſhall have the ſervice due from the Woman, during the minority of the Infant. *Fitz. Dower* 138.

Fine on a *Copiholder.*

If I be Lord of a Mannor, and a Fine certain or uncertain be Aſſeſſed upon the admittance of a Tenant: This ſum of money aſſeſſed (as it ſeems) is a Chattel to me, which ſhall go to my Executors if I die.

If a man have a Judgment for Land, in a real or mixt Action, or damages, and die; now the Heir ſhall have execution of the Land, and the Executors ſhall recover the damages: So if a man recover damages for detaining of Charters, and die, the Heir ſhall have the Charters, but the Executors the damages; but the Executor ſhall not have Execution for the damage, before the Heir hath ſued a *Scire facias* for the Charters, *Fitz. Executor.* 32. 139.

The Executors ſhall have a raviſhment of Ward, for a Ward took away in the time of their Anceſtor, *per Stat.* of *Ed* 3. for Goods taken away in the life of the Teſtator; this is a Chattel therefore in them: So if the Teſtator had a Leaſe for years, or an Intereſt by Statute, or Elegit, and be ouſted and die, the Executor may have an *Ejectione firme:* So if the Teſtator bring an accompt, and the Defendant ſay *Neunques ſon bailge*, and it be found againſt him, and after Judgment the Plaintiff doth die; this Action ſhall ſurvive to the Executors: So if the Teſtator hath recovered any debt, or damages in any perſonal Action, this as a Chattel ſhall go to the Executor: So all cauſes of Action and Suits ſhall go to the Executor, and not to the Heir. Wherefore ſee more in *Executor*, the very ſame Queſtion in effect with this. *Fitz. Execut.* 52, 53, 59, 84, 117. & *Accompt.* 56.

5. Where not, but the Heir or ſome other ſhall have them.

Regularly all thoſe things which ſhall not be forfeit by Utlary in a perſonal Action, nor be attached in an Aſſize, nor diſtrained for Rent, are not reputed Chattels, neither ſhall go to the Executor, but to ſome other.

Heir.
Incidents.

Alſo whatſoever it will not be Felony to ſteal, as all the Incidents of an Houſe, as Glaſs of the Windows annexed to the Windows by Nails, or otherwiſe; all the Wainſcot about the Houſe, fixed by Nails, Screws or Irons put through the Poſts, or Walls, Tables Dormant, Furnaces of Lead and Braſs, and Fats in a Brew-houſe or Dye-houſe ſtanding, and faſtned to the Walls, or ſtanding and faſtned to the ground in the middle of the Houſe (though faſtned to no Wall) a Copper or Lead fixed to the Houſe; all the Doors without and within, whether they be ſet up at the charge of the Lord or Tenant, ſhall go with the Houſe to the Heir, or him that is to have the Houſe, and not to the Executor of the Tenant, as a Chattel.

Trees.

Alſo Trees ſtanding, and Graſs growing, is parcel of the Inheritance, and not as Chattel to go to the Executor or Adminiſtrator, 20 *H.* 7. 13. *Kelw.* 118. *Co.* 4. 63, 64. 21 *H.* 7. 26. 4 *H.* 7. 10. *Kelw.* 86. *Dyer* 273. *b. Co.* 4. 65.

Game of Parks.

Alſo Pales, Walls, and Stakes, Deer, Coneys, Pheaſants, Partridges, and the reſt of the Game of a Park, ſhall go with the reſt of the Park, as parcel of the Freehold, and Incident, and Concomitant thereunto, and not as a Chattel to the Executor. *Co.* 7. 14. 22 *Ed.* 4. 7 *Hen.* 7. 15. 10 *H.* 7. 6.

Fiſh.
Pigeons.

Alſo the Fiſh in the Pond are not reputed as Chattels, neither ſhall go to the Executor, but ſhall go with the Pond: So alſo the Pigeons of an Houſe ſhall go with the Houſe, *Kelw.* 118. 18 *Ed.* 48. *Goldsb.* 129. *pl.* 24.

If Land or Rent be granted to one and his Heirs, during the life of another; now after the death of the Grantee, his Heirs ſhall have this eſtate, and not his Executors as a Chattel, *Litt. Sect.* 739.

If one ſeized of Land, wherein are Trees in Fee, and make a Feoffment of it (excepting the Trees) and after ſell the Trees to the Feoffee abſolutely, or grant them to him and his Heirs; in this caſe the Trees are reunited, and parcel of the Inheritance, and are no Chattels, nor ſhall go to the Executors. And if a man ſeized in Fee of ſuch Land, make a Leaſe for life, or years (excepting the Trees) theſe Trees are no Chattels in the Leſſor, neither ſhall go to his Executors, but to him that hath the Land, *Co* 4. 63. & 11. 48.

If there be Tenant for life, the Remainder in Fee of a Tenancy, and the Lord grant his Seigniory for life, and after he in Remainder in Fee of the Tenancy die, his

his Heir within age; and after the Lord die, and after the Tenant for life die: Now in this caſe the Heir of the Lord, and not his Executor ſhall have the Wardſhip, *Co.* 2. 93.

If the Kings Tenant by Knights ſervice in *capite*, be ſeized of a Mannor whereunto an Advowſon is appendant, and the Church become void, and the Tenant dieth, his Heir within age, the King that hath the Wardſhip, ſhall have the Preſentment, and not the Executor as a Chattel: But if the Land were holden of a common perſon, the Executor and not the Guardian ſhould have it, *Co. upon Littl.* 388.

If a Leaſe be made for years, rendring Rent at *Michaelmas*, or within ten days after, and the Leſſor, during the Term, happen to die after *Michaelmas*, before the ten days expired. Now in this caſe the Heir of the Leſſor, and not his Executor, ſhall have this laſt years Rent due at *Michaelmas*. *Hill.* 7 *Jac. per totam curiam in B. R. & H.* 9 *Jac.*

If any Office of Truſt, Judicial, or Miniſterial, being for the Adminiſtration of Juſtice, or the like, be granted to me for years, or to me, my Executors, and Adminiſtrators for years; yet this is no Chattel, which my Executor, or Adminiſtrator, ſhall have after my death; for it is Perſonal, and dies with the perſon, *Co.* 9. 96, 97.

If one have a Wardſhip, as Guardian in Socage, and die, his Executors ſhall not have it, for it is perſonal, *Plow.* 293. *Co.* 3. 39.

If the Father have the Wardſhip of his Son, and Heir Apparant, *Jure naturæ*, this is no Chattel in him which his Executor ſhall have after his death; for the Cuſtody is inſeparably annexed to the perſon. As if there be Lord, and a Woman-Tenant by Knights ſervice, and the Tenant doth make a Leaſe for life, and after the Lord and Tenant do enter marry, and have Iſſue, between them a Son, and the Wife die, and after the Father doth die, the Son within age, his Executors ſhall not have this Ward by reaſon of the Seigniory, 33 *H.* 6. 55. *Co.* 3. 39.

In ſome caſes things that are in their nature but Chattels, yet ſhall not go to the Executors, as certain Jewels, *&c.* of the Kings of *England*, that ſhall not go to the Executors of the King, but ſucceeding Kings: So alſo if a King hath the Temporalties of a Biſhop, all Wardſhips, and preſent Actions, happning by reaſon thereof, ſhall go to the ſucceeding King, not to the Executor: Alſo by the Cuſtom of certain places, Heirbomes, and a reaſonable part of the Goods may go to others from the Executors, 11 *Hen.* 4. 5. *Broo. Chattels* 2. *F. N. B.* 122. *Fitz. Debts* 51, 52. 38. 60.

If a Major and Commonalty, Dean, and Chapter, or any other Corporation, have Goods or Chattels, in the Right of their Corporation; though they change not their nature thereby, yet they ſhall not go to the Executors, but to the Succeſſors in the Corporation: But if a Leaſe be made to a Biſhop, and his Succeſſors for years, his Executors, or Adminiſtrators, ſhall have it as a Chattel, but in *auter droit*; for Regularly no Chattel can go in ſucceſſion, in caſe of a ſole Corporation, *Co.* 4. 65. *Co. upon Littl.* 46. *b.*

If Goods be given to a Woman in marriage, and the Husband and the Wife, be after divorced; now in this caſe, though theſe Goods change not their nature; yet they, at leaſt thoſe that remain, ſhall come back to the Wife, and ſhall not be the Husbands any longer, or go to his Executor after his death. See *Divorce*. 26 *H.* 6. 7. *Broo. Chattels* 1.

If a man grant a Rent in Fee, and grant over that if the Rent be behinde, *&c.* That he ſhall forfeit twenty ſhillings *nomine pœnæ* to the Grantee, and his Heirs; now if this Rent be behinde, and he die, the Heir, not the Executor ſhall have and recover this Rent, and Penalty, and he may have an Action of Debt for it; but if an Annuity or Rent be granted to one for his life or years, and he die; his Executor ſhall have and ſue forth for them, and Arrearages incurred in his life time, *F. N. B.* 120. *M. Fitz. Covenants* 17. *Fitz. Executors* 99.

If a man make a Feoffment in Fee of Land, and the Feoffee Covenant to do ſomething to the Feoffor and his Heirs, *Et quoties defectus fuerit &c.* That he ſhall forfeit to him, and his Heirs, five pound. Now upon default, the Heir, and not

not the Executor ſhall recover this penalty. *Dyer fol.* 24. *a.*

Relief. If a man ſeized of a Mannor in Fee, and have a Relief due to him upon the death of a Tenant, and he die before it be had, it ſeems the Heir, not the Executor ſhall have it; but if the Lord were onely ſeized of an eſtate for life, or had a Leaſe for years of the Mannor, *Contra*, ſee ſomewhat more in the *Queſtion* following, where Eſtate if *Freehold*, may be of a Chattel preſently. *Dyer fol.* 24.

6. Emblements, to whom they ſhall appertain, and who ſhall have them. Emblements ſtrictly are the profits of Land which hath been ſowed (which in ſome caſes, he that ſoweth the Land ſhall have, and in ſome caſes not) but the word is ſometimes uſed more largely for any profits that ariſe, and accrew naturally from the ground, as Graſs, Fruits of Trees, Hemp, Flax, and the like. *Terms Ley. Kelw.* 125. *Co. upon Littl.* 55.

If a Tenant in Fee-ſimple, or Fee-tail, ſow the Land, their Executors after their death, if they die before cutting, not their Heir ſhall have the Emblements. *Merton, cap.* 2. 37 *H.* 6. 25.

Husband and Wife. If one have Land in Fee-ſimple, or otherwiſe in his own or Wives right; or be eſtated in Land for years in the right of his Wife, and he ſow it with Corn, and die before it be reaped; in this caſe the Executor of the Husband, not the Wife, or Heir ſhall have it.

And ſo it ſeems of Planted Hops, Saffron, and Hemp, *Quicquid plantatur ſolo, ſolo cedit.* But Graſs, Apples, Pears, and other fruit upon the Trees, though ripe, and ready to be cut ſhall go to the Heir with the Land: But all theſe of both ſorts, if the Land in which they grow, be ſold away, and not excepted paſs with the Land. The Roots of Carrets, Turneps, Parſnips, and Skirrets, are diſputable. *New Book of Executors*

If a Diſſeiſor, or a Diſſeiſor of a Diſſeiſor, or a Feoffee, Donee, or Leſſee, of the firſt, or ſecond Diſſeiſor, ſow the Land, and cut and carry the Corn away, or cut and carry away the Graſs, or Trees, or gather, and carry away the Fruit, as Apples, Nuts, or the like; or give, or ſell away any of this, (unleſs it be in a Market or Fair, *&c.*) yet when the Diſſeiſee doth re-enter, he ſhall have it all again, and may take it whereſoever he doth finde it; for the property of it is ſtill in him, and if he die, his Executor may do the like; and if they be gone, or ſpent, the Diſſeiſee may have an Action of Treſpaſs for them, againſt the Diſſeiſor, but not againſt his Leſſee, Feoffee, or Donee, which come in by Title. *Co.* 11. 51. *Dyer* 31. 173. 12 *H.* 7. 25. *Perk. Sect.* 519. *Co.* 5. 83.

If a Tenant for his own or anothers life, ſow the Land, and after die, his Executors, and not him in Reverſion, ſhall have the Emblements: And ſo is the Law for any particular Tenant that hath an eſtate uncertain; but if a Tenant for years ſow the Land, and before that he hath cut, and ſevered the Emblements from the Land, his Term expireth, there the Leſſor, or he in Reverſion, and not the Leſſee, or his Executors ſhall have the Emblements: But if Leſſee for years of the Tenant for life, ſow the Land, and the Leſſee for life die before he can Reap, yet the Leſſee for years ſhall have the Crop. So if a man ſeized of Lands, in Fee hath Iſſue, a Daughter, and dieth, his Wife being *enſevit*, or with childe of a Son, and the Daughter ſoweth the grounds, and after the Son is born, yet the Daughter ſhall have the Emblements, 10 *Aſſ. p.* 6. *Littl. Sect.* 68. 7 *H.* 4. 13. *Co.* 5. 106. 7 *Aſſ. p.* 19. *Dyer* 310. 16 *H.* 6. 6.

If Tenant for life be diſſeiſed, and the Diſſeiſor ſow the Land, and the Tenant for life die; in this caſe the Executors of the Tenant for life, and not the Diſſeiſor, nor him in Reverſion, ſhall have the Corn, Leſſee for life, the Remainder for life, and the firſt Leſſee for life, make a Leaſe for years, and this Leſſee was put out of poſſeſſion by a ſtranger, who ſoweth the Land, and the firſt Leſſee for life died, and he in Remainder for life entred into the Land, and leaſed it to Sir *H. R.* In this caſe it ſeems not he, but the Leſſee for years of the firſt Leſſee for life muſt have the Corn. *Goldsb.* 143. *pl.* 60.

Husband and Wife. If a Woman Copiholder, during her Widowhood, according to the Cuſtom of the Mannor, ſoweth the Land, and before the ſeverance of the Emblements, ſhe taketh an Husband, the Lord ſhall have the Emblements: So if ſhe make a Leaſe for years,

years, and the Leſſee ſow the Land, and then ſhe take an Husband, there the Lord, not the Leſſee, ſhall have the Emblements, though the Leſſees eſtate be determined by the act of a ſtranger, *Co.* 5. 106. and upon *Littl.* 55. *b. Goldsb.* 189. *pl.* 136.

If the Wife have a Leaſe for years of Land, as Executor to a former Husband, and her preſent Husband ſow it, and die; in this caſe, the Corn, at leaſt, ſo much as is more then the value of the Land, ſhall go to the Wife, not to the Executor of the Husband. *New Book of the Executors.*

If a Leaſe be made to the Husband and Wife, during the Coverture, and the Husband ſoweth the Land, and after they are divorced, *cauſa præcontractus*, the Husband not the Leſſee ſhall have the Emblements.

If one ſeiſed of Land, in the right of his Wife, in Fee, or for life be, and he, or his Leſſee for years ſow the Land; and before the Corn be cut, the Wife die, or the Husband die; now in the firſt caſe, the Husband, or his Executors, and the laſt the Leſſee, or his Executors, if he die, ſhall have the Emblements (*a*) But if the Husband and Wife be Joint-tenants of Land, and the Husband ſoweth the ground, and the Land doth ſurvive to the Wife; here it ſeems he ſhall have the Corn, and not the Executors of the Husband, but the Husband might have given or diſpoſed them. 7 *Hen.* 4. 17. 7 *Aſſ. p.* 19. *Broo. Embl.* 6. *Co.* upon *Littl.* 55. (*a*) *Aſſ.* 21. *Dyer* 316.

Where one doth enter into Land by a right Paramount, or the Leaſe, or Eſtate, doth determine by the act of the Leſſee, or by his means that did ſow the Land, or by the means of him, under whom he claims; in this caſe, though the eſtate of the Leſſee be uncertain, yet he ſhall not have the Emblements: As if one enter upon, or recover Land, ſaved by vertue of a condition in Law, or in Deed, as if the Leſſee for life, or years, do alien in Fee, or commit Waſte, and he recover the Land, or a Feoffment, or Leaſe be made on Condition, and the Condition be broken; or the Lord of a Copiholder enter for a forfeiture of the Tenant, or a Lord enter on his Villains Land, or the King, or Lord enter upon the Land of his Tenant after a Felony done for a forfeiture: In theſe and ſuch like caſes, he that entreth upon, or recovereth the Land, ſhall have all the Emblements that are there growing, and not cut upon the Land at the time of his Entry, or Recovery. So if a man recover Land by a Suit upon a Right, and be put in poſſeſſion by an *Habere facias Seiſinam*, or *Habere facias Poſſeſſionem*, he ſhall have all the Emblements that ſhall be then growing upon the Land. *Fitz. Treſpaſs* 254. 44 *Ed.* 3. 25. *Co* 5. 106. and upon *Littl.* 55. *b. Co.* 4. 21. *Perk. Sect.* 515. 40 *Ed.* 3 5. 19 *H.* 9. 45. *Stamf. lib* 3. 301. *Co.* 5. 111. *Broo. Embl.* 8.

And yet if a Feoffment be made upon Condition, and the Condition is broken, and the Feoffee before the entry of the Feoffor, cut the Corn ſowed on the ground, and after ſuch ſeverance Feoffer re-enter; in this caſe, not he but the Feoffee ſhall have the Emblements, but if he had entred before, he ſhould have had it: So if a Copiholder after forfeiture, and before entry of the Lord, cut the Corn, he ſhall have that which is cut, 5 *H.* . 17. *Broo. Embl.* 4.

If a man Leaſe Land at Will, and the Leſſee doth ſow the Land with Corn, or ſet Roots, or ſow Hemp, or Flax, or any yearly profit, and the Leſſor determined the Will, before it be ripe, and ouſt the Leſſee: Now in this caſe, the Leſſee ſhall have the Corn, and if he die, his Executor ſhall have it; but if the Leſſee himſelf determine the Will, he ſhall not have the Emblements, but the Leſſor: And if ſuch a Tenant at Will, plant yong Fruit Trees, or yong Oaks, Aſhes, Elms, *&c.* or ſow the grounds with Acorns, *&c.* he ſhall have no profits of theſe; for this doth not bring any yearly profit: So if he, or any other Tenant that ſhall have Emblements, do onely Ear and Dung the Land, they ſhall have no benefit by this, *Co.* 5. 116. and upon *Littl.* 55. 18 *Ed.* 4. 18. *Littl. Sect.* 68. *Co.* 5. 116.

If a Tenant by Statute-Merchant, ſoweth the ground, and then a ſudden, and caſual profit hapneth, by which he is ſatisfied, yet he ſhall have the Emblements, 44 *Ed.* 3. 15. *Co.* on *Littl. f.* 55. *b.*

If a Tenant at Sufferance be diſcharged, and notwithſtanding he continue in poſſeſſion,

poſſeſſion, and ſow the Land, and the Lords Baily take the Rent at our Lady-day after, and payeth it to the Lord in a groſs ſum with other monies: Now it ſeems in this caſe the Tenant, and not the Lord ſhall have the Corn at Harveſt, *Cromp. Jur.* 215.

If a man under colour of a Feoffment or Leaſe, preſuming he hath a good eſtate, when in truth he hath none, ſow the Land; now in this caſe, neither he nor his Executor, but the Feoffor or Leſſor ſhall have the Emblements, *Lees* Caſe, 9 *Jac.*

Tenants in Common. If two be Tenants in Common, and one die, and his wife hold in Common, and ſow the Land, and die; the other Tenant in Common, or the Heir ſhall not have it, but the Executor of the woman, *Perk. ſect.* 523.

If a Leaſe be made to an Husband and Wife at will, and they be afterward divorced *cauſa præcontractus*, and the Land be ſowed before; now in this caſe the Husband, and not the Leſſor ſhall have the Emblements, *Co.* 5. 116.

Husband and wife. If a Tenant in Dower ſow her Land, and die before ſeverance of the Corn, the Heir ſhall not have it, but the Executor of the Wife: And if after the ſowing ſhe take an Husband, and he die before it be cut, his Executors ſhall not have it, but the Wife ſhall have it. If a Feme-ſole ſow her Land, and after marry, and he die before ſeverance, the Wife, not the Executor of the Husband ſhall have it, *Bro. Embl.* 26. *St.* 20 *H.* 3. *c.* 2. *Perk. ſect.* 522.

Parſon. If a Parſon die before the firſt day of *May*, when the Land is ſowed, and another Parſon is made, the Succeſſor ſhall not have the Tenths, but the Executors or Adminiſtrators of the firſt Parſon: But if he die before the Conception of the Virgin *Mary*, the Succeſſor ſhall have the Tenth of the Emblements. But now by the Statute of 28 *H.* 8. the Profits are to be ſequeſtred from the death of the Parſon, and to be delivered all to the Succeſſor; only the Corn ſowed upon the Glebe-land by the Predeceſſor, which he may diſpoſe by Will; and if he do not, it ſeems his Executor ſhall have it, *Stat.* 21 *H.* 6. *cap.* 30. 34 *H.* 6. 33. 35 *H.* 6. 39. 28 *H.* 8. 11.

Sect. 8. *Forfeiture.* If a man be outlawed in a Perſonal Action, the King, not the party or his Executors, if he die, ſhall have all the Emblements on his ground at the time of his Outlary. So if a man forfeit his Goods in caſe of Felony by flight, though he be after acquitted, or being convicted, the King will have all the Emblements at the time of the flight in the firſt caſe, and Felony done in the ſecond caſe, or at any time after (as it ſeems) until Conviction, or Acquittal, 5 *H.* 7. 16. *Fitz. f. Corone*, 344.

Tythe. If Corn be reaped, and the Tythe not ſet out, and the Inheritor of the Tythe die; it ſeems the Executor, not the Heir of the Inheritor ſhall have the Tythe, *New Book of Executors.*

Note. But note, That in all theſe caſes where a man hath right to Emblements, and dies, if he make any Deviſe of them, then they ſhall go according to his will and diſpoſing. See *Teſtament. Dyer* 316.

7. The remedy to recover the Emblements.

And in all theſe caſes before, he to whom the Law doth give the Emblements, may lawfully enter into and upon the Land or ground where they grow, and cut and carry them; and he is not put to his Action for them, nor bound to take them ere they be ready, or at one time; but the Law doth give him convenient entry of Ingreſs, Egreſs and Regreſs; and if he be diſturbed in this way, he may have his Action of the Caſe, and ſhall recover as much as he is damnified. *Quando Lex aliquid alicui concedit, concedere videtur, & id ſine quo res ipſa eſſe non poteſt.* And if a man that hath right to theſe Emblements have any Treſpaſs done to him in them, he may have an Action of Treſpaſs for it, *Co. ſuper Lit.* 56. *Kelw.* 125. *Kelw.* 160. *a*

Action.

If a man be poſſeſſed of a Term or Leaſe for years, and do by Will deviſe it to one for life, and after to another for life, or for the reſidue of the years, theſe Deviſes are good, and the Deviſees ſhall have it accordingly, and the Executor of him in Remainder after his death ſhall have this poſſibility as a Chattel; and he that hath the firſt Eſtate cannot bar him of the next, but not as a Freehold, for the quality of the Eſtate is not hereby changed. But if ſuch a Conveyance were by Deed, in this caſe

caſe he to whom the firſt Eſtate were limited, would have all the whole Term; and they that are to come in the Remainder, would have nothing. So alſo ſuch a Deviſe by Will of a Chattel perſonal, will (as it ſeems) be void to him in Remainder. But *Quære* of this; and ſee *Fitz. Deviſe contra*, *Co.* 8. 95. 10. 47. *Plow.* 525. *Dyer* 358. *Bro. Chat.* 23.

But if a man be poſſeſſed of a Term, and do deviſe it to one and the heirs of his body, the Remainder to another; this Deviſe is void to him in Remainder, and the firſt Deviſee and his Executors ſhall have it all the time: And if he deviſe to one of his Heirs, the Deviſee hath no Freehold, but it ſhall go to his Executors as a Chattel, *Co* 10. 87. *Walts* and *Gouldſtorous* Caſe, *M.* 19 *Jac. Co. B.*

If a man be poſſeſſed of a Term or Leaſe for years of Land, and grant a Rent-charge out of it to *J. S.* for his life, or in fee, this is a good Grant, and the Land ſhall be charged during the Term only, *Co. ſuper Lit.* 147. *b.*

If one that hath a Leaſe for years enter into a Statute, and Execution be ſued thereupon, and the Sheriff extend the Leaſe, and deliver it to the Conuſee at a yearly value, as he may either ſell it outright, or extend it at a yearly value, which he will; this is no frank Tenement in the Conuſee, but a Chattel ſtill.

If a Termor grant all his Eſtate to *A.* to the uſe of himſelf and his wife for their lives; in this caſe neither the Termor or his wife hath any Freehold; for the Statute of 27. doth not execute the Poſſeſſion to this uſe: And therefore if he or his wife grant this to another, their Grant is void, for the whole intereſt in Law is in *A.* *Dyer* 369 *a.*

If a Leaſe be made to *J. S.* for Forty years, if he live ſo long; and if he ſhall die within the ſaid term, that his wife ſhall have the Reſidue of the term: Now this is no Freehold, and by the death of *J. S.* the Leaſe is ended, and therefore the Remainder to his wife is void, *Dyer* 253. *b.*

A man may have an Eſtate of Freehold or Inheritance in other things as well as Lands, Rents, Commons, and ſuch like; as in a Robe or Garment, Bread or Drink, or the like. See *Corody*, and *Fitz.* in *Aſſiſe.*

If Land or Rent be granted to one and his heirs during the life of *J. S.* in this caſe, after the death of the Grantee, his Heir, not his Executor ſhall have it, *Lit. ſect.* 739.

And regularly all other things which are not forfeited by an Outlary in a Perſonal Action, nor attachable in Aſſiſe, nor diſtrainable for Rent, nor the taking away whereof will be no Felony; they are not to be reckoned Chattels that ſhall go to the Executor, 20 *H.* 7. 13. *Kelw.* 118.

8. *Thing in Action*, what.

A Thing in Action, is, when a man hath Cauſe, or may bring an Action, or have other Remedy for ſomething due, or ſome wrong done to him. As a Right or Title of Entry into Land, which another hath; an Action of Debt upon an Obligation, or Annuity, or Rent, or Action of Covenant; or an Aſſiſe upon a Diſſeiſon, *Ejectione firme* upon an Ejectment; a Raviſhment of Ward, upon the detaining of a Ward; Treſpaſs of Goods taken away, Beating, or the like. And becauſe they are things whereof a man is not poſſeſſed, but for recovery of them is driven to his Action, they are called things in Action, or the Poſſibility of a thing. And this is either certain, (*i.*) when the demand is certain, as in caſe of Debt; or uncertain, (*i.*) when the demand is of a thing uncertain, as in Actions of Treſpaſs, and the like. And theſe Choſes in Action alſo are ſome of them Perſonal, as Debt, Damages, and the like; and ſome of them are mixt, as Wardſhips; and ſome are real, as Rights, Titles of Entry or Action, and the like, *Terms ley*, *Finches ley*, *f.* 25. *Bro. Pat.* 98.

The kinds.

9. The nature of it.

Theſe things in Action, or Cauſes of Suits, as Entries to continue ones Right, or upon a Title Poſſibilities, and the like, or of that nature, as that regularly they cannot be given nor granted, nor yet transferred from one Subject to another, by act of Law; as a Right of Action will not come to the Lord by Eſcheat. And if an Obligation had been made to a Villain, and the Lord ſeiſe him, he ſhall not have, nor can recover this Debt, but in the Villains name; nor yet be given or granted by act of the party from one man to another. And therefore if a man hath a Debt due by Eſpecialty or otherwiſe, he cannot grant or aſſign it to another, ſave only in ſome ſpecial

caſes; but he may depute another to ſue it for him, and in his name, or by Agreement promiſe it to another when it is recovered; or he may grant, give, or aſſign the Eſpecialty it ſelf, and ſo deprive himſelf of the means to recover it, as hath been often adjudged. But ſuch things may be extinct by Releaſe, or Confirmation, &c. But this muſt be always between the parties themſelves: For, no ſtrangers, but parties themſelves and privies, *(i.)* Heirs, Succeſſors, Executors and Adminiſtrators can take advantage of them, unleſs it be in ſpecial caſes: As where a man is Executor, or where is a Grant of a Reverſion, (for which ſee the Statute 32 *H.*8. *cap.*8. *& vide infra.*) And this the Law doth provide to avoid multiplicity of Suits, and ſubverſion of Juſtice, which would follow, if theſe things were grantable one from another, 1 *H.* 6. 4. *Co.* 10. 48. 22 *Aſſ. p.* 37. *Dyer* 30. *b.* 39 *H.* 6. 26. 34 *H.* 6. 30. *Fitz. Maint.* 14: *Plow.* 185. *b.*

Extinguiſhment.

10. Where, and what things ſhall be reputed in the nature of things in Action, and not grantable.

Whatſoever comes under the definition of Action, (for which ſee *Action*) or is a Chattel only in Action, (for which ſee above) as all Cauſes of Suit for any Debt or Duty, Treſpaſs or Wrong, are to be accounted Choſes in Action. Alſo if I have a Judgment againſt another man for money, or a Statute for money; theſe are Choſes or Things in Action. So alſo if I have an Annuity to me in Fee, for life or years, it ſeems this is in nature of a Choſe in Action, and not grantable. But *Quære.* See *Fitz. Grant* 45. For it ſeems, an Annuity in Fee to me and my heirs, is grantable, *Bro. Adjudg.* 16. *Co.* 5. 89, 90.

If a man have an Advowſon, and the Church be void, the Preſentation to it is in the nature of a Choſe in Action, and cannot be granted by a common perſon, but might be in the caſe of the King. But in this caſe, if the Patron grant the next Preſentation when it ſhall be next void, the Grantee it ſeems ſhall have the next Avoidance after this, *Bro. Choſe in Action. Dyer* 296. *Fitz. Grant* 50. *Dyer* 26. *a.*

Alſo a Poſſibility of an Intereſt, or an Eſtate in a Term of years, is ſomewhat near in its nature to a Choſe in Action, and therefore is not grantable from one Subject to another; but this may be releaſed to Privies and Parties in the Eſtate, *Co.* 4. 66. *a b.* But if one ſell to me and my Aſſigns an hundred Load of wood in his Wood, to be taken by my Aſſignment; this is more then a thing in Action, for it is an Intereſt which I may grant over, and if he refuſe to aſſign it, I or my Aſſigns may take it without him. So if one ſell me his wood in ſuch a Wood, (except twenty of the beſt Trees) and that I ſhall cut it within two years; this is an Intereſt in me grantable over; and if he refuſe to chooſe his twenty Trees in reaſonable time after I have requeſted him, I may cut down the Wood, and leave him twenty Trees. So if one grant me reaſonable Eſtovers in his Wood, to be taken by the view and delivery of his Bailiff, this is an Intereſt; and if his Bailiff will not deliver it after requeſt, I may take it without him, *Co.* 5. 25. 5 *Ed.* 3. 64.

Grant.

Sect 10.

11. When, and what right of Title, Debt, Duty, or thing in Action, may be given or granted over

By the King.

All Choſes in Action perſonal that are certain, that were the Kings originally, or that did come to him by Forfeiture from others, as Annuity, Debt, Ward, or the like, might have been by ſpecial and apt words by his Prerogative granted to any Subject; and the Grantee might have ſued for the ſame in his own name, albeit there had been no words in the Patent to enable him ſo to do: And the courſe is to ſue for them in the Exchequer. Alſo the King might have granted the Preſentation of a Church, when it was void, *Dyer* 30. *Fitz. Grant* 16. *Bro. Ch. in Act.* 1. 33 *H.* 8. 39. The King might have granted his Obligations made to him, to his Heir or Executor, at his pleaſure. Alſo the King (as it ſeems) might have granted over his Rent, and his Condition of Re-entry for not payment, or any other real or mixt Choſe in Action, which another may not do, but where a Reverſion is granted within the Statute of 32 *H.* 8. And if the King be indebted to others, he might have aſſigned over all, or part of a Tenth, for the payment of it to thoſe he did owe it, or appoint it to be paid by his Cuſtomers, 2 *H.* 7. 8. *per Huſſey.* 1 *H.* 7. 8. *Bro. Pat.* 98. 5 *Ed.* 4. 8. *Det.* 38. 43. 62.

By a common perſon.

But a Common perſon regularly cannot give or grant any ſuch Choſe in Action, (unleſs it be to the King, which he may do by Deed not inrolled) and if he do, ſuch Gifts and Grants will be void. As if an Obligee give or grant his Debt and Obligation to another man; in this caſe he to whom it is given or granted, cannot have

nor

nor recover the Debt in his own name, but he may cancel the Obligation or deliver it up to the Obligor. So if a man hath a Right or Title of Entry into Land, he cannot give or grant this over to a ſtranger. As if a man diſſeiſe me of Land in Poſſeſſion or Reverſion, and I grant my Right of Entry into this Land to a ſtranger: Or if I make a Feoffment in Fee on Condition, that if I do ſuch a thing, I ſhall re-enter; this Condition or Title of Entry in the nature of a Choſe in Action, is not grantable over; but ſometimes a Condition incident to a Reverſion is grantable by the Statute of 32 *H.8. Co.*10.48. *Co.*5.89 90. 21 *H.*7.15. *Fitz. Prerog.* 10. 2 *H.*7.8. *Perk: ſect.*86.280. *Co.*2.56.*a.* 3.4.*a.*

If a man have the Wardſhip of an Infant, and he is contracted to another in his minority, and then he grant the Wardſhip, and after the Infant is married: Now in this caſe the Grantee ſhall have the Writ of *Raviſhment of Guard*; for this Grant was good, *Fitz Guard.*94.

If a man take away any of my Goods and Chattels from me as a Treſpaſſor; now it ſeems I cannot give or grant theſe Goods or Chattels to another, until I have deveſted the Property of them again in me by ſeiſure,&c. 2 *Ed.*4.*f.*15. 10 *H.*7.27.

The things in Action ſometimes are extinct and gone by the act of the party that hath right to them; and ſometimes they are only ſuſpended, and ſhall be again revived: As if the Ordinary commit the Adminiſtration of the Goods of the Debtee to the Debtor, the Debt is only ſuſpended. And therefore if the Adminiſtration be unduly granted, and after revoked and granted to another, the ſecond Adminiſtrator may recover this Debt of the firſt: And if there be not Aſſets beſides, this ſhould be accounted Aſſets in the hands of the firſt Adminiſtrator, whiles it doth continue. So if a Feme-ſole Executrix of a Debtee, take the Debtor to husband, this doth only ſuſpend the Debt; and if he die, the wife may ſue the Executors or Adminiſtrators of her husband, as ſhe might before, and that Debt alſo ſhall ſtill be reputed Aſſets in her hands. So if the Debtor makes the Debtee, or the Debtee the Debtor his Executor, and he do legally refuſe it, or if he make him and others Executors, and they all refuſe, then the Debt is revived again, *Co.*3.136. *Plow.*185. *Co.*8.136.9.37.

But if a Feme-ſole Debtee take her Debtor to husband, or if there be two Obligors in an Obligation, and the Obligee take one of them to husband; or if one be bound to a Feme-ſole and another in an Obligation, and ſhe take the Obligor to husband; or if the Debtor make the Debtee his Executor, or the Debtee and another his Executors, and they do take the Executorſhip upon them; or if the Debtee make the Debtor his Executor, or him and another his Executors, and the Debtor die before he take upon him the Executorſhip: In all theſe caſes the Debt or Action is extinct, and ſhall not revive. See *Suſpenſion. Co.*8.136. 21 *Ed.*4.3. *Plow.*184. 11 *H.*7.4. 21 *H.*7.24.

If a man diſſeiſe me of Land, and then I make him Leaſe for years of the Land: Or if I make him a Feoffment in Fee on Condition, and before the Condition performed, make a Leaſe of all or part of it to another; by this the right or title is ſuſpended: And if I make a Feoffment in Fee; in theſe caſes the right or title is extinct, and will never revive. So if the Diſſeiſee levy a Fine of the Land to a ſtranger, the right is extinct, and the Diſſeiſor ſhall hold the Land for ever, *Co.*4.52. *Co.*2.56.*a.*

When a man doth die, all theſe things called Choſes in Action ſhall go to his Executors as part of his Chattels. See in *Chattels.*

If an Obligation be made to two men, and one of them forfeit by Outlawry or otherwiſe, or had granted all to the King; in this caſe the King would have had the whole, and the other had loſt his part, 19 *H.*6.7. 22 *Aſſ. p.*37.

If a Villain eſcheat, the Lord ſhall have no Choſes in Action that were his: And if the King had had an Ideot, he ſhould not have had any Choſes in Action that were his hereby. And yet if a man had been outlawed, the King ſhould have had thereby the Forfeiture, or all Debts upon Eſpecialties, but not of Debts upon ſimple Contracts, 1 *H.*7.24. 50 *Aſſ. pl.*1.

12. Where a right or thing in Action once ſuſpended, ſhall be at another time revived, where not.

13. Who ſhall have things in Action.

CHAP.

CHAP. XLVI.

Of Claim and Coaches.

1. *Claim.*

Quotuplex.

IT is a challenge by any man of an Intereſt or Ownerſhip of a thing, that is in the poſſeſſion of another, or at leaſt out of his own, and this is either Actual or by Deed; as by Action (*i.*) when a man doth bring his Action for the thing he claimeth, or by Entry or Seiſure (*i.*) when one doth enter into, or ſeiſe the thing he doth ſo claim; or elſe it is verbal (*i.*) when one doth by words claim and challenge the thing that is ſo out of his poſſeſſion; and this is ſometimes to Lands and ſometimes to Goods or Chattels: Alſo ſome diſtinguiſh Claim into Expreſſed and Implied; for which ſee *Infra, Co. ſuper Littl.* 251. *b. Terms Ley, Plow.* 359. *Littl. Sect.* 442. *&* 419, 420.

Sect. 1. *Continual Claim.*

And continual Claim is a frequent Claim, or a Claim made once every year and day at the leaſt, unto ſome Land or other thing, by which means the Entry or Property of him that hath right is preſerved, and a miſchief prevented: So that this doth nothing differ from Claim, but that Claim is but once onely, and continual Claim is, and muſt be re-iterated and renewed once in every year at the leaſt; for in their effects and operations they both agree for the moſt part. *Littl. Sect.* 414. 429.

Claim entry

And note that by Claim in moſt caſes of Land, is underſtood a Claim with an Entry into ſome part of the Land, or at leaſt a near approach thereunto; for a Claim is ſo to be made of Land, *viz.* In and upon ſome part of the Land, or within view of it, unleſs it be in ſpecial caſes of fear, *&c.* And there it may be made in view, or afar off, as the cauſe of fear and danger is, *Co. ſuper Littl.* 254. *a. b.*

Aſſize

And note alſo that this Claim may be by an Action brought, as if the Diſſeiſee bring an Aſſize; this is a Claim for Lands: And if the Goods of a Villain be diſtrained before the Lord ſeize them, the Lord may have a Replevin, and by the bringing of this Action as by a Claim, the property of the Goods is veſted in the Lord. *Co. ſuper Littl.* 263. *a.*

2. The effects and operations of this *Claim.* As to *Lands.*

diſſeiſons diſcontinuans Remitter &c

The effect and operation of the Claim, is divers, and he that doth make it, hath thereby great advantage; for by it in ſome caſes he ſhall avoid a diſſent of Lands, and thereby in ſome other caſes, he ſhall have his Title, which otherwiſe would be loſt; and therefore ſuch Claims in Judgment of Law, amount to an Entry in Law, and will preſerve the right of Entry to him that maketh it, notwithſtanding there be any Diſſeiſons, Diſcontinuances, Remitters, or Diſſents by any Diſſeiſor, Intrudor, Abator, *&c.* or their Feoffee or Donee, within the year and day: As where a man hath Right and Title to enter into any Lands or Tenements, whereof another is ſeized in Fee, or Fee-tail: As if I be diſſeiſed, or my Tenant for life or years make a Feoffment in Fee, whereby he do forfeit his Land, and I having Title to enter, do make continual Claim, (*i.*) I claim the Land within the year and day before the death of the Diſſeiſor, or the Feoffee: In this caſe, I or my Heir, if I die, may enter notwithſtanding the Diſſent. *Littl. cap. Continual Claim in toto.*

Heir

Heir

King

But if the Diſſeiſor die ſeized, his Heir within age, and by office the King is intituled unto the Wardſhip of him; in this caſe I cannot enter upon the King, but muſt have other remedy. *Fitz. Continual Claim* 1, 5 *Ed.* 4. 4.

Aſſize Treſpaſs or forcible entry

And they both do defeat the eſtate unjuſtly gained, and put the party that claimeth in poſſeſſion ſo, that if the other occupy the thing, after he may have either an Aſſize againſt him, or an Action of Treſpaſs, or forcible Entry, as if he were in the Actual poſſeſſion of it: For ſuch a Claim being an Entry in Law, is as ſtrong and as forcible as an Entry in Deed, and that as well in the hands of one that hath the Land by Title, as by wrong; and therefore ſuch an Entry in Law will avoid a Warranty.

Warranty

But

But yet this continual Claim of the Diſſeiſee, ſhall veſt the poſſeſſion and ſeiſon in him onely for his own advantage, and not his diſadvantage: And therefore, if he bring an Aſſize, and hanging the Aſſize, he make his continual Claim otherwiſe; or by the bringing of the Writ which doth amount to a continual Claim in Law; this ſhall not abate the Aſſize, but he ſhall recover damages from the beginning: And as often as he which hath right of Entry, making ſuch Claim, and the other doth continue the occupation, ſo often he doth wrong and diſſeiſons to him, and ſo many Actions of Treſpaſs he may have, and recover his coſts and damages; or may have an Action upon the Statute of 5 *R.* 2. 7. In which caſe he ſhall recover damages for the firſt wrongful Entry, but not for the mean profits; or may have an Action on the Statute of 8 *H* 6. 9. In which caſe, without any Regreſs, he ſhall recover treble damages, as well for the mean occupation as for the firſt Entry, *Co. ſuper Littl.* 253, 254. 11 *H.* 6. 51. *Littl. Sect.* 430, 431. *Co. ſuper Littl.* 263. *a. Littl. Sect.* 430. *Co. ſuper Littl.* 257.

Sect. 2. 3. How an Eſtate may be forfeited by *Claim.*

This Claim doth ſometimes alſo produce a Forfeiture of Eſtate for an Eſtate may be forfeited by Claim in two ſorts. Either Expreſſed; as if Tenant for life will in Court of Record Claim Fee, or if Leſſee for years be ouſted, and he bring an Aſſize *ut de libero tenemento*: Or Implied; as if in a Writ of Right brought againſt him, he will take upon him to joyn the *niſe* upon the meer Right, which none but Tenant in Fee-ſimple ought to do: So if Leſſee for years looſe the Land in a *Precipe*, and bring a Writ of Error, for Error in Proces; this is a Forfeiture by Claim implied: *Co. ſuper Littl.* 251. *b. Fitz. Judgment* 237. *Fines* 120. 15 *Ed.* 4. 29. 2 *H.* 6. 9. 16 *Aſſ. p.* 16.

As to *Goods* and *Chattels.*

By the Claim of Goods the property is altered and removed from one to another; As if my Villain have Goods, which by Law are mine; now after I have made my Claim to them, and ſeized ſome part of them, the property ſhall be ſaid to be in me: So if the Wardſhip of a body belong to me, and I by words Claim the Ward being preſent; though I lay no hands on him, yet by this he ſhall be ſaid to be ſeized. And ſo in other caſes where Claim is neceſſary, by the Claim the Forfeiture of the Goods is prevented. *Vide infra. Fitz. Replevin* 43. 9 *H.* 6. 25. 42 *Ed.* 3. 18. *Co. ſuper Littl.* 118. *b.*

4. Where and in what caſe others may incloſe one againſt another, and where not.

If two Lords of two ſeveral Villages or Mannors have Waſtes or Fields adjoyning together parcel of their Mannors: And there is no incloſure or ſeparation between them, but the bounds and circuits of each Mannor are known, and there is in that Waſte or Field a Common, becauſe of Neighborhood, for the Tenants of both Mannors: In this caſe the Lords and Tenants of either Mannor may incloſe their own, and divide themſelves from the other ſide, and ſo make an end of their Inter-commoning without their conſent, although their ſide incloſed be the greateſt part. *Co.* 4. 38, 39. 9. 113. 7. 5.

In caſes where the owners of the Land have been uſed in a place to incloſe their own Land in the Field, and to relinquiſh and wave their Common in the reſt of the Field, and have kept out the Commoners; ſo that they have not taken any Common in the incloſed ground, there every man may incloſe his Land at his pleaſure: But where the reſt of the Commoners have been uſed to take their Common, and put in their Cattle in ſuch incloſed grounds, notwithſtanding the Incloſure from Harveſt till Sowing time; in this caſe no man may incloſe, although he would wave his Common in the Field beſides: And yet if in ſuch a caſe there be an ancient Incloſure taken out of the Field held always in ſeveralty; this may be kept incloſed always, *Co.* 7. 5.

If two men have Inter-common, the one in the ground of another, they may by Agreement incloſe and ſeclude one another; but one of them alone, cannot incloſe and ſeclude the other without his Agreement, although he wave and refuſe his Common in the ground of the other; neither when the one hath incloſed, may the other incloſe without mutual conſent: Alſo the owners of the Soil, and the Commoners altogether, by an unanimous Agreement, may incloſe any Commons whatſoever, *Co.* 7. 5. *Broo. Common* 47.

If

Feoffm^t of Waſte

If the Lord make a Feoffment of Parcel of his Waſte, it ſeems the Feoffee may incloſe it; and that this is a kinde of Improvement of the Lord; but then it muſt be in caſe where an Approvement is lawful: So if a Lord have a great Moor and Infeoff another, of a hundred Acres of the North-ſide thereof, the Feoffee may incloſe it, or the Lord may incloſe the reſidue, *Fitz. Garanty de Charters* 31. *Dyer* 372. *p.* 10.

If one have an ancient Sleight for Cattle in a Field upon his own Land, whereon he hath been uſed to keep them, and to drive out Cattle of other men that come within it; it ſeems in this caſe he may incloſe this Sleight. *Per Juſt. Jones.* 6 *Car. Gloceſter* Aſſizes.

Stat. of improvem^t

If the Lord have Common in the Soil of the Tenant held of him, the Tenant in this caſe may incloſe a part of his own Soil, ſo as he leave ſufficient, by the Statute of Improvement, although it ſpeak onely of Lords, *Broo. Commons* 22.

Sect. 3. 5. Where and in what caſe a *Claim* or *Entry* is requiſit, where not. To *Lands.*

In all caſes where a Right or Title of Entry is come to any man, and nothing doth hinder but he may enter into it, or make his Claim to it, there he muſt ſo do before he ſhall be ſaid to be in Actual poſſeſſion of it, or before he can grant it over: But where the party that hath right, is in poſſeſſion already, or where an Entry or Claim, cannot be made, *Contrà.* As if a man Diſſeiſe me of my Land, or I make a Feoffment in Fee of Land in poſſeſſion, upon Condition, and the Condition is broken; or my Tenant in Fee-ſimple do Alien in Mortmain; or my Tenant for life, do make a Feoffment in Fee, (in both which laſt caſes he doth forfeit his eſtate.) Now in all theſe caſes, I muſt either make an Actual Entry upon the Diſſeiſor, Feoffee, and Tenant; or I muſt make my Claim to the Land (which is *tant amount*) before the Law will adjudg me to be in Actual Poſſeſſion: And the ſame Law is where one doth grant an Advowſon, Rent, Common, Reverſion, or any ſuch like thing which doth lie in Grant, upon Condition, and after the Condition is broken: Now in this caſe alſo the Grantor muſt make his Claim to this thing, before it ſhall be ſaid to be in him. But if a Feoffment be made on a Collateral Condition, and the Feoffee make a Leaſe to the Feoffor, and after the Condition is broken; in this and ſuch like caſes where the party hath it in poſſeſſion, he need not make any Entry or Claim. *Littl Sect.* 436. *Co.* 1. 157.

Tenant in tail Claim Formedon

If a Tenant in Tail make a Feoffment, and diſcontinue the Eſtate-tail, and then die; in this caſe, the Iſſue of the Tenant in Tail muſt Claim, if he will prevent the inconvenience of a Diſcent; for after a dying ſeized of the Feoffee, the Iſſue cannot enter, but is put to his Formedon, *Vide Diſcontinuance.* See *Littl. Sect. Diſcontinuance.*

Seized in right of y^e wife

If a man ſeized of Land in the right of his Wife, and make a Feoffment in Fee on Condition, and the Husband dieth, and the Condition is broken, and the Heir enter, as he muſt; in this caſe the Wife need not Claim, nor enter to bring her Eſtate to her, for the Law doth veſt it in her, without any Claim. *Co. ſuper Littl.* 202. *a. Co.* 8. 43, 44.

Infants, Feme-Coverts, perſons *de non ſane memorie*, beyond the Sea, or in Priſon, whiles they ſo continue, need not make any Entry or Claim. *Vide Infra.*

Fine to expire

If a Fine be levied of my Land; in this caſe if I will prevent the Bar, I muſt make my Claim to this Land within five years after the Proclamations had, made or certified, or elſe I am barred of my Land for ever. For which, ſee *Fines.* 4 *Hen.* 7. *cap.* 24.

To *Goods.*

If a Lord have right to the Goods of his Tenant, becauſe he is Villain, he muſt claim or ſeize the Goods, ere he ſhall be ſaid to have the property: If I have right to the Wardſhip of a Body, I muſt lay hands on him, or claim him, ere I ſhall be ſaid to be ſeized of him. So if my Goods be taken as Waiffs, or Eſtray, or Wreck; in this caſe, I muſt claim them within a year and a day of the Seiſure, or elſe I ſhall loſe them for ever. *Co. ſuper Littl.* 118. *b. Co.* 5. 107.

Waiffs & Strays worke per must be reclaimed within a year & a day

After

After a Right or Title of Entry accrewed, it is good policy to make a mans Claim or Entry, as ſoon as he can. For if a Fine be levied of anothers Land according to the Statute of 4 *H.* 7. (as moſt Fines are at this day) he that hath right muſt enter or make his Claim within five years after his Right or Title accrewed; or elſe he is barred, not onely of his Right of Entry, but of his Right to the Land for ever. But if the Fine be a Fine at Common Law, and not with Proclamations; in that caſe, he that hath Right muſt make his Claim within a year and a day after the Fine levied, or elſe he is barred for ever. See *Fines. Co.* 9. 105. *Dyer* 3. 72. 224. *Co.* 5. 107. 8. 101.

If a Judgment were had in a Writ of Right and Execution thereupon, and another man hath right to the Land; now he muſt have made his Claim within a year and a day of the Judgment, or elſe he is barred for ever. *Co.* 5. 507. 8. 101.

If I be diſſeiſed of my Land, and thereby put to a Right of Entry: Now in this caſe, by the Common Law, I muſt make my Claim, or my Entry within a year and a day, (the day wherein the Claim was made being accounted one) of the diſſeiſon, or elſe if it happen the Diſſeiſor die ſeized in the interim: I am barred of my right of Entry, ſo if one abate, or intrude into my Land. *Littl. Sect.* 421. 426.

So alſo if I make a Feoffment in Fee on Condition, and the Condition being broken, ſo as I have Title to re-enter, I muſt enter within the year and day, elſe if the Feoffee die ſeized within that time, my Title of Entry is gone, and I am put to my Action to recover the Land. But now by the Statute of 32 *H.* 8. 33. in caſe of Diſſeiſon, a Diſſeiſor muſt be in five years quiet poſſeſſion before his dying ſeized can hurt the Deſſeiſor; and then it may, and therefore after that time the Diſſeiſor muſt make his continual Claim; but the Law for Abators and Intrudors, and the Feoffee of a Diſſeiſor is, as it was before, *Co. ſuper Littl.* 283. *Plow.* 47.

But if I make my Claim, and after the Diſſeiſor, or Feoffee, *&c.* of the Diſſeiſor die ſeized; this will not hurt me. Alſo if it happen that the Diſſeiſor, *&c.* do not die, in forty years after the Diſſeiſon. If I make my Claim before his death a year and a day, and he die within the year; this doth prevent the miſchief of his dying ſeized. *Littl. Sect.* 427.

If a Tenant Alien his Land in Mortmain, the Lord if he will take advantage of the Forfeiture, muſt make his Claim or Entry within a year and a day after the Alienation; otherwiſe he is barred of his Entry and Action for ever. *Dyer* 25.

Continual Claim muſt be made once every year; and once every year doth ſuffice what ever happen. And therefore, if he that hath right maketh Claim, and the Tenant dieth within the year and the day, this Claim, though it be but once made ſhall preſerve the Entry of him that maketh the Claim: And if the Anceſtor or Predeceſſor Claim, and the Diſſeiſor die, and then the Anceſtor or Predeceſſor dieth, now his Heir or Succeſſor may enter. But if the Anceſtor or Predeceſſor make a Continual Claim, and dieth, and the Son or Succeſſor make no Continual Claim, and within the year and day after the Claim made by the Anceſtor, the Diſſeiſor dieth; this ſhall take away the Entry of the Son or Succeſſor, for that the diſcent was caſt in his time. *Co. ſuper Littl* 250, 251. 22 *H.* 6. 37. 15 *Ed.* 4. 22.

If my Goods be ſeized as Waiffs, or Eſtray, or Wreck; in this caſe I muſt claim them within a year and a day of the ſeiſing of them firſt, or elſe I ſhall loſe them; but the Lord is not bound to this time for the Goods of his Villain, nor for the Body of his Ward. *Co.* 5. 107.

The party himſelf that hath right, either immediate or remote, may and muſt in moſt caſes make his Claim or Entry to the Land; and this he may do in perſon, or by his Servant or Deputy, for *Qui per alterum facit, per ſeipſum facit.* And therefore if the Maſter ſay to his Servant, that he dares not come to the Land, or any part of it, *&c.* and that he dareth go no nearer then ſuch a place; and command him to go thither, and make his Claim, and he do ſo; this is good, though the Servant do not fear at all. *Littl. Sect.* 432, 433. *Co. ſuper Cro.* 245. *a.*

If an Infant, or any Man of full age, have any Right of Entry into any Lands, any ſtranger in the name, and to the uſe of the Infant, or Man of full age may enter into the Lands, and this Regularly ſhall veſt the Lands in them without any Commandment,

6 Within what time ſuch *Claim* ſhall be made, and ſuch *Claim* is good, being made within the time; where not.

To *Lands:*

7. By what perſons ſuch *Claim* may be, or ſhall be made, and when ſuch *Claim* is good by ſuch perſons, and where not.

mandment Precedent, or Aſſent Subſequent. *Omnis enim ratihibitio retrotrahitur & mandato æquiparatur.* But in caſe of a Fine, a ſtranger without authority preſent, or ſubſequent Agreement, cannot make a Claim to avoid. And in all caſes where one hath a Right or Title of Entry that is in Ward, his Guardian in Chivalry or Soccage may enter for him. *Fitz. Releaſe* 28. 7 *Ed* 3. 39. 10 *H.*7. 12. *Co.*9. 106. *a. & ſuper Littl. f.*245. *a.*

Sect. 5. To *Lands.*

If the caſe be ſo with a man that he dare not, being forbidden by authority to go abroad, or cannot being ſick, and not able to go to the Land; if in this caſe he command his ſervant to make a Claim for him, and the ſervant is afraid of beating, maiming, or death, and goeth as near the Land as he dareth, and there doth make Claim for his Maſter; this is good, and will ſuffice, for *Impotentia excuſat legem:* But if the Maſter in that caſe were in health, and might go to part of the Land himſelf, ſuch a Claim by his ſervant will not avail him. *Littl. Sect.*434.

Alſo in ſome caſes he that hath right, and cannot enter, yet may make this Claim: As he in Reverſion, after an eſtate for years (and as ſome hold after an eſtate for life) by Statute Merchant, Staple, or Elegit, may enter to make a Claim to prevent a deſcent, or to avoid a Collateral Warranty: But none but ſuch as have Right or Title of Entry, can make this Continual Claim, *Co. ſuper Littl.* 250, 251. *b.*

If a Fine be levied of my Land, any man may enter, or make claim for me, and to my uſe to avoid this Fine, by authority precedent from me; and without authority alſo, if I do afterwards agree to it within the five years, but not otherwiſe.

A Guardian for Education, or in Soccage may enter or make Claim in the name of the Infant that hath right without any Commandment Precedent, or Aſſent Subſequent, in reſpect of the privity, is between him and the Infant.

The Chapter in caſe of a Dean and Chapter, nor Cominalty in caſe of a Major and Cominalty, in the vacancy of the Dean or Major, cannot make any Claim; for they have not ability nor capacity to ſue or be ſued, and Entry and Continual Claim muſt always purſue the Action. *Co. ſuper Littl.* 263. *b.*

To *Goods.*

The party himſelf that hath right to the Goods or Chattels, or his Deputy or Servant, or any other in his behalf by his Precedent appointment, or Aſſent ſubſequent, may claim or ſeize Goods that he hath right unto, and it ſhall be good; for ſuch perſons may claim Land, *à fortiori* then, Goods. *Vide ſupra.*

8. In what place ſuch *Claim* ſhall be made, and when it is well done in ſuch place, or not.

He that is to make any Claim or Entry into Lands, if he be not afraid, is to go to the Land, or ſome part of it; and if by his Entry or Claim, he be to deveſt any eſtate that is in another, he muſt enter into ſome part of the Land; but if it be onely to bring him into actual poſſeſſion, and not to deveſt any eſtate in another, he may do it in view; but if he dare not come to, nor in view of the Land, he muſt come as neer it as he dare, and make his Claim there. 9 *H.*4. 5. 11 *H.*6. 51. *Co. ſuper Littl.* 252. 254.

To *Lands.*

If a man have cauſe to enter into any Lands or Tenements which are in divers Villages in one County, if he make his Entry into the Land within one Village in the name of all the reſt he hath right to enter into, within all the Villages of that County; this is good for all the reſt: But if it be in divers Counties, he muſt make divers Entries. But if three ſeveral men diſſeiſe me of three ſeveral Acres (though in the ſame County,) or if one man Diſſeiſe me of three Acres, and letteth it to three ſeveral men for life; or one Diſſeiſe me of one Acre at one time, and another Acre at another time; in all theſe caſes my Entry muſt be ſeveral, elſe it will ſerve onely for ſo much as I enter into: But if I infeoff another of one Acre of ground upon Condition, and after I infeoff him of another in the ſame County on Condition, and both Conditions are broken, an Entry into one in the name of both is not ſufficient; but an entry into one part in the name of all, ſubject to one Condition, is good; although there be divers parcels in divers Towns. And according to this patern (as it ſeems) a Claim muſt be made, 7 *Aſſ.*18. 12 *Ed.* 4. 10. 36 *H.*6. 27. *Dyer* 337. 11 *H.*7. 25.

But if it be ſo that the party in poſſeſſion do lie in wait, or have threatned to kill, beat, or maim the party that hath right if he come upon the Land; ſo that he is in fear

fear of his life, and he doth not dare to go into any part of the Lands; there he may come as near it, within the view of it as he dare, and claim it; and this is good enough. *Littl. Sect.* 421.

If one have cauſe to claim or ſeize the body of a man or woman-childe for his Ward, it muſt be in his preſence by words, or elſe by laying hands upon him: But the Lord may claim his Villains Goods in any place where he findes them; and ſo may any man in any other caſe. 3 *H.* 4. 5. *Fitz. Barr.* 217. *Doct. & Stud. fol.* 139. *To Goods.*

If a man have Right or Title to enter into any Lands or Tenements, whereof another is ſeiſed in Fee, or in Fee-tail, if he which hath Title to enter, makes Continual Claim to the Lands or Tenements before the dying ſeiſed of him which holdeth them; then albeit ſuch Tenant dieth thereof ſeized, and the Lands do diſcend to his Heir, yet he that hath made this Claim, or his Heir if he die enter into the ſame Lands, and the force of the diſcent is hereby avoided. *Littl. Sect.* 414, 415. 9. Where the *Continual Claim* of him which hath Right or Title, ſhall avoid a deſcent. Where not. *Sect.* 6.

As if I be diſſeiſed, or my Tenant for life Alien in Fee, and I make Continual Claim to the Lands in the life of the Diſſeiſor, or Alienee, if after the Diſſeiſor or Alienee die ſeized, and the Land diſcend to his Heir, yet I may enter upon the poſſeſſion of the Heir, and avoid this diſcent: So if the Diſſeiſor, or Feoffee, *&c.* of the Diſſeiſor diſſeiſed, yet my right of Entry by this Claim is ſaved.

If there be Tenant for life; the Remainder for life, the Remainder in Fee, and the Tenant for life Alien in Fee, and he in Remainder for life, maketh continual claim before the dying ſeized of the Alienee, and after the Alienee die ſeized, and after he in Remainder for life die before any Entry by him made: Now in this caſe he in Remainder in Fee ſhall have benefit by the Claim of the Tenant for life, and he may enter upon the Heir of Alienee; and ſo may he in Reverſion alſo: And if two Joynt-tenants be diſſeiſed, and one of them do make continual Claim, and dieth, the Survivor ſhall have the benefit of this Claim: But if the Tenant for life doth make continual Claim; this will not avail him in the Remainder, unleſs the Diſſeiſor die in the life time of the Tenant for life. *Littl. Sect.* 416. *& Co. ſuper Cro.* 10. Where the *Claim* of one ſhall avail another. Where not.

The Claim of the Lord ſhall avail the Tenant that is a Copiholder, ſo likewiſe ſhall the Claim of the Copiholder avail the Lord: So the Claim of him in Reverſion or Remainder ſhall avail the particular Tenant, and the Claim of the particular Tenant avail him in Remainder or Reverſion: For which ſee more in *Fines. Plow.* 359.

It is where one hath omitted, or neglected to make his Claim in the time and manner the Law appointed him, then this may be ſhewed or pleaded againſt him, to bar him of the thing he doth challenge, or would have. 34 *Ed.* 3. 16. *Cromp. Jur.* 144. 11. *Non-claim. Ou Laches de Claim, ou non Claim ſerra prejudice ou barre, ou nemy.*

If an Infant be diſſeiſed, and the Diſſeiſor during the time of the Infancy die ſeized, this will not prejudice the Infant, although he made not his Claim in all that time, but he may enter when he comes to age: So if a Fine be levied of his Land, during his minority, and the proclamations and five years be paſſed, and in all this time, he hath made no Entry, nor Claim; this will not hurt him; for he ſhall have five years after he come to age to make his Claim. *Vide Fines. Co.* 8. 200. *& Littl. Sect.* 402. *Al Infant.*

If there be Tenant in Tail, the Remainder in Fee, and the Tenant in Tail levy a Fine with Proclamations, he in the Remainder die, his Heir within age; and after the Tenant in Tail doth die without Iſſue; ſo that the Title doth accrew to the Infant, and five years incur, and yet he is within age: Now in this caſe he ſhall not be hurt by his non-claim in theſe five years, for he ſhall have five years after he come to his full age, *Dyer* 133. *a.*

If a man be diſſeiſed of Land he hath in the right of his Wife, and the Diſſeiſor die, during the Coverture, and no Claim is made by the Husband; now in this caſe the non-claim of the Husband ſhall not prejudice the Wife, though it do bar him; And if a Fine be levied of any Land, which is the Land of a Feme Covert, within the Statute of 4 *H.* 7. In this caſe, though the Husband make no Claim, during the *Feme Covert.*

Coverture, yet this ſhall not hurt the Wife, but ſhe ſhall have five years to make her Claim or Entry after the death of her Husband: But if the Wife, whiles ſhe was ſole (if ſhe were of full age) were diſſeiſed, and after take a Husband that doth not make his Claim or Entry, but ſuffer a diſcent; now this Laches of her Husband ſhall prejudice her, and bar her of Entry after his death. *Co.* 100. 9 *H.* 7. 24. 2 *Ed.* 4. 25. 7 *Ed.* 4. 7. *Littl. Sect.* 403, 404. 20 *H.* 6. 28.

Home de non ſane memorie.

If a man *de non ſane memorie*, that hath not Intelligence and Reaſon, be diſſeiſed, have any Right or Title to enter into Land, and do not make his Claim, but ſuffer a dying ſeized, if all this be during the time of his diſtemper; this Laches of his ſhall not hurt him at all. See *Non ſane memorie.* *Co.* 8. 100.

Home en priſon.

If a man be impriſoned, and he be diſſeiſed, and the Diſſeiſor dieth ſeized, during the time the Diſſeiſee is in priſon, whereby the Tenements diſcend to the Heir of the Diſſeiſor; this Diſcent, or his Non-claim, will not hurt the Diſſeiſee which is in priſon: But if he were at large at the time of the diſſeiſon, or at any time after, before, or at the time of the dying ſeized of the Diſſeiſor, here is Non-claim will bar him. *Plow.* 360. *Co. ſuper Littl.* 259. *a.* 9 *H.* 7. 24.

Sect. 7. *Home ultra le meere.*

If a man be out of the Realm, in the Kings ſervice, for the buſineſs of the Realm, or otherwiſe, if ſuch a one be diſſeiſed when he is beyond the Seas, and the Diſſeiſor dieth ſeized, the Diſſeiſee being ſtill out of the Realm, his Laches of Entry here ſhall not prejudice him, neither ſhall his Diſcent grieve him: But if he were *infra quatuor maria*, at the time of the Diſſeiſon, or at any time after, before, or at the time of the Diſcent, *Contra.* *Littl.* 9. *Sect.* 439, 440.

Al Auters.

If a Biſhop, Parſon, Vicar, Prebend, or Abbot die, and during the Vacancy, one enter into any of the Land belonging to the Biſhoprick, *&c.* and claim it to him and his Heirs, and die ſeized of that Eſtate, and it diſcend to his Heir during the Vacancy: Now this Diſcent and Laches will not hurt, but the Succeſſor may enter notwithſtanding. So if a uſurpation be had to a charge in time of Vacation, this ſhall not prejudice the ſucceſſor to put him out of poſſeſſion, but that at the next avoidance he ſhall preſent. *Littl. Sect.* 443. *Co. ſuper Cro.*

12. *Diſclaimer.*

It is where a man doth not challenge, but deny that which is his; or it is a plea containing an expreſs denial, or refuſal. And this is ſometimes in the Tenancy, ſometimes in the Seigniory, ſometimes in the Blood, ſometimes of Goods. As where the Lord diſtraineth his Tenant, and he ſueth a Replevin, and the Lord avoweth the taking of it, by reaſon that he holdeth of him, if the Tenant in this caſe ſay, That he diſclaimeth to hold of him; this is called a *Diſclaimer.* And hereupon the Lord may bring a Writ of Right *Sur Diſclaimer*, and if it be found againſt the Tenant, he loſeth his Land for ever, if the Diſclaimer be in a Court of Record, elſe he is to be amerced for it onely. So if a *Precipe* be brought againſt two men for Land, and one of the Tenants diſclaimeth, and ſaith that he is not Tenant thereof, nor doth claim any thing therein, for the manner of Diſclaim is ſuch. *Nihil habet, nec habere clamat in terra illa, nec die impetrationis brevis originalis prædict' habuit nec clamavit, ſed aliquid in terra illa habere de advocat' & diſclamat'.* Now by this he loſeth his part of the Land, and the other Tenant ſhall have the whole. And if there be but one Tenant, and he do ſo diſclaim, the Writ ſhall abate, and the Demandant may enter into the Land preſently, whether he have right or not. And in this caſe the Tenant hath no Remedy by Writ of Error, to avoid his own Diſclaimer, 13 *H.* 7. 27. 16 *Hen.* 7. 1. *Weſtm.* 2. 2. *Co.* 3. 26. *F. N. B.* 150. 13 *H.* 7. 27. *Co.* 8. 62.

Right of Diſclaimer.

Alſo the Lord may diſclaim of his Seigniory, and in this caſe if he do ſo in Court of Record, the Seigniory is extinct, and the Tenant ſhall hold of the Lord next Paramount, the Lord that did ſo diſclaim by the Services he held before. *Littl. Sect.* 146.

Of *Blood.*

Alſo we may diſclaim in the Blood, as in caſe where a *Nuper obiit* is brought by one Coparcener againſt another, the Tenant may claim by purchaſe, and diſclaim in the Blood; and it ſeems if this be found againſt him, he loſeth the benefit of the Blood and Diſcent. *F. N. B.* 197. 9.

Of *Goods.*

Alſo one may diſclaim his own Goods: As if a man be Indicted that he did felonioufly

ouſly ſteal the Goods of another, where in truth they are his own proper Goods, and the Goods are brought in Court, and ſet before him, and being demanded what he ſaith to them, he doth diſclaim them; now hereby he hath loſt them to the King, as Goods confiſcate, although he be afterwards acquitted of the Felony. *Fitz. Corone* 355. *Stamf. fol.* 186. *a.*

Alſo there is a Diſclaimer of Eſtates, (which ſee more of in *Wayver:*) As if Lands be given to Husband and Wife in Fee, or in Tail, and the Husband dieth: Now the Wife cannot by any Verbal Wayver, or Diſclaimer in the Country. As if before any Entry made, ſhe ſaith ſhe doth altogether wave, and diſclaim the ſaid Eſtate, and will never take, nor accept thereof; yet the Freehold doth remain in her, and ſhe may enter when ſhe pleaſeth: So a Charter of Feoffment was made to four, and Seiſon delivered to three, in the name of all; and the fourth when he ſeeth the Deed, ſaith, He will not have, nor accept it, and diſclaimeth; yet the Freehold is in him, and he hath as much to do with the Land, as the reſt. *Co.* 3. 26. Of *Eſtates.*

Baron & Feme

Charter of Feoffment made to 4 & Seiſon delivered to 3 *infra*

Of Coaches.

For Coaches, theſe things are to be known.

1. There ſhall not above Two hundred perſons within *London*, *Weſtminſter*, and ſix miles about the late Lines of Communication, keep Hackney Coaches and Horſes. Nor ſhall they have and uſe above Three hundred Hackney Coaches, nor above Six hundred Hackney Horſes.

2. The Stage Coaches that come to, and go from *London*, to or from the remote places of the Nation excepted.

3. That the Government of them be always in the Court of Aldermen, within the City of *London*.

4. This Court may make and ſet down Orders, and offer them to the Lord Protector and his Council, who may alter them as they ſee good, and then they ſhall be binding to them.

5. The Thirteen perſons named in the Ordinance, are to be Thirteen of the firſt Two hundred perſons, who ſhall keep Hackney Coaches, and Hackney Horſes.

6. Theſe Thirteen, or the greater part of them, were to name to the Court of Aldermen Two hundred perſons; out of which, the Court of Aldermen, if they thought fit, were to chuſe thereof.

7. Every one to be firſt admitted to keep a Hackney Coach, was to pay Forty ſhillings towards a common Stock, to bear up the Company.

CHAP. XLVII.

Of Colluſion or Covin.

Sect. 1.

1. *Colluſion or Covin.* What.

COlluſion is a crooked proceeding, or the deceitful and ſecret Aſſent and Agreement between two or more, to the prejudice or hurt of another.

Fraud or *Diſceit.*

It differeth nothing from Fraud, but in this, That Fraud may be by one, but Colluſion muſt be by two or more.

This Colluſion is either apparant, when it is, and ſheweth it ſelf in the face of the Act it ſelf; or elſe (which is moſt common) it is Secret, that is, when it is vailed over with the ſhews of honeſty, or done in the dark, that it cannot be eaſily eſpied, *Co.* 9. 109 *Plow.* 54. *Co.* on *Littl.* 3. 12. *Sect.* 678.

2. The effect or operation of it.

This Covin, although it doth inſinuate it ſelf into moſt of the Acts and Affairs of men, yet is it a thing the Law doth much abhor and oppoſe; and therefore it doth make void all Acts that are done by it, and not onely ſo, but all Acts that are dependant upon it, though otherwiſe in themſelves never ſo good, or much favored in the Law. *Quod aliàs bonum & juſtum eſt; ſi per vim vel fraudem petatur, malum & injuſtum efficitur. Fraus & dolus nemini patrocinari debent.* *Co.* upon *Littl.* 366. *Co.* 3. 78.

3. Wherein it is converſant. And what ſigns are of it.

Covin is commonly hatched, and converſant in and about Conveyances of Land, be they by Fine, Feoffment, Recovery, or otherwiſe, and then it is tending to defeat Purchaſors of their Lands, or Creditors of their Debts, or Lords of their Wardſhips and Services. Alſo it is uſed oft-times in and about Deeds of Gift of Goods. But it is ſometimes practiſed in Suits of Law, and Judgments had thereupon, in Letters Patents, in Preſentations, Adminiſtrations, Contracts, Releaſes, and almoſt in every thing.

And if the Fraud be in the Conveyance of Lands or Goods, there are ſome certain ſigns or marks, whereby the ſame may be deſcried and found out. As

1 When the Conveyance, or Deed of Gift, hath in it a power of Revocation or Alteration at the will of him that makes it.

2. When the party granting, giving, or ſelling, doth notwithſtanding the ſale, or gift, ſtill poſſeſs and uſe the thing given, or granted, as his own.

3. If the ſale or gift be made after Suits of Law be begun againſt him, or when he is about to ſell the thing to another.

4. When the thing is done in ſecret, *Qui malè agit odit lucem. Et Dona clandeſtina ſemper inducunt ſuſpicionem.*

5. Where there is any Expreſs, or any implied Truſt in the Caſe.

6. When the Deed doth contain ſome unuſual clauſes or flouriſhes of honeſty and truth in it. *Clauſulæ inconſuetæ ſemper inducunt ſuſpicionem.*

7. When the Deed is very general, *Verſutus vadit in generalibus.* 27 *Eliz.* 4. *Dyer* 294. *Co.* 3. 81. 6. 72. 10. 53.

Sect. 2.

4. What ſhall be accounted a *Fraudulent Conveyance* to deceive a *Purchaſor*, and void, or not.

All Fraudulent Conveyances of Land, or any Rent, or profit out of Land made by whomſoever, with intent to deceive any one that ſhall purchaſe the ſame Land, or any Rent, or profit out of it, for money or other good conſideration of the Fruit, and effect of their Purchaſe, ſhall be void as to ſuch Purchaſors; and all ſuch as come under their Eſtate, as to ſo much as they ſhall ſo convey, and he that ſhall knowingly avow ſuch a Conveyance, may be puniſhed for it. 27 *Eliz.* 4. But ſuch Conveyances as are made *Bona fide*, and upon good conſideration, are not to be accounted Fraudulent. *Ibid.*

For the further opening and clearing of this Statute, and the Law, in this point, theſe things are to be known.

1. The

1. The good Conveyance muſt be both *Bona fide*, and upon good conſideration, or elſe it is void, for *Bona fide* is oppoſed to ſuch as are made upon, or with any truſt Expreſſed or Implied: And good Conſideration is to diſtinguiſh from ſuch Conſiderations, as are not valuable, as Nature, Blood, and the like; for ſuch Purchaſors as come in upon any ſuch Conſideration, cannot avoid a former Conveyance as Fraudulent, *Co.* 3. 81.

2. If one convey Land with a preſent or future power of Revocation or Alteration at the will of him that doth convey it; this is Fraudulent as againſt him that ſhall after purchaſe the Land of him that made the firſt Conveyance. As if one convey Land to the uſe of himſelf for life, and after to the uſe of divers of his Blood, with a future power to revoke it after the death of ſuch a one, or after ſuch a day, and before the day, he ſell the Land for valuable Conſideration; in this caſe, the firſt Conveyance is void as to the Purchaſor, and he may avoid it, *Co.* 3. 82.

3. If the Father make any Fraudulent conveyance, and after continue the occupation, and then the Land diſcend to the Son, and the Son ſell it for money, or other valuable conſideration; in this caſe the Purchaſor may avoid the Conveyance made by the Father, whether the Son were privy to it, or not. *Co.* 6. 62.

4. If a man have made an Eſtate with power of Revocation, and after with an intent to defraud a Purchaſor, levy a Fine, or make a Feoffment to a ſtranger, to extinct the power, and after ſell the Land for valuable conſideration; in this caſe the Purchaſor may avoid both the former Conveyances, as Fraudulent. *Co.* 3. 83.

5. If one had made the firſt Conveyance to the King, and after had ſold the Land for good conſideration to a common perſon; in this caſe the Purchaſor might have avoided the firſt Conveyance: *Co.* 11. 74.

6. If the firſt Conveyance be made by way of Bargain and Sale, yet if it be Fraudulent within the intent of this Statute; it is voidable by the Purchaſor. So it was ruled by the Lord Chief Juſtice *Hide*, in evidence to a Jury in *London* at *Guild-hal.* 3 *Car.*

7. If there be Grand-father, Father, and Son, and the Grand-father makes a Leaſe for a thouſand years to the Father, and the Father to prevent the drowning of the Leaſe by the diſcent of the Reverſion, aſſigned it to divers of his friends to the uſe of the Son, being an Infant, under pretence to pay Debts, the Grand-father dieth, the Father continueth the Occupation, and maketh Eſtates, and doth all Acts as owner of the Land, the Son paid no Debts, and Aſſignment, though divers perſons of good quality were named in it, yet it was delivered by the Father to one of the Aſſignees of mean Eſtate, and in private, and afterwards the Father ſold the Land for a valuable conſideration; in this caſe it was reſolved, That the Leaſe and Aſſignment both might be avoided by the Purchaſor, as Fraudulent, *Co.* 6. 72.

8. If a Feoffment be made of Lands held by Knights Service to *J. S.* upon condition, that he within a certain time ſhall Enfeoff *J. D.* And that this Feoffment to *J. D.* ſhall be to the uſe of the Wife of the firſt Feoffor, for her Joynture, *&c.* In this caſe the Feoffment ſhall be Fraudulent. *Dolus circuitu non purgatur.*

9. Albeit the Purchaſor when he buyes doth know of the Precedent former Conveyance, and go on with his Purchaſe, yet he may avoid the former Conveyance as Fraudulent. *Co.* 5. 60.

10. If there be Tenant in Tail, the Remainder in Tail or in Fee, and he in Remainder in Tail or in Fee, ſell his Remainder by Deed, inrolled to the King; and after one buy the Land of the firſt Tenant in Tail, and he ſuffer a common Recovery; in this caſe the Purchaſor may avoid this ſale to the King, as Fraudulent. *Co.* 11. 74.

11. If there be a Leaſe for years, and the Leſſor make a Fraudulent Conveyance in

in Fee, and then for good conſideration make another Leaſe to begin after the end of the former Leaſe; this may be a Fraudulent Leaſe. And he for publiſhing and avowing of this Leaſe (though it be during the firſt Leaſe) yet he may fall under the penalty of the Statute, and the party likely to be grieved, may have his Action. *Cowel* and *Barton. M.* 4. *Jac.*

12. If *A.* make a Leaſe for years to *B.* upon good conſideration, and after he make a Leaſe to *C.* of the ſame Land for the ſame time, and *B.* drives this Bargain, and is witneſs to this ſecond Leaſe, and doth not diſcover the Leaſe to him, nor is it excepted in the ſecond Leaſe; and this ſecond Leaſe is upon good conſideration alſo. In this caſe it was ſaid the firſt is Fraudulent. By two Juſtices. *Hil.* 18 *Jac. B. R.*

13. If one after marriage make a voluntary Conveyance of his Land for a Joynture or a maintenance of his Wife, and after ſell the Land for money; in this caſe the Conveyance made to, or for his Wife, ſhall be ſaid to be Fraudulent. And yet if a man upon a marriage before the marriage made, and in conſideration thereof convey Land to the uſe of his Wife, *&c.* In this caſe, without queſtion, the Conveyance is good, and ſhall not be avoided as Fraudulent, eſpecially if it be in conſideration of money alſo, as the common courſe is.

If one in conſideration of a marriage had, and money to be paid, convey his Land, and after ſell it for money; the firſt Conveyance will not be Fraudulent. So alſo it is thought when it is in conſideration of a marriage paſt, and money paid together. *A.* being to have fifteen hundred pounds with his Wife in marriage, in conſideration hereof did Covenant to aſſure Land for the benefit of his Wife, the fifteen hundred pounds is ſecured to *A.* they enter-marry, after *A.* having a Leaſe of the Mannor of *S.* for ſixty years, doth grant it to Friends to the uſe of himſelf for his life, after of his Wife for her life, and after of their Son; after this, he doth Mortgage to *J. S.* for money borrowed. This it ſeems was ruled not Fraudulent, during the life, and therefore much leſs after his death. *H.* 20 *Jac. Peter Vanlores* caſe.

And if the Joynture or Eſtate be made before the marriage, and this after the marriage is delivered up, and a new Eſtate for Joynture, *&c.* made in conſideration thereof of other Lands; this perhaps may be good alſo, and not judged to be Fraudulent. The opinion of ſome Learned Lawyers. *Mich.* 10 *Car.*

14. If one make a Leaſe by Covin or Fraud to one, and after make another Leaſe to another *Bona fide*, but without Fine or Rent; in this caſe, this ſecond Leſſee cannot avoid the firſt Leaſe, becauſe he is not a Purchaſor that comes in for money, *Co.* 3. 83. So if one make a Leaſe for thirty years without conſideration, and after marriage make it to his Wife in Joynture; this laſt will not avoid the firſt.

15. If one Covenant for the advancement of his Heirs Males, or for the like conſideration, to levy a Fine by a day, to the uſe of himſelf for life, and after of his Iſſue Male, *&c.* and before that day he make a Leaſe by Fraud for many years, and after levy the Fine accordingly; in this caſe they cannot avoid this Leaſe as Fraudulent within this Statute, for they come not in for money. *Co.* 3. 83.

16. If a man be ſomewhat fooliſh and given to waſte, be perſwaded to ſettle his Land upon ſome of his Friends, of purpoſe to maintain himſelf with it, and after ſome of his leud companions inveagle him, and get him for a ſmall ſum of money to convey it to them; in this caſe they ſhall never avoid this former Conveyance as Fraudulent, *Co* 3. 83.

17. If one that hath a Term of Land for ſixty years, if he live ſo long, make it away, and he forgo a Leaſe for ninety years abſolutely, and he by Indenture reciting the forged Leaſe for valuable conſideration, doth ſell the forged Leaſe, and all his intereſt into the Land to *J. S.* In this caſe *J. S.* is not ſuch a Purchaſor as within this Statute to avoid this precedent Leaſe. *Co. Inſt.* 1. *part. pag.* 3. *Paſche*, 12 *Jac. Jones* caſe.

18. If

18. If a man be ſeiſed of Land in Fee, and he make a Feoffment for divers good Conſiderations to the uſe of himſelf and his wife, and the heirs on the body of his wife begotten, and after he ſels the Land to *J. S.* for money: In this caſe it ſeems the former Conveyance ſhall not be ſaid to be fraudulent to the Purchaſor, but the Eſtate-tail made thereby is good, except there be ſome circumſtances of fraud in it more then uſual.

19. *A.* ſeiſed of ~~the fifth~~ five parts of the Manor of *D.* and *C.* of the ſixth part, and *M.* comes to *A.* to buy this Manor of him; after *M.* tels *A.* My Council tels me, you cannot ſell, unleſs *C.* join with you: After this, *C.* grants a Rent-charge of Fifteen pounds a year out of the Manor, to *S.* her youngeſt ſon and his heirs of his body, for natural affection, he being then but three years old; with a Proviſo, That if *B.* (whom ſhe intended to marry) ſhall grant to *S. T.* the like Rent of Fifteen pounds, and for the like Eſtate out of Twenty pounds a year Land of *B.* then the Grant to be void: After *A.* doth buy the ſixth part of the Manor, of *B.* and *C.* his wife, (they being now intermarried together) and after *A. B.* and *C.* his wife join in a Grant to *M.* In this caſe it was agreed, that this Grant was not fraudulent: For it is the changing of an Eſtate, and at a great charge. Otherwiſe it were, if it were upon the tender of a pair of Gloves, or the like, *M.* 19 *Jac. Co B. Millers* Caſe. But no Purchaſor but he that comes in for money or good value, can take advantage of the fraud, for it doth bind all others: And the latter Conveyance muſt have a good, as well as valuable cauſe, *M.* 37. 38 *Eliz. Uptons* Caſe, *Co.* 3. 83.

Sect. 3. 5. What ſhall be accounted a fraudulent Conveyance, or an Act to defeat Creditors or others of their Debts or Duties, and therfore void; or not.

All Feoffments, Gifts, Grants, Alienations, Bargains and Conveyances of Lands, Tenements, Hereditaments, Goods and Chattels, or any Rent, Profit or Commodity out of Land. So all Bonds, Suits, Judgments, Executions made and entred into by Fraud or Colluſion of Truſt for him that made it or entred into it, or otherwiſe with intent to hinder, delay, or put by Creditors, or others of their juſt and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries, or Reliefs ſhall be void as againſt them to whom ſuch Debt or Duty doth belong, and they may proceed to take their remedy, as if no ſuch thing had been done or made, *Stat* 3 *H.* 7. 4. 47 *Ed.* 3. 6. 2 *R.* 2. 3. 13 *Eliz.* 5. 50 *Ed.* 3. 6. And for the further opening of theſe Statutes, and the Law in this matter, theſe things are to be known.

1. By the antient Common-Law, he that had a former Right, Title, Intereſt or Demand, might avoid an Eſtate ſubſequent made by fraud. As if one ſell my Goods in a Market overt by Covin and fraud, I may avoid it: And if I have a Judgment for Debt or Damages againſt another, and in the mean between the Judgment and the Execution he give or ſell away his Goods by fraud, I may make Execution of them, 22 *Aſſ.* 44. *Dyer* 295. *Co.* 3. 83. *Bro. Don* 20.

2. But now by theſe Statutes, one that hath a ſubſequent right, and may avoid a precedent eſtate, right, &c. And therefore if one be indebted to *A.* Twenty pounds, and to *B.* Forty pounds, and be poſſeſſed of Goods to the value of Twenty pounds, and *A.* ſues him for this Twenty pounds, and hanging this Suit, the Debtor ſecretly makes a general Deed of Gift of all his Goods to *B.* in ſatisfaction of his Debt, and yet he himſelf doth continue the poſſeſſion and uſe of the goods as the Owner thereof, ſell and ſheer the Sheep &c. mark them in his own name, ~~and after *A.* getteth a Judgment and Execution in his own name,~~ and after *A.* getteth a Judgment and Execution in his Suit for his Twenty pounds; in this caſe *A* ſhall make Execution of theſe goods, as if no ſuch Deed of Gift had been made. So if in this caſe the Debtor had given all his goods to *B.* in ſatisfaction of his Debt before any Suit begun by *A.* upon any expreſs or implicite Truſt, as that he ſhould be favorable to him in reſpect of his poor eſtate, or the like; or that he ſhould ſuffer him to uſe his goods, and pay him as he can, or the like: In all theſe and ſuch like caſes, although the thing be done upon good conſideration; yet becauſe it is not done *bona fide*, becauſe there is a Truſt in the Caſe, therefore it ſhall be ſaid to be fraudulent, *Co.* 3. 83.

3. If one in conſideration of natural affection give all his goods to his Child or Couſin, *bona fide*; this as to Creditors ſhall be ſaid to be fraudulent. So if I, when Suits be againſt me, convey away my Land to my Children or Couſins, with a Proviſo

viſo to avoid it at my pleaſure; this as to Creditors will be fraudulent, *Co.* 3. 80. *Dyer* 295.

4. If two be bound together in an Obligation, and the Principal having a Leaſe for years grants it over to his Surety, in conſideration he is bound with him, and after he enters into a Statute, or ſuffers a Judgment againſt him; in this caſe the Grant ſhall be ſaid to be fraudulent, and ſubject to Execution. But if the Surety had been bound to ſave the Principal harmleſs, and he had paid the money for him, and delivered up his Counterbond, and for this he had made him this Aſſignment without any Truſt, this had been good, *Wilſons* Caſe, *Paſch.* 8 *Jac. B R.*

5. Where the Deed is made upon theſe terms, That if he can provide the money, he ſhall have his goods again; this ſhall be eſteemed fraudulent.

6. If one bind him and his heirs in an Obligation, and after make a fraudulent Conveyance to another to defeat the Debtee, and die; in this caſe the Obligee may ſue the Heir, and recover the Debt againſt him, *Co.* 5. 60.

7. If after a Commiſſion of *Bankrupt* be ſued out, the Debtor deliver or make over all his goods, or any part thereof to one of the Creditors in ſatisfaction of his Debt; this ſhall be ſaid to be fraudulent, and the Commiſſioners may ſell them notwithſtanding.

8. If the fraudulent Deed be made by one to ſome of his friends, and they are not privy to it; yet it ſhall be accounted fraudulent, and ſhall be void as to Purchaſors or Creditors, *Co* 8. 131. *Plow.* 54.

9. If an Adminiſtrator do covinouſly give or ſell away the Goods, and after his Adminiſtration is revoked, and another granted to another; in this caſe the Creditors may ſue the firſt Adminiſtrator, and his Deed of Gift as to them ſhall be void, *Co.* 6. 18.

10. If a Recuſant or any other, with an intent to defeat the King or other Lord of his Forfeiture, make a Deed of Gift of his Goods and Chattels, after the offence is committed; this as to the Lord or King ſhall be ſaid to be fraudulent, *Stat.* 13 *Eliz. chap.* 1.

11. If one ſue an Executor or Adminiſtrator for a Debt due from the deceaſed, and there is a Judgment had before that time againſt him at another mans ſuit, which is not ſatisfied, and he have not Aſſets in his hands more then to ſatisfie for the firſt Judgment; in this caſe if the firſt Judgment be *bona fide*, it is a Bar to the ſecond Suit. But if the firſt be fraudulent, as the Law will judg it to be, in caſe where either there was no, or not ſo much Debt *rei veritate* due from him that is dead, or the Executor or Adminiſtrator hath compounded for leſs, and the Judgment is left of purpoſe to bar other Creditors; this Judgment, as to the Plaintiff in this Suit, ſhall be ſaid to be fraudulent, *Co.* 1. 132.

12. If one being indebted, and having goods, make a Deed of Gift of his goods to *J. S.* and then make him his Executor, ſuppoſing by this to keep his goods from being liable to his Debt; this ſhall be ſaid to be fraudulent and void as to Creditors, and *J. S.* will be charged as Executor for all the goods. So if one, when Judgment is given, or like to be given againſt him for a Debt, make away his Lands or Goods of purpoſe to avoid Execution: Or if one in priſon for divers Debts, procure himſelf to be indicted and attainted for ſome offence, to the intent to forfeit his Eſtate, have his Clergy, to defeat his Creditors; all theſe Acts will be made void as fraudulent.

13. If a man a little before his death convey away his Land, to the intent that a Warranty and Aſſets ſhould not bar his ſon for other Land; this may be avoided as fraudulent, *Dyer* 295.

14. If *A. bona fide*, and for valuable conſideration mortgage his Leaſe for Twenty one years to *B.* upon condition, that if he repay the money a year after to *B.* he ſhall re-enter; *B.* covenant with *A.* that he ſhall receive the profits till the time of payment, &c. *A.* doth not pay the money at the time: *B.* hoping that *A.* in time will pay him, doth not interrupt him, but ſuffer him to take the profits two or three years after; and in the interim a Judgment is had againſt *A.* upon a Bond, and Execution awarded: In this it was held, that this was no fraudulent; and being no fraudulent

dulent Conveyance at the firſt making, it cannot become a fraudulent Conveyance by matter *ex poſt facto*. By both the Judges of Aſſiſe, in the Caſe of the Lady *Lambeth, in Com. South.* 5 *Car.*

15. Such Conveyances, Deeds of Gift, Contracts and Agreements as are made *bona fide* and upon good conſideration, are not to be accounted fraudulent, nor can they be avoided. And all ſuch Conveyances and Deeds as are void by theſe Statutes, are void as to Purchaſors and Creditors only, but good againſt them that make them, and all others, and as to all other purpoſes. And therefore it was adjudged, That if *A.* for Twenty pounds paid him grant all his Goods in a Schedule annexed to the Deed to be carried away upon demand, and covenant that he and his Executors ſhall deliver them upon demand, and the Executor is required to deliver them, that he ſhall not ſay, being ſued, that this Deed is fraudulent, *Brownl.* 1 *part*, 111. And any man that will, may by word or writing give, or he may ſell his Goods outright for money, at any time before Execution done; ſo that there be no Truſt in the caſe, that upon payment of the money, he ſhall have the Goods again, or the like; and this will be good againſt himſelf, his Executors, Adminiſtrators, or any to whom he ſhall after ſell or convey them, *Stat.* 3 *H.* 7. 4. 13 *Eliz. ch.* 15. *Co.* 3. 82. 59. 60. See more for this in my Book of *Common Aſſurances*, in *Chap.* of *Deeds.*

Sect. 4. 6. What ſhall be accounted a fraudulent Conveyance to defraud the Lord of his Wardſhip or other Duty; and void, or not.

If any Tenant holding Land of the King or other Lord *in capite*, or by Knights ſervice, make a Feoffment or other Conveyance to defeat the King or Lord of whom he holds his Land, of his Wardſhip, primer Seiſin, or other benefits of his Tenure reſerved to him by the Statute of 32 and 34 *H.* 8. of *Wills*, it will be void as to a third part as to the Lord, and he ſhall have the ſame benefit as he ſhould have had if no ſuch Conveyance had been made. And as to this, take theſe Caſes.

1. Therefore if ſuch a Tenant enfeoff his lineal or collateral Heir within age, or make a Leaſe for life, the Remainder to his Heir; or make a Gift in Tail, the Remainder in Fee to his Heir; or make a Feoffment to another and his Heir; or make a Feoffment on condition that he ſhall enfeoff back again his Heir at his full age; or make a Feoffment for the payment of his Debts, Preferment of his wife and children; or enfeoff one to the intent that he ſhall receive the profits till he have an Heir-male, and then to reinfeoff him; or deviſe all his Land by his Will in any ſuch ſort: This ſhall be eſteemed fraudulent, and will be void as to the Lord for a third part, *Co.* 6. 76. *Plow.* 49 *Co.* 8. 164. 9. 119. *Dyer* 36. *Stat. Marlb. c.* 6.

2. But in caſe the Tenant had left a full third part to deſcend to his Heir, he might have diſpoſed the reſt either by Act executed, or by Will before, or at his death how he had pleaſed, and no Averment of Fraud doth lie for more then a third part in any ſuch caſe: For a man might by thoſe Statutes have conveyed or deviſed two parts in three of his Land to or for his wife, children, or payment of his Debts, and the Lord ſhall have nothing out of that, but he muſt have what is due to him out of the third part that is left, *Dyer* 276. *Co.* 8. 104. And for Lands held by Soccage-tenure, every man may diſpoſe them at his pleaſure.

3. If one that holdeth his Land to pay a Heriot at his death, and he in conſideration of natural love enfeoff his ſon and heir; and the ſon, to prevent the Dower of his wife during his fathers life, makes a Leaſe for Forty years, if his father live ſo long; the father pays the Rent, and the ſon doth ſuit of Court for the Land, and after the father dieth: In this caſe the Conveyance ſhall not be adjudged fraudulent as to the Lord to deceive him of his Heriot, for it was done to another end, *Brownl. Rep.* 2 *part*, 287. *Co.* 10. 46. So if a man for fear of Debts convey his Land to friends with condition, that upon payment of Ten pounds they ſhall convey it to whomſoever he ſhall appoint, *Co* 1047. *Dyer* 268.

4. If one make a Feoffment of Land to two and their heirs for money, or other valuable conſideration, and this was of Land holden by this Tenure, this was not accounted fraudulent. So neither where one of the Joint-tenants make a Feoffment of his Moity to a ſtranger, *Co.* 8. 164.

5. If a Feoffment be made by Colluſion, and the Feoffee die, or make a Feoffment over *bona fide* to another before the death of the Anceſtor; this ſecond Feoffment is good, and the Colluſion is gone, *Co.* 1. 22. 2 94. *Dyer.*

6. For fraudulent Conveyances to deceive the King of Abbey-lands, See *Stat.* 35 *H.*8.13. 1 *Ed.*6.44.

Sect. 5. 7. In what caſes Judgments and Recoveries in Suits ſhall be void by Covin or not.

For this matter, take theſe Caſes following.

1. If a woman that hath a title of Dower to the Land of her husband, cauſe one to diſſeiſe the Tenant of the Land, with intent to ſue him, and after ſhe doth ſo, and recover her Dower againſt him; all this is void. And yet if a Diſſeiſor, Intrudor, or Abator do endow a woman that hath a lawful title of Dower, without any practice; this is good, and ſhall bind him that hath right, *Co.* 3. 77. 11 *Ed.* 4. 2. 7 *H.*7.11. 19 *H.* 8. 12. So if a Tenant in tail be ouſted of his Land, and may bring his *Formedon*, and he ſhall cauſe another to diſſeiſe the Tenant of the Land, and bring his Action and recover the Land againſt him; this is void, and ſhall be no Remitter to the Tenant in tail, *Plow.*54. *Co.*3.77. So in all caſes where a man hath a rightful and juſt cauſe of Action, and he of Covin and conſent doth raiſe up a Tenant by wrong againſt whom he may recover, this Covin doth ſuffocate the Right; ſo as the Recovery, though upon a good title, ſhall not bind nor reſtore the Demandant to his Right, 41 *Aſſ. pl.*28. 25 *Aſſ. pl.*1. 15 *Ed.*4.2.

2. If *A.* and *B.* Jointenants, be entitled to a real Action againſt the Heir of the Diſſeiſor, and *A.* cauſe the Heir to be diſſeiſed, againſt whom *A.* and *B.* recover and ſue Execution; in this caſe *B.* is remitted, and ſhall hold in common with *A.* for he was no party to the Covin, but *A.* is not remitted, *Co.* upon *Lit.* 357.

3. So it is ſaid, if an Attorney appear without Warrant, and ſuffer a Judgment againſt me by fraud between him and the Plaintiff in the Action, it is all void, *Dyer* 361.

Sect 6. 8. In what caſes Fines and Common Recoveries may be void by Covin, or not.

For anſwer to this, take theſe Caſes.

1. If a Copiholder or Leſſee for years levy a Fine of Covin, or make a Feoffment of Covin with intent to levy a Fine to bar him in Reverſion, this is all void; and though five years paſs without claim, yet is he not hurt by it, eſpecially where the Tenant doth pay the Rent, and do the Service ſtill as he was wont to do. But if a man purchaſe Land of *B.* by Feoffment, or by Bargain and Sale inrolled, and after finding that *B.* hath a defeaſible Title, and that *C.* hath the Right, and *B.* levieth or taketh a Fine with Proclamations, with an intent to bar the Right of *C*: this is good. So if one pretend Title to Land, and enter and diſſeiſe the Tenant, and after levy a Fine with intent to bar the Diſſeiſee; this is not fraudulent, but is good: And if the Diſſeiſee do not claim nor enter within the five years, he is barred, *Co.*3.79.

Common-Recovery.

2. If the King had given Lands in tail to any one in recompence of any ſervice done to him, or for other cauſe; and the Tenant in tail, while the Reverſion was in the King, had ſuffered a Common-Recovery; this had been eſteemed fraudulent and void, as againſt the King and his Succeſſors, *Stat.* 34 *H.* 8. 20. *Co.* 10. 48. 1. 15. *Plow.* 54.

3. If Lands be conveyed by a husband or any of his Anceſtors, to the wife for her life, or to her and her husband and their iſſue in tail, for the Jointure of the wife; and after the husbands death, the wife alone, or ſhe and another husband ſuffer a Common-Recovery of the Land; this ſhall be eſteemed fraudulent and void, by the Statute of 11 *H.*7. *c.*20.

4. If a Tenant for life ſuffer a Common-Recovery without the Aſſent of him in Reverſion, this is void by the Stat. 32 *H.*8.31. 14 *Eliz.*8. But if any Tenant in tail in Poſſeſſion or Remainder ſuffer a Common-Recovery by Agreement, (except in the caſe before where the Reverſion is in the King;) this is good, and cannot be falſified as done by fraud. And if there be Tenant for life, the Remainder in Tail, or in Fee, and the Tenant for life doth ſuffer a Common-Recovery, and vouch over him in the firſt Remainder in Tail; this is not fraudulent, but a Bar to the Eſtate tail, *Co.*10.49.

5. But in many caſes where there is a fraud in the firſt Conveyance to defeat Purchaſors, Creditors, &c: if the Grantee ſhall after *bona fide* grant it away to a third perſon; here perhaps the Colluſion may be gone, and this ſecond Grant may be good, 33 *H.*6.28. *Goldsb.*118. *pl.*2. *in Bro. Colluſ.*23. 39 *H.* 6. 19. 44 *Ed.* 3.46. 41 *Aſſ.*28. 15 *Ed.*4.4. *Co.*6.58. *Co.*8.132. *Plow.*51.

A Deed of Gift may be of Goods, with intent to defeat Succeſſors of Spiritual perſons of their remedy for Dilapidations; of which ſee *St.* 13 *Eliz.* 10. 14 *Eliz.* 11. 1 *Jac.* 25. *Sect.* 7. 9. Where other things done ſhall be ſaid to be done by Covin, and therefore void, or not. 1 *Jac.* 25 *Dilapidations.* 13 *El.* fo. 14. *Property.*

If one ſell another mans Goods in a Market overt or Fair, *revera & bona fide*; by this the Property is altered. But if this be by Covin and Agreement, and of purpoſe to alter the Property, it is otherwiſe, *Co.* 3. 83. *Sale of Goods.*

If the Husband ſell away his Wives goods of purpoſe to prevent her having them again after a Divorce, and they be divorced; in this caſe ſhe ſhall have all her goods ſhe had before the marriage, that are ſo covinouſly ſold away: But being ſold away *bona fide*, ſhe cannot avoid the Sale, 26 *H.* 8. 7.

If Tenant in tail and his Iſſue diſſeiſe the Diſcontinuee to the uſe of the Father, and the Father dieth, and the Land deſcend upon the Iſſue; he is not remitted againſt the Diſcontinuee, for he is privy to the wrong, but in reſpect of all others he is remitted, and ſhall deraign the firſt Warranty, *Stat.* 11 *Ed.* 4. 2. 12 *Ed.* 4. 21. 15 *Ed.* 4. 23. *Remitter.*

If a Diſſeiſor give to another Seiſin of a Rent out of the Land, that hath right to the Rent; this is good, if there be no Covin in it: Which if there be, this will make it void, *Co.* 6. 58. *Seiſin of Rent.*

Letters-Patents may be void by Fraud; as when it ſhall be to compaſs the Land held of another in Mortmain, or the like, *Co.* 11. 74. *Letters-Patents*

If one die inteſtate, and the Adminiſtration is committed to his Wife, and another by Covin between him and a Creditor procure the Adminiſtration to him, and a Revocation of the firſt Adminiſtration, and then releaſe to the Debtor his Debt; if this be all of purpoſe, it is a void Releaſe, *Dyer* 339. *Releaſe.*

If one be outlawed whiles he is in Priſon, the Outlawry may be avoided: But if it be of purpoſe that he is impriſoned, it is otherwiſe, 38 *Aſſ. pl.* 17. *Outlawry.*

If one in Priſon, to the intent he may be removed, cauſe himſelf to be indicted by Covin, this will make it all void, 37 *Aſſ. pl.* 9. *Indictment.*

There may be Colluſion in divers other caſes. For which ſee *Stat.* 50 *Ed.* 3. *ch.* 5: 1 *R.* 2. 15. 5 *H.* 4. 13. 11 *H.* 7. 27. 13 *Eliz.* 10. 23 *Eliz.* 8. 43 *Eliz.* 8. 31 *H.* 6. 9. 4 *H.* 7. 20. 33 *H.* 8. 1. 5 *Eliz.* 2. 43 *Eliz.* 6.

This Colluſion may ſometimes be tryed in the ſame Action wherein the Covin is, and ſometimes it may be tryed in another Action, as for Lands aliened in Mortmain by a *Quale jus*, *Co.* 9. 33. 18 *H.* 8. 6. *Sect.* 8. 10. Where it ſhall be tryed, and how it may be proved and found by a Jury.

And when it is apparent, there need no proof of it: *Quod conſtat clarè, non debet verificare.* But when it is ſecret, it muſt be proved by Witneſſes, and found by a Jury, as other matters of fact be; and a little proof will ſerve, becauſe it is commonly very ſecret. And if a Jury find a Fraud ſpecially by their Verdict, they muſt expreſs it how, to defeat Creditors, or to defeat Purchaſors: For if the Jury find only a Fraud in general, or ſome circumſtances of Fraud only, this will not be a good Verdict: And if the Jury find it a Fraud to one purpoſe, it ſhall never be ſaid to be a Fraud to any other purpoſe, *Co.* 10. 47. 9. 108. *Plow.* 46. *Brownlows Rep.* 2 *part*, 187. *Verdict.*

Diſceipt, is a Writ that lieth againſt him that doth any thing deceitfully in the name of another, for him that receiveth harm thereby. And this is properly Diſceipt. But others do take it in a larger ſenſe, and ſay it is Original, where any Diſceipt is done to another, ſo that he hath not performed his Bargain. For which ſee much in my *Firſt Part of the Marrow of the Law*, *Chap.* 22. where many Caſes are put upon it. Or it is Judicial, when upon a *Scire facias* ſued out of a Record to warn a man to appear, the Sheriff doth return the party ſummoned, and it is not ſo, or he was not legally ſummoned, and hereby Judgment is given againſt him for the Land: For this the party grieved, in ſome caſes, ſhall recover damages againſt the Sheriff; and in ſome caſes alſo the Judgment ſhall be vacated, *F. N. B.* 95. *Old N. B.* 5. *St.* 2 *Ed.* 3. 15. 11. *Diſceipt*, what it is.

If I make an Attorney for me in a Real Action, and the Attorney by agreement between him and the Plaintiff ſuffer me to loſe the Land, I may have this Action, *F. N. B.* 95. *Sect.* 9. Where it doth lie, or not.

So

So if in any Action againſt me, another perſon will come into Court and perſonate me, and hereby any miſchief come to me, I may have this remedy againſt him: As if he ſue out a Writ in my name, wherein a Fine is to be paid. So if one acknowledg a Judgment in my name, and I ſuffer any loſs hereby, I may be righted againſt him by this means, *F.N.B.* 96, 97.

So if one levy a Fine, ſuffer a Recovery, knowledg a Statute, Recogniſance, or Bail in my name, and I be hereby damnified, I may have this remedy, *F.N.B.* 100. So if a man in a Suit I have againſt him, get a Protection, or remove the Suit only to delay me, and without any cauſe; I may have this Writ, *Co.* 5. 34. *F.N.B.* 97. So if one forge any Deed in my name, and uſe it, or it be uſed againſt me, I may have this Writ, *F.N.B.* 99. *Dyer* 75. And ſo in many other caſes. As if my Attorney in a Suit do any thing in my name he hath no Warrant for: One procure another to ſue and vex one: I be bound to pay money on a Statute, and have paid it at the day, and another cauſeth the Statute to be extended without the will of the Conuſee. One promiſe to make me a Feoffment of Land by a day, and before the day he make it to another: Or promiſe me to deliver Wares, and he deliver falſe and ſophiſticated Wares; or ſell me Cloth, and warrant it of a certain length: Or another and my ſelf are ſued as Executors, whereas I only am Executor, and the other confeſs the Action; in all theſe caſes I may have remedy by this Writ, *F.N.B.* 98. *Dyer* 301. 75. 23, 24.

And if a Recovery be had in a Real Action by the falſe Retorn of the Sheriff, the party grieved or his Heir may have this Action againſt the Sheriff and the Demandant; and the Summoners, Vexors, and Pernors ſhall be examined; and if it be found, the party ſhall recover damages againſt the Sheriff, reverſe the Judgment, and have Reſtitution of the Land, *Co.* 6. 9. upon *Lit.* 259. *Co.* 8, 9. *F.N.B.* 97. So in a *Scire facias* to execute a Fine, if the Land be recovered on the Sheriffs falſe Retorn, the party grieved may avoid the Judgment by this Writ, *F.N.B.* 97. *d.* So if one ſue a *Scire facias* on a Recogniſance for Debt, and the Sheriff retorn Summons where none was, *F.N.B.* 97. 99. So if after a Recovery in an Annuity, ſuch a Retorn be on a *Scire facias*, and hereby the Annuity is recovered, the party grieved may have this Writ, *F.N.B.* 88. And if a Tenant in antient Demeſn levy a Fine of his Land, the Lord may avoid it by this Writ, *Plow.* 370. *F.N.B.* 98, 99. See *Action of the Caſe, Chap.* 4. *Sect.*

There are other Deceits, as by Counterfeit-Letters to get money; in a Miller to change his Griſt, and otherwiſe; puniſhable by Juſtices of Peace. See my *Juſtice of Peace* for it.

CHAP.

CHAP. XLVIII.

Of Common.

COmmon is that Soil, Water, or other thing, the uſe whereof is common to this or that Town, Lordſhip, or Perſon: Or it is the Right that a man hath to take of that which is anothers. And it is either of Paſture; of Turbary, *(i.)* of digging and taking Turfs; or of Fiſhing; or of Eſtovers, *(i.)* taking Wood; or it is of digging for Coals, Mines, and the like. And the Common of Paſture is divided into Common Appendant, Appurtenant, Engroſs, or by reaſon of Neighborhood: And ſome is certain, *(i.)* for ſo many Cattel, or the Cattel levant on ſuch a place; or incertain, which is for Cattel without number, *Co.* 8. 70. upon *Lit.* 122. 6. 60. 5. 60. 7. 5.

Common, what it is.

The kinds of it.

Turbary, what.

And whoſoever doth claim any Common, he muſt claim it in one of theſe kinds. For if a man will claim it in any other kind, as *Ratione commorantiæ* or *reſidentiæ*, *(i.)* by reaſon of dwelling or reſidence in a houſe, this is no good title. And that Common that may be claimed, is, and may be claimed in ſome caſes by Grant; but in moſt caſes a Title is made to it, and it is claimed by Preſcription or Cuſtom, *Co.* 4. 38.

Sect 1. 2. How a man may claim Common, and what kind of Common a man may claim or not; and and what Preſcription or Cuſtom for Common ſhall be good, or not.

But Copiholders may alleage a Cuſtom, That every cuſtomary Tenant of the Manor may have Common in the Lords Waſte. So alſo Inhabitants of a Village who are a Corporation, may alleage a Cuſtom to have Common in ſuch a place, as belonging to their antient houſes, *Co.* 6. 59. 60. Or Copiholders may preſcribe to have Common in the ground of another beſides the Lord; but then they muſt do it in the Lords name, *Co.* 4. 32.

One may make himſelf a title to have and enjoy *ſolam veſturam terræ* for a time, *(i)* from ſuch a day to ſuch a day, and ſo long to exclude the Owner himſelf to feed there: But a cuſtom or preſcription to exclude him always, is not good, *Co. ſuper Lit.* 122.

A Lord preſcribed, That time out of mind the Lord of the Manor had been uſed to have for himſelf, his Farmers and Tenants of the Manor, Common of Paſture in &c. for all his Sheep which are levant and couchant in and upon the Demeſn lands of *W.* which lie and are in *A.* aforeſaid, every year; and it was allowed for good, *Duncombs* Caſe, *H.* 9 *Jac. Brownl.* 1 *par.* 232.

One preſcribed that he was ſeiſed of a Meſſuage and certain Land in *Dale*, and that he, and thoſe whoſe eſtate he hath, for himſelf, his Farmers and Tenants, uſed to have Common in the Field or place called *B.* in *S.* when the ſaid Field called *B.* was freſh and not ſowed all that year, with their Cattel levant and couchant; and when the Field was ſown with corn, and the corn carried away, until it was ſown again; and allowed good.

One preſcribed to have Common in anothers ground, as belonging to his Meſſuage and Yard-land, thus: For ſix Horſes, Geldings or Mares, two Colts, ſix young Beaſts called Steers, or young Beaſts called Heifers, and two Mares called Breeders, in and upon the ſaid Meſſuage and Yard-land lying and riſing in manner following; that is to ſay, from the 1. of *Auguſt* until the 25. of *February* then next following, and good, *Brownl. Rep.* 2 *par.* 61.

A Cuſtom was alleaged, That the Lord had the place wholly to himſelf till *Lammas*, and after it was common to the Tenants, every one of which is to put in a certain number, and no more, and that then the Lord is to put in but a certain number; and it ſeems good, *Brownl.* 1 *par.* 187.

And generally for Common, a Cuſtom or Preſcription may be alleaged for Common, either for all ſorts of cattel, or for ſome kind of cattel only: And it may be for a certain number of cattel only, or it may be for the cattel levant and couchant

A Cuſtom or preſcription may be alleaged for

on

on such a place, which is certain by consequence; or it may be without number. And it may be either for the whole year, or at some times only of the year: And it may be for more cattel at one time, and for fewer at another time, and the like. But for an Allegation of a Prescription of Common that shall be good and allowable, there must be these things in the case.

1. It must be such a Common as might have a reasonable commencement by agreement of parties or otherwise, *Brownl.* 2 *par.*64.

2. The Land wherein the Common is to be taken, and the Land to which the Common to be had doth belong, must be laid to be in a Parish and County in certain.

3. If it be Common appendant, it must be for cattel levant and couchant upon such Land; for if it be for all his cattel without restriction, it is not good.

4. It must not be belonging to a thing which began of late: And therefore Prescription of Common time out of mind, to a House built within time of memory, cannot be good, *Goldsb. Rep. p.*38. See for all these things, *Brownl. Rep.* 1 *par.* 180. 189. 198. 232. 2 *par.*47. 63. 222. 297. *March: Rep* 83. 37 *H.* 6. 34. 32 *Ass. pl.* 3. See more in the next Questions, to every kind of Common: And see more in my *Second Part of the Marrow of the Law, p.*296,297.

For this, take these Cases.

Sect 2. 3. How a Grant of Common shall be taken.

1. If one grant me Common *ubicunque*, where-ever the Beasts of the Grantor shall go: By this, if he occupy an hundred Acres with his Beasts, I may common in that hundred Acres with him at all times. But if the Grant be made to me of Common in his Land *quandocunque*, whensoever the Beasts of the Grantor shall go there; in this case I may not common in his ground, but at such times only as his Beasts are in the Common, and at no other time, 9 *H.*6.35. *Finch.*36.

2. If a Lord grant me Common out of all his Manor, this must be understood in all commonable places, and not in his Gardens, &c. and it must be understood of Common with commonable Beasts only, and not with Pigs, and such like things, 9 *H.*6.35. *Fitz. Dower* 123.

3. If one grant me a Messuage with Common appurtenant for ten Beasts; by this I cannot take Common without number, but for ten Beasts only, 9 *H.*6.35.

4. If one grant me Common for ten Beasts in his ground for three years, and I take no Common for the first two years; I may not by this put in thirty Beasts the third year, and take the three years profit together, but must put in ten Beasts only, 27 *H.*6.10.

5. If a Lord of the Manor of *Dale*, wherein is a great Waste, wherein the Farmers of every House have Common, grant a House with all the Commons thereunto belonging and therewith used; by this it seems the Grantee shall have usual Common in the Waste, *Brownl.* 2 *par.* 222.

6. If a Lord seised of a Moor of two hundred Acres, enfeoff me of fifty Acres of the North-side thereof; by this I have no Common in the rest, but we must divide and keep our cattel one from another, or we shall be Trespassors one to another, *Dyer* 372.

7. If one grant me Common in his ground without number, it seems I may put in as many cattel as I will, and so he may also; though some say I may not put in so many, as not to leave him enough for his own cattel, 12 *H.*8.2. See more, *Sect.* 6. *Brownl. Rep.*220.

8. If one grant me Common in his ground, he can do nothing to prejudice his own Grant: And therefore he cannot set a Rick there on the ground, nor drive my cattel from his Rick, *Brownl.* 1 *par.* 220.

Common Appendant, what.

Common appendant is, where a man hath Common for his commonable cattel, as Oxen, Horses, Sheep, Kine, and the like, only in the ground of another man, by reason of certain Land that hath been ancient errable Land, unto which that Common is so annexed, that it cannot by any means be severed from the same, but he that hath the one must have the other, *Co.*8.70. 4.37.

The nature of it.

This Common is of all other the best; for this is said to be of common right, and is evermore belonging to errable Land, or to the Land which was anciently errable Land,

Land; for it cannot be created at this day, nor can it belong to new Errable Land. But it may belong to a Mannor, Farm, or Yard-Land, which are things in Groſs (wherein there is Errable Land included) and then it doth in truth belong to the Errable onely.

The beginning of it.

This Common began when Lords did infeoff their Tenants of Errable Land, to hold by Tenure in Soccage; for in this caſe it was included in the Feoffment, That for the maintenance of their Plough, which they by their Tenure were bound to keep; and for the furtherance of Tillage (a thing much favored in Law) the Tenant was to have Common in the Lords great Waſtes for all his Commonable Beaſts, that did dung or dreſs his Land; for at the firſt, almoſt all the Ground that doth now lie incloſed in Meadows and Paſtures, did lie open in great Waſtes and Commons, and were in the hands of Lords of Mannors. *Co.* 4. 37. *Mert.* 4. *Perk.* 670.

Title to it.

One may preſcribe for this Common; or one may claim it without preſcription, thus, That he hath two Acres of Land, to which he hath Common Appendant, *&c.*

Sect. 3.

For the Anſwer of this Queſtion, theſe things muſt be known.

4. What ſhall be ſaid to be *Common Appendant*; or not, but ſome other *Common.*

1. If there be a Houſe built upon that which was antiently Errable, and part of it be turned into Meadow, and part into Paſture, the Common Appendant to it may be claimed and taken ſtill as Appendant; and he ſhall have Common for all the Beaſts that he doth keep upon that which was ancient Errable Land. *Co.* 4. 37.

2. It may belong to a Mannor, Farm, or Plough Land. *Co.* 4. 37.

3. It may be claimed to be taken in a Field, when it is not ſown to Corn onely. 37 *H.* 6. 34.

4. This Common is always for ſuch Beaſts, as either manure the Land, as Oxen or Horſes; or elſe for ſuch as marl and compaſt the Land, as Sheep and Kine. And therefore if the Common be claimed for any other Cattle, it cannot be this Common, but it muſt be ſome other. 37 *H.* 6. 34. 26 *H.* 8. 4.

Common Appurtenant.

5. In Pariſhes where their Lands in their Fields do lie intermixt, and any one of them do incloſe his Land, and the Inhabitants have uſed to have Common in this incloſed ground, after Harveſt, till Seed time again; in this caſe if the Common be for Beaſts onely that manure and marl the Land, then it is Common Appendant; but if it be for all manner of Beaſts, then it is Common Appurtenant, *Co.* 7. 5.

Common by cauſe of the *Vicinage.*

6. If there be two Villages adjoyning, and a great Field or Waſte between them, part of which doth belong to one Pariſh, and part to the other; and the Tenants of the one Pariſh do, have Common there with the Tenants of the other Pariſh; this is not a Common Appendant, but a Common becauſe of Neighborhood. *Dyer* 47. But if there be two Villages, and a third between them, and one Village hath Common with the third, and there are no Waſtes adjoyning; this it ſeems, ſhall be a Common Appendant, and not by cauſe of Vicinage. *Dyer* 47.

Shack. What it is.

7. Where the Lands of men do lie intermixed in little parcels in great Fields, and they do uſe to Common altogether promiſcuouſly, from Harveſt till the Field be ſown again; this which is like to their Shack in *Norfolk*, is a kinde of Common Appendant; and there if any man incloſe, and the reſt do then uſe to Common with him notwithſtanding; this is Common Appendant. *Co.* 7. 5.

Sect. 4.

5. *Common Appurtenant* What, and what ſhall be ſaid to be this *Common*; or not, but ſome other.

Common Appurtenant is, where a man hath Common for all manner of Beaſts in the Ground of another man. And this Common, a man may have or claim by Grant, or by Preſcription; for this Common a man may create at this day. *Co.* 8. 70. 6. 60. And therefore this Common differeth from Common Appendant in many things: For,

And how it differeth from *Common Appendant.*

1. Common Appendant cannot be created at this day; for when it began it grew by continuance, and muſt now be claimed by Preſcription, time out of minde, but Common Appurtenant may be newly granted.

2. That may be had by, and claimed for thoſe Cattle onely that manure and marl the Land; but this may be had and claimed by, and for all manner of Cattle.

Common Appendant.

3. That is to be claimed for, and taken by, ſo many Beaſts onely as will ſerve to marl and manure the Land, to which it is Appendant. But this may be claimed for, and taken by Beaſts without number.

4. That is to be claimed for, and taken with the Beasts onely, whiles they be Demurrant, Levant, and Couchant upon the Land, to which it is Appendant: But this may be claimed for, and taken by the Beasts of him that doth claim it, where ever they go or are kept.

5. That is to be claimed for, and by reason of ancient Errable Land onely. But this may be claimed for, or by reason of a House, or any other Land as Meadow or Pasture, or Errable Land newly made.

Apportionment. 6. That cannot be severed from the Land, to which it is Appendant by any act of God, act of Law, or act of the parties: But this may be severed from the House or Land, to which it is Appurtenant.

Admeasurement of Pasture. 7. That must be taken with a proportion, having respect to the Land to which it is dependant, as if it be Appendant to one Acre, he shall have Common for so much, as that one Acre will keep, and if he take more, the rest of the Commoners may have a Writ of Admeasurement of Pasture. But this may be taken by Beasts without number, and this Writ will not lie in this case of Common Appurtenant.

8. That must be taken with a mans own Beasts, and cannot be taken with the Beasts of another man. But if he have but a Special Property in the Cattle, it seems it is well enough. *Co.* 8. 70. 6. 60. 4. 38. 15 *Ed.* 4. 32. 10 *Ed.* 3. 56. 37 *H.* 6. 34. 9 *Ed.* 4. 3. 4 *Ed.* 4. 29. 22 *H.* 6. 43. 26 *H.* 8. 4. 5 *H.* 7. 7. *F. N. B.* 125. 4 *H.* 6. 13. 15 *Ass. pl.* 5. 18 *Ed.* 3. 30. 13 *H.* 7. 13. 15 *H.* 7. 10. 14 *H.* 6. 6.

6. Common in Gross. What shall be said to be this kinde of *Common*, or not.

Common in Gross is, where one claimeth to have Common for all manner of Beasts, or for some kindes of Beasts without number, or to a certain number of Cattle, by special Grant in writing, and not by reason of any Land. *Terms Ley. Co.* 4. 38.

Sect. 5. *Appurtenant.* How it may be taken.

If one that is Lord of a Mannor, wherein are divers Wastes, grant to another certain Lands within the Mannor and Common, within the Wastes of the Mannor, for all his Cattle; this is a Common in Gross, and not Appurtenant. But if the Grant be of Common for a certain number of Beasts, then it is Common Appurtenant. By three Judges, *B. R.* in *Stamps* case. And so this Common may be made at this day, for every man may grant to another what Common he will, upon his own Ground: And this Common, the Grantee may take with the Cattle of another body, if his Grant do not express that he must take it with his own Cattle, as if it be a Grant of Common for his Cattle, or for his Ten Beasts, or the like; for then he must take it with his own Beasts. 11 *H.* 6. 22. 36 *Ass. pl.* 5. But otherwise he may take it with any Beasts he will, that he hath for the present any Special Property in, for that purpose. 15 *H.* 7. 10. 14 *H.* 6. 6.

Common by cause of *Vicinage.*

Common by cause of Vicinage is, where the Tenants of two Lords, which be seized of two Villages or Towns, lying neer one another, and either of them have been used time out of minde, to inter-common and feed their Cattle of all sorts of Commonable Cattle together, and one with another.

The nature of it. *Appendant.* How it may be taken and used. *Inclosure.*

This Common is much of the nature of Common Appendant, for it cannot be created at this day, but one must have and claim it by Prescription. And the Commoner may not put in what he will, but according to the proportion of the Land, to which it is Appendant, and the quantity of the Common belonging to that Village, of which the Commoner is. And this Common by consent may be inclosed. *Co.* 4. 38. 7 *Ed.* 4. 26. *Dyer* 47.

Distres damage Feasant.

But this, the Commoners of one Village cannot put in their Beasts into the Common of the other Village, but they must put them in on their own side upon their own Common; and then if they go into the Common of the other Village that lieth open with their Common, they cannot distrain them damage Fesant, nor bring any Action, nor chase them out. And such a Commoner may put in what kinde of Cattle he will.

Estovers. What.

Common of Estovers is, where a man hath right to cut and take House-boot in anothers Wood to spend in his House: And this is sometimes Certain, and sometimes Incertain, and sometimes Appendant, sometimes in Gross. It may be by Grant,

Grant, or by Preſcription; but it is always belonging to a dwelling Houſe, and cannot be granted or ſevered from it, but he that hath the one muſt have the other, and it muſt belong to the old Houſe, not a new one; and the old Chimneys, not to new Chimneys. And this, if the Commoner be hindred of, as if the owner of the Wood cut down ſo much, that he doth not leave him enough, he may have a *Quo Minus*; if he have a Freehold, he ſhall have Remedy by Aſſize, otherwiſe by Action of the Caſe. And if the Commoner take too much, the owner of the Wood may ſue him in Treſpaſs. *Co.* 4. 37. 8. 46. *F.N.B.* 180. *Bro Rep.* 1. *part.* 221.

For Anſwer to all theſe Queſtions at once, take theſe things.

1. In theſe Caſes the Law doth much heed the Cuſtom of the place.

2. No Commoner may take away the Graſs upon the Common, otherwiſe then by the mouths of his Beaſts. 45 *Ed.* 3. 25. Nor can he meddle with the Soyl, no not to better it. 12 *H.* 8. 2. 22 *Aſſ.* 36. 13 *H.* 8. 16.

3. If I have Common in another mans Ground, I cannot ſhut him out, but he may Common with me. *Co.* upon *Littl.* 1. 22.

4. If one have two Tenements in two Villages, and Common Appendant to one of them; in this caſe he cannot take his Cattle that are upon the other Tenement, to eat up the Common Appendant to that Tenement. *F.N.B.* 125. 10 *Ed.* 3. 56.

5. He that hath Common in Groſs by Grant, as if a Grant be to him of Common for twenty Beaſts, may feed it with another mans Cattle; but if the Grant be for Common for his own Cattle onely, it is otherwiſe. 11 *H.* 6. 22.

6. If a Grant be to me of Common for Cattle, without number in a Cloſe, I may put in without ſtint; but if the Grant be of Common, for a certain number of Cattle, I can take no more then are named. 11 *H.* 6. 22.

7. He that hath Common Appendant, or becauſe of Neighborhood, may put in no more but a reaſonable number of Cattle, he muſt be ſtinted. 13 *H.* 7. 13. *Co.* 4. 38. 12 *H.* 8. 2.

8. If a Copiholder be to have Common, it muſt be onely for the Cattle that are Levant and Couchant upon his Copihold. 15 *Ed.* 4. 32. See more to this before *Sect.* 2. How the Grant of Common ſhall be taken.

9. For the power of the Commoner againſt them that diſturb him, take theſe things.

Firſt, If any Commoner that hath any Freehold in the Common be ouſted or hindred of his Common, totally by Incloſure, Treſpaſs, or the like, ſo that he cannot have it; he may have remedy by an Aſſize, be it the Lord, or any other that doth hinder him. But if the Impediment be ſuch, that he cannot have and enjoy his Common ſo beneficially, and ſo plentifully as he was wont to do; his proper Remedy is by Action of the Caſe. And if the Commoner be onely Leſſee for years, or a Copiholder, albeit the hindrance deprive him totally of his Common; yet he cannot have an Aſſize, but muſt have an Action of the Caſe. Or the Commoner may take the Beaſts of any man but the Lords, upon the Common damage Feſant. But all this is to be underſtood of ſuch a Treſpaſs, as that thereby the Commoner doth in all or part, loſe his Common: For if it be onely a little Treſpaſs, by cutting a Tree, digging a Turf, or the like, that is no hindrance to the Commoner in his Common, the Commoner can neither have Action, nor diſtrain damage Feſant. And yet perhaps the Lord may for this. Alſo a Commoner may drive out any mans Cattle that are there doing Treſpaſs, *Co.* 9. 112, 113. 8. 79. *Kelw.* 41. 147. *Goldsb.* 132. *pl.* 30. *Dyer* 3. 16. *Bro. Rep.* 1 *part.* 187, 197, 208, 228. 2 *part.* 55. 148, 149, 323.

Secondly, If the Lord of the Soyl make new Coney-Burrows, and his Coneys grow to ſo many, that they hinder the Commoner of his Common, the Commoner cannot ſtop the Burroughs, Ferret-Chaſe, or kill the Coneys, nor diſtrain them, no more then his Piggs, or the like; but he muſt have his Action of the Caſe againſt the Lord, *Bro.* 1 *part.* 208, 228. *Mich.* 9 *Jac. Sawburns* caſe. *Mich.* 7 *Jac. B.R. Mich.* 5 *Jac.* Sir *Chriſtopher Hudſons* caſe.

Thirdly, A Commoner may come upon the Common to ſee to his Cattle, and to ſee to Treſpaſſers. But if he ſhall then do any unlawful thing there, as cut down a

Sect. 6.

7. Of the Acts of a *Commoner*. How he may take and uſe his *Common*. And what he may do to them that hinder him there-of. And the power of ſuch a *Commoner*, otherwiſe.

Quo Minus.

Aſſize.

Action of the Caſe.

Damage Feſant.

Tree, dig up the Soyl, or Mow, and carry away the Graſs, or the like, he will be a Treſpaſſer *ab initio*. *M.* 5 *Jac.* Sir *Chriſtopher Hudſons* caſe, 15 *H.* 7. 12. 13 *H.* 7. 13. 12 *H* 8. 2.

4. If any one ſet up any Houſes or Ditches on the Common, any Commoner may throw it down. Sir *Chriſtopher Hudſons* caſe. 5 *Jac.*

5. If Trees be cut in the Common, and lie upon the Graſs, the Commoner may lay them aſide in the ſame Ground. But if he take them away, or put them in another Ground, he may by this be a Treſpaſſer *ab initio*. *Hil.* 9 *Jac.* Dean of *Wincheſters* caſe.

6. If the owner of the Ground, make a Hedg on the Ground, and keep out the Commoner, he may throw down all the Hedg. But if the Hedg be on another Ground, the Commoner muſt break his way to it onely. 15 *H.* 7. 10.

7. If one Grant me Common in his Ground, and he ſet up a Rick there, and my Cattle come to his Rick, and he chaſe my Cattle away; I may have an Action of Treſpaſs againſt him for this. *Farmers* caſe. *Hil.* 8 *Jac.* *Brownl.* 1 *part.* 120. See more of this point in my *Second Part of the Marrow of the Law*, *p.* 301, 302, 303, 304, 305, 306.

8. Of the Acts of the Lord, or owner of the Soyl. And what he may do and juſtifie. *Sect.* 7.

The Lord and Commoners together, may do what they will with the Soyl and Common. And the Lord himſelf, without his Tenant, and againſt his minde, may in ſome caſes, to preſerve Woods, or make a Paſture, incloſe a part of the Common, leaving ſufficient for the Commoners; and this is called an Approvement or Improvement. And he may make a Warren, and keep Coneys there, if he do not keep ſo many to deprive the Tenants of their Common. But for this, ſee more in my *Second Part of the Marrow of the Law*, *p.* 306, 307, 308.

Approvement or *Improvement.*

9. Where a Common may be extinguiſhed and gone for ever, or ſuſpended for a time. And where it ſhall be apportioned, or not. *Apportionment.* *Sect.* 3, 4, 5.

For the Anſwer to this Queſtion, we are to know theſe things.

1. That where one comes to as high, as good, and as durable eſtate in the Land, as he hath in the Common; there generally the Common is extinct: As if the Commoner purchaſe the Land wherein he hath Common, or it deſcend to him, and being extinct, it can never be after revived. *Co.* 4. 38. *D. & St.* 25. *Dyer* 45. *Plow.* 72. *Goldsb.* 3. *pl* 6.

2. If one that hath Common out of Land in Fee, and he get an eſtate for life or years onely; by this the Common is onely ſuſpended, and may be revived again when that eſtate is ended. *Co. ſuper Littl.* 310.

3. If one have Common Appendant, and purchaſe ſome of the Land out of which it comes in Fee; this is not gone, but ſhall continue, and be apportioned. But otherwiſe it is of Common Appurtenant. *Brownl.* 2. *Rep. p.* 287. *Co* 8. 79. 4. 38.

4. If a Commoner, Alien or Demiſe part of his Land, to which the Common doth belong; this doth not extinguiſh the Common, be it Common Appendant or Appurtenant: But it doth ſtill continue, and ſhall be apportioned. *Co.* 8. 79. *Bro. Rep.* 2 *part.* 297.

5. If one have Common Appendant in a great Waſte, belonging to his Tenement, and the Lord improve and incloſe part of it, leaving ſufficient, and after make a Feoffment of this to the Commoner; this doth not deſtroy his Common in the reſt of the Waſte, *Dyer* 339.

6. If a Copiholder claim Common by cuſtom in a great Waſte, and the Lord grant part of this Waſte to another, and then make a new eſtate of this Copihold; this Common in the Waſte granted away, is not gone, but the Copiholder will have Common there alſo. *Co.* 8. 64.

7. If he out of whoſe Land the Common is had, doth purchaſe part of the Land, to which the Common is Appendant; yet the Commoner hath not loſt his Common, but ſhall have *pro rata* for the Reſidue. *Co.* 4. 37, 38.

8. If one have Common in Certain, (*i.*) for ten Beaſts in twenty Acres of Land, and ten Acres of this Land doth deſcend to the Commoner; by this the Common is not gone, but ſhall be apportioned. But if the Common were Common Incertain, and without number, there ſhall be no Apportionment, but it ſhall be as it was before. *Co. ſuper Littl.* 149.

9. If there be Common Appurtenant to Copihold Land, and part of it be ſold away,

away, and divided from the reſt, it ſeems by this the Common is gone; otherwiſe of Common Appendant. *Brown.* 1 *part.* 17.

Grant of Common.

10. A Copiholder is of a Meſuage, and two Acres of Land in Fee, and the Lord by Deed doth grant and confirm the Meſuage and Lands, with the Appurtenances to the Copiholder in Fee, and ſo deſtroy the Copihold; by this the Common is gone, and the Grant of the Land, with the Appurtenances, will not create it *de novo*. *Brown.* 1 *part. p.* 220.

So if a Copiholder be to have Common in the Land of another, beſides the Lord, and the Lord make him a Feoffment of his Copihold. But perhaps if in theſe Grants there be a Grant of all Commons belonging to it, or uſed with it, it may be continued. *Brown.* 1 *part.* 173. 2 *part.* 209, 210. See more in *Suſpenſion*.

Sect. 8. 10 *Admeaſurement of Paſture.* What.

Admeaſurement of Paſture, is a Writ lying where many have Common in the Ground of another man, and one of them doth ſurcharge the Common with more Beaſts then he ſhould keep, then any one of the Commoners, or all the reſt of the Commoners together, may have this Writ againſt him that doth oppreſs the reſt. Or one may ſue him that doth ſurcharge, and all the reſt of the Commoners; for all the Commoners muſt be Plaintiffs, or Defendants in the Suit, becauſe all muſt be Admeaſured. *F. N. B.* 123. 8 *H.* 6. 26. *Old N. B.* 72. And by this means it ſhall be enquired of, and hereupon an Order ſhall be ſet down, how they ſhall take their Common for after times. And if any one of them do break this Order, and overcharge again, the party grieved may bring another Writ called a *Secunda ſuperoneratione*. And thereby he ſhall recover damages, and the party that doth ſurcharge, ſhall loſe the value of the Beaſts, wherewith he doth ſurcharge more then his proportion, as forfeit to the King. *Weſtm.* 2. 8.

Secunda Superoneratione. What it is.

11. For, and againſt whom this Writ lieth, or not.

This Writ of Admeaſurement lieth onely for, and againſt ſuch as have Common Appendant, or Common by reaſon of Neighborhood. And it will lie alſo againſt him that hath Common Appurtenant, or ingroſs to a certain number. But it lieth not amongſt them that have Common Appurtenant, or ingroſs without number. Nor will it lie againſt the Lord of the Waſte, by a Commoner that is his own Tenant. For in this caſe, if the Lord ſurcharge or improve more then he ought, the Tenant may have an Aſſize againſt him. And if the Tenant ſurcharge, the Lord may diſtrain him Damage-Feſant: Or either of them (as it ſeems) may have his Action of the Caſe againſt the other. *F. N. B.* 125. *Old N. B.* 73. 22 *Aſſ. pl.* 65.

Damage-Feſant.

Quod permittat is a Writ lying where a man is diſſeiſed of his Common of Paſture, and the Diſſeiſor alieneth, or dieth ſeized, and his Heir entreth, and then the Diſſeiſee die; then his Heir may have this Writ. *Terms Ley.* 159.

Quod Permittat. What.

Quo Jure is a Writ lying for him that hath Land, wherein another doth challenge Common time out of minde; and this is to compel him to ſhew by what Title he doth challenge this Common. *F. N. B.* 128.

Quo Jure. What.

See more of theſe things in *Extinguiſhment*, *Apportionment*, *Action of the Caſe*, *Grant*, *Seiſin*, *Preſcription*.

CHAP.

CHAP. XLIX.

Of Common Law, Common-Weal, Concealment, and Confirmation.

Common Law. What.

THE Common Law is taken divers ways, ſometimes it is taken for the ancient Laws and Cuſtoms of the Realm, before any Statutes were made; and ſo it was nothing elſe but the common uſage and cuſtom of the Country, grounded upon the Law of God, and common Reaſon; and in this ſenſe it is diſtinguiſhed from the Statute Law. And ſometimes it is taken for the whole Common Law and Statute Law, together. And ſo it is diſtinguiſhed from the Civil Law, the Spiritual Law, and certain private Cuſtoms, or Cuſtomary Laws: And ſometimes it is taken for the Courts at *Weſtminſter*, and ſo it is diſtinguiſhed from the lower and baſe Courts in the Country. *Terms Ley. Co.* 9. 15. *Dyer* 54.

For the Original Antiquity, Equity, and Excellency of the Common Law: See *Hows Annals* 94 *Forteſcue* in *Laudem Legum Angliæ. Co.* 3. In the *Epiſtle. Doct. & Stud. l.* 1.

Of Common-Weal.

Common-Weal.

BY Common-Weal is underſtood in our Law, *Bonum Publicum*, or Common Good; and this is a thing the Law doth much eye: And therefore it doth rate many things to be done for Publick good, that otherwiſe might not be done. As in caſe of Fire, or Enemies, to prevent increaſe of miſchief by them, men may pull down Houſes, or do any other thing upon mens Houſes or Lands, and juſtifie it when it is done. To apprehend Felons, or prevent Murders, and the like, men may break Houſes or Doors. The Oxen of the Plough, Horſe that is under a man in travel, may not be diſtrained. And upon this ſcore it is, that all Monopolies are void, all Obligations, and Covenants, to reſtrain Tillage, or free Trade, are void; the Law will ſuffer a little wrong to go unpuniſhed, then ſuffer multiplicity of Actions, as knowing, *Expedit Reipublicæ ut ſit finis litium. Plow.* 10. 25. *Co.* 11. 50. *Dyer* 36. 14 *H* 8. 25.

Of Concealment and Concealers.

Concealment.

CONcealed Land was that Land which was concealed from the King, and ſecretly detained in the hands of common perſons that had nothing to ſhew for it. And Concealers were ſuch as did finde out ſuch Lands concealed, whereof the main Rule is this, That Land ſhall never be ſaid to be concealed, or unjuſtly detained from the King, where there is any Record extant, to inform him of his Title, or where he is, or may be acquainted with his Title by any reaſonable intendment; but for this, ſee *Co.* 10. Sir *Arthur Legates* caſe. *Co.* 4. 113. 43 *Eliz.* 1.

By the Statute of 22 *Jac.* The King is to be barred where there is ſixty years poſſeſſion againſt him. See for this *Co.* 3 *part. of Inſt. cap.* 87.

Of Confirmation.

1. *Confirmation: What.*

A Confirmation is the Conveyance of an Eſtate or Right that one hath into Lands or Tenements to another that hath the poſſeſſion thereof, or ſome eſtate therein, whereby avoidable eſtate is made ſure, and unavoidable, or whereby a particular eſtate is increaſed and enlarged. And this albeit it may be made by other words, as by *Dedi* or *Conceſſi*, which are generall words, and ſerve to make a Grant, Feoffment, Leaſe, Releaſe &c. yet it is moſt commonly and properly made by theſe words *Confirmaſſe, Ratificaſſe, & Approbaſſe*, which do ſignifie *Ratum & firmum facere & ſupplere omnem defectum.* And he that makes the Confirmation

is

is sometimes called the Confirmor, and he to whom it is made the Confirmee. *Terms Ley Co. super Lit.* 295.

Confirmor Confirmee.

There are two kinds of Confirmations, *viz.* a Confirmation implied, or in Law, which is when the Law by Construction makes a Confirmation of a Deed made to another purpose, and a Confirmation express or in Deed, which is when the Act Done or Deed made is intended for a Confirmation. And both these are always in writing. The latter is properly called a Deed or Instrument of Confirmation, and is made after this manner, *Noveritis universi &c. me* A *de* B *ratificasse, approbasse & confirmasse* C *de* D *statum & possessionem quos habeo de & in uno Mesuagio & c. cum pertinen. in* F *&c.* A Confirmation is also distinguished by his effects, for sometimes it doth tend and serve to confirm and make good a wrongfull and defeasible estate, or to make a Conditionall estate absolute. And then it is said to be *confirmatio perficiens*, And sometimes it doth Tend and Serve to increase and enlarge a rightfull estate, and so to passe an interest. And then it is called *confirmatio crescens*. And sometimes it doth tend and serve to diminish and abridge the services whereby the Tenant doth hold. And then it is called *confirmatio diminuens. Co. super Lit.* 295. *Plow.* 140. *Lit. Sect* 515. *Co.* 9. 142.

2 The Kinds

The nature and work of this where it doth find a foundation to work upon is, either to increase and enlarge the estate of him to whom it is made from a lesser to a greater, and to give him some new interest he had not before, or to Corroborate and perfect the estate that was imperfect before, or to change the quality of it from an estate upon Condition to an absolute estate or otherwise, for this a Confirmation will doe. In some Cases also it will extinguish Rights and Titles of Entry. But it will not make an estate good that is meerly void; nor add, nor take from an estate a descendible quality, and make a man capable of it that is uncapable in himself, or *è contra.* In some cases also it wil lessen and diminish rents or services. But it cannot ne will change the nature of the service into some other kind of service, nor increase it into a greater service. *Co.* 146. 147. *Dier.* 109. 7. *H.* 6. 7. *Lit. Sect.* 539. *Co.* 9. 142.

3. The nature and operation of it in generall.

If a Bishop, Dean, Archdeacon, Prebend, or the like, make any lease of the Land they have in the right of their Bishoprick, Deanery, Archdeanery, or Prebendship not warranted by the Statute of 32 H. 8. and within the other Statutes, it seems this lease must be confirmed by the Dean and Chapter by their common seal, and if there be two Chapters, it must be confirmed by them both, or otherwise it is not good. But if the lease be such a lease as is warranted by the Statutes, the Bishop may make it without the confirmation of the King, the Patron, and Founder of Bishopricks, or the Dean and Chapter. And so also it seems of the rest. And a Corporation aggregate as Dean and Chapter, Master and Fellows, and the like, may grant without any confirmation of the Founder, and this grant will be good. If a Bishop, &c grant an ancient office belonging to his Bishoprick, albeit it be but for the life of the Grantee, yet it must be confirmed by the Dean and Chapter, otherwise it is not good. If a Parson or Vicar had made any lease for longer time then his own life, it must have been confirmed by the Patron and Ordinary. But at this day albeit it be confirmed by the Patron and Ordinary, yet the lease is good for no longer then during the Parsons ordinary residencie, except it be impropried. *Co. super Lit.* 300 301. *Co.* 10. 62. 5. 3. *Dier.* 145. 273. 349. 338. 339. 61. *Co.* 10. 62. *Dier.* 52. *stat.* 13. *El. ch.* 20.

4 Where the *Confirmation* of some persons is needfull to perfect the grant of others Or not. And how it may be done.

If Tenant for life grant a Rent-charge to *I. S.* and his heirs; in this case he in reversion must Confirm it, otherwise the grant of the Rent will be good for no longer then the life of the Tenant for life. *Co.* 1. 147.

Where a man hath an interest in any Lands, Tenements, Rents, Commons, Felons-goods or the like, by grant of any of the Kings of the Realm, he need not have the Confirmation of any or of every succeeding King. Also it seems grants of Fairs, Markets, Warrens, and the like, made by one King, will be good in Law against his successors without any Confirmation. But all such as have any judiciall or Ministeriall Offices, Commissions and Authorities derived from the King, must have the Confirmation of every succeeding King, otherwise they may lose them. *Co.* 8. 167. *Dier.* 277. *Dier.* 327. *Lit. Bro.* 203. *Kelw.* 145. 188. In

5 What *Confirmations* may be made. And what shall be said a good expresse or implied confirmation. Or not. And by what words it may be made.

1. To Confirm, or alter the quality of the eſtate of him to whom it is made.

In every good Confirmation tending to confirm an eſtate or alter the quality of it, theſe things muſt concur.

1 There muſt be a good Confirmor, and a good Confirmee, and a thing to be Confirmed as in other Grants, and the Deed muſt be well ſealed, &c.

2. There muſt be a precedent Rightfull or Wrongfull eſtate in him to whom the Confirmation is made in his own or in anothers Right, or at leaſt he muſt have the poſſeſſion of the thing whereof the Confirmation is to be made that may be as a Foundation for the Confirmation to work upon. As if Feoffee on condition make a Feoffment over, and the Feoffer confirm his eſtate to him to whom the ſecond Feoffment is made and his heirs; this is a good Confirmation to make his eſtate abſolute. *Co.* 1. 146. 9. 142. 7. *H.* 6. 7. And if Leſſee for life make a Feoffment in Fee, or Leaſe for years, and the firſt Leſſor confirm this ſecond eſtate; it ſeems this is a good Confirmation. *Littleton ſection* 516. And if one Diſſeiſe me of Land, I may after Confirm the eſtate of the Diſſeiſor, or of his heir if he be dead, or of his Feoffee if he have aliened it, and this will make his eſtate good for ever: And if the Diſſeiſor make a Leaſe for Life, or years of it; I may Confirm the eſtate of the Leſſee, and this will make it good for the time. *Co.* 9. 142. 6. 15. *Perk. ſect.* 86. *Lit. ſect.* 518. 521. 11. H. 7. 29. 28. And if one make a Leaſe for Life abſolute, or a Feoffment in Fee, or Leaſe for Life on Condition, or be Diſſeiſed of Land, and the Leſſee for Life, Feoffee, or Diſſeiſor doth grant a Rent out of the Land in Fee, and the Leſſor, Feoffer, or Diſſeiſee doth Confirm the eſtate of the Grantee; this doth make good the Grant for ever. *Co.* 1. 144. *Lit. ſect.* 527. 529. 11 H. 7. 28. *Co. ſuper Lit.* 300. *Lit. ſect.* 547. 11. H. 7. 28. And ſo alſo if the heire of a Diſſeiſor that is in by Deſcent Grant a Rent-charge, and the Diſſeiſee Confirmeth it; this is a good Confirmation. And if an Infant make a Leaſe for 20 years, and the Leſſee doth make a Leaſe to another for all or part of the time, and the Infant at his full age doth confirm this ſecond Leaſe; this is a good Confirmation, and doth perfect the Leaſe; for it is a Rule, That which I may defeat by my entry, I may Confirm by my deed. But if there be no precedent eſtate on which the confirmation may work, or the eſtate be ſuch an eſtate as is meerly void, then is the Confirmation void, and cannot take effect as a Confirmation: as for example, If a man aſſign Dower to a woman that hath nothing to do with it, or a Court that hath not power doth make Leaſes by Commiſſion, or an eſtate that was upon Condition is avoided by entry, or a Leſſee ſurrender, or a Diſſeiſee enter upon a Diſſeiſor, and afterwards he that hath the Rightfull eſtate Confirm their eſtates ſo defeated and gone; theſe Confirmations are void. *Debile fundamentum fallit opus. Co. ſuper Lit.* 295. 301. *Dier.* 263. And a Confirmation to him that hath nothing in the Land is void. And hence it is that if one Confirm all his eſtate that he hath granted to another, when in truth he hath granted none at all; this is void. And ſo alſo it is if there be an eſtate and no poſſeſſion: as if a Diſſeiſor make a Leaſe for years to begin at *Michaelmas*, and before the day the Diſſeiſee doth Confirme the eſtate of the Leſſee for years; it is ſaid, this is not a good Confirmation, *ſed quære.* 4. H. 7. 10. *Dier* 109.

Infant.

3 The Confirmor muſt have ſuch an eſtate and property in the thing whereof the Confirmation is made, as he may be thereby enabled to Confirm the eſtate of the Confirmee, as the Leſſors, Feoffers, and Diſſeiſees in the caſes before have, otherwiſe the Confirmation is void. 19, H. 6, 62. And therefore if the heir of the Diſſeiſee during the Life of the Diſſeiſee Confirm to the Diſſeiſor; this is no good Confirmation to perfect his eſtate, albeit the Diſſeiſee die, and the Right of the Land deſcend to his heir afterwards. *Co.* 9, 138. So if Lands be given to *A.* and *B.* his Wife and the heirs of their bodies iſſuing, the Remainder in Fee to *A*, and *A* levy a fine with Proclamations and die, and ſhe within five yeares doth enter and Claime, and after the Conuſee doth Confirm the eſtate made by the firſt gift to the Wife, To have and to hold according to the ſame; this Confirmation is to no purpoſe *Co.* 9. 138. So if Leſſee for Life make a Leaſe for thirty yeares, and after he in Reverſion and the Leſſee for Life Leaſe for ſixty yeares; in this caſe he cannot Confirme the Leaſe for thirty yeares, becauſe he hath granted it before for

ſixty

sixty yeares. *Fitz. Confirmation* 15. *Lit. Sect.* 523. *Dier* 263. And hence it is also that the Confirmation by one Jointenant of the estate of his companion worketh nothing, for their estates are equall, and each hath interest in the whole Land. And yet if one Jointenant confirme the whole Land to his companion, To have and to hold the Land to him and his heires; this shall amount to a Grant, and so will be good to pass his moity. *Lit. sect.* 543. *Co. super Lit.* 308. And hence it is also, that if a man grant a Rent-charge out of his Land to another for life, and then confirme his estate without any clause of distress (for by a clause of Distress a grant of a new Rent may be made) To have and to hold to him in Fee-simple, or Fee-taile; that this is void, for the Confirmor hath no reversion of the Rent in him. *Jointenants.*

4. The precedent estate must continue untill the Confirmation come, as in all the cases of voidable estates made the confirmation must be before the estates be made void by entry, &c. or otherwise the confirmation will be void. And therefore if Lessee for life or yeares surrender, or the Disseisee enter upon the Disseisor, and after the Lessor or the Disseisee confirme the estate of the Lessee or Disseisor; this Confirmation comes too late. *Co.* 5. 15. *Lit. sect* 60.

5. The estate precedent and that which is to be Confirmed, must be lawfull and not prohibited by any act of Parliament. And therefore if a spirituall person, as Prebend, or the like, make a Lease not warranted by the Statutes; the Confirmation of the Deane and Chapter will not help nor amend it. And if Tenant in taile make avoidable Lease, and after confirme it himself, this is voidable still. *Lit. sect.* 531. 532. 10. *Ed.* 4. 3. *Co. super Lit.* 295. *Dier.* 116. *Co.* 1. 147. 5. 15.

6. There must be apt words of Confirmation in the Deed or Instrument. And herein note that albeit the words *Confirmavi, ratificasse & approbasse*, be the most significant & proper words to make this conveyance, yet such as are made by other generall words may make a good Confirmation. And therefore it is agreed, that a Deed made by the words *Dedi, Concessi*, or *Demisi*, may make a good Confirmation: And therefore that if the Disseisee, Coparcener, or Lessor make a Deed of the Land by the word *Dedi*, or *Concessi* to the Disseisor other Coparcener, or Lessee for life, and deliver the Deed; this is a good Confirmation without Livery of Seisin. Also if a Feoffment be made to *A*, to the use of *B* and his heires upon condition, and before the Condition broken, the Feoffor and *B* doe joine in the grant of a Rent-charge, and after the Condition is broken; in this case the Law doth interpret this a good Grant from *B* and a good Confirmation of the Feoffee without any words of Confirmation. So if Tenant for life doe grant a Rent to him in reversion, and he by Deed doth grant it to another and his heires in Fee; in this case the Law doth construe this a good Grant and a Confirmation also. *Lit. sect.* 519. *Co. super Lit.* 296. And in these cases of Confirmations of estates, if it be by the Disseisee to the Disseisor, it is good without any words of heires, as if the Disseisee confirme the estate of the Disseisor, or confirme the Land unto him, and say not, To him and his heirs; this is an effectuall Confirmation to him and his heires for ever. And if a Lessee for life or a Disseisor make a Lease for life, or yeares, &c. and he in the Reversion, or the Disseisee confirme their estates and not the Land, and without any *Habendum* or limitation of estate; this is good for so long as the estates do continue. *Co.* 1. 147. But it is most safe alwayes to expresse the estate, *i.* to say, To have and to hold the Land to him and his heires, or for life, &c. as the agreement is. If Lessee for life grant a Rent to one and his heires out of the Land, and the Lessor doth confirme the estate, or this Rent-charge this doth make the estate of Rent sure. And so also if he doe confirme the Rent, and say, To have and to hold to him and his heires; this is a good Confirmation. But if he confirm the Rent, To have and to hold to him in fee, without naming his heires, hereby his estate it not bettered. *Lit sect.* 531. 132. 10 *Ed.* 4. 3. *Co super Lit.* 295. *Dper* 116. *Co.* 1. 147. 5. 15. *Livery of Seisin.*

2. To enlarge the estate of him to whom it is made.

If the Lessor confirme the estate of his Lessee for life with this clause, To hold without impeachment of waste. this is a good Confirmation to change the quality of the estate so farre as to make it dispunishable of Waste. So if the Lord Paramount confirm the estate of the Mesn with clause of Acquital. And so if Lessee for years or

for anothers life be without impeachment of waſt, and the Leſſor confirme to him for his own life, and omit that clauſe; hereby this priviledge is gone and the eſtate is become puniſhable for the waſt. *Co.* 9. 139. *F. N. B.* 136. *Co.* 8. 76. *Dier.* 10.

This kind of Confirmation *Creſcens* muſt have all the qualities of the former: and there muſt be alſo in this caſe a privity between the Confirmor and the Confirmee. *Co.* 9 142; *ſuper Lit.* 305. *Dier* 145. 296. *Co.* 6. 15. *Lit. Sect.* 533. 532. 523. *Dier* 263. And then it may enlarge the eſtate of him to whom it is made, as from an eſtate at will to an eſtate for yeares, or to a greater eſtate; from an eſtate for yeares to an eſtate for life, or to a greater eſtate; from an eſtate for life to an eſtate in Taile, or in Fee; and from an eſtate Taile to an eſtate in Fee; and theſe Confirmations are good. But in all theſe kind of Confirmations care muſt be had of the manner of penning them, and that in every ſuch Deed there be a limitation of the eſtate; *i.* That theſe words be inſerted, To have and to hold the Tenements, &c. to him and his heires, or to him and the heires of his body, or to him for terme of life, or yeares; as the agreement is; for if Leſſee for life make a Leaſe for yeeres, and then Leſſee for life, and be in Reverſion confirm the land, To have and to hold to him for life, or to him and his heires; theſe words will make the eſtate to increaſe. But if the Confirmation be made to the Leſſee for life or for yeares of his Terme or eſtate, and not of the Land; As when he doth confirm his eſtate, To have and to hold his Eſtate to him and his heires, this doth not increaſe the eſtate. And yet if he confirme the Land, To have and to hold the Land to him and his heires; this will increaſe the eſtate. *Et ſic de ſimilibus. Littleton ſect.* 524. 545. *Plow.* 540.

If the husband have an eſtate of Land for life or yeares in the right of his wife, or to them both for life, and a Confirmation to him alone, of his eſtate or of the Land To have and to hold the Land to him and his heires; this is a good conveyance of the Fee ſimple to him after the death of his wife. And if I let Land to a woman Sole for the Terme of her life, who taketh a husband, and after I doe confirme the eſtate of the husband and wife To have and to hold for Terme of their two lives; this is good, but it ſhall enure onely to enlarge his eſtate for Terme of his life if he ſurvive his wife. But if one leaſe to another for life, and after confirm the eſtate of the Leſſee to him and his wife for Terme of their two lives; this is void as to the wife. *Co. ſuper Lit.* 299. *Plow.* 160. *Lit. ſect.* 525. *Fitz. Confirmation* 7. 17.

If one Grant a Rent-charge out of his Land for life, and after the Grantor confirme the eſtate of the Grantee in the Rent without any clauſe of diſtreſſe To have and to hold to him in Fee ſimple or Fee taile; this Confirmation is not effectuall to enlarge the eſtate. But if a man be ſeiſed of an old Rent-charge or Rent-ſervice, and grant the ſame firſt for life, and after confirme the eſtate of the Grantee in Fee ſimple, or Fee taile; this is good and will enlarge the eſtate accordingly. *Lit. ſect.* 548. 549.

If Tenant for life grant a Rent out of the Land to one and his heirs during the life of the Leſſee for life, and after the leſſor confirme the Rent to the Grantee and his heires; it ſeemes the eſtate is not hereby enlarged, but when the Tenant for life doth die, the Rent ſhall ceaſe. *Co.* 1. 147.

This kind of Confirmation may be made by the ſame words as the former, *viz.* by the words, Give, Grant, or Demiſe. But neither of theſe may be made by the words, Surrender, Releaſe, Exchange or the like, for theſe are peculiar words deſtined to a ſpeciall end being proper and peculiar manner of conveyances. And yet if I that am a Leſſor do ſay to my Leſſee for yeeres by my deed, I will that you ſhall hold the Land for your life; this is a good Confirmation to increaſe the eſtate by this word *volo* only. So if I grant to my Leſſee for yeares, that he ſhall hold the Land for Terme of his life; this without any other words is a good Confirmation. *Co. ſuper Lit.* 301 *Fitz. Confirmation* 23.

3. To diminiſh or abridg the ſervices, &c.

By a Confirmation the Lord may confirme the eſtate of his Tenant which holdeth by Knights ſervice to hold in Socage, or to hold for a leſſe Rent, or to hold at common law where before he did hold in ancient demeſne, and ſuch a Confirmation is good. But ſuch a confirmation as is to hold by new ſervices, as a roſe for money

or

or the like, is not good for that purpoſe. And in this caſe there muſt be alſo a privity; and therefore if there be Lord, Meſn and Tenant, and the Lord confirm the eſtate of the Tenant, to hold by leſs ſervices; this is void. And if the Lord confirm to his Tenant after he is diſſeiſed before his Entry, to hold by leſs ſervices; this is void. *Co.* 9 194. *Littl. Sect.* 538.

6 Where a Confirmation may be good for part of the Eſtate, or for part of the thing, or not.

A Confirmation may be by apt words in caſe of a Leaſe for years for part of the time, but in caſe of a Freehold it cannot be ſo. And ſo alſo it may extend to part of the thing before in eſtate; and therefore if a Diſſeiſor, Tenant in Tail, Husband of the Land, he hath in the right of his Wife, or Leſſee for life make a Leaſe for years, and the Diſſeiſee, Iſſue in Tail, Wife, or Leſſor make a Confirmation of all the Land, for part of the time, or of part of the Land for all the time; this Confirmation is good. But if any ſuch perſon make a Leaſe for life, Gift in Tail, *&c.* the Diſſeiſee cannot confirm part of the eſtate, but he muſt confirm all; and therefore if he confirm his eſtate for one hour, it is a Confirmation of the whole eſtate. And ſo alſo if he confirm the Land to the Diſſeiſor himſelf but one hour, one week, one year, or for his life, *&c.* this is a good Confirmation of the eſtate for ever. And if it be a Leaſe for years that is confirmed, care muſt be had to the manner of the Confirmation; for if the Confirmation be of the eſtate or the term for one hour; this is a good Confirmation for the whole time: And therefore the Confirmation muſt be had of the Land, To have and to hold for part of the term; and being ſo made, it may be good for that time onely, and no longer. *Co.* 5. 81, 82. *Littl. Sect.* 519. *Co. ſuper Littl.* 297. *Littl Sect.* 520.

7. The force and vertue of it; and how it ſhall enure and be conſtrued and taken.

If I make a Feoffment on Condition, and before the Condition broken, I confirm the eſtate of the Feoffee abſolutely; this will not extinguiſh the Condition. And yet if the Condition be broken firſt, ſo as my Entry is lawful; in this caſe the Confirmation will extinguiſh the Condition. And if the Feoffee make a Feoffment over abſolutely to another, and I confirm the eſtate of the ſecond Feoffee, whether it be before or after the Condition broken; by this, the Condition is diſcharged. 11 *H.* 7. 29. *Co* 1. 146. 9. 142.

If the Lord confirm the eſtate of his Tenant in the Tenements, or one that hath a Rent, Common, or profit out of Land, confirm to the Terretenant his eſtate; in theſe caſes notwithſtanding this Confirmation, the Signiory, Rent, Common, *&c.* do continue, and this ſhall not enure to extinguiſh it. *Littl. Sect.* 535, 536, 537.

If the Diſſeiſee and a ſtranger diſſeiſe, the Heir of the Diſſeiſor, and the Diſſeiſee confirm the eſtate of his Companion; this ſhall not enure to extinguiſh the ſuſpended right of the Diſſeiſee, but when the Heir of the Diſſeiſor ſhall re-enter it ſhall be revived. And if the Grantee of a Rent-charge and a ſtranger diſſeiſe the Tenant of the Land, and the Grantee confirm the eſtate of his Companion; this ſhall not enure to the Rent, ſuſpended to extinguiſh it, but after the re-entry of the Tenant, the Rent ſhall be revived. *Co. ſuper Littl.* 298.

If a man hold his Land of me by Knights ſervice, Rent, ſuit of Court, *&c.* and I confirm his eſtate to hold of me by Knights ſervice onely, for all manner of ſervices and demands; in this caſe albeit this do abridge the ſervice, yet it ſhall not be conſtrued to take away Wardſhip, Relief, Aid, to marry my Daughter, and make my Son Knight, and the like. *Co. ſuper Littl.* 305.

If I have an eſtate in Land for my life, and he in the Reverſion doth confirm the eſtate to me, and my Wife, for the term of our lives; this ſhall enure onely as a Confirmation of my eſtate, and not ſo as to give any eſtate to my Wife. But if I have a Leaſe for life or years in right of my Wife, and he in the Reverſion do confirm the eſtate to me and my Wife, To have and to hold to us for our lives; this ſhall enure not onely to confirm the eſtate, but alſo to create an eſtate to me after my Wives death: And in the caſe of a Leaſe for years, it maketh our eſtate joynt, but in the caſe of a Leaſe for life, I ſhall take by way of enlargement of eſtate for my life after my Wives death. And if in this caſe the Confirmation be to me and my Wife, To have and to hold the Land to us two, and our Heirs; this ſhall enure to us in Fee-ſimple as Jointenants. See before.

If Land be let to Husband and Wife, To have and to hold the one moyety to the

Husband for his life, and the other moyety to the Wife for her life, and the Leſſor confirm to them both their Eſtate in the Land, To have and to hold to them and their Heirs; in this caſe, as to the one moyety it doth enure onely to the Husband, and his Heirs, but as to the other moyety they ſhall be Jointenants. And yet if ſuch a Leaſe for life be made to two men by ſeveral moyeties, and the Leſſor confirm their Eſtates in the Land, To have and to hold to them and their Heirs; by this they are Tenants in Common of the Inheritance. *Co ſuper Littl.* 299.

If the Diſſeiſee confirm the Eſtate of the Diſſeiſor, To have and to hold to him, and his Heirs of his Body engendred, or, To have and to hold to him for term of his life; this ſhall enure to him as a Fee-ſimple, and ſhall confirm his eſtate for ever. *Littl. Sect.* 419.

If my Diſſeiſor make a Leaſe for life the Remainder over in Fee, and I confirm the Eſtate of the Tenant for life; this ſhall not enure to, nor avail him in Remainder. And if the Diſſeiſor make a Gift in Tail, the Remainder to the right Heirs of the Tenant in Tail, and the Diſſeiſee confirm the eſtate of the Tenant in Tail; this ſhall not extend to the Fee-ſimple, no more then if the Diſſeiſor make a Gift in Tail the Remainder for life, the Remainder to the right Heirs of the Tenant in Tail, and the Diſſeiſee confi m the eſtate of the Tenant in Tail; for this ſhall extend onely to the eſtate Tail, and not to the Remainder for life, or in Fee But if the Diſſeiſee in the firſt caſe confirm the eſtate of him in the Remainder; this ſhall enure to and avail the Tenant for life. And ſo if a Diſſeiſor make a Leaſe for life, and keep the Reverſion, and after the Diſſeiſee doth confirm to the Diſſeiſor; this ſhall enure to the Tenant for life. And ſo if a Diſſeiſor make a Leaſe for life to *A.* and *B.* and the Diſſeiſee confirm the eſtate of *A*; this ſhall enure to *B.* and make his eſtate good alſo in the other moyety. And ſo if there be two Diſſeiſors, and the Diſſeiſee confirm the eſtate of one of them, without ſaying more; this ſhall enure to them both. But if the Confirmation be of the Land, To have and to hold the Land to one; in this caſe it may enure to him alone. So if a Diſſeiſor enfeoff *A.* and *B.* and the Heirs of *B.* and the Diſſeiſee confirm the eſtate of *B.* albeit it be but for his life; yet this ſhall enure to both, and to the whole Fee-ſimple. *Co. ſuper Littl.* 298. 297.

If a Leaſe be made for life to *A.* the Remainder to *B.* for life, and the Leſſor confirm their eſtates in the Land, To have and to hold to them and their Heirs; this ſhall enure as to the one moyety to *A.* in Fee, after the death of *B.* and as to the other moyety in Fee to *B.* after the death of *A. Co. ſuper Littl.* 299.

If Lands be given to two men, and the Heirs of their two Bodies begotten, and the Donor doth confirm their eſtates in the Land, To have and to hold the Land to them two, and their Heirs; it ſeems this ſhall enure to them as a joynt eſtate for their lives, and after for ſeveral Inheritances, *Co. Idem.*

If the Leſſee for life, or the Diſſeiſor doth make an abſolute Leaſe for years, and he in the Reverſion or the Diſſeiſee doth confirm the eſtate of the Leſſee for years; this makes the Leaſe good for all the time. So if the Diſſeiſor makes a Leaſe for life, and the Diſſeiſee doth confirm the eſtate of the Leſſee for life; this makes the eſtate good for the life. And if he in Reverſion confirm the eſtate of the Termor but one hour; this doth make it good for all the term. And if an eſtate for life, or in Fee, be confirmed but for one hour; it is a good Confirmation for all the eſtate. And if the Diſſeiſee confirm the eſtate of the Diſſeiſor, To have and to hold for one hour, year, or for life, or in tail; this is a good Confirmation for ever, and makes his eſtate unavoidable. And yet if the Diſſeiſee confirm the Land *Habendum* the Land for life, or in tail, *&c. Contrà. Littl. Sect.* 516, 521. 519, 520, 541. *Co.* 5. 79.

Note. If a voidable Leaſe be made for forty years, and the Leſſor confirm the term for twenty years; this is a good Confirmation of the whole term But if he confirm the Land for twenty years, it may be good for that time onely and no longer; wherein as in divers other caſes before obſerve, that the very words whereby the Confirmation is made are much to be heeded, for *Parols ſont Plea. Dyer* 52. 339. *Co.* 5. 81.

If

If Tenant in Tail, or for life of Land, letteth it for years, and after confirm the Land to the Leſſee for years, To have and to hold to the Leſſee, and his Heirs for ever; by this the Leſſee hath onely an eſtate for term of the life of the Tenant in Tail, or for life, and therein his Leaſe for years is extinct. *Littl. Sect.* 606, 607, 610.

If Tenant for life doth grant a Rent to another, and his Heirs, during the life of the Tenant for life, and the Leſſor confirm to the Grantee, and his Heirs; this ſhall be conſtrued to be an eſtate for life onely, and no enlargement of the eſtate. But if Tenant for life, Grant a Rent-charge in Fee, and the Leſſor confirm it; this ſhall be conſtrued to be a Confirmation of the Fee-ſimple. *Co.* 1. 147. *ſuper Littl.* 301.

CHAP. L.

Of Conſanguinity, Affinity, Conſideration, Conſpiracy, and Condition.

Conſanguinity, Affinity.

Conſanguinity is a kindred or joyning of perſons by Birth or Blood, and Affinity is a kindred or joyning of perſons by Marriage.

Next of Bloods

For the Expoſition of theſe words, and how they ſhall be taken in Expoſition of Deviſes, and in Diſceits; to whom Land ſhall diſcend, and in Heir who ſhall be Heir to another.

Of Conſideration.

Conſideration. What. The kindes of it.

Conſideration is deſcribed to be a cauſe or an occaſion meritorious, requiring a mutual recompence in Deed or in Law, or the material cauſe of a Contract, without which, no Contract is ſo to be binding in Law. And this is either valuable, as Money, Land, or Goods, or not valuable, as Natural love and affection, advancement of Blood, and the like; and both theſe are ſometimes Expreſſed, and ſometimes Implied. Expreſſed when the thing is agreed upon, and ſet down between the parties, and where one for Twenty pound doth bargain and ſell his Land, or where one doth ſell his Land for other Land in exchange, or where one doth give twenty ſhillings for a Horſe, or where one for twenty pound doth promiſe to do a thing: Or elſe it is implied, as where one doth come to an Inn, and call for proviſion for himſelf or his Horſe; in this caſe there is an Implied contract, and the Inn-keeper may either ſue him for it, or keep his Horſe, but not his perſon, till he pay as well, as if he had made an Expreſs agreement with him. So if one without expreſſing any conſideration, covenant to ſtand ſeized to the uſe of his Wife, Childe, Brother, or Couſin; in theſe caſes, by the naming of them to be of their Kin, there is an Implied conſideration, and thereupon the uſe will riſe, which without ſome valuable or invaluable conſideration will not riſe by Covenant. But for theſe things ſee *Co.* 3. 80 *Dyer* 366. *and Contracts, Bargain and Sale, and Uſes*, in my Books of the *Marrow of the Law*, and of *Common Aſſurances*.

Innkeeper

Horſe

Of Conſpiracy or Confederacy.

Sect. 1: 1. *Conſpiracy or Confederacy. What.*

THis word is always in our Law, taken in ill part. And largely it doth ſignifie any Agreement, Combination, or Confederacy between two or more to do ſome unlawful act: As where they do agree or binde themſelves by Oath, Covenant, or other Alliance, that every of them, ſhall bear, and aid the other, falſly and maliciouſly to indite, or falſly to move or maintain Pleas, and alſo ſuch as cauſe children within

within age, to appeal men of Felony, whereby they are impriſoned and ſore grieved; and ſuch as retain men in the Countreys with Liveries or Fees, to maintain their malicious enterpriſes; and this extendeth as well to the takers, as to the givers: Alſo Stewards and Bailiffs of great Lords, who by their Seigniory, Office, or Power undertake to bear or maintain Quarrels, Pleas, or Debates, that concern other parties, then ſuch as touch the Eſtate of their Lords, or of themſelves; but in this ſenſe it is confounded with maintenance, and champerty. See *Maintenance* for this. 34 *Ed.* 1. 2. 4 *Ed.* 3. 11. 3 *H.* 7. 13. 1 *H.* 7. 3. 18 *H.* 6. 12.

And ſometimes, and moſt commonly, and ſo in this place, it is taken more ſtrictly, that is, where two or more perſons, do purpoſely and malitiouſly conſpire and labor together, to indite another falſly and unjuſtly, without any ground at all; for ſome Treaſon, Felony, or other offence; and after, he which is ſo indicted, is upon that indictment after a lawful tryal, purged and acquitted. *Poulton de Pace* 232. 28 *Aſſ. pl.* 12.

Judgment in it. In this caſe, and for this wrong, the party grieved may have the offenders indicted, and ſo puniſhed at the Suit of the Lord Protector. And therein if the partie be found guilty, their Judgement is, That they ſhall loſe their Frank or Free Law. (*i.*) That they ſhall not afterwards be put into Juries, or Aſſizes, nor be otherwiſe produced as witneſſes to teſtifie truth. And if they have any thing to do in the Lord Protectors Court, they muſt do it by Attorney, and ſhall not come themſelves within twelve miles of the Court, that their Lands, Goods, and Cattles, ſhall be ſeiſed into the Lord Protectors hands, their Houſes waſted, their Trees eradicated, and their Bodies taken and impriſoned, and this is called a Villanous Judgment. Or the party grieved, might have preferred his Bill into the *Star-Chamber*, and have puniſhed it there; or he may have his Writ of Conſpiracy at the Common Law, which is a ſpecial Action of the Caſe; and therein the Judgment ſhall be, that the Plaintiff ſhall recover his damages, and the Defendant ſhall be taken. 27 *Aſſ. pl.* 59. 43 *Ed.* 3. 33. 46 *Aſſ. pl.* 11. 24 *Ed.* 3. 34. *F.N.B.* 114, 115. *Co.* 9. 56.

Frank-law.

There are divers Confederacies, and Conſpiracies, to other purpoſes, whereby men are wronged, and for thoſe there is relief given by other means. *F. N. B.* 116.

Sect. 2. In all caſes where this Writ may be had, or this Action doth lie; there muſt be theſe Incidents in the caſe.

2. In what caſe this *Writ* of *Confederacy*, or general *Action* of the *Caſe* for *Confederacy* lieth, or not.

1. There muſt be two perſons or more in the plot and practiſe; for a Writ of Conſpiracy is not maintainable againſt one, unleſs the charge be, that he *ſimul cum* others did conſpire ours. And hence it is, that it will not lie againſt a man and his wife alone, unleſs ſome others be made Defendants with them; for they two are but one perſon in Law. And hence it is alſo, that although the Suit be begun againſt divers, yet if all of them but one, be diſcharged to all intents, as if all of them, but one, be acquitted by a Verdict, or by matter in Law, as if they plead they were Indictors, or any ſuch like matter in Bar, hereby that one is diſcharged alſo; and if the Writ be brought againſt two, and they plead not guilty, and one is found guilty, and the other not, hereby he is diſcharged alſo, and the Plaintiff cannot recover. But if the Writ be brought againſt two, and one of them is attainted, and the other doth Bar the Plaintiff by a Demurrer in Law, or one doth appeal, and plead, and his Plea is found againſt him; in this caſe the other is not diſcharged, but the Plaintiff ſhall recover, though the other be not attainted (and yet perhaps in this caſe, the one may refuſe to anſwer without the other.) So albeit one of the Conſpirators be dead, yet the Suit may be had againſt the other alone; and in all caſes, where the practiſe is ſuch by one perſon, that if there were more joyned with him, a Writ of Conſpiracy would lie, there a general Action of the Caſe will lie. *F. N. B.* 116. 114. 18 *Ed.* 4. 1. *Broo. Conſpiracy* 21. 24 *Ed.* 3. 34. 40 *Ed.* 3. 19. 38 *Ed.* 3. 3. 22 *Aſſ. pl.* 71. 28 *Aſſ. pl.* 12 11 *H.* 4. 62. 28 *H.* 6. 25. 24 *Ed.* 3. 34. 35 *H.* 6. 14.

2. The party that would have this Action, muſt be indicted, arraigned, and acquitted, and therefore a man cannot have this Action, nor a general Action upon his caſe, for a plot or preparation, onely to ſuch an act without an Execution; for

in

in this caſe the Rule doth hold *Non officit conatus niſi ſequatur effectus.* And yet notwithſtanding ſuch a Confederacy in preparation onely, as where two or more, knit, unite, and binde themſelves to maintain each other in their matters, right or wrong, or to do any unlawful act (which implies no more but a falſe Accuſation) albeit the party be never indicted and acquitted; this is puniſhable by Indictment at the Aſſizes, or might have been by Bill in the *Star-Chamber.* Therefore Juſtices of Aſſize and *Niſi prius*, are to inquire of Conſpirators in their Circuits, and puniſh them. But then ſuch Confederacies as are ſo puniſhable by the Law, before they be executed, muſt have in them always theſe four Incidents. *Accuſation.*

Firſt, They muſt be overtly declared by ſome manner of proſecution, as giving of Bonds, or the like.

Secondly, They muſt be malitious as for ſome unjuſt revenge, *&c.*

Thirdly, They muſt be falſe againſt an Innocent.

Fourthly, They muſt be voluntarily out of Court, and not by reſtraint. If the parties proceed further therefore, as to cauſe the accuſed perſon to be apprehended, brought before Juſtices, examined, bound to appear, ſent to Gaol, Indicted, or if they give Evidences, retain Counſel, or the like, againſt the priſoner, although the Jury finde an *Ignoramus* upon the Indictment; this is much more puniſhable by Indictment or Bill, for *Quando aliquid prohibetur & id per quod pervenitur ad illud.* But if all this be done and no more, in that the party be not arraigned and tried by the Petti-Jury, and thereupon acquit, it ſeems he cannot have this Action, for the Writ is *Et legitimo modo acquietatus.* And yet *Quære*, for I have heard ſay, that it hath been adjudged on the contrary. See for this *19 R. 2. Co. 9. 50. F.N.B. 114. 6 Ed. 4. 1. 24 Ed 3. 34. 27 Aſſ pl. 59. 19 H. 6. 28. 21 H. 6. 26. 9 Ed 4. 12. 27 Aſſ. pl. 44. Articuli ſuper Chartas, c. 10. 4 Ed 3. 11. Co. 9. 56, 57.*

3. The proceeding and proſecution muſt be voluntary, and therefore neither this Action, nor the general Action of the Caſe, will lie againſt him or them that ſhall proſecute any man after this manner, by conſtraint or compulſion; as when they are thereunto obliged by their Oaths, Duties, or Offices. Hence it is, that if a Juſtice of Peace doth any thing in open Seſſions, to diſcover or puniſh offenders, or Jurors ſworn upon an Enqueſt, to enquire of Felonies, do indict a man for Felony, or make known the Felony to their fellows, or move or ſet forward an Indictment againſt him whiles they ſtand ſworn, albeit ſome of them did conſpire before they were ſworn, or they be after diſcharged before their verdict given; or one come into a Court to diſcover a Felony voluntarily, or one is ſworn and doth give Evidence to the Enqueſt, unleſs he did before conſpire, falſly to give this Evidence, that no Action will lie for any of theſe things, for all theſe things are juſtifiable and not puniſhable in any Court. Therefore it ſeems to be a good Plea to this Action, for the Defendant to ſay he came to the Seſſions of the Peace, and informed a Juſtice of Peace, of the matter againſt the party, and that at the Juſtices requiring, he did put the Information in writing, for this any man may juſtifie, for therefore is Proclamation made, that any man ſhall inform the Court that will, that ſuch as will may do it. *27 Aſſ pl 12. 12 Ed. 4. 18. 21 Ed. 4. 67. 47 Ed 3. 17. 21 Ed. 1. 17. 17 H. 4. 31. 27 Aſſ. pl. 12. 36 Aſſ pl. 21.*

4. The proceeding and proſecution muſt be malitious, and therefore if one man do proſecute another, upon good ground, as when a Felony is done, and there is ſome cauſe of ſuſpition of that perſon, either by the common fame, or otherwiſe; or when a man is robbed, and the next Village upon Hue and Cry make purſuite, and take a man they ſuſpect, and the party robbed doth indict him, and he is acquitted; or a Coroner after a murder, ſitting *ſuper viſum corporis*, cannot finde out the murderer, and then enquiring of the firſt finders of the body, they ſay that *J. S.* killed him, and after *J. S.* is indicted and acquitted. Theſe are no faults at all, neither are any of theſe puniſhable at all in any Court. *Broo. Conſpiracy.*

5. The charge and accuſation muſt be falſe, ſo the Writ muſt run, That the Defendants conſpired to indict the Plaintiff falſly and malitiouſly without any ground or cauſe. And hence it is, that if there be a conſpiracy to indict a man for murder, and upon his arraignment it is found he killed the man; but it was lawful, or *per infortunium*, or *ſe defendendo*; no action will lie for this. *Bro. Conſpiracy. 22 Aſſ. pl. 77. Fitz. Conſp. 21, 24. Stanf 3. 12.*

6. The

6. The party indicted muſt be *legitimo modo acquietatus*, he muſt be acquitted after an indictment found upon his tryal by the other Jury, or he muſt be non-ſuite, if he bring an Appeal in the ſuit. And hence it is, that if any conſpire to indict another man, and he is acquitted by the Kings general Pardon, or he is acquitted by the Kings particular Pardon (unleſs he wave that, and after plead not guilty, and then be acquitted) or he is diſcharged by the inſufficiency of the Indictment; or there be a general Pardon, and the party doth not take advantage of it, but doth plead, and is acquitted. In all theſe caſes, the parties that do proſecute, cannot be puniſhed, neither can the party grieved, have any Remedy; for in the caſes of the general Pardon, the Judges ought to have allowed it, and diſmiſſed the party without pleading of it. And hence it is alſo, that it hath been always held, that if the party be indicted for an offence: And hence it is alſo, that it hath been always held, that if the party be indicted for an offence by a conſpiracy, and the Jury upon Bill finde an *Ignoramus*, no Action lieth for this.

2. This Writ lieth as well where the Defendant is acquitted, or the Plaintiff is non-ſuit upon an Appeal. As where the Plaintiff was acquitted upon an Indictment: But if the Appeal be founded on an Indictment, and the Defendant be acquitted, or the Appellant be non-ſuit upon the Appeal, after Declaration, and the Defendant be arraigned and acquitted at the Kings ſuit, or the Plaintiff be non-ſuit upon the Appeal (*Contra*, (and yet ſee *F. N. B.* 114. contrary to this) *Dyer* 85. 33 *H.6.* 2. 40 *Ed.*3.42. *Stamf* 5. 12.

3. If a Conſpiracy be to indict one as Principal, and another as Acceſſory, and after he is non-ſuit in his Appeal, or the Principal is acquitted (which is an acquital of the Acceſſory) yet the Acceſſory may have this Action, as well as the Principal. But if the Principal had been out-lawed, had got his pardon, or had died before tryal. *Contrà. F. N. B.* 115. *Bro. Conſpiracy* 2. 34 *H.* 9. 33 *H.*6.2.

4. If the Indictment and acquital be before a Major, or a Bailiff, or any other that have power to deliver Goals, the party grieved may have this Writ. *F. N. B.* 115.

5. If the Conſpiracy be to indict a man for Treſpaſs, or any other offence, beſides Treaſon or Felony, the party grieved may have this Action againſt the Conſpirators. *F.N.B.* 116. *Broo Conſpiracy* 25. 3 *Aſſ. pl.*13.

6. If the Conſpiracy be to indict a man for any offence againſt any Statute Law, the party grieved may have this Action, as well as when it is for an offence againſt the Common Law. *New Book Entries* 126.

7 If any perſon ſhall be indicted or appealed of Felonie, Treaſon, or Treſpas in a Forrein Countie, Liberties, or Franchiſes, where the ſaid perſon did never dwell or converſe, after he is duly acquited by verdict, he may have an Action of the Caſe againſt the procurer of ſuch Indictment, and herein ſhall recover treble damages. *Old Book of Entries. f.* 126.

8 If any doe malitiouſly indict of Treaſons, or Felonies, ſuppoſing that in their ſaid Appeales and Indictments that the ſaid Treaſons or Felonies were committed in one certain place, where in truth there is no ſuch place in the Countie; the Indictments and Appeales and Proces thereupon ſhall be void, and the parties grieved may have this Writ againſt the Conſpirators. 9 *H.* 5. 1. 13 *H.* 6. 12.

9 If one of meer malice procure one to be falſely indicted at Aſſiſes for a pretended murther and he be acquited, the partie may have an Action of the Caſe. *Hobbard Rep.* 8. *Miles* caſe.

10 If Overſeers of the Poor or other Officers conſpire in an undue way, and by colour of their Office to oppreſſe a man and do ſo, this Action may lye for this.

Sect. 3. 3. What ſhall be a good *Barr* or *Plea* to this *Action.*

1 It is a good Bar or Plea to plead a Concord made between the Plaintiff and them. 21 *H.* 6. 28.

2 Any thing that will prove the Indictment or the Acquitall of the Plaintiff erroneous is a good Bar, although the partie indicted did take no advantage by it. *Co.*9.26. 9 *Ed.* 4. 12.

3 It is a good Plea to ſay that there is no ſuch Record, as the Plaintiff doth ſet forth. 9 *H.* 6. 26.

4 It

4. It is a good to Plea to ſay, that they were Jurors, and did preſent upon their Oaths; or that they were Witneſſes, and gave evidence, or any ſuch like matter as is above. 20 *H.*6.5.

5. But if the Writ be brought againſt two, it is no good Plea for one of them to ſay, the other is dead hanging the Writ; for it may be found, that he and the other did conſpire, and then it is well enough, 18 *Ed.*4.1.

6. It is no good Plea to ſay, the Plaintiff was guilty of the Felony, after he is acquitted of it. 20 *H.*7. 11.

7. If twenty be indicted, and one of them doth briug a Writ of Conſpiracy, ſuppoſing that the Defendant conſpire to indict him; it is no good Plea, that the Record is, that he and others are indicted. 9 *Ed.*4.23.

Of a Condition.

A Condition is a kinde of Law or Bridle, annexed to ones act, ſtaying or ſuſpending the ſame, and making it uncertain, whether it ſhall take effect, or no. Or as others define it, It is *modus* an Equality annexed by him that eſtate intereſt or right to the Land, *&c.* whereby an eſtate, *&c.* may either be created, defeated or enlarged upon an incertain event. *Terms Ley. Co. ſuper Littl.*201. 1. *Condition.* What.

And this doth differ from a Limitation, which is the bounds or compaſs of an eſtate, or the time how long an eſtate ſhall continue. *Limitation.* What.

And this ſometimes is contained in a Teſtament or Will, and ſometimes in a Deed. And when it is in a Deed, it hath no proper place aſſigned it, but it may be in any part of the Deed; howbeit, for the moſt part it is placed next after the *Habendum*, or next after the Reſervation of the Rent. It is alſo ſometimes annexed to and depending upon eſtates; and ſometimes annexed to, and depending upon Recognizances, Statutes, Obligations, Contracts, and other things: Conditions are alſo contained in Acts of Parliament and Records. But of theſe we ſpeak not here in the enſuing matters, which are eſpecially to be applied to ſuch Conditions, as are uſually contained in Deeds and annexed to the realty, *i.* To eſtates in Fee-ſimple, Fee-tail, for life or years. 27 *H.*8. 16. *Co* 2.70.

And of theſe Conditions there are divers kindes. For ſome are in Deed or Expreſs, *i.* When the Condition is expreſſed by the party in legal terms, and by expreſs words in writing, or without writing, knit to the eſtate, as if I enfeoff a man of Land, rendring Rent at a day on condition, That if it be not paid, it ſhall be lawful for me to re-enter. And ſome are in Law or implied, *i.* When the Condition is *tacitè* created by the Law, without any words uſed by the party. *Co. ſuper Littl.*201. *Plow. Colthirſts* caſe. *Co.*8.43. 2. The Kindes.

The firſt ſort of Conditions alſo are ſome of them precedent or executed, *i.* When the Condition muſt be fulfilled ere the eſtate can take effect, as where an Agreement is between me and *J. S.* That if he pay me Ten pound at *Michaelmas*, he ſhall have ſuch a ground of mine for ten years; or I make a Leaſe of Land to *J. S.* for ten years, provided, That if he pay me Ten pounds at *Michaelmas*, he ſhall have the Land to him and his Heirs; and in theſe caſes by the performance of the Condition the eſtate is acquired.

And ſome of them are Subſequent and Executory, *i.* When the eſtate is executed, but the continuance thereof dependeth upon the breach or performance of the Condition, as where a Leaſe is made for years, on condition that the Leſſee ſhall pay ten pound to the Leſſor at *Michaelmas*, or elſe his Leaſe ſhall be void; and in this caſe, by the performance of the Condition, the eſtate is held and kept.

Theſe Conditions alſo are ſome of them in the Affirmative, *i.* That do conſiſt of doing, as providing that the Leſſee ſhall pay the Rent, or pay ten pound to the Leſſor, *&c.* And ſome in the Negative, *i.* that conſiſt of not doing, as provided, That the Leſſee ſhall not alien, *&c.* And ſome of them are in the Affirmative, which imply a Negative, as provided, That if the Rent be unpaid that the Leſſor ſhall re-enter which implieth a Negative, *viz.* not paid.

Conditions alſo are ſome of them Collateral, *i.* When the act to be done is a

Collaterall act, as that the party ſhall pay 10 l. goe to Rome, or the like. And ſome are inherent. *i.* Such as are annexed to the Rent reſerved out of the Land whereof the eſtate is made. And ſome of them alſo are Reſtrictive and contain a reſtraint, as that the Leſſee ſhall not alien, or do waſt, or the like. And ſome are compulſory, as that the Leſſee ſhall pay to the Leſſor 10 l. ſuch a day, or his leaſe ſhall be void.

And ſome of them be ſingle. *i.* To doe one thing only. And ſome Copulative, *i.* To doe divers things. And ſome diſjunctive. *i.* when one thing of divers is required to be done. And ſome conditions make the eſtate whereunto they are annexed voidable only by entry or claime. And ſome of them make the eſtate void *ipſo facto* without entry or claime.

And ſometimes they tend to deſtroy eſtates, ſometimes to make, or to enlarge eſtates, and ſometimes neither to make nor deſtroy, but only to clogg eſtates, as where a Leaſe is made rendring Rent on a day, on condition if it be not paid that the Leſſor ſhall enter on the Land and keep it till the Rent be paid. And all theſe waies conditions may be lawfully made. *Ineſſe poteſt donationi modus, conditio ſive Cauſa. Lit ſect.* 327.

The conditions in Law or implied are either by Common Law, or by Statute Law. The firſt ſort are ſome of them founded on skill, as where an office is granted, there is a condition *tacite* implied, that if the Grantee doth not execute it faithfully according to the truſt, the Grantor may put him out. *Co.* 8. 44. 3. 65. *Lit.* 325. 378. *F. N. B.* 205.

And ſome are without skill, as where an eſtate is made for life or yeares of Land, there is this condition implied, that if the Leſſee doe waſt he ſhall forfeit the place waſted, or if the Leſſee make a Feoffment of the Land he ſhall forfeit his eſtate and the Leſſor ſhall enter.

And where an eſtate is made in Fee of Land; this condition is implied, that the Feoffee ſhall not alien it in Mortmaine.

And theſe conditions doe ſometimes give a recovery, and no entry, as in the caſe of waſt: And ſometimes they give an entry and no recovery, as in the caſe of Alienation in Mortmaine. In the caſe of exchange alſo there is a condition in Law, for which ſee *Exchange. Co.* 4. 121.

3 What things may be made and doneupon Condition. And to what things a Condition may be annexed, Or not. And how it may be made and annexed ther-unto.

It is a generall rule, That when a man hath a thing, he may condition with it as he will. Conditions in deed therefore may be annexed to things inheritable, to Frank Tenements, or to Chattels Reall and Perſonall: as for example, If a Feoffment in Fee, gift in Taile, or Leaſe for life be made of Lands or Tenements, or a grant be of a Rent, Common, or the like thing in Fee-ſimple, Fee-taile, or for life, theſe things may be done upon condition.

So a Leaſe for years of Land, or a grant of a Rent, &c. for years may be made upon condition. And a Leaſe may be made for five years on condition that if the Leſſee pay to the Leſſor within the firſt two years 10. markes, that then he ſhall have the Fee, otherwiſe but for five years. 21 *H* 7. 24. *Perk. ſect.* 707. 708, *&c.*

Alſo a Gardian in Chivalry may grant the wardſhip of the body and land or either of them on condition. A Tenant by ſtatute Marchant, Staple, or Elegit may grant their eſtates upon condition. The Lord may grant his Seigniory to his Tenant on condition. The Tenant for life may grant his eſtate to his Leſſor, or him in reverſion upon condition. The King may make letters Patents of denization to an Alien, or a Charter of pardon to a man for his life upon condition. Alſo releaſes and Confirmations may be made upon condition. And a ſubmiſſion to an award may be upon a condition. But an Inſtitution to a Benefice, or an induction may not be on a condition. An Atturnment, or an expreſs Manumiſſion of a villaine cannot be upon a condition ſubſequent, as it may be upon a condition precedent, And a condition cannot be releaſed upon a condition, as ſome hold. But the contrary is held by others cleerly, and that there is no difference between this and a releaſe of a right, *Ideo quære.* An award cannot be made on a condition as was held in *Sherers caſe* 35 *Eliz.* A Contract or ſale of a Chattel perſonall, as an oxe or the like, may be upon condition, as if *A* ſell his horſe to *B* that if *A* doe ſuch an act, then that *B* ſhall pay 5 l. at the day agreed upon, otherwiſe but 4 li,

So

So if I agree with a Phyſitian, that if he cure ſuch a diſeaſe, he ſhall have ſo much, and in this caſe he cannot have the money untill he have done the cure As where I promiſe a man 10 l. when he hath built ſuch a houſe, in this caſe he cannot have the money untill the houſe be built. Alſo retaining of ſervants, delivery of Charters and divers other things may be done upon condition.

And if an Executor aſſent to a Legacy upon a condition; the Aſſent is good, but the condition is void. *Perk. ſect.* 781 *Co. ſuper Litt.* 274. *Perk. ſect.* 724. *Co.* 8. 98. *Dier.* 242. *Co.* 2. 74. *Co. ſuper Litt.* 274. *Perk. ſect.* 712. 713. *Co.* 4. 28.

And conditions annexed to eſtates in all the caſes before, howſoever they are moſt frequently and falſely made by deed in writing, yet it ſeems ſuch conditions may be made and annexed to any eſtate of a thing grantable without deed without any writing at all; howſoever in ſome caſes it cannot be well pleaded nor uſed without a deed, for it is a Rule, That if a condition be pleaded in any action to defeat a Free old, the deed wherein the Condition is contained muſt be ſhewed, But of Chattels reall, as Leaſes for years and the like, or grants of Chattels perſonall, a man may plead that ſuch leaſes and grants were made upon condition, without ſhewing the deed. *Litt. ſect.* 365. *Co. ſuper Lit.* 161. 216. *Doct. & Stu.* 16. *Perk. ſect.* 715.

And in the firſt caſe alſo of a condition to avoid a freehold, it may be given in evidence to a Jury, and they may finde the matter at large as it is, and ſo the party may have advantage of the condition without ſhewing any deed of it. Alſo the pleading of a Feoffment in Fee on condition without deed and Reentry, is good if the party confeſs the condition. A condition may be annexed to a limitation of uſes, and thereby the ſame may be made void. See *Vſe. Co.* 5. 40. *Co.* 8. 90.

4. The nature of a condition in deed, and of a limitation.

The nature of an expreſs condition annexed to an eſtate in generall is this: That it cannot be made by, nor reſerved to a ſtranger, but it muſt be made by, nor reſerved to him that doth make the eſtate. And it cannot be granted over to another, except it be to and with the Land or thing unto which it is annexed and incident.

And ſo it is not grantable in all caſes; for the eſtates of both the parties are ſo ſuſpended by the condition, that neither of them alone can well make any eſtate, or charge, of or upon the Land; for the party that doth depart with the eſtate, and hath nothing but a poſſibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. *Co. ſuper Litt.* 186. *Perk. ſect* 818. *Litt. Sect.* 358. *Dier.* 6.

And if he that hath the eſtate, grant or charge it, it will be ſubject to the condition ſtill, for the condition doth alwaies attend and wait upon the eſtate or thing whereunto it is annexed: ſo that although the ſame doe paſs through the hands of an hundred men, yet is it ſubject to the condition ſtill; And albeit ſome of them be perſons priviledged in divers caſes, as the King, infants, and women covert, yet they alſo are bound by the condition. And a man that comes to the thing by wrong, as a Diſſeiſor of Land whereof there is an eſtate upon condition in being, ſhall hold the ſame ſubject to the condition alſo. *Dier* 298. *Co.* 8. 44. *Perk. ſect.* 818. 819.

And when the condition is broken or performed, &c. the whole eſtate ſhall be defeated: So that if there be a Leaſe for life made by deed and not by will, the remainder over in Fee, on condition that the Leſſee for life ſhall pay ten pound to the Leſſor; if the Leſſee pay not this ten pound, the eſtate in remainder is avoided alſo, *Et ſic é converſo*, unleſs by ſpeciall limitation it be otherwiſe provided, as if *A* grant by Indenture Land to *B* for life, the remainder to *C* in Fee, rendring Rent to *A* and his Heirs with condition that if the Rent be behind, to reenter and retain the Land during the life of *B* and no more, and *A* doth enter in the life time of *B* for non-payment; this doth not deſtroy the remainder. *Dier* 117. *Co.* 10. *in Mary Portingtons caſe. ſuper Litt.* 230. *Litt. ſect* 374. *Perk ſect* 564. *f.* 108. *Litt. f.* 224. *Dier.* 127. *Co. ſuper Litt.* 224.

And if Tenant for life and he in remainder joyn in a Feoffment on condition that if, &c. that then the Tenant for life ſhall reenter; this is good without deſeating the entire eſtate, for regularly a condition cannot avoid a part of an eſtate onely, and leave another part entire; neither can the eſtate be void as to one perſon, and good as to another, (except it be in caſe of a condition annexed to an eſtate limited by way of uſe, as in *Frances* caſe. *Co.* 8. 90.) And yet if *A* make a gift in tail to *B*, the remainder to *B* in Fee upon condition not to alien, and *B* doth alien; this doth defeat the eſtate taile onely, and not the remainder. Alſo the whole eſtate of the whole, and not of ſome part only, ſhall be avoided, except by agreement the condition be ſpecially reſtrained to ſome part, and the reentry given in that part only, as where a Feoffment is made of two acres, on condition that if ſuch a thing happen, the Feoffer ſhall enter into one of them. And further when he that hath right doth reenter by force of ſuch condition, he ſhall avoid all charges and incumbrances put upon the Land after the condition made, for he that doth enter into Land by force of ſuch a condition, muſt have it again in the ſame plight as it was when he parted with it. And finally, a condition for the moſt part will not determine the eſtate without entrie or claim. So that howſoever a limitation hath much affinity and agreement with a condition, and therefore it is ſometimes called a condition in Law, both of them doe determine an eſtate in being before, and a limitation cannot make an eſtate to be void as to one perſon, and good as to another, as if a gift be made in taile to one and his Heirs males, untill he doe ſuch a thing, and then his eſtate to ceaſe and goe to another: yet herein they differ. 1. A ſtranger may take advantage of an eſtate determined by limitation, and ſo he cannot upon a condition: 2, A limitation doth always determine the eſtate without entrie or claime, and ſo doth not a condition. *ſee Brown.* 1 *part* 31. *Co.* 4. 121. *Dier.* 127 *Perk. ſect.* 840. *See Infra Litt. ſect* 380, *Co.* 9. 128. 8. 17. 6. 41. *Plow.* 413. *Co.* 10. 50. *Dier* 300. *Litt. ſect.* 90.

§ When an eſtate ſhall be conditionall. And what words will make a condition. And what not. And how a condition may be known from a covenant, or limitation. *Proviſo, Ita quod ſub conditione Si. Si contingat.*

Conditions annexed to eſtates are ſometimes ſo placed and confounded amongſt covenants, ſometimes ſo ambiguouſly drawn, and at all times have in their drawing ſo much affinity with limitations, that it is hard to diſcern and diſtinguiſh them. Know therefore that for the moſt part Conditions have Conditionall words in their frontiſpice, and doe begin therewith, and that amongſt theſe words there are three words that are moſt proper, which in and of their own nature and efficacy without any addition of other words of reentry in the concluſion of the condition that doe make the eſtate Conditionall, as *Proviſo, Ita quod*, and *ſub conditione*. And therefore if *A* grant Lands to *B*, To have and to hold to him and his Heirs, Provided that, or ſo as, or under this condition, that *B* doe pay to *A* Ten pound at Eaſter next; this is a good condition, and the eſtate is Conditionall without any more words. But there are other words as *Si, ſi contingat*, and the like, that will make an eſtate Conditionall alſo, but then they muſt have other words joined with them, and added to them in the cloſe of the condition as that then the Grantor ſhall reenter, or that then the eſtate ſhall be void, or the like. And therefore if *A* grant Lands to *B*, To have and to hold to him and his Heirs, and if, or but if it happen the ſaid *B* doe not pay to *A* Ten pound at Eaſter, without more words, this is no good condition, but if theſe or ſuch like words be added, that then it ſhall be lawfull for *A* to reenter, then it will be a good condition. *Co.* 2. *Lord Cromwels caſe.* 10 *Mary Portingtons caſe. Co. ſuper Litt.* 204. 27 *H.* 8. 16. *Litt. ſect.* 328. 329. 330. 331.

But here note that theſe words *Proviſo, Ita quod*, and *ſub conditione*, albeit they be the moſt proper words to make conditions, yet doe they not always make the eſtate by the deed to be Conditionall, but ſometimes doe ſerve for other purpoſes; for the word *Proviſo* hath divers operations beſides; for ſometimes it doth ſerve for, and work a qualification or limitation, and ſometimes it doth ſerve to make and work a covenant onely. And then only (being inſerted amongſt the covenants of the deed) it doth make the eſtate Conditionall, when there are theſe things in the caſe. *Co. ſuper Litt.* 146. *Co.* 2. 70. *Dier* 152. 311. *Litt. Bro.* 256. *Dier* 6. 222. *Plow.* 136. 5 *H.* 7. 7. *Perk. ſect.* 732.

1. When

1. When the clauſe wherein it is, hath no dependance upon any other ſentence in the Deed, nor doth participate with it, but ſtands originally by and of it ſelf. 2. When it is compulſory to the Feoffee, Donee, &c. 3. When it comes on the part, and by the words of the Feoffor, Donor, Leſſor, &c. 4. When it is applied to the Eſtate, and not to ſome other matter, as if one grant a Manor with an Advowſon appendant, and after the *Habendum* and reſervation of Rent amongſt the Covenants, there is this clauſe inſerted, [Provided that the Grantee ſhall regrant the Advowſon for the life of the Grantor] this is a good Condition. And thus it may be alſo a Condition, and a Covenant: As if the words run thus; Provided always, and the Feoffee &c. doth covenant &c. that neither he nor his heirs ſhall do ſuch an act, this is both a Condition and a Covenant. But if the clauſe have dependance on another clauſe of the Deed, or be the words of the Feoffee, &c. to compel the Feoffor to do ſomething, then is it not a Condition, but a Covenant only: As if *Covenant.* there be in the Deed a Covenant, that the Leſſee ſhall ſcour the ditches; and then theſe words follow, [Provided that the Leſſor ſhall carry away the earth.] Or there is a Covenant, that the Leſſee ſhall repair the Houſes; and then theſe words follow, [Provided that the Leſſor provide Timber.] So if this clauſe be applied to ſome other thing, and not to the thing granted, then it is no Condition; as if a Leaſe of Land be made rendring Rent at *B.* Provided, that if ſuch a thing happen, it ſhall be paid at *C.* this doth not make the Eſtate conditional. Or a Leaſe is made for years without impeachment of Waſte, *proviſo quod non proſternet domus voluntarie*; in this caſe howſoever this doth make the privilege, yet doth it not make the Eſtate conditional. Or a Leaſe is made for years rendring Rent, provided that the Leſſor ſhall not diſtrain for the Rent; in this caſe this is a good Condition, but not annexed to the Eſtate. So if in a Deed of Bargain and Sale of Land, after the *Habendum*, there are theſe words, *viz.* upon theſe Conditions following, *viz.* That if the Vendor pay the Vendee twenty pounds at *Eaſter*, and enfeoff him of the Meadow called *S.* before *Whitſontide*, that the Bargain ſhall be void: Provided nevertheleſs, that the Bargainor ſhall hold the Land for 20 years without let of the Bargainee, it ſeems this *Provided* in this caſe doth not make a Condition. So if a Leaſe be made of a Houſe, and amongſt the Covenants theſe words are inſerted, [Provided alſo, that if the Leſſor will dwell upon it, or keep it in his hands, then the Leſſee, his Executors and Aſſigns doth covenant upon one years warning to remove and give place to the Leſſor, this Leaſe notwithſtanding;] it ſeems this is no Condition, but a Covenant only, *Dyer* 318. 27 *H.* 8. 15. *Bro. Condition* 7. If a Leaſe be made, provided that if the Rent be behind, without any more words; this is no good Condition, *Curia Paſch.* 14 *Jac. Br.* in the Caſe of *Muddy*. *Co. ſuper Lit.*

Proviſo, ſometimes makes a Condition: As if one leaſe Land, Provided that the Leſſee ſhall not alien without the aſſent of the Leſſor, under pain of Forfeiture. Sometimes it is taken for an Explanation: As if I have two Manors called *Dale*, and I leaſe to you the Manor of *Dale*, Provided that you ſhall not have my Manor of *Dale* in the occupation of *I. S.* Sometimes for a Covenant: As if one leaſe a Houſe, and the Leſſee covenant to keep it in Repair, provided that the Leſſor ſhall find great Timber. Sometimes for an Exception: As if I leaſe to you my Meſſuage in *Dale*, Provided that I will have ſuch a Chamber my ſelf. Sometimes for a Reſervation: As if I make a Leaſe rendring Rent at ſuch Feaſts as *J. S.* ſhall name, Provided that the Feaſt of *S. Michael* be one. *Goldsb.* 131 *pl.* 27. See more, *Brownl.* 1 *par.* 45. 170. 2 *par.* 150.

The word *ſi* alſo doth not always make a Condition; for ſometimes it makes a limitation, as when a Leaſe is made for years, if *J. S.* ſhall live ſo long.

There are other words alſo, that in the Kings Grant, in laſt Wills and Teſtaments, and other ſpecial caſes do make Conditions; as, *ea intentione*, *ad effectum*, *propoſitum*, *intentionem*, *Paying*, and the like. So that if one deviſe his Land to *J. S.* *ea intentione*, &c. that he ſhall pay to *W. S.* Ten pounds, or paying, or ſo as he pay to *W. S.* Ten pounds, or to ſell, &c. theſe are good Conditions. But theſe words regularly do not make a Condition when they are uſed in Deeds.

And

And therefore if one make a Feoffment in Fee *ea intentione, ad effectum, &c.* that the Feoffee ſhall do, or not do ſuch an act; theſe words do not make the Eſtate conditional, but it is abſolute notwithſtanding. And yet perhaps theſe words being conjoined with ſome others, may make a Condition; as if Lands be granted *ea intentione quòd ſi defecerit, &c. tunc quod reintrabit*, or the like. *Co. ſuper Lit.* 236. 237. *Doct & Stu.* 122. *Dyer* 138. *Plow.* 142. 7 *H.*4. 22. *Co. ſuper Lit.* 204. *Co.* 10. 42. *Dyer* 318. *Doct. & St.* 34. *Idem* 94. *Dyer* 6. 91. 63. 92.

Alſo Conditions are ſometimes made, eſpecially in Eſtates and Leaſes for years, without any of theſe formal words; when the apparent intent of the Leſſor is to make the Eſtate conditional, albeit the words be not uſed as the words of the Leſſor, but as the words of the Leſſee, or indefinitely of neither. And therefore it hath been ſaid, That if an Indenture be made between *A.* and *B.* thus: It is agreed and covenanted between the parties aforeſaid, that *B.* ſhall have the Land for years, and that he ſhall not alien it; that this Eſtate is conditional. But it ſeems this is not Law. But if this clauſe be inſerted amongſt other Covenants, *viz.* If the Leſſee hinder the Leſſor to fell, cut, and carry away the Trees upon the Lands deviſed, that the Leſſor may re-enter, and the Leaſe ſhall be void; this is a good Condition, and ſo it hath been adjudged in the caſe of *Haward* and *Fulcher*, *Hil.* 3 *Car. B.R.* And if a Leſſee for years do covenant in his Leaſe, that if he, his Executors or Aſſigns ſhall alien, that it ſhall be lawful for the Leſſor to re-enter; it ſeems this is a good Condition, and not a Covenant only. And if a Leaſe for years be made, and this clauſe is inſerted in the Deed: It is agreed between the parties, That if the Leſſee do not pay Ten pounds to the Leſſor at *Eaſter*, from thenceforth the Leaſe ſhall be void; this is a good Conditoin. And if a Leaſe be made with this clauſe inſerted in the Deed: It is agreed, That whoſoever ſhall have have the Eſtate or Intereſt, that he or they ſhall find Sureties within the year for the Rent, otherwiſe the Eſtate ſhall ceaſe; it ſeems this is a good Condition. *Dyer* 66. 65. *Curia M* 37, 38 *Eliz. B.R.* And if a Leaſe for years be made with this clauſe inſerted, And that it ſhall not be lawful for the Leſſee to alien without licence of the Leſſor, under pain of Forfeiture; this is a good Condition. And if a Leaſe for years be made of a Houſe, with this clauſe inſerted in the Deed, And the Leſſee ſhall continually dwell upon the ſame Houſe, upon pain of Forfeiture of the ſaid Term; this is a good Condition, *Dyer* 79. 27. *Co. ſuper Lit.* 204. *Plow.* 132. And if in a Leaſe for years, the Leſſee covenant to pay ſo much Rent, and then theſe words are inſerted; And if it ſhall happen the ſaid yearly Rent, &c. then the Leſſee doth covenant and grant, &c. that the Leaſe ſhall be void; it ſeems this is a good Condition, and ſo hath it ever been taken, as was ſaid by *Juſt. Dodridg, Hil.* 3 *Car.* And in all theſe caſes the Eſtate is conditional. But in caſes of Feoffments in Fee, Gifts in tail, and Leaſes for life, it ſeems words penned in this manner will not make Conditions; but that in theſe caſes the preciſe and formal words of a Condition are requiſite. And therefore that if a Feoffment be made by Deed, and therein is inſerted this clauſe; That it is agreed, or that the Feoffor doth covenant, that if the Feoffee do ſuch an act, that the Feoffor ſhall re-enter; this is no Condition, nor the Eſtate hereby made conditional. And yet ſee *Perk. ſect.* 744. *Co. ſuper Lit.* 204. *Doct. & Stu.* 94. *Dyer* 65. 138.

If one make a Leaſe for years on condition to pay Rent at four Feaſts; and after there is a clauſe in the Deed, And if the Rent ſhall be behind &c. that he ſhall diſtrain; this clauſe doth not take away the Condition, but the ſame doth continue, and the Eſtate is conditional ſtill, *Dyer* 348. See more in the next Queſtion.

In the making of Eſtates, the Cauſe is regarded: And in caſe of the Grant of Lands or Tenements, *Cauſa* doth ſometimes make a Condition; as if a woman give Lands to a man and his heirs, *cauſa matrimonii prælocuti*; in this caſe if ſhe either marry the man, or the man refuſe to marry her, ſhe ſhall have the Land again to her and her heirs. But on the other ſide, if a man give Land to a woman and to her heirs *cauſa matrimonii prælocuti*, though he marry her, or the woman refuſe, he ſhall not have the Lands again to him and his heirs. And in the caſe of a Grant executory, the word *pro* may make a Condition. *Co. ſuper Lit.* 204. 10. 42. *Plow.* 141. 9 *Ed.* 4. 19. 15 *Ed.* 4. 2. *Dyer* 6.

And

And therefore if a man grant me an Annuity *pro una acra terre*, or *pro decimis, &c.* or if he grant me an Annuity for a way, or a gutter through my ground, this is Conditionall, and if he be diſturbed in the way, acre of Land, Tithes, or Gutter, he may refuſe to pay the Annuity. So if an Annuity be granted to an Officer for the executing of his Office, or *pro conſilio impendendo*, if the Grantee doe not execute the Office, or give counſell, &c. the Annuity ſhall ceaſe. But if one grant me Tithes or an Annuity, and I grant an Annuity for theſe Tithes, or grant to give counſell for the Annuity; it ſeems the Grants that are in this manner are not Conditionall, but abſolute. So if I *pro conſilio, &c.* or *pro una acra terre &c.* make a Feoffment in Fee, or Leaſe for life of another acre, theſe eſtates are not Conditional. And if one deviſe Land to be ſold by his Executors, and to be diſtributed for his ſoul; by this it ſeems the eſtate or power of the Executors is Conditionall. So if one deviſe his Land to find a Preacher or a Chaplain. But otherwiſe it ſeems it is of Land ſo conveyed by Deed in a mans life time. And if a Feoffment be made of Land *ad erudiendum filium*; ſome have ſaid this eſtate is Conditionall. *Dier* 7. 127 *ſee Teſtament. Plow.* 141. 142.

Annuity

Teſtament.

The moſt apt and proper words to make a limitation of an eſtate are *Quamdiu, Dummodo, Dum, Quouſque, Si*, and ſuch like. And therefore if *A* grant Lands to *B*, To have and to hold to him and his Heirs, untill *B* goe to Rome. or untill he be promoted to a Benefice, or untill *B* pay to *A*, or *A* pay to *B* twenty pound, or ſo long as *I. S*, ſhall live, or if *A* grant Lands to *B*, To have and to hold to him, his Executors, &c. if *I. S* and *I. D.* ſhall live ſo long. Or if *A* grant Lands to *B*, To have and to hold to him for the life of *B*, So that *B*, pay 20 pound to *A* at Eaſter following; theſe are not Conditionall, but limited to eſtates. So if *A* grant Lands to *B* To have and to hold to him for ſo long as he ſhall keep himſelf a Widower, or *dum ſola fuit*, or *durante viduitate*, if the Grantee be a Widow, theſe are good limited eſtates, but theſe words doe not make the eſtates to be Conditionall. *Co. ſuper Litt.* 234. 235. *Co.* 10. 42. *Plow.* 413. *Litt. ſect.* 90. *Dier* 290.

Limitation.

If the words in the cloſe or concluſion of a condition bee thus, that the Land ſhall return to the Feoffer; &c. or that he ſhall take it again and turn it to his own profit, or that the Land ſhall revert, or that the Feoffer ſhall *recipere* the Land; theſe are either of them good words in a condition to give a Reentry, as good as the word [*reenter*] and by theſe words the eſtate will be made Conditionall. *Dier* 125. *Plow.* 159. *Perk ſect.* 740.

The Tenant by the curteſie, the Tenant in Taile after the poſſibility of iſſue extinct the Tenant in Dower, the Tenant for life, the Tenant for years, by Statute, or Elegit, Gardian, &c. doe hold their eſtates ſubject to a condition in Law, ſo that if either of them Alien his Land in Fee, or claime a greater eſtate in a court of Record then his own, he doth forfeit his eſtate, and he in Remainder or Reverſion may enter, and if ſuch a Tenant doe waſt, he in Reverſion ſhall recover the place waſted. The Tenant in Fee-ſimple doth hold his eſtate ſubject to a condition in Law, ſo that if he Alien his Land in Mortmain, he doth forfeit it, and the Lord may enter upon him. So alſo he that doth take Land in exchange doth hold it under a condition in Law, *viz*, that if the Land he give in Exchange for that Land be recovered from him that hath it, that he ſhall enter upon his own Land again. Alſo every Officer that hath to doe in the Adminiſtration of Juſtice, all Keepers of Parks, Stewards. Beadles, Bailiffes, and ſuch like hold their Offices under a condition in Law; ſo that if they doe not duly execute it, and doe all that thereunto doth appertain, they may forfeit them, and the Grantor may put them out. *In quo quis delinquit in eo eſt de jure puniendus. Co. ſuper Litt*, 233. 234. *Co.* 8. 44.

6 What ſhall be ſaid a condition in Law. And when an eſtate ſhall be ſubject to ſuch a condition.

7 What ſhall be ſaid a good condition in a deed or limitation in his Originall creation. And what not.

To every good condition is required an externall form. *i.* Words to declare an intent in the party to have the eſtate Conditionall, as in the caſes before.

And an internall form, that is, ſuch matter as whereof a condition may be made.

1 For the manner, and frame, and order of making of it.

As

Grant of fee abſolute not be made conditionall a making of the day and before or afterwards to contrade annuity

As to things executed, the condition muſt be made and annexed to the eſtate at the time of the making of it, but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the ſame deed wherein the eſtate is made, if it bee delivered at the ſame time it is as good as if it were contained in the ſame deed. And therefore if a man make a Feoffment, Leaſe, or the like, by one deed abſolute, and at the ſame time make another deed of defeaſance or condition, and deliver both together, this is a good condition, and will make the eſtate Conditionall. But if the defeaſance be ſealed and delivered before, or after the Deed, *contra*. And therefore if one make an abſolute Feoffment in Fee, and before or after the ſealing or delivery of that Deed the Feoffer declare himſelf by Deed: or the Feoffer and Feoffee agree by deed that the eſtate made before, or to be made after, ſhall be Conditionall, yet this is not Conditionall. And yet if an Annuity be granted abſolutely by one Deed, and after the Grantee grant to the Grantor, that if the Grantor doe ſuch a thing, the Annuity ſhall ceaſe: in this caſe the Annuity is Conditionall. *Perk. Sect.* 717. *Co.* 1. 113. *Plow.* 133. *Co. ſuper Litt.* 146. 217. *Co.* 2. 71.

Annuity

Vſe

A condition may be annexed to an eſtate by way of uſe, as if a Feoffment be made to a *A*, to the uſe of *B*, and his Heirs, on condition that *B* ſhall pay to the Feoffor twenty pound ſuch a day; this is a good condition. So if one Covenant to ſtand ſeiſed of Lands to the uſe of *B* and his Heirs, on condition that if he pay him Ten pound, the uſe ſhall be void, or the like. Alſo a condition may be annexed to an eſtate created by Will, as if one deviſe Land to *I. S.* for his life, Provided that he pay ten pound yearly to *I. D.* this is a good condition. Whereof ſee in *Teſtament. Co.* 146. *Hil.* 40. *Iac. B. R. Warners caſe: Co* 1. 112. *Albanies caſe. Dier* 126. 348.

by will

Rent

Rent may revive contra Land

A Rent, or any ſuch like thing may be granted on condition, that if ſuch a thing be or be not done, the Rent ſhall ceaſe for a time, and then revive again, and this condition is good. But in caſe of Land it is otherwiſe, for that cannot be granted after this manner. Alſo a condition to make an eſtate void for a part of the time is not good, And therefore if a Feoffment be on condition, that upon ſuch a contingent the Feoffer ſhall enter and have the Land for a time, or the eſtate ſhall be void for a part of the time; or make a Leaſe for Ten years, provided that upon ſuch a contingent it ſhall be void for five years; theſe conditions are not good: And yet if a Feoffment be made of two acres, provided that upon ſuch a contingent the eſtate ſhall be void as to one acre onely; this is a good condition. *Co.* 8. 17. 24 *Ed.* 3. 29. *Co.* 1. 86. *Perk. ſect.* 718. *Co.* 4. 121. *Dier* 6.

Upon a contingent void as to part of the Land but not part of the term

Stranger can have the advantage of A condition broken

A condition that a ſtranger, or the Heir of the Feoffor ſhall doe an act is good, as if a Feoffment be made to *I. S* on condition that *I. D.* ſhall pay to the Feoffor, Ten pound at Eaſter next; or if a Feoffment be made on condition that if the Heir of the Feoffor pay Twenty ſhillings to the Feoffee, that the Feoffor and his Heirs ſhall reenter. But a condition to give a ſtranger a reentry is void ſo far forth. And therefore if an eſtate be made upon condition, that upon ſuch a contingent a ſtranger ſhall enter, or the eſtate ſhall ceaſe, and another ſhall have it, howſoever this may be ſo drawn, as it may be a good condition to give him his Heirs, &c. that doth make the eſtate an entry, yet it cannot be good to give the eſtate or the entry to the ſtranger. So if a Feoffment be made on condition that upon ſuch a contingent the Feoffor and a ſtranger, ſhall enter; this is not good to give an entry to the ſtranger, but it is good to give the Feoffor a reentry. And yet by will a man may deviſe a Terme after this manner. *Co. ſuper Litt.* 214. *Dect. & Stud.* 94. 159. 100. *Co. ſuper Litt.* 379. *Co.* 1. 84. *Dier.* 33. 21 *H.* 7 11. *Dier* 4. *Co.* 8. 95.

Stranger advantage by will

Note Rent or rent to a Stranger

If a man Enfeoffe another, upon condition that he and his Heirs ſhall render to a ſtranger and his Heirs a yearely Rent of Twenty ſhillings, &c. and if he faile of payment thereof, that the Feoffer ſhall reenter, albeit this as a reſervation of Rent is meerly void, and the condition that doth call it a Rent, is meerly miſtaken, yet the condition is good, and *ut res valeat*, the words ſhall be taken contrary to their proper ſenſe. *Co. ſuper Litt.* 213.

If

If I infeoffe *I S* of land on condition that if *I D* give to him ten pound, or goe to Rome before ſuch a day &c. that then the feoffee ſhall pay to me ten pound &c. this is a good condition. *Perk. Sect* 798.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pound, hee ſhall have the fee of land; this is not a good condition.

But if he ſay further, And if he fail to pay that, the feoffor ſhall reenter, this is good. *Co ſuper Litt.*207.

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs ſhall reenter; this is avoid condition, for when the iſſues fail, the eſtate is at an end. *Co. ſuper Litt. Sect.* 224.

A man makes a leaſe for years rendring Rent on Condition with a Covenant that the leſſee ſhall repair the houſe with other Covenants. And after he deviſeth the ſame land to the leſſee for more years rendring the like Rent and under the like Covenants as in the firſt leaſe the Remainder in fee to another; in this caſe there is no Condition made by the deviſe to give Entre to him in Remainder. *Goldsb.*74. *Pl.*1.

Conditions that are ſo penned, as they are inſenſible and altogether incertain are void. as if one make a leaſe on condition that if the rent be behinde to reſtrain, and if there bee not ſufficient, the ground to enter into the premiſſes; this condition is void for inſenſibility, and the eſtate is abſolute. *Et ſic de ſimilibus. Muddy & Gardners caſe. Adjudge paſche* 14. *Jac. B. R. Co.* 6. 41.

A condition to enlarge or encreaſe an eſtate may be good, as if a gift be made in tail, or a leaſe be made for life or years, on condition that if ſuch an act be done or not done, the leſſee ſhall have the land to him and his heirs, as if one make a leaſe for life to one, and if the leſſor die without heir of his body, then he doth grant the land to the leſſee and his heirs for ever. Or if land be granted to a man for 5 years, on condition that if the grantee pay to the grantor within the two firſt years ten pound, then that he ſhall have the fee-ſimple; otherwiſe that he ſhall have the land but for five years, and livery of ſeiſin be made according to the deed; this is a good condition, and by this upon the performance of the condition the fee-ſimple will paſſe. *Co.* 8. 75. *Plow.* 477. 481. *Litt. Sect.* 350. *Perk Sect.* 710. *Plow.* 135. 10. *Aſſ. pl* 15. *Perk. Sect.* 745. 707. *Plow* 25. *Litt. Sect.* 707. 350. *Plow.* 272. 482, 483. 45 *H.* 7. 4. *See more in the Lord Staffords Caſe, Co.* 8. 73.

So if one grant land for five years rendring rent, and that if the leſſee will hold it over to him and his heirs, that he ſhall pay twenty pound rent; this is a good condition, and if he pay the rent, he ſhall have the feeſimple. So if a man make a leaſe for years, and at the ſame time for the ſurety of the terme to the leſſee makes a feoffment to him upon condition that if he be diſturbed in his term, hee ſhall have the feeſimple of the land, and deliver both theſe deeds at one time, and give livery of ſeiſin accordingly; this is a good condition. So if a leaſe for life be made upon condition, that if the leſſor or his heirs pay to *B* or his heirs, ten pound at a certain day, that then the leſſor may reenter, and if he doe not pay it at that time, and the leſſee pay to the leſſor or his heirs ten pound at a certain day, after the former day, that then the leſſee ſhall have the land to him and his heirs for ever; this is a good condition. But in all caſes where theſe kind of conditions are good to make the increaſed eſtate good, there muſt be theſe things in the caſe.

1. There muſt be a precedent particular eſtate as an eſtate in tail for life, or years, for a foundation to erect the ſubſequent eſtate upon, and that firſt eſtate alſo muſt be certain and irrevocable, not upon contingency, or with power of revocation.

2. The privity muſt remain untill the time of the performance of the condition, for if the donee or leſſee doe grant away the firſt eſtate, the condition cannot afterwards be performed to effect and produce the encreaſing eſtate.

3. The ſubſequent eſtate muſt veſt *eo inſtanti*, when the contingency upon which the condition dependeth, ſhall happen or never.

4. The firſt and ſecond eſtate muſt take effect by one and the ſame deed, or elſe by two deeds delivered at the ſame time, for *quæ incontinenti fiunt ineſſe videntur.* 5. The condition upon which increaſe is, muſt be poſſible and lawfull, for upon an impoſſible condition it cannot, and upon an unlawfull condition it ſhall not increaſe: *ſee Brownl. 2 part* 224. 225. 249. 250.

If one make a Leaſe for life, provided that if the Leſſee die within ſixty years, that his executors ſhall have the Land for ſo many of the ſixty years as ſhall be to come at the time of his death; this is no good condition to make the eſtate to increaſe, but it may be a Covenant. And if a leaſe for years be made, on condition that if the Leſſor ſell the reverſion of the ſame land, the Leſſee ſhall have the Fee of it; this is no good condition to increaſe the eſtate. And a poſſibility cannot decreaſe upon a poſſibility, as a Leaſe for years to a Leaſe for life by one contingent, and the Leaſe for life to a Fee-ſimple by another. And if a Leaſe be made to a man and a woman for their lives, on condition that which of them two ſhall firſt mary that one ſhall have the Fee & they intermary; in this caſe neither of them ſhall have the Fee for incertainty. *Co.* 1. 155. *Dier* 150. *Co.* 1. 84. *Co.* 8. 75. *Co ſuper Litt.* 218.

Covenant.

To abridg an eſtate.

If a man make a Leaſe for life, and add this condition, that if the Leſſee within one year doe not pay twenty ſhillings, that he ſhall have but a Term of two years, and he doe not pay the 20 s. by this his Leaſe for life is gone, and he hath now but a Leaſe for two years. *Co. ſuper Litt:* 218. 50 *Ed.* 3. 27.

2. For the matter and ſubſtance of it.

If a Leaſe be made, on condition that if a ſtranger diſlike it, or be diſcontented with it, that the Leaſe ſhall be void; this is a good condition. 1 *H.* 8. 13.

If a Leaſe be made, on condition that if the Leſſee be outlawed, the Leaſe ſhall be void; it ſeems this is a good condition. *Hil. 6 Jac. B. R. Curia.*

Prerogative.

If a Feoffment be made, on condition that if the Feoffee commit treaſon; that the Feoffor ſhall reenter; in this caſe the condition is vain; for if the Feoffor enter, his entry is not lawfull, for the King is intitled, and his title ſhall be preferred. *Trin* 3 *E.* 6, *per Curiam.*

Teſtament. Uſe.

No condition or limitation, be it by act executed, limitation of a uſe, or by deviſe, or laſt Will, that doth contain in it matter repugnant, and tending to the utter ſubverſion of the eſtate, or matter that is againſt Law, or matter that is impoſſible to be done is good. And therefore in all ſuch caſes if the condition be ſubſequent, the eſtate is abſolute, and the condition void: And if the condition be to goe before the eſtate, the eſtate and the condition both are void. *Co.* 1. 83, 6. 43. *Co.* 9. 128.

Repugnant conditions. To reſtrain Alienation.

If a Feoffment or other conveyance be made of Land, or a grant of Rent, &c. in Fee-ſimple by deed or will, upon condition that the Feoffee or Grantee ſhall not alien to certain perſons, as to *I. S.* or to *I. S.* and *W. S.* this is a good condition, So if one make a Feoffment in Fee of Land, on condition that the Feoffee ſhall not alien it in Mortmain; this is a good condition. So if *A* be ſeiſed in Fee of black acre, and *B* doth infeoffe *A* of white acre in Fee, on condition that he ſhall not alien black acre; this is a good condition. But if the condition be that the Feoffee or Grantee ſhall not alien the thing granted to any perſon whatſoever, or that if he doe alien to any perſon, that he ſhall pay a fine to the Feoffor; theſe conditions are void in the caſe of a common perſon as repugnant to the eſtate. But in caſe of the King, ſuch conditions are good. And in the caſes of a common perſon alſo the alienation is good until it be avoided by the Feoffor. And in *Paſc.* 19 *Jac. B. R.* it was held by Juſt. *Dodridge* and *Chamberlain*, that if a Feoffment be on condition that if the Feoffee alien, he ſhall pay 10 l. to the Feoffor; that this is a good condition: but Ch. Juſt. and Juſt. *Haughton* held the contrary, for then this ſhall be a circumvention of the Law. If a gift had been made to an Abbot, and his ſucceſſors, on condition not to alien, this had been a good condition. *Co. ſuper Litt.* 223. *Bragge and Tanners caſe. Doct. & St.* 124.

Infant

If one make a Feoffment of Land to an infant, on condition he ſhall not alien to any perſon; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a Feoffment to a husband and wife, on condition they ſhall not alien; this condition to ſome intent is good, *i.* to reſtrain alienation by Feoffment or deed, and to ſome intent repugnant and void, *i.* to reſtrain alienation by fine, for that is lawfull.

So

So if a gift be made in taile, on condition that the Tenant in tail may alien for the profit of his iſſues; this is a good condition. And ſo if Land be given in tail, upon condition that the Tenant in Tail or his Heirs ſhall not alien in Fee-ſimple, Fee-tail, nor for the Term of any others life, but for their own lives; this condition is good *Co. ſuper Litt.* 224. 10 *H.* 7. 11. 13 *H.* 7. 23. *Co.* 10. 30. *Perk ſect.* 739. 21 *H.* 6. 33.

But if Lands be given in tail on condition, that the Tenant in tail, or his Heirs in tail ſhall not ſuffer a common Recovery, levy a fine with Proclamations according to the Statutes of 4 *H.* 7. and 32 *H.* 8. to bar the iſſues, or on condition that he ſhall not make Copyhold eſtates of Copyhold Land, according to the cuſtome of the place, or make Leaſes according to the Statute of 32 *H.* 8. *ca.* 28. theſe conditions are held to be repugnant, and for that cauſe void. And yet ſee, for the laſt of theſe caſes the opinion in *Co. ſuper Litt.* 223. to be contrary, and that a condition to reſtrain the making of ſuch leaſes is good; for this power is not incident to the eſtate, but given to him collaterally by the Statute, and *Quilibet poteſt renunciare juri pro ſe introducto.* But *tota curia* in *Mary Portingtons* caſe is againſt him. If a man make a gift in tail to *A* the remainder to him and his Heirs, on condition that he ſhall not alien; this condition as to the eſtate tail is good, and void as to the other. And therefore if an alienation be, he ſhall defeat it only as to the eſtate tail. And if a man make a gift in Tail on condition that the Donee or his Heirs ſhall not alien; this is a good condition to ſome intents, and void to other; and therefore if he make a Feoffment in Fee, or any other eſtate by which the reverſion is diſcontinued tortiouſly, the Donor ſhall enter; otherwiſe if he ſuffer a common recovery. And a gift in tail, on condition that the Tenant in tail ſhall not make a Leaſe for his own life, is not a good condition, by *Co.* 6. 43. againſt *Co. ſuper Litt.* 223. If one ſeiſed in Fee of Land, and make a Leaſe of it for years or life, on condition that the Leſſee ſhall not alien the Land leaſed, or any part thereof during the Term, or on condition that he ſhall not alien it, or any part of it, during the Term without licence of the Leſſor; theſe are good conditions. So if one be ſeiſed in Fee of a Manor, and he make a Leaſe of years of it to *I. S.* on condition that he ſhall not make voluntary eſtates by copy; this is a good condition. But in a Feoffment in Fee ſuch a condition is repugnant and void. And if one be poſſeſſed of a Leaſe for years, or of a houſe, or of any other chattel reall or perſonall, and he give or ſell all his intereſt therein, upon condition that the Donee or Vendee ſhall not alien the ſame; this condition is void for repugnancy, and the gift or ſale is abſolute. *Dier.* 48. *Co.* 6. 43. *Co. ſuper Litt. Idem Dier.* 227. *Co.* 6. 43. *Co.* 6. 43. 4. 84. *ſuper Litt.* 223.

If one make a Feoffment of Land in Fee, on condition that the Feoffor ſhall retain the Land for twenty years without interruption; it ſeems this is a good condition and not repugnant. *Co.* 2. 72. *Dier* 318.

If I grant Land to another for life, if it ſhall pleaſe me ſo long to ſuffer him; it ſeems this condition is repugnant and void. *Dier.* 94.

If a Feoffment be made of Land in Fee, on condition that the Feoffee ſhall not enjoy the Land, or ſhall not take the profits of the Land, or on condition that the Heir of the Feoffee ſhall not inherit the Land, or condition that the Feoffee ſhall not doe waſt, or condition that his wife ſhall not be endowed; in all theſe and the like caſes the condition is void as repugnant to the eſtate. *Co.* 10. 39. *ſuper Litt.* 206. *Plow.* 77. 133. 21 *H.* 7. 8. 8 *H.* 7. 10. *Perk Sect.* 731.

If a gift in tail be made, on condition that the Donee or his iſſues ſhall not take the profits of the Land, or on condition that if the Donee die, his eſtate ſhall go unto another, or on condition that their Wives ſhall not be endowed, or on condition that they ſhall not do waſt, or on condition that warranty and aſſets or a collaterall warranty ſhall not bar the iſſues in tail; all theſe conditions are repugnant and void. *Co.* 6. 41. 184. *ſuper Litt.* 224.

If Lands be given or granted to two and their Heirs, on condition that the ſurvivor ſhall have the whole notwithſtanding partition, or on condition that the ſurvivor ſhall not have the whole albeit there be no ſeverance; theſe conditions are repugnant and void. *Co.* 1. 84.

If one make a Leaſe for life, on condition that the Leſſee ſhall not doe fealty; this condition is not good. *Perk. fol.* 141:

If Lands be given to one and the Heirs males of his body, provided that if he die without Heirs, Females of his body, that the Donor ſhall reenter; this condition is repugnant and void, *Co. Super Litt.* 264.

If one have Land in poſſeſſion, or reverſion, and he grant a Rent out of it; on condition that the grant ſhall not charge the perſon of the Grantor; this is a good condition, and not repugnant. But if a man grant a bare Annuity, or grant a Rent charge, out of another mans Land with ſuch a condition, or if one grant a Rent charge, on condition that the Grantee ſhall not diſtrain nor charge the perſon of the Grantor, or if one grant a Rent out of Land, on condition that the Land ſhall not be charged with it; all theſe conditions are repugnant and void. So if two grant a Rent charge out of Land, provided that it ſhall not extend to one of them; this condition is repugnant and void. *Co. ſuper Litt.* 146. 10 *H.* 7. 8. *Co.* 6. 41. 5. *H.* 7. 7. 7 *H.* 6. 44. *Perk. ſect.* 732.

If a man ſeiſed in Fee of Land make a Leaſe for years rendring Rent, and after the Leſſee makes a Leaſe to the Leſſor of other Land, on condition that he ſhall not diſtrain for his Rent in the former Leaſe made to this Leſſee; this is a good condition, and not repugnant. *Perk. ſect.* 733.

If one make a Feoffment in Fee, or Leaſe for life, with warranty, on condition that the Feoffee or Leſſee ſhall not vouch to warrant, nor recover in value, or if the leaſe be made without impeachment of waſt, on condition that if the Leſſee doe waſt the Leſſor ſhall reenter; theſe are good conditions and not repugnant. *Perk. ſect.* 734. *Dier* 47.

Conditions againſt Law.

All Conditions annexed to eſtates being compulſory, to compell a man to doe any thing that is in its nature good, or indifferent, or being reſtrictive, to reſtrain or forbid the doing of aay thing which in its nature is *malum in ſe*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any Statute, or the like; all ſuch conditions are good, and may ſtand with the eſtates. But if the matter of the condition tend to provoke or further the doing of ſome unlawfull act, or to reſtrain or forbid a man the doing of his duty; the condition for the moſt part is void.

And therefore if Lands be given or granted to a man, upon condition, that he ſhall kill a man, or upon condition that he ſhall burn his neighbours houſe, or upon condition that he ſhall forſwear himſelf, or upon condition that he ſhall ſave and keep harmleſs the Grantor whatſoever he ſhall doe, or that if he doe not theſe things, the grant ſhall be void; this condition is void. Or if Lands be given or granted to an Officer, upon condition that he ſhall not duly execute his Office; this condition is againſt Law, and void: *Et ſic de ſimilibus.* So if a gift be made in tail, upon condition that the Donee ſhall diſcontinue, or one give or grant Land on condition that the Grantee ſhall be a foreſtaller againſt the Statutes; theſe and ſuch like conditions are void. And hereupon it is, that conditions annexed to Land, that the profits thereof ſhall be employed to ſuperſtitious uſes are void. And hence alſo it is that ſuch conditions as are againſt the Liberty of Law, as that a man ſhall not marry or the like, are void. And hence alſo ſuch as are againſt the publique good. And therefore it ſeems if one grant his Land to *I. S.* on condition that he (being a husbandman) ſhall not ſow his errable Land this condition is void. And in all theſe caſes if the condition be ſubſequent to the eſtate, the condition only is void, and the eſtate good and abſolute; if the condition be precedent, the condition and eſtate both are void, for an eſtate can neither commence nor encreaſe upon an unlawfull condition: *ſee Brownl.* 2 *part* 138. 139. *Co. Super Litt.* 223. 224. 207. *Perk. Lect.* 722. 723. *Perk. ſect.* 727. *Co* 1. 24. 6. 43. *Dier.* 343. *Co. ſuper Litt.* 206. *Co.* 11. 53. 7 *E.* 3. 65. *Perk ſect.* 722. 725.

Conditions impoſſible.

All conditions annexed to eſtates that contain in them matter at the time of making of them impoſſible to be done are void. *Co.* 6. 41. *ſuper Litt.* 207. 219. 206. *Dier.* 252. 262. *Plow.* 152. *Perk. ſect.* 935. 729. *Plow.* 272. 276. *Co.* 1. 84. *ſuper Litt.* 207.

And

And therefore if one give or grant land on condition, that a man ſhall go to Rome in three days, or condition that a man ſhal infeoffe a corporation, when there is none ſuch, or if one give lands in taile, on condition that the eſtate ſhall ceaſe, as if the tenant in tail bee dead, or if one grant lands, on condition that a man ſhall infeoffe his wife; all theſe and ſuch like conditions are void. And in theſe caſes alſo, if the condition be ſubſequent, the condition is void onely, and the eſtate is abſolute, and if the condition bee precedent, the condition and the eſtate both are void, for an eſtate can neither commence nor increaſe upon an impoſſible condition. And if the thing to be done by the condition be poſſible at the time of the making of the condition, and doe afterwards by the act of God become impoſſible; the condition is become void, and the eſtate abſolute; as if a feoffment be made, on condition that the feoffee ſhall before Eaſter following enfeoffe the feoffor, and the feoffee die before the day, or on condition that the feoffee ſhall appear in ſuch a Court before or at Eaſter, and he die before the time; in theſe caſes the condition is gone, and the eſtate is abſolute.

And the ſame Law is for the moſt part of Limitations, if they bee repugnant, impoſſible, or againſt Law, as is before ſhewed to be of Conditions. See more in the next diviſion following. *Co.* 6. 41: 1: 84.

It is a generall rule, That ſuch conditions annexed to eſtates as goe in defeaſance, and tend to the deſtruction of the eſtate being odious to the Law, are taken ſtrictly, and ſhall not bee extended beyond their words, unleſſe it be in ſome ſpeciall caſes. And therefore if a leaſe be made, on condition that if ſuch a thing bee not done, the leſſor [without any words of heirs, executors &c.] ſhall reenter and avoid it; in this caſe regularly the heir, executor &c. ſhall not take advantage of this condition. So if one make a leaſe for years of a houſe, on condition that if the leſſor ſhall be minded to dwell in the houſe, and ſhall give notice to the leſſee, that hee ſhall depart; in this caſe if the leſſor die, his heire, executor, &c. ſhall not have the like advantage and power as the leſſor himſelf, for the condition ſhall not be extended to them. And hence it is, that if a leaſe for years be made, on condition that the leſſee ſhall not alien without the licence of the leſſor; in this caſe the reſtraint ſhall continue only during the lives of the leſſor and the leſſee, and no longer. And yet this rule hath an exception, for if a man mortgage his land to *W.* upon condition that if the mortgagor and *I. S.* pay 20*s.* ſuch a day to the mortgagee, that then he ſhal reenter, and the mortgagor die before the day; in this caſe *I. S.* may pay the money and perform the condition. But otherwiſe it is whiles the mortgagor doth live, for in that time *I. S.* alone without him may not tender it, and if he do, this tender is no performance of the condition. And in caſe where a condition doth tend to create an eſtate, there it ſhall have the moſt favourable expoſition that may be, and therefore in that caſe albeit the words be not ſatisfied, yet if the intent be ſatisfied, it ſufficeth: And therefore if one make a feoffment in fee, on condition that the feoffee ſhall make an eſtate back again in tail to the feoffor and his wife before ſuch a day, and before that day the feoffor die; in this caſe the condition ſhall be performed as neer to the intent as may be; & therefore if the condition be, that he ſhall make the eſtate to them two *Habendum* to them and the heirs of their two bodies engendred, the remainder to the right heirs of the feoffor, the eſtate ſhall be made to the wife for life without impeachment of waſt, the remainder to the heirs of the body of the husband begotten on the wife. And if *A.* enfeoffe *B.* on condition that *B.* ſhall make an eſtate in frankmariage to *C.* with ſuch a one the daughter of the feoffor; in this caſe albeit an eſtate in frankmariage may not be made, yet an eſtate ſhall be made to them for their lives. *Et ſic de ſimilibus. Conditio beneficialis quæ ſtatim conſtruit benigne ſecundum verborum intentionem eſt interpretanda, odioſa autem quæ ſtatum deſtruit ſtrictè ſecundum verborum proprietatem eſt accipienda. Brownl.* 1: *part.* 135. *Co.* 8. 90 *ſuper Litt.* 219. 27. *H.* 8. 14. *Dier*, 66. *Co. ſuper Litt.* 219 *Litt. Sect.* 352 *Co. ſuper Litt.* 219. *Co.* 8. 60.

In all caſes where a time is ſet for the doing or performance of the matter contained in the condition, be it to pay mony, make an eſtate, or the like, it muſt be done at the time agreed upon; and ſet down in the condition. And

Limitation.

8. How a condition in deed or a limitation ſhall be taken and expounded. And how it muſt & ought to be performed.

1. In reſpect of perſons.

Not to alien.

To pay mony.

To make an eſtate.

2. In reſpect of time.

And in caſes where it is to be done before a time certain, it muſt be done before that time, or elſe the condition is broken. *Co. ſuper Litt.* 209. 208. 219. *Co.* 2. 79. 6. 31. *Litt.* 353: *Plow.* 30. *Perk. Sect.* 155. 779. 794. 787. 793, 789. 788. 38. *Ed.* 3. 11. *Dier* 311.

But in all caſes where no time is ſet for the doing of the thing contained in the condition, be it to pay money, make an eſtate, or the like, if the act to be done, bee to be done to the party that doth make the eſtate, or be to be done to him and a ſtranger, and be ſuch a thing as is for the benefit of him that doth make the eſtate, and for his benefit only, there regularly the party that is to doe the thing ſhall have time to doe it during his life, unleſſe the party, feoffor, &c, that doth make the firſt eſtate, whereunto the condition is annexed, doth haſten the doing thereof by requeſt: for if he requeſt the doing thereof and ſet no time, it muſt be done within a convenient time after that requeſt; and if he requeſt and prefix a time convenient when he doth deſire to have it done, it muſt be done at that time; and in theſe caſes the condition cannot be broken without a requeſt, ſo long as he to whom the eſtate upon condition is made be living. And therefore in this caſe it is not like to a condition made by a Wil, for if one deviſe his land to *I S*, ſo as he pay the twenty pound to *I D*, the Teſtator doth owe him, and no time is ſet for the payment thereof; in this caſe he muſt pay it as ſoon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a ſtranger, and be for the profit and benefit of a ſtranger only: as if a feoffment be made, on condition that the feoffee ſhall mary the daughter of the feoffor, or on condition that the feoffee ſhall infeoffe a ſtranger, and no time is ſet for the doing hereof, in theſe caſes the feoffee ſhall not have time during his life to doe it, but he muſt do it in a reaſonable time, and that without any requeſt at all, or elſe he doth break the condition. And in ſome ſpeciall caſes when the act to be done is to be done to the party himſelf, the party ſhall not have time to doe it during his life, as if one grant land to *I S*, on condition that he ſhall grant an Advowſon to the grantor for his life, or on condition that he ſhall grant a rent charge to the grantor during his life, to be paid at Michaelmas and our Lady day; in theſe caſes the grant of the Advowſon muſt be before the Advowſon fall, and the grant of the rent muſt be before either of the daies of payment come, and that without requeſt, elſe the condition is broken. And if the condition be that if *I S*, do ſuch an act, that then the feoffee ſhall pay ten pound to the feoffor, elſe that the feoffor ſhall reenter, and no time is ſet when the feoffee muſt pay this ten pound; in this caſe it ſeems the payment muſt be as ſoon as the ſame act is done, and that without any requeſt at all. And in caſe where the feoffee &c. or a ſtranger be to doe an act, and he alone is to doe it, and it doth nothing concern the feoffor &c. as to goe to Rome, or the like, there the feoffee &c. or ſtranger ſhall have time during his life to doe the thing, and it cannot be haſtned by requeſt. *Perk. Sect.* 9. 798. *Co. ſuper Litt.* 209.

If lands be granted, on condition that the grantee ſhall make a leaſe for life of other lands to the grantor, the remainder to a ſtranger; in this caſe the feoffee ſhall have all the time of his life to doe it, if hee be not haſtned by requeſt. But if the condition be to make a gift in taile to a ſtranger, the remainder to the feoffor; in this caſe it muſt be done in time convenient without requeſt. *Co. ſuper. Lit.* 220. 222.

If the King licence his tenant to infeoffe *A.* and *B*, ſo as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this caſe it muſt bee reconveyed before the death of the feoffor, or elſe the condition is broken.

If *A.* infeoffe *B.* of black acre, on condition that if *C.* infeoffe *B.* of white acre *A.* ſhall reenter; in this caſe *C.* ſhall have time to do this during his life, if *B.* doe not haſten it by requeſt. *Co. ſuper Lit.* 208.

If a leſſee grant his eſtate to a ſtranger, on condition that the grantee doe get the good will of the leſſor, and no time is ſet when he ſhall get his good will; it ſeems in this caſe he ſhall have time to get his good will during the terme, and that although he deny it at the firſt, yet if he grant it afterwards, that this is ſufficient. *Perk. Sect.* 795.

When

When a time is ſet in certain for the payment of mony, or the doing of any other thing generally; neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certaine, but no houre of the day is ſet down wherein the ſame ſhall be done; in this caſe they muſt attend ſuch a diſtance of time before the Sun ſet, as may be convenient to doe that work in. And if the condition be to pay money at a place certain, at any time during life; in this caſe the money may not be tendred at any time in the place, in the abſence of him that ſhould receive it, but he that is to pay it muſt give notice to the other party before-hand what time he will tender it, that the other may be ready to receive it. Or if at any time the parties hap to meet at the place, a payment or tender then at that place is ſufficient. And the ſame law is for the moſt part in conditions of obligations. *Lit. Sect.* 342. *Co. ſuper Litt.* 213.

To pay money

give notice & bring & tender it

Obligation.

3. In reſpect of place.

In caſes where a place is ſet down for the doing of the thing contained in the condition, there it muſt always be done at that place, unleſſe by ſome agreement made between the parties, afterwards another place be appointed, otherwiſe the condition is not performed, and the parties are not bound to attend in any other place. But in caſes where there is no place ſet down for the doing of the thing contained in the condition, if the thing to be done be a corporall ſervice, as to pay money, or any ſuch like thing, the party that is to do it muſt at his perill ſeek out the perſon to whom it is to be done, if he be *intra regnum Angliæ:* but if he be not within the kingdome, he is not bound to ſeek him, and yet the condition is not broken. And if the thing to be done be either locall, *i* ſuch a thing as muſt be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this caſe the thing muſt be done at that very place, and a tender of doing it in that place is a ſufficient performance of the condition; as for example, if a feoffment be made on condition that the feoffee ſhall pay to the feoffor twenty pound on Eaſter day at Dale; and the feoffee tender the twenty pound the ſame day at Sale: And albeit the feoffor be at Sale, and he tender the twenty pound to his perſon there the ſame day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is ſet for the payment thereof, in this caſe the mortgagor muſt ſeek the mortgagee and tender it to his perſon at his perill: and tender of the money upon the land mortgaged, is not a ſufficient performance of the condition. And if a feoffment be made, on condition that the feoffee ſhall infeoffe the feoffor of white acre in Dale; in this caſe the feoffment, or the tender of it muſt be in Dale, and cannot be elſewhere, and a tender of it there is ſufficient to perform the condition. So if the condition be, that the feoffee ſhall in Eaſter Terme next acknowledge ſatisfaction upon a Judgement in the Kings Bench; this muſt be done there, and cannot be done elſewhere. So if a feoffment in fee bee made of white acre, rendring rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and no place is ſet for the payment of it; in this caſe the feoffee is not bound to tender his rent any where for the ſaving of the condition, but upon the land, and a tender there is ſufficient. And if a man make a feoffment in fee, without any reſervation of rent precedent in the deed, on condition that the feoffee and his heirs ſhall render a yearly rent of twenty ſhillings a year to the feoffor and his heirs, and if they fail, that the feoffor ſhall reenter; in this caſe alſo it ſeems the payment or tender muſt be upon the land. But if the condition be, that he ſhall render twenty ſhillings a year to a ſtranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this caſe the feoffee muſt tender it to the perſon of the ſtranger where he can find him at the day, or elſe hee doth break the condition, and tender upon the ground is not ſufficient. But in theſe caſes if the nature of the thing to be done be ſuch as will not admit of ſuch a cariage from place to place to ſeek out the perſon of the feoffor &c. there albeit the thing to be done be corporall or tranſient, and not a locall thing, yet he that is to doe it ſhall not be bound to ſeek out the perſon of the other; as for example. If an eſtate be made, on condition that the grantee ſhall deliver twenty quarters of wheat, or twenty load of wood to the grantor at ſuch a time, and no place is ſet for the doing thereof; in this caſe the grantee is not

To pay money

To infeoffe.

tender upon y land — mortgaged

To acknowledge ſatisfaction.

tender rent

8 10. to a ſtranger

To deliver wood or corn:

not bound to cary the ſame about to ſeek the Feoffor or Grantor, as he is bound to cary money; but before the day, the Grantee is to know of the Grantor where he will appoint to receive it, and there it muſt be tendred. And the like Law, is for the moſt part in conditions of obligations. *Co. ſuper Litt.* 210. 211. 213. *Litt.* ſect. 343. 345. *Bro. Condition* 60.

Obligation. A Caveat.

It is beſt therefore in all theſe caſes, and herein he that is to be the agent is to take care to have certainty of time and place ſet down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him.

4 In reſpect of other matters To pay mony.

If a Leaſe be made, on condition that the Leſſee ſhall pay to the Leſſor all ſuchſums of money as the Leſſor ſhall lay out in ſuch a buſineſs; in this caſe the Leſſor muſt firſt tender to the Leſſee a note of the charges before the Leſſee is bound to pay, and untill this be done the condition cannot be broken. And after a note is given alſo, he ſhall have ſome reaſonable time to provide the money. And if he tender him a note of more then in truth he doth lay out, the Leſſee if he know it, may pay ſo much as is laid out, and he may refuſe to pay any more. *Per Juſt. Bridgeman.*

To make an eſtate.

If Lands be granted, upon condition that *A* ſhall make an eſtate of Lands at the charges of *B*; in this caſe *A* muſt doe the firſt act. *viz.* notifie to *B* what aſſurance he will make before *B* is bound to tender the charges. *Co.* 5. 22.

To deliver houſhold ſtuffe, or pay money.

If a Feoffment be made, on condition that the Feoffee ſhall give ſo much houſhold ſtuffe to the Feoffor, or ſo much mony for it as it ſhall be rated at by two indifferent perſons to this end to be choſen; it ſeems in this caſe the election of the two men muſt be by the Feoffee: but if the words be by two perſons to be indifferently choſen, then the election ſhall be by both parties, for in the firſt caſe the word Indifferent doth goe to the praiſing, not to the perſons, *Paſche* 17. *Jac. B. R.*

To cleanſe ditches. To dwell in the houſe.

If a Feoffment be made of a ground, on condition that the Feoffee ſhall rake the ditches, in this caſe if the Feoffee doe it once, it is a ſufficient performance of the condition. And yet if a man grant a houſe for life, on condition that the Leſſee ſhall dwell and be reſident in the houſe during the ſaid Terme; in this caſe it is not ſufficient that he dwell in it once during the Terme, but muſt doe ſo all the Terme, or elſe the condition is broken. 27 *H.* 8, 1. *Plow. Colthirſts caſe.* 21.

Annuity

If an Annuity be granted of Ten marks *per Annum* to a man, on condition, or till he be promoted to a benefice by the Grantor, and it is not ſaid of what value the benefice ſhall be, in this caſe it ſhall be taken for a benefice of as great value, and of as good an eſtate as the Annuity is, otherwiſe the Grantee may refuſe it, and yet his Annuity ſhall continue. *Perk. ſect.* 804.

~~To give goods~~ togiod goods

If a Feoffment be made on condition that the Feoffee ſhall give all his goods *ſi quæ fuerint*, or give all his Pikes in his pond *ſi quæ fuerint*; in this caſe the words ſhall be taken in the preſent tenſe, for the goods and Pikes that are at the time of the grant. But if a Feoffment be on condition that the Feoffee ſhall give all his goods in London *ſi quæ fuerint*, that did belong to *I. S.* in this caſe the words ſhall be taken in the preterperfect tenſe. *Perk. Sect.* 742.

Not to diſturb the Leſſor in taking the wood.

If one make a Leaſe of the Manor of Dale (wherein is a wood called Dale wood) excepting all the woods and underwoods growing in Dale wood and all the great trees growing elſewhere, and this is upon condition that if the Leſſee ſhall diſturbe the Leſſor to cut and ſell the wood and underwood excepted the Leaſe to be void; in this caſe it ſeems the condition ſhall extend only to the wood and underwood in Dale wood, and not to the trees elſewhere, but if the words of the condition be [ſhall diſturbe, &c. to cut &c. the wood and underwood on the premiſſes] *contra Haward & Fulchers caſe. Hil.* 3. *Car. B. R.*

To pay Rent.

If one grant Land rendring Rent at the Feaſts of *S.* Michael and our Lady or within a Moneth after, on condition that if it be behind after the Feaſts and daies limited by the ſpace of eight weeks that the Leaſe ſhall be void; in this caſe the eight weeks ſhall be accounted from the Moneth which is the twenty eight day after the Feaſt. *Dier* 142.

Copulative

If the condition be made in the Copulative and conſiſt of divers parts, every part muſt be obſerved, or the condition will not be performed. But when it is made

made in the disjunctive, if any part of it be obſerved it is a ſufficient performance of the condition. And therefore if a feoffement be made, on condition to reinfeoffe and pay twenty pound, and the feoffee do reinfeoffe but not pay the twenty pound; in this caſe the condition is broken. But if the condition be to reinfeoffe or pay twenty pound and the feoffee doe one of them; it is a good performance of the condition. And when it is made in the copulative and disjunctive both it ſhall be taken in the disjunctive only, as if a leaſe be made to *A.* and *B.* his wife, on condition that the ſaid *A.* and *B.* or any child between them ſhall ſo long live; this ſhall be taken in this ſenſe, if the husband wife or child ſhall ſo long live, ſo that the leaſe ſhall not be determined by the death of the husband or wife alone. If there be two proviſoes in two ſeverall indentures of conveyance of ſeverall Manors to *A.* and *B.* that if the feoffor pay or tender twenty ſhillings to *A.* and *B.* or the heirs of *A.* that the Conveyance ſhall be void, and *A.* die; in this caſe tender to *B.* is not ſufficient, and it muſt be made to the heir of *A.* and it muſt be twenty ſhillings for every proviſo: but otherwiſe it is of a collaterall act. 12.*H.*7.10.

If the words of a condition be thus, that upon ſuch a contingent the party ſhall enter and retaine the land untill the thing be done &c. in this caſe and by theſe words the eſtate is not determined, as it is by theſe words, [that the eſtate ſhall be void, or that the grantor ſhall reenter, or the like.] And in theſe words there is a difference alſo to be obſerved: for if the words be, that upon ſuch a contingent the eſtate ſhall ceaſe and be void, and it be a leaſe for years to which the condition is annexed, the eſtate is *ipſo facto* void without entry or claime, and can never be affirmed afterwards; but if the words of the cloſe of the condition be, that the feoffor, leſſor, &c. ſhall reenter, without any other words, albeit it be in a leaſe for years, yet the leaſe is not void untill he hath made an actuall reentry. But in both caſes if the eſtate to be avoided be an eſtate in fee, or for life, it is only voidable by the breach of the condition, and muſt be made void by entry or claime, and untill this be done the grantor can make no new eſtate of the land. But in the firſt caſe before the party ſhall retaine the land and take the profits of it in the nature of a pledge untill the thing be done agreed upon in the condition, and then the other party ſhall have the land againe. See more in the next queſtions. And in *Obligation Numb.*7. *Covenant Numb,*6. *Co.*3.64.*ſuper Lit.* 203,204 *Dier.*6.127:11.*H.*7.21.

9. When and how a Condition or limitation ſhall be ſaid to be performed; Or not

The words of a condition may be performed and not the intent, and the intent may be performed and not the words; and then for the moſt part a condition is performed when the intent and meaning of it is obſerved. And therefore if a feoffment be made, on condition that the feoffee or his heirs ſhall make an eſtate to the feoffor and his wife in taile before ſuch a day, and before the day the husband die, and then he make an eſtate as neere it as he may, *viz.* to the wife for life without impeachment of waſt and after to the heirs of the body of the husband; this is a good performance of the condition. And if the condition be that the grantee ſhall make a feoffment of land; and he make a leaſe of the land firſt, and then a releaſe to the leſſee and his heirs; this is *tantamount* and a good performance of the condition. *Co.*8.90. *Litt.Sect* 352. *Co.*3.64.282.2*H.*4.11.

1. When the act is to be don between the parties themſelves. To make an eſtate.

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pound by a day the feoffment to be void, and the feoffor before the day doth commit treaſon and is executed and ſo dieth without heire, and after before the day the heire is reſtored, and he at the day doth pay the money; in this caſe this is a good performance notwithſtanding there was once a diſability. So as if heretofore one had made a feoffment, on condition to reinfeoffe by a day; and before the day the feoffee had entred into Religion, and then had been dearraigned, and at the day had made the feoffment; this had been a good performance of the condition. *Co. ſuper Litt.*222. *Perk. ſect.*802,803.

To pay money

If a Feoffment be made, upon condition that if the Feoffee ſhall pay to the Feoffor Ten pound ſuch a day, that then he ſhall have the land to him and his heires, otherwiſe that the Feoffor ſhall re-enter, or if it be made on condition that the

By, and to whom money ſhall bee paid upon a condition.

feoffee ſhall pay ten pound to the feoffor ſuch a day; and before the day the feoffee ſell the land; in this caſe the ſeller or the buyer either of them may tender the money at the day, and this will be a good performance of the condition, for he that hath intereſt in the land on the one ſide, or in the condition as party or privy on the other ſide may tender and performe the condition to ſave the eſtate. *Co.* 5.96 *& ſuper Litt.* 208. 207:

money upon a condition may be tendred by purchaſer

Mortgage.

If lands be mortgaged, (or which is al one) if a feoffement be made of lands on condition that if the mortgagor or feoffor pay ten pound to the feoffee ſuch a day that then the eſtate ſhall be void, and before the day the mortgagor or feoffor die; in this caſe the heire or executor of the feoffor, the Ordinary, the Gardian in Chivalry or Socage of the heire of the feoffor, or any other by either of their commandement precedent, or aſſent ſubſequent may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition. And ſo alſo it ſeemes is the law upon a deviſe of land to *I. S.* paying to *I. D.* twenty pound; if *I. S.* die his heire or executor may pay twenty pound, and this is a good performance of the condition. But in theſe caſes if a ſtranger of his owne head without any ſuch commandement or agreement pay the ten pound; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an Ideot; the payment or tender by any one in his behalfe ſhall be a good performance of the condition.

Teſtament.

no time limited heir must pay y^e money &c

And if a feoffment be made, on condition that if the feoffor pay ten pound to the feoffee that the eſtate ſhall be void, and no time is ſet for the payment of this money, and the feoffor die before any payment or tender made; in this caſe his heire cannot tender it and ſo perform the condition. *Lit. Sect.* 534. 537. 15. *H.* 7. 2. *Co. ſuper Litt.* 206. *Litt. Bro. Sect.* 125. *Litt. Sect.* 337.

feoffee &c to pay or feoffor &c pays good.

If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pound ſuch a day, the feoffment to be void, and the feoffor die before the day and *I. S.* alone pay it; this is a good performance of the condition. *Co. ſuper Litt.* 207. *Bro. Condition* 109.

If a feoffment be made, on condition that if the feoffor pay to the feoffee or his heirs ten pound ſuch a day, and before the day the feoffee doth grant the land away to another; in this caſe the money may be paid to the feoffee himſelf, or if he be dead to his heirs, and this payment is a good performance of the condition. And if the words of the condition be [That if he pay to the feoffee, his heirs or aſſignes &c.] in this caſe payment to either of them is a good performance of the condition; ſo as if in this caſe the feoffee make a feoffment over, it is in the election of the firſt feoffor to pay the money to the firſt or ſecond feoffee, and if the firſt feoffee die, to pay it to his heire or ſecond feoffee: But payment to an executor or adminiſtrator in this caſe is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without words, heires, executors &c.] ten pound ſuch a day, in this caſe the payment may be made to the executor or adminiſtrator of the feoffee after his death, and ſuch a payment is a ſufficient performance of the condition: And if the words of the condition be [that if the feoffor pay to the feoffee, his heirs, executors or adminiſtrators &c.] in this caſe payment to either of them is a good performance of the condition. But payment to an aſſignee in this caſe is not good. And if the words be, that if he pay to the feoffee and his heirs &c. in this caſe payment to his executors or to his aſſignes is not a good performance of the condition. So that in all theſe caſes it ſeemes for the perſon to whom payment is to be made the words of the condition are preciſely to be purſued. *Co. ſuper Litt.* 210. 5. 96. *Dier.* 181. 101. *Co.* 6. 69. *Litt. Sect.* 339.

To tender money.

If a feoffment be made, on condition that if the feoffor ſhall tender twelve pence to the feoffee ſuch a day the feoffment to be void, and afterwards the feoffee is diſſeiſed of the land, and after the feoffor doth tender the twelve pence to the feoffee at the day; this is a good performance of the condition. *Paſ.* 9. *Jac.* 5. *Sir Richard Lees caſe.*

If

If a feoffment be made to two men, on condition that they ſhall reinfeoffe the feoffor, or make a leaſe to him by a day, and before the day one of them die, and the ſurvivor doth reinfeoffe, or make the leaſe; this is a good performance of the condition. And ſo alſo it ſeemes the law is if both the feoffees be living, for by his owne acceptance it ſeemes he hath diſpenſed with the condition and ſo cannot enter for the breach of it. *Dier.* 69. 41. *E.* 3. 25. To reinfeoffe.

If a feoffment be made on condition that the feoffee ſhall infeoffe the feoffor of the Manor of Dale by ſuch a time, and before the time appointed the feoffee doth grant a rent charge out of the Manor to a ſtranger, and then at the time appointed makes a feoffment of the Manor according to the condition; in this caſe this is a good performance of the condition. But if in this caſe the feoffee before the time appointed grant away to a ſtranger twenty acres parcell of the Manor, and then doth make a feoffment of the Manor according to the condition; this is no good performance of the condition. And if a feoffment be made on condition that the feoffees or leſſees in truſt of ſuch land ſhall grant an Annuity out of it, and ſome of them only doe grant this Annuity; this is no good performance of the condition. *Plow.* 23. 3 *H* 7. 4. 21 *H.* 6. 101

If there be a feoffment made, upon condition that the feoffee ſhall make a leaſe of land to the feoffor for life, the remainder to *I. S.* in fee, and the feoffee make a leaſe to the feoffor for life, and after by another deed doth grant the reverſion to *I. S.* this is a good performance of the condition. 44 *E.* 3. 22, To make a leaſe.

If a feoffment be made upon condition that the feoffee ſhall purchaſe lands or tenements to the value of twenty pound *per Annum*, and he purchaſe a rent common, or any ſuch like thing to that value; this is a good performance of the condition. But if in this caſe the feoffee and another purchaſe ſo much land together jointly this is no good performance of the condition. So if the feoffee alone purchaſe lands to the value of twenty pound *per Annum*, and there is a rent iſſuing of it which muſt be deducted; this is no good performance. And yet in theſe caſes, if the ſtranger Jointenant releaſe to the feoffee all his right in the land, or the grantee of the rent releaſe to him the rent before the time of the performing of the condition the condition is well performed in both caſes. *Tantum valet terra quantum vendi poteſt.* To purchaſe lands.

And if one make a feoffment in fee, on condition that if the feoffee purchaſe land to the value of twenty ſhillings, the feoffment ſhall be void, and after the feoffee diſſeiſe another man of land to that value: it is ſaid that by this the condition is performed, *Sed quere.* And that if he recover ſo much land in value in an action: that this is no performance of the condition. *Sed quere.* For this ſeemes to me a better performance of the condition then the former. *Perk. ſect.* 807, 808. 21 *H.* 6. 28. *Dier.* 15. *Perk. ſect.* 812.

If lands be granted, on condition to pay money, and the money is tendred according to the condition, but either no body is ready to receive it, or it is refuſed: this is a good performance of the condition. And after a man hath once refuſed the money ſo tendred to him according to the condition, he hath no remedy in law to recover it except it be money lent upon a mortgage. *Dier.* 181. *Lit. Sect.* 334, 335. 338. *Co. ſuper Lit.* 209. ~~*Termes of the law tit. Coine.*~~ To pay mony. Tender.

And if the payment be made part of it with counterfeit Coine, and the party accept it and put it up, this is a good payment and conſequently a good performance of the condition. *Co. ſuper Litt.* 212. *Fitz. Barre.* 343. Acceptance.

And if at the day of payment the parties doe account together, and he to whom the money is to be paid being indebted to the other, that debt by agreement is allowed, and the reſidue is paid and accepted: this is a good performance of the condition. *Co. ſuper Litt.* 212.

So if the party that is to receive it accept and take new ſecurity by bond or ſtatute for the money: this is a good performance of the condition. *Dier.* 45. *Co.* 5. 96.

And ſo in moſt caſes, when by a condition a thing is to be done one way; and to be done to the party to the condition himſelf and not to a ſtranger, and

he doth accept it another way: this is a good performance of the condition. *Volenti non fit injuria.* But if the thing to be done be to be to a ſtranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof: this is no performance of the condition. And ſo alſo if the time of doing the thing be paſt, as if one make a feoffment to me, on condition that if he pay me ten pound ſuch a day the feoffment ſhall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heire and me he doth pay me the ten pound, and I receive and accept it, and thereupon I ſuffer him to enter and hold the land: in this caſe the condition is not performed, but I may enter upon him and out him notwithſtanding. *Perk. Sect.* 392.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed, and the mortgage diſcharged notwithſtanding. *Adjudge Mich* 40. & 41. *Eliz. B. R. Powel verſus Bartholomew.*

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or adminiſtrators of *I. S* ten pound the feoffment ſhall be void; and *I. S*, die, and the ten pound is paid to the executors of *I S.* according to the condition, but it is covinouſly done, *i.* there is a private agreement that the feoffor ſhall have all, or part of his money againe: this payment in this caſe is no good performance of the condition, but that payment that muſt be a performance of a condition in this caſe to fetch lands out of the hands of an heir muſt be reall, full and effectuall. *Brownl. part.* 64.

To get the good will of *I. S*,

If a leaſe be made, on condition that the leſſee ſhall get the good will of *I. S.* and the leſſor doth come to *I. S.* firſt and aske his good will, and he denie it him, and after when the leſſee doth aske it he doth grant it him; in this caſe the condition is performed. So if the condition be, that he ſhall get his good will by ſuch a day, and at the firſt being deſired he denieth it, but afterwards and before the day he doth grant it. And yet if no day be ſet, and he deſire his good will and *I. S.* denieth it and afterwards he doth get his good will; it ſeemes this is no performance of the condition. 14 *H.* 8. 17

If there be two things in the copulative to be done by the condition, both muſt be done, otherwiſe the condition will not be performed. *Perk. ſect.* 746, *ſee before.*

2. When the act is to be done by a ſtranger, to pay money.

If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pound at Michaelmas the feoffment ſhall be void, and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor beliving, *contra. Co. ſuper Lit.* 219.

3. When the act is to be done to a ſtranger. To make an eſtate. Tender.

If a feoffment be made on condition to make an eſtate to a ſtranger by a day, and before the day he die; in this caſe if an eſtate be made as neere the condition as may be, it is ſufficient. *Plow.* 133. *Co.* 3 64.

If a feoffment be made to *I. S.* on condition that he ſhall infeoffe *I. D.* and his heirs; and *I. S.* doth tender the feoffment to *I. D.* and he doth refuſe to take it; this is no performance of the condition in this caſe. But if it be to be done to the feoffor himſelf, *contra.* And ſo alſo it is, if the condition be to make an eſtate taile, or any leſſer eſtate to a ſtranger, and he tender it and the ſtranger refuſe it; this is no good performance of the condition. And if a feoffment be made, on condition to reinfeoffe the feoffor and his wife in tail the remainder to *W.* in fee, and he tender it to the wife only and not to him in remainder; this is no good performance of the condition. *Co. ſuper Litt.* 209. 19 *H.* 6. 67. *Perk. ſect.* 815, 816. 2 *E.* 4. 2. 19. *H.* 6. 67.

10. What act ſhal be a breach of a Condition in deed And when a condition indeed ſhall be ſaid to be broken. Or not.

And the ſame law for the moſt part is in conditions of obligations. See more in *Obligations* at *Numb.* 9.

If a feoffment be made, on condition that the feoffee ſhall not infeoffe *I. S* of the land, and the feoffee doth make a feoffment to *I. S* and *I. D.* this is a breach of the condition. And ſo alſo it is if the feoffee make a feoffment to *I. D.* to the intent that he ſhall alien to *I. S Quando aliquid prohibetur fieri, directô prohibetur & per obliquum.*

And

And yet if the Feoffee in the caſe before alien to *I. D.* and after he doth alien to *I. S.* this is no breach of the condition. And if the condition be, that the Feoffee ſhall not infeoffe *I, S.* and he die, and his Heir enfeoffe *I. S.* this is no breach of the condition. *Co. ſuper Litt.* 222. *Dier.* 45. 46. Not to alien.

If a Leaſe for years be made, on condition that the Leſſee ſhall not aſſigne, or alien, the Term, or the Land during his life without the licence of the Leſſor, the Leſſee doth give it by his will without licence; this is a breach of the condition and forfeiture of the eſtate. But if he make an executor of his will only, this is no breach. And if the condition be that the Leſſee ſhall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the Leſſee ſhall not alien, but to his children, and the Leſſee by will deviſe it to his executors; it ſeems this is a breach of the condition. So if he deviſe that *A.* his ſon ſhall have his Term after his wife, & doth make *A* his ſon his executor; it ſeemes this is a breach of the condition. But if he doe not make *A* his executor, *contra.* And in caſes of deviſe albeit the executors doe not aſſent yet the condition is broken, as in caſe where a reverſion is granted on condition that the Grantee ſhall not alien it, and he doth alien it, but no atturnement is to this grant; yet it ſeems this is a breach of the condition. And if a Leaſe for years be made, on condition that the Leſſee or his aſſignes ſhall not alien, and the Leſſee doth make his wife his Executrix, and ſhe doth take another husband, and he doth alien it; it ſeems this is a breach of the condition and a forfeiture of the eſtate. But if a leaſe be made on condition that the Leſſee ſhall not alien without the licence of the Leſſor, and after the Leſſor die, and the Leſſee aſſigne, or the Leſſee die and his executors or adminiſtrators aſſigne; this is no breach of the condition in either of theſe caſes. So if a Leaſe be made, on condition that the Leſſee ſhall not alien the terme during his life, and he makes an executor, but doth not deviſe it to him; this is no breach of the condition. And if a Leaſe be made, on condition that the Leſſee his executors or aſſignes ſhall not alien the Terme to any perſons without the licence of the Leſſor but to the wife or one of the children of the Leſſee, and the Leſſee die, and his Executors alien to one of the children of the Leſſee and he alien to a ſtranger without licence; this is no breach of the condition. And if one make a Leaſe of a houſe and Land, on condition that the Leſſee ſhall not parcell out the Land or any part of it from the houſe, and the Leſſee doth grant all his Terme in the houſe and part of the Land, and doth keep the reſt, and after doth Leaſe that part alſo; this is a breach of the condition. If a Leaſe be made to *I. S.* for years on condition, that if he ſhall deviſe other then for a year, that the Leſſor may reenter, and after he deviſe it by will; this is a Forfeiture, *Gouldsb.* 184. *Dier* 45. 65. *Per* 3. *Juſtices B. R.* 3. *Jac.* *Dier* 6. *Dier* 152. *Co.* 4. 120. *Hil.* 38. *El. Marſh verſus Curtis.*

If a Leaſe be made of a houſe, on condition that the Leſſee ſhall not ſuffer any woman great with child to harbour or lodge in the houſe ſix daies after notice given by the Leſſor, and the Leſſee doe ſuffer any ſuch perſon after notice given, albeit the Leſſor conſent to it; yet the condition is broken. But if the Leſſor doe *nolens volens* keep ſuch a woman there againſt the mind of the Leſſee; this is no breach of the condition. *Co.* 892. Not to ſuffer a woman with child in the houſe.

If a Leaſe be made on condition that if any waſt be done the Leſſor ſhall re-enter; in this caſe if the houſe fall by a tempeſt, this is no breach of the condition, for this is not waſt: but if it be uncovered by tempeſt, and the Tenant hath a convenient time to repair it, and doth not, but doth ſuffer the timber to periſh for want of covering; this is a breach of the condition and the Leſſor may enter and put out the Leſſee. And if a Leaſe be made, on condition that the Leſſee ſhall not doe waſt, and he ſuffer waſt to be made in decay of the houſes, &c. it ſeems the condition is broken. *Sed quære.* 12 *H.* 4. 5. *Bro. Condition.* 40. *Per Dier and Walſh Juſtices. Dier.* 281. Not to doe waſt.

If a Leaſe be made, on condition that if the Leſſee be minded to ſell his eſtate the Leſſor ſhall have the firſt offer thereof, giving as much as another will give; in this caſe if the Leſſee doth not give notice when he is minded to ſell it, he doth Not to ſell till the Leſſor refuſe it to any other,

doth break the condition : but if when he is minded to ſell he doth tell the Leſſor of his purpoſe and what he is offered for it, and the Leſſor doth either ſay he will not have it, or that he will not give ſo much for it, or doth not accept it, but doth delay, &c. and then the Leſſee doth ſell it to another: this is no breach of the condition, neither is he bound to wait upon him in this caſe. *Dier* 13.

To make an eſtate.

If a Feoffment be made, on condition that the Feoffee ſhall make a Feoffment in Fee, gift in taile, leaſe for life, or years of the Land to the Feoffor, or to a ſtranger by a day; and before the day the Feoffee doth diſable himſelf to doe it, either by making ſome eſtate of the ſame thing to ſome other perſon in taile, for life, years in preſent or future, or for one year, or by taking a wife whereby ſhe may be entitled to dower, or by ſuffering a recovery of the Land, or by granting of any Rent, Common, or the like, or by entring into any Statute, &c. or by ſuffering any Judgement to be had againſt him, or by doing any other ſuch like act, whereby he cannot convey the Land according to the condition in the ſame plight, quality and freedom it was at the time of the conveyance made : in either of theſe caſes the condition is *ipſo facto* broken. And albeit the Land be afterward diſcharged and the party againe enabled before the day to performe the condition, yet this will not ſalve the breach. And ſo alſo it is of a limitation. But when the condition is to be performed of the part of the Feoffor or Grantor, there diſability before the time will not hurt ſo as he be againe enabled at the time. And ſo alſo it is when the condition is to be performed of the part of the Feoffee, and there is no certain day ſet for the performance of the thing, for in this caſe albeit he be once diſabled, yet if he be afterwards again enabled, and doe it within the time that the Law doth give him to do it; in this caſe the condition is not broken. And ſo alſo it is, if the Feoffee be diſſeiſed, and during the diſſeiſin, he doe any ſuch act as before, in this caſe before his entry this is no breach of the condition, for till then the charge doth not bind the Land. And ſo likewiſe it is when the diſability doth proceed from another cauſe, as where one doth make a Feoffment on condition that the Feoffee ſhall re-enfeoffe before ſuch a day, and before the day the Feoffor diſſeiſe the Feoffee and keep him out till the day be paſt, or one doth make a Feoffment, on condition the Feoffee ſhall marry *B.* before ſuch a day, and before the day the Feoffor himſelf doth marry her ſo that the Feoffee cannot perform the condition; in theſe caſes the condition is not broken. *Co. ſuper Litt.* 221. 222. *Co.* 2. 58. *Perk ſect.* 80. 803. *Litt. ſect.* 355. *Co. ſuper Litt.* 206.

To employ the profits to charitable uſes.

If one make an eſtate of Lands (held *in Capite*) on condition that he to whom it is made ſhall employ the profits thereof to divers charitable uſes, and he die his Heir within age, by reaſon whereof the King hath the Land during the minority of the Heir, ſo that the profits cannot be employed; this is no breach of the condition. *Trin.* 13 *Iac. Slade verſus Tompſon. B. R.*

To reinfeoffe.

If one make a Feoffment of Land, on condition to reinfeoffe in convenient time, and the Feoffee doth not ſo, but doth make a Leaſe to another; this is a double breach of the condition. And the ſame Law is of a Deviſe by will in this manner. *Co.* 1. *in Porters caſe.*

To make an eſtate.

If a Feoffment be made, upon condition that the Feoffee ſhall make ſome eſtate to the Feoffor, or ſome other by a day, and the Feoffee before the day ſay to him to whom the eſtate is to be made, that he will never make the eſtate, notwithſtanding he doth make the eſtate before the day according to the condition; in this caſe it is ſaid the condition is broken. *Sed quere* of this, for it ſeemes if he really deny it before, and actually performe it at the day, that this is a good performance of the condition.

To ſuffer one to take his goods.

As if a Leaſe be made of a houſe, on condition that the Leſſee ſhal not diſturbe the Leſſor in the taking away of his goods out of the houſe, and when the party doth come or ſend to fetch them the Leſſee doth only forbid them; this in this caſe is no breach of the condition, and it was agreed in this caſe that words without ſome deeds, as ſhutting the dore againſt them, forcible reſiſtance or laying of hands upon them, or the like are no breach of ſuch a condition.

And

And if a Leaſe be made, on condition that the Leſſor ſhall be four times a year in the houſe demiſed without being ouſted by the Leſſee, and the Leſſee ſeeing him comming doth ſhut the dores or windows againſt him; this hath been thought to be no breach of this condition. *Brownl. 2 part. 277. Perk. ſect. 796. Co. 8. 90. ſee the parable. Mat. 21. 28.* To ſuffer one to come into a houſe.

If a Leaſe be made, on condition that the Leſſee ſhall pay yearly to the Leſſor during the Terme ten pound; in this caſe if he faile of payment once, the condition is broken and eſtate forfeit. So if one make a Feoffment in Fee of Land, on condition to pay ten pound yearly to *I. S.* if he faile once, the condition is broken. *Dier 33. 3 H. 4. 8.* To pay a yearly Rent or ſum.

If a Leaſe be made of a Manor in which are divers Copyholders, on condition that the Leſſee ſhall not moleſt, vex, or put out any Copyholder paying his duties and ſervices, in this caſe if the Leſſee enter upon, and put out any one Copyholder, this is a breach of the condition. But if he enter *vi & armis* upon a Copyholders Tenements, and there beat him only, or the like: this is no breach of the condition. *Penner verſus Glover 37. & 38 El. Mich. B. R. per curiam.* Not to moleſt Copyholders.

If there be a condition to pay Rent, and the Leſſee let part of the Land to other undertenants, or let all the Land to another for part of the time, and he undertake the Rent ſtill, and faile of payment: in this caſe the condition is broken and eſtate forfeit. But if there be any covin and practiſe in the caſe between the firſt Leſſor and the Leſſee, the undertenants may perhaps have relief in equity. *Cromp. Jur. 65.* To pay Rent. Equity.

If one make a Leaſe for years of Land, and then alſo make a Feoffment in Fee of the Lands on condition that if the Leſſee be diſturbed in his Terme that he ſhall have the Fee-ſimple, and he is diſturbed by the Feoffor or by his means; in this caſe the condition is broken and the Leſſee ſhall have the Fee-ſimple. But if the diſturbance be by a ſtranger and not by the Feoffor or by his means or conſent; this is no breach of the condition. *Co. 8. 90.* Not to diſturb

If a Leaſe be made on condition that the Leſſee ſhall not be outlawed, and he is outlawed without proclamation; it ſeems this is no breach of the condition, becauſe the outlawry is not good. *Per 2 Juſtices H. 7 Jac. B. R.* Not to be outlawed.

If a condition poſſible at the time of creation become after impoſſible in part by the act of God, and the party doe not performe that which is poſſible, the condition is broken. *Litt. ſect. 352. Co. 2. 59.*

If a man make a Leaſe for years on condition, and the Leſſee doth not know of it, and after the Leſſor doth by will give the Land to the Leſſee without condition, and the Leſſee doth ſuch an act as is a breach of the condition; in this caſe the condition is not broken, for the Leſſee muſt have notice of the condition ere he can break him. *Co. 8. 92.*

If a Leaſe be made rendring Rent, on condition, that if the Rent be not paid within twenty daies the Leſſor ſhall re-enter, and the Rent is not paid; in this caſe the condition is broken, but the Leſſor cannot enter untill he hath made a legall demand, and if he die before he doe it, his Heir ſhall never take advantage of that breach, but it is diſcharged for ever. *Doct. and Stu. 35. 13 H. 4. 17.* To pay Rent.

When an act is to be done in time convenient, or otherwiſe, and the party doe it not by the time appointed by Law; the condition is broken. *Litt. ſect. 353. Plow. 30.*

If one grant an Annuity *pro conſilio impenſo & impendendo*, and the grantor require adviſe, and the Grantee refuſe or neglect to give it: this is a breach of the condition and a forfeiture of the eſtate. And if the deed be, that he ſhall goe to ſuch a place, to give counſell and he require him to goe thither, and he refuſe it, this is a forfeiture of the eſtate. But if he refuſe to goe with him to another place, or give counſell to his adverſary being not required to give counſell to him, this is no breach of the condition nor forfeiture of his Annuity. And if one had heretofore deviſed his Land to be ſold by his executors, and to have been diſtributed for his ſoule, and the executors had not ſold it in time convenient, or had taken the profits to their own uſe: this had been a breach of the condition. To give adviſe

See

See more in the laſt foregoing diviſion, and in *Obligation Numb.* 10: *Covenant Numb.* 7. The ſame Law is for the moſt part of conditions of obligations. See *Obligation Numb.* 10 21 *E.* 3. 7. 8 *H.* 6. 24. *Dier* 369. *Litt. Sect.* 383.

11. When a condition in Law ſhall be ſaid to be broken. Or not. Forfeiture.

Every particular eſtate hath a condition in Law Annexed to it, and therefore if Tenant for life in Dower, by the courteſie, or after poſſibility of iſſue extinct, Leſſee for years, Tenant by ſtatute merchant, elegit or the like make any abſolute or conditional eſtate of the Lands they hold in Fee-ſimple, Fee-tail, or for life, and give livery of ſeiſin thereupon or levy a fine *Sur conuſance de droit* or ſuffer a recovery of the Land, or the like; this is a breach of the condition in Law and a forfeiture of their eſtate. Alſo if any ſuch Tenant (except tenant in taile after poſſibility of iſſue extinct) doe waſt in the Lands they doe ſo hold; this is a breach of the condition in Law, and a forfeiture of their eſtate in ſo much as the waſt is committed. But if an Infant or feme covert that hath ſuch an eſtate ſhall make any ſuch eſtate, &c. this is no breach of the condition in Law. And yet if ſuch a perſon doe waſt, this is a breach of the condition in Law. And ſo alſo if any ſuch perſon be an Officer and doe any thing which is a cauſe of forfeiture in another; this will be a forfeiture in him or her alſo. *Co.* 2. 15. 8. 44. *ſuper Litt.* 233.

Infant. Women-covert.

If any keeper of a Park without warrant kill any Deer, fell or cut any wood and convert it to his own uſe, pull down the lodge or any houſe with the Park uſed for hay for the Deer, or the like; this is a breach of the condition in Law. So alſo if a keeper ſhall not look to the Game, but the Deer be killed by his default, and damage come to the Lord; by this alſo the condition is broken. But the not attending upon ſuch an Office for two or three dayes if the Lord have no ſpeciall loſs thereby, is no cauſe of forfeiture. *Co. ſuper Litt.* 223.

Offices that are for the Adminiſtration of Juſtice, or of clarkſhip in any Court of Record, or concerning the Kings Treaſure, Revenue, Account, Alnage, Auditorſhip, &c. have alſo conditions in Law annexed to them, and therefore if ſuch Officers ſhall ſell their Offices or miſdemeane themſelves in their Offices, by this the condition in Law may be broken, and they may forfeit them. *Co. ſuper Litt.* 234.

12. Who may enter for a condition broken. And what perſons ſhall take advantage of a condition or a limitation. And what not.

As no man may create or annex a condition to an eſtate, but he that doth create the eſtate it ſelf, ſo neither can a man give or reſerve the power, title or benefit of re-entry and avoidance of an eſtate upon the breach of a condition to any other but to him or them, or at leaſt to one of them that doth make the eſtate, his or their Heirs, Executors or Adminiſtrators, &c. for it is a Rule of the common Law, That none may take advantage of a condition but parties and privies in Right and repreſentation, as Heirs, Executors, &c. of naturall perſons, and the ſucceſſors of politique perſons: and that neither Privies nor Aſſignees in Law, as Lords by Eſcheate, nor in deed, as Grantees of Reverſions, nor Privies in eſtate, as he to whom a remainder is limited, ſhall take benefit of entry or re-entry by force of a condition. *Litt. Sect.* 347. *Plow.* 175. *Co.* 3. 62. 347. 5. 56. *Dier.* 131. *Co. ſuper. Litt.* 214. 215. *Doct. & Stud.* 93. *Perk. ſect.* 830. 831. 833. 835. *Plow.* 488. 489.

And therefore if a man had made a Leaſe for life reſerving Rent, on condition that if the Rent be behind, the Leſſor, his Heirs and aſſignes ſhall re-enter, and after had granted the Reverſion to a ſtranger; this Grantee ſhould not by the common Law have had benefit by his condition. But if the Leſſor had died, his Heir or the Gardian in Chivalry or Socage of ſuch an Heir if he had been an Infant and in ward might have taken advantage by the condition. And if one had been poſſeſſed of a Leaſe for years, and had granted his Terme upon condition and had died; his Executors or Adminiſtrators might have had advantage of this condition. *Brownl.* 1 *part.* 149. 2 *part* 56. 224. *&c.*

And at this day the Law is ſtill the ſame as touching Privies in blood, for an Heir ſhall take advantage of a condition, though no eſtate deſcend to him from the Anceſtor. And therefore if one be ſeiſed of Land of the part of his mother, and he make a Feoffment in Fee of it, on condition, and die, and the condition is broken; in this caſe the Heir of the part of the Father ſhall enter, but as ſoon as he hath entred, the Heir of the part of the mother ſhall enter upon him and enjoy the Land.

And

And if a man be ſeiſed of Land in the right of his wife, and he make a Feoffement in Fee of it, upon condition, and die; the Heire of the husband ſhall enter for the condition broken, but the wife ſhall have the Land. And ſo alſo is the Law as touching Privies in right and repreſentation, for Executors and Adminiſtrators ſhall take advantage of a condition now as heretofore. And ſo alſo ſhall the Succeſſors of a Deane and Chapter, Biſhop, Arch-deacon, Parſon, Prebend, or any body Politique or Corporate, Eccleſiaſticall or Temporall; theſe ſhall take advantage of conditions as heretofore they did. So alſo the Law is the ſame as touching Privies in Law, for they ſhall no more take advantage of a condition now then heretofore. But as touching Grantees of reverſions and Privies in eſtate, there is ſome alteration made of the Law, for by a new Law it is provided, That all perſons which ſhall have any Grant of the King of any reverſion of any lands &c. which pertained to Monaſteries &c. as alſo all other perſons being Grantees or aſſignees &c. to or by any other perſon or perſons, and their Heirs, Executors, Succeſſors and aſſignes, ſhall have like advantage againſt the Feoffees &c, by entry for not payment of Rent, or for doing Waſt, or for other Forfeiture &c. as the ſaid Leſſors or Grantors themſelves ought or might have had. *Stat.* 32. *H.* 8. *Cap.* 34.

And for the true underſtanding of the ſenſe of this Statute and the ancient Common Law further touching this point, 1. Theſe Diverſities muſt be obſerved to be taken before the Statute which take place ſtill. *Co. ſuper Lit.* 214. *Plow.* 27.

1. Between a condition that doth require a Reentry, and a limitation that doth *ipſo facto* determine the eſtate without Entry, for albeit a ſtranger might not take advantage of the firſt, yet he might take advantage of the laſt by the Common Law. And therefore if a man at this day make a Leaſe to another *quouſque*, or untill *I.* S. come from *Rome*; or if a man make a Leaſe to a woman *quamdiu caſta vixerit*, or if a man make a Leaſe to a widow *ſi tandiu in pura viduitate viveret*, or if a man make a Leaſe to another for one hundred years if he live ſo long, and then the leſſor doth grant the reverſion to a ſtranger; in all theſe and ſuch like caſes the grantee of the reverſion may take advantage of the limitation, for after the eſtate is ended by the limitation he may enter. *Co.* 10. 36. *F. N. B.* 201.

2. Between a condition annexed to a freehold and a condition annexed to a leaſe for years, for if before the Statute a man had made a gift in taile, or leaſe for life, on condition that if the donee or leſſee did not pay tenne pounds by ſuch a day the gift or leaſe ſhould be void or ceaſe; in this caſe the grantee of the reverſion could not by the common law have taken advantage of the condition, for it could not be void or ceaſe, but by entry which could not be tranſferred to another. But if a leaſe for years had been made on ſuch a condition; a grantee of the reverſion might by the common law have taken advantage of this condition, for the eſtate in this caſe was by the breach of the condition *ipſo facto* void without entrie. But now the grantee of the reverſion ſhall have advantage of the condition in both theſe caſes. *Co.* 3. 64, 65. *Co. ſuper Lit.* 214. 11 *H.* 7. 17. *Plow.* 136.

3. Between a condition in deed and a condition in law, for by the very common law not only the grantee of the reverſion, but alſo the Lord by Eſcheat, may either of them have advantage of a condition in law for any breach in his owne time. *Co. ſuper Lit.* 214.

2. Theſe Reſolutions and Judgements upon the Statute muſt be marked. 1. That the Statute is generall, and the grantee of the reverſion of every common perſon as well as the King may take advantage of conditions. 2. That the Statute doth extend to grants made to the ſucceſſor of the King aſwell as to the King, albeit he only be named in the Statute. 3. That he that comes to the reverſion by fine, feoffement, graut, limitation of uſe, common recovery, or bargaine and ſale, is ſuch a grantee as is within the intendment of the Statute. 4. That where the Statute doth ſpeak of feoffees &c. that it doth not extend to gifts in taile, and therefore if a gift in taile be upon condition, and after the donor doth grant the reverſion; this grantee ſhall never have any benefit of this condition. *Co. ſuper Lit.* 214. *Co.* 5. 13

Grantees of part

5. That where the Statute doth ſpeak of grantees and aſſignees of the reverſion; that hereby an aſſignee of part of the ſtate of the reverſion may take advantage of the condition, as if leſſee for life be, and the reverſion is granted for life &c. or if leſſee for years be &c. and the reverſion is granted for years &c. in theſe caſes the grantees of the reverſion ſhall have advantage of the conditions.

So if a leſſee for one hundred years make a leaſe for tenne years, rendring rent, with condition of reentry, and the firſt leſſee doth afterward grant his terme and eſtate to *I S*; in this caſe *I S* is ſuch a grantee and aſſignee of the reverſion as ſhall take advantage of the condition. *Davie and Mathews caſe per & 2 Juſtices Trin. 14. Jac. B. R.*

Grantees of grantees in infinitum

6. That as well mediate as immediate grantees *i.* The grantees of grantees *in infinitum* are intended within this Statute. *Co. 5. 112. 113. Co. ſuper Litt. 214.*

Grantee of part

7. That a grantee of part of the reverſion cannot take advantage of a condition by this Statute. And therefore if a leaſe be made of three acres reſerving rent upon condition, and the reverſion is granted of two of the three acres; in this caſe the rent ſhall bee apportioned, but the condition is deſtroyed except it be in the Kings caſe. And yet a condition may be apportioned by the act of law, or by the wrong of the leſſee. As if a leaſe be made of two acres (the one of the nature of Burrough Engliſh, and the other at the Common law) upon condition, and the leſſor having iſſue two ſons dieth; in this caſe each of them ſhall enter for the condition broken: And if the leſſee upon condition make a feoffment of part of the land, this doth not deſtroy the condition. There is therefore herein a difference between a condition that is compulſory, and a power of revocation that is voluntary: for he that hath ſuch a power may by his own act extinguiſh it in part, by levying a fine of part of the land or otherwiſe, and yet his power may remaine for the reſidue as in the caſe of a limitation; but in the caſe of a condition he cannot do ſo. *Co. 5. 113. 114. Co. 8. 92.*

Prerogative.

Apportionment.

Power of Revocation.

Limitation Condition

Grantees of Reversion by fine or grant must have attornment

8. Such grantees as ſhall have advantage by this Statute, muſt be compleat grantees, and therefore grantees of reverſions by fine, or deed, muſt have atturnment ere they can take advantage of the condition. And yet if a reverſion be granted by fine to one that hath ~~an~~ no atturnment, and he grant it to another that hath atturnment; in this caſe the ſecond grantee ſhall take advantage of the condition, albeit the firſt grantee ſhall not. And the leſſee muſt have notice of the grant of the reverſion, ere he in reverſion can take any advantage of a condition. And therefore it is, that if the leſſor bargain and ſell the land by deed indented and inrolled (in which caſe there needs no atturnment); or if the leſſor make a feoffment of the land, and ſo out the leſſee, and the leſſee reenter (which is an atturnment in law); the grantee or feoffee in theſe caſes cannot take advantage of any condition before he hath given notice to the leſſee of this grant of the reverſion. *Co. ſuper Litt. 214. Paſche. 7 Jac. Co. B. per 2 Juſtices.*

notice Inrolled Liberty attornment in Law

Meerly by act of law

9. Such as come in meerly by act of law, or paramount, as the Lord of a Villain, the Lord by eſcheat, the Lord that doth enter for Mortmain, or the like, cannot take advantage of a condition within this Statute. And hence it ſeems it is that if the leſſee for forty yeares make a leaſe for thirty ſeven years on condition, and after ſurrender his eſtate to his leſſor, that the ſurrendree ſhall not have advantage of this condition. *Co. ſuper Litt. 215. Dier. 309. Curia in Leeks caſe. Paſche 7 Jac. Co. B.*

Collaterall

10. Albeit the words of the Statute be generall, yet grantees and aſſignees ſhall not take benefit of every forfeiture by force of a condition, nor yet of all conditions but onely of ſuch as are inherent. *i.* Such as are either incident to the reverſion, as for payment of rent, or for the benefit of the State, as for reſtraining of waſt, for cauſing of reparations, making of fences, ſkowring of ditches, preſerving of woods, and the like. And of conditions that are collaterall, ſuch grantees ſhall not take benefit. And therefore if the condition be for payment of a ſum of money in groſſe, to reſtraine alienation, for the delivery of corn, wood, or the like, the grantee of the reverſion of the land ſhall not have advantage of it by this Statute, for theſe remain as they were before the Statute at the Common law. *Per Juſtice Bridgman.*

11. Such

11. Such conditions as are on the part of the Leſſor, it ſeems are not within this Statute; And therefore if one make a Leaſe for years, on condition that if the Leſſor his Heirs or aſſignes, pay ten pound to the Leſſee at our Lady day, the Leaſe to be void, and the Leſſor doth grant the reverſion to a ſtranger before the day; it ſeems the Grantee ſhall not take advantage of this; but the condition is gone.

If one make a Leaſe for years rendring Rent to him and his Heirs, on condition that if it be not paid within fourteen days, that he and his Heirs ſhall reenter, and the Rent is behind, and the Leſſor doth demand it, and then die; in this caſe the Heir may enter. But if he die before demand, the Heir cannot make a demand, and ſo take advantage of that breach of the condition, which was in the time of his Anceſtor. *Doct. & St.* 25. 13 *H.* 4. 17.

If a man be poſſeſſed of Land for twenty years in the right of his wife, and he make a Leaſe of it for ten years rendring Rent, with condition of reentry for default of payment, and after the husband die; in this caſe the wife ſhall have the Rent, but it ſeems ſhe ſhall not take advantage of the condition. *Perk ſect.* 834.

If a leaſe be made to *I. S.* on condition that if ſuch a thing be, or be not done that the Land ſhall remain to *I. D.* or that *I. D.* ſhall enter; in this caſe *I. D.* ſhall never take advantage of this condition, either by the Common Law or by this Statute. *Co.* 1. 85. *ſuper Litt.* 379. *Dier.* 127, 117.

13. Where entry or claim is needfull, to avoid an eſtate on condition. And where a man may take advantage of a condition without entry or claim. And where not.

Regularly where a man will take advantage of a condition, if he may enter, he muſt enter, and when he cannot enter, he muſt make a claim; for an eſtate of freehold or inheritance will not ceaſe without entry or claim. And he that is to have advantage by the condition, may wave his advantage if he will. And untill ſuch entrie or claim made, the party that ſhould enter can make no good eſtate of the thing to any other. But herein a difference is to be obſerved in the penning of a condition, and between a Leaſe for years and a Leaſe for life or a greater eſtate; for if a Leaſe for years be made, on condition that upon ſuch a contingent the eſtate ſhall ceaſe, or the Leaſe ſhall be void; in this caſe when the thing doth happen, the Leaſe is *ipſo facto* void without entry or claim. But otherwiſe it is of a Leaſe for life, albeit there be the ſame words in the condition. And if one make a Leaſe for years, on condition that if ſuch a thing be done, the Leſſor ſhall re-enter; in this caſe an entry is needfull to avoid the eſtate. *Co. ſuper Litt.* 218. 237.

If one make a Feoffment in Fee, gift in taile, or Leaſe for life, on condition that upon ſuch a contingent the eſtate ſhall be void; in this caſe there muſt be an entry made after the condition is broken to avoid the eſtate. So if one bargain and ſell his Land by deed indented and inrolled, with proviſo that if the bargainor pay &c. then the eſtate ſhall ceaſe and be void, and he doth pay the money; in this caſe the eſtate is not reveſted in the bargainor before an actuall re-entry is made. And ſo it is alſo if Lands be deviſed to a man and his Heirs, on condition that if the Deviſee doe not pay twenty pound at a day, his eſtate ſhall ceaſe and be void; in this caſe the eſtate is not void untill an actuall re-entry be made. And ſo alſo it is if a reverſion, Remainder, Advowſon, Rent, Common, or the like, be deviſed on ſuch a condition; in theſe caſes there muſt be a claim before the eſtate will be determined. And therefore if a man grant ſuch a thing to another and his Heirs, on condition that if the Grantor pay twenty pound on ſuch a day, the ſtate of the Grantee ſhall ceaſe or be void, and the grantor doth pay the mony according to the condition; in this caſe the ſtate is not reveſted in the Grantor before a claim made at the Church in caſe of an Advowſon, and in the other caſes upon the Land. But in caſe where a man cannot make an entry or claim, there the Law will not compell him to it. And therefore if one grant Land to another for five years, on condition that if he pay to the Grantor within the two firſt years forty marks, that then he ſhall have the Fee, otherwiſe but for tearm of five years, and livery of ſeiſin is made accordingly, and the Grantee doth not pay this mony; in this caſe after the two years are paſt, the freehold ſhall be in the Grantor without entry or claim, for as this caſe is, he cannot enter, but he muſt out the Leſſee of his term. So if I grant a Rent charge out of my Land upon condition; when the condition is broken, the Rent is extinct, and here needs no claim.

Rent.

14. When a condition broken ſhall make the eſtate, &c. void *ab initio*. And when not. And to what intents the Leſſor, Feoffer, &c. ſhall be adjudged by his reentry to be in of his firſt eſtate. And to what intents not.

So if a man make a Feoffment of Land to me in Fee, on condition that I ſhall pay him twenty pound ſuch a day, &c. and before the day I let the Land to him for years, rendring Rent, and after the condition is broken; in this caſe he may retain the Land without entry or claim, and the Rent is extinct. So if one covenant to ſtand ſeiſed to the uſe of himſelf for life or otherwiſe, and then after to the uſe of others, with a proviſo of revocation &c. and after he doth revoke it; in this caſe all the eſtates are reveſted in him without entry or claim.

It is generally true that he that doth enter for a condition broken, doth make the eſtate void *ab initio*, and that he ſhall be in of his firſt eſtate in the ſame courſe and manner as it was when he departed with the poſſeſſion, and at the time of the making of the condition. *Co.* 4. 120. *Perk. ſect.* 840. *Plow.* 186. 482. 14 *H.* 8. 17.

And hence it is, that if there be any charge or incumbrance on the Land, as if Leſſee of Land upon condition grant a Rent charge out of the Land, or enter into a Statute or Recogniſance, and the Conuſee have the Land in Execution and this charge is after the condition is made; in this caſe when the condition is broken, and the party doth re-enter, he ſhall by relation avoid the Rent, ſtatute, and recogniſances, and hold the Land freed from them all. And if an eſtate be to paſs by way of increaſe, upon condition, or a Leaſe is to be made upon a condition precedent; when the condition is performed, the party ſhall hold his eſtate free from all after charges and clogs. *Co ſuper Litt.* 234. *Perk. ſect* 843. 844. *Co. ſuper Litt.* 233.

And if a man enter for breach of a condition in Law, he ſhall avoid all charges and acts done after that thing is done which doth produce the forfeiture, but he ſhall not avoid any thing done before that time; for he muſt take the thing as he findes it: as if a houſe or Land belong to an Officer in reſpect of his Office, and he grant a Rent out of it for his life, and then he doth Forfeit it: in this caſe the Rent ſhall continue. And if Leſſee for life of Land grant a Rent out of it, and then make a Feoffment in Fee of the Land; in this caſe the Rent ſhall continue and the Leſſor cannot avoid.

But if Leſſee for life of Land make a Feoffment in Fee of it, and then grant a Rent out of the Land; in this caſe the Leſſor ſhall avoid it. And if a Leſſee grant a Rent out of his Land, and then doe waſt, and the Leſſor recover the Land, he cannot avoid this Rent, but ſhall hold the Land charged with it. But if the Leſſee doe waſt firſt, and then he grant a Rent charge to a ſtranger out of the Land, and after the Leſſor recover the place waſted; in this caſe he ſhall hold the Land diſcharged. And if Leſſee for life make a Leaſe for years and after enter upon the Leſſee for years, and make a Feoffment in Fee; this ſhall not avoid the Leaſe for years. *Crompt Jur.* 64 65.

And if a man make a Leaſe for years; rendring Rent with clauſe of entry for non payment and the Leſſee doth make under-leaſes of part of this Land, and after the Rent is unpaid, and the Leſſor doth enter; in this caſe he ſhall have all the Land, and avoid all the under leaſes.

But if there be any covinous practiſe in the caſe, the under-tenants may have remedy in Equity *Co.* 10. 41.

And if a Leaſe be made for life, the remainder in taile on condition; in this caſe if the condition be broken, both the eſtates be avoided. *Et ſic de ſimilibus.*

But this generall rule doth faile in divers particulars: as if a man be ſeiſed of Land in the right of his wife, and he maketh a Feoffment in Fee by deed indented, upon condition that the Feoffee ſhall deviſe the Land to the Feoffer for life, &c. and the husband dieth, and then the condition is broken; in this caſe the Heir of the husband ſhall enter, and yet he ſhall not have the eſtate of the Feoffer, for this doth preſently after his entry vaniſh away. *Co. ſuper Litt.* 202. *Perk. ſect.* 242. 842 843.

So if a Tenant in ſpeciall tail hath iſſue, and his wife dieth, and Tenant in taile maketh a Feoffment in Fee upon condition, the iſſue dieth, the condition is broken, and then the Feoffer doth reenter; in this caſe he ſhall have but an eſtate for life as Tenant in Tail after poſſibility of iſſue extinct.

So

So if a leſſee for life or years make a feoffment in fee on condition, and after doth enter for the condition broken; in this caſe he ſhall not be in the ſame courſe, for now his eſtate is ſubject to entry for forfeiture, though he be tenant for life ſtill. So if a diſſeiſor be of certain land, and he die ſeiſed thereof, and his heir is in by deſcent, and the diſſeiſee enter upon the heir, and infeoffe aſtranger upon condition, and the heir of the diſſeiſor doth enter upon the feoffee, and the diſſeiſee doth ſue a writ of entry *ſur diſſeiſin*, againſt the heir of the diſſeiſor, and doth recover and hath execution, and the feoffee on condition doth reenter, and after the condition is broken; in this caſe the feoffor is not in the ſame caſe, for now the diſſeiſor cannot enter upon him as he might before. And in ſome caſes the feoffor by his reentry ſhall be in his former eſtate, but not in reſpect of ſome collaterall qualities: as if tenant by homage Anceſtrell, make a feoffment of the land he doth ſo hold in fee, on condition, and entreth for the condition broken; in this caſe it ſhall never be held in homage Anceſtrel again. And ſo if a copyhold eſcheat be, and the Lord make a feoffment in fee upon condition, and entreth for the condition broken; in this caſe the cuſtome annexed to that land is gone. So if there be Lord and tenant by fealty and rent, and the Lord is in ſeiſin of the rent, and granteth his Seigniory to another and his heirs on condition, and the tenant doth atturn and payeth his rent to the grantee, the condition is broken; the Lord diſtraineth for his rent, and reſcous is made, in this caſe the former ſeiſin ſhall not enable him to have an aſſiſe without new ſeiſin. If there be Lord and tenant, and the Lord diſſeiſe the tenant of the tenancy, and thereof doth enfeoffe a ſtranger on condition, and after the condition is broken, and the Lord entr?, and the tenant doth enter upon him; in this caſe the Seigniory is not revived.

If tenant in tail make a feoffment in fee on condition, and dieth, and the iſſue in tail within age doth enter for the condition broken; in this caſe he ſhall be in firſt as tenant in fee ſimple, and heir to his father, and then ſhall be preſently remitted: but if he be of full age he ſhall not be remitted.

If one make a feoffment of white acre and black acre, on condition &c. and that he ſhall enter into black acre onely; in this caſe upon breach of the condition, he ſhall enter into that part onely. *Co. ſuper Litt.* 202, 203.

If the words of a condition be, That if ſuch a thing be not done, the feoffor or leſſor ſhall enter into the land, and take the profits thereof untill the thing be done, or to the like effect; in this caſe if the feoffor or leſſor enter upon the breach of the condition, hee doth not avoid the eſtate, or get any thing by his entry, but the poſſeſſion onely in the nature of a pledge, or a diſtreſſe untill the thing be done; And if the condition be for the payment of the rent, he ſhall hold the land untill he be paid the rent.

And if the words be (That the Feoffor, &c. ſhall enter and take the profits, untill thereof he be ſatisfied, or untill he be ſatisfied or paid the Rent) in the firſt caſe as ſoon as he is paid, either by receiving of the profits, or payment of the Rent behind, or both together; and in the laſt caſe as ſoon as he is paid the Rent by the Feoffee or Leſſee, the Feoffee or Leſſee may enter again into the land.

If a condition be poſſible in his creation, and after become impoſſible by the act of God, the condition is diſcharged and gone for ever, and the eſtate is abſolute. As if a feoffment be made to me, on condition that I ſhall reinfeoffe the feoffor before a day, or on condition that I ſhall appear at *Weſtminſter* in the Kings Bench ſuch a day, or on condition that I ſhall go to *Paris* about the affairs of the feoffor before ſuch a day, and before the day appointed it doth happen that I die; in all theſe caſes the condition is diſcharged. So if the condition of a feoffment be that if the feoffor or his heirs pay ten pound to the feoffee ſuch a day, and before the day the feoffor dieth without heire; in this caſe the condition is gone. And if the condition become impoſſible in part onely, then it is diſcharged for ſo much onely. *ſee Goldsb.* 181 *Co. ſuper Lit.* 207. 219. 15. *H.* 7. 13 *Dier.* 262.

If there be Lord and tenant, and the tenant doth enfeoffe a ſtranger on condition and the feoffee die without heir, ſo that the tenancy eſcheat; in this caſe the condition doth continue, and the Lord muſt hold it ſubject to the condition. *Perk. Sect.* 8. 9.

15. When and by what means a condition ſhall be diſchargedand extinguiſhed for ever, or ſuſpended for a time, or not.

1. By the act of God.

Conditions impoſſible.

Albeit

2. By the Act of Law.

Albeit a condition cannot be divided by the act of the parties, but it will be deſtroyed, yet it may be divided by the act of law; and therefore if a leaſe for years be made of two acres of land (the one of the nature of Burrough Engliſh, and the other at the Common law) on condition, and the leſſor having iſſue two ſons dieth, in this caſe albeit the condition be divided, yet it is not gone, but doth continue ſtill, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reverſion, grant part of his reverſion to a ſtranger; the condition is deſtroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the law, or the wrong of the leſſee. *Co. ſuper Litt.* 215. *Co.* 4. 120.

3. By the Act of the parties.

A condition may be deſtroyed in the very creation of it; as if one deviſe lands for life with expreſſe words of a condition, and not words of limitation, or words that may be ſo taken, the remainder over to a ſtranger; in this caſe the ſtranger cannot enter, neither is the remainder good, nor the condition effectuall. *Co.* 2. 59. *the Lord Cromwels caſe, Dier,* 309. *Co. ſuper Litt.* 265. 379. *Co.* 10. 41.

Or it may be diſcharged by matter *ex poſt facto:* as in the examples following. If one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make an abſolute feoffment, or levy a fine of all or part of the land to the feoffee, or any other; by this the condition is gone and diſcharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguiſh the condition. And if a fine in this caſe be levied in purſuance of a former agreement; as if one by Indenture bargain and ſell his land to another, and in the Indenture there is a covenant that all other aſſurances ſhall be to the uſe of the bargainee, according to the firſt agreement, and the bargaine and ſale hath a condition annexed that the bargainee ſhall make a feoffment of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the firſt bargain; in this caſe the condition is not extinct, but ſaved by the original agreement. And if one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make a leaſe for years onely of the land, or part of it to the feoffee or any other; by this the condition is ſuſpended for that time. And if the feoffor after a feoffment made of land upon condition, enter upon all or part of the land and be impleaded, and loſe it, by this the condition is gone for ever. *Co.* 2. 59. *Perk, Sect.* 819, 820. 163. *Litt. Bro. Sect.* 212. *Co ſuper Litt* 219.

And if he enter and hold the poſſeſſion onely, by this the condition is ſuſpended during his poſſeſſion, and if he hold the poſſeſſion ſo long that the feoffee cannot perform the condition, the condition is diſcharged for ever. And if one make a feoffment of land upon condition, and after and before the condition broken, the feoffee doth make a feoffment of all or part of the land to the feoffor, by this the condition is gone for ever. *Co.* 7. 144. 52. *Litt. Bro. Sect.* 212. 85. *Co. ſuper Litt,* 218.

And if the feoffee make a leaſe for life or yeares onely of part of the land; by this the condition is ſuſpended for that time. But if the feoffee make a feoffment in fee, leaſe for life, or years to a ſtranger; this is no extinguiſhment nor ſuſpenſion of the condition. And if the condition be to pay mony, or do any ſuch collaterall thing; if in this caſe the feoffee make a leaſe to the feoffor, this doth not ſuſpend the condition. *Brownl.* 2. *part,* 224. 225. 56.

Releaſe.

If the feoffor or leſſor releaſe to the feoffee or leſſee all conditions, or all demands in the land, or confirm the eſtate of the feoffee without condition &c. by either of theſe means the condition is deſtroyed and gone for ever. *Perk. Sect.* 823. *Co.* 1. 147. *See Releaſe and confirmation.*

If one make a leaſe for life or years of land on condition, and after grant the reverſion of part of this land; hereby the condition is deſtroyed for ever. And if he make a leaſe of part of it onely; by this the condition is ſuſpended. *Co.* 2. 59. *Perk. Sect.* 163. *Co.* 4. 119.

A condition may be extinct or ſuſpended by the intermarriage of the parties to the condition; as if a Feoffment be made by a woman on condition to pay ten pound, or on condition to infeoffe her by a day certain, and before the day they two do intermary, and the marriage doth continue untill after the day; in this caſe the condition is gone. And if the condition be to reenter for not payment of Rent; the condition ſhall be ſuſpended and no Rent be paid during the coverture. *Perk. ſect.* 763. 765. 764.

If a Leaſe be made for years, on condition that the Leſſee or his aſſignes ſhall not alien without the licence of the Leſſor, and the Leſſor licence the Leſſee alone to alien, or licence him to alien a part of the Land, or licence him to alien al the Land for a time, or if the leaſe be to three on ſuch a condition, and the Leſſor licence one of them to alien in all theſe caſes the condition is gone for ever. *Co.* 4. 119. 5. 34. 2. 59. 714. *Dier* 309.

If one had Enfeoffed me, on condition that I ſhould pay him ten pound at Eaſter, and before the time he had entred into Religion, and made me his executor, and had not been deraigned; in this caſe the condition had been gone for ever. *Perk. ſect.* 766.

If I be ſeiſed of Land in Fee, and take a Wife, and during the marriage enfeoffe a ſtranger on condition and die, and the Feoffee endow my wife of her third part; in this caſe the condition is not deſtroied, and yet the third part is freed from the condition, but the reverſion of that third part is not freed from the condition. And if ſhee grant her eſtate again to the Feoffee, the condition is revived: So if there be Lord and Tenant, and the Tenant make a Feoffment in Fee upon condition, and the Feoffee is attainted of Felony, &c. ſo that the Tenancie doth eſcheate; in this caſe the condition is not gone, but the tenancy is charged with it. *Perk. ſect.* 822.

If a Feoffment, or Leaſe be made rendring Rent, on condition for not payment a reentry, and the Feoffer, or Leſſor after the breach of the condition doth diſtrain or bring an aſſiſe for the Rent, or doth accept the Rent at another day; hereby the condition is not deſtroied but it is diſcharged for that time, ſo that the Feoffor or Leſſor cannot take any advantage of that breach: and if the act to be done by the condition be a collaterall act, as not to alien, or the like; and the condition is broken, and the Feoffor not having notice thereof doth accept the Rent; in this caſe alſo and by this means the condition is not diſcharged, *Co.* 3. 64. *ſuper Litt.* 211.

If one diſſeiſe the Feoffee, or the heir of the Diſſeiſor, or any other that hath Lands by a juſt title, and thereof enfeoffe a ſtranger on condition, and the Land is lawfully recovered from him by him that hath the title; hereby the condition is deſtroied for ever. And if a Diſſeiſor make a Feoffment in Fee on condition, and after the Diſſeiſee doth enter upon the Feoffee on condition; this doth extinguiſh the condition. But if the Diſſeiſee releaſe to the Feoffee on condition; this Releaſe doth not diſcharge the condition. But if a Diſſeiſor make a Leaſe for life, and the Leſſee for life make a Feoffment in Fee on condition, and the Diſſeiſee releaſe to the Feoffee of the Tenant for life, by this the condition in Law is deſtroied. And if the Feoffee upon condition make a Feoffment over without condition, and the Diſſeiſee releaſe to the ſecond Feoffee; by this the condition is deſtroyed, be the releaſe before the condition broken or after. And if Feoffee on condition make a Leaſe for life, and the Feoffor releaſe to the Feoffee on condition or Leſſee for life all conditions, or all demands to the Land; by this the condition is diſcharged. And if the Feoffee on condition make a Feoffment to another on condition, and after the firſt Feoffor doth enter for breach of the condition, hereby the ſecond Feoffment and the condition alſo is gone for ever. *Litt. ſect.* 476. 477. *Co. ſuper Litt.* 277. *Perk. ſect.* 823. 821.

4. By the Act of a ſtranger.

Releaſe.

If a man ſeiſed of Land in Fee let it to a ſtranger for years, and one that hath no right doth out the Leſſee, and thereof die ſeiſed, and his Heire is in by deſcent, and he doth make a Feoffment to a ſtranger upon condition, upon whom the Leſſee for years doth enter within the terme claiming his terme; in this caſe the Leſſee ſhall hold the land diſcharged of the condition. *Perk. ſect.* 820.

CHAP.

CHAP. LI.

Of a Contempt, and Coopers.

Contempt, what.

THis word *Contempt* is uſed for a kind of Miſdemeanor, by doing what one is forbidden, or omitting to do what one is commanded: As where a Sheriff ſhall not obey the command of a Court in the Retorn of ſome Writ directed to him; and the third Refuſal by him herein, is eſteemed a Contempt. And a ſpecial miſcarriage alſo in the face of a Court is eſteemed a Contempt. This, however it be but in the nature of a Treſpaſs, yet it is ſometimes a greater, and ſometimes a leſſer offence; and accordingly the puniſhment is greater or leſs, ſometimes by Fine and Impriſonment both, and ſometimes by one of theſe, *Co.* 8. *co. Dyer* 177, 128. 2 *Ed.* 4. 1. 36 *H.* 6. 27. *Bro. Contempt*, throughout.

Of Coopers.

Coopers.

AS to Coopers, theſe things only are here to be known.

1. That Juſtices and Head-Officers in Corporate-Towns muſt ſet the Prices for Ale, Beer, and Sope, *Stat.* 8 *Eliz. ch* 9.

2. Coopers muſt make their Veſſels of good Wood, and put their own Marks upon them, 23 *H.* 8. 4.

3. The Barrel he doth ſell for Beer, muſt contain thirty ſix Gallons; the Kilderkin for Beer, eighteen Gallons; the Firkin for Beer, nine Gallons of the Kings Standard-gallon. And for Ale, the Barrel thirty two Gallons, the Kilderkin ſixteen Gallons, and the Firkin eight Gallons.

Veſſels.

4. No Cooper muſt make any Veſſel of any other meaſure, unleſs he ſet down upon it a Mark of the certain Content of it.

5. The Cooper muſt alſo put his own Mark upon the Veſſels he ſels.

6. Sope-makers Veſſels muſt be according to the Content of the Statute.

7. In *London*, the Wardens of Coopers muſt ſearch to ſee if their Veſſels be ſo: And out of *London*, Head Officers of Corporations and Conſtables of Towns muſt ſearch and ſee to it.

8. No Veſſel thus made, muſt be after diminiſhed.

9. An Ale-Brewer or Beer-Brewer may keep a Cooper in his houſe to amend his Veſſels, *St.* 23 *H.* 8. *c.* 4.

9. Veſſels brought from beyond Sea muſt be gauged, if they be for Beer or Ale, 31 *Eliz.* 8. See *Wingates* Abridgment of the Statutes, Tit. *Coopers.*

Dr. Com.

CHAP. LII.

Of a Copiholder and a Copihold.

THe Copihold-Eſtate is that, for which a man hath nothing to ſhew but the Copy of the Rolls made by the Steward of the Lords Court. For the manner is, that the Steward doth write out a Remembrance of this (amongſt other things) That ſuch a one is admitted to ſuch an Eſtate; and this commonly is tranſcribed in Parchment, which Tranſcript is called the Court-Roll, the Copy whereof the Tenant hath under the Stewards hand: And this is all his Evidence, and he can make no title but by this Roll. 1. *Copihold, what.* *Rolls of the Court, what.*

The Copiholder is he which is admitted Tenant of any Lands within any Manor, which time out of mind by uſe and cuſtom of the Manor hath been demiſed and demiſable to ſuch as will take the ſame in Fee-ſimple, Fee-tail for life, years, or at will (as the cuſtom is) according to the cuſtom of the ſaid Manor, by Copy of Court-Roll of the ſaid Manor, *Weſt.* 1 *Symb. l.*2. *ſect.*646. *Co.*4.25. *Lit.ſect.*13. *Copiholder, what.*

So that to make a Copihold eſtate, two things are requiſite.

1. It muſt be a parcel of a Manor. *Sect.* 1.

2. It muſt be demiſed or demiſable time out of mind, &c. And if either of theſe fail, the Copihold-tenure is gone. For this cauſe the Tenure cannot be made at this day, unleſs it be made by Act of Parliament, *Stat.* 35 *H.* 8.13. *Co.* 1 *par. Inſt. fol.* 58.

Theſe Tenants in moſt places are called Copiholders and Cuſtomary Tenants; but in ſome places they are called Tenants by the Verge, Baſe-tenants, or Bond-tenants, &c. and ſo are the Lands called Baſe-lands, Bond-land, &c. *Tenants by the Verge.*

The Grant of this Tenant is at the Will of the Lord. So the Tenant was antiently a Bondman, and his Tenure a Baſe-tenure: But time hath changed both, and now he and his Eſtate both are ſo far free, that if he pay his Rent, and do his Services according to the cuſtom of the place, the Lord cannot hurt him or his Eſtate, *Co.* 4. 29. And if he or any other evict him, he ſhall have relief againſt them. Whereof ſee afterwards.

If any of the Tenants will tranſfer or alien any of their Copihold-lands, it muſt be done by way of Surrender to the Lord or his Steward, or ſome of the Tenants according to the cuſtom of the place, to the uſe of ſuch perſon who is to have it for the time agreed upon between them; and then the party is to pay his Fine, and to have it from the Lord according to the Surrender, and to have it entred, and a Copy thereof according to the cuſtom of the place: And if the Lord after ſurrender refuſe to admit, or die, or his Eſtate end before admittance, he or his Succeſſor ſhall be compelled to make the admittance. And by Deed or otherwiſe ſuch a Tenant cannot alien his Land without committing a Forfeiture, no, not by way of Exchange with another Tenant. And if the Copiholder will deviſe it, he muſt ſurrender it to the uſe of his laſt Will, and declare his intent, *Co.* of *Copiholds, f.*35. 2. How the Copiholder may grant his Land. *Surrender.* *Admiſſion.* *Alienation.* *Forfeiture.* *Exchange.*

And for this the Tenant need not alleage a Cuſtom; for this is the Common-Law; ſo neither for a Surrender out of Court into the Lords hands. But to ſurrender to three of the Tenants, or to the Bailiff or Reeve out of the Court, to make this Surrender good, there muſt be a ſpecial Cuſtom alleaged for it, *Co.* 1 *par. f.* 59. And yet by a Deed of Releaſe he may extinguiſh his Right to a Copihold whereinto another is before admitted, and hath ſuch an Eſtate as upon which the Releaſe may enure. As if a Surrender be made out of Court to the uſe of *J. S.* and it is not duly preſented according to cuſtom, and therefore void; yet *J. S.* is admitted according, and after he that hath the right doth by Deed releaſe all his right to *J. S.* this will bar him, and make good the Eſtate. *Contra*, where the Eſtate to paſs by the Releaſe, *Cuſtom.* *Releaſe.*

doth paſs by way of Enlargement: As if a Copiholder by Licence leaſe for [illegible] and then doth releaſe to the Leſſee for years. But I may ſurrender my Reverſion [illegible] to the Lords hands, and he may grant it to the Leſſee, *Co.* of *Copiholds*, *f.* 300. So where no precedent Eſtate is by Admittance, as if one diſſeiſe the Copiholder, and the Copiholder releaſe to the Diſſeiſor, theſe Releaſes are void, *Co.* 4. 25.

One Copiholder being ouſted by another, cannot releaſe to him. If a Copiholder be ouſted, and the Lord admit him that ouſted him, by his Releaſe the Copiholder may extinguiſh his Right, *Co. c.* 114. And yet if a Surrender be made out of Court upon Condition, and preſented as abſolute, and ſo the Admittance is made, the Surrenderer by Releaſe may make it good, *Co.* of *Copiholds*, *fol.* 101. But if *I.* be ouſted, and the Lord admit him according to the cuſtom, I may releaſe to him. If a Copiholder doth bargain and ſell his Copihold-land to his Lord without any Surrender, it is ſaid this will paſs it: But if his Eſtate be an Eſtate of Inheritance, *contra per curiam Mich. 2 Jac. B.R.*

2. Conſidered according to the Common-Law.

Ejectione firmæ.

Theſe ſtates are in ſome caſes ruled according to the Common-Law, and in ſome caſes according to the Cuſtom. And therefore if ſuch a Copiholder be put out of his land by his Lord or any other, heretofore he had no remedy but in the Lords Court, or in Chancery: yet at this day he may have remedy againſt his Lord or any other by *Ejectione firmæ*, or Treſpaſs, or in Chancery, as a man that hath ſuch an Eſtate by Deed, *Co.* 4. 21. 29. 22, &c. And if he make a Leaſe rendring Rent, he may bring Debt for it; and if one cut his Trees, he may have an Action of Treſpaſs.

He ſhall be barred by a Fine and Non-claim in ſeven years, as another man ſhall be, *Brownl.* 1 *par.* 181.

If the Copiholder make a Leaſe for years by the Lords licence, he may after ſurrender the Reverſion after this Leaſe for years; for it is the Copiholders, not the Lords Leaſe. And yet perhaps if the Copiholder forfeit, the Leaſe may be made good, *Hob. Rep. pl.* 199.

Sect. 2. Eſtates in Fee-ſimple, Tail, or for life.

The ſame words which will make Eſtates in Fee-ſimple, Fee-tail for life, &c. upon a Deed, will make Eſtates by Copy. And therefore if a Surrender be to the uſe of *J. S.* without limitation of any Eſtate, hereby *J. S.* ſhall have an Eſtate for his life only: And yet by cuſtom in ſome places it is otherwiſe.

322 And if a Copiholder in Fee ſurrender *Habend.* after his deceaſe to the uſe of his child *in venter ſa mier*, (*i.*) in the mothers womb, and the heirs of this child; and if it die before marriage or full age, then to the uſe of *J. S.* and his heirs: By this the father hath an Eſtate for life, and the limitation to the child is void, and ſo it ſeems is the Remainder alſo, *Co.* 4. 21, 22, *&c.* For a Freehold cannot commence *in futuro*, nor one Fee depend on another, *Simpſons* Caſe adjudged *Mich.* 13 *Jac. B.R.*

Freehold.

Diſcent.

And Deſcents of this Land, as well as the Creation of the Eſtate, ſhall be guided by the Rules of the Common-Law; except there be any ſpecial cuſtom in the place to the contrary, the eldeſt ſon ſhall inherit. *Poſſeſſio fratris facit ſororem eſſe hæredem* of the lands in a Fee-ſimple; otherwiſe it is the Iſſue of a Copiholder in tail: This land may be intailed by Cuſtom, *Co.* of *Copiholds*, *f.* 136. and the Iſſue ſhall have a *Formedon in Diſcender.* If one have iſſue a ſon and daughter by one venter, and a ſon by another, and the eldeſt purchaſe a Copihold in Fee, and die without iſſue, the daughter ſhall have the land, *Co.* of *Copiholds*, *f.* 143. But a Deſcent of a Copihold ſhall not take away an Entry, *March.* 6. *pl.* 13.

Entail. Cuſtom. Diſcent.

Eſcheat.

If one have a Copihold-eſtate to the heir of the mothers ſide, and he die without iſſue, it ſhall go to the heirs of the mothers ſide, and ſhall rather eſcheat then go to the heirs of the fathers ſide. But if I purchaſe Copihold-lands, and die without iſſue, and have no heirs of my fathers ſide, it ſhall go to the heirs of my mothers ſide. If there be father, uncle and ſon, and the ſon purchaſe this land and die, it ſhall go to the uncle, not to the father. So if there be three brothers, and the middle purchaſe this land and die without iſſue, the eldeſt ſhall have it. And if there be two Partners or Tenants in common of this land, and one die having iſſue, his Heir ſhall inherit, not the Survivor. *Contra* of Jointenants. *Co.* of *Copiholds*, *ſect.* 50. *Calthrop*, *fol.* 88, 89, 92, 93.

But

But in other things they differ from other Inheritances, and the Rules of the Common-Law. And therefore these Inheritances® (except there be a special Custom for it in the place) have not these Collateral qualities which concern not Descent, as other Inheritances have. For such land so descended shall not be accounted Assets in the Heirs hands to charge him upon any Obligation; the Wife shall not be endowed, the Husband not Tenant by the courtesie; Descent shall not take away Entry, *Co.* 4. 23. 3. Considered according to Custom. *Assets. Dower. Courtesie.*

A Surrender made by a Tenant in tail of this land, (admitting it may be entailed) or by a Husband of the Copihold he hath in the right of his wife, makes no Discontinuance, *Co. idem* of *Copiholds*, *f.* 144. *Brownl.* 1 *par.* 121. For as an Estate-tail may be created by Custom, so it may be barred or discontinued by Surrender by Custom, and so hath it been adjudged, 27 *Eliz.* for the Manor of *North-hall* in the County of *Essex*, *Brownl.* 2 *par.* 121. *Tail. Discontinuance.*

If the Lord enter into a Statute, or take a Wife, and after the Copihold become void, and in the Lords hand by Surrender, Forfeit or Escheat, whiles it is in his hands it is liable to this charge. But if he grant it *de novo* according to the Custom, the Copiholder shall hold his Estate discharged of both, *Co.* 8. 63. 4. 23. The true reason is, because when the Copiholder is once admitted, he is in by Custom, which is Paramount the Grant; therefore if the Lord grant a Rent-charge, and then grant the Copy, yet shall the Copiholder hold the land discharged of the Rent, as it seemeth, though then he be not his Tenant, 8 *Rep.* 63. *b.* *Statute. Charge.*

The Lord of a Manor where Copiholders are for life, grants a Rent-charge forth of the Manor; one Copihold escheats, and the Lord grants again the same by Copy; in this case it was judged that the Copiholder shall hold it discharged of the Rent, and so of Statutes, Recognizances, Dowers. But if the Grant were out of twenty Acres by name in the occupation of such a Copiholder, there perhaps in such a case the Copiholder may hold it charged, *Brownl.* 2 *par.* 208.

Copihold-land is not extendable upon a Statute-Staple; but upon the Statute of Bankrupts it is extendable, *Brownl.* 1 *par.* 34.

If the Feoffee of a Manor on Condition, before the Condition broken, make Copihold-Estates, they are good, *Co.* 4. 24. If the Copiholder acknowledg a Statute, and then surrender, the Land is not liable, *Calth. f.* 98. *Condition.*

If Tenant in tail (without a special custom) or Copiholder in the right of his wife surrender, this is no Discontinuance, *Co.* 4. 23. *Dyer* 263. So if the Lord make a Lease for years of the Manor, excepting all Woods and Underwoods, and the Lessee make Grants by Copy according to the custom; the Copiholder shall have wood in these Woods according to the custom, *Co.* 8. 107. So if the Copiholder be used to have Common of Pasture or Estovers in the Lords Wastes or Woods, and the Lord alien the Woods or Wastes to another in Fee, and after make a Copihold-estate according to the custom, the Copiholder will have Common there as hath been used, *Co.* 8. 63. The Copiholders have been used to lop for Repair and for Fire, and the Lord lease the Manor (excepting the Trees) for years; the Lessee makes an Estate according to Custom: In this case the Copiholder may cut the Trees as he hath used to do; and if the Lord cut down all the Trees, the Copiholder may have an Action of the Case. So if the Lord fell his Waste, and the Copiholder die, and the Lord grant a new Copy, this Copiholder will have Common there, *Brownl.* 1 *par.* 231. But in this case the Custom in pleading must be laid specially: Otherwise it is of a Lease for life by Deed. *Discontinuance. Grant. Exception. Common. Estovers. Action of the Case.*

Sect. 3. 4. What Grant of a Copihold estate shall be good, or not.

As long as a Copihold of Inheritance is in the Tenants hands, it is not liable to any Estate or Charge of the Lord, as *Dower*, *Courtesie*, *Elegit*, *Statute*, *&c.* But when it is in the Lords hands, it is liable, *Co.* 4. 22. But a Custom in this case may make it chargeable, *Calth.* 88, 89. 92, 93.

Divers things are requisite to make a good Grant of a Copihold-estate. As,

1. There must of necessity be a good Manor and Court continuing: For a Copihold-estate cannot be made without a Court, and a Court cannot be without a Manor; and then there must be a Custom for the allowance thereof, and this Custom must be of and in the same Manor. A Lord to give the Copihold; a Tenant of capacity

1. In respect of the Manor of the which the Land is parcel, and of the Court in which the Estate is granted.

capacity to take, and the thing to be granted, which muſt be grantable, and may be held according to the tenure. But for the opening of theſe things, it muſt be known touching a Manor,

1. That a Manor cannot be made at this day.

Manor deſtroyed. 2. Albeit it cannot be made at this day, yet it may be marred: For a Manor may be diſſolved many ways. As firſt, if the Court-Baron (which is incident to every Manor) be deſtroyed; for the Court and Manor ſtand and fall together. And therefore if all the Freeholders but one eſcheat to, or be purchaſed by the Lord, hereby the Manor is deſtroyed: For there muſt be two Freeholders at leaſt to ſupport the Court-Baron, and two Copiholders at leaſt to ſupport the Cuſtomary Court. So if the Lord ſuffer all his Copiholds but one to fall in his hand, or make a Feoffment of all but one, hereby the Manor is diſſolved.

Extinguiſhment

Court. But here this difference muſt be heeded; That there being (as we have ſhewed before) in every Manor where are Freeholders and Copiholders, two Courts: A Court of Freeholders, which is by Common-Law for the Trial of Actions wherein they are Judges; and a Court of Copiholders, which is for the ſurrendring and granting of Eſtates, and making Admittances, and wherein the Lord or his Steward is Judg; that one of theſe may ſtand without the other. And therefore if the Lord ſell the Reverſion of all his Copiholds in Fee to one man, this man hath a Manor and a Court to this purpoſe, and may do all touching Copihold-eſtates which the Seller might have done; and he that ſels may do all that belongs to the Freehold-Court, as he did before, *Co.* 4. 26. 6. 64. *Co.* 1 *par.* 58.

Judg.

So if the Lord make a Leaſe for years of all his Copihold-lands, it ſeems the Leſſee for the time of the Leaſe may keep Courts, and grant Eſtates. But if the Lord make a Feoffment or Leaſe of one, or of ſome of the Copiholds only, it ſeems this Feoffee or Leſſee cannot keep Courts; and therefore the Manor, as to this parcel, is deſtroyed.

If the Demeſns be once by the Act of the party ſevered from the Services in Fee-ſimple, or the Copiholds from the Manor, hereby the Manor is deſtroyed for ever, *Co.* 4. 26. 6. 24.

If one have a Manor, and grant the Moyety of it to another, hereby the Manor is deſtroyed, by Juſt. *Jones* opinion: *Sed quære.* So if the Lord ſell away the Inheritance of all the Copiholds to ſeveral perſons, hereby the Manor and Court of Copiholders are diſſolved.

By act of Law

And if the Severance be but for an inſtant, and without any tranſmutation of Poſſeſſion, yet the Manor is deſtroyed. But by Act of the Law a Manor may be divided: As when a Manor deſcends, and is divided between two Partners, that one have one part of the Demeſns and Services, and another the other part; each of them have a Manor and a Court.

Franchiſe loſt.

If one Manor held of another eſcheat, they are united, and continue both. And yet if a Court-Leet, Waif, Stray, Wreek, and the like be together by Preſcription, albeit the Manor be deſtroyed, yet the Leet, Waifs, &c. continue. *Calthrop fol.* 13.

lost waifs &c

Suſpenſion. 2. As a Manor may be diſſolved, ſo it may be ſuſpended for a time, and revived again: As if a Manor come to Parceners, and one upon the Diviſion hath all the Services, and the other all the Demeſns, and after one of them die without Iſſue, ſo that his part cometh to the other alſo; by this the Manor is revived again. *Fortior eſt diſpoſitio legis quàm hominis, Co.* 4. 26.

The Court muſt be kept on ſome part of that which is within the Manor; for if it be holden out of the Manor, it is void; except by Cuſtom, he having two Manors, have time out of mind kept one Court for both. *Coke* upon *Littleton, fol.* 58.

2. In reſpect of the Lord of the Manor and his Eſtate.

The ſecond thing required to the making of a good Grant by Copy of Copihold-Land, is, a good Lord; that is, the party that makes the Grant muſt be ſeiſed, that is, he muſt be in poſſeſſion in, and have a good right or title to the Manor, of part whereof the Eſtate is made. For the opening whereof, theſe things are to be known.

That

That any perſon who may be a good Grantor in a Deed, may be a good Grantee of a Copihold-Eſtate. For this any perſon, man or woman, that hath a lawful Eſtate in a Manor for a time, may be a good Lord to grant Copiholds, take Surrenders, make Eſtates and Admittances according to the Cuſtom of the Manor, notwithſtanding the diſability of his perſon, or exility of his eſtate. And therefore it is held, that a Lunatick or a man *non compos mentis*, an Infant, an Excommunicate perſon, a perſon outlawed in an Action perſonal; a Felon before his Attainder by Outlawry, Verdict or Confeſſion, being Lord of a Manor, may grant Copihold-Eſtates for any time according to the Cuſtom of the Manor, as another man may do, and Eſtates made by them are unavoidable. So a Villain Purchaſor of a Manor, and Alienee in Mortmain, may make Copihold-Eſtates till the Lord do make his Entry, *Co.* of *Copiholds*, *f* 89.

A Tenant in tail for life, years, in Dower, by the Courteſie, by Statute or *Elegit* of the Manor, may make Copihold-Eſtates, as well as a Tenant in Fee-ſimple. So may a Tenant at will of a Manor, by Copihold, or at Common-Law; and this of Copiholds in Reverſion, as well as Copiholds in Poſſeſſion. And therefore if a Tenant for life of a Manor grant a Copy in Reverſion according to Cuſtom, and die before the Copiholder; this is a good Copy in Reverſion againſt all the ſucceeding Lords. Adjudged 29 *Eliz. B. R.* Sir *Peter Carews* Caſe. *Brownlow*, 1 *par* 231.

If one ſeiſed of a Manor for life, wherein are Copiholds of Inheritance, and a Copiholder doth ſurrender to the uſe of a ſtranger in Fee, the Lord may grant and admit accordingly, and this will bind him in Reverſion. But if the Copihold be only grantable for lives, it is ſaid then, the Lord upon Surrender cannot grant more then for the life of the Grantor. But if the Lord of a Manor, for or during the Minority of a Ward, of which the Copihold is demiſable for three lives ſucceſſively, and not ſeverally; if there the Copiholder dieth, the Lord may grant it being void for three lives at his pleaſure, and this ſhall bind him in Reverſion, or his Heir at full age, *Calthrop Read.* 50. But *quære* of this.

If a Copiholder in Fee ſurrender to the uſe of the Lord for life, the Remainder to a ſtranger in Fee, or keepeth the Reverſion to himſelf, the Lord cannot grant this in Fee by Copy. *Nemo poteſt plus juris in alium transferre, quàm ipſe habet.*

So may a Feoffee or Leſſee of a Manor on Condition, till the Condition be broken. And yet a Leaſe for life by Deed in this caſe will be avoided: And it is held by ſome, that if a Leaſe be made for life on Condition, and the Leſſee after the Condition broken, and before Entry of the Leſſor, make Copihold-Eſtates, that theſe are good, becauſe this Leaſe is not void, but voidable at the pleaſure of the Leſſor; *Co.* of *Copiholds* 89.

If the Feoffor or Leſſor, after the Condition broken, keep Court and make Copihold-Eſtates, theſe are good; for the keeping of the Court is an Entry in Law, *Calthrop Read.* 94.

If a Feoffee of a Manor on Condition, enfeoff another of it, and the next day, or the ſame day after he hath the Manor, make Copihold-eſtates, they are good; for it ſufficeth if he be lawful Lord for the time. But if a Tenant for life of a Manor, make a Leaſe for years of it and dieth, and then the Leſſee for years maketh Copihold-Eſtates, theſe are voidable by the firſt Leſſor. So if a Leſſee for years of a Manor grant a Copihold in Reverſion, and before the Reverſion happen the Term is expired, the Grant is void; and ſo it is if the Leſſee ſurrender his Term, and before the Leaſe ſhould have ended, the Reverſion happen, yet the Grant is not good, *Co.* of *Copiholds* 88.

A Gardein in Chivalry that hath a Manor of the Wards, may make Copihold-Eſtates upon it. The Husband and Wife, within a Manor he hath in right of his Wife, but not the Wife alone, may make Copihold-Eſtates; nor may the Husband alone (as it ſeems) make Eſtates.

If the Husband and Wife in free marriage make Copihold-Eſtates, and they be afterwards divorced, the Eſtates made before the Divorce are good; ſo if the Wife be after divorced for Infancy.

If

Deviſee. If one ſeiſed in Fee of a Manor, by his Will in Writing deviſe, that his Executors ſhall ſell or make Copihold-eſtates according to the Cuſtom, for payment of his debts or the like, they may make good eſtates accordingly, *Co.* upon *Lit.* 58. And yet if the Lord deviſe that his friends ſhall keep Courts, or make Copiholds, and no more, this is not good, *Calthrop, f.* 95.

So if one die ſeiſed of a Manor, having a daughter, his wife privily with child of a ſon, the daughter may make Copihold-eſtates till the ſon is born.

Body-Politick. A Corporation, Biſhop or Prebend ſeiſed of a Manor, may make Copihold-eſtates.

Parſon. If a Parſon that hath a Manor after inſtitution, and before induction, make Copihold-eſtates, it ſeems theſe are not good: So if after induction he had not read the Articles, and he be after removed for this. But if he be deprived after for any crime, his Grants before are good, *Co.* of *Copiholds, f.* 89, 90.

Tenant by Statute. Tenant in Dower. If the Lord acknowledg a Statute, and after make a Copihold-eſtate, and then it is extended, this will not hurt the eſtate. So if the Lord take a wife, and then make Copihold-eſtates, and then dieth, the wifes Dower will not hurt the eſtate, though ſhe be endowed of the Manor. And yet if an Heir after the Lords death make Copihold-eſtates, and after the Manor is aſſigned to his wife, ſhe may happily avoid this, *Co.* of *Copiholds*, 84.

If the Lord make a Feoffment in Fee, Leaſe for life or years of all his Copiholds, the Feoffee or Leſſee may make Copihold-eſtates, take Surrenders, Admittances, &c. But if the Lord grant the Reverſion of one Copihold, neither he nor the Grantee, nor both of them together are able to grant any Copihold-eſtate of this land.

If the Lord releaſe all the Services of the Freeholders of the Manor, or all the Freeholds eſcheat, yet the Lord doth continue a good Lord, and able to make Copihold-eſtates of the Copihold-lands.

Diſſeiſor. Abator. In all caſes where the Lord may make Copihold-eſtates *de novo*, he may take Surrenders, and make Admittances. But in theſe caſes, and theſe perſons, a Diſſeiſor, Abator, or Intrudor in a Manor, the Heir or Feoffee of a Diſſeiſor, Grantee of a Tenant in tail, one that holdeth after his Eſtate is ended as a Feoffee or Leſſee upon Condition, after the Condition is broken; one that hath no Eſtate at all, or no good Eſtate, or the Copihold is deſtroyed; theſe cannot make any Copihold-eſtate by way of voluntary Grant, or take Surrenders and make new Grants accordingly. And yet it is thought, that a Diſſeiſor of a Manor, or any ſuch Lord that hath poſſeſſion only of a Manor, may make Admittances upon Deſcents, or do any ſuch like act, and that this will bind him that hath right, *Co.* 4. 27. 8. 63, 64. 1 *par.* 58. 74. *Calthrop fol.* 98. 94. 90. 91. *Co.* of *Copiholds* 36. 80. 87. *Dyer* 375.

Admittances. And yet if the Cuſtom be deſtroyed by granting away the Reverſion, or where there is one Copiholder only left; in this caſe he cannot make Admittances, or do any thing as Lord, *Co.* 4. 27.

Sect 3. 3. In reſpect of the Steward. To make a good Grant of Copihold-land, there muſt be a good Steward of the Court wherein the Eſtate is granted. And as touching this point, theſe things are to be known.

Ability. 1. Any man may be a Steward: And therefore if an Infant, Lunatick, *Non compos mentis*, Outlawed or Excommunicated perſon be made Steward, all Acts that he doth according to his Office are good.

2. He may be retained by word, as well as by Patent: Otherwiſe it is if it be a Stewardſhip of the Kings Court. And any colourable authority may be ſufficient to make a man a Steward to this purpoſe: Yea, it is held, that a Copihold granted by an Under-Steward without any authority from the Lord or High-Steward, is good, *Co.* 4. 3. of *Copihold* 126. 27. *Calthrop f.* 73.

Judg. 3. His authority is derived wholly from the Lord, whoſe perſon he doth repreſent; and under him in his abſence he is Judg of the Court.

4. He muſt do all in the Lords name: As if he take Surrenders, make Grants or Admittances, or give licence to alien where he hath ſpecial power from the Lord, or is enabled by ſpecial cuſtom ſo to do; he muſt do this in the Lords name, *Co.* of *Copiholds* 125.

5. The

5. The Steward cannot do ſo much as the Lord himſelf: For the Lord himſelf may make Grants or Admittances in what place he pleaſe without as well as within the Manor; but the Steward cannot do ſo without the Manor: And the Lord may give licence to his Tenant to alien his land by Deed; but it is doubted whether the Steward can ſo do or not in Court, without a ſpecial cuſtom of the place, or a ſpecial authority from the Lord to enable him thereto, *Co.* of *Copiholds*, *f.*124. *Licence. Admittance.*

6. This Office may be forfeit many ways. 1. By Abuſer; as if the Steward burn the Court-Rolls, or be corrupt in his Office, or the like. 2. Non-uſer; as when he is bound by his Patent to keep Courts at certain times in the year without requeſt, and the Lord be prejudiced by this omiſſion. 3. Refuſer; as if he be bound to keep Court upon demand, and do not, albeit the Lord have no prejudice by it, yet it is a Forfeiture, *Co.* of *Copiholds*, *f.*129. *Forfeit.*

7. The Steward may appoint an Under-ſteward. See for this, *Co.* of *Copiholds*, *fol.* 132. *Under-ſteward.*

Any one that may be a good Grantor in a Deed at Common-Law, may make a good Surrender or Grant of Copihold-land. And as to this point, theſe things are to be known. *4. In reſpect of the perſon that doth make the Grant or Surrender.*

1. Any Body-Corporate or Politick, being Lord, may make a Grant; or being Tenant, may make a Surrender of Copihold-land:

2. Grants by Lords, and Surrenders by other Tenants, as Felons before Attainder, Baſtard, Hereticks, Lepers, deaf, dumb, or blind men, are good. *Ability.*

3. He that is not a good Grantor, cannot make a good Grant or Surrender of Copihold-land without a ſpecial Cuſtom to enable him thereunto. And hence it is, that Surrenders made by Infants, Aliens, Ideots, ſuch as are born deaf, dumb, or blind, and Women covert, Wives without Husbands, are not good. And yet it is held, that a Woman-covert being Jointenant with another, may ſurrender her own part to the uſe of her Husband. But I doubt much of this. *Co.*4.26,27. *Co.* 1 *par. f.*42. of *Copiholds f.*90. *Calthrop f.*93.

4. A Woman covert cannot ſurrender with her Husband, but ſhe muſt be firſt examined by the Lord or his Steward; and this cannot be by the Tenants, *Calthrop* 86, 87.

5. Such perſons as may grant or ſurrender, cannot grant more then they have. And therefore if the Copiholder be a Jointenant, he cannot grant but his own part: He that is Copiholder for life only, can ſurrender but for this life. And yet if there be two Jointenants of a Manor, and a Copihold eſcheat, and one of the Lords grant this Copihold alone; this is good to bind his Companion. *Co.* of *Copiholds*, *fol.* 91. *Jointenants.*

Any one that may be a good Grantee by Deed, may be a good Grantee by Copy, and a good Copiholder. And herein theſe things are to be known. *5. In reſpect of the perſon to whom, or to whoſe uſe it is made.*

1. A Surrender or Grant of Copihold-land may be made to a Lunatick, Baſtard, man not of a ſound memory, perſon attaint of Felony, Major and Commonalty, Infant, Outlawed or Excommunicate perſon, Bondman or Feme-covert. But a Monk or Frier cannot be a Copiholder; and it is doubted whether an Alien born may be a good Copiholder, or not. *Perk. ſect.*52. *Co.* of *Copiholds* 97. *Calth. f.*52. *Ability.*

2. The Surrender to the uſe of a Feme-covert is good, till her Husband diſagree to it. *Incertainty.*

3. In caſe of an Infant or Feme-covert, as to the Lords ſervice; for the Infant, it muſt be done by the Gardein or Prochein-amy; and for the Wife, by the Husband. *Infant.*

4. The Lord ſhall retain the land of the Ideot or Lunatick, till he come to himſelf. So ſome ſay for the Infants lands till he be of age, *Calth. f.*52.65.

5. A Surrender may be of Copihold-land to the uſe of the Lord himſelf, and he may have a Copihold to his own uſe, *Co.* of *Copiholds*, *f.*94. Doubted by *Calthrop*, *fol.* 52.

6. The Husband may ſurrender to the uſe of his Wife, and by a ſpecial Cuſtom the Wife may ſurrender to the uſe of the Husband, *Co.* 4.21. 30. Of *Copiholds*, *fol.* 94. *Husband and Wife.*

7. One

Jointenant.

7. One Jointenant may ſurrender to the uſe of another Jointenant.

8. A Surrender may be of Copihold-land to the uſe of him that ſhall be Heir of *J. S.* or the next Child of *J. S.* or next Wife of *J. S.* or to him that *J. S.* ſhall name, is good; for nothing paſſeth till admittance. Otherwiſe it were of ſuch a Grant by Deed, *Co.* of *Copiholds*, *f.* 97, 98. *Quære.* And a Surrender to the uſe of the right heirs of *J. S.* being alive, is void.

9. A good Grantee may take by Attorney, *Co.* of *Copihold*, *f.* 95.

10. A Grant of Copihold-land may be to two or more, and they ſhall be Jointtenants, *Kitch. f.* 11.

6. In reſpect of the place where it is done.

The Lord of a Manor himſelf in perſon may make any Grant of Copihold-land, or take a Surrender, or make any Admittance hereof, or a Surrender or Deſcent in any place as well without as within the Manor, and as well without as within the Court. But the Steward muſt do it within the Manor, and in Court, or it is not good. And yet by a ſpecial Cuſtom of the place, a Surrender may be made to the Steward, or to ſome of the Tenants out of Court; and this is good.

7. In reſpect of the thing granted and ſurrendred.

The thing granted or ſurrendred, muſt be at the time of the thing done, parcel of the Manor. For the opening of which point, theſe things are to be known.

1. A Cuſtomary Manor which hath Copiholds within it, may be held of another Manor, and be granted by Copy as other Land may be, *Co.* 11. 18. So may Houſes, Lands, Meadows or Paſtures, and whatſoever doth concern them which is of perpetuity and parcel of the Manor, as a Common, Advowſon, or Fair appendant, the Veſture or Herbage of Land, Underwoods out of a great Wood, and that without the Soil, if they have been uſually demiſed for Copy. And if the thing granted be incertain, it may be made certain by Election, as in other caſes of Grants at Common-Law, *Co.* 1 *par. Inſt. fol.* 58. of *Copiholds* 117, 118. *Co.* 4. 31. 37. *Idem* 120.

But ſuch things as lie not in Tenure, as a Rent, Bailiwick, or Stewardſhip, Commons or Advowſons in groſs, which are incorporate Hereditaments, out of which no Rent can iſſue, are not grantable by Copy; ſo the Lords Demeſns never let by Copy, are not grantable by Copy. And yet if in this caſe the Lord grant them by Copy, he himſelf cannot avoid the Grant, but it will be good againſt him for his life. *Quære* how he ſhall plead it, as Grant by Copy, or by Leaſe-parol.

Sect. 6. Parcel of the Manor.

2. The thing granted muſt be at the time of the Grant made, parcel of the Manor; otherwiſe the Grant will not be good. And therefore if the Lord make a Leaſe for years of the Reverſion of one of his Copihold-Tenements, this Tenement during this Term is no part of the Manor, and therefore cannot be granted by Copy in the Lords Court. (*Quære* 1 *Inſt.* 325. *a. Plow. Com.* 103 *b.*) But this happily may be in time reunited to the Manor, and then grantable. But if a Feoffment be made with or without a Deed by the Lord of a Manor, of one Copihold-Tenement; by this the ſame is divided for ever from the Manor, and cannot be granted by Copy: And yet the Grant made before the ſeverance, is good. So if one grant his Manor, except one Acre, and after grant this Acre by Copy; this is not good, becauſe at the time of the Grant it was not parcel of the Manor, *Co. ſuper Lit.* 324, 325. Of *Copihold* 82. *Dyer* 281.

Demiſed or demiſable by Copy.

3. The thing granted muſt be demiſed, or demiſable time out of mind by Copy; (that is) it is either let by Copy at the preſent, or capable of being let by Copy; having been ſo let, and not by Leaſe, time out of mind. And if when it were laſt let, it was let by Copy, and be now come into the Lords hands, and he never let it for many years together by Deed or otherwiſe, this hindereth not but that it may be let by Copy.

And in this caſe it matters not how it came into the Lords hands, whether by Eſcheat or Forfeiture, or Surrender. And yet if the Lord purchaſe the Copihold of the Tenant, or it eſcheat, ſome have doubted if it be not extinct, and ſo not grantable again. (But upon little reaſon, as I conceive.) *Calthrop, fol.* 16. 86. 91. 90. *Idem* 55. *Co. ſuper Lit. f.* 58.

And

And if a Copiholder forfeit his Land by Waſte, and a Seiſure is awarded, but the Lord ſuffereth the Tenant to occupy the Land twenty years together, without receiving Rent, he may after grant it by Copy; but if after Seiſure awarded, a ſtranger, enter, diſſeiſe him, and make a Feoffment in Fee, and then the Lord re-enter, and grant it by Copy; this is not good by *Calthrop, fol.* 25. *Quere* for a diſſeiſing, and Feoffment, cannot alter the nature of the Land.

If a man will overthrow a Copihold Eſtate, under pretence that it hath been let by Indenture, or otherwiſe then by Copy, he muſt ſhew it to be within the time of mans memory: For if it hath been let by Copy for fifty or ſixty years, it will hardly be admitted to the contrary, *Calthrop, fol.* 19. 85.

The Heir of a Copiholder in Fee, hath before his Admiſſion, ſuch an Eſtate in the Land, that he may ſurrender it, or bring Treſpaſs; and if he die, his Heir ſhall have it by deſcent. *Dyer* 292. 302. *Co.* of *Copihold.* 4. 21.

8. In reſpect of the manner, and order of the *Grant*, and of *Grants, Surrenders.*

If a Copiholder ſurrender his Land, to the intent that a ſtranger may have a Rent out of it; this is not a good Copihold-Rent, by *Calthrop, fol.* 92.

No Copihold-Land can paſs from the Lord to his Tenant, nor from one Tenant to another, but by way of Grant, or Surrender in the Court of the Mannor, according to the cuſtom of the place; and as touching this point, theſe things are to be known.

Preſentments, and *Admittances.*

1. In ſome Grants a Surrender is ſufficient without Preſentment, or Admittance; in ſome an Admittance without a Surrender, or Preſentment; in ſome a Surrender and Admittance, are both neceſſary, and in ſome a Surrender Preſentment, and Admittance are all neceſſary. As if the Copi-holder Surrender to the Lords uſe, there needs no Admittance: And if a Lord make a voluntary Grant of a Copihold in his hands, no Surrender is needful, but Admittance onely. If the Copiholder ſurrender in Court to the uſe of a ſtranger; beſides the Surrender, Admittance is requiſit. And if the Surrender be made out of Court, to the Lord himſelf, which the general Cuſtom will Warrant, or into the hands of the Bailiff, or of two of the Tenants (which by ſpecial Cuſtom onely is warrantable.) In this caſe there muſt be, beſides the Surrender, a true Preſentment of the Surrender in Court, by the ſame perſons, into whoſe hands the Surrender was made, and an Admittance of the Lord, according to the effect of the Surrender, and Preſentment. *Co.* of *Copihold. Sect.* 38.

2. A Grant may be of Copihold-Land in Fee-ſimple, Fee-tail, for life, or years, in Poſſeſſion or Reverſion, as the Cuſtom expreſly, or interpretatively will warrant it, *Co.* of *Copihold. Sect.* 47. But the Lord without a cuſtom, cannot grant a Copihold in Reverſion. 15 *Car. B. R.*

3. If the Lord having Copihold-Land in his hand, grant it by Deed, or Iſſue, to hold at Will, according to the Cuſtom of the Mannor; this is not good to make a Copihold-Eſtate. *Calthrop, fol.* 47.

Ancient Rent.

4. In all good Grants of Copihold-Eſtates, it ſeems the Antient-Rent muſt be reſerved, not onely in quantity, but in all beneficial qualities: And therefore it is held, That if the Antient-Rent were in Gold, and the new be in Silver; or the old were payable at four days, and the new be payable at two days: Theſe are not good Copihold Grants. But this it ſeems is to be underſtood of Copiholds of Inheritances, and Admittances into them. *Co.* of *Copiholds, fol.* 109, 110. *Calthrop, fol.* 88, 89, 81.

Sect. 7. *Surrender.*

A Surrender is the giving up of the Land by the Tenant to the Lord, according to the Cuſtom: And this is entred in this manner, *Ad hanc curiam venit* A *de* B. *& ſurſum reddidit in eadem curia unum Meſuagium, & in manus domini ad uſum* C. *de* D. *& hæredum ſuorum (vel hæredum de corpore ſuo exeuntium,) vel pro termino vitæ ſuæ, &c. Et ſuper hoc venit prædictus* C. *de* D. *& cepit de domino in eadem curia Meſuagium prædictum, &c. Habendum & Tenendum ſibi & hæredibus ſuis (vel ſibi & hæredibus de corpore ſuo exeuntibus, vel ſibi ad terminum vitæ, &c.) ad voluntatem domini ſecundum conſuetudinem manerii, faciendo & reddendo inde redditus, ſervitia & conſuetudines, inde prius debita, & conſueta, & dat' domino pro fine, &c. & fecit domino fidelitatem, &c.* Herein are many things to be known.

1. This may be Abſolute, or upon Condition; and it may be rendring Rent on condition of Re-entry for not payment. *Co.*4. 21, 30. And if he enter for the Condition broken, it is in him as at the firſt, without Admiſſion.

Cuſtom. 2. It may be to the Lord himſelf, or his Steward, or his Tenants, or his Reeve, or his Bailiff, as the cuſtom is. And it may be to the Lord out of Court, but it cannot be to the Steward out of Court, without a ſpecial Cuſtom to enable it. *Mich.* 37, 38 *Eliz. Brights* caſe.

3. It is in ſome Caſes neceſſary, and in ſome Caſes not. See for this afterwards.

4. When it is neceſſary, it muſt be made,

Firſt, By a Copiholder, and Admiſſion, otherwiſe it will not help.

Secondly, It muſt be made to the Lord, that can make Copihold-Eſtates, or ſome other to his uſe, as the Cuſtom is.

Thirdly, If it be out of Court, it muſt be preſented at the next Court according to Cuſtom.

Fourthly, The Lord muſt admit accordingly, or elſe (as ſome ſay) the Surrender is void. *Kitch.*82. 60. *Co.*4. 27. *Co.* 1 *part.* 61, 62. *Calthrop f.*97.

Words of *Surrender.* Fifthly, This cannot well be made by any other word, but by the word *Surrender*, and therefore if it paſs in the Court by the word, give, grant, bargain, or ſell; this will not paſs it, but the Heir of the Copiholder may avoid it. *Co.* of *Copihold* 103. And yet if a Copiholder come into the Court, and deſire the Lord to admit his Son into his Copihold; ſome think this is a good Surrender to the uſe of his Son. *Calthrop, fol.*57. But if the Tenant come to the Lord, and tell him that he is willing for his Sons preferment, that he ſhall have his Land preſently, and deſire the Lords agreement; who doth ſo, it is ſaid this is no good Surrender. And yet if the Homage do after preſent it for a Surrender, it is more queſtionable. *Calthrop, f.* 59. If a Copiholder in the preſence of other Copiholders of the Mannor, ſay, He is content to ſurrender his Copihold to the uſe of *J. S.* This is not a good Surrender. But if he ſay he doth ſurrender into the hands of the Lord, to the uſe of *J. S.* if the Lord will thereunto agree; this is a good Surrender, whether the Lord will or not. So if the Tenant reſign his Intereſt in the Court, into the Lords hands therewithal, for him to do what he will; it ſeems that this is a good Surrender. If the Copiholder ſay in the Court, he will be no longer Tenant to the Lord, and this be recorded; this is no Surrender. If a Copiholder for life, take a new Eſtate for life; this is a Surrender of his firſt Eſtate for life, but if the ſecond be by Deed. *Quere Calthrop, fol.*59.

Attorney. 5. A Surrender may be made of a Copihold, by Attorney, if there be no Cuſtom in the place againſt it; it is not of neceſſity that the Copiholder be preſent in Court. But if this power be by ſpecial Cuſtom, it cannot be done by Attorney: As if a Copiholder have a power to make a Leaſe for twenty years after his death; or an Infant *Infant.* have power to make a Leaſe at years of diſcretion, or a man may Surrender out of Court to the Tenants: Theſe things cannot be done by Attorney. *Co.* of *Copihold*, 93. *Co.*9. 76.

6. If a Copiholder in Fee, Surrender to the uſe of himſelf for life, and after to the uſe of *R.* his Son for life, and after to the uſe of his laſt Will; this is a good Surrender, and the Eſtate may be made accordingly. *Co.*4. 23. But a Surrender after a mans death, to the uſe of a mans laſt Will, is not good. If a Copiholder in Fee, Surrender to the intent that the Lord ſhall re-grant to him for his life, the Remainder to his Wife, till his Son come to one and twenty years of age, and after to his Son in Tail; this is a good Surrender, and is to be executed accordingly. *Dyer* 251. And *Jointenants.* if two Joyntenants be, and one ſurrender his part out of Court, into the Lords hands to the uſe of his laſt Will, and by his Will deviſeth his part to a ſtranger in Fee, and die, and at the next Court this is preſented; this is a good Surrender, and by this the Joynture is ſevered, *Co.* 1 *part.* 59.

7. If a Surrender be to the Lord generally, without ſaying to whoſe uſe, it is good enough, *Kytch.* 81.

8. If the Copiholder Surrender to the uſe of another, and the Lord grant it to the *Ceſtuy que uſe* not naming the Surrender; this is good enough by *Calthrop, f.*99.

9. In

9. In a Surrender it matters not, whether the Partee to whoſe it be, be preciſely expreſſed, if by any circumſtance he may be known: And therefore a Surrender to the Archbiſhop of *Canterbury*, Major of *London*, next of his Kin, or next of his Blood, his Brother, his Siſter, or his Son may be good, and it may be made certain by Averment. So if it be to a mans Wife without warning of her, or to the high Sheriff of *Norfolk*: But a Surrender to the uſe of ones Couſin or Friend, is void for incertainty; ſo if it be to the uſe of three or four of *Dale*, or to the uſe of *A. B.* or *C. D. Co.* 4. 29. of *Copihold* 96. *Incertainty.*

10. The Surrender bindes the Land immediately, ſo as the Lord cannot avoid, or prevent the intention, nor prejudice him, that is to have it, by any act that he can do: And yet it is rather a manifeſting of the parties intention, then the paſſing of an Intereſt. For till Admittance, the Surrenderer is Tenant to the Land, and ſhall receive the profits to his own uſe, and he muſt perform the Services: And yet he cannot paſs the Land to any other, or make it ſubject to any incumbrance of his; nor hath the Grantee any intereſt to puniſh Treſpaſs, Surrender, *&c.* And yet he cannot be defeated of it; and he may compel the Lord to admit him, *Co.* 4. 26, 29. of *Copihold, fol.* 106. If I make a Surrender to the Lord *Ea intentione*, that he ſhall grant the Land to *J. S.* and the Lord refuſe to grant it accordingly; in this caſe I may re-enter upon the Lord: But *J. S.* hath no remedy, as in caſe where the Surrender is made to the uſe of *J. S.* by *Calthrop. f.* 61. *Sect.* 8. The operation of a *Surrender.*

11. A Surrender is not Countermandable by the Surrenderer; and yet if a Copiholder languiſhing in extremity, ſurrendreth his Land out of Court to the uſe of his Couſin, in conſideration of Blood, or to the uſe of his Son in conſideration of natural love, and after recover before Preſentment; happily this may be revoked. But if it be upon good conſideration, as for payment of debts, and for any ſum of money paid; though it be made out of Court, yet it is as binding, as if it were made in the Court. *Co.* of *Copihold, f.* 106. *Countermand.*

The Preſentment made out of Court, muſt be afterwards duly preſented at the Court, according to the Cuſtom of the Manor, in which theſe things are to be known. *Preſentment.*

1. This Preſentment is the Information of men, ſworn to the Lord or Steward, touching ſome things done out of Court.

2. This is either general, *viz.* of all things, and by the whole homage; or it is ſpecial, *viz.* by ſome Tenants, or of one, or ſome things onely.

3. This by the General Cuſtom, is to be made the next Court after the Surrender, but by the Cuſtom of ſome Manors, may be the ſecond or third Court after the Surrender; and if it be not then preſented according to the Cuſtom, it is void. *Co. 1 part. 61, 62.* *Cuſtom.*

4. This alſo muſt be made in all things according to the Surrender, otherwiſe it is not good: And therefore if the Surrender be Conditional, and the Preſentment abſolute, all is nought; and yet if the Surrender be rightly preſented, and the Entry of the Condition be omitted by the Steward, this upon proof may be holpen. *Co. 1 part. 61, 62.* of *Copihold, f.* 107.

5. No death will hurt the Preſentment, and therefore if the Surrenderer die, yet the Preſentment may be made after his death: And if he to whoſe uſe the Surrender is made, die before Preſentment, the Preſentment may be made thereof after his death; and thereupon his Heir ſhall be admitted. So if *J. S.* Surrender to the uſe of *A.* for life, the Remainder to *B.* and *J.* S. die, and *A.* die before the Preſentment made, and after the Preſentment is made; in this caſe he in Remainder ſhall be admitted. So if two Surrender to the uſe of two joyntly, and one of them die before Preſentment; in this caſe the other ſhall be admitted to the whole. So likewiſe if the Tenants that take the Surrender, die, the Lord may notwithſtanding upon the proof of it, take in the Tenant by Admittance. *Co.* 4. 39. of *Copihold. Sect.* 40. *fol.* 107. *Co.* 4. 28, 29. And yet if a Surrender be made to the Lord in the preſence of Tenants out of Court, and there the Lord doth grant it, but he dieth before this is preſented, or the Tenant admitted; this it ſeemeth is not good. *Calthrop, fol.* 46.

Admittance upon Grant or Surrender.

To the Perfection of the Copiholders Eſtate, admiſſion, as that without which no Eſtate paſſeth by the Surrender, is neceſſary; as touching which, theſe things are to be known.

1. This is the receiving of the Tenant into the Copihold by the Lord, or his Steward, according to the Cuſtom of the place; and it is thus entred, *Ad hanc curiam* J. S. *petit admitti, &c. Quem dominus per ſeneſchallum admiſſit, & unde admiſſus eſt tenens. Co.* of *Copihold, f.*125. *Calth. f.*62.

2. Some make it expreſs, and implied, (*i.*) by acceptance of Rent, *&c. Calth. f.*62. It is alſo either upon a voluntary Grant or Surrender, or upon a Deſcent. *Co.*1. 140.

3. It is a Judicial Act of the Lords, and in caſe of a voluntary Admittance, he is but an Inſtrument, and may be compelled according to the Cuſtom to do it; for he is not eſteemed as owner to any purpoſe, and therefore he cannot prejudice the Surrender in any caſe: And therefore as to this Act, the Lords Title to the Manor, whether he hath it by right or wrong, is not much conſiderable. *Co.* of *Copihold, f.*110.

4. This is neceſſary, for upon voluntary Grants and Surrenders, the Tenant hath nothing in the Land till Admittance, and upon Deſcents he is not perfect Tenant till his Admittance. *Co.* of *Copihold, f.*112, 113. Yet in this caſe of a Surrender to the Lords uſe, no Admittance is needful; and where there is an implicite Admittance, there needs no Expreſs Admittance: And where Tenant in poſſeſſion is admitted, he in the Remainder on the ſame Copy, need not to be admitted; and yet the Heirs of a Copartner muſt be admitted into a moyety, *Calth. f.*63, 64. And he that enters for a Condition broken, needs no Admittance. *Calth. f.*61. If a Copiholder for years, die, the Executor needs not be admitted, ſo neither the Husband of the Wife, Copiholder for years after her death, *Calth f.*95.

5. The Steward it is ſaid, may do it out of Court any where within the Manor, except there be any Cuſtom againſt it. *Kitch.*82. *Co.* of *Copihold, f.*123.

Sect. 9.

6. The Admiſſion muſt purſue the Surrender; yet in ſome caſes albeit it do differ from it, it is good enough; and therefore if the Surrender be to the uſe of *J. S.* for life, or to the uſe of *J. S.* generally, and the Lord doth admit him in Fee; this is a good Admittance for his life onely. And yet if the Surrender be on Condition, and the Lord omit the Condition, it is all void, *Co.* of *Copihold, f.*112. So if the Surrender be to the uſe of *J. D.* alone, and the new Grant and Admittance are to *J. D.* and *J. B.* This is good for *J. D* and void for *J. B. Co.* of *Copihold, f.*111, 112. So if the Surrender be reſerving ten ſhillings and the Admittance be reſerving twenty ſhillings, it is good for the ten ſhillings. But if the Surrender be reſerving twenty ſhillings, and the Admittance reſerving ten ſhillings, it is all naught; the contrary ſeems to be deduced from the caſe of *Weſtwick*, 4. *Rep.* 28. *a, b.* So if the Surrender be to the uſe of *J. S.* and the Lord admit *J. G.* and after admit *J. S.* It is ſaid in this caſe *J. S.* and *J. G.* ſhall have the Land together. But if the Surrender be to the uſe of *J. S.* alone, and the Lord admit *J. G.* alone; this is all void. *Co.*4. 28. of *Copihold, f.*111. If the Surrender be to the uſe of *A.* for life, the Remainder to *B.* and *A* is admitted; this is good for him in Remainder, *Co.*4. 23, 24.

Rent.

7. The Admiſſion muſt be according to the Cuſtom, yet if the Cuſtom will warrant the Womans eſtate *durante viduitate* onely, and the Lord admit for life, or the Lord admit not reſerving the Antient Rent in quantity or quality; this will not prejudice the Heir, but that he may avoid it. *Co.* of *Copihold, f.*109.

8. Admittance cannot make a bad Eſtate good, nor change the Cuſtom. *Kitch.* 82. 86. See more of this after at *Fine. Numb.*9. 10.

Upon a Deſcent.

The Heir of a Copiholder in Fee hath ſuch a Poſſeſſion, and is ſuch a Tenant before Admittance, that he may (paying the Lord his Fine, which may be afterwards) enter, take the profits, Surrender, or bring an Action of Treſpaſs; and if he die, the Heir ſhall have the Land, and there ſhall be a *poſſeſſio fratris* upon his Entry. And yet it hath been doubted, if a Copihold diſcend to a Feme-Covert, and the Husband take the profits, but ſuffer a Court day to paſs without Admittance, whether he ſhall be Tenant by the Courteſie, or not. *Dyer* 291, 292. *Calth.*60. But in Admittances upon a Grant, or Surrender; as if one Surrender to the Lord to the uſe of *J. S.* and the Lord grant it accordingly, it is otherwiſe; for there the Tenant hath nothing till Admit-

Admittance. But the Heir of a Copiholder ſhall not be ſworn of the Homage, nor bring a Plaint in the nature of an Aſſize, till Admittance. So that an Admittance in this caſe, is rather for the benefit of the Lord to help him to his Fine, then to ſtrengthen the Title of the Heir: But the Heir is in moſt places bound, under pain of Forfeiture of his Eſtate, or ſome other great penalty to be admitted, and therefore he muſt be admitted. *Co.* 4. 23. *Dyer* 291. *Co.* of *Copihold*, *f* 113, 114, 117. *Calth. f.* 62.

9. Upon every Admittance there is fealty due to the party admitting, by the party admitted; a thing inſeparable to the perſon, which cannot be done by deputy; and yet if the Lord will accept it, or diſpence with it altogether, it is will enough. *Co.* of *Copihold*, *f.* 95. 10. There is alſo a Fine due upon every Admittance: See after.

There is in moſt places a Ceremony uſed in the paſſing of the Lands; in ſome places there is the giving and taking of a Turff, and a Twig; in ſome places the giving and taking of a Glove; in ſome places the giving and taking of a Straw; in ſome places the giving and taking of the Hand; but in moſt places the Ceremony is by giving and taking of a Rod: And albeit the Grant, or Surrender may be good without this Ceremony, yet it is not ſafe to omit this. This the Copiholder that doth ſurrender, doth uſe to give to the Steward, or Bailiff, to deliver over to the party, to whoſe uſe the Surrender is made in the name of ſeiſing; and herein, *Conſuetudo loci eſt obſervanda.*

How *Grants* and *Surrenders* ſhall be taken.

1. If a Surrender be made to the Lord in general, without expreſſing to what uſe, it ſhall be taken to the Lords uſe, *Kitch.* 81.

2. The ſame conſtruction (for the moſt part) which the Law maketh upon words in a Deed, it will make upon a Copy; and therefore it is, that a Copihold Eſtate made to one, and his Heirs-males, or Heirs-females, is accounted a Fee-ſimple, though it be otherwiſe in the Kings Grant, *Co.* 4. 29. of *Copihold*, *f.* 139. So of a Grant to one *& ſanguini ſuo hereditabili*, or to a Major, or Commonalty, or other Corporation, where no eſtate is named. So if I Surrender to one and his Heirs, and he reciting this, doth ſurrender it to my uſe in the ſame manner as I ſurrendred to him. So if I ſurrender to *J. S.* as large an eſtate as he hath in the Manor of *Dale*, and he hath a Fee-ſimple in that Manor; in all theſe caſes, the Law will conſtrue it to be a Fee-ſimple, *Co* 4. 29. of *Copihold*, *f.* 139. *Fee-ſimple.*

If a Copihold be ſurrendred to a man *& femini ſuo hereditabili de corpore*, or to a man *& heredibus ex ipſo procreatis*, or to a man in frank-marriage with his Wife; in the firſt of theſe caſes, an Eſtate-Tail paſſeth without the word Heirs, in the ſecond without the word Body, and in the third without either, *Co.* 4. 29. of *Copihold*, *f.* 139. *Fee-tail.*

If a Copihold be granted to man in a Fee-ſimple, or to a man *& ſanguini ſuo imperpetuum*, or *ſibi & aſſignatis ſuis imperpetuum*, without the word Heirs, that is onely an Eſtate for life. So if ſuch a Grant had been to an Abbot, and his Heirs; ſo to *J. S.* and his Heirs, ſo long as *J. D.* ſhall live. And yet if the Grant be to *J. S.* and his Heirs, ſo long as ſuch a Tree ſhall grow in ſuch a ground, this ſhall be a Fee-ſimple. *Co.* as before. *Sect.* 10.

If this Land be granted to two men *& heredibus* without *ſuis*; by this no Inheritance is made, and they are Joyntenants for life onely; yet if it be granted to *J. S. & heredibus* without *ſuis*, hereby *J. S.* hath a Fee-ſimple, and not an Eſtate-tail. And if it be granted to a man *& liberis, aut pueris ſuis de corpore*; this is no Eſtate-tail for lack of the word Heirs. *Co.* as before. *Joyntenants.*

If the Grant be to a man, and the Iſſues-males of his Body; by this is made an Eſtate for life.

If this Land be granted to three *habendum ſucceſſivè*; by this they are Joyntenants, and ſhall take together, unleſs the Cuſtom (as in moſt places it doth) do otherwiſe conſtrue it. *Co.* as before.

If there be Copiholder for life, the Remainder to another in Fee, and the Copiholder for life, doth ſurrender to the uſe of another in Fee, and the Lord admit accordingly; by this there paſſeth an Eſtate for life onely. *Co.* of *Copihold*, *f.* 91. So if the Surrender be to the uſe of a ſtranger for life, and the Lord grant in Fee; this

is

is good for life onely, *Calth. f.* 61. So if the Lord grant a Copihold for life, where an Eſtate in Fee is warrantable; and this Grantee doth ſurrender in Fee, to the uſe of a ſtranger, and the Lord admit him accordingly; by this it is ſaid the Fee doth not paſs, *Co.* of *Copihold, f.* 91. If the Surrender be to the uſe of the laſt Will, and the Surrender deviſeth it to two, and one of them onely is admitted according to the Will; by this both of them ſhall have it, *Co.* of *Copihold, f.* 98.

If one Copihold be between two Joyntenants in Fee, and one of them ſurrender his part out of Court to the Lord according to the Cuſtom, to the uſe of his laſt Will, by which he doth deviſe it to the uſe of a ſtranger in Fee, and dieth; and this is preſented at the next Court, hereby the Joynture is ſevered, and the Deviſee muſt be admitted to a moyety of the Lands, *Co. ſuper Littl.* 59.

Deſcent. If a Copiholder ſurrender to the uſe of his Wife for life, the Remainder to the right Heirs of the Husband and Wife, the Wife dies, and the Husband doth ſurvive; in this caſe, if he hath no Iſſue by his Wife, his Heir ſhall have it, by the opinion of *Calthrop, f.* 82. And yet if the Wife hath Iſſue by another Husband, it is doubted, and it is ſaid, That the Husband and the Heirs ſhall have the Land; yet if the Husband had firſt two Sons, the Heirs of the Husband, and Heirs of the Wife, ſhall have the Land in Common after the deceaſe of the Wife, *Calth. f.* 83.

If Land be given for life, the Remainder to two men and their Heirs, in this caſe they cannot have one Heir; and therefore if the Tenant of life, die before them in Remainder, they ſhall be Joyntenants. But if neither of them be alive when the Tenant for life dies, then the Heirs of them in Remainder, ſhall hold in Common. *Calth f.* 84.

If a Copihold be ſurrendred to the uſe of *J. S.* and his Heirs, till he marry *A. G.* and then to the uſe of them two in ſpecial Tail; this is good, and ſhall enure accordingly. *Calth f.* 22.

If a Copiholder ſurrender to the uſe of a ſtranger, in conſideration that the ſtranger ſhall marry his Daughter before ſuch a day; in this caſe, if the marriage ſucceeds not, the ſtranger ſhall take nothing by the Surrender. But if the conſideration be, that the ſtranger ſhall pay ſuch a ſum of money, at ſuch a day; albeit the money be not paid, yet the Surrender is good. *Calth. f.* 37.

If the Copiholder in conſideration of twenty pound to be paid by *J. S.* doth make a Surrender of his Land to *N. R.* This Surrender ſhall be to the uſe of *J. S.* and not to the uſe of *N. R.* But if in the Copy the uſe be expreſſed to *N. R.* and no conſideration mentioned, the uſe expreſſed ſhall ſtand againſt any Conſideration to be averred. *Calth. f.* 37.

If a Copiholder ſurrender his Land to the uſe of *J. S.* ſo that *J. S.* pay twenty pound at ſuch a day, if he pleaſe; this is an abſolute, not a conditional Surrender, *Calth. f.* 39.

9. In reſpect of the payment of the *Fine*, and of a *Fine*. The payment of the Fine by the Tenant, is neceſſary to the continuance, but not to the creation of the Eſtate, for the Eſtate is made perfect without the Fine payment: But for the more full underſtanding hereof, theſe things are to be known.

1. A Fine is a ſum of money to be paid of Common-right to the Lord for an In-come into the Lands; and this is ſometimes by the change, or alteration of the Lord, and ſometimes by the change of the Tenant, the change of the Lord cannot produce a Fine, except it be by the act of God; but by the change of the Tenant, be it either by the act of God, or by the act of the party a Fine may be due.

2. This in ſome places is certain, and in other places incertain; and where it is certain, the Lord cannot increaſe it, and where it is incertain, yet it muſt be reaſonable.

Cuſtom. Admittances. 3. By general Cuſtom this is to be paid onely upon Admittances, but it may be alſo by ſpecial Cuſtom upon Licences granted to Demiſe by Indenture.

4. The Fine is to be paid upon Admittances, in theſe caſes following, *viz.* Where the Lord after a Copihold come into his hands, and he make a voluntary Admittance; and where a Copiholder doth Surrender to the uſe of a ſtranger, and the Lord doth admit

admit him, to whoſe uſe the Surrender is made, and where a Copihold of Inheritance deſcendeth, and the Heir is to be admitted: So where the Wife is to come in as Tenant in Dower, or the Husband as Tenant by the Courteſie: And ſo alſo, where one doth enter as a general, or ſpecial Occupant. And ſo alſo where the Copihold-Lands of a Bankrupt are to be ſold upon the Statute of the 13 *Eliz.* 1. In all theſe caſes the Tenant is to be admitted and to pay a Fine. So alſo if a Copihold be ſurrendred to the uſe of one for life, the Remainder to the uſe of another, and the Tenant for life die, he in Remainder muſt pay Fine upon his Admittance; ſo where the *habendum* of the Grant is ſucceſſive, and one of them die, the next muſt be admitted, and pay Fine.

So if two Copartners or Tenants in Common be, and one die, and the whole deſcend to the other, there muſt be Fine upon the Admittance. But if there be two Joyntenants, and one of them die, and the other come to the whole by Survivorſhip, or one take a Wife, a Copiholder in Fee, or marry with the Termer of a Copiholder, or a Copiholder be diſſeiſed, or then enter upon the Diſſeiſor, or recover by Plaint in the nature of an Aſſize; or a Copiholder in Fee, ſurrender for life, reſerving the Reverſion, and the Leſſee for life dieth; or a Copihold be granted on Condition, and the Condition is broken, and the Granter re-entreth; or the Lord enter upon a Villain that hath purchaſed a Copihold; or the Bailiff is by Cuſtom to have the Wardſhip of an Infant: In all theſe caſes there needs no Admittance, and therefore no Fine is to be paid. *Sect.* 11.

And yet if a Copiholder die ſeized, and a ſtranger abateth, and the Heir recovereth by Plaint, in the nature of an Aſſize of *Mort Danceſter*; upon this Recovery an Admittance is to be made, and therefore a Fine is to be made. *Co.* of *Copihold*, *Sect.* 56. *in toto.* The reaſonableneſs or unreaſonableneſs of the Fine muſt be ſet down and determined by the Judges, and not by a Jury; and therefore if it be unreaſonable, it muſt be ſet forth in the pleading by the Tenant, *Hobbard. pl.* 179.

5. The Lord muſt demand his Fine, as he muſt his Rent, at the time, or after it doth become due before any forfeiture can be, *Hobbard. pl.* 180.

6. If the Lord uſe to take for his Fine, ſometimes two pence, ſometimes four pence, ſometimes ſix pence an Acre; this is ſo uncertain, that it ſhall be ſaid to be Arbitrary, *Calthrop, f.* 25.

The Steward of the Court muſt take care to Record, and Inrol all the Conveyance of Eſtates; for ſome have held, That if the Lord in open Court grant a Copihold-Eſtate, and no Entry is made hereof in the Court Rolls; that the Grant is not good, and that no Collateral proof will make it good. *Calthrop. f.* 47. But if the Tenant have no Copy, or loſe his Copy, the Roll of the Court is a good Evidence. And if theſe Rolls be loſt, it is thought clearly it may be ſupplied by proof, *Calth. f.* 47. 10. In reſpect of *Entry* in the *Rolls* of the Court.

And yet if By-laws be made and entred on the Rolls, and the Rolls be loſt, the By-laws are gone, otherwiſe it is of Cuſtoms and Priviledges, inrolled and loſt. *Idem.* *By-Laws.* *Cuſtoms.*

That the Grant made by Copy of Court Roll may be good, it muſt be made according to the Cuſtom of the Mannor, and that Cuſtom muſt be according to Law: but as touching Cuſtoms, theſe things are to be known. 11. In reſpect of *Cuſtom*, and of *Cuſtoms*.

1. A Cuſtom is a Law, or Right not written, which being eſtabliſhed by long uſe, and the conſent of our Anceſtors hath been, and is daily practiſed. *Cuſtom.* What.

2. Though Cuſtom, Preſcription, Uſage, and Limitation, be much of Affinity, and one of them be taken for another, yet they differ much: For

1. Cuſtom can have no beginning ſince mans memory, but Preſcription may. *Preſcription.*

2. Cuſtom toucheth many men in Common, that they by continuance of time have gotten a Right; and this is alleaged thus, That in ſuch a place is ſuch a Cuſtom, but Preſcription toucheth this or that man, when he by continuance of time hath obtained a Right againſt another man; and this is Perſonal, and alleaged in the name of ſome perſon in Certain, thus. That he and his Anceſtors, and thoſe whoſe Eſtates he hath time out of minde, *&c.*

3. Uſage

Vſage. 3. Uſage is the Efficient cauſe, or life of both, for both loſe their being, if Uſage fail. *Calthrop. f.* 17. *Co.* of *Copihold, Sect.* 33.

Limitation. 4. Limitation is where a Right may be obtained by reaſon of a Non-claim, by the ſpace of a certain number of years, differing in account of time from Cuſtom and Preſcription.

1. The meaſure whereof is ſo long, as mans memory cannot remember the contrary, that is, That no man alive hath heard, or knoweth any thing to the contrary. But Limitation hath a certain time of beginning and end.

2. Cuſtoms are either general, as which is part of the Common Law uſed in all places alike; or particular, which are uſed onely in ſome places; as in *Kent*, *North-Wales*, *Gavelkinde*, *Burrough-Engliſh*. And theſe again are either diſallowing what general Cuſtoms do allow: As that the Copiholder ſhall not ſell his Land to a ſtranger, and compel the Lord to admit him, till he hath firſt offered it to the next of blood, or the next of kin, or next neighbor *ab oriente ſolis*; who giving as much as the party to whom the ſurrender is made, ſhall have it: Or elſe they be ſuch as do allow what general Cuſtoms do diſallow. As for a Copiholder to let his Land by Deed for longer time then a year without Licence, which by the Cuſtom of ſome Mannors he may do. *Conſuetudo ex certa cauſa rationabili uſitata privat Communem legem. Co.* of *Copihold. Sect.* 33.

Sect. 12. 3. To know what Cuſtoms are good, and what not, theſe Rules muſt firſt be taken.

Firſt, Cuſtoms and Preſcriptions muſt be reaſonable, 2 *Ed.* 4. 24.

Secondly, They muſt be according to Common Right, 42 *Ed.* 3. 4.

Thirdly, They muſt be upon good conſideration, 5 *Hen.* 7. 9.

Fourthly, They muſt be compulſary, not voluntary, 42 *Ed.* 3. *Avowry* 66.

Fifthly, They muſt be certain. 13 *Ed.* 3. 4.

Sixthly, They muſt be beneficial to them that claim them, 31 *Ed.* 3. *Preſcription* 40. 28.

Seventhly, It cannot help a man to that which is gained onely by matter of Record.

Eightly, It cannot extend to a thing newly created.

Ninthly, They need not be uſed daily and hourly, but according to time and occaſion. *Calthrop, f.* 22. 21.

Tenthly, *Non uſer*, as if the Lord hath been uſed to have Work-days, and have not had them for twenty years together; this will not hurt the Cuſtom. *Calthrop, f.* 25.

Eleventhly, Cuſtom may oppoſe the Common Law, but not a Statute Law. *Calthrop. f.* 87.

Hence it is, that theſe following Cuſtoms are not allowed to be good, *viz.* That no Tenant ſhall uſe his Common by putting in of his Cattle in *Campis ſeminatis*, after ſeverance of the Corn, till the Lord put in his Cattle; for he may chuſe, if he will, to put in at all.

To have a Fine for a *Treſpaſs*, or other *Cauſe*. That if any mans Beaſts be taken Damage-Feſant on the Lords Demeans, he may keep them till the owner give him ſuch as he ſhall pleaſe; for this is to make him Judg in his own caſe: And if the Cuſtom be, that if the Copiholder Treſpaſs him, and it be preſented at Court, that this ſhall be a forfeiture is good. *Calthrop. fol.* 29.

That every Copiholder ſhall pay the Lord a certain ſum of money for every Court he keeps; or that he ſhall never keep a Court, till when it pleaſe him; for this Court being to do Juſtice, muſt be *gratis*. And yet ſuch a Cuſtom alleaged to be for the keeping of an extraordinary Court, is good.

That every ſtranger that ſhall make a pound breach, ſhall pay one pound; and yet it is held, that a Cuſtom laid, that every Tenant that ſhall make a pound breach, ſhall forfeit five pounds. *Calthrop. f.* 31.

That every one that rides through the Kings High-way, within the Mannor, muſt pay the Lord ſuch a ſum of money. And yet if it be, that every one that paſſeth over ſuch a Bridg within the Mannor, which the Lord doth maintain; it is good enough.

That

That every Copi-holder that doth marry, or ſhall marry his Daughter, ſhall pay ſo much to the Lord for a Fine; and yet where the Cuſtom doth admit the Husband Tenant by the Courteſie, and Wife to be Tenant in Dower, or to have Widows eſtate of the Copihold; that in theſe Caſes they ſhall pay a Fine, is a good Cuſtom.

That every Copi-holder ſhall hold his Land, without paying any Rent, or Service to his Lord. And yet it is held a good Cuſtom to preſcribe by Fealty, for all manner of Services is held good. *Calthrop, f.* 29. So a Cuſtom may be good to exempt one Tenant from that, which all the reſt of the Tenants do bear, and good. *Calthrop, f.* 77.

That every Copiholder ſhall give to the Lord, ſo much in the time of War, every moneth to bear his charges: And yet if it be that he ſhall pay ſo much to the Lord, for this purpoſe it is good; the reaſon of the difference is, becauſe a payment is Compulſory, a Gift voluntary. *Incertainty.*

That when one Copiholder dieth, another of the Copiholders (and ſay not which) ſhall hold the Land for the year following: And yet if it be, that if a Copiholder die without Heir, the eldeſt Tenant of that name within the Manor ſhall have the Land; this is good. *Calthrop, f.* 31.

A Cuſtom, that if any Copiholder commit Felony, and it be preſented by the Homage, that the Lord may take and ſeiſe the Land, was ruled good. *Brownl.* 2 *part.* 217. See a Cuſtom, That a married Wife, Copiholder, might ſurrender to the uſe of her laſt Will, and after might deviſe to her Husband, was adjudged good. 24 *Eliz. Skegs* caſe. *Brown.* 3 *part.* 218.

That the Lord ſhall have for his Fine, two pence Rent an Acre, and when he pleaſe, four pence an Acre: And yet happily if the Lord preſcribe to have two pence an Acre Rent, in time of peace, and four pence in time of War; this may be certain enough, and good. For *Fine.*

That a Copiholder ſhall cut down what Timber he pleaſeth, fire, pull down, or deſtroy the houſes, or let them fall; and yet happily a Cuſtom, that the Tenant ſhall have neceſſary Fire-boot, *&c.* That he may fell Under-woods and Shrouds; may be good. To do *Waſte.*

That every Tenant ſhall pay a Fine at every Alienation of the Lord: And yet if it be, that every Tenant ſhall pay a reaſonable Fine at the Lords death; or that a Fine ſhall be paid at every death, or alienation of the Tenant; or that the Lord ſhall admit without Fine; if the Uſage have been ſo. *Calthrop, fol.* 40. To pay a *Fine.*

That if the Copiholder do not repair, he ſhall be amerced, and it ſhall be levied by Diſtreſs, is a good Cuſtom; but that for this, he ſhall diſtrain any mans Cattle, beſides his own, upon the Land, is ſomewhat doubtful. *March* 161.

That the Copiholder may lop the Trees, growing upon his Copihold for neceſſary fire, and Reparations is good: And if he hath been uſed to do ſo, it is good, and he may do it without alleaging a ſpecial Cuſtom for it. *Brownl.* 1 *part.* 23 1. 87.

Theſe, and the like Cuſtoms as before are allowed to be good; but theſe following Cuſtoms are not diſallowed, *viz.*

That the Wife of a Copiholder ſhall during her life, or Widows Eſtate hold all the Land.

That the Tenant ſhall have Common in the Lords Waſtes.

That if he that hath Right, claim not the Land within a year, and a day after the Anceſtors death, he ſhall loſe it; and yet this will not binde an Infant. *Sect.* 13.

That the Lord may grant for one two or three lives in Reverſion.

That a Surrender may be made to the Bailiff, or Reeve, or two or more Tenants out of Court.

That the Surrender made by the Tenant in Tail, ſhall bar the Iſſue in Tail. To make *Surrender.*

That the Lord may keep his Court at another of the Manors.

That the Lords Steward, or Bailiff, may grant Copihold-Eſtates to the Tenants.

That a Feme-Covert may grant her Copihold-Eſtate to her Husband by Surrender.

That an Infant of years of diſcretion may Surrender.

That a new Tenant ſhall pay a Fine to the Lord, as he can agree upon his Admittance.

That Proclamation be made three Courts one after another; and if the Heir come not, and pay his Fine for Admittance, he ſhall loſe the Land. *M. 7 Jac. B. R. Lyfords* caſe.

That the Copiholder may let for longer time, then one year without Licenſe.

To *Surrender* out of Court. That an Inheritance ſhall paſs by Surrender in the Lords Court, without his leave, and be delivered over by the Bailiff to the Feoffee, according to the Deed to be inrolled in Court.

If the Lord preſcribe, that whoſoever take a Diſtreſs within his Manor, he muſt have him in his pound for a time; this is not good, for it is no benefit to him. But if he adde further, that the Lord is to have ſo much for the impounding, it is good.

To grant *Copihold Eſtates.* A Cuſtom to grant Copihold-Eſtates in Reverſion, is good; for without ſuch a Cuſtom, it ſeems Copiholds are not grantable in Reverſion. *March 6. pl.* 13.

Preſcription. The Lord may not preſcribe to have Felons Goods, Fugitives Goods, Deodands, becauſe they cannot be forfeit, till they appear of Record. But Waiffs, Eſtrayes, Wreck, and ſuch like things, may be gained to the Lord by Preſcription; for they may be gained by Uſage, without matter of Record.

That the Wife of the Copiholder ſhall be Tenant in Dower, Husband Tenant by the Courteſie (a *quere* may as well be made of this, as of Intailing Copiholds; ſince this Tenant by Elegit, *&c.* commenced by Statute, which is within the memory of man) or a ſtranger Tenant, by Statute merchant (and ſo no Cuſtom can be of it. *Co.* of *Copihold Sect.* 47.) or Staple of the Land in the hand of the Copiholder, are good Cuſtoms, *Co.* of *Copihold*, 136.

To make Leaſes. That the Tenant may make a Leaſe for twenty years after his death, is a good Cuſtom. *Co.* of *Copihold. f.* 93.

To pay Rent. That the Tenants ſhall pay the Lord every fourth year, the double Rent, and every ſixth year an half years Rent, is a good Cuſtom. So that when they ſow their Land, they ſhall pay their Rent in Corn, and when they feed it, in money, is a good Cuſtom. *Calthrop, f.* 25. *Goldsb. pl.* 8.

It is a good Cuſtom to Demiſe for longer time then a year, but without ſuch a Cuſtom, the Copiholder cannot let for longer time then for one year without Licence of the Lord, *Brownl.* 1 *part.* 133.

How they ſhall be taken. All Cuſtoms, eſpecially ſuch as are in derogation of the Common Law, are taken ſtrictly, but not literally. And therefore where a Cuſtom is, that a man may grant in Fee; by this he may grant in Tail, or for life: So where the Cuſtom is, that the Lord may grant for life, by this he may grant *Durante viduitate cui licet quod majus, non debet quod minus eſt non licere, ſed non è converſo.* But where the Cuſtom is, that the Wife of the firſt taker ſhall have her Widow-hood; by this the Wife of the ſecond ſhall not have it. *Co.* 4. 30. of *Copihold*, 70. 77.

To make Eſtates. If the Cuſtom be, that the Copihold-Land may be leaſed by the Lord, *Vel ſupervisor', vel deputat' ſupervisor'*, the Lord cannot by this Teſtament, appoint, authoriſe one to keep Courts, and make Eſtates. *Co.* 4. 30. of *Copihold, fol.* 35.

To pay Money. If there be a Cuſtom, that for every houſe in the Manor two ſhillings Fine ſhall be paid. If the Tenant maketh one houſe into two houſes, or maketh a new houſe, no Fine ſhall be paid for theſe new houſes.

Common. So if I have Eſtovers Appendant to my houſe, and I build a new houſe, I ſhall not have Eſtovers to this new houſe. But if I onely change the Rooms, my Eſtovers do continue.

So it is of a Water-courſe to a Fulling-Mill, converted to a Corn-Mill, or of a Light in an Hall converted to a Parlor. *Co.* 4. 32. *Littl. Sect.* 74.

Proof of it. The proof of theſe Cuſtoms and due preſident, as to prove Leaſes, may be made for longer time then a year, to ſhew one Leaſe, is no proof of a Cuſtom.

In

In Cuſtom there is *Uſer*. *Loſt.*

1. When according to time and occaſion it is uſed.

2. *Non Uſer*; *i.* When for want of time and occaſion, through negligence, or forgetfulneſs, it is not uſed; this will not hurt the Cuſtom: And therefore if there be a Cuſtom that the Tenants ſhall do work for the Lord yearly, and it hath not been done for divers years; yet the Cuſtom remaineth, if any man living can remember it hath been done. And ſo it is, if one have a Market one day a week, and do not keep it.

3. If the Tenant uſe to pay the Lord when they ſowe their Land, Rent-Corn, and when they feed it, money, or to pay the Lord every fourth year a double Rent, and every ſixth year an half Rent; this is a good Interuſer. For payment of *Rent*.

4. Abuſer is where the Tenant doth put in other Cattle, or more Cattle in the Lords Soil then he ought; this doth not deſtroy the Cuſtom, but this is finable at the Lords Court. And ſo it is, if the Lord hath a Fair or Market one day of the week, and he keep it another day; this is not a forfeiture of the Cuſtom. And yet if he hath it two days, and keep it three days; this is held to be a Forfeiture. *Calth. f.* 43, 44. See more to this in the next *Queſtion*.

For the clearing of this point, theſe things are to be known. 5. When and how a *Copihold* ſhall be ſaid to be deſtroyed or ſuſpended.

1. The Copihold is deſtroyed and gone in all theſe caſes following. *i.* When the Copihold is either by act of Law, or act of the Lord, or the Copiholder, or Tenant, become not demiſable by Copy: As for example, If the Lord by Fine, or Feoffment, or otherwiſe, by Deed grant the Reverſion of one, or ſome of the Copihold Tenements, of the Manor in Fee, or for Leaſe to me; by this it is gone. And in this caſe alſo it is ſo gone, that no Acceptance of Rent, or Admittance of the Tenant, after will revive it. But if the Lord grant the Reverſion of all his Copihold Tenements; by this the Manor is not deſtroyed. *Co.* 4. 27. of *Copihold*, *f.* 176.

Or, if when the Copihold is come into the Lords hand, he do by Fine, Feoffment, or Recovery, paſs away the Fee, or make a Leaſe for life, or years of the Land, or ſuffer it to be extended on a Statute, or Elegit of his own acknowledgment; or if after it come into the Lords hands he die, and if it be afterward aſſigned to his Wife in Dower; by this in theſe caſes, the Cuſtom is deſtroyed for this Land. *Co.* 2. 17. *Calth* 91. *Goldsb.* 206. *pl.* 246.

If one that hath a Manor of Copiholds, doth grant away one Copihold for life; it ſeems the Cuſtom is gone for this Copihold, *March.* 206. *pl.* 246. So if the Lord by Deed do grant and confirm to the Copiholder, his Eſtate by Copy is gone, *Brownl.* 1 *part.* 220. Or if the Lord or his Leſſee of the Manor, doth make Leaſe of the Copihold to the Copiholder, or make a Feoffment abſolute or conditional to the Copiholder of the Copihold; the which he doth accept. If the Lord make a Leaſe for years to the Copiholder himſelf; this doth determine the Copihold. But if he make a Leaſe for years to another, and he aſſign it to the Copiholder, it is doubted. *Goldsb.* 34. 9. *March* 206. *pl.* 246. *Goldsb.* 34. *pl.* 9. Or if the Lord make a Leaſe of the Manor to the Tenant for life, the Remainder to a ſtranger; by either of theſe alſo it is gone, *Dyer* 114. *Kitch.* 82. Or (as ſome ſay) if the Copihold come into the Lords hand by Eſcheat, or the Lord purchaſe the Copihold; but this opinion is diſallowed. *Calth.* 90. 88. 91. But if the Lord grant part of the Copiholds onely, by this it is clear the Manor is gone, and Cuſtom deſtroyed. Adjudged, 29 *Eliz. Calth.* 99. And where the Copihold is extinguiſhed, the Land can never be afterward granted by Copy. If there be a Leaſe for years of the Manor, and one of the Copiholders doth purchaſe the Reverſion in Fee; by this the Copihold is deſtroyed, and the Leſſee of the Manor ſhall out the Copiholder, and have the Land for the time. *Calth. f.* 97. And yet if the Copiholder accept a Leaſe for years of the Manor, or marry with the Wife of the Lord; by this the Copihold is not extinct, but it is ſuſpended. And if a Copihold be in hand, and the Lord alien by Fine, or Feoffment, or make a Leaſe of the Manor for years; by this it is extinct. *A.* was ſeized of a Manor in which were Copiholds, and he took to Wife *M.* and died ſeized, and ſhe ſued for Dower by the name of a hundred Meſuages, and one hundred Acres of Land, *&c.* and was endowed accordingly of part of the Demeſns, and part of the Copihold

Services; in this case it was adjudged, the Copihold was gone, at least, during her Estate, and that she could not grant Copihold Estates upon the Copihold Land: But perhaps if she had demanded and recovered by the name of a third part of a Manor, it had been otherwise, and she might have had a Manor. *Goldsb.* 37. *pl.* For the Grant of a Copihold cannot be without a Manor. And if a Copihold be granted to three for their lives, and the first of them take an Estate by Deed, with Livery of Seisin from the Lord; by this, the Copihold for that life is at least suspended. *Dyer* 30. *Co.*4. 31. But the Copihold is neither extinct, nor suspended in these following cases. *viz.*

Sect. 14. Where the Copihold is Surrendred, Forfeit, or doth Escheat into the Lords hands, and the Lord doth keep it in his own hands, or let it at Will onely; or the Tenant having Licence from the Lord, make a Lease to a stranger according to his Licence, or without Licence make a Lease to the Lord, *Co.*4. 30. So where the impediment is tortious, as if the Lord be disseised, and the Disseisor die seized; or the Land be recovered by false Verdict, or erroneous Judgment, and afterwards is recontinued. *Quod contra legem fit pro infecto habetur; non valet impedimentum, quod de jure non sortitur effectum. Co.*4. 31. of *Copihold, f.*178.

But in all the cases before where the Copihold is gone, by Grant of the Reversion, it is not so gone, but that the Tenant shall hold his Estate still, and subject to Forfeiture as before; and he must still perform the same services (suit of Court excepted) as before, and the Customs incident to the Land, as if it be Burrow-English or Gavelkinde continue still. But Fine upon Alienation and Admittance is gone, and the Tenant cannot now surrender or pass his Estate by any way, but by a Decree in *Chancery*; and this will binde the person onely. *Co.*4. 25. of *Copihold, fol.* 17. 6.

6 What Acts amount to the *Forfeiture* of a *Copihold Estate*, nd how.

Of Acts which amount to a Forfeiture, some are Forfeitures *ipso facto & eo instanti*, that they are done, such are offences apparent, and notorious; of which the Lord by common presumption, cannot but have notice: Some are no Forfeitures, till a Presentment be made thereof. Other Acts there are which are offences, but are not such as cause a Forfeiture; yet are they Finable to the Lord.

Of the first sort are these following Acts.

1. By not coming in to take his Land. *Admission.*

If by special Custom upon the descent of any Copihold of Inheritance, the Heir be bound upon three solemn Proclamations at three several Courts, to come in and be admitted into his Copihold, and he cometh not; this is a Forfeiture if he do not come, this is *ipso facto* a Forfeiture. *Calthrop, f.* 69. *Co.* of *Copihold, f.*164. And yet if a Copiholder enter before Admittance, this is no Forfeiture without a special Custom for it.

2. By denying of *Suits* of *Court.*

So if a Copiholder being sufficiently warned to appear at the Court Baron of the Manor, and he wilfully make default, having no excuse for his absence: And this absence is greater, if he do wilfully refuse to come; or being come to be sworn of the homage, or being sworn to present; or if he depart without Presentment; as if thirteen be sworn, and twelve present, and one refuse: But if a Copiholder be hindred by sickness, waters, debts, or the like; his default is no Forfeiture, but otherwise it is *ipso facto*, a Forfeiture. *Dyer* 211. 31. *Calth. f.*67. *Dyer* 233. 9. *H.*6. 44. So if he swear in Court, he is none of the Lords Copiholders, or being required to be sworn of the Homage, refuse it for that cause: This it seems is a Forfeiture, and that without Presentment.

So if the Steward shew a Roll, whereby the Tenant is proved a Copiholder, and the Tenant say he is a Freeholder, and shew a Deed to that purpose, and tear in pieces the Court Roll: this is such a Forfeiture. And yet if there be a doubt in it, and the Copiholder do his service with a Protestation, that it may be recorded, as it shall fall out; this is no Forfeiture, nor Finable. So if he speak unreverent words of the Lord in the Court, as if he say, he doth exact and extort unreasonable Fines, and undue Services that is onely Finable: So if he say, he will devise a means to be no longer his tenant; this is neither a Forfeiture, nor Finable.

3. By non-payment of the *Fine.*

Where the Fine upon Admittance is certain, if after Admittance it be upon demand denied, or not paid, or where the Fine is uncertain, and the Lord hath set a reasonable

reaſonable Fine, and the Tenant doth not pay it in a reaſonable time after demand; in theſe caſes, it ſeems there is a Forfeiture: But it is no Forfeiture in him to deny the payment, if it be ſet unreaſonable. And of this point the Judges, not the Jewry ſhall be Judge; and yet of this alſo, ſome hold there muſt be a Preſentment, before there can be a Forfeiture. *Co.* 4. 27, 28. *Calth. f.* 67. *Trin.* 4 *Jac. B. R.* But no Forfeiture can be by this, without demand, made at, or after the time of the Fine ſet, ſo alſo of a Rent. *Hobbard, Rep. pl.* 179. *Demand.*

If a Copiholder ſue a Replevin againſt the Lord, diſtraining for his Rent, or Service; this is ſuch a Forfeiture. *Co.* of *Copihold. f.* 165. So if the Lord bring Treſpaſs againſt the Tenant, and he plead it his Freehold. 4. By bringing a *Replevin.*

And yet if the Copiholder doubting of the truth hereof, whether it be due or not, intreateth of the Lord, that the Jewry may enquire thereof; this is no Forfeiture. 5. By Pleading.

If a Copiholder for life ſuffers a recovery by Plaint in the Lords Court, as Copiholder of Inheritance; this is ſaid to be ſuch a Forfeiture. And yet if ſuch a Copiholder ſurrender in Fee; this is no Forfeiture. 6 By ſuffering a *Recovery.*

So if Copiholders in Fee, make Partition; this is no Forfeiture. *Calthrop, fol.* 98.

If the Lord demand his Rent of the Copiholder, and he deny to pay it, or he delay to pay it, without the Lords Agreement; or if the Lord come upon the Land, and there continue demanding of the Rent, and it is not paid; this is ſuch a Forfeiture: For the Copiholder knowing the time of payment, is to provide it againſt that time. And this alſo by a ſpecial Cuſtom may be a Forfeiture before the Admittance of the Tenant. *Co.* of *Copihold, fol.* 167. *Mich.* 7 *Jac. B. R.* But to demand it after the day, can be no Forfeiture. *Brownl.* 1 *part. fol.* 143. 7. By not paying Rent.

Waſte in a Copiholder is either voluntary or permiſſive. If a Copiholder commit voluntary Waſte, as if he pluck down any ancient built Houſe, or build a new Houſe, and then pull it down again, or Plough up Meadow-ground, ſo that the ground is thereby made worſe; or cut more Timber then there is need of, or being cut, doth miſ-imploy it, or doth not employ it in due time; or lop the Trees, and ſell the loppings; or cut down any Fruit-trees for fewel, having other Wood ſufficient; or behead Trees, or break the Boughs, ſo as the Bodies do thereby putrifie. All theſe things are Forfeitures, and yet the cutting and carrying away Shrouds, or Underwood is no Forfeiture, without a ſpecial Cuſtom to make it ſo. 8. By doing *Waſte.*

So if the Tenant hath a Grant of the Trees, or a Licence to cut down Trees; in this caſe it is no Forfeiture. But otherwiſe in theſe and ſuch like caſes without a ſpecial Cuſtom (which ruleth much herein) to enable the Act, it is a Forfeiture. 9 *H.* 4. 12. *Calth. fol.* 68. 36, 37 *Eliz. Co. B. Co.* 4. 27. of *Copihold, fol.* 168. *Calth.* 98. *Co.* 1. 63. And theſe things will be a Forfeiture, when they be done by the Leſſee at Will of a Copiholder, and the Copiholder ſhall have his Remedy over againſt the Tenant at Will, by Action of the Caſe. *Sect.* 15. to grant

So alſo it is for permiſſive Waſte, as if the Copiholder ſuffer his Houſe to decay, or fall for want of repair, or ſuffer his Meadows, or Lands by his ill Husbandry to be ſpoiled. And yet ſome are of another opinion in ſome of theſe caſes, for they hold that many of theſe are no Forfeitures, till there be a Preſentment of them. And herein they diſtinguiſh between voluntary and involuntary Acts, and Acts that lie in Non-feaſance, which they ſay muſt be preſented, and Acts that lie in Miſfeaſance, which needs no Preſentment. *Calth. f.* 68. 50.

Of the next ſort, whereof the Lord muſt have a Preſentment, before he can take advantage of the Forfeiture, are theſe things following, *viz:* 9. By committing of *Treaſon, Felony, &c.*

Where the Copiholder doth commit Treaſon, or Felony, and be therefore attaint, or be convict for Recuſancy, or be Out-lawed, or Excommunicated, or goeth about in any other Court to intitle the Lord to the Copihold.

Or if he alien his Copihold Land by Fine, Deed, or make a Leaſe of it without Licence of the Lord, and yet this Leaſe as to all others, but the Lord himſelf is good. 10. By making a *Leaſe, Licence, &c.*

But

But in caſe where the Cuſtom will warrant a Leaſe for a year, there it is no Forfeiture, whether it be by word, or writing; for without a Cuſtom of Enablement, it is held, that a Copiholder by the Common Law, cannot make a Leaſe for a year, 35 *Eliz.* 21. *Trin.* 3 *Jac. Curia. Co.* 4. 27. *Littl. Sect.* 74. If the Copiholder having a Licence to let for ten years, and he let for twenty years; this is a Forfeiture: Yet if the Copiholder for life ſurrender to the Lord, to the uſe of another in Fee, or make a Feoffment in Fee, or Leaſe for life; but doth not make Livery or Seiſin upon it, or not make a good Livery upon it, or doth bargain and ſell the Land without enrolment of the Deed; neither of theſe is a Forfeiture. *Trin.* 36 *Eliz.* 2. *Co.* 4. 23. of *Copihold. f.* 169. *Brownl.* 1 *part.* 39.

So if the Copiholder have Copihold Lands, and other Lands in *Dale*, and he bargain and ſell all his Lands in *Dale*, and the Deed is enrolled, by this the Free-land onely paſſeth, *ergo*, this is no Forfeiture: But if he have no Free-land, there it is a Forfeiture. And all theſe offences are the greater when they are willingly done.

Of the third ſort of Offences, are theſe following, *viz.*

Where the Copiholder being of the Grand-Jury, doth indict the Lord, or give evidence againſt him; or being a Bailiff, if he arreſt him, or ſue him at Law (except it be in the caſe of a Replevin before,) neither of theſe acts is a Forfeiture, nor is it Finable. So neither if the Copiholder diſſeiſe the Lord of any other Land. *Calth. f.* 68, 91. So if the Copiholder abuſe the Lord in words, or abuſe the Lords Common with his Cattle, or rail upon another Copiholder in the Court, or uſe any ſuch like words, or Deeds of Contempt, that do not tend to the Lords diſ-inheritance: Theſe things are at the moſt but Finable. *Calthrop, f.* 45.

In anſwer to this Queſtion, theſe things are to be known.

8. Who may Forfeit, and how.

1. A Copiholder of *Non ſane memorie*, an Ideot, or a Lunatick, cannot forfeit his Eſtate.

Infant.

2. An Infant under fourteen years of age, cannot forfeit; for he is till then to be in Ward to the next of Kin, or Bailiff, according to the Cuſtom of the place: Nor can he forfeit by any negligent, or ignorant offences as non-claimed, not coming to be admitted, not repairing, not *malefaſans.* Thus, if he bring a Replevin againſt the Lord, alien by Deed, or the like acts: But by a voluntary Waſte, or obſtinate denial of Rent, an Infant may commit a Forfeiture, and ſo he may by doing a Felony. *Co.* of *Copihold*, 172.

Feme-Covert.

3. A Feme-Covert cannot by any act ſhe can do alone forfeit her Eſtate; but her Husband, or ſhe with the conſent of her Husband, may; yet if a ſtranger with the Wives conſent, without the conſent of her Husband, commit a Waſte: This is not a Forfeiture. *Co.* 4. 27. of *Copihold, f.* 172, 173.

Guardian.

4. The Guardian of a Copiholder may forfeit his Wardſhip, but he cannot forfeit his Copihold. *Co.* of *Copihold, f.* 172, 173.

Cey que uſe.

5. *Cey que uſe* of a Copihold cannot forfeit it.

6. A Diſſeiſor of a Copihold cannot forfeit it.

7. He that doth forfeit, can forfeit but his own part; and therefore if there be two Joyntenants, and one of them commit a Forfeiture: Leaſe for life, the Remainder for life, or in Fee, and the firſt Tenant for life commit a Forfeiture, or purchaſe the Manor, and extinguiſh the Copihold, the Remainder is not hurt. If the Husband and Wife be Joynt-Copiholders of the purchaſe of the Husband, during Coverture; and he is attainted of Felony, and dieth, his Wife ſhall have all the Land: But if the purchaſe were before the marriage, then a Moyety is gone, *Calth. f.* 92, 97. So where the Eſtate is made to three *ſucceſſive*, and one of them doth commit a Forfeiture; this cannot hurt the Eſtate of the other two. So where a Copiholder in Fee, by Licence doth make a Leaſe for years by Deed, or without Licence by Copy, and either of theſe Leſſees commit Waſte: By this the Reverſion is not forfeit. *Co.* of *Copihold f.* 172.

8. If a Copihold be ſurrendred to the uſe of *J. S.* he cannot forfeit this before Admittance.

9. If one hath ſeveral Copies, the Forfeiture of one of them is not the Forfeiture of the other. *Co.* of *Copihold, f.* 174.

Regularly,

Regularly, None can take advantage of the Forfeiture, but he that is Lord of the Manor at the time of the Forfeiture; and therefore if the Copiholder make a Feoffment, and then the Lord doth alien the Manor; in this case, neither the Granter, nor the Grantee, can take advantage of the Forfeiture. And yet if there be Tenant for life of the Manor the Remainder in Fee, and a Copiholder commit a Forfeiture, and the Tenant for life of the Manor die before his Entry; in this case he in Remainder may enter. And he that was never Lord of the Manor, shall take advantage of the Forfeiture, as where the Lord make a Feoffment of the Copihold in Fee; in this case the Feoffee shall enter upon the Forfeiture. *Co.* 4. 24. of *Copihold*, 176.

9. Who shall take advantage of a Forfeiture, or not.

In case where a Copihold is forfeit, and the Lord hath notice of it, if he shall do any thing afterward, whereby he shall acknowledge the Copiholder to be his Tenant, as distrain upon the Land for Rent, admit him to be Tenant, or the like: By this the Lord is concluded to take advantage of the Forfeiture. And yet if the act done by the Copiholder be such an act as doth destroy the Copihold, as if he make a Feoffment of the Copihold, or the like; in this case no subsequent act of the Lord will help. *Co.* of *Copihold*, 176.

10. What *Acts* will confirm an Estate forfeit.

They are expressed in these following Statutes, *Rich.* 3. 4. A Copiholder that hath twenty six shillings and six pence *per annum*, may be a Juror as well as he that hath twenty shillings *per annum* of Freehold Land. 1 *Ed.* 6. 14. About Abby Land. 2 *Ed.* 6. 8. About Offices found, 1 *M.* 12. Now expired touching the assistance of Justices of Peace to suppress a Riot. 5 *Eliz.* 14. About Forgery to defraud a Copiholder. 13 *Eliz.* 7. About the Copihold of a Bankrupt. 14 *Eliz.* 6. About his Copihold that doth depart the Kingdom without leave. 35 *Eliz.* 2. About a Recusant. When the Statute doth alter the Service-Tenure, Interest of the Land, or other thing in prejudice of the Lord, Custom, or Manor, or of the Tenant there, the general words of Tenant, or the like, extend not to Copiholders: But when the act is for the good of the Commonwealth, and no prejudice may accrew, by reason of any alteration of the Interest, Service, or Custom of the Manor, there usually Copiholders, and Copiholds are included. *Co.* 3. 8. *March* 36. *Brownl.* 1 *part.* 34. For this cause it is judged, they are not intended in these following Statutes. *viz. Westm* 2. 1. of *Intails*. And yet by Custom such Lands may be intailed.

Sect. 16.

11. In what *Statutes* the *Copihold* and *Copiholder* is included, or not.

Westm. 2. 26 Of an *Elegit*. 16 *R.* 2. 5. Of *Forfeiture of Lands* by receiving Bulls, *&c.* 2 *H.* 5. 7. Of the *Forfeiture of Hereticks*. 27 *H.* 8. 10. Of *Uses*. 31 *H.* 8. 1. 32 *H.* 8. 32. About *Partition*. 32 *H.* 8. 28. Of Leases made by Tenant in Tail, or Husband and Wife. 17 *Ed.* 2. 18. Of *Ideots Lands*. *Merton* 1. Of *Damages*. *Co.* 4. 30 *Westm.* 2. 3 31 *H.* 8. 13. And that of 32 *H.* 8. 9. Of *Champerty*. *Co.* 4. 26. 4 *H.* 7. 24. Of *Fines*. *Co.* 9. 105. See *Bro.* 2 *part.* 85, 86, 77, 78.

Customs.

For the better understanding hereof, these things are to be known.

1. For any thing which doth concern his Copihold, he cannot sue, or be sued in any real Action, or Actions favoring of the reality elswhere, but in the Lords Court. But he may bring an Action personal in any other Court, and the Lessee of a Copiholder may bring an *Ejectione firme* in any other Court. *Co.* of *Copihold*, 147.

12. How the *Copiholder* may sue, or be sued.

2. If the Lord out him he may have an *Ejectione firme* or Trespass against the Lord in any Court; but he cannot have an Assize against the Lord. *Co.* of *Copihold*. 146.

Ejectione firme.

3. A Copiholder of base Tenure in Antient Demesn, cannot have a Writ of *Droit Close*, or *Monstraverunt*, but Tenants, of Franck-tenure in Antient Demesns may. *Co.* of *Copihold*. 146.

4. If the Copiholder by Licence of the Lord make a Lease of the Land, and the Lessee cut down Timber, there being a custom that the Copiholder may cut down Timber; the Copiholder in this case must punish this in the Lords Court.

5. If a Wife dowable by custom, recover her Dower by plaint in the Lords Court and in the Action she recover damages also, she may not sue for these damages at the Common Law. *Co.* of *Copihold*, 146.

6. If a Copiholder make a Lease by Copy for years, or by Deed, with Licence rendring Rent, an Action of Debt; for this Rent may be brought in any other Court. *Co.* of *Copihold*, 146.

7. If

7. If a ſtranger cut down the Trees growing on the Copihold, an Action of Treſpaſs lieth againſt him; for this at Common Law. So if the Trees by Cuſtom belong to the Tenant, and the Lord doth cut them down. *Co.* of *Copihold*, 147.

8. If the Copiholder Surrender to the uſe of the Creditor in truſt to pay his Debts, and then to have the Land again, and he keep it; in this caſe this being proved by Examination of Witneſſes upon an Engliſh Bill, the Lord may reſeize and reſtore the Land. *Calthrop*, *f.*74.

9. If the Lord hath a great Waſte, and he grant a Rent out of it; the Grantee may diſtrain the Tenants, unleſs they can preſcribe to have Common there. *Calthrop*, *f.*97.

10. If the Steward, Bailiff, or Tenants, into whoſe hands the Surrender is made, refuſe to preſent, or admit the Tenant; in this caſe he is to ſue by Bill or Petition, to the Lord in his Court. And if the Lord there will not do him right, the Tenant may ſue him and them in *Chancery*, and there he ſhall have relief. *Co.* of *Copihold*, 180.

11. For the order of Proces in Suits in the Lords Court, inquire the Cuſtom of the place, and ſee *Calthrop*, *f.*75. 98.

13. Of a *Licenſe to Alien.*

For this theſe things are to be known.

1. That the Lord may Licence his Tenant to let by Deed for years, if there be a Cuſtom for it. And the Entry of this in the Court Rolls is thus, *Ad hanc curiam* J. S. *petit licentiam domini demittendi, &c. Cui dominus licentiam dat, &c.* And if it be by the Steward, *Cui dominus per ſeneſchallum licentiavit.* *Co.* of *Copihold*, 123, 125.

Cuſtom.

2. This Licence (it ſeemeth) is not grantable by the Steward, without a ſpecial Cuſtom to enable him to do it, or a ſpecial Warrant from the Lord to give him power ſo to do, *Co.* of *Copihold*, *f.*124.

3. If a Tenant for life of a Mannor, grant a Licence to a Copiholder to Alien, and the Lord die; in this caſe the Licence is good. *Co.* of *Copihold*, *f.*85.

CHAP. LIII.

Of Corn, and a Corrody.

Tranſportation.

FOr Corn theſe things are to be known.

1. None may tranſport any Corn, whatſoever, nor any Malt made thereof, nor any Beer, Butter, Cheeſe, Herring, or Wood, but for victualling of Ships, or the like, without the Kings Licence, except it be in ſome ſpecial caſes when Corn is very cheap, and from ſome Ports, and with ſome kinde of Ships onely, and by allowance, and direction of ſome great Officers.

Cuſtoms.

2. The King by his Proclamation may reſtrain the Tranſportation of it at his pleaſure.

3. The Kings Cuſtoms muſt be duly paid therein.

4. He that doth Tranſport, muſt Lade at one place. 1, 2 *Phil. & Mar.* 5, 13 *Eliz.* 13. 35 *Eliz.*7.

5. There is no Act now to forbid the importing of Corn, for that *Stat.* of 3 *Ed.* 4.3. is repealed by 21 *Jac.* 28.

Ingroſſing, Foreſtalling, &c.

6. None may buy Corn to ſell again without Licence. 5 *Eliz.*12.

7. He that ſhall buy Corn for the change of his Seed, muſt bring in as much other Corn to the ſame Marker. 5 *Ed.*6. 14. 13 *Eliz.* 25.

8. Corn when it is of a ſmall price may be ingroſſed and kept in Grainers, 15 *Ed.* 6.14. 13 *Eliz.*25.

Purveyors.

9. Purveyors muſt take Corn by meaſure ſtriked, and not without the owners conſent. See *Purveyors.*

10. None

10. None may buy Corn to sell it in Meal, unless he be licensed under the hands and seals of five Justices in open Sessions, under pain of treble value, and two moneths Imprisonment without Bail, *Act.* 23 *Octob.* 1650. See more in *Wingates Abridgment*, *Stat.* 5 *Eliz.* 12: 13 *Eliz.* 13. 3 *Car.* 4.

Of a Corody.

A *Corody* was an Allowance of money, or meat or drink, due to the King from an Abbey or House of Religion of his own founding, towards the reasonable sustenance of one of his Servants, being put to his Pension, where he thought good to bestow it. But a *Pension* was taken for money given to one of the Kings Chaplains for his better maintenance in his service, until he can be better provided for by a Benefice. The Corody was given to one of the Kings servants that did live in the Abbey; the Pension was given to him that did attend on the King. *Terms Law*, *F.N.B.* 230. *& Stat.* 33, 34 *H.*8. *ch.* 19.

Corody, what.

Pension, what.

CHAP. LIV.

Of Costs and Damages.

COsts are the Expences laid out in the prosecuting of any Suit in Law, which is so much as the Court will allow him that is the Plaintiff or Defendant in the Action, and is to have it at the end of the Suit.

1. *Costs*, what it is.

For Answer to this Question, all these things must be known.

Sect. 1. Where Costs shall be recovered in Suit, or not.

1. Where a Plaintiff doth recover the thing sued for in any Personal Action, there he shall recover Costs of Suit also, *Plow.* 320. 9 *H.*6. 32.

2. Where a Plaintiff is Nonsuit after Appearance, or after Verdict given against him in an Action of Debt, Trespass, Detinue, Covenant, or upon the Case, the Defendant shall recover Costs against him, 23 *H.*8. 15. *Dyer* 32.

3. Whersoever a man shall recover Damages by the Common-Law, or by the Statutes of 6 *Ed.* 1. *ch.* 1. or *Merton.* 1. there he shall recover Costs also, *Co.* 10. 110.

4. Where an Act of Parliament doth give increase of Costs, there some Costs were recoverable before, *Stat.* 2 *H.*4. 1. 27 *H.*6. 10. 14 *H.*6. 13. 8 *Ed.*4. 13. *F.N.B.* 148.

5. In a *Mortdaunceſter*, *Aile* and *Besaile*, and Intrusion of his own doing, the Demandant shall recover Costs, *Glouc. ch.* 1.

6. In an Attaint, Costs shall be recovered, 11 *H.* 6. 4.

7. Where the Defendant sueth a Writ of Error, the Plaintiff shall recover Costs, 11 *H.* 7. 10.

8. Where a Verdict is found for the Defendant, the Plaintiff must pay Costs, albeit the Declaration be insufficient. So it hath been often adjudged, as two Judges said, *Pasch.* 19 *Jac.*

9. If an Executor avow for Arrearages of Rent upon *St.* 32 *H.* 8. and recover, it seems he shall recover Costs, *Trin.* 22 *Jac. B.R.*

10. In a Suit in Chancery, if the Bill prove false, or the Plaintiff delay his Suit, the Defendant will have Costs there, *Bro. Conscience*, 24.

11. But he that sueth, or is sued *in forma Pauperis*, a Plaintiff or Defendant that is admitted so to sue, shall neither recover nor pay Costs, neither party shall pay Costs, 22 *H.*8. 15. *Bro.* 452. *Pasch.* 7 *Jac. B.R. Eslins* Case.

12. If the Suit be in the Kings name, and it be Nonsuit, or Judgment is given against the King, after Verdict no Costs shall be recovered, *Stat.* 23 *H.* 8. *ch.*15. 24 *H.*8.8. 4 *Jac.* 3. 8 *Eliz.* 2. 43 *Eliz.* 6.

13. Where in any Suit double or treble Damages is given by any Statute, and no Damages was recoverable before, as in the case of Waste and *Q. impedit*, and some other Actions, there no Costs shall be recovered, *Co.*10.116. *Kelw.*26. 27 *H.*6.10. 2 *H.*4.7. *Curia* 7 *Jac. Co.B.*

14. In an Action of Debt for Ingrossing, where a great Sum of money is recovered, no Costs shall be recovered, *Co.*10.110. *Bro.*258.

15. In case where the Action brought doth not exceed Forty shillings, Debt or Damages, there no Costs shall be recovered in it, 43 *Eliz.* 6. 1 *Jac.* 25.

Executor or Administrator.

16. If an Executor or Administrator be Nonsuit, or Verdict pass against him in a Suit for any thing touching the Testament, he doth not pay Costs. But if he bring an Action for a thing done to himself, as for taking away Goods from himself, and the like, and he be Nonsuit, or Verdict pass against him, in this case he shall pay Costs. *Experience.* The Issue was, That the Plaintiff was not Executor, and the Jury found for the Defendant, and yet the Court would not give Costs to the Defendant, *Brownl. Rep.* 1 *par.* 79.

17. No Costs shall be recovered against an Executor or Administrator, upon the Statute of 8 *Eliz.* 2. nor upon the Statute of 4 *Jac.*2. By the Court, *M.* 6 *Jac. B. R.* See more of these things in *Brownl Rep. par.*66.79.107. *Westm.*2.5. *Marlb. ch.*17.6.4. And see more in Damages, *March f.*57. *pl.*88. *f.*61.*pl.*94.

For this, take these things following.

Sect. 2. What Costs shall be recovered, and how they shall be taxed.

1. That in an Action of the Case for slanderous words, if the Jury do give under Forty shillings Damages, then the Plaintiff shall recover no more Costs than the Jury hath given him in Damage, *Stat.* 21 *Jac. ch.*16.

2. If the Action be a Personal Action, and do not concern Land, or a Battery, and the Debt or Damages to be recovered do not come to Forty shillings, or above, the Costs must be no more than the Debt or Damages is, 43 *Eliz.*6 1 *Jac.*25.

3. Where Officers are sued for any thing about their Offices, and Verdict is given against the Plaintiff, or he is Nonsuit; there in some cases the Officer shall recover double, in some cases treble Costs. And for this see the several Statutes of 43 *Eliz. ch.*2. 7 *Jac.* 5. *Ordinance. March* 1654. See more for Costs, 11 *H.*6.4. 3 *H.*7.10. 19 *H.*7.20. 23 *H.*8.15. 24 *H.*8.8. 8 *Eliz.*2. 43 *Eliz.* 6. 4 *Jac.* 13. 21 *Jac.* 12. 3 *Jac.*15. *Wingates Abridgment.* And in all cases the Costs are to be taxed and set down by the Court wherein the Action is, and at the end of the Suit, and not before, *Co.*10.116. 110. *Dyer* 291.

Where the Costs may be increased or abridged, or not.

In some cases the Court may and doth abridg, and in some cases increase the Costs given by the Jury. And this the Court doth as it seeth cause: For if the Court doth apparently see the Jury hath given excessive Costs, upon Motion made, it will abate it: And if it perceive the other to put him to excessive Costs, as if after Issue tryed the other get an Injunction to stay the Suit, and he get it dissolved; in this case upon Motion to the Court, it will increase the Costs, 21 *Ed.*4.78.

Sect. 3. 3. *Damages*, what.

Damages taken largely, is a recompence for a wrong: But taken strictly, it signifieth a part of that which the Jurors are to enquire of passing for the Plaintiff or Demandant in any real or personal Action. For, after Verdict given of the principal Cause, they are then asked their consciences touching Cost and Damages, which is concerning the loss that the Plaintiff or Demandant hath suffered by means of that wrong done to him. So that *Damna* is either *pro injuria illata*, for the wrong done, or *expensæ litis*, for the charges laid out in the Suit. And this Damages for the wrong done, is always to be recovered from the Tenant or Defendant; but Costs may be recovered against the Defendant by the Plaintiff, or against the Plaintiff by the Defendant, *Co.* upon *Lit.* 257. 22 *H.*6.27.

Damna.

4. In what Action Damages shall be recovered, or not; and what Damages shall be recovered, and how taxed.

For answer to this, we are to know these things.

1. That regularly Damages are to be recovered in all Personal and in all Mixt Actions, and in such Real Actions wherein any Statute hath given Damage; otherwise not: For otherwise by the Common-Law no Damages are recoverable in any Real

real Action. And for this, see *Co.* 10. 116. 106. 9. 74. *Plow.* 82. *Stat.* 6 *Ed.* 1. 1: *Weſtm.* 2. 35. 13 *Ed.* 1. 5. 1 *Ed.* 3. 6. 23 *H.* 8. 3. 11 *H.* 6. 4. *Co.* 4. 30. 71. *Co. ſuper Lit.* 32. 33. *Dyer* 284. 14 *H.* 25. 33 *H* 8. 39. 18 *Eliz.* 5. 27 *Eliz.* 10. 21 *H.* 8. 19. 7 *H.* 8. 4. 3 *H* 7. 18. *Bro. Coſts*, 29.

2. In ſome caſes ſingle Damages only are to be given, as in Dower; and regularly in all Actions. For which ſee *Stat.* 52 *H* 3. *ch.* 3. 20 *H.* 3. 1. 8 *Eliz.* 22. 13 *Ed.* 1. 36. 6 *Ed.* 1. 8. 6 *H* 4. 1 *H* 6. 11. 52 *H.* 3. 6. 3 *Ed.* 1. 24. 17 *R.* 2. 6. In ſome Caſes and Suits double Damages are to be recovered: And for this ſee *Stat.* 2 *H.* 4. *ch* 11. 34 *Ed.* 1. 27 *Ed.* 3 51. 8 *Eliz.* 14. 2 *Ed.* 6. 13. 23 *H.* 8. 9. 28 *Ed.* 1. 9. 12 *Ed.* 2. 5. 13 *Ed.* 1 26. 37 *Ed.* 3. 2. 1 *R.* 2. 9. And in ſome caſes treble Damages are to be recovered: And for this, ſee *Stat.* 36 *Ed.* 3. *ch.* 10. 8 *H.* 6. 9. 8 *Eliz.* 2. 3 *Ed.* 6. 3. 2 *H.* 4. 5.

3. A man ſhall never recover more Damages then he doth declare for in his Declaration, *Co.* 10 113. 13 *H.* 7. 16.

4. In Perſonal Actions, the Damages ſhall be only for the wrong done before the Writ brought: But in Real Actions the Plaintiff doth never count for Damages, for there he is to recover at the laſt for all the time, *Co.* 10. 116.

5. How a Jury may tax Coſts, and where it may divide the Coſts, or not, See *Co.* 11. 5. 10. 130. 18 *H.* 8. 1.

3. Where the Damages may be increaſed or abridged, or not.

In ſome caſes the Court may alſo increaſe Damages; and ſo the Court may in ſome caſes alſo abridg the Damages given by the Jury. But it muſt be in a caſe obvious to the Court; as for the Maim of a man (which is to be ſeen) when the Jury give ſmall damage. And ſo when every man that looks upon the wrong, and damage given for the wrong, they ſee it to be exceſſive; in this caſe the Judges do uſe to keep the Plaintiff from his Judgment, until he do releaſe the Exceſs of the Damages.

Writ to enquire of Damages, what.

The Writ to enquire of Damages, is a Writ that iſſueth forth after a Judgment had in Treſpaſs upon a Confeſſion or Default, to enquire by a Jury what Damages the Plaintiff hath ſuſtained by the Treſpaſs: And then upon that Inquiſition, the final Judgment is given for ſo much as the Jury ſhall find, and for Coſts of Suit. See more for this Coſts and Damages, *St.* 3 *Jac.* 15. 21 *Jac.* 16. 4 *Jac.* 3. 43 *Eliz.* 6. 23 *H.* 8. 15. 3 *H.* 7. 10.

CHAP. LV.

Of Cottages.

A Cottage is a little Houſe newly built, that hath not four Acres of Land to it: And he is a Cottager, that doth dwell in ſuch a Houſe.

1. *Cottage.*

A Houſe built ſince 31 *Eliz.* for habitation, or any Building or Houſing made for other purpoſe, that ſince that time hath been or ſhall be converted or ordained to be uſed as a Cottage for habitation or dwelling, where there is not aſſigned and laid to the ſame Cottage or Building four Acres of ground at the leaſt, to be accounted according to the Statute or Ordinance *de terris menſurandis*, lying neer to the ſaid Cottage, being his or her own Freehold and Inheritance that doth enter or convert the Cottage or Building, and to be continually occupied and manured therewith ſo long as the ſame Cottage ſhall be inhabited; is to be accounted a Cottage within the Statute. Wherein theſe things are to be known.

2. What ſhall be ſaid to be a Cottage, and how the parties that erect or continue it ſhall be puniſhed.

1. If a man convert that Building which before this Statute was one Dwelling-houſe, into two Dwelling-houſes; theſe are two Cottages puniſhable by this Statute. *Sect.* 1.

2. If one build a new Houſe upon an old Foundation, in the ſame quantity that the old was; this is no Cottage within this Statute.

3. If one build two diſtinct Cottages together, the one upon the old foundation, the other upon the new: That which is built upon the old foundation, is no Cottage; but that which is built upon the new foundation, is a Cottage.

4. If one build a Houſe upon an old and new foundation together, ſo that the entire Houſe doth ſtand upon both together; this is a Cottage within this Statute.

5. If a man have a Houſe, and one hundred Acres belonging to it, and he ſell the Houſe from the Land, or the Land from the Houſe, or ſell all the Land, and keep the Houſe; this is now become a Cottage within this Statute. And if a man erect a Houſe, and lay four Acres to it, and after take it away again; now this is become a Cottage within this Statute.

6. Any Houſe ordained or erected for habitation or dwelling in any City, Town-Corporate, antient Borough or Market-town, or for the neceſſary and convenient habitation of any Workmen in any Mineral works, Coal-mines, Quarries, or Delfs of Stone or Slate, in or about the making of Bricks, Tile, Lime, or Coals; ſo as the ſame Building be not above one mile diſtant from the place of the ſame Mineral or other Works, and be uſed only for the habitation of the ſaid Workmen, ſhall not be accounted a Cottage within this Statute.

7. Any Houſe made within a mile of the Sea, or upon the ſide of ſuch part of any Navigable River where the Admiral ought to have juriſdiction, ſo long as no other perſon ſhall dwell therein but a Sailer, or man of manual occupation, to or for making or furniſhing, or victualling of any Ship or Veſſel uſed to ſerve on the Sea; nor made in any Forreſt, Chaſe, Warren or Park, ſo long as no other perſon ſhall dwell therein but an Under-keeper or Warrener, for the keeping of the Deer or other Game of the Warren; nor any other Houſe made, ſo long as no other perſon do dwell therein but a common Herdſman or Shepherd, for keeping the Cattel or Sheep of the Town, or a poor, lame, ſick, aged or impotent perſon; is not to be accounted a Cottage puniſhable by this Statute. But no Cottage (by this Statute) made for a common Herdſman, for a common Shepherd (called a Sheep-coat) or a poor, lame, ſick, or impotent perſon, that was not made before the Statute, is excepted by the Statute; for it was meant only of ſuch as were then in being. *Co. 2 par. Inſt.* 737.

8. Any Cottage that ſhall be by Order of the Juſtice of Aſſize at the Aſſizes, or Juſtices of the Peace at the Quarter-Seſſions by their Order entred in open Aſſizes, or at Quarter-Seſſions for any juſt cauſe upon complaint to them, be decreed to continue for habitation, for ſo long time only as by ſuch Decree they are tolerated and limited, is not to be accounted a Cottage againſt this Statute.

9. And therefore if the Churchwardens and Overſeers of a Pariſh, or the greater part of them, by the leave of the Lord or Lords of the Manor, whereof any Waſte or Common within their Pariſh is or ſhall be parcel, and upon agreement before with him or them made in writing, under the hands and ſeals of the ſaid Lord and Lords, ſhall ſet up any Houſe in a fit place within the ſaid Waſte, at the charges of the Pariſh, for the habitation of the impotent Poor of the Pariſh, by Order of the Juſtices of Peace at their Quarter-Seſſions, is not a Cottage againſt this Law.

10. Four Acres by Copy for lives, or for any number of years, will not ſerve to lay to it.

11. This Statute doth not extend to Cottages erected, or Houſes converted to Cottages before the 29. day of *March*, 1589. *Co. 2 par. Inſt.* 737.

12. The forfeiture of him that ſhall erect any ſuch Cottage, or convert any Houſe into ſuch a Cottage, is Ten pounds: And the forfeiture of him that ſhall afterward willingly uphold and maintain any ſuch Houſe erected or converted, is Forty ſhillings for every moneth the ſame is continued; and theſe Forfeitures are to go to the King, *Stat.* 31 *Eliz. chap.* 7. Reſolved by the Judges 8 *Car. B. R. Stat.* 31 *Eliz. per* Juſtice *Bridgman. Stat.* 43 *Eliz. chap.* 2. *Stat.* 31 *Eliz. Co. 2 part* of his *Inſt.* 736.

2. Inmates or Under-tenants who they are, and how they ſhall be puniſhed, redreſſed or tolerated.

Inmates be thoſe that are admitted to dwell for their money, jointly within another man; though in ſeveral Rooms of his Manſion-houſe, paſſing in and out at one

one door, and being not able to maintain themſelves, *Kitch.*45. *Stat.* 31 *Eliz.* 2. *chap.* 7.

There muſt not be an Inmate, or more Families or Houſholds then one, dwelling or inhabiting in any one Cottage erected, placed or ſuffered, *Kitch.* 45. Wherein theſe things are to be known. *Sect.* 2.

1. If one demiſe part of his Houſe in which he doth dwell, to a Gentleman that doth not keep his Table there, but goeth to Victualling-houſes for his Victuals, and yet he hath certain Rooms in the houſe; this is not an Inmate, *Kitch.*45.

2. If one keep his Daughter that is married, and her Husband, or his Son, by Covenant or otherwiſe, and he doth find them, and they have ſome Rooms in his Houſe; this is not an Inmate, *Kitch.*45.

2. If one keep his Daughter that is married, and her Husband, or his Son and his Wife, by Covenant or otherwiſe, and he doth find them, and they have ſome Rooms in his Houſe; theſe are not to be accounted Inmates, neither ſhall they have Common. But if theſe live in one Cottage, and they part the Houſe between them, and diet themſelves ſeverally, it ſeems they are Inmates, *Kitch.*45.

3. If one have a Houſe, and he let certain Rooms of it to another to dwell in with him, he is to be accounted an Inmate, and yet he ſhall not have Common in the Lords Waſtes and in the Fields, except he be of ability; for if he be a man of ability, he ſhall not be ſaid to be an Inmate in any caſe. But if one take one into his Houſe to Table, or ſojourn with him, and let him certain Rooms, he is not to be accounted an Inmate, neither ſhall he have Common, *Kitch.*45. ability

4. If the Inheritor of a Houſe demiſe a certain parcel of his Houſe in which he doth dwell, and ſever it from the other part, ſo that there are ſeveral doors into the High-ſtreet; it is now as two Houſes, and is not to be accounted an Inmate, but he ſhall not have Common. But if there be but one door out into the ſtreet for both the Families, then he that is taken in is to be accounted an Inmate, *St.* 43 *Eliz. chap.*2: But an Inmate within the meaning of this Statute muſt be one that is in a Cottage. 2. It extendeth to Cottages as well made before, as after the Statute. 3. And as well to Cottages that have four Acres of ground, or more laid to them, as thoſe that have not four Acres of ground laid to them, *Co.*2 *par. Inſt.*738.

5. Inmates may be placed by the Order of the Juſtices in their Quarter-Seſſions, with licence of the Lord of the Manor, in any Cottage built upon the Waſte of the ſame Manor for the impotent Poor, by the Churchwardens and Overſeers; and they are not to be puniſhed that do ſo place them.

6. It ſeems the Statute of 31 *Eliz.* as to Inmates, doth extend to Cities, Burroughs and Market-Towns; for it is put generally, and the Exception in the Statute doth go to the erection of Cottages, and not to Inmates; and ſo is the common practice.

7. The Forfeiture of every Owner or Occupier of any ſuch Cottage, placing or willingly ſuffering any ſuch Inmate or other Family then one, is Ten ſhillings for every moneth any ſuch Inmate ſhall ſo dwell in any ſuch Cottage. And this Forfeiture is to go to the Lord of the Leet where the Cottage is. The moneth ſhall be accounted by 28 days: *Co. Book of Entries.* 165 *b.* 3 10 £ moneſom

All the offences aforeſaid may be heard and determined by the Juſtices of the Aſſizes, and Juſtices of Peace in their open Seſſions, and by Lords within the Precincts of their Leets, and none others may do it; the Sheriff cannot do it. And they may award Execution for the levying of the ſaid Forfeitures, as cauſe ſhall require. The Lord hath election to ſue in any Court for the Forfeiture, or to diſtrain and ſell the Diſtreſs, and give back the overplus. And if he bring an Action at Common-Law, when he hath Judgment, he ſhall have Execution by *Fieri facias*, *Elegit* or *Capias*, as the words of the Statute are, *Co.* 2 *par. Inſt.* 738. And as touching the Forfeitures for Inmates, the Lord in his Leet may take the Preſentment of the Jury thereof, and afterward levy the ſame Forfeitures by Diſtreſs and Sale of Goods to his own uſe, *St.*31 *Eliz. c.*7. *Co.* 2 *par. Inſt.*738. 3 *H.*7.4.

CHAP.

CHAP. LVI.

Of a Covenant.

1 *Covenant, what.*

A Covenant is the Agreement or Conſent of two or more, by Deed in Writing ſealed and delivered, whereby either or one of the parties doth promiſe to other, that ſomething is done already, or ſhall be done afterwards. And he that makes the Covenant, is called the Covenantor; and he to whom it is made, the Covenantee. *Terms of the Law. Plow.* 308.

Covenantor. Covenantee.

2 The Kinds.

And this is either expreſs, or in Deed, *i.* when the Covenant is expreſſed in the Deed: As when *A.* by Deed doth covenant with *B.* to ſerve him for a year, and *B.* doth covenant with *A.* to pay him Ten pounds for this ſervice. Or it is implied or in Law, *i.* when the Deed doth not expreſs it, but the Law doth make and ſupply it. As when one doth make a Leaſe for years by the words [*demiſe* or *grant*] without any expreſs Covenant for quiet enjoying; in this caſe the Law doth intend and make ſuch a Covenant on the part of the Leſſor, which is, That the Leſſee ſhall quietly hold and enjoy the thing demiſed againſt all perſons, at leaſt having title under the Leſſor, and at leaſt during the Leſſors life and (as ſome think) during the whole Term. And hereupon an Action of Covenant may be brought againſt him in the Reverſion: So that if the Heir that is in by Deſcent put out the Termor of his Father, the Termor may have this Action againſt him *Terms of the Law, tit. Covenant. Co.* 4. 80. 5: 17. *F.N.B.* 145, 146. *Dyer* 338. 257.

Reall

A Covenant is alſo either real, *i.* that whereby a man doth bind himſelf to paſs a real thing, as Lands or Tenements: As a Covenant to levy a Fine of Land, in which caſe the Land is to be recovered; or when it doth run in the Realty ſo with the Land, that he that hath the one, hath or is ſubject to the other; and ſo a Warranty is called a real Covenant. Or it is perſonal, *i.* when it doth run in the Perſonalty, and not with the Land, but ſome perſon in particular ſhall have benefit by it, or be charged with it: As when a man doth covenant to do any perſonal thing, as build or repair a houſe, ſerve him, or the like. And theſe alſo are ſome of them ſaid to be inherent, *i.* ſuch as are converſant about the Land, as that the thing demiſed ſhall be quietly enjoyed, ſhall be kept in reparations, ſhall not be aliened, or if it be to be ſold, that the Leſſor ſhall have the firſt refuſal; to pay Rent, not to cut down Timber-trees, or do Waſte, to fence the Copices when they be new cut, to make further Aſſurance, or the like. And ſome of them are ſaid to be collateral, *i.* that are converſant about ſome collateral thing that doth nothing at all, or not ſo immediately concern the thing granted: As to pay a ſum of money in groſs, to build a houſe in another mans ground, to make a Feoffment or Leaſe of other Land, to give other Security to perform the Covenants, or to pay the Rent, or that the Leſſor ſhall diſtrain for the Rent in ſome other Land then that which is demiſed, or the like, theſe are collateral Covenants. There is alſo a Covenant to ſtand ſeiſed of Land to Uſes, which is now become a kind of Conveyance of Land. For which read *Uſes* at large. *Brownl.* 1 *par.* 22, 23.

Warranty
Perſonall
Inherent
Collaterall

3. The uſe and operation of it.

The moſt frequent uſe of a Covenant, is to bind a man to do ſomething *in futuro*; and therefore it is for the moſt part executory: And if the Covenanter do not perform it, the Covenantee may have thereupon for his Relief an Action or Writ of Covenant againſt the Covenantor, ſo often as there is any Breach of the Covenant, *Co.* 1. 154. *Lit. Bro.* 309. 27 *H.* 8. 16. *Plow.* 308. *F.N.B.* 145.

A Writ or Action of Covenant what.

And this Writ of Covenant is therefore defined to be a Writ lying where a man is bound by a Covenant in a Deed, and hath broken it. And in this caſe commonly the party damnified ſhall recover Damages only for the Breach: And if he have a Judgment in an Action brought for one Breach, and after the Covenantor doth break the

the Covenant again; in this caſe he may bring a new Action, and ſo for every Breach. But a Covenant doth ſometimes alſo make a tranſmutation of a Property and Poſſeſſion of things, as in caſe of a Covenant to ſtand ſeiſed of Land to Uſes, for which ſee *Uſe*. And in caſe where one doth covenant, that another ſhall have a piece of Land for five years; this is a good Leaſe for five years, for which ſee *Leaſe*. And in caſe where one doth covenant with another, That if he pay him Ten pounds ſuch a day, he ſhall have all his Cattel in *Dale*, or his Leaſe for years he hath of the Manor of *Dale*; in this caſe it ſeems if he pay the money at the time, he ſhall have the Property of the Goods, and of the Leaſe for years. It is ſaid therefore, that in ſome caſes upon the Writ of Covenant, the party ſhall recover the Land it ſelf out of which he hath been ejected.

Uſe. *Leaſe.* *Contract.*

A Covenant may be in the Affirmative, or in the Negative. And it may be executed, *i.* that a thing is done already; or executory, *i.* that a thing ſhall be done hereafter: And theſe are all good. But if it be of a thing preſent, as if I covenant that my Horſe is yours; this is void. *Plow.* 330. 27 *H.* 8. 16,

4. What ſhall be ſaid a good Covenant in Deed, upon which an Action of Covenant may be had, and what not.

And theſe Covenants being made by a Deed poll, are as good and effectual as when they are made by a Deed indented, ſo as the party have the Deed to ſhew; for otherwiſe a common perſon cannot have an Action of Covenant; for it doth not lie upon a Verbal agreement, neither can it be grounded without a Writing, except it be by a ſpecial Cuſtom as in *London*, *F.N.B.* 145. *g. Co.* 3. 63. *Ewers* Caſe, 8 *Jac.*

1. In reſpect of the manner of making it.

And there needs not in this caſe formal and orderly words, as *Covenant*, *Promiſe*, and the like, to make a Covenant on which to ground an Action of Covenant. For a Covenant may be had by any other words, and upon any part of an Agreement in writing, in what words ſoever it be ſet down for any thing to be, or not to be done; the party to or with whom the Promiſe or Agreement is made, may have this Action upon the breach of the Agreement. *Lit. Bro. ſect.* 450. *Co.* 2. Lord *Cromwels* Caſe. *Dyer* 57. 110. 21 *H.* 7. 37. 40 *E.* 3. 5.

And therefore if theſe words be inſerted in a Deed amongſt other Covenants, [That the Leſſee ſhall repair, Provided always that the Leſſor ſhall allow Timber: Or that the Leſſee ſhall ſcour ditches, Provided always that the Leſſor do carry away the earth;] theſe are good Covenants on both ſides. And if a Leaſe be made of Houſes by Patent to *J. S.* for Twenty one years, and therein is inſerted this clauſe, [And that the ſaid *J. S.* and his Aſſigns ſhall repair the Houſes when they ſhall be decayed;] this is a good Covenant. *Adjudg. Paſch.* 14 *Jac. B. R.* Sir *Thomas Bret verſ. Cumberland's* Caſe.

And ſo alſo it is where theſe or the like words be inſerted amongſt other Covenants, [And that the Leſſee ſhall pay Ten ſhillings a year Rent, or that the Leſſee ſhall not alien;] theſe ſhall be ſaid to be Covenants, unleſs it be in ſuch caſes where there is ſome other means to inforce the doing of the thing; as if in caſe of the Rent there be a clauſe of Diſtreſs, Re-entry, or *nomine pœnæ*. *Bro. Cov.* 21. 26. & *Co.* & *Dyer ubi ſupra.*

And in all caſes regularly, where words that do begin the ſentence be conditional, and have the effect of a Condition, and do give another remedy, there they ſhall not be conſtrued to make a Covenant, as in the caſes of Condition before. And yet if words of Condition and words of Covenant be coupled together in the ſame ſentence, as [Provided always, and it is Covenanted, or the like;] in ſuch caſes the words may be conſtrued to make a Covenant and a Condition both. Covenant with two ſeverally is good, *March* 103. *pl.* 176.

If a man make a Leaſe for life by Indenture, and therein are inſerted theſe words; [It is provided, that if the Leſſee die within ſixty years, that then his Executors and Aſſigns ſhall have the Land until the ſixty years be ended, to be accounted from the date of the Indenture;] this, albeit it be not a good Leaſe, yet it is a good Covenant. *Leaſe.*

If a man make a Leaſe for years, and warrant it to the Leſſee, his Heirs and Aſſigns during the Term, or he that hath right to the Land confirm the Eſtate of the Leſſee for years with Warranty; in theſe caſes howbeit this be not a Warranty, nor in the nature of a Warranty, yet it ſhall be conſtrued a good Covenant in Law for the quiet-

quiet enjoying of the thing, *Bro. Covenant* 38. *Deſcent* 50. 21 *H.* 7. 32.

If the Lord grant to his Tenant, that he will not diſtrain him in ſuch a part of his Land for his Rent; this ſhall be taken to be a good Covenant, by this word [grant.] *Perk. ſect.* 69.

2. In reſpect of the matter or ſubſtance of it.

A Covenant to do any thing that for the ſubſtance and matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good. As if the Grantor covenant, That he is ſeiſed or poſſeſſed of a good Eſtate of and in the thing he doth grant, and hath power to grant it: That the Grantee ſhall quietly enjoy it: That it is and ſhall be free from Incumbrances: That he will make further Aſſurance, if need be. That if the Grantee be evicted, he ſhall pay no Rent: That the Grantee ſhall pay Rent: That he ſhall diſcharge all dues, and ſave and keep harmleſs the Grantor. That he ſhall not alien the thing granted; or if he do, that the Grantor ſhall have the firſt refuſal thereof. That he ſhall not do Waſte. That he ſh all have Houſeboot, Hayboot. That the Grantor or Grantee ſhall repair the old Houſing, or build new. That he ſhall pay and diſcharge all Rents and payments iſſuing out of the Land. That he ſhall not fell Trees; or if he do, that he ſhall pay to the Grantor ſo much in money for every Tree. That if he fell any Underwood, he ſhall fence it. That he ſhall make an Eſtate of Land. That he ſhall be quit of any Suit, Service, or Payment. That he ſhall give ſufficient Security to *J. S.* for an Hundred pounds he doth owe him; and all theſe and the like Covenants are good, See *Weſt. Symb.* in his firſt Part *toto*, *& infra Plow.* 308. 302. 27 *H.* 8. 16. *Dyer* 13. 324. 253. 251. *Fitz. Cov.* 1.

And generally where a Condition for the matter of it is good, a Covenant comprehending the ſame matter, is good alſo. See *Condition, numb.* 7. But if the matter required to be, or not to be done by the Covenant, be for the ſubſtance thereof unlawful, then is the Covenant void, and doth not bind. See *Conditions againſt the Law, numb.* 7. *Dyer* 6. And therefore if one covenant to kill, or rob a man, or the like; this Covenant is void. So if one covenant that he will maintain another in his Suits, or that he will not appear in Inqueſts, or that he will break the Peace, or that he will foreſtall Corn, or the like; theſe Covenants are void. So if one be Tenant in Fee-ſimple of Land, and he covenant that he will not alien it; this Covenant is void. So if a man be a Tradeſman, and he covenant that he will not uſe or exerciſe his Trade; this Reſtraint, if it be abſolute and continual, is void; but if it be *ſub modo* only, as that he ſhall not uſe his Trade at one time, or in one City or Town only, this Covenant may be good. 18 *Jac. B. R. Joilliff verſus Broad. Paſch.* 19 *Jac. B. R. Tanner verſus Brag.*

Againſt Law.

So if a man be by Covenant reſtrained to ſow the Land which hath been uſed to be ſowed; and this be either abſolutely, or *ſub modo*, *i.* That if he ſow it, he ſhall pay thus much an Acre for it; theſe Covenants have been held to be void. *Sed quære* how the Law is now; for it ſeems the Statute of 39 *Eliz. ch.* 2. is diſcontinued. If *A.* owe money to *B.* and *B.* owe money to *C.* and *B.* doth make a Letter of Attorney to *C.* to ſue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not releaſe the Debt to *A.* In this caſe, albeit this be Maintenance in *C.* to ſue at his own charge, yet this is a good Covenant, and not againſt Law. *Hil.* 20 *Jac. Co. B. Maire verſus Stapleton.*

So alſo if a Dean and Chapter, or the like, covenant to renue a Leaſe, contrary to the meaning of the Statute of 18 *Eliz. ch.* 11. it ſeems this is a good Covenant, *Trin.* 14 *Jac. Co. B. Tailors* Caſe.

Impoſſible.

And if the thing to be done by a Covenant, be in the nature of it impoſſible, the Covenant is void, 27 *H.* 8. 27. 4 *H.* 7. 4. And therefore it is, that if a man covenant to go to *Rome* in three days, or the like, the Covenant is void. So if a man covenant to make a Feoffment to his wife, this Covenant is void. But if a man covenant to make a good Eſtate of Land to her in Fee-ſimple, or otherwiſe, or to find her Maintenance, or to give her ſo much by the year; theſe are good Covenants. And generally, there where the matter being in a Condition, will make the Condition void, becauſe it is againſt Law; there it being in a Covenant, will make the Covenant void. See *Condition, num.* 7. *Brownl.* 2 *par.* 281.

If

If a Leſſor Covenant with his Leſſee, that he ſhall and may have Houſ-boot, Hay-boot, Plough-boot, *&c.* by the aſſignment of the Bailiff of the Leſſor; this is a good Covenant: And yet it ſeems it doth not reſtrain the power that the Leſſee hath by the Law, to take theſe things without Aſſignment. But if the Leſſee do Covenant that he will not cut any Timber, or Fuel, without the leave, or without the Aſſignment of the Leſſor; this is a good Covenant, and doth reſtrain him; for in this, and ſuch like caſes, the rule is, *Modus & conventio vincunt legem. Dyer* 19. 115.

If an Obligee Covenant with the Obligor, that he will not ſue him upon the Obligation until *Eaſter* following; this is a good Covenant, but no Releaſe or Suſpenſion of the Debt. *Mich.* 36, 37 *Eliz. Co. B. R.* Adjudge *Deaux verſus Jefferies.* 21 *H.*7. 23.

If there be Lord and Tenant of three Acres of Land, White-acre, and two others, and the Lord grant to the Tenant by Deed, that he will not diſtrain in White-acre for his Rent, or Services; this is a good Covenant, but doth not determine the Seigniory. *Perk. Sect* 69.

If one man grant a Mill within his Manor, and Covenant for him and his Heirs, that there ſhall be no other Mill ſet up within the Manor; it ſeems this is a good Covenant. *Fitz. Covenant* 5.

If one make a Leaſe, wherein are divers Covenants to be performed on the part of the Leſſee, and after the Leſſee doth Covenant, that if any of the Covenants be broken, that the Leſſor ſhall enter upon the Land demiſed, and hold it until the Leſſee make him amends for the damage done by the breach of the Covenant; it ſeems this is a good Covenant, and that the Leſſor may take advantage thereof accordingly. See more in *Brownl.* 1 *part.* 21. *Fitz Covenant* 3.

If a man ſeiſed of Land in Fee, Covenant to ſtand ſeiſed of it to Uſes, and no Eſtate doth riſe by the Covenant; yet this may be good by way of Covenant, and give remedy to the Covenantee in an Action of Covenant. But with this difference. If the Covenant be future, as where one doth Covenant with another, that in conſideration of a marriage, his Lands ſhall deſcend, remain, or revert to his Son and Heir Apparent, and to the Heirs of his Body, on the Body of his Wife; in this caſe the Covenantee may have a Writ of Covenant upon the Covenant. For if a Covenant be preſent, as that a man and his Heirs ſhall from henceforth ſtand and be ſeiſed to ſuch and ſuch uſes, and the uſes will not ariſe by the Law in the caſe; in this caſe no Action of Covenant will lie upon this Covenant, for this Action will never lie upon any Covenant, but upon ſuch a Covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done, and not when it is for a thing preſent, as when *A.* doth Covenant with *B.* that his black Horſe ſhall be for ever after the Horſe of *B*; this is no good Covenant to give the Horſe to *B.* or to give him an Action of Covenant for him, but *A.* may keep him ſtill notwithſtanding. *Plow.* 307, 308. 21 *H.*7. 18. 27 *H.*8. 16. *Fincheſley* 49.

If one Mortgage upon Condition to re-enter upon payment of an hundred pound at a day, and the Mortgagee doth Covenant that he will not take the profits of the Land, until default of payment; this is a good Covenant, and the Mortgagee therefore may not meddle with the profits, until the day of payment come. Agree, 8 *Car.*

If one make a Leaſe for years of Land, by the words [*Demiſe or Grant,*] and there is not contained in the Leaſe any expreſs Covenant for the quiet enjoying of the Land; in this caſe the Law doth ſupply a Covenant for the quiet enjoying of it againſt the Leſſor, and all that come in under him by title, during the term, and upon this the Leſſee, his Executors, Adminiſtrators, or Aſſigns, may have an Action of Covenant if he be diſturbed. But where there is an expreſs Covenant in the Deed for the quiet enjoying of the Land, there the Law will not make this implied Covenant. *Expreſſum facit ceſſare tacitum.*

5. What ſhall be ſaid a good *Covenant* in *Law*, upon which an *Action* of *Covenant* may be had, and what not. *Warranty.*

And therefore herein this is not like to the caſe, where a man doth make a Leaſe for life by the words of *Dedi & conceſſi*, or make a Leaſe for life by other words, Reſerving Rent; (in which caſes the Law doth create a Warranty againſt all men, during the life of the Leſſor:) For if in theſe caſes there

qualify y^e Warranty

be an Expreſs Warranty in the Deed, yet this doth not take away nor qualifie the implied Warranty, but the Leſſee may make uſe of which of them he will, if he be ouſted or evicted by one that hath an elder title. *Brownl.* 2 *part.* 212, 213, 214. *Co.* 4. 80. 5. 17. *Trin.* 3 *Jac. B. R. Stiles* caſe. *Paſche,* 7 *Jac. B. R. Winchcombs* caſe.

6. How a *Covenant* in *Deed* or *Law* ſhall be taken and expounded, and how it ſhall be performed.

A Covenant in particular (being one part of a Deed) is ſubject to the general Rules of Expoſition of all parts of Deeds in general, as to be always taken moſt ſtrongly againſt the Covenantor, and moſt in advantage of the Covenantee. 2. To be taken according to the intent of the parties. 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it ſhall be done in reaſonable time, and the like. *Plow. Sect.* 287. See the Expoſition of Deeds before *in toto.*

Joynt and ſeveral.

In caſes where the Covenantees have, or are to have ſeveral Intereſts or Eſtates, there when the Covenant is made to, and with the Covenantees, *Et cum quolibet eorum, aut altero eorum*; in this caſe theſe words make the Covenant ſeveral: As if one by Indenture Demiſe Black-acre to *A.* and White-acre to *B.* and Green-acre to *C.* and Covenant with them and either of them, or Covenant with them, and every of them, that he is lawful owner of all theſe Acres; in this caſe the Covenant is ſeveral: But if he Demiſe to them the three Acres together, and Covenant in this manner; the Covenant is joynt and not ſeveral. And if *A.* and *B.* do Covenant joyntly, and ſeverally; in this caſe the Covenant may be joynt, or ſeveral, and the Covenantors may be ſued, either the one way or the other, at the Election of the Covenantee. *Co.* 5. 19. *Dyer* 338. *Bro. Covenant* 49.

For quiet enjoying.

If one make a Leaſe of Land to another, and Covenant that he ſhall quietly enjoy it without the let of any perſon whatſoever, or without the let of any perſon whatſoever claiming by, or under the Leſſor; in both theſe caſes the Covenant ſhall be taken to extend to ſuch perſons as have title, or claim ſome Eſtate under the Leſſor; for if in the firſt caſe any perſon that hath no title, and in the ſecond caſe any perſon that ſhall claim under another, and hath title, or that ſhall claim under the Leſſor, claim, or enter, or otherwiſe diſturb the Leſſee; this is held to be no breach of the Covenant. *Sed quere* of the firſt caſe; for herein ſome conceive a difference between a Covenant in Deed, and a Covenant in Law: And that howſoever the Covenant in Law is extended onely to evictions by title, yet that the Covenant in Deed ſhall be extended further. And therefore that if *A.* make a Leaſe for years to *B.* and doth Covenant that *B.* ſhall quietly enjoy it, during the term, without the interruption of any perſon or perſons; that if a ſtranger in this caſe, that hath no right, doth interrupt *B.* that he may have an Action of Covenant; as when ſuch a promiſe is by word, an Action of the caſe will lie upon it. See *Brownl.* 1 *part.* 20, 21, 22. *F. N. B.* 145. *Dyer* 328. 26 *H.* 8. 3. *Mich.* 7 *Jac. B. R.* Accord in *Gambles* caſe. *Co.* 4. 80. *Dyer* 328. By *Furner* at *Lent* Aſſize, *Gloceſter.* 23 *Car.*

Covenant in Deed in Law

Action of the *Caſe.*

And if the Leſſor Covenant with his Leſſee, that he hath not done any act to prejudice the Leaſe, but that the Leſſee ſhall enjoy it againſt all perſons; in this caſe theſe words [*Againſt all perſons*] ſhall refer to the firſt, and be limited and reſtrained to any acts done by him, and no breach ſhall be allowed, but in ſuch an act. *Curia Jervis verſus Pead. Mich.* 40, 41 *Eliz. B. R.*

The Covenant in Law upon the words Demiſe or Grant alſo for the quiet enjoying of the thing demiſed, is general againſt all perſons that have title, during the term, and extendeth to the Heir after the death of the Leſſor, as againſt himſelf

Executors.

onely, and ſhall charge the Executors or Adminiſtrators for any diſturbance in the life of the Covenantor, but not for any diſturbance afterwards; he that doth ſue therefore upon this Covenant, muſt ſhew that he was moleſted or evicted by one that had an elder title. *Co.* 5. 17. 22 *Hen.* 6. *chap.* 52. *Co.* 4. 80. *Dyer* 257.

If one doth Covenant to enter into Bond for the quiet enjoying of Land, and doth not ſay what Bond; in this caſe it ſhall be taken to be a Bond of ſo much as the Land to be enjoyed is worth. *Co.* 5. 78.

A Warranty in a Leaſe for years, ſhall be taken for a Covenant for quiet enjoying, *Fitz. Covenant.* 21. See before. 7 *Eliz.* 4. 6. *Bro. Grant.* 64.

If one Covenant with another, to acquit him of all charges iſſuing out of the Land, and after by Parliament the tenth part of the value, not of the Iſſues of all Lands are given to the King; in this caſe it ſeems the Covenant ſhall not extend to this. But if the Parliament had given the tenth part *exituum terræ*; the Covenant would have extended to this as well as to Rents, Commons, and ſuch like things, wherewith the Land is charged. *Brownl.* 1 *part.* 19, 20, 21. To free from Incumbrances and Charges.

If *A.* Covenant with *B.* to make ſuch Aſſurance, or ſuch further Aſſurance of Land as the Counſel learned in the Law of *B.* ſhall adviſe; in this caſe albeit *B.* be learned in the Law himſelf, yet he may not deviſe this Aſſurance, but ſome other learned in the Law muſt adviſe, otherwiſe *A.* is not bound to make it. *Co* 5. 19. To make *Aſſurances* of Land.

And if *A.* Covenant with *B.* to make ſuch Aſſurance of Land by a day, as *B.* or his Heirs ſhall deviſe; in this caſe *B* or his Heirs muſt firſt deviſe the Aſſurance before *A.* is bound to do any thing. And therefore if one ſell Land for money, and the Vendee doth Covenant to make back to the Vendor and his Heirs, ſuch Aſſurance of the Land, as the Counſel of the Vendor ſhall deviſe within one year, provided, That if the Vendee make default in the Aſſurance, then if he do not pay twenty pound to the Vendor, that then the Vendee ſhall ſtand ſeized to the uſe of him and his Heirs, and the Vendor tender no Aſſurance, the twenty pound is not paid; in this caſe the Land is in the Vendee freed from the Covenant. And therefore in theſe and ſuch like caſes, where a man is to make ſuch Aſſurance, as *A* or his Heirs, at their Counſel ſhall deviſe: *A.* or his Heirs muſt take care, that in time they have an Aſſurance reaſonably drawn, and ready to be ſealed, and to tender it to him that is to ſeal it, for until then there can be no breach of Covenant. But if *A.* be bound to make a Feoffment, Leaſe, or other Aſſurance of Land to *B.* by a day; in this caſe *B.* need not to demand it, or tender the Aſſurance, for *A.* at his peril muſt do it, otherwiſe he doth break his Covenant. *Co.* 5. 19, 20. *Dyer* 361. And by Juſtice *Bridgman.*

And yet if in this caſe *B.* do get the Aſſurance drawn, and tender it to *A.* it ſeems *A.* is bound to ſeal it, or otherwiſe he doth break his Covenant. *Trin.* 20 *Jac. B. R. Steed verſus Spike.*

And if the caſe be ſo that *A.* is bound to make ſuch Aſſurance to *B.* by a day, at the coſts of *B*; in this caſe *A.* muſt do the firſt act, *viz.* notifie to *B.* what manner of Aſſurance he will make, that he may know what money to tender; and when the money is tendred, *A* muſt ſee that he do make the Aſſurance accordingly at his peril, and if he fail in either of theſe, the Covenant is broken. *Brownl.* 2 *part.* 283. *Co.* 5. 20, 22.

If *A.* be bound to make ſuch Aſſurance to *B.* as by the Counſel learned of *B.* upon requeſt made, ſhall be deviſed; in this caſe it is ſufficient if the adviſe be given to *B.* and that he do make it known to *A.* and it is not needful it be given to *A.* immediately. *Co.* 5. 20. And if *A.* Covenant with *B.* to make ſuch Aſſurance to *B.* as *J. S.* ſhall deviſe, and *J. S.* doth deviſe a reaſonable Deed of Bargain and Sale, and he tender it to *A.* to Seal; in this caſe *A.* is bound to Seal it preſently, and he ſhall not have time to adviſe with his Counſel upon the Deed; but if he be illiterate and cannot read the Deed, he may refuſe and delay to Seal it, until he can get ſome body to read it, which he muſt do as ſoon as he can. *Dyer* 338. *Co.* 2. 3. And if one be bound by Covenant to make an Aſſurance upon requeſt; the Covenantee muſt requeſt and tender an Aſſurance alſo, and he muſt tender ſuch a one alſo as is reaſonable, otherwiſe the Covenant will not be broken by the refuſal or neglect to do it; as if one be bound to make a Feoffment to *A.* upon requeſt; in this caſe *A.* muſt get a naked Deed of Feoffment drawn without Warranty or Covenants, and tender it. And if the Covenant be to make ſuch a Leaſe as the former; in this caſe the ſecond Leaſe muſt not differ from the former, & if it do, the party is not bound to Seal it. *Experientia.*

If one Covenant to levy a Fine at the next Aſſizes for thirteen years *extunc*; this ſhall be taken from the time of the Fine levied, and not from the time of the Covenant. *Curia Hil.* 7 *Jac. Co. B. R.*

If one bargain and ſell Land to me by Deed indented, and before the Inrolment of the Deed, I do Covenant with *J. S.* to convey all the Land, whereof I am ſeized, and to do this before ſuch a day, and before the day the Deed is inrolled; in this caſe my Covenant ſhall not extend to this Land conveyed to me by this bargain and ſale. Adjudge in Sir *Jo. Brets* caſe.

If *A.* Covenant with *B.* that in conſideration of a marriage between the Son of *A.* and ſiſter of *B.* that he at the coſts of his Son, and by his ſufficient Deed, will before *Eaſter* day, aſſure Land to his Son; and *B.* doth Covenant, that if *A.* do perform this, then he will make him a general Releaſe; in this caſe albeit *A.* be ready, and the Son do not tender the Aſſurance, and the Conveyance is not made, *B.* is not bound to make any Releaſe. *Dyer* 371.

To repair the Houſes.

If one Covenant to keep and leave a houſe in the ſame, or as good plight as it was at the time of the making of the Leaſe; in this caſe the ordinary and natural decay of it, is no breach of the Covenant: But the Covenantor is hereby bound to do his beſt to keep it in the ſame plight, and therefore to keep it covered, *&c. Brownl.* 1 *part.* 23. *Fitz. Covenant* 4.

For the having of Houſeboot,

If the words of a Covenant be [That the Leſſee ſhall have thorns by the Aſſignment of the Leſſor and neceſſary fuel alſo;] it ſeems by this, that there muſt be an Aſſignment of the fuel, as well as of the thorns. *Dyer* 19.

If the Leſſor Covenant with his Leſſee, that he ſhall have ſufficient Hedgboot, by Aſſignment of the Bailiff of the Leſſor; in this caſe, and by this the Leſſee is not reſtrained from that liberty that the Law doth give him, and therefore that he may take without Aſſignment: But if the words be Negative, that he ſhall not take without Aſſignment, or that he ſhall take by Aſſignment, and not otherwiſe, *contrà. Dyer* 19. 20.

To convey Lands of the value of, *&c.*

If *A.* doth Covenant with *B.* that where as a marriage is intended to be ſolemnized between *A.* and *C.* the Daughter of *B.* at or before the fourteenth day of *Auguſt* next, and where the ſaid *B.* hath paid to the ſaid *A.* a thouſand pound for portion, *&c.* the ſaid *A.* in conſideration thereof doth Covenant with *B.* that he within one year of the day of the marriage, will aſſure Lands of the value of four hundred pound *per annum*; in this caſe, albeit the marriage be not before that day, yet the Covenant muſt be performed. *Trin.* 21 *Jac. B. R. George verſus Lane.*

That the Leſſee ſhall make Eſtates.

If one make a Leaſe for years of a Manor, and Covenant that the Leſſee ſhall make eſtates for life or years, and that they ſhall be good; in this caſe it ſeems this Covenant ſhall not be taken to enable the Leſſee to make eſtates for a longer time then his eſtate will bear. By Juſtice *Bridgman.*

That if the Leſſee ſell, the Leſſor ſhall have the firſt refuſal.

If the Leſſee Covenant with the Leſſor, That if the Leſſee be minded to ſell his eſtate, the Leſſor ſhall have the firſt refuſal; in this caſe when the Leſſee is minded to ſell, he need do no more but acquaint the Leſſor with his purpoſe, and know his minde, and if he do not anſwer him preſently, he may ſell it to whom he will: And if the Covenant be further, that the Leſſor ſhall give as much as another will, the Leſſee muſt tell him what another doth offer him, and ask him whether he will give ſo much; and if he refuſe or do not accept it preſently, the Leſſee may ſell to whom he will. *Dyer* 13.

To do one thing for another.

If one Covenant to ſerve me a year, and I covenant to pay him ten pound for it; in this caſe albeit he do not ſerve me, yet I muſt pay him the ten pound. But if I Covenant with him to pay him ten pound, if he ſerve me a year, *contra*; for in this caſe I am not bound to pay him the money, unleſs he ſerve me a year. So if one Covenant to make new Pales, ſo as he may have the old; in this caſe it ſeems he is not bound to make the new Pales, unleſs he may have the old Pales. So if one Covenant to pay money for ſervice, counſel, or the like, or Covenant to marry ones Daughter, or make an eſtate, and the Covenant is penned conditionally, and ſo as one thing is the cauſe of another, and it is not ſet down by mutual and reciprocal Covenants; in all theſe caſes, if the cauſe or condition be not obſerved, the Covenant ſhall not be performed. *Co. ſuper Littl.* 204. *Dyer* 371. *Mich.* 7 *Jac. Co. B. R.*

If

If one make a Leaſe for ten years, and Covenant that if the Leſſee pay him ten pound within the ten years, that he ſhall have the Fee-ſimple and the Leſſee ſurrender his eſtate within the time; in this caſe, if the Leſſee pay the money, the Leſſor is bound to make the Fee-ſimple to him. But if the words of the Covenant be, that if he pay him ten pound within the term, he ſhall have Fee, and the Leſſee ſurrender his term, and then pay the ten pound; in this caſe the Leſſor is not bound to make the Fee-ſimple, for it was not paid within the term. *Co.* 1. 144.

That the Leſſee ſhall have the Fee.

If one Covenant to do a thing to *J. S.* or his Aſſigns, or to *J. S.* and his Aſſigns by a day, and before the day *J. S.* die; in this caſe it muſt be done to his Aſſigns, if he before the day, name any Aſſignee; and if he do not, it muſt be done to his Executor or Adminiſtrator, which is an Aſſignee in Law. See more in *Condition. Num.* 8. *Obligation* 7. 27 *H.* 8. 2.

Aſſigns.

If one be ſeized of Land in Fee, or poſſeſſed of a term of years, and he doth alien it, and ſuppoſing he hath a good eſtate, he doth Covenant that he is lawfully ſeized or poſſeſſed, or that he hath a good eſtate, or that he is able to make ſuch an alienation, *&c.* And in truth he hath not, but ſome other hath an eſtate in it before; in this caſe the Covenant is broken, as ſoon as it is made. *Dyer* 303. *Co.* 9. 60.

7. When a Covenant in Deed or Law ſhall be ſaid to be broken, and when not, and how.

And if I bargain and ſell Land by Deed indented to *B.* and before the Deed is inrolled, I grant the ſame Land to *C.* and Covenant that I am ſeized of a good eſtate of it in Fee, and after the Deed is inrolled; in this caſe the Covenant is broken. Adjudge Sir *Peral Brocas* caſe. 32 *Eliz.*

That the Covenantor is ſeized of a good Eſtate, *&c.*

If *A.* let Land to *B.* and Covenant that he ſhall quietly enjoy it without the let of any perſon whatſoever, and *A.* himſelf, or any other perſon that hath any title to the Land, by, or under him, as if he make a Leaſe of it, or grant a Rent out of it to another, or any other perſon that hath any title to the Land, albeit it be not by, or under *A.* as if *A.* were a Diſſeiſor, and the Diſſeiſee do enter or diſturb *B*; in all theſe caſes the Covenant is broken. And ſo alſo is the Law deemed to be by ſome in caſe of Covenant, in Deed for quiet enjoying, where a ſtranger or one that hath no title to the Land, doth enter or diſturb *B.* But otherwiſe it is in caſe of Covenant in Law for quiet enjoying; for in this caſe, if a ſtranger that hath no title to the Land, doth enter or diſturb the Leſſee; this is no breach of the Covenant in Law. And in all caſes where any perſon hath title, the Covenant is not broken until ſome Entry, or other actual diſturbance be made by him upon his title. *Mich.* 8 *Jac. Lambs* caſe. *Dyer* 328. *F. N. B.* 145. 26 *H.* 8. 3. *Hil.* 39 *Eliz. B. R. Corns* caſe. *Fitz. Covenant.* 26. *Bro. Covenant.* 40.

For quiet enjoying.

If a man make a Leaſe of Land, and after make a Feoffment of the ſame Land, and the Feoffee doth diſturb the Leſſee; in this caſe it hath been ſaid, this is a breach of the Covenant for quiet enjoying. *Sed quere Brownl.* 1 *part.* 20, 21, 22, 23 24. 78. 80, 81. 20 *Jac. Bro. Covenant* 7.

If a man purchaſe Land to him and his Wife, and his Heirs in Fee, and then make a Leaſe for years of it to *J. S.* and Covenant for him, his Executors and Aſſigns, that the Leſſee, his Executors and Aſſigns, ſhall quietly hold and enjoy the premiſſes, without the let of the Leſſor, his Heirs or Aſſigns, or any other perſon, by or through his or their means, title or procurement, and after the Leſſor doth die, and his Wife doth enter and diſturb; in this caſe, and by this means the Covenant is broken. *Hil.* 20 *Jac.* Adjudge *B. R. Butler verſus* Lady *Swinerton.*

And ſo it is alſo, if *A.* purchaſe Land of *B.* to have and to hold to *A.* for life, the Remainder to *C.* the ſon of *A.* in Tail, and after *A.* doth make a Leaſe of this Land to *D.* for years, and doth Covenant for the quiet enjoying as in the laſt caſe, and then he dieth, and then *C.* doth out the Leſſee; in this caſe this was held to be no breach of the Covenant. *Swans* caſe. *M.* 7, 8 *Eliz.*

So likewiſe if *A.* be ſeized of White-acre in Fee, and take to Wife *B.* and then make a Leaſe of it to *C.* with ſuch a Covenant as before, for the quiet enjoying, and then *A.* doth die, and after *B.* doth recover Dower; by this the Covenant is broken, and yet if the Mother of *A.* recover Dower, and out the Leſſee, *contra.* So alſo if a Tenant in Tail doth make a Leaſe with ſuch a Covenant, and his Iſſue doth diſturb the

the Leſſee; this is no breach of the Covenant. And yet if the Leſſor be the cauſe of the Gift in Tail, or procure the diſturbance, this may be a breach of the Covenant. And ſo alſo it is where a man is ſeiſed of Land in Fee, and he doth make a Leaſe with ſuch a Covenant, and afterwards he doth die, and then his Heir is in Ward by reaſon of a Tenure, and hereby the Leſſee is diſturbed; it ſeems this is no breach of this Covenant. *Dyer* 42. 26 *H* 8. 3. *Fitz. Covenant.* 6. 26.

If one Covenant that the Wife he is about to marry ſhall quietly enjoy all her Goods, and that the Covenantee ſhall take it into his poſſeſſion, and the Husband doth onely take the Goods, and keep them in his poſſeſſion; this is no breach of the Covenant. *Curia. B. R. Paſch.* 6 *Car. Crowls* caſe.

If a Covenant be for the quiet enjoying againſt all perſons, but the King and his Succeſſors, and the Patentee of the King do diſturbe; this is a breach of this Covenant. Adjudge. *Hil.* 38 *Eliz. Woodroffe verſus Greenwood.*

If two make a Leaſe, and Covenant that the Leſſee ſhall enjoy the Land without the let of them, or any other, and one of them alone doth diſturb the Leſſee; this is a breach of the Covenant. Adjudge. *Mich.* 2 *Car. B. R. Sanders* caſe.

If a Leſſee grant and aſſign all the Land contained in his Leaſe to *A.* and doth Covenant with him, that he hath not done any act or thing by which the Grant or Aſſignment might be impaired, but that the Aſſignee his Executors, *&c.* may enjoy it againſt all perſons, and before this time the Wife of the Leſſor had recovered and had execution of a third part of this Land for her Dower; in this caſe this is no breach of the Covenant, for the words [*but that, &c.*] do refer to the former, and are not abſolute. *Dyer* 240.

If *A.* grant the Bailiwick of *W.* to *B.* for life, and *B.* aſſign it to *C.* for three years, and after to *D.* and *C.* doth Covenant with *D.* that he will not do or ſuffer to be done any act, during the ſaid three years, by which the Grant made by *A.* may be forfeit, but that after the three years ended, he may enjoy it in as ample manner as *C.* did, or might have done without any act by *C.* and after the three years ended, *C.* doth execute a Proces there, and thereby incroach upon the Office; this is no breach of the Covenant. Adjudge. *Rich verſus Row. Paſche,* 13 *Jac. Co. B. R.*

To free from Charges and Incumbrances.

If *A.* grant Land to *B.* and his Heirs, rendring ten pound Rent, and *B.* doth ſell the Land to *C.* and his Heirs, and doth Covenant with *C.* that from ſuch a day he ſhall enjoy it, diſcharged of all Incumbrances, and before that day a Common Recovery is had againſt *C.* in which *A.* is vouched, and this is to the uſe of *C.* and his Heirs, ſuppoſing hereby the Rent had been gone, which is not ſo; in this caſe the Covenant is broken, for this Rent is an Incumbrance. *Brownl.* 1 *part.* 20, 21. *Curia, Hil.* 20 *Jac. Co. B. R. Greenway* and *Tuckfalds* caſe.

If a Leaſe be made of Land for years, and the Leſſee deviſe it to his Wife *durante viduitate*, and after to his Son, and he in Reverſion doth ſell the Fee to the Woman, during the Widowhood, and doth Covenant that the Land is diſcharged of all former Sales, Rights, Titles, Charges; in this caſe the Covenant is broken at the firſt by reaſon of the poſſibility of the Son *Co.* 10 52.

If *A.* grant White-acre to *B.* and Covenant that *B.* ſhall enjoy it againſt all Incumbrances, and *C.* doth diſturb him in the taking of Common there, and this is a Common which is againſt Common Right, and which he hath by Preſcription; in this caſe it ſeems this is a breach of the Covenant. But if it be of a Common that is of Common Right, *Contra.* 9 *Eliz. Co. B. R.*

To make *Eſtates* and *Aſſurances.*

If *A.* Covenant with *B.* before *Eaſter* to make him a good ſure Eſtate of Land, diſcharged of all former Bargains, Leaſes, and Incumbrances whatſoever. (Leaſes or Grants for life or years, reſerving the ancient Rent during the term onely excepted) and *A.* after this, and before the eſtate made, doth make a Grant of all or part of the Land, reſerving the old Rent; it ſeems this is no breach of the Covenant. *Brownl.* 1 *part.* 84. *Dyer* 139.

If one make a Leaſe to *J. S.* for years, and Covenant with him that upon the Surrender of that Leaſe, he will make him a new Leaſe, and the Leſſor before *J. S.* can make any Surrender, doth ſell away the Reverſion, or make a Leaſe to another

of

of the Land, and ſo diſable himſelf; this is *ipſo facto* a breach of the Covenant, without any Surrender made by the Leſſee, which in this caſe is not needful. For, *Lex neminem cogit ad vana & inutilia peragenda.* So if one be ſeiſed of Land in Fee and Covenant to make a Feoffment of it to *J. S.* by a day upon a Requeſt, and the Covenantor before the day doth make a Feoffment of it to another, and then doth die before any Requeſt made to him; in this caſe the Covenant is broken. *Co.* 5. 21.

If *A.* Covenant with *B.* to make ſuch Aſſurance as *B.* or as the Counſel learned of *B.* ſhall deviſe, and *B.* tender ſuch an Aſſurance to *A.* to ſeal, and *A.* doth refuſe or delay to ſeal it; this is a breach of the Covenant. *Dyer* 338. *Co.* 2. 3.

If *A.* doth Covenant with *B. C. D.* and *E.* to make them a Feoffment ſuch a day, and they come to the Land at the time to take it, and *A.* doth not make the Feoffment; by this the Covenant is broken. And ſo alſo if *B.* and *C.* onely, or one of them doth come to the Land; for it may be made to any of them in the name of the reſt. But if none of them come to the Land, albeit the Feoffor never come there, it ſeems the Covenant is not broken. *Bro. Covenant* 3.

If *A.* Covenant with *B.* before *Eaſter* next, to aſſure his Houſe to him, and *K.* his Wife, during the life of *J. S.* and *A.* ſurrender his Houſe to the uſe of *B.* and ſuch as *K.* ſhall name at the Requeſt of *B*; in this caſe the Covenant is broken, for this is no performance of it. *Curia, B. R.*

If one Covenant to repair, ſuſtain, and amend a Houſe, and the Houſe is burnt by the negligence of the Covenantor, and not repaired again; this is a breach of this Covenant. And if the Leſſee Covenant for him and his Executors, to repair at his own coſts (the principal Timber not hurt or in decay for lack of reparations, or otherwiſe in default of the Leſſee or his Executors onely except) and he die, and afterwards the Houſe is burnt in default of the Executors; in this caſe the Covenant is broken, and the Executors may be charged. *Dyer* 324. To repair.

If one Covenant to leave a Wood in the ſame plight he findes it, and he cut down Trees; in this caſe the Covenant is broken preſently, for it is now become impoſſible to be performed by his own act: But if in this caſe ſome of the Trees be blowed down with the wind, or the like, by this the Covenant is not broken, for it is now become impoſſible to be done by the act of God, and in this caſe the Covenantor is not bound to ſupply it. And ſo likewiſe of a Covenant to repair Houſes, or if one Covenant to ſuſtain Houſes or Sea-banks, or Covenant to leave them in as good caſe as one doth finde them, and the Houſes be burnt, or thrown down by tempeſt, or the like, or the Banks be overthrown by a ſudden flood, or the like accident; in this caſe the Covenant is not broken by this accident onely; but if the Covenantor do not repair, and make up theſe things again in time convenient, the Covenant will be broken. And if Houſes be let to me for years, and I Covenant to leave them in as good plight as I finde them, and I throw down the Houſes; this is no breach of the Covenant for I may re-edifie them, and therefore no Action will lie upon this Covenant until the end of the term. *Fitz. Covenant* 29. *Co.* 5. 15. *F. N. B.* 145. *Co.* 1. 98. *Perk. Sect.* 738. *Dyer* 33. *Plow.* 29. 40 *Ed.* 3. 5.

If one Covenant to repair a Houſe before a day, and it happen the Plague is in the Houſe before and until the day, and thereby it is not done; in this caſe the Covenant is not broken, for this will excuſe, but then it muſt be done in convenient time afterwards, for otherwiſe the Covenant will be broken. *Hil.* 8 *Jac. Curia.*

If a Leſſee Covenant to do all the reparations of a Houſe Demiſed at his own coſts and charges, and he cut Trees upon ſome of the Ground Demiſed to amend the Houſe; it ſeems this is a breach of his Covenant. See *March. f.* 17. *Dyer* 198.

A man makes a Leaſe, and that the Leſſee ſhall have *Conveniens lignum non ſuccidendo & vendendo arbores*, and the Leſſee cuts down Trees; this is a breach of Covenant. *March* 9. *pl.* 22.

If one Covenant to pay money at five ſeveral days, and he fail of payment the firſt day; by this the Covenant is broken. *Co. ſuper Littl.* 292. *Brownl. Rep. f.* 19, 20, 22. 2 *part.* 176, 177, 273. To pay money.

If

To leave a ſtock, &c.

If one take Land ſowed, or a ſtock of Cattle in Leaſe for years, and the Leſſee Covenant to leave it in as good plight, as he doth take it; in this caſe he muſt leave it ſowed again, and if any of the Cattle die, he muſt make up the number, otherwiſe he doth break his Covenant. 40 *Ed.* 3. 5.

Not to take Toll.

If a Corporation do Covenant not to take Toll, and their Common Officer appointed for that purpoſe doth take it; this is a breach of the Covenant. 43 *Ed.* 3. 17.

To build a Houſe.

If *A.* Covenant with *B.* to build a Houſe by a day, and *B.* doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this caſe the Covenant is broken, for this will not excuſe him: But if he do by any actual impediment hinder him, or be the cauſe why the thing is not done, then the not doing of it is no breach of the Covenant. And therefore if a Leſſee Covenant to clenſe one of the Ditches in the Land demiſed, and the Leſſor enter upon the Land it ſelf, and keep out the Leſſee, and he doth not clenſe the Ditch by the time; by this the Covenant is broken: But if in this caſe the Leſſor do by force keep the Leſſee out of the Ditch or place it ſelf, *Contra.* 18 *Edw.* 4. 8. *Kelw.* 34. *Trin.* 36 *Eliz. B. R. Carrel verſus Reade.*

To clenſe a Ditch.

To have liberty to go in and out of a Shop.

If *A.* and *B.* be Joyntenants of a Shop, and *A.* Covenant with *B.* that he and his Aſſigns ſhall have free ingreſs and egreſs in and out of the Shop, and *A.* doth appoint *C.* his Servant to enter as Servant to him, and to occupy in Common with *A.* and this Servant doth expel the Servant of *B*; in this caſe this is a breach of the Covenant. *Hil.* 16 *Jac. B. R. Siliard verſus Loe.*

To come into a Houſe.

If *A.* Covenant with *B.* that *B.* ſhall come four times a year into the houſe of *A.* without being ouſted by *A.* and *A.* when he doth ſee *B.* coming, doth ſhut the doors and windows, and doth not ſuffer *B.* to come in; by this the Covenant is not broken. 3 *H.* 4. 8.

To marry another. Make a Feoffment, &c. Tender and Refuſal.

If *A* Covenant with *B.* to marry the Daughter of *B.* make a Feoffment, or do any other act to *C.* (who is a ſtranger to the Covenant) and *A.* doth tender it and offer to do as much as doth lie in his power, but the ſtranger doth refuſe it, and thereby it is not done; yet this doth not excuſe, but the Covenant is broken. But if the Covenant be to do any ſuch act to the Covenantee himſelf, and the Covenantor tender it, and the Covenantee refuſe it; by this the Covenant is performed. To pay Rent. See *Brownl. Rep. f.* 19, 20, 22, 24. 2 *part.* 176, 177, 273. 33 *H.* 6. 16. *Bro. Covenant* 3. *Fitz. Bar* 62.

Stranger Covenantee

See more in the laſt Queſtion, and in *Obligation, Numb.* 7, 8, 9. and in *Condition, Numb.* 9, 10. *Mich.* 7 *Jac. Co. B. R.*

8. Who ſhall or may have advantage of a *Covenant* in *Deed* or *Law*, and bring a *Writ* of *Covenant* upon the breach of it, or not.

Any one that is party to the Deed, to whom the Covenant is made, may take advantage of the Covenant, but not a ſtranger; for if *A.* Covenant with *B.* to do an act to *C.* who is no party to the Deed, and he doth it not, *B.* and not *C.* muſt ſue him upon this breach.

If a Leaſe be made of Land to a Husband and Wife for years, and the Leſſor doth enter upon the Land, and put them both out, or the one of them after the death of the other; in this caſe both of them whiles they both live, and the ſurvivor after the death of one of them, may have this Action of Covenant upon the Covenant in Law.

So if a Wardſhip be granted to a Woman by Deed, and ſhe take a Husband and die, the Husband ſhall have advantage of this Covenant in Law made by the word [*Grant*] if he be diſturbed.

So if one by the words [*Demiſe or Grant*] Leaſe Land to a Woman-ſole for years, who taketh a Husband and dieth; in this caſe if the Husband be diſturbed he ſhall take advantage of this Covenant in Law. *Co.* 5. 17. *Dyer* 257. 47 *Ed.* 3. 12.

Heir.

Warranty

If a Feoffment be made in Fee, and the Feoffor doth Covenant to warrant the Land, or otherwiſe to the Feoffee and his Heirs; in this caſe the Heir of the Feoffee ſhall take advantage of this. As if *A.* Covenant with *B.* and his Heirs to infeoff *B.* and his Heirs of Land, and *B.* die before it be done; in this caſe his Heirs ſhall take advantage thereof.

And

And if *A. B.* and *C.* have Lands in Coparcenary, and they purchaſe other Lands in Fee, and they Covenant each to other his Heirs and Aſſigns to make ſuch Conveyance to the Heir of him that ſhall die firſt, of a third part as he ſhall deviſe; in this caſe the Heir, not the Executor, ſhall take advantage of the Covenant. *Dyer* 338.

Executors and Adminiſtrators.

Executors and Adminiſtrators ſhall take advantage of Inherent Covenants, albeit they be not named. And therefore if *A.* Covenant to do a thing to *B.* and do not name his Executors or Adminiſtrators, and it be not done; it ſeems the Executors or Adminiſtrators of *B.* may have an Action of Covenant for the not doing of it. As if one Covenant with *J. S.* to pay him money at *Michaelmas*, and do not ſay to his Executors, *&c.* and he die before the time; in this caſe his Executor or Adminiſtrator ſhall take advantage of this Covenant, and may recover the money. *Co.* 5. 17. *F.N.B.* 145. *Dyer* 112. 271.

Aſſignees or Grantees.

Grantees of Reverſions ſhall have the like advantage againſt Fermors (by Action onely) for any Covenant or Agreement contained in their Leaſe, as the Leſſors, their Heirs or Succeſſors might. And ſo alſo ſhall Leſſees againſt Grantees of Reverſions (Recoveries in value except) by the Statute of 32 *H.* 8. 34. And herein (as in the caſes of a Condition before) a difference is taken between Covenants that are inherent, and Covenants that are collateral. For the Covenants whereof Grantees by this Statute ſhall take advantage, are inherent Covenants, (*i.*) Such Covenants as do concern the thing granted, and tend to the ſupportation of it: As where a Leſſee for life or years doth Covenant with his Leſſor and his Heirs, to keep the Houſes demiſed in good reparations, or the like, and after the Leſſor doth grant away the Reverſion of all, (*Mich.* 8 *Jac. Primes* caſe,) or part of the Houſes to *J. S*; in this caſe *J. S.* ſhall take advantage for any breach of the Covenant in his time, but not for any breach before the time the Reverſion was granted. But if the Leſſee doth Covenant with his Leſſor and his Heirs, to pay him a ſum of money, or make him a Feoffment, or the like, and then the Leſſor doth grant the Reverſion to *J. S*; in this caſe *J. S.* ſhall not take advantage of this Covenant: And yet the Executors or Adminiſtrators of the Leſſor ſhall take advantage of this Covenant. See *Goldsb.* 175. *pl.* 109. See *Condition, Numb.* 12. *Co.* 5. 18. 9 *Jac. B. R. Wilborne* and *Beſtwichs* caſe. Accord.

Regularly, every Aſſignee of the Land or thing Demiſed, ſhall take advantage of inherent Covenants, as if a Covenant be, to have Eſtovers to burn in the Houſe Demiſed, or to have Timber to repair, or if the Covenant be that the Leſſor or Leſſee ſhall repair, or the like. And therefore of theſe Aſſignees in Deed and in Law Aſſignees of Aſſignees *in infinitum*, ſhall take advantage. and Aſſignees of Executors or Adminiſtrators, Tenants by Statute, or Elegit, or after a ſale upon a *Fieri Facias*, a Husband in the Right of his Wife; any one of theſe, and any other that ſhall come lawfully to a term, unto which ſuch a Covenant is incident, albeit he be not named, yet may he take advantage of it. *Co.* 5. 17.

If a Leaſe for years be made to *J. S.* by the words [*Demiſe or Grant*] and the Leſſee aſſign this over to *J. D*; in this caſe *J. D.* may take advantage of the Covenant in Law, and bring an Action againſt the Leſſor, if he be diſturbed. *Co.* 4. 80. *Dyer* 257. *Fitz. Covenant* 30.

If a Leaſe for years be made of Land, and the Leſſor doth Covenant with the Leſſee and his Aſſigns to do, or not to do ſomething; in this caſe an Aſſignee by word, or an Aſſignee by Deed, may take advantage of this Covenant. *Co.* 3. 63. *F.N.B.* 145.

If two Coparcenors make Partition of Land, and the one of them doth Covenant with the other to acquite her, and her Heirs of a Suit that iſſued out of the Land, and the Covenantee doth alien her part to a ſtranger; in this caſe the Alienee ſhall have the ſame advantage for acquital of the Land as the Covenantee had.

So if *A.* be ſeiſed of the Manor of *B.* whereof a Chappel is parcel, and a Prior with the conſent of his Covent, had covenanted with *A.* and his Heirs, Lords of the Manor to celebrate Divine Service in the Chappel, and after *A.* had ſold the Manor;

in this case the Vendee or Assignee of the Manor should have had the same advantage of the Covenant the Vendor had. But if the Lord had sold the Chappel, the Assignee of the Chappel should not take advantage of the Covenant. And if a Covenant be to say Divine Service in the Chappel of a stranger; in this case the Assignee of the Manor, in which the Chappel is, shall not take advantage of the Covenant. *Brownl. 2 part. 56. 207. Co. super Littl. 385. Co. 5. 23. 18.*

Stranger

9. Who shall be bound and charged by a *Covenant*; and against whom a Writ of *Covenant* doth lie, and where, or not. *Executors, Administrators.*

Regularly, all those that do seal and deliver the Deed, and are named and bound by the express words of the Covenant, whether the Covenant be collateral or inherent, are bound by the Covenant contained in the Deed: And therefore if Heirs, Executors, Administrators or Assigns, be named in the Covenant, for the most part they are bound by the Covenant. And in all cases of Inherent Covenants also, where a man doth Covenant for himself onely, and doth not name his Executors and Administrators, or either of them; they are bound, and may be charged by the Covenant notwithstanding: And in some cases the Law is so also for collateral Covenants; and in most cases of Inherent Covenants that tend to the support of the thing granted, (in respect of which, it is presumed, the Lessor took the less for the Land) such as have the Land, albeit they be neither Executors nor Administrators, or either of them but Assignees, *&c.* shall be charged by the Covenant, though they be not named; for these Covenants are said to run with the Land. *Co. 5. 16, 17, 18.*

If a Feoffment or Lease be made to two, or to a man and his wife, and there are divers Covenants in the Deed to be performed on the part of the Feoffees or Lessees, and one of them doth not seal, or the wife doth, or doth not seal during the Coverture, and he or she that doth not seal, doth notwithstanding accept of the Estate, and occupy the Lands conveyed or demised; in these cases, as touching all Inherent Covenants, as for payment of Rent, and the accessaries thereof, as clauses of Distress, of Re-entry, of *Nomine pœnæ*, Reparations, and the like; they are bound by these Covenants as much as if they do seal the Deed. So if a Lease be made to *A.* for years or life, the Remainder to *J. S.* in Fee, and there is a Rent reserved, or there be divers Covenants on the part of the Grantees, and *J. S.* doth never seal the Deed or Counterpart; yet if in this case he accept the estate after the death of *A.* he must pay the Rent, and perform all the Covenants that are Inherent. So also if there be Covenants in the Kings Patent to be performed on the part of the Patentee. As if there be this clause in the Patent [*And that* J. S. *(the Patentee) shall repair the House when it is decayed*;] in this case the Patentee is bound by this Covenant, and all such like Covenants. But *quere* of collateral Covenants in the first cases, for therein it seems the Feoffee or Lessee is not bound: And yet it is said, That if an Indenture be made between *A.* of the one part, and *B.* and *C.* of the other part, and therein there is a Lease made by *A.* to *B.* and *C.* on certain Conditions, and *B.* and *C.* are bound to *A* by the Indenture in twenty pound, to perform the Conditions, and *B.* onely doth seal the Deed, and not *C*; yet in this case, if *C.* accept of the Estate he is bound by the Covenants, and one of them cannot be sued without the other, whiles they are both living. *Qui sentit commodum sentire debet & onus. Et transit terra cum onere. Co. super Littl. 231. Dyer 13. Bro. Covenant 6. Det. 80. Experientia. Pasche, 14 Jac. B. R. Bret* and *Cumberlands* case. *Co. super Littl. Sect. 231.*

Heirs.

If a man Covenant for him and his Heirs, to do any thing whatsoever; hereby his Heirs are bound: But otherwise, except the Heirs be bound by the Deed by express name, an Heir shall scarcely be bound or charged in any case by a Deed. And therefore it is, that if the Lessee for years be ousted by any other but the Heir himself, no Action of Covenant will lie against the Heir, unless there be an express Covenant wherein and whereby the Lessor and his Heirs are bound. But if he be ousted by the Heir himself, it seems an Action of the Covenant will lie against him: And yet if he be ousted by an elder title from the Lessor, *Contra*; for in this case the Heir shall not be charged. *Co. 5. 17. Bro. Covenant 38. 32 H. 6. 32. Dyer 257. Fitz. Covenant 31.*

Executors, Administrators.

If a man do Covenant for himself onely, to pay money, build a House, for quiet enjoying, or the like, and he doth not say in the Covenant [*His Executors*

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Deſcent Adminiſtrators, &c.] Yet hereby his Executors and Adminiſtrators are bound, and ſhall be charged. And yet if a Leſſee for years Covenant for himſelf, to repair the Houſes demiſed, omitting other words; it ſeems in this caſe he is bound to repair onely during his life, and the Executors or Adminiſtrators are not bound. So if a Leſſor Covenant for himſelf onely, to diſcharge the Leſſee of all quit Rents out of the Land; it ſeems this Covenant is onely perſonal, and ſhall binde the Covenantor onely during his life. But if in theſe caſes theſe words [*during the Term*] be added in the Covenant, as if a Leſſee Covenant for himſelf to repair the Houſes during the term, or the Leſſor Covenant for himſelf to diſcharge the Leſſee of all quit Rents, during the term; in theſe caſes it ſeems the Executors and Adminiſtrators alſo, will be charged after his death. 10 *H* 7. 10. *Dyer* 19. 14. *Bro. Covenant* 50. *Dyer* 114

If a Leſſee be ouſted by one that hath title; it ſeems an Action of Covenant will lie for this ouſter againſt the Executor or Adminiſtrator upon the Covenant in Law, if he were put out in the life time of the Leſſor, and not otherwiſe: For if there be Tenant for life, the Remainder in Fee to another, and the Tenant for life by the words [*Demiſe or Grant*] doth make a Leaſe for years and die, and after he in the Remainderdoth enter and put out the Leſſee for years; in this caſe he cannot upon this Covenant in Law, charge the Executors or Adminiſtrators of the Leſſor: But upon an expreſs Covenant for quiet enjoying he may. *Dyer* 257.

Aſſignees or Grantees.

In ſome caſes an Aſſignee ſhall be charged though he be not named, and in ſome caſes ſhall not be charged, though he be named; and in ſome caſes he ſhall be charged when he is named, as when the Covenant doth extend to a thing in *eſſe*, parcel of the Demiſe, there the thing to be done is Appurtenant and *quodammodo* annexed to the thing, and ſhall binde the Aſſignee, though he be not expreſly named, as a Covenant to repair, *&c.* But if the Covenant be annexed to a thing not in *eſſe* before, but *de novo* to be erected on the thing, as to ſet up a new Houſe, or the like; in this caſe it will not binde the Aſſignees, unleſs they be named in the Covenant And if the Covenant be to do a thing meerly collateral; in that caſe it will not binde the Aſſignees, albeit they be named expreſly. Alſo when a contract is perſonal onely, and a man doth binde himſelf and his Aſſigns, his Aſsigns ſhall not be bound hereby: As if one Demiſe Sheep, or other ſtock of Cattle, or any other perſonal Goods for any time, and the Leſſee doth Covenant for him and his Aſsigns, at the end of the Term, to deliver them in as good plight, as they were at the time of the Demiſe, or ſuch a price for them, and the Leſſee aſsign them; in this caſe this Covenant will not binde the Aſsignee: But the Executors and Adminiſtrators of the firſt Leſſee are bound hereby. So if one Demiſe a Houſe and Land, with a ſtock or ſum of money for years, rendring Rent, and the Leſſee doth Covenant for him and his Aſsigns to deliver the money at the end of the term; in this caſe an Aſsignee ſhall not be bound by this Covenant as the Executors and Adminiſtrators of the Leſſee ſhall. See more in *Brownl.* 1 *part.* 19, 20, *&c.* *Co.* 5. 16.

Executors.

If a Leſſee Covenant to repair the Houſes demiſed, or to diſcharge the Leſſor *de omnibus oneribus circa terram*, or the like; in theſe caſes, and ſuch like, albeit Aſsignees be not named in the Covenant, yet Aſsignees and Aſsignees of Aſsignees *in infinitum*, and all others that ſhall come to the Land by the Act of Law, or by the Act of the Parties, ſhall be bound and charged by this Covenant. *Co.* 5. 17. *Dyer* 27. *Bro. Deſcent* 50.

If a Leſſee Covenant for him and his Aſsigns to build a new Houſe upon the Land demiſed within ſeven years, and the Leſſee aſsign it over; in this caſe the Aſsignee is chargable. But if a man Covenant for him and his Aſsigns to make a Feoffment, Obligation, or the like, in this caſe the Aſsignee ſhall not be charged, albeit he be named. And if the Leſſee Covenant for himſelf, or for himſelf, his Executors and Adminiſtrators onely to build a new Houſe upon the Land demiſed, and the Leſſee aſsign over the Land; in this caſe the Aſsignee is not bound by this Covenant. See more in *Conditions* of *Obligations*. *Co.* 5. 17.

If a Leaſe be made rendring Rent, and if it be arrear that the Leſſee his Executors and Aſsigns ſhall forfeit three ſhillings four pence *nomine pœnæ*, and the Leſſee

assign the term; in this case it seems the Assignee shall be charged with the *nomine pœnæ*. *Goldsb.* 127. *pl.* 125. *Thins* case. *versus Cholmsley*. *Trin.* 36 *Eliz. Co. B. R.*

Note. And in all the cases before where a Covenant is broken, an Action of Covenant may be brought. But herein note that howsoever in divers of the cases before Assignees are chargable upon a Covenant, yet the Lessee himself is not hereby discharged, but the Lessor or Grantee of the Reversion, hath Election to charge which of them he will. And therefore if a Lessee Covenant for him and his Assignees to repair, and the Lessee assign; in this case the Lessor may have his Action of Covenant against either of them. And if a Lessee Covenant for him, his Executors, Administrators, and Assigns, to repair the Houses demised; and he in Reversion doth grant away his Reversion, and the Lessee assign his estate; in this case albeit the Grantee of the Reversion, have accepted the Rent of the Assignee of the term, yet he may still have an Action of Covenant against the Executor of the Lessee upon this Covenant. So if a Patentee Covenant for him and his Assigns to repair, and he assign; the King may have his Action against either of them. *Brownl.* 1 *part.* 120, 121. *Bro. Covenant* 32. *Hil.* 16 *Jac. B. R. Curia, Bret versus Cumberland.*

If *A.* and *B.* do Covenant for themselves joyntly without more words; the Covenant is joynt, and one of them cannot be discharged without the other. But if they Covenant for themselves severally, the Covenant is several, and they may be sued apart. And if they Covenant joyntly and severally; then the Covenant is joynt and several, and they may be sued either way at the Election of the Covenantee. *Co.* 5. 23.

10. When a Covenant shall be said to be gone and discharged, and when not, and how.

Where the Deed it self wherein the Covenants are contained, or the Estate on which the Covenants as accessary to the Principal do depend, is gone and determined, there regularly the Covenants are gone also. And therefore if a Lease for life or years, be surrendred, whereby the Estate is gone, or a Deed become void by rasure, or the like, and there be Covenants contained in the Deed; by these means the Covenants are gone also. But this Surrender doth not discharge the breach of Covenant which was before the Surrender. For if a Parson Lease his Glebe for years, and after resign, whereby the Lease for years doth become void; in this case the Covenants of the Lease, as to the time before the Resignation shall be said to be in force still. *Dyer* 20. *Co.* 5. 23. 40 *Eliz.* 3. 27. *Bro. Surrender* 47. *Covenant* 42. *Hil.* 4 *Jac. B. R. Moile versus Austin.*

Where a Covenant is become impossible to be done by the act of God, as where one doth Covenant to serve another seven years, and he die before the seven years be expired; by this the Covenant is discharged. *Co.* 1. 98. *Plow.* 286.

Where there is an express Covenant in a Deed, for quiet enjoying, the implied Covenant is gone. *Expressum facit cessare tacitum. Co.* 4. 80.

Release. By a Release of all Covenants from the Covenantee the Covenant is discharged, so as the Release be by Deed, for a Covenant by Deed cannot be discharged by word. And therefore if *A.* by Deed Covenant with *B.* to build a House by a day, and *B.* doth wish him to let it alone; this is no discharge of the Covenant. 18 *Eliz.* 4. 8.

If the Lessor accept the Rent of the Lessee or his Assignee, after a Covenant broken; this doth not discharge the breach of the Covenant, but the Lessor may sue for it notwithstanding. *Pasche*, 6 *Car. B. R.* Adjudge *Batchelors* case.

If the Deed wherein the Covenant is, be by consent of both parties cancelled; this dischargeth the Covenants in time to come, but if any were broken before, he may sue for that. *Brownl.* 2 *part.* 167.

See more in *Brownl.* 2 *part.* 134, 135, 158, 159, 170.

CHAP.

CHAP. LVII.

Of a Countermand, or Revocation.

A Countermand or Revocation, is the recalling and determining of ſome power or authority given, or thing before done: Or it is the commanding of ſome thing contrary to that which one had commanded before. And this is either in Law or implied, and ſo the making of a ſecond Will, and the granting of ſecond Letters of Adminiſtration, is a Revocation of the firſt Will, and Letters of Adminiſtration: Or it is expreſs and in fact, where a man doth indeed Countermand, and recal his act. And ſo it is either general, as when a man doth revoke all former Wills; or ſpecial, as where a man doth revoke his Will made ſuch a day. Or it may be general and ſpecial, as where a man doth revoke all former Wills, eſpecially his Will made ſuch a day. And in caſe where an Authority or Licence is revoked, it is as if it had not been given; and if he that had it, ſhall do any thing upon it, he may be puniſhed for it, as if no ſuch Authority at all had been given him. *Broo.* 330. 27 *H* 8. 26. 4 *H.*7. 14.

Countermand or Revocation. What. The kindes of it.

For this take theſe things.

1. That the King by his Prerogative might have revoked his Preſentment to an Advowſon before Induction, which a common perſon could not have done. And he may Countermand his Authority, Protection, and Commiſſion at his pleaſure. *Dyer* 348. 292. *Regiſter* 304, 305.

What acts are *Revocable*, or not. By the King.

2. A common perſon may Countermand his Licence, Power, Authority, or Command, before it be executed. And ſo (for the moſt part) he may do his Grant, if it be onely of a matter of eaſe, pleaſure, or truſt. And therefore if I Licence another to enter into my Houſe or Ground, or to take and uſe my Horſe for a time, or to take and deliver ſuch a thing to *J. S.* or I being a Juſtice of Peace, make a Warrant to *J. S.* to arreſt a man, or I command or licence one to take Deer for me, or to cut Wood for me, or the like; or I make a Letter of Attorney to make, or take Livery of Seiſin for me, or to ſue, or do any thing in my name; or I deliver another Goods or Money, to deliver over to another, or give to the poor, or to beſtow for a new years gift, or the like; or I make another my Factor, Proctor, or Attorney, or I aſsign Auditors to take an account, or I Grant to another to hunt in my Park, or to keep my Court; or if I command another to do any of theſe things: In all theſe caſes, before the thing be done, I may forbid the doing of it, and may recal the Power. So a mans Will is revocable at his pleaſure, notwithſtanding he ſay in it, it ſhall be his laſt Will, and not revocable, and notwithſtanding it be annexed to a Feoffment, and Livery, and Seiſin made upon it. So an Adminiſtration granted, may be revoked by him that makes it; ſo alſo it ſeems of an Attornment; and ſo it is ſaid of a Surrender of Copihold-land to uſes; that this in ſome caſes, is revocable. So a Submiſſion to an Award, is revocable alſo. *Brownl. Rep. 2 part.* 29. *Dyer* 22. *Co.* 4. 62. *Dyer* 49. 5 *H.*7. 18. 9 *Ed.*4. 4. 39 *H.*6. 7.

Sect. 1. By a common Perſon. Warrant to Arreſt. *Will.* *Adminiſtration.*

3. All theſe things being in their own nature revocable, are ſtill ſo, albeit they be made and done with irrevocable words; and though a man binde himſelf by Bond or Aſſumpſit not to revoke it, and yet he may be ſued upon the Aſſumpſit or Bond for revoking it. But a man cannot by any act he can do, make a Power or Authority, not revocable, which by Law, and in his own nature, is revocable. *Co.* 8. 82. 5 *Ed.*4. 3.

4. But a man cannot revoke an Intereſt, as if he hath made a Leaſe for years of his ground, or a Grant of his Horſe for four days, or Grant to another the keeping of his Park for two years. Or grant one the keeping of his Court, and ten pound yearly out of the Iſſues thereof, for a time certain; theſe things cannot be recalled. *Dyer* 348. 292. 49. 39 *H.*6. 7. 18 *Ed.*4. 8.

5. It

5. It is ſaid alſo, That if a thing be delivered, to be given to another in ſatisfaction of ſomething before done; that this is not revocable. *Dyer* 49. 22.

6. If one deliver a Deed to another, as an Eſcrow on certain Conditions performed, to take effect as his Deed; this is not countermandable. *Perk. Sect.* 141.

Surrender. 7. If a Copiholder, like to die, do Surrender to Tenants out of Court, according to cuſtom, to the uſe of his Wife or Children; and this is without any conſideration of money, *&c.* and he recover, it is ſaid before the Preſentment and Admittance; this is countermandable. But if it be to the uſe of a ſtranger, it is otherwiſe. *Kitch.* 82.

8. If two exchange Land by Deed, or without Deed, and neither of them enter, they may revoke or diſſolve the exchange by mutual conſent; but it muſt be diſſolved by Deed. 3 *H.* 7. 13. *F.N.B.* 36.

9. If I preſent a Clerk to an Advowſon, I cannot revoke it. 14 *Ed.* 4. 2.

10. If I grant a Reverſion, I cannot before Attornment revoke it: So it is in Nominations and Elections. If I enfeoff ſuch a one as *J. D.* ſhall name within a year, and he name *J. D.*, yet before the Feoffment, and within the year, he may name another, and Countermand the firſt Nomination: But if I enfeoff *J. S.* to the uſe of ſuch a one as *J. D.* ſhall name within a year, and he name *J. D.* and he do name within the time; this is not revocable. 14 *E.* 4. 4. 2.

For anſwer to this, take theſe caſes.

3. What *Act* ſhall be ſaid to be a good *Revocation* of a thing revocable, or not. Of a *will.* *Sect.* 2. *Woman-ſole* marry.

1. By the making of a latter Will of Land in writing, a former Will is revoked; and this, albeit it make no mention of the former Will. And if the former Will be onely about Goods and Chattels, the latter Will, albeit it be but Verbal, will revoke a former Will made in writing. *Co.* 8. 90. *Dyer* 310. *Co.* 4. 60. If a Woman-ſole make a Will, and then take a Husband; this is a Countermand of her Will: But if in this caſe ſhe happen to out-live her Husband, and this Will continue, and no other Will is made, the Will perhaps will be revived, and good again. *Co.* 4. 62. If one make a Will of Land, and after he make a Feoffment of the Land, or a Bargain and Sale of it, but this Conveyance is defective for lack of Livery of Seiſin or Inrolment; yet this is a Countermand of the Will. And yet if I do onely Covenant, to make an eſtate of it, and do make no eſtate of it; it ſeems this is no Revocation of the Will. And if I make a Deviſe of my Land, and after make a Leaſe for years of it; it ſeems this is no Revocation, but the Will may ſtand good, for the Reverſion after the Leaſe for years ended. *Dyer* 74. 47; If one have a Leaſe for years, and give it by Will, and then Surrender it, and take a new Leaſe; this is a Countermand of the Deviſe, and if he die, the Deviſee ſhall not have this Leaſe. *Goldsb. Rep.* 93. If a man that is of ſound memory, make his Will, and after this he becomes not himſelf; this is no Revocation of the Will in Law, nor can he whiles he is in this caſe, make any expreſs Revocation of it. *Co.* 4. 61.

Non compos mentis.

Of an *Attornment.* 2. If a Feme-ſole make a Leaſe for life, rendring a Rent, and after ſhe ſell the Reverſion, and then before the Attornment of the Tenant ſhe marry; it is ſaid, That by this the Attornment of the Tenant is Countermanded, and that now it cannot be made. But if ſhe take to Husband the Grantee of the Reverſion, that this is no Countermand. 2 *R.* 2. 8.

Of a *Submiſſion* to an *Arbitrement.* 3. If a Woman-ſole ſubmit to an Arbitrement, and after ſhe marry, and after the marriage the Award is made; this Award is void: For by the marriage, the Submiſſion is countermanded in Law. And let the Award be never ſo much to her profit, it is void. *White* againſt *Gifford, B. R.* Adjudged.

Feme-covert. 4. A Woman-covert whiles her Husband lives, can make no good Countermand of any thing ſhe did, whiles ſhe was unmarried. *Co.* 4. 61.

5. The Countermand that is of force to revoke a Power regularly, muſt be made after the ſame manner was made; that is, if the Power be created by writing, it muſt be diſſolved in the ſame manner; in that caſe therefore, the Revocation muſt be by writing alſo.

Notice. 6. And regularly where there is an expreſs Revocation, there notice muſt be given of it, to him to whom the power is given, before he execute the power, otherwiſe it is not good: For if once the Power be executed, the Revocation comes too late; but in caſe of a Countermand in Law, there no notice is needful. And therefore if one make

make a Feoffment with a Letter of Attorney to make Livery, and before the Livery be made the Feoffor make a Leaſe or Feoffment to another; this is a good Countermand without Notice. *Fortior eſt diſpoſitio Legis quàm hominis, (i.)* The Diſpoſition of Law, is ſtronger then the diſpoſition of man. *Vivions* caſe. *Brownl.* 2 *Rep.* 290.

But for the Revocation of a Will, ſee in my Book of *Common Aſſurances, chap.* 23. *Numb.* 5, 6, 11, 12. And for *Revocation of Uſes, chap.* 24. *Numb.* 9. And ſee more in *Goldsb. Rep.* 109. And in *Titles, Licence, Arbitrement,* in my Book of the *Second Part of the Marrow of the Law, page* 139. And *Authority, page* 59.

CHAP. LVIII.

Of Courts.

THis word Court did ſometimes ſignifie the Kings Houſe, where he did reſide and abide with his Houſhold: It doth alſo ſignifie a Tribunal or place where Juſtice is adminiſtred Judicially. And of theſe Courts there are many kindes. They were heretofore diſtinguiſhed into Courts Eccleſiaſtical, Chriſtian, or Spiritual, ſuch as did handle Spritual Matters; aad theſe were ſtiled the Convocation, the Subſcription, the High Commiſsion, the Prerogative, the Arches, the Audience, the Conſiſtory, the Courts of Faculties, of Peculiars, of the Archdeacon or his Commiſſary, of Delegates, and incidently of Appeals, of Commiſsioners of Review, and of the Conſervators of the Privileges of St. *Johns* of *Jeruſalem*; all which are now gone, and out of uſe, whereof you may read in *Cook*, in the Fourth Part of his *Inſtitutes*, from Page 321, to the end of the Book.

Sect. 16. *Court.* What. The kindes of it. *Spiritual Courts.*

And Courts Civil, which were ordained and uſed about Civil Matters; and theſe were very many; and of theſe there are ſome out of uſe, and others that are ſtill in Being, and of uſe. Thoſe Courts and Juriſdictions that are out of uſe and gone, are ſuch as theſe: The Council Table, the Courts of the High Steward of *England*, of the Star-Chamber wherein the Great Lords of the Council and the Judges were Judges, of Redreſs, of Delays, of Judgments in the Kings Great Courts, wherein were Judges, ſuch great Men as the King did appoint; a Court to enquire of, and certifie unlawful and true Accounts in the Exchequer, wherein were Judges, ſuch as the King did appoint; the Courts of General Surveyors of divers of the Kings Lands, *&c.* Of Chivalry before the Conſtable and Marſhal, of the Counting Houſe of the Kings Houſhold, wherein the great Officers about the King, were Judges; of the Lord Steward, Treaſurer, and Comptroller of the Kings Houſhold, concerning Felony, *&c.* Of Port-moots, kept in Haven Towns or Ports; about Beacons, Lighthouſes, Sea-marks, *&c.* about Ambaſſadors, Leagues, and Treaties, of Juſtices of Trailbaſton, of Court of Wards and Liveries, wherein the Maſter, Attorney, and Receiver General were Judges, of the Royal Franchiſe of *Ely*, of the County Palatine of *Pembroke*, of the Eſcheator and Commiſsioners for finding of Offices, and ſome others; theſe are in a manner quite gone.

But there are other Courts and Powers like to Courts, ſtill in Being, more or leſs, as the Parliament, the Council of the Lord Protector, the Kings Bench, now called the Upper Bench, the Chancery, the Common Pleas, the Exchequer, wherein is the Exchequer Chamber, the Firſt Fruits, Tenths, and Augmentation Courts, the Court of Admiralty, the Courts of the Juſtices of Aſsize, of the Juſtices of *Niſi Prius*, of the Juſtices of *Oyer* and *Terminer* of all ordinary ſorts, General and Special, and of Juſtices of Gaol-delivery; the Courts of the Juſtices of the Peace, and of Juſtices in Eyre; the Courts of the Marſhalſey, of Requeſts, of the Dutchy Chamber of the Cinque Ports; the Courts of the Counties Palatine, the Courts of the Citie of *London*, the chief whereof is called the Huſtings, the Courts of *Weſtminſter* and

Huſtings. What.

and *Norwich*, of the two Univerſities, of *Wales* of the North, of the *Stanneries* in *Cornwal* and *Devonſhire*; the Courts of the Foreſts, of the Iles of *Man*, *&c.* the Courts of the Tourn, of the Leet or view of Frank-pledg; the County Court, the Hundred Court, the Court Baron and Copihold Court, the Court of Ancient Demeſn, the Court of the Coroner, the Court of Pipowders, the Court of the Clerk of the Market; the Powers of the Commiſſioners of Sewers, of Bankrupts, and ſome others; all theſe are more or leſs of uſe amongſt us. And ſome of theſe are alſo of Record; and ſo they are all or moſt of them, except the County Court, Hundred Court, Court Baron, and Copihold Court, which are not of Record, and therefore called Baſe or Inferior Courts. Of all which, you may read in *Co.* 4 *part of his Inſt.* 1 *part.* 58. 260. 117. *Cromp. Jur. of Courts* throughout. And you muſt know that in ſtead of the Kings Privy Council, there is a Council of the Lord Protectors. And for their Election, Office, and Power, ſee the *Act* of *Government*, 16 *December.* 1653.

Sect. 2.

2 *Parliament*, What.

The *Judges*. *Knights* of the Shire.

The Parliament is the Supreme Court and Power of the Commonwealth, ordained by the Common Law, made up of a great Aſſembly, choſen by the people, called Knights, Citizens and Burgeſſes, who are the Judges there.

By the new Act of Government made, theſe things are ordained. 1. That a Parliament be called every three years. 2. That during five moneths, without their own conſent, it be not adjourned, prorogued, or diſſolved. 3. The numbers to be choſen for *England*, *Scotland*, and *Ireland*, are there ſet down. 4. The ſending of Writs, of Summons, and manner of proceeding thereupon, and in the Election of Members is there ſet down. 5. That ſixty of this Aſſembly do make a Parliament, and the Supreme Legiſlative Power is to reſt in the Lord Protector and them. 6. If they agree upon any Bills, and preſent them to the Lord Protector, and he do not within twenty days agree to them, they may paſs them for a Law, without his conſent, if they pleaſe. The *Government*, 16 *December.* 1653.

Their Juriſdiction and Power.

This Aſſembly by the ancient Common Law of the Nation, hath an abſolute Power over and above all other Courts, they are to debate and conclude Matters for the Commonwealth: This Court hath power to make, revoke, alter, or change any of Laws or Statutes of the Nation, to judge of Matters in Law, to try any one for his life, to reverſe the proceedings in any other Court, and to correct and reform all other miſchiefs, eſpecially ſuch as have no other ordinary remedy; and for which there is no Regular Redreſs in other Courts. And from hence there doth lie no Appeal; nor can any other Court examine any thing that is done in this Court. But for this Court, the Power thereof, the Qualifications and Privileges of the Members of the Aſſembly, the Proceedings therein, and the Officers belonging thereunto, and other matters concerning it, See *Crompt. Jur. of Courts* 19. *D. & St.* 55. *Forteſcue*, *cap.* 8. 4 *Ed.*3. 14. 36 *Ed.*3. 10. 5 *R.*2. 4. 4 *H.* 4. 23, 5 *H.*4. 2. 7 *H.*4. 15. 1 *H.*5. 1. 8 *H.*6. 1. 10 *H.*6. 2. 11 *H.*6 11. 23 *H.*6 11. 7 *H.*8. 16. 25 *H.* 8. 21. 31 *H.* 8. 10. 34, 35 *H* 8. 13. 1 *Ed.*6. 12. And in divers other places, but excellently in *Co.* 4 *part of his Inſtitutes*, *cap.* 1.

3. *Star-Chamber*, What.

The Star-Chamber was a Court to puniſh Riots, Frauds, Perjuries, Forgeries, and ſuch like offences, that had not ordinary remedy in other Courts, it was held in a Chamber at *Weſtminſter*, over which were many gilded Stars; it is now put down. You may read of it, in *Crompt. Jur. Co.* 4. *part of his Inſt.* It was diſſolved by 16 *Car.* 17. And ſo was the Orders of the Council Board.

Council Board.

Chancery, What.

The Chancery is a Court of Equity or Conſcience inſtituted by the Common Law. But for this, ſee a large Treatiſe in my Firſt Part of the *Marrow of Law*, *cap.* 59.

Court of Requeſts, What.

The Court of Requeſts alſo, being much of the ſame nature with the Chancery, is a Court of Equity, inſtituted for the help of ſuch Petitioners, as in caſes of Conſcience, did make their addreſs by ſupplication to the King, wherein the Lord Privy Seal and Maſters of Requeſts were Judges. They had to do onely in cauſes that were meerly Equitable, or one of the Parties did belong to the King, or one of the Parties was poor and oppreſſed by a rich Man, or where any ſpecial Matter was ſent unto them by the King, or where the thing did concern Colleges, Univerſities, or Hoſpitals. But for this ſee Sir *Tho. Smith*, *de Republica. Co.* 4. 9. *Minſheus*, *f.* 104.

The

The Upper-Bench (formerly called the Kings Bench) is the moſt antient Court of the Nation, inſtituted by the Common-Law originally for the Pleas of the Crown, as Treaſons, Felonies, Miſpriſion, and the like: But now it dealeth not only in Criminal, but in Civil matters alſo, as Contracts, and the like. The Judges of this Court are the Lord Chief Juſtice, and three, four, or five other Judges as the Lord Protector ſhall appoint. But antiently the King himſelf did uſually ſit in it, and therefore it followed his perſon; but it is now kept at *Weſtminſter-Hall*. In this antiently Officers were ſworn, and the Oath of Allegiance was taken. And at this day all Criminal matters are here decided, and many Common pleas alſo; alſo all Breaches of the Peace, publick Annoyances and Offences againſt the Lord Protector and his people are to be redreſſed. See for the Power and Proceedings of this Court, *Cromp. Jur.* 68. *Plow.* 320. *Co.* 11. 98. *Co.* 4 *par. Inſt. ch.* 7.

Upper-Bench, what. *Judges.* The *Power.*

This Court (now out of uſe) was inſtituted by the Common-Law for the deciding of matters of War, and in times of War; and herein the Lord High-Steward, Conſtable, or Marſhal was Judge. And for this ſee *Cromp. Jur.* 82. *Co.* 4 *par. Inſt. chap.* 4.

Court of the *High-Steward*, &c. what.

There was a Court of Chivalry for matters of War, and Titles of Honor and Place, held before the Conſtable of *England*, and Earl Marſhal; now gone. *Co.* 4 *par.* 117.

Court of *Chivalry*, what.

The Marſhalſey was the Court wherein the Marſhal of the Kings houſe was Judg: He was to hear and determine, and puniſh all offences done within the Verge, and to determine all matters of difference between ſuch as were of the Kings houſhold, and betwixt them and others within the Verge. For this ſee *Co.* 4. 47. *Cromp. Jur. Co.* 4 *par. Inſt. ch.* 18.

Marſhalſey, what. *Judg.* *Power.*

There is a Court of the Steward and Marſhal of the Kings houſe; and it ſeems to be included within the Marſhalſey, or is the ſame *Stat.* 13 *Ed.* 3. *ch.* 3.

The Court of *Steward* and *Marſhal.*

The Court of Common-Bench or Common-Pleas, is that Court inſtituted by the Common-Law for the Pleas and Controverſies of common Perſons, or common Pleas; and herein they are commonly heard and determined. And the Judges of this Court are the Lord Chief Juſtice, and three, four, or five other Judges as the Lord Protector pleaſe to appoint. In this Court are handled Suits for Land, Debts, Benefices and Contracts. And in this Court do paſs Aſſurances of Land by Fines and Recoveries, which did formerly ſometimes paſs in the Upper-Bench, and before Juſtices in Eyre. For the power and proceeding of this Court, ſee *Cromp. Jur.* 91. *Co.* 4 *Inſt. c.* 10.

Sect. 3. *Common-Bench* or *Common-Pleas.* *Judges.* *Power.*

The Court of the Exchequer is a Court inſtituted by the Common-Law, wherein all cauſes touching the Revenues of the Crown have been handled and decided. The Judges of this Court are the Lord Chief Baron, and three, four, or five other Barons, as the Lord Protector ſhall appoint: And their work and power is, to hear and decide all cauſes belonging to the Lord Protectors coffers, and to receive and pay all money due to and from him, which is called the *Receipt of the Exchequer*. They have there alſo a Court of Chancery before the Chancellor and Barons of the Exchequer, called the *Exchequer-Chamber*. For the Power and Proceeding of theſe Courts, ſee *Cromp. Jur.* 52. 104. *Co.* 4 *par. Inſt. ch.* 11. 13. And herein now is all the power of ordering of Firſt-fruits and Tenths exerciſed. For which ſee *Co.* 4 *par. Inſt.* 14. *St.* 26 *H.* 8. *c.* 3. 2 & 3 *P.* & *M c* 4. 1 *Eliz.* 4. The Augmentation-Court ſeems alſo to be here. See *Stat.* 27 *H.* 8. *c.* 27. 33 *H.* 8. 39. 37 *H.* 8. 4. 1 *M.* 10. See *Officers.*

Exchequer, what. *Judges.* *Power.*

Exchequer-Chamber, what.

Court of *Firſt-fruits & Tenths* and of *Augmentation.*

The Court of Wards and Liveries (now aboliſhed) was a Court appointed by the Law for the ordering of the Kings Wards and their Lands. For which you may read Sir *Tho. Smith de Rep.* 116. *Cromp Jur.* 112. *Co. Inſt.* 4 *par.*

Court of *Wards* and *Liveries*, what.

The Court of Admiralty is a Court inſtituted by the Common-Law for the hearing and determining of matters done upon the Sea. The *Admiral* is Judg here: And he is ſaid to be an Officer whoſe authority is in matters done upon and beyond the Seas; all which he is to determine by the Rules of the Civil-Law. He was alſo to prepare and maintain the Kings Navy, and might have arreſted Ships for his ſervice. He is to ſuppreſs and chaſe Robbers. And his Juriſdiction reacheth into the great Rivers of the Country below the Bridges, but not within the body of any

Admiralty and *Admiral*, what. *Judg.* *Power.*

County, ſave only to cite men to appear, and to execute his Judgments; which he may do upon the Land. But otherwiſe if he take upon him to meddle with any thing done in part, or in all upon the Land, it is *coram non Judice*, and a Prohibition may be had out of ſome other Court to forbid him, *Co.* 2. 93. 13 *R.* 2. 15. 15. *R.* 2. 3. 12 *H.* 4. 11. 8 *Eliz.* 5. *Co.* 5. 10.

Flotſam, what. *Jetſam*, what. *Lagan*, what. *Wreck*, what.

This Officer only hath conuſance of *Flotſam*; which is, where a Ship is periſhed, and the Goods that were therein float upon the Sea. *Jetſam*, which is where the Goods are caſt into the Sea to ſave the Ship. And *Lagan*, which is where a Cork is tyed to the Goods, that it may be found again. But he hath not to do with Wreck, which is where a Ship is broken, the Paſſengers drowned, and not one of them eſcapeth to Land alive; and eſpecially if the Owner of the Goods be drowned. *Co.* 5. 106, 107.

What ſhall be ſaid to be *Wreck*, and what *Flotſam*, *Jetſam*, and *Lagan*, or not; and who ſhall have them.

For this, know theſe things.

1. Where-ever Goods ſhall be accounted Wreck, there are theſe things in the caſe. 1. There muſt be a Shipwrack; the Ship muſt be drowned. 2. The Goods muſt be caſt out upon the Land by the Sea, and not floting ſtill upon the Water; for then they are *Flotſam*: Nor caſt upon the Land by the Mariners for fear of a Tempeſt, or when the Ship is about to periſh. 3. All the living creatures muſt be dead; for if any Man, Dog or Cat eſcape alive to the Land, it is not Wreck. But in this caſe where Goods come ſo to Land, they muſt be laid up and preſerved, or ſold, if they be ſuch Goods as will not keep, by the Sheriff or other Officer; and the Goods, or if they be ſold, the Money made thereof, delivered to the Town to keep. And if the Owner of them come within a year and a day of the Seiſure thereof, and prove them to be his own, he muſt have them again: And ſo may his Executor or Adminiſtrator after his death. But ſomething muſt be allowed to them that have ſaved and kept them.

2. Whiles Goods remain in or upon the water, they are accounted *Flotſham*, *Jetſam*, or *Lagan*; but when they be caſt upon the Land, they be Wreck.

3. If the Ship periſh, and Owner be not known, and the Goods prove *Flotſham*, *Jetſam*, or *Lagan*; the Lord Protector, or any that hath any Kings grant, or may preſcribe for it, may have it, and take it by ſeiſure. And ſo likewiſe it is of Goods wrecked; any Lord may claim and have them by Patent, Cuſtom, or Preſcription; and if no ſuch Title can be made by any other, they will go to the Lord Protector. *Co.* 5. 106, 107. *D. & St.* 51. *Plow.* 466. *Weſtm.* 1. 14. *Bro. Wreck* 2. 1. *Co.* 10. 91. *Stat.* 17 *Ed.* 2. *ch.* 11. *Co.* 2. 93. 1 *H.* 7. 23. 9 *H.* 7. 20. 39 *H.* 6. 35. *Co.* 4 *par: Inſt. ch.* 22. *Prer. Reg.* 11.

Sect. 4. The Courts of the Juſtices of *Aſſiſe*, Juſtices of *Niſi prius*, of *Gaoldelivery*, of *Oyer* and *Terminer*, what. The *Judges*. The *Power*.

All theſe four Courts are held by Commiſſion from the Lord Protector, and not by authority only of the Common-Law, or of any Act of Parliament. And in theſe Courts the Commiſſioners only are the Judges.

The Juſtices of Aſſiſe are to take Aſſiſes in the Country; and theſe have the power of the antient Juſtices in Eyre. The Juſtices of *Niſi prius* are to try Cauſes in the Country, or adjourn them to the next Term. The Juſtices of Gaol-delivery are to hear and determine all ſuch Cauſes as appertain to thoſe that for any offence are caſt into Gaol. The Juſtices of *Oyer* and *Terminer* are to hear and determine ſome notorious miſdemeanors in the Country.

And all theſe Courts, and the Court of the Juſtices of Peace, are commonly held at once, and by one and the ſame Commiſſion, by our Judges in their Circuits at our Meetings called the Great Aſſiſes. And theſe Commiſſions were deviſed, and are uſed for the eaſe of the People, that by this means they may have Juſtice neer home. And therefore it is at this day, that there are Six Circuits in this Nation; and the Judges go over all theſe Circuits twice a year, and uſe to ſtay three or four days in a place, and in that time do hear and diſpatch all the buſineſs of the place where they be, and give notice of the day before they come. And they come commonly with five Commiſſions; *Oyer* and *Terminer*, *Gaol-delivery*, *Aſſiſe*, *Niſi prius*, and *Juſtices of the Peace*. And by theſe Commiſſions they keep all theſe Courts together, where Trials are by *Niſi prius*, to the great eaſe of Juries and Parties, that otherwiſe muſt go to *London* with their Evidences and Witneſſes. And the Courts at *Weſtminſter* alſo

alſo are much eaſed hereby. But in matters of great weight, and where the Title is intricate, the Judges are wont to retain thoſe Cauſes to be tryed at *Weſtminſter*. And in theſe Courts the Sheriff, and all the Juſtices of the Peace of the County are bound to attend, or the Judges may fine them for their default; and ſo they may for any other miſdemeanor in them. For the Power of theſe Courts and Judges, and their manner of Proceeding, See *Cromp. Jur.* 104.135. *F.N.B.* 151. *Stat.* 4 *Ed.* 3.5. 8 *R.*2.3. 33 *H.*8.24. 2 *R.*3.2. 20 *R.*2.3. *Weſtm.*2.30. *Co.* upon *Lit.*293. *Co.* 4 *par. Inſt.*27,28,29,30,31.

The Court of the Juſtices in Eyre, was by Commiſſion; the Judges whereof were the Commiſſioners called *Juſticiarii itinerantes*. Theſe are now out of uſe, and included within the other Commiſſions. See for this *Co.* 9: in the Epiſtle. *Cromp. Jur.* 142. Court of *Juſtices in Eyre*, what.

For the Courts of *Green-Cloth*, *Chivalry*, and ſome other Courts now gone and forgotten, you may read in *Co.* 4 *par. Inſt.* Of *Green-cloth*, *Chivalry*, &c.

The Court of the *Dutchy of Lancaſter*, was a kind of Chancery-Court for the hearing and deciding of the matters that concern the Dutchy of *Lancaſter*: And in this Court the Chancellor of the Dutchy was Judg. For this, ſee *Plow.* 214. *Cromp. Jur.* 134. 163. *Dyer* 168. *Co.* 4 *par. Inſt.* 36. It was diſſolved by *Stat.* 16 *Car.* 17. Of the *Dutchy of Lancaſter*.

The Courts of the Principalities of *Wales*, were thoſe Courts that are held in and for the Counties of *Wales*. For which ſee *Co.* 4 *par. Inſt.*47. *St.* 27 *H.*8.26. 34 *H.*8. 26. 5 *Eliz.*29. They were diſſolved by the ſame Act. Of the *Principalities*.

The Courts of the Counties-Palatine of *Lancaſter*, *Cheſter*, *Durham*, *Pembroke*, and *Ely*, were the Courts of theſe ſeveral Counties, and the Juriſdictions they have there. For which ſee *Cromp. Jur.* 137. 27 *H.*8.25. *Co.* 4 *par. Inſt.*36,37,38,39,40. Theſe were diſſolved by the ſame Act; and ſo were all other Courts of like juriſdiction. See *Wingates* Abridgment. Of the *Counties Palatine*.

The Court of the *Five Ports* or *Haven Towns*, are the Courts appointed for thoſe Towns only. See for this *Cromp. Jur.*146. *Co.* 4 *par. Inſt.*42. Of the *Cinque-Ports*.

The Courts of the *Juſtices of the Forreſt*, are Courts appointed by the Inſtitution of the Common-Law for matters of the Forreſt only. For which ſee *Cromp. Jur.* 146. *Forreſt. Co.* 4 *par. Inſt. ch.*73. Of the *Juſtices of the Forreſt*.

The Court of *Commiſſioners of Sewers* are by the Common-Law to ſee the Ditches drained, and Mounds well kept in the Mariſh or Fen-Countries, and the paſſages in the great Rivers ſcoured for the carrying of the water in the Sea, and for preſerving the Country. *St.* 6 *H.*6.15. *Co.*4 *par. Inſt.*62. Of the *Commiſſioners of Sewers*.

The Court of the *Quarter-Seſſions*, is the Court of the Juſtices of the Peace held in every County quarterly before the Juſtices of the Peace of the County, about matters of the Peace. And for this, and the power and office of the Juſtices of the Peace, and their proceeding in this Court, and in their other Seſſions, ſee my two Books of the *Juſtice of Peace Office*, at large. Of the *Quarter Seſſions*. *Special* } *Seſſi-* *Private* } *ons*.

The Court of *Pipowders* was antiently a Court by Common-Law, incident to Fairs and Markets only, for the puniſhment of Diſorders there, and the Trial of matters done in and about the Fair: And in this Court the Steward is Judg. But at this day they uſe to try matters done out of the Fair, in theſe Courts. See for this, *Co.* 4 *par. Inſt.*60. *Dyer* 133. *Co.*5.51. 10.73. *Kelw.*99. *St.* 17 *Ed.*4.2. Court of *Pipowders*, what. *Judges*. *Power*.

The Court of the *Clerk of the Market*, is by the Common-Law kept by and before an antient Officer called the *Clerk of the Market*, whoſe office is to look to Weights and Meaſures: And to keep the Standards, (*i.*) the Examples thereof; whether dry, as Ells, Yards, Buſhels, Pecks, &c. or moiſt, as Pints, Quarts, &c. and to ſee that all the Weights and Meaſures of the Country be according to this pattern, and to puniſh them that buy or ſell by any other Weights or Meaſures. And for this they are to go Circuit every year all the Country over in all places, and to view and enquire by Jury, and return into the *Exchequer* what they find of Defaults. See for this, *Co.*4 *part Inſt.*61. *Cromp. Jur.*126. *Weſtm.* 1 *ch.*10. *Co.*4.46. 5.7. *Stamf l.*1.52. 17 *Ed.*4.2. Of the *Clerk of the Market*. *Judges*. *Power*.

Sect. 5. Court of the *Coroner*, what. *Iudg.* *Power.*

The Court of the Coroner, is a Court inſtituted by the Common-Law, and kept before an Officer ſo called; whoſe office therein is, to enquire of every man that is ſlain, and cometh to an untimely end, by what means he came to his end; and to enquire of every circumſtance, and to enquire who they were that committed the fact; and to enquire what lands, goods and chattels the party had at the time of the fact committed, and to ſeiſe them to the uſe of the Lord Protector. And theſe Officers are alſo to enquire of *Treaſure-Trove*. *Mag. Charta, ch.* 9. *Weſtm.* 1. *ch.* 10. *Co.*46.57. *Stamf. lib.*1. 52. *Cromp. Jur.* 126. *Co.*4 *par. Inſt. ch.*59.

Court of the *Eſcheator*, what.

The Court of the Eſcheator was inſtituted by Common-Law to be held by an Officer of that name, whoſe duty and office therein was, to enquire and find by Office after the death of the Kings Tenants, what had happened to him, and to return this Office into the Exchequer. But the Tenure *in Capite* being gone, this Office, Court, and Officer is gone with it. You may read of it, *Stat.* 1 *H.*8. *ch.*8. 3 *H.*8 2. *F N.B.* 100. *Co.* 4 *par. Inſt.* 43.

Of the Sheriffs *Turn*, *Leet*, *Law day*, and *View of Frank-pledg*, what.

The Sheriffs Turn, Leet, Law-day, and view of Frank-pledge, are Courts of one nature, uſe and end. And for the better underſtanding of them, we are to know, that at firſt all Adminiſtration of Juſtice was in the King; and no Law was uſed, nor Juſtice adminiſtred, but what was before him. Afterwards when by the increaſe of people and cauſes, the burden grew too great for him; as the Kingdom was divided into Counties, ſo was the Adminiſtration of Juſtice divided into Courts, into the *Kings-Bench*, and other Courts; and amongſt other, Powers were given and Courts granted to every Sheriff within his County, who antiently were the greateſt men of the County. And this Officer for his help had two Courts: The one called the *Turn*, being a Court of Record inſtituted by the Common-Law for every County, wherein the Steward is Judg; and this is to reform publick grievances, and matters of the Crown. And to this Court all Lay-men above twelve years old, under the degree of Baron, were to appear and do ſervice, to be ſworn to the King, to ſerve Offices, and to hear and be inſtructed in the Laws, be bound to be of good abearing, and be viewed to ſee how they kept their Bonds. Here Breakers of the Peace were puniſhed, and publick Anoyances redreſſed: Here alſo Inne-keepers, Victuallers, Butchers, Fiſhmongers, and other Tradeſmen may be puniſhed for ſelling by unlawful Weights or Meaſure, or by exceſſive prices. And this Court at firſt was taken out of the *Kings-Bench*.

Turn.

Judge. *Power.*

The other Court which the Sheriff had, was called the *County-Court*; and this was erected for to give remedy in Civil actions between man and man, in any matter of wrong under Forty ſhillings. And by theſe two Courts the whole County was governed at the firſt. After this, by reaſon of a greater increaſe of people, and ſo of cauſes, and for eaſe of the people, derived other Leets or Law-days out of the Sheriffs Turn, and Hundred-Courts out of his County-Court, and granted to the Lords of Manors and Liberties much of that Power the Sheriff had, as we find it at this day. And ſo one man hath, and may have a Leet in another mans Land or Manor.

Leet or *Law-day*, or *View of Frank-pledg.*

So that by this we ſee, that a Leet is, where one hath by Grant from the King all that did belong to the Sheriffs Turn within a certain Precinct, as Hundred, Manor, or the like; wherein the Steward alone is Judg, and wherein he hath the ſame power within that Precinct, as the Sheriff had in his Turn over all the County. So that now the Sheriff is not to meddle within that Precinct, except in caſe where the other Stewards of Precincts do neglect their duties there, or when the Leet is forfeit (as it may be) into the Kings hands: And if the Sheriff do ſo, he is a Treſpaſſor. And if he warn to his Turn any of them that are under another Leet, they may be diſcharged by a ſpecial Writ for that purpoſe. Theſe Courts had conuſance of leſſer offences and cauſes: The greater offences and cauſes were heard and determined in the Kings-Bench, Common-Pleas, by the Judges there, and by the Judges in their Circuits in their Courts there. See for this, *Mag. Charta, ch.*35. *Bro. Leet. Dyer* 30. *Finches law, f.*241. *Co* 6.67. 9. in his *Epiſt. Inſt* 4 *par. ch.*54. *Stat.* 31 *Ed.*3.14.1. 1 *Ed.*3.17.4. 1 *Ed.*4.2. 28 *Ed.*3.9. 42 *Ed* 3.4. 11 *H.*7.15. 13 *Ed.*1 26. *Marl.*10. *Weſtm.* 2.32. 31 *Ed* 3.1. 19 *H.*7.24.

All

All theſe three Courts, the *County-Court*, the *Hundred-Court*, and the *Court-Baron*, are much of one nature, and much alike in all their Proceeding. The *County-Court* is for the whole County; the other for the Hundred; and the laſt for the Tenants of the Manor to which it is incident: For to every Manor there is a *Court-Baron* incident; and to every Sheriffs Office his *County-Court* is incident; and that ſo inſeparably, that the King could not by his Grant have divided them, or the profits thereof from the Sheriffs, albeit the Grant were made before the Sheriff were made. *Sect. 6. County-Court, Hundred-Court, Court-Baron, what. Judges. Power.*

The *County-Court* then is a Court not of Record, incident to the Sheriffs Office, for the hearing and determining of ſmall matters under Forty ſhillings, between party and party within the County. And in this Court the Sheriff is only a Regiſter, and no Judg; but the Freeholders of the County are Judges, and called Free-ſuitors. *County-Court, what. Free ſuitors.*

The *Hundred-Court* is derived out of this, and is of the ſame nature and extent of power within the Hundred, as the other is within the County: And in this Court alſo the Steward is but a Notary, the Freeholders of the Hundred are Judges. *Hundred-Court, what.*

The *Court-Baron* is the Court that every Lord of a Manor hath as incident to his Manor. And this is in ſome Manors double, *i.* The one is called the Copiholders Court, which is for Trial of the Titles of their Lands, and for the taking and paſſing of Eſtates, Surrenders, Admittances and Grants; and herein the Lord or his Steward is Judg. And the other Court, which is called the Freeholders Court, is only for the Trial of Actions, ſuch as are triable in the County or Hundred Court; wherein the Freeholders of the Manor are Judges. And for this ſee *Manor and Copihold.* *Court-Baron, what.*

To ſhew the Time and Place for keeping theſe Courts, Power and Juriſdiction thereof, and manner of Proceeding therein, by particulars, would of it ſelf fill a Book. But for this, being for the greateſt part of it done by me already, See it in my Book called the *Court-keepers Guide.* And ſee *Co. 4 par. Inſt. ch.* 55, 56, 57: *Co.* 4. 33. 6. 1. 11 43. 1 *par. Inſt.* 58. *Cromp. Jur.* 230, 231.

A Preſentment is an Information given in by a Jury in a Court, to any Officer which hath authority to puniſh any offences done contrary to Law. The word is alſo taken for a Preſentation to a Church, *Terms of the Law.* See my *Juſt. of Peace,* 2 *par. in tit. Indictments. Co.* 9. 113. *Preſentment in a Court, what.*

Affeerors are ſuch as be appointed in a Court-Leet, &c. to mulct ſuch as have committed any fault which is arbitrably puniſhable, and for which no expreſs penalty is preſcribed by Statute. See for this at large in my *Court-Keepers Guide, p.* 22, 23. *Co.* 8. 40. *Affeerors, what.*

The *Spiritual Courts*, that are now taken away, were for Spiritual matters; for Tythes, Legacies, and againſt men for Hereſies, Defamations, and the like. And in theſe Courts Eccleſiaſtical men, as Biſhops, their Chancellors were Judges. *Sect. 7. Convocation, what.*

There were many of theſe kinds of Courts: As the *Convocation of the Clergy*, who were to puniſh Hereſies, Schiſms, and the like offences. The *High-Commiſſion-Court*, which was the Court held by the Biſhops and other Commiſſioners upon the Statute of 1 *Eliz. ch.* 1. for the ordering and reforming of ſome ſpecial offences appertaining to Spiritual juriſdiction, by the puniſhment of Fine and Impriſonment. Which is diſſolved by *Stat* 16 *Car.* 17. *High Commiſſion Court, what.*

The *Prerogative-Court* of the Archbiſhop of *Canterbury*; which was for the proving of Wills, and granting of Adminiſtrations, in the caſe where the party dead within his Province had *bona notabilia* within ſome other Dioceſe then that wherein he died: which regularly was to be the value of Five pounds, but in the Dioceſe of *London* Ten pounds by Compoſition. And this Power doth continue ſtill, and is now veſted in and exerciſed by certain Commiſſioners in *London*, who do ſit in the *Doctors Commons.* *Prerog. Court of the Archb. of Cant. what.*

The Court of the *Arches* or *Audience*, which had ſome peculiar juriſdiction in Spiritual cauſes; the which was uſually kept in *Bow-Church* before the Dean of the *Arches*, Judg there. Court of the *Audience* or *Arches*, what.

The Court of *Audience*, which was uſed to be kept by the Archbiſhop in his Palace, with Confirmations of Biſhops, Conſecrations, Elections, Admiſſions, Court of *Audience*, what.

and

and Inſtitutions into Benefices, Diſpenſing with Banes of Matrimony, and the like.

Court of *Faculties*, what.

The Court of *Faculties*; which did belong to the Archbiſhop or his Subſtitute, and was to give Diſpenſations to marry, to eat Fleſh on days prohibited, to have two or more Benefices, and the like.

Of *Peculiars*.

The Court of *Peculiars*; which was a peculiar Juriſdiction which the Archbiſhop of *Canterbury* had in divers Pariſhes within the City of *London*, and other Dioceſes, *&c.*

Conſiſtory-Courts of *Archbiſhops* and *Biſhops*.

The *Conſiſtory*-Court of every Archbiſhop and Biſhop in his Dioceſe, was that which was uſually held before the Chancellor in the Cathedral-Church, or before his Commiſſary in the remote places of the Dioceſe.

Of the *Arch-Deacon*, or his *Commiſſary*.

The Court of the *Archdeacon* or his Commiſſary, which was a Court of the Archdeacons, held where and when he pleaſed; wherein he had, and did exerciſe Juriſdiction in ſome Spiritual cauſes within his Archdeaconry.

Of *Delegates* and *Appeals*.

The Court of *Delegates* and *Appeals*; which was a Court wherein perſons delegate by the Kings Commiſſion, did ſit to hear Appeals in the *Chancery* in certain cauſes.

Of *Commiſſioners of Review*.

The Court of *Commiſſioners of Review*; which was a power granted by the King to certain Commiſſioners to review a Sentence and Cauſe heard and determined by others.

But for theſe Courts and Powers, they being aboliſhed and gone, we ſhall ſay no more of them; but refer him that deſires to read of them, to *Co.* 4 *par. Inſt. ch.* 74. 5. 51. 11. 54. *D. & St.* 164. *Dyer* 240. *Stat.* 24 *H.* 8. *ch.* 12. 1 *R.* 2. 13, 14. 2 *&* 3 *Ed.* 6. 13. *F.N.B.* 52. *Brownl. Rep.* 1 *par* 34.

Citation, *Libel*, what.

Their courſe of Proceeding in theſe Courts, was by Citation, which was the Proceſs by which the party was called into their Courts to anſwer: And then by Libel, which was the original Declaration in the Suit, and delivering a Copy thereof; the which if the Defendant could not have gotten of the Eccleſiaſtical Judg, he might by a Writ called *Copia libelli deliberanda*, have forced him to it. They could not have impoſed any Pecuniary mulcts, nor given Damages in any cauſe; nor could they have enforced ſubjection to their Sentences, but by Eccleſiaſtical cenſures, as by Penance, Interdiction, and Excommunication. By Penance, *(i.)* by ordering the Offender to do ſome open penance in ſome publike place. Interdiction, *(i.)* the forbidding the Adminiſtration of Divine things. Excommunication, *(i.)* the caſting of a man out of the Church. But ſee theſe things in the places before cited: And ſee more in *Officers*, *Judges*, *Judgment*, and other Titles.

Copia libelli deliberanda.

Penance.
Interdiction.
Excommunication.

CHAP.

CHAP. LIX.

Of the Offences and matters heretofore called of the Crown.

AS touching the matters heretofore called the matters of the Crown, and reduced in the Law to that Title and Head; they are the things that do concern Treaſon, Felony, and divers other offences, ſome by Common-Law, and ſome by Statute-Law: Of which ſome are greater, and ſome leſs. The firſt and greateſt offence is High-Treaſon. And this heretofore might have been done many ways: But now by certain new Laws it is ordained and declared, That theſe following Acts and Words, and none other ſhall be adjudged Treaſon, (that is to ſay;) *Coron.*

Sect. 1. High-Treaſon, what it is, and how it may be committed.

1. To compaſs or imagine the death of the Lord Protector for the time being.

2. Malitiouſly or adviſedly either by Writing, Printing, open Declaring, Teaching, Preaching, or otherwiſe publiſhing any of theſe things. That the Lord Protector and People in Parliament aſſembled, are not the Supreme Authority of this Commonwealth: Or that the exerciſe of the chief Magiſtracie, and adminiſtration of the Government over the Countries and Dominions of *England*, *Scotland* and *Ireland*, and the People thereof, is not in the Lord Protector aſſiſted with his Council; or that the ſaid Authority or Government is tyrannical, uſurped or unlawful: Or ſo declare, That there is any Parliament in being, or that hath continuance, or any Law in force for continuing the ſame.

3. To plot, contrive, or endeavor to ſtir up or raiſe Force againſt the Protector or the preſent Government, or for the ſubverſion or alteration of the ſame, and ſhall declare ſuch endeavor by any open Deed.

4. If any one (not an Officer or Member of the Army) ſhall plot, contrive or endeavor to ſtir up any Mutiny in any part of the Army, or to withdraw any Soldier or Officer from their obedience to their Superiors in the Army, or from the preſent Government.

5. If any ſhall procure, invite, aid or aſſiſt any Foreiners or Strangers to invade *England*, *Scotland*, or *Ireland*, or any the Dominions thereto belonging, or ſhall adhere to any Forces raiſed by the Enemies of this Commonwealth.

6. If any ſhall plot, contrive or endeavor the betraying, ſurrendring, or yielding up any City, Town, Fort, Magazine, Ship, Veſſel, or Forces by Sea or Land belonging to this Commonwealth.

7. If any ſhall counterfeit the Great Seal of *England*, or of *Scotland* or *Ireland* for the time being, uſed and appointed by authority of Parliament, or the Lord Protector with the conſent of the Council; or the Sign Manual, Privy Signet, or Privy Seal of the Lord Protector for the time being.

8. If any perſon ſhall proclaim, declare, publiſh, or any way promote any of the Iſſue of the late King, or any claiming by or under him or them, to be King or chief Magiſtrate of *England*, *Scotland*, or *Ireland*, or either of them, or of any of the Dominions to either of them belonging. Or ſhall keep or hold any Intelligence whatſoever by Letters, Meſſages, or otherwiſe, to or with *Charls Stuart*, or *James Stuart*, their Mother the late Queen, or any of them.

9. If any counterfeit the Money of this Commonwealth, or bring any falſe Money, either counterfeit, or other like to the Money of this Commonwealth, into this Land, (knowing it to be falſe) to the intent to merchandiſe, or otherwiſe: Or ſhall falſly forge or counterfeit any ſuch kind of Coin either of Gold or Silver, which is not the proper Coin of this Commonwealth, and yet is or ſhall be current within the ſame: Or ſhall bring from beyond Sea into any of the Dominions of this Commonwealth any ſuch falſe or counterfeit Coin, being current within this Common-

Commonwealth, (knowing it to be ſo) to the intent here to utter it by Merchandiſe or otherwiſe: Or ſhall impair, diminiſh, falſifie, clip, waſh, round, file, ſcale, or lighten for gain any of the Monies of this Commonwealth, or any of the Dominions of it, or the Coin or Monies of any other Dominions allowed or ſuffered to be current here.

10. If any maintain the Popes authority here, or procure any Inſtrument of Abſolution to the People here from their obedience, or of Reconciliation; or ſhall uſe any ſuch Inſtrument to ſuch purpoſe; or ſhall endeavor to abſolve or reconcile the People by any ſuch means from their obedience here to any other Prince, to be had or uſed here: Or if any ſhall be willingly ſo by any means withdrawn and reconciled, or promiſe obedience to any Foreign Power: Or if any Prieſt, Jeſuite, or other Religious perſon born here, and having taken Orders under the Pope, ſhall come into, be, and remain in any of the Dominions belonging to this Commonwealth.

11. That if the Lord Chancellor or Commiſſioners of the Great Seal do not ſend abroad the Writs of Summons for Parliaments, according to the Act of Government: Or if the Sheriffs and others ſhall not give notice thereof, and do their duty for the Election of Knights and Burgeſſes. All theſe Offences are Treaſon. *Ord.* 19 *Jan.* 1643. The *Act of Government*, *Decemb.* 16. 1653.

The puniſhment of it.

The puniſhment for this offence is; That the perſon duly convicted and attainted thereof, is to forfeit to the Supreme Magiſtrate all his Lands he hath in Fee-ſimple, Fee-tail for life or years; all his Goods and Chattels, and his Life. If he be a man, he is to be drawn on a Hurdle to the place of Execution, and there to hang till he be half dead; then to be cut down, his Entrails and Privy-members to be cut and taken out of and from his Body, and burnt in his ſight, and his Head to be cut off, and his Body to be divided in four parts, and placed where the Lord Protector pleaſeth. But if it be a woman that is the Traitor, ſhe is to be drawn to the place of Execution, and burnt only. But for all theſe things, and the Trial of, and Proceeding againſt Traitors, you may read *Stamford* of the *Pleas of the Crown*. 6 *Ed.* 6. 11. *Dyer* 99. *Bro. Corone* throughout. *Dyer* 205. 300. *Co.* 3. 11. 1. 99. 7. 13. 8. 24. 5. 12.

The kinds and degrees of Felonies.

The next degree of offences, are Felonies. And theſe are ſome of them ſimple, and ſome of them relative. And ſome of them concern the Commonwealth, and are againſt it; and ſome more immediately againſt private perſons. Some of theſe alſo do touch the body, ſome the goods, and ſome the body and goods together, and ſome the goods only. That which doth concern the body only, is either by taking away the life thereof, which is called Homicide; or by abuſing it without death, as by cutting out the Tongue, Buggery, or the like.

Homicide is either of ones ſelf, or of another. That of another is either voluntary, or involuntary. That which is voluntary, is either diſpuniſhable by the Law, when it is commanded for Juſtice ſake; or allowed or excuſed for other cauſes, which be no Felonies. Or it is puniſhable: And that is ſometimes upon malice, which is Murder; or ſudden adventure, as by a ſudden falling out, and in hot blood; or without any premeditate malice, or in a mans own defence, or by a meer chance as Chancemedly. The offence of killing man is therefore greater or leſs, according to circumſtances in theſe and other particulars: For if a woman kill her Husband; Child, a Parent; or Servant, a Maſter; theſe are Petit-Treaſon. And of all theſe offences a man may be guilty ſimply, or by relation, when a man doth participate of the offence of another man by advice, counſel, or the like. Hence we have the diſtinction of a Principal offendor, and an Acceſſary thereunto.

The next offence in order, is Petit-Treaſon.

Sect. 2. *Petit-Treaſon*, what it is.

Petit-Treaſon is, where any Woman killeth her Husband; Man or Maid-ſervant, his or her Maſter or Miſtreſs; Son or Daughter, his or her Father and Mother; this is Petit-Treaſon. So if a Servant reſolve to kill his or her Maſter or Miſtreſs, and after, before it be done, he or ſhe be out of his or her ſervice; yet this is Petit-Treaſon. So if a Woman procure her Servant to kill her Husband, it is Petit-Treaſon againſt the Woman and her Servant: Otherwiſe it is in a ſtranger, if he do ſo.

So

So if the Servant hold the Candle, whiles another doth kill her Maſter, ſhe being in the Confederacy: And if one do ſuffer a priſoner for High Treaſon to eſcape, it ſeems it is Petit-Treaſon in him; theſe offences are Petit-Treaſon. For the which, a man ſhall loſe all his Fee-ſimple Lands, all his other Lands, Goods, and Chattels: And if it be a Man, he muſt be drawed and hanged; if a Woman, ſhe muſt be burned. Alſo ſome rank Sodomitry and Hereſie, under this offence, and Sorcery. See *Finches Law, f.* 219. *Co.* 3 *part of his Inſtitutes, chap.* 2. The puniſhment of it.

The next ſort of offences are Man-killings, or Homicides, of which there are divers kindes and degrees: Thefts alſo, of which there are many kindes.

Sect. 3. *Homicide, what it is.*

Man-killing or Homicide taken ſtrictly, is where one man killeth another; but taken largely, it is where a man is killed by any thing elſe. *Stamf. lib.* 1. *chap.* 12. *Co.* 3 *part. Inſt. chap.* 7, 8.

To make the killing of a man Felony, two things are requiſite. 1. That the party killed be in *rerum naturâ*. 2. That he die within a year and a day after the wound.

The kindes of it.

Man-killing or Homicide, is either by one or more; and it is either Spiritual or Corporal: Corporal Man-killing or Homicide, is ſaid to be either *linguâ* by tongue, or *facto* by deed. Corporal Man-killing or Homicide by the tongue, is, Firſt, *Diſſuaſione*, by diſſwaſion, by diſſwading a man from helping to ſave anothers life. Secondly, *Præcepto*, by precept or command; by commanding one to kill another. Thirdly, *Defenſione vel tuitione*, by defending or ſaving the murderer; by helping to pack away the murderer, or by keeping him from his tryal. Fourthly, *Conſilio*, by counſel, by counſelling one to kill another.

Corporal Man-killing or Homicide by fact, may be either, Firſt, *Juſtitiâ*, by Juſtice, which is alſo twofold; by Compulſive Juſtice, As when an Officer is commanded to execute an offender; or by Permiſſive Juſtice, as when a Felon reſiſteth the Officer, and will not be apprehended, and he kill the Felon. Secondly, *Neceſſitate*, by neceſſity, which is alſo two ways; either by way of offence, As when in caſe of War or Execution of Juſtice, or by way of Defence; as when one killeth another in defence of himſelf. Thirdly, *Caſu*, by chance, which may be done by men, or by other animate Creatures, or by inanimate things. By men two ways, either *licitè*, lawfully, as when one doth a lawful act, and unawares killeth a man thereby; or *illicitè*, unlawfully, as when by doing an unlawful act, one killeth another man unawares; as when one doth ſtrike at one, and kill another man. Fourthly, *Voluntate*, by will, or voluntarily, which may be alſo two ways; either *conſultè*, with deliberation, as when one man doth kill another of malice prepenſed; or *inconſultè*, without deliberation, as when one killeth another upon a ſudden affray.

For all which ſorts and kindes of Man-killings, ſome are lawful, and ſome not; and of thoſe which are unlawful, ſome are greater, and puniſhed with greater puniſhment; and ſome are leſs, and puniſhed with leſs puniſhment: For all which, ſee the ſeveral examples and caſes beneath.

For Anſwer of this Queſtion, take theſe following caſes.

Sect. 4. What *Man-killing* is lawful, or not.

1. If a man ſet upon me to rob me upon the High-way, I may kill him and juſtifie it.

2. So if he come to rob, burn, or burglarily to break my houſe, I or any of my Servants may kill him and juſtifie it.

3. So in a lawful War, a Soldier may kill as many of the enemies as he can, and juſtifie it.

4. So a Judge by Rules of Law, may adjudge a man to death, and the Officer appointed, according to that judgment may execute him, and juſtifie it.

5. So if a Traitor or Felon in purſuit, flie, or reſiſt, ſo that he cannot be apprehended, and the party appointed to take him, kill him, he may juſtifie it.

6. So if priſoners riotouſly reſiſt the Gaoler, ſo that he cannot otherwiſe ſuppreſs them, and he kill any of them, he may juſtifie it.

7. So where men riotouſly reſiſt the Juſtices, and they cannot otherwiſe ſuppreſs them, or keep the Peace.

8. So if a man out-lawed for Felony, be brought before the Judge, he may command him to be executed.

9. So if a Foreſter, Parker, or Warrener, do kill any that were doing hurt in their Foreſt, Park, or Warren, if they will not yield after they be required, or he cannot apprehend them; in this caſe he may juſtifie it, 21 *Ed.* 1.

10. So if one do kill anot her upon tryal by Combat, it is juſtifiable.

11. And in all theſe caſes a man need not ſue any pardon of courſe for his life; as in caſes of Man-killing, by defending himſelf, or by chance.

12. But one cannot juſtifie the killing of a man attainted in a Premunire, 5 *Eliz.* 1.

13. And if a man be adjudged to be hanged, and the Sheriff behead him, or execute him in any other manner; this is not juſtifiable by the Sheriff: So if any other that hath no Authority, will of his own head, execute ſuch a perſon; this is Felony in both theſe caſes, though it were the Judg himſelf that condemned him.

14. So if any man ſhall kill a man that is out-lawed or condemned for Felony, it is Felony in him.

15. So to kill any perſon attainted upon a Premunire.

16. So if one hath robbed anothers Houſe, and after he hath done, and is gone, the true man kill the Thief, this ſeems to be Felony.

17. So if one man kill another in an unlawful War, which is not undertaken by Authority of the Lord Protector, 35 *H.* 6. 58. *Co.* 5. 1. 22 *Aſſ.* 55. 21 *H.* 7. 39. 1 *Jac.* 8. 1 *Mar.* 12. 21 *Ed.* 1. *Dyer* 327. 37 *H.* 6. 21. 35 *H.* 6. 58. 5 *Eliz.* 1.

Murder, what it is. The puniſhment of it.

Murther is where one man doth kill another of malice prepenſed for gain or revenge; this is properly called Wilful murther, for which offence the murtherer ſhall forfeit and loſe all his Lands, Goods, and Chattels, and he himſelf muſt be hanged, *Plow.* 261. 52 *H.* 3. 26. *Kelw.* 136. *Powlt. de pace* 120. *Co.* 3 *part. Inſt.* 7, 8.

For the Anſwer to this, take theſe caſes.

Sect. 5. What Acts ſhall be ſaid *Murder*, or not, but ſome other offence.

1. If I bid another kill me, and he doth it, it is murder in him, *Dyer* 186.

2. If a Woman bid the Midwife kill the childe, aſſoon as it is born, and ſhe doth ſo; it is murder in them both, *Dyer* 186.

3. If one kill an Alien, if he be under the Kings Protection, it is murder.

4. If one have malice prepenſed, and I ſtrike the firſt blow, yet it is murder in him, if he kill me, *Powlt. de pace* 120.

5. If one do wilfully poyſon another, or lay poyſon for one, and another hap to take it, and be poyſoned; in both theſe caſes it is murder, 1 *Ed.* 6. 12. *Plow.* 474. *Co.* 11. 33.

6. If one ſtab or thruſt another, that had then no weapon drawn, nor then firſt ſtricken the party that did ſtab, and herewith the party die within ſix moneths; this is of the nature of wilful murder, 1 *Jac.* 6.

7. If one kill a Conſtable, Bailiff, or any other Officer as Watchman, or the like, or their aſſiſtants, or any other in their due execution of Juſtice: As in arreſting them upon Proces out of any Court, or by Warrant from any Juſtice of Peace, or in the keeping of the Kings peace, or the like; this act is murder, and ſo puniſhable, *Powlt. de pace* 121. *Co.* 9. 66. 68. 98. 4. 41.

8. If a Thief kill a true man, being about to rob him, becauſe he would not yield him his purſe, or becauſe he reſiſted him, it is murder, *Co.* 9. 67.

9. If one kill another without any cauſe, the Law will preſume there was malice, and therefore it is murder, *Ibid.*

10. If one do wilfully hold a man whiles another doth murder him, or ſtand by him and incourage and abet another, or commandeth another, or came with others of purpoſe to kill him, and ſtand by whiles another doth kill him; this is murder in all, *Qui non ſunt immunes a culpâ non debent eſſe immunes a pœnâ*, *Co.* 9. 67. *Plow.* 98. *Co.* 11. 5.

11. If one bear malice againſt *A.* and be about to aſſault him, and *B.* withſtand him, and he kill *B.* this is murder, though he did bear him no malice, *Plow.* 101.

12. If one that bears no malice, accept of a challenge from the other, and fight it *ſedato animo*, and he kill the challenger, this is murder. *Morgan & Egerton*, 9 *Jac.*

13. If two fall out at *Weſtminſter* by accident, and fight and be parted; and after they meet and appoint to fight the next day; and then either of them is killed, this is murder, and that notwithſtanding he that doth kill, ſhall ſay before the fight, that he bears him no malice. See *Man-ſlaughter.*

14. If

14. If the Maſter have malice, and tell his ſervants of it, and that his intention is to kill him he doth malice, and they go with him, and they do kill him; this is murder in all, both Maſter and Servants, *Plow.* 100.

15. If one lie in wait to kill one man, and miſtake him, and kill another; or ſhoot at one and miſs him, and kill another, this is murder, *Plow.* 101. 474.

16. If one carry any man that is ſick unto the cold, with intent to kill him, and he do die, this is murder, 2 *Ed.* 3. 18.

17. If *J. S.* of malice prepenſed, diſcharge a Piſtol at *J. D.* and miſs him, and throw down his Piſtol, and flie, and *J. D.* purſueth him to kill him, and he draw his Dagger and killeth *J. D.* this is murder: But if *J. S.* had faln down, his Dagger drawn, and *J. D.* fall by haſt upon his Dagger, *J. D.* is *felo de ſe*, and *J. S.* ſhall go quit, 44 *Ed.* 3. See *Malb ch.* 24.

18. The private making away or hiding of the Baſtard-childe by the Mother, unleſs ſhe can prove by one witneſs that it was born dead, is murder in her. 21 *Jac.* 27.

19. The killing of one in a Duel upon a challenge, is murder by the new *Ordinance*, *June* 24. 1654.

20. If one beat a Woman great with childe, and the childe is born alive, but one may ſee it to be bruiſed and dieth (as is conceived) by the bruiſes, this is murder, *Goldsb.* 176.

If one perſwade another to kill himſelf, and be preſent, when he doth, it is ſaid to be murder, *ſed quære.*

Man-ſlaughter, what it is.

It is where one doth kill another man, with felonious intent, upon ſudden quarrel without any premeditate malice: As if two meet together, and ſuddenly by accident fall out, and either at that time, or anon after, before the heat be paſt the one of them doth kill the other; this is Man-ſlaughter.

The puniſhment of it.

For which offence one ſhall forfeit and loſe all that he ſhall loſe for murder; but in this caſe he ſhall have the benefit of Clergy for his life, which if he demand before Judgment, and can read, he ſaveth his life and his Lands; but if he demandeth not the benefit of Clergy, until after Judgment, and then doth demand the benefit of the Clergy, and can read, yet he ſhall ſave his life onely: But in both caſes he doth forfeit his Goods and Chattels. See *Clergy*, *Plow. Com.* 162. *Stamf. l.* 1. *ch* 9. 43 *Aſſ.* 31. 3 *H.* 7. 1. 21 *H.* 7. 31. *Plow.* 99. *Dyer* 228. *Plow.* 100.

What Act ſhall be accounted Man-ſlaughter, and not Murder.

If one goeth with malice to kill a man, and another ſeeing them fighting, taketh his part that went with malice, and kill the man: Now though this be murder in the other, yet it is but Man-ſlaughter in him that took his part. So if the Maſter go with malice, and the Servants go and know nothing, and then they joyn with him in the aſſault, and murder, yet this is but Man-ſlaughter in the Servants.

If one arreſt another unlawfully, and the party arreſted, kill him, this is not murder but Man ſlaughter onely, unleſs the caſe be with ſtabbing within the Statute of 1 *Jac.* 6. *Dyer* 6. 26. *Co.* 9. 66.

If one that had no malice, accept a challenge from him that had malice, and fight preſently and kill him that had the malice this is but Man-ſlaughter. *Dyer* 60. 26. 9. 16. *Co.* 9. 66. *Morgan & Egerton*, 9 *Jac.*

If two fall out by accident at *Weſtminſter*, and they be then parted, and after they meet at *Algate*; or they appoint to meet at *Iſlington* the ſame day, and then one of them doth kill the other, this is but Man-ſlaughter. Sir *Thomas Lucas* mens caſe.

If one be much wounded by another, and he go and tell, or ſhew unto his Father or Brother, or ſome near Kinſman; whereupon he goeth preſently and fighteth with him that gave the wound and kill him, this is but Man-ſlaughter. *Railies* caſe, *Hil.* 9 *Jac.*

If there be a ſudden affray, and a confuſed multitude, and amongſt them one man is killed, and no man can tell how; this is Man-ſlaughter in them all.

If two be in an Inner-chamber faln out, and together by the ears, and a Brother of one of them ſtanding at the door, that cannot get in, cries unto his Brother to make him ſure, and preſently after he gives the other a mortal wound, this is Man-

ſlaughter in him that ſtood at the door. All the Judges in *Serjeants Inne, Trin.* 10 *Jac.*

If one that is not an allowed Phyſitian, kill a man by his ignorance, and unskilfulneſs in giving him Phyſick, this is Man-ſlaughter, *Stamf. l.* 1. *f.*16.

Sect. 6. *Felo de ſe.* The puniſhment of it.

A *felo de ſe* is he that killeth himſelf, for which offence he is to loſe all his Goods and Chattels, *Stamf. l.* 1. *c.*11. *Plow.*262. *Co.*9. 129. *Plow.*258. But his Wife ſhall not loſe her Dower; nor his Blood be corrupted in this caſe, as in ſome other Felonies.

In what caſe a man ſhall be ſaid a *Felo de ſe*, or not.

If one man do ſtrike another to the ground, and then draweth his knife to kill him, and the other lying along, draweth his knife to defend himſelf, and the other is ſo haſty to kill him, that he falleth upon the knife that was drawn, and ſo killeth himſelf; he is in this caſe *felo de ſe*, 44 *Ed.*3.44.

If one ſhoot at *J. S.* to kill him, and thereby kill himſelf, it is ſaid, he is *felo de ſe.*

If a man that is mad ſometimes, and hath his *lucida intervalla*, whiles he is well, give himſelf his wound, and after become mad, yet he is *felo de ſe.* So if a man do kill himſelf in his drunkenneſs, he is *felo de ſe.* So if a villain had killed himſelf. *Co.*19. *Plow.*260, 261.

If a childe of a mad-man, whiles he is mad, before he cometh to himſelf, give himſelf a mortal wound, whereof he afterwards dieth, he is not *felo de ſe*, neither ſhall he forfeit any thing, 21 *H.*7.31. though he be of found memory before he die, 22 *Ed.*3. *Corone* 244. *Co.*9. 19. *Lib.*9. *Plow.*230.

Chancemedley, or by *Miſadventure*, what. The puniſhment of it.

It is when one man doth kill another, without any purpoſe or evil intent, by ſome miſchance. For which offence if a man be found guilty of it, he ſhall forfeit his Goods not loſe life nor Lands, and lie in priſon till he have his pardon, which he muſt have of Grace and Courſe from the Lord Protector. And it ſeems there is a difference between a meer chance, and a chance mixt with the wickedneſs or negligence of the party; for in the laſt caſes the offence will fall out to be more then Man-ſlaughter *per infortunium*, *Gloc. ch.*9. 24 *H.*8.5. 52 *H.*3.20. *Co.*5.91. 9.12. 26 *H.*8.5. 44 *Aſſ.*17. *Stamf.*1.7. *Marlb.*25. 6 *Ed.*1.4.

What ſhall be ſaid to be *Chancemedley*, or not but a greater offence.

If certain men ſet upon *J. S.* to kill him, and another being preſent doth labor to part them, and in his labor doth kill *J. S.* this *per infortunium.* See *Exod.* 21. 13, 14.

If one beat his childe or ſervant moderately, and in meaſure, the childe happen, or the ſervant chance to die thereby; this is but Chancemedly: But if his beating were immoderate the offence is greater. So if a Maſter in beating his Scholar kill him, *Kelw.*168. *Powlton de pace* 120.

If one kill another at Wreſtling, Fence, or ſhooting in Bowes and Arrows at Buts, or at length; this ſhall be ſaid *per infortunium*, *Kelw.*108. *Fitz Corone* 102. 354.

If one caſt a ſtone at a Bird or a Beaſt, and a Man coming by, is hit with the ſtone and killed by it; or one is felling a Tree, and part, or all of it falleth upon a body and killeth him; this is Chancemedly.

If one cut down any thing, or throw down any thing in or near a High-way, and when it falleth, calleth aloud to Travellers to look to themſelves; or where two men do run at Tilt, Juſt, or fight at Bariers together, and one kill the other; in all theſe and the like caſes, when the thing is lawful, and this fall out upon it, it ſhall be ſaid to be *per infortunium*, 12 *H.*7. 33.

When there is a malicious minde, and unlawful act joyned with the chance, as when one intend a man, and kill another; or when one doth caſt ſtones into a High-way, where men do uſually paſs, and not give warning; or ſhoot Arrows into a Market, or other place, where men do uſually reſort, or fight at Bariers, or run at Tilt or Juſts, without the Kings Command; and in theſe caſes a man is killed, this will be an offence of an higher nature, *Stamf. lib.*1. *ch.*8. *Bro.* 335.

Se defendendo, what. The puniſhment of it.

This offence is in the ſame degree with the former; and it is when the Aſſailant doth make an affray or offer force to the Defendant, and doth ſtrike him, and the Defendant doth flie ſo far as he can for ſaving of his life: So that he is come to a ſtrait, beyond the which, he cannot flie, and the Aſſailant doth continue his aſſault;

ſo

ſo that he cannot eſcape, and thereupon the Defendant doth ſtrike the Aſſailant and kill him; this is Homicide in his own defence. For which a man ſhall be puniſhed in all things as in Chance-medley, ſee before. And how a man may have his pardon. See *Fitz Corone* 116. 161. *F. N. B.* 246. *Gloc. ch.* 9. *Fitz. Corone* 284, 286, 287. *Powlton de pace* 119. 4 *H.* 7. 2, 16. 16 *Ed* 3. 116. 43 *Aſſ.* 3. 44 *Aſſ.* 17. *Fitz Corone* 305.

If one come and aſſault my Houſe in the day time onely to beat me (and not to rob) and I kill him, this ſhall be ſaid to be *ſe defendendo*: If one have a weapon in his hand, and run away till he can go no further, and the other run ſo haſtily upon him, that he runneth upon the others weapon which he holdeth out for the defence of himſelf, and ſo he is killed; yet this is Man-ſlaughter *ſe defendendo*, *Gloc. ch.* 9. What Act ſhall be ſaid to be Homicide *ſe defendendo*, or not but a greater offence.

But in this caſe there muſt be no malice before in him that doth kill, for if ſo, then though there were an inevitable neceſſity, yet it is murder. 2. Where there is no malice precedent, there muſt be a neceſſity inevitable at the time, elſe it will be Man-ſlaughter, *Co.* 5 91. *Fitz Corone* 387. *Co.* 9. 13. 4 *H.* 7. 2.

A man ſometimes comes to his death by anothers chance, as wel as by a mans hands, or other means; as by the fall of himſelf, or ſome other things upon him, or otherwiſe: And in theſe caſes there is ſomething forfeited to the King, which is called *a Deodand*. Which is defined to be a thing given to God, for the parification of his wrath, in a caſe of miſadventure, whereby any Chriſtian ſoul comes to a violent end, by unreaſonable, ſenſeleſs, or dead Creatures, *ex Deo & danda*; and the King, or his Patentee muſt have it, and it muſt be gotten by ſeiſure, and by his Amner, an Officer for the purpoſe. The things forfeited are to be ſold, and the price given to the poor, and diſtributed for the appeaſing of Gods wrath ſtirred up againſt the Earth and place for the ſhedding of innocent Blood thereupon; which ſeemeth to be grounded on *Exod.* 21. 28. *Stamf. pl. Corone* 1. 2. *Fitz Corone* 209. 340. *Co.* 3 *part Inſt.* 9. *Deodand*, what.

For the Anſwer of this Queſtion, take theſe things.

1. If a Horſe ſtrike a man that he die, the Horſe is a *Deodand*: If a Tree fall upon a man, and kill him, the Tree is a *Deodand*: If a Cart, or the like, go over a man by chance and kill him, the Cart-wheel, Cart, Loading, and Horſes, are all forfeit, *Omnia quæ movent ad mortem ſunt Deodanda*; and that whether it move primarily or ſecondarily, as principal or acceſſary: So therefore if a Board preſs againſt a Wall, and that Wall fall or kill a man, the Board is forfeit alſo, *Kelw.* 68. *D. & St.* 175. *Dyer* 78. *Co.* 5. 110. *Fitz Corone* 298. What ſhall be forfeit by ſuch a *Man-killing*, and ſhall be accounted a *Deodand*, or not.

2. If a man be Lopping, and the Hilt or Head of his Hatchet flie, and kill a man, the Head is forfeit as a *Deodand*. And if a man fall from a Horſe or Cart whiles it is going; the horſe in the firſt caſe; Cart and Horſes, and all are forfeit in the next caſe, *Fitz Corone* 389. 140. 397.

3. If one fall upon Timber, or the like, it ſeems that alſo is forfeit, yet ſee *Fitz Corone* 314.

4. If a Cart loaded, whiles the Horſes ſtand ſtill, fall upon a man and kill him, yet it ſeems they are all forfeit: So if one Horſe move onely, and overthrow the Cart, and kill a man: So if one fall againſt the Wheel of a Cart, it ſeems all is forfeit, if the Cart be going, *Fitz Corone* 326. 407.

5. If a Bell ringing fall from a Beam, the Bell and Beam are both forfeit, *Fitz Corone* 405.

6. If one come under the Wheel of a Mill, and the Mill go, and he is killed, all is forfeit; but if it had ſtood ſtill, the Wheel onely is forfeit, *Fitz Corone* 389.

7. If a Ship drown a man in freſh-water, the Ship is forfeit, but *contra* if it were in the Sea, but nothing in the Ship, in the firſt caſe, ſhall be forfeit: If one fall from a Horſe into the Water and be drowned, the Horſe ſhall be forfeit, *Fitz Corone* 401.

8. If one fall from a Rick or Hovel, and die, the Rick or Hovel ſhall be forfeit, *Fitz Corone* 314.

9. If any Bull, or Bear, or any other Beaſt, kill a man, it is forfeit, *Fitz Corone* 298.

10. How ſuch a *Deodand* ſhall be preſerved, *Fitz Corone* 289.

For

What *Man-killing* is diſpuniſhable.

For Anſwer to this, theſe things muſt be known.

1. If one lay Ratsbane for Rats, or more, without any evil intent, and one take thereof; and die; this is not puniſhable. So if one give his Wife a poyſoned Apple, and ſhe not knowing any thing, giveth it to her childe, and ſhe die; this is no offence in the Mother: So if one follow me to kill me, and I fall down and having a weapon, hold him up to defend my ſelf, and he running in haſte to ſtrike me, run upon my weapon and kill himſelf, this is no offence to me; and yet how near theſe caſes come to the caſes of Chancemedly, conſider well. So *Homicides* in doing Juſtice, are juſtifiable: So killing one as would rob or kill a man in the High-way, or his own houſe, are not puniſhable, 24 *H.* 8. 5. *Plow.* 474. *Co.* 9 13.

2. If one kill a childe in the Mothers Womb, there is no puniſhment for it: So if one give a man his deaths wound, and he die after the year and a day, there is no puniſhment for this, *Exod.* 21. 22. 22 *Aſſ.* 44. 3 *Aſſ. pl.* 2. *Dyer* 186. *Fitz Corone* 303.

Action of the caſe.

3. If one that is an allowed Phyſitian, kill his Patient, through ignorance or miſchance in the operation of his Phyſick, this is diſpuniſhable. And yet if by his unfeſance he hurt him, and he die not; *Action of the Caſe* will lie againſt him, *Stamf.* 16. *Fitz Corone* 163.

4. If an Infant under twelve years old (unleſs it appear that he had more then an ordinary wit at that age) or a mad-man, during his madneſs, kill a man, there is no puniſhment for this: So if a man that is both deaf and dumb, but *contra* it is of a drunken man, 3 *H.* 7. 2. *Plow.* 19. *Co* 4. 42. 125.

5. If one compel another to kill a man, as by holding his hand, or the like; this is not puniſhable at all in him, whoſe hand was held, *Plow.* 8.

6. It is no Felony for Foreſters to kill miſdoers, if they will not ſubmit themſelves, *Stat. de maleſactoribus*, 21 *Ed.* 1.

7. If one hath a Beaſt which he doth know, doth uſually hurt, and doth not look to him, but let him go abroad, and it kill a body; this is Felony in the owner, *Exod.* 21. 28. *Fitz Corone* 311.

What other Acts againſt the life of a man ſhall be accounted Felony, or not.

For Anſwer to this, theſe things are to be known.

1. If one kill a childe after birth, and before Baptiſm, it is Felony, *Dyer* 186.

2. If a Gaoler keep his priſoner more cruelly then he ought, ſo that he die thereby; this is Felony in the Gaoler, *Stamf.* 1. 16.

3. If one that is no Phyſitian allowed, do give Phyſick, and kill the man through his ignorance; this is Felony, *Stamf.* 2. 16.

4. If one cut out any mans tongue, or put out his eyes, this is Felony, 5 *H.* 4. 5. if it be done maliciouſly.

5. If one practiſe Conjuration, Inchantments, Charms, Witchcraft, Sorcery, or the like, where by any Man, Woman, or Childe, ſhall be killed or hurt, it is Felony, 1 *Jac.* 12.

6. If any one that hath the Plague upon him, and is commanded by the Magiſtrate to keep in, do notwithſtanding go abroad, it is Felony, 1 *Jac.* 31.

7. If any of the Kings ſworn ſervants had conſpired to kill any of the Lords of the Realm, or any of the Kings Council that were ſworn as the Steward, Treaſurer, or Comptroller, or the like, though they did not effect it, yet it was Felony, 3 *H.* 7. 14.

8. If one beat another grievouſly and leave him for dead, and after he recover; this is no Felony, *Non officit conatus niſi ſequatur effectus*, *Fitz Corone* 383.

Sect. 8. *Felonies* by *Theft.*

9. Thus far of Felonies by *Homicide*; now follow Felonies by Theft.

Theft, what it is.

Furtum eſt fraudulenta, illegitima & Felonica tractatio rei alienæ perſonalis & mobilis animo furandi invito illo cujus res illa fuerit. It is the felonious taking away of another mans movable Goods from againſt his will, and with a purpoſe to ſteal them. So that to make up this offence, three things are requiſit; Firſt, *Animus furandi*, it muſt be without pretence of Title, and this muſt be at the time, that the party doth come to the poſſeſſion of the Goods: Secondly, The thing ſtoln muſt be *res aliena*: Thirdly, it muſt be a perſonal thing, *vide infrà*, *Stamf.* 1. 20. 4 *H.* 7. 5.

This

This Theft is either a *perſona hominis in præſentiâ ejus*, or *in abſentiâ ejus*; and it is from his perſon *ad terrorem*, as Robbery or violent Theft; or elſe it is *abſque terrore*, as picking the Purſe: And that in his abſence, is either *magna*, when the thing ſtoln is above the value of twelve pence, or *parva* when the thing ſtoln is under the value of twelve pence, which is called *Petit-Larceny*, *Stamf. l.*1. *c.*20. 4 *H.*7. 5. *Co.* 3 *part Inſt. cap.*47. The kindes of it.

For Anſwer to this Queſtion, take theſe things.

1. There are degrees in this.

2. The firſt and greateſt offence of this nature, is *Burglary*. What Acts ſhall be accounted *Felony* by *Theft*, or not.

3. Burglary is where one doth break and enter into the Houſe of another, wherein ſome Body is, or into the Out-houſe or Stable, adjoyning to the Houſe, wherein people be, in the night time, with an intent to rob or kill, or do ſome other Felony; in which caſe though he carry away nothing, nor kill any Body, yet it is Felony, 22 *Aſſ.*39. *Dyer* 99. 58. But all this muſt be underſtood in a time of peace. *Broo. Corone* 176. *Co.*11.32. 3 *H.*7. 12. *Stamf.* 30. *Dyer* 99. 58. But if one break a Houſe with intent to rob, and do not enter the Houſe, or break the Houſe in the day time, between Sun-riſing and Sun-ſet, and then rob; neither of theſe acts are Burglary, but it will be a leſſer offence, *Kelw.*75. *Powlton de pace* 120. *Burglary*, what.

4. If one with his family be upon occaſion out of doors in the night, and the whiles one break, and rob his houſe, this is Burglary, *Co.*4. 40.

5. If a Thief finde the door open, and come in by night, and rob a Houſe, and being frighted, break a door to eſcape, this is Burglary.

6. If one have two Houſes, and dwell ſometimes in one, and ſometimes in the other, and hath ſervants in both; and whiles his ſervants be abroad, his Houſe be broke, and he is robbed; this is Burglary. But both theſe caſes muſt be underſtood of Manſion-houſes.

7. If one of a mans own ſervants, let them in at the doors, or at the windows, yet it is Burglary in the Thieves, but Felony onely in the Servant. But to break a Cloſe, with an intent to rob, and to rob, or to break a Houſe, with an intent to beat a man, and to do it; is not this offence, but a leſſer offence, *Dyer* 99. *Co* 11. 32, 36. *Stamf.*30. *Sect.* 9. *Robbery*, what.

8. The next is Robbery, which is, where one doth take from anothers perſon, feloniouſly and violently any money, or other thing, though it be but to the value of one peny; yet if it be in this manner, it is Robbery and Felony, *Fitz Corone* 115. And whether he take it, or the party deliver it upon an aſſault for fear, it is all one, *Dyer* 224. 9 *Ed.*4. 26. And under this degree is the Cut-purſe offence.

9. If one threaten to kill a man, if he do not deliver his Purſe, and thereupon he give it to him, this is Robbery. *Powlton de pace* 128. Cutting a Purſe.

10. If one take a mans Goods, that lie before him, whether the owner will or no, or take a mans Horſe or Beaſt before his face, the owner reſiſting him; this is Robbery, as well as if he took it from his perſon, *Powlton de pace* 128.

11. If two or more do threaten a man to kill him, unleſs he will bring them money, and he do and they take it away, or threaten to kill him; if he do not ſwear to bring them money ſuch a day, and he do accordingly; this is Robbery, *Finch.*4. 44 *Ed.*3. 14. 4 *H.*4.3. See for *Robberies*, ſee *Weſtm.*1. 27 *Eliz.* 13.

12. If Thieves beſet a mans houſe, and the owner is afraid they will enter; and thereupon caſt them out money, and they go away with it, this is Robbery, 44 *Ed.*3.14. *Felony* by *Theft.*

13. If one bargain with a Carrier to carry certain Sales of Wares to a place, and he carry them to another place, and there take out the Wares, and ſteal them, this is Felony. So if one undertake to carry a Tun of Wine, and the Carrier open the Tun, and take out ſome of the Wine feloniouſly: So if one deliver one any Goods to carry to a place, and he carrieth them thither, and there ſtealeth them, this is Felony. So if one that hath the keeping of my money, or my Butler, or Horſman, carry or convey away my Money, Plate, or Horſe, this is Felony: So if my Shepherd ſteal away my Sheep; for in theſe caſes ſtill it is in the Maſters though they keep it, 13 *Ed.*4.9. 13 *Ed.*4.10. 21 *H.*4.14. 3 *H.*7. 12. 13 *Ed.*4.9. 27 *Aſſ.* 39. But if a man deliver Goods to his ſervant, or a Carrier, in other caſes, and he carry and keep them away from the owner; this will not be Felony, 13 *Ed.*4.9.

14. If

13. If I deliver my ſervant the Key of my Chamber, and he rob me; this is Felony, 13 *Ed.*4.9.

14. If a gueſt in a Tavern take away a Bowl, or any thing before him felloniouſly, it is felony: So if a gueſt take away any thing in his Chamber.

15. If I deliver mine own Goods to another to keep, and after I ſteal them away, it is felony in me. 7 *H.*6. 45. 5 *H.*7.18. So if I confederate with another to ſteal my Goods from my Baily. *Goldsb.* 186.

16. If one ſteal any of the Goods of any Church, or Chappel, or Corporation, it is felony. 7 *Ed.*4. 14. 9 *Ed.*4.33. Though it be in time of Vacation of a Governor.

17. If one ſteal Goods ſtoln before, it is felony. 13 *Ed.*4.3. 4 *H.*7.5. If one take out of their Neſt, in a Dove houſe, yong Pigeons, before they can flie: So ſuch yong Goſhawks, or Hierons in a Park or Ground, before they can flie: Fiſh out of a Pond or Trunk, where they may be taken out by hands without Nets; or Swans, Peacocks, Turkies, Geeſe, Capons, Ducks; a Stag, Hinde, Buck, or Doe marked and tame: To kill Sheep, and take away their Skins, or to pluck them, and take away their Wool; or to take away wilde Fowl where they be dead, is Felony. But to ſteal wilde ſavage Beaſts or Fowls, as wilde Deer or Coneys in a Warren, Pigeons, Hawks, or Doves flying abroad in a River, or the like; theſe acts are not Felony, 3 *Ed.* 1.20. 31 *H.*7. 6. 1 *Ed* 3.17. 18 *Ed.*4.8. 18 *H.*8.2. If Servants imbezzle their Maſters Goods at the time of his death, and afterwards being duly ſummoned by the Executors, will not appear, this is Felony, 31 *H.*6. 1. If two, three or more of them ſteal Goods to the value of twelve pence; this is Felony in all of them, *Fitz Corone* 404.

If any Servant above eighteen years old, that is not an Apprentice, do felonioufly depart with, imbezzle or convert to his own uſe, any Goods or Chattels of his Maſter or Miſtreſs, delivered to him by his Maſter or Miſtreſs, or any his fellow-ſervants, to the value of forty ſhillings or above, it is Felony, 21 *H.*8. 7. 5 *Eliz.*10. *Dyer* 5. But if I deliver my Servant a Bond for forty ſhillings, and he receive it, and then go away; this is no Felony. So if I deliver him Wares to ſell at a Fair, and he ſell them, and then go away with the money, this is no Felony, *Dyer* 5.

If I deliver a man Goods to keep, and after take him into my ſervice, and then he goeth away with my Goods; this is not Felony by this Statute, becauſe he was no ſervant at the time, 28 *H.*8. 2. So if I deliver Goods to the ſervant of *J. S.* to keep, and after die, and make *J. S.* my Executor; and before any new Commandment of *J. S.* to his ſervant to keep the ſame Goods, his ſervant goeth away with them; this alſo is out of the Statute. Sir *Francis Bacon*, *f.*34.

Sect. 10. *Petit-Larcenie*, what.

If one ſteal any thing (beſides the things excepted beneath) from another man, which the Jury upon the tryal of the Thief, ſhall finde to be above the value of twelve pence, it is Felony, though it be ſtoln at ſeveral times, *Fitz Corone* 455. But if the Jury finde it under twelve pence. See more of *Burglary* and *Robbery*. *Co.*3 *part Inſt. cap.*14.17. Or not above twelve pence in value, then it is but *Petit-Larcenie*, and not Felony; for which the offender is to forfeit his Goods, and be puniſhed otherwiſe, by whipping, binding to the Good-behavior, Impriſonment, or the like, at the diſcretion of the Judge: But he is not to be puniſhed with the loſs of his life, 27 *H.*8.22. *Bro.*515. *Co.* 3 *part Inſt.* 47. For *Felonies by Theft*, ſee 39 *Eliz.* 29. 27 *Eliz.*13. 7 *Rich.*2. 6. 18 *Ed.*3. 11. 5 *Ed* 3.14. *Articuli ſuper Chart.* 17 *Stat. Wincheſter.*

The puniſhment of it.

What taking of Goods is not accounted *Felony.*

To ſteal Apples, or Hops on the Trees, Corn ſtanding upon the Ground, or Wood growing, or the Lead or Tyle of a Church or Houſe, is not Felony: But if theſe things be taken away cut and ſevered from the Houſe or Land; in theſe caſes the taking of them away will be Felony, *Co.*4.14. 7. 18. 18 *H.*8.2. And if a Thief cut down a tree this day, and come to morrow and fetch him away, this perhaps may be Felony.

To take away Writings, or a Ward, or Goods that are Treaſure, Trove, Wreck, a Waiff, or Eſtray, is no Felony. 10 *Ed.*4.15. 12 *Aſſ.*32.

Husband and *Wife.*

If a Wife ſteal Goods by the Commandment or Compulſion of her Husband, this is not Felony in her. And if ſhe and her Husband do ſteal Goods together; this is no Felony in her, as Principal or Acceſſary: But if ſhe ſteal Goods without his privity,

vity, or receive ſtoln Goods againſt his minde, and without his knowledge; this is Felony in her, but none in him, 27 *Aſſ. pl.* 40. *Fitz Corone* 160. 383. And if the Wife take away her Husbands Goods, and give them to another; this is no Felony in the Wife that gives, nor in the other that takes them, *Fitz Corone* 455.

If an Infant under ten years of age, do ſteal my Goods, it is ſaid this is not Felony. But it ſeems the courſe is to conſider of the ripeneſs of wit in the Felon, and according to that, to judg him, let him be of what years he will, *Co.* 4. 124. 35 *H.* 6. 11. The ſame Law is of Man-killing by an Infant; and yet if an Infant beat or wound me, he may be indicted and fined for this, or I may ſue him in Treſpaſs, and recover damages, 35 *H.* 6. *Infant.* *Treſpaſs.*

If an Idiot or Lunatick do ſteal any Goods, this is no Felony, *Co.* 4. 124. 35 *H.* 6. 11. So likewiſe it is of an Idiot, as to the point of murder. And yet if he beat or wound another, he may ſue him in Treſpaſs, and have damage for this, 35 *H.* 6. *Lunatick.* *Treſpaſs.*

If one ſteal Apes, Hounds, Grey-hounds, Poping-jays, Squirrels, or the like things of no value, this is no Felony, 18 *H.* 8. 2. 22 *Aſſ.* 95.

If one put his hand into anothers Pocket to take out his Purſe, and the Purſe doth hang ſtill to a Key faſtned to the Purſe in his Pocket, this is not Felony. And yet if one ſteal away Goods out of one part of a Houſe, and carry them away, and hide them in another part of the Houſe, this is Felony: By two Juſtices, *M.* 8 *Jac.*

If my Goods be ſtoln away from me, and I take them again by force, where I finde them, or by the delivery of the Felon; this is no Felony, nor puniſhable at all. For any man may chuſe whether he will proſecute a Felon for ſtealing his Goods, or not, till he be bound by Recogniſance: But if I take money for my Goods, eſpecially if I take more by a great deal, then the Goods be worth, or take money of the Felon, with agreement to conceal him, or the like; this is dangerous, and I may be fined for it; and yet it is clear, this is not Felony, by Juſtice *Bridgman*, *Hil.* 7 *Car.* But if I break the priſon, wherein a Felon is, and let him out, or reſcue him being apprehended, and he get away; or I have him in cuſtody, and ſuffer him purpoſely and willingly to eſcape; theſe things are Felony, and make me liable to the ſame offence and puniſhment, as he is liable to.

If Goods be taken out of a Church or Chappel felonioufly, this is a Felony, and a high degree of Felony, called Sacrilege. *Sect.* 11. *Sacrilege*, what.

By all which, we ſee that to the making up of this offence of Felony by Theft; there muſt go theſe things,

1. The taking muſt be of Goods or Chattels, perſonal and movable. For the ſtealing of Chattels real, as Charters of Land, an Infant in Ward, or the like, is not Felony: Nor is the taking of any thing therefore (upon this account) which is parcel of the Freehold, and unſevered, as Fruit of a Tree, Lead on a Houſe, or the like, Felony.

2. The party from whom they are taken, muſt have a property and a poſſeſſion in the things: And therefore is it, that the ſtealing of Goods, waiffed, wrecked, or ſtrayed, is no Felony. And hence it is, that the ſtealing of things of a wilde nature, as Doves abroad, Fiſh in the River, or the like, is no Felony.

3. The things taken, muſt be things of profit. And therefore it is not Felony to take away hunting, or any Dogs, Apes, Parrots, ſinging Birds, and the like.

4. The caſe muſt be ſo, that the Goods muſt not come to the party that hath them by the delivery of the owner: And therefore if a ſervant or Carrier, take away the Goods delivered, it is not Felony; and yet if a man have the uſe of them onely, as Plate in a Tavern; or one deliver Goods to carry to a Carrier, to be carried to one place, and he carry them to another, or after he hath carried them to the ſame place, then he carry them away; this may be Felony.

5. The things ſtoln muſt be taken away and removed out of the place; and yet if one ſtealing my Horſe be taken in the manner, with the Bridle about his head, *&c.* ſo that he cannot go away with him; it ſeems this is Felony.

Piracy is the robbing by Sea: And this is as penal to the offender, as the robbing by Land. See for this largely, *Co.* 2 *part Inſt. cap.* 49. *Piracy.*

Where it ſhall be tried, 28 *H.* 8. 15.

What other Acts, and not acts of *Mankilling*, or *Theft*, ſhall be ſaid to be *Felony*, or in the degree of *Felony*, or not.

For Anſwer to this Queſtion, we are to know that a man may commit Felony, and be in danger to loſe his life in divers other caſes, and for divers other things; as in theſe caſes following.

1. If any man wilfully put out the Eyes, or cut out the Tongue of another man, this is Felony, 1 *H* 4. 5.

2. If one above fourteen years old, counterfeit himſelf an *Egyptian*, and ſo continue a moneth together in *England*; he is a Felon, 5 *Eliz.* 26.

3. If one multiply Gold or Silver, it is Felony, 5 *H.* 4. 4.

4. If one take up a Hawk, and do not proclaim him, and deliver him, when he is demanded, but deny him, 34 *Ed.* 3. 22.

5. If Maſons do make Congregations or Aſſemblies to ſubvert the Laws, it is Felony, 3 *H.* 6. 1.

6. A Soldier or Marriner may by miſ-behaving himſelf in a wandring life, become a Felon, 39 *Eliz.* 17. A man may be a Felon by forging of Evidences the ſecond time, 5 *Eliz.* 14.

7. To take away any Record whereby a Judgment is Reverſed, is Felony, 8 *H.* 6. 12.

8. It is Felony for a Rogue, baniſhed by the Juſtices to return again, 39 *Eliz.* 4.

9. Purveyors of the King in their Purveyance for him, may commit Felony in divers caſes, 28 *Ed.* 1, 2. 20 *R.* 2. 5. 25 *Ed.* 3. 15. 5 *Ed.* 3. 2. and others.

10. Felony may be done by robbing Parks, 3 *Ed.* 1. 20. 1 *H.* 7. 7.

11. To imbezzle or ſell the Kings Ordnance, or Armor, was Felony, 31 *Eliz.* 4

12. It is Felony to cut down any part of Powdike in Marſhland, 22 *H.* 8. 11. 2, 3 *Ph. & Ma.* 19.

13. It is Felony to take a man out of *Cumberland*, *Weſtmerland*, *Northumberland*, *Durham*, *&c.* priſoner, and carry him elſwhere, 43 *Eliz.* 13.

14. Soldiers and Marriners may divers ways commit Felony, 39 *Eliz.* 13. 18 *H.* 6. 19. 2 *Ed.* 6. 2. 5 *Eliz.* 5.

15. One may be a Felon by relieving or receiving a Jeſuit, 27 *Eliz.* 2.

16. If any Man or Woman commit Inceſt, or a Woman knowing her Husband to be living, or not having been three years abſent, or by common report reputed to be dead, be known by a man; this is Felony in them both. So if one lie with a Married-woman, knowing her to be ſo, it is Felony in them both. If any one be a Bawd and keep a Bawdy-houſe after one Conviction, the ſecond offence is Felony, *Act*, 10 *May*, 1645. 9 *Aug.* 1648.

17. If any man, not an Attorney, ſhall acknowledg any Judgment againſt any man, not being privy or conſenting to it: Or if any levy a Fine, ſuffer a Recovery, or acknowledg any Statute-Recogniſance, or Bail, in the name of any other perſon, not being privy or conſenting thereto; either of theſe Acts are Felony, 21 *Jac.* 7. 26.

18. If any man imbezzle, or raſe any part of a Record in any of the great Courts, whereby a Judgment is reverſed; or ſo corrected as that the Error is redreſſed, this is Felony, 8 *H.* 6. 12. 2 *R.* 3. 10. *Bro. Corone* 173. But if the Judg do ſo, it is Miſpriſion onely, *Co.* 11. 34. 8. 160.

19. If a Jailor uſe his priſoner ſo hardly, and thereby cauſe or compel his priſoner to be an Approver againſt his will; this is Felony, 14 *Ed.* 3. 9.

20. If one marry a ſecond Wife, his firſt Wife being living, and having been heard of within ſeven years, it is Felony, 1 *Jac.* 11.

21. If one willingly burn any dwelling-houſe or Barn full of Corn, or any outhouſe adjoyning to ſuch dwelling-houſe or Barn, it is Felony, 4 *Ed.* 5. *Co.* 4. 20. 11 *H.* 7. 1. *Stamf.* 24. 9 *Ed.* 4. 26. 13 *Ed.* 1. 33. 6 *R.* 2. 6.

Sect. 12. *Rape*, what.

22. If any Man raviſh any Woman, Widow, or Maid, it is Felony. If one carnally know any Maid under ten years of age, it is Felony. If any one take away any Wife, Widow, or Maid, againſt her will, which hath Lands or Goods, or is Inheritrix, or Heir apparant, it is Felony, 13 *Eliz* 6. 3 *H.* 7. 2. 39 *Eliz.* 9. 3 *Ed.* 1. 14. 9 *Ed.* 4. 22. See *Exod.* 21. 16. To have two Wives at one time, is Felony, 1 *Jac.* 11. And yet if the party have been abſent ſeven years, and it is not known whether he or ſhe be living, it is not Felony.

Bigamy, what.

23. If any priſoner that is in priſon for Felony; or any other break any priſon, and

and go out, or let out any ſuch priſoner, 1 *Ed.* 2. *De frangentibus priſonam*, 23 *H.* 8. 11. It is Felony.

24. If one tranſport Sheep out of the Realm the ſecond time, it is Felony, 3 *El.* 3.

25. If a Recuſant that hath abjured, do not depart the Realm, according to his Abjuration, it is Felony, 35 *Eliz.* 1. 2 *Jac.* 25.

26. If one do commit Buggery with man or Beaſt, it is Felony, 25 *H.* 8. 6. 5 *El.* 17. *Buggery*, what. *Sodomy.*

27. If any man ſhall maliciouſly cut or burn any frame of building, provided for a Houſe, ſo that the ſame ſhall not ſerve for that purpoſe, for which it was prepared, this is Felony, 5 *H.* 4. 5. 37 *H.* 8. 6.

28. Other Felonies there are alſo, for which ſee 1 *Jac.* 31. 31 *Eliz.* 4. 5 *H.* 4. 24. 37 *H.* 8. 6. 1 *Ed.* 6. 12. 1 *Jac.* 11. 21 *Jac.* 26. 23 *H.* 8. 11. See for all theſe Felonies, *Co.* 3 *part of his Inſt.* 13, 15, 17, 19, 20, *&c.*

29. Hereſie, where one had been once convinced by the Biſhop of Hereſie, *viz.* For wilful and obſtinate oppoſition of any point of Chriſtian Faith againſt Scripture, and had abjured it, and afterwards faln into the ſame or ſome other Hereſie again, was puniſhed with death. And for that ſerved the Writ of *Heretico Comburendo*: See for this *D. & St.* 29. 2 *H.* 4. 15. *F.N.B.* 269. *Broo.* 468. *Co.* upon *Littl.* 381. 2 *H* 4. 15. 2 *H.* 5. 15. 2 *H.* 5. 7. 5 *R.* 2. 5. See *Co.* 3 *part Inſt.* 5. But this out of uſe, *Terms of Law.* *Sect.* 13. *Hereſie*, what. *Heretico comburendo*, what.

We have done now with the Simple Felonies, and Principal Felons: And now we come to Relative Felonies, and to Acceſſaries. For a man by Participation with, may make himſelf guilty of another mans offence, divers ways; we have ſhewed before, That the breaking of a Priſon, and letting out of Felons is a Felony. So if one ſhall Reſcue a Felon apprehended, this is a Felony: See for this *Reſcous* in *chap.* So for a voluntary Eſcape, if one that hath a Felon in his cuſtody, ſuffer him wilfully to eſcape or turn him going, this is Felony; and if it be in an Officer, it is the worſe: But for the clearing of it, we ſhall handle the point of Principal and Acceſſary at large. Breaking of Priſon. *Reſcue.* *Eſcape.*

Theſe two words are Relative words, Principal doth ſignifie the chief actor of any villany, and the Acceſſary is he that hath his hand and conſent in it before or after, but is not preſent at it, called ſometimes an Abettor: And he is two manner of ways, either before the fact done, when he is one of the helping and moving cauſes of it, which may be by Provocation, Counſel, or Conſent; or after, when he laboreth to hinder the execution of Juſtice upon the offender for the fact; in both caſes the offence of the Acceſſary is equal in degree and quality with the offence of the Principal; and for both, he is to be puniſhed as the Principal is, *Conſentientes agentes & inſtigantes pari pœnâ plectuntur*, 46 *Aſſ.* 23. *Stamf pl. Corone* 44, 45, 46, *&c.* *Co* 7. 2. 1. *Principal* and *Acceſſary*, what. *Abettor.* The kindes of it.

Some alſo divide them again into Acceſſaries by the Common Law, and Acceſſaries by the Statute, (*i.*) Such as are made ſo by any Statute, are ſuch as abet, counſel, or receive any which commit, or have committed any offence made Felony by any Statute, albeit the Statute do not mention Acceſſaries, *Stamf. pl. Corone*, 1. 45.

For Anſwer to this, theſe things are to be known.

1. In Treaſons there can be no Acceſſaries before nor after, for all that have their hands in thoſe offences are called and eſteemed Principals. In what offences and caſes, there may be an *Acceſſary*, or not.

2. Alſo in Man-ſlaughter there can be no Acceſſaries before, but there may be Acceſſaries after; but in all other Felonies there may be Acceſſaries before and after.

4. In Maime, Forcible entry, Riots, Routs, and all Treſpaſſes, there can be no Acceſſaries before or after; but all are eſteemed Principals.

5. Alſo Acceſſaries may be in relation to offences by Statute Laws, albeit the Statute doth not mention Acceſſaries, *Co.* 4. 44. upon *Littl.* 57. *Stamf.* 1. 4. 5 *H.* 7. 10. *Stamf. pl. Corone* 45, 46, 47.

6. A man may be an Acceſſary to the ſtealing of his own Goods; as if he confederate with another to ſteal them from his Baily, to the intent to charge him, *Goldsb.* 18. *pl.* 128.

If one man do command, counſel, adviſe, procure, abet, allow or ſtir up, comfort, encourage, aid, conſent to, or hire another to do any Felony, and be not preſent himſelf when the other doth it, he is an Acceſſary before, *Stamf.* 1. 45. *Co.* 9. 112. 7. 2. 4, 5 *Ph. & Ma* 4. *Kelw.* 67. *Plow* 476. In what caſe a man ſhall be ſaid an *Acceſſary* before the offence, or not.

A man may be Acceſſary before, by provocation; and that may be, Firſt, by incenſing or allurement, of which, ſee examples in Scripture *Job* 2.9. 1 *Kings* 21. 25. *Prov.* 1. 10. Secondly, One may be Acceſſary by counſel, of which read 2 *Sam.* 13. 5. 16. 21. 2 *Chron.* 22. 3, 4. Thirdly, One may be Acceſſary by conſent, and this may be either overt, and that may be either by word or deed, of which ſee *Acts* 8. 1. 26. 10. 7. 56. *Prov.* 1. 14. *Pſal.* 50. 18. Or Covert, when one is of the confederacy, and ſtands by, and is ſilent. And by all theſe ways a man may be Acceſſary by our Law. As by theſe following caſes,

1. If one counſel a Woman to murther the childe in her body, and after the childe is born, and then ſhe doth murder him in the abſence of him that gave her the counſel, in this caſe he is an Acceſſary, *Dyer* 186. *Plow.* 475. 2. If I perſwade or command one to go and beat another man onely, and he do beat him, and kill him; by this I am made Acceſſary, not onely to the beating, but to the murther, *Stamf.* 1. 45. *Co.* 4. 75. 4. 44. 3. If one perſwade another to perſwade a third perſon to drink ſuch a potion, wherein is poyſon, knowing it to be ſo, and he doth ſo, and thereof the party die; the firſt perſwader is an Acceſſary, *Co.* 4. 44. *Plow.* 475, 476. 4. If one command or adviſe another to rob another, and he in robbing of him, kill him in fight; in this caſe the adviſer or commander is Acceſſary to this murther alſo. So if one command one to beat another, and with that beating he kill him. So if one command one to burn the Houſe of *J. S.* and by this means any other Houſes are burnt too, he is Acceſſary unto all; and ſo in all like caſes where other evil enſueth upon any evil thing, counſelled or adviſed, *Co.* 4. 44. *Plow* 475. 5. But if divers come to do a lawful buſineſs, and one kill a man without the conſent of the reſt, or one do a Felony; or if a man happen by chance into company where ſuch a murther or Felony is committed (being not of their company, nor confederacy, and having no ſuch purpoſe) and he do not let ſuch Felony, or do not raiſe Hue and Cry after it is done; by theſe things he doth not make himſelf Acceſſary, but he may be fined for theſe things: So if a Sheriff command his Bailiff to take a man, and the Bailiff do take the man and rob him, the Sheriff is not Acceſſary to this Robbery, *Plow.* 475. *Stamf.* 1. 45. 6. If one counſel or command one to kill a man, and he kill another; or to burn one mans Houſe, and he burn anothers; or to ſteal a Horſe, and he ſteal a Cowe; or to ſteal a black Horſe, and he ſteal a white Horſe; or to ſteal a Goldſmiths Plate from him, going to ſuch a Fair, and he go to his ſhop in Cheapſide, and rob him there, and break open his houſe to do it; here in theſe caſes the party ſhall not be Acceſſary, becauſe this is another Felony; and yet if one command a Felony, and it be done in another faſhion, time, place, or manner, then it was commanded onely; he may be Acceſſary to it, *Plow.* 475. As if one bid another to rob *J. D.* on *Shooters-hill*, and he doth it on *Gads-hill*, or to rob him one day, and he doth it another day, or to do it himſelf, and he doth it by another, or to kill him by poyſon, and he doth it by a Sword; in all theſe caſes he ſhall be an Acceſſary: But if he bid him kill *J. S.* and he kill *J. D.* it is otherwiſe; and it is ſaid if one command another to rob *J. S.* as he goeth to *Turbridg* Fair, and he rob him in his houſe, that by this he is not Acceſſary, *Plow* 475.

In what caſe a man ſhall be ſaid to be an Acceſſary after the offence, or not.

1. If one after a Felony is committed, and he hath knowledg of it, doth notwithſtanding receive and favor, aid, aſſiſt, hide, comfort, or help the Felon in his houſe, or elſwhere, and conceal him from them that ſearch after him; or help convey him away by aid of money, or other aſſiſtance, or hinder or endeavor to let his apprehenſion, reſcue him, or the like, he is Acceſſary after the offence, *Stamf.* 1. 46. 14 *H.* 7. 31. *Plow.* 476. But to know of a Felony onely, will not make a man acceſſary to it. 2. If one be out-lawed for Felony, or otherwiſe attainted by a Record, and a man do after receive him; in this caſe it ſeems he is an Acceſſary after, though he know not of the Felonie, becauſe it is upon Record, eſpecially if the out-lawry be in the ſame County, *Fitz. Corone* 377. *Dyer* 355. *Stamf.* 1. 46. 3. If one felonioufly receive another that is acceſſary to a Felony; this receiver is an Acceſſary, *Stamf.* 1. 43. So that one may be an Acceſſary to an Acceſſary. 4. If one give one money to help ſhift him out of the Country, after he hath told him of the Felony he hath committed; by this he makes himſelf Acceſſary, *Stamf.* 1. 46. *Parrams* caſe, *B. R.* *M.* 7 *Jac.*

M. 7 *Jac.* The *Court*, *Fitz Corone* 447. 5. If one receive another into his houſe, that flieth for a Felony, and ſhuts the door, ſo as the Country not thinking him to be there, he eſcape whiles no man followeth him, he is Acceſſary, *Stamf.* 1. 46. 6. But if a Woman do after her Husband hath committed a Felony conceal him, live with, aid, and comfort him, or the like; this is no Felony in her, neither is ſhe Acceſſary: But if ſhe ſerve any other man ſo, ſhe may be an Acceſſary, *Stamf.* 1. 19. *Fitz Corone* 183. 7. If one know of a Felony, and do not hinder it, or purſue the Felon, but he doth not conſent to it, nor is at it; this is not Felony. And if one after a Felony is committed, do help a man by his counſel, Letters, or the like, to help him out of his trouble, this will not make him an Acceſſary, *Stamf.* 1. 46. 8. If one do receive Goods which he doth know to be ſtoln, he is not (as it ſeems) by this Acceſſary to the Felony. But it is dangerous ſo to do, and eſpecially to buy ſuch Goods at a low rate: But if one purſue a Felon with Hue and Cry, and then take his Goods, and let him go; by this he may be made an Acceſſary to the offence, *Stamf.* 1. 46. If one receive his own Goods from the Thief, after they be ſtoln, if it be not with a purpoſe to conceal the offendor, or bear with him, or to help him to eſcape; this is not puniſhable at all, *Halls* caſe, 38 *Eliz. B. R.* But if one take money of the Felon not to give evidence againſt him; by this he may be Acceſſary. *Wife.*

Sect. 14.

In what caſe a man ſhall be eſteemed a Principal, and not an Acceſſary.

1. If many come together to do an unlawful act, as to rob or to do a riot, or the like, and one of them kill a man; in this caſe they are all Principal offendors, *Bro.* 237. *Plow.* 98. *Kelw.* 161. 2. If one do command, incite, or perſwade another to do a Felony, and be preſent himſelf at the doing of it, he ſhall be deemed a Principal, *Co.* 9. 112. 3. If one be preſent, and doth move others to kill (or though he incite not) yet if he come for that purpoſe, or to aid if need be; or hold a man while another doth kill him; or be of the confederacy or company, though he do nothing; in this caſe, if one offence be committed amongſt them, he that ſo doth ſhall be a Principal, and in equal degree in the offence, and may be arraigned as a Principal, *Stamf.* 1. 45. 13 *H.* 7. 10. *Plow.* 97. 4. If one ſtand at the door of a room, wherein two are fighting, and he bid one of them kill the other, and he do ſo, if the fact by him that doth kill him, be Man-ſlaughter, the offence is the ſame in him that provoked him, and they are both Principals, *Plow.* 97. 5. If one knowing there is poyſon in drink, perſwade another to drink it, and do tell him, it will do him good, and after he is gone, the other doth take it, he is a Principal, *Co.* 4. 44.

How the Acceſſary ſhall be proſecuted.

1. The Acceſſary ſhall not be arraigned, until the Principal be arraigned; and if there be many Principals, he ſhall not be arraigned till all the Principals be arraigned; and if he be found Acceſſary to any one of them, it is enough: But if he be charged as Acceſſary to one of the Principals, and the Principal be attainted by out-lawry, then the Acceſſary may be arraigned, *Stamf.* 1. 49. *Plow.* 98. *Dyer* 25. *Co.* 7. 2. 2. But a man may ſue the Acceſſary till exigent, and then it muſt ſtay till the Principal be attainted, *Co.* 9. 117. 3 *Ed.* 1. 14. *Dyer* 120. So if he appear he ſhall anſwer, but when he hath pleaded to iſſue, it ſhall ſtay till the Principal be tried: But if they both appear, they muſt anſwer together immediately one after another, 21 *H.* 7. 31. 3 *H.* 7. 12. *Plow.* 98. 3. And if a Principal before Attainder, or after Attainder, by Verdict or Confeſſion, and before Judgment die, or be pardoned, or hath his Clergy, the Acceſſary by this is diſcharged, 17 *H.* 4. 19. *Co.* 4. 43. 4. But after Attainder and Judgment given after Verdict, Confeſſion, or by Out-lawry, if the Principal get his Pardon or Clergy, yet the Acceſſary ſhall be arraigned, *Acceſſarius ſequitur ſuum Principalem, & ubi non eſt Principalis ibi non eſt Acceſſarius*, *Stamf.* 1. 50. 5. If the Attainder of the Principal be erroneous, or by Error in the Proces or Out-lawry, he being out of the Land, or the like, yet the Acceſſary may be attained and executed, till the firſt Attainder be reverſt; and if the Out-lawry be reverſed after the Acceſſary is executed, or the Principal plead, and be acquitted; the Heir of the Acceſſary ſhall have his Land again, which the Anceſtor did forfeit by the Attainder, *Co.* 9. 116. 6. But if the Principal be acquitted onely by reaſon of the inſufficiency of the Indictment, this doth not diſcharge the Acceſſary, *Co.* 4. 45. 7. If a man have been indicted as Acceſſary and acquitted, yet he may after be indicted, as Principal, *Bro.* 401.

8. If

8. If one be indicted for murder as Principal, and one for being Acceſſary before, and another after, and the Principal is convicted of Man-ſlaughter, or do confeſs it, and hath a pardon, or his Clergy before Judgment, both the Acceſſaries are diſcharged, 3 *H* 7.1. 7 *H.*4. 16. See *Co.* 3 *part Inſt.*64.

Abettors or *Particeps criminis*, what:

9. An Abettor or *Particeps criminis* (*i.*) A partaker in the crime is in divers caſes: He is ſaid to be an Abettor, that without juſt cauſe doth malicioufly procure one to ſue a falſe Appeal of Felony or Murder againſt another: But he is ſaid to be an Abettor in Murder or Felony, who doth command, procure, counſel, or encourage another to the doing of a Murder, or other Felonie; this is but an Acceſſary: But it is ſaid to be in ſome other caſes.

For the manner of proceeding againſt, and ſome other things concerning Murderers, and other Felons. See *Statutes*, 3 *H.*7. 1. 2 *H.*7. 1. 3 *H.*7. 1. 2 *Ed.*6. 24. 6 *Ed.* 9. 33 *H.* 8. 23. 3 *H.*7. 1. 3 *Ed.* 1. *Officium Coronatoris.* 33 *H.* 8. 12. 13 *R.*2. 1. 9 *H.*4. 4. 3 *Ed.*1. 9. 3 *Ed* 3. 19. 21 *H.*8. 11. 7 *H.*3. 22. 11 *Ed.*1. 6. 1 *R.*3. 3. 6 *H.*8 6. 5 *Ed* 3. 11. 8 *H.*6. 10.

The ſtate and condition of a *Felon.*

For the ſtate and condition of a Felon, theſe things are to be known:

1. He is capable to receive by way of Gift or Grant, any thing from others, before or after Attainder, as before.

2. He cannot give or grant away any of his Lands after the offence done, but his Goods he may ſell or give at any time before Attainder, and after he muſt live by them: But ſee for this, *Diſability*, *Grant*, *Numb.* 2, 3. *Fine*, *Numb.* 6, 8. And in the next *Queſtion.*

Sect 15. The Forfeiture and Puniſhment in caſe of *Felony.* And for condition of a perſon Attaint of *Felony.* *An jour & Waſt.*

The puniſhment of every Felon, Principal and Acceſſary; for a Felony by the Common Law, is to hang between Heaven and Earth (as unworthy of both) to loſe his Blood upwards, ſo that he cannot be Heir to another, being a Son of the Earth, to loſe his Blood downwards; for his Blood is corrupted, ſo that none can be Heir to him, to forfeit all his Goods and Chattels, and all his Lands: The which the King is to have for a year and a day, to the end he may eject his Family, raſe his Houſes, ſubvert his Trees, and Plough up his Meadows, and after the year the Lord of whom the Land is held, is to have it for ever, *ut pœna ad paucos metus ad omnes perveniat*: And the Wife is to loſe her Dower, and ſo it is for Felonies by Statute Law. But that in ſome caſes, and for ſome Felonies made by Statute Law, it is ſaid by the Law, there ſhall be no Corruption of Blood, nor loſs of Dower. The Statutes muſt therefore be ſeen; and according to this, the Judgment is given upon the trial of the Felon: But if the Felon upon his Arraignment, and upon his trial, ſhall not anſwer at all, or ſhall not anſwer directly, or ſhall challenge peremptorily above twenty: Or if he plead not guilty to the Indictment, and then will not put himſelf upon the Country; in all theſe caſes the Judgment is, That he be preſſed to death for his Contumacy; and this is called *Judgment de paine fort & dure.* And in this caſe, and by this means (except it be in the caſe of Treaſon) he ſaves his Land, but doth forfeit all his Goods and Chattels notwithſtanding, *Co.* 4. 124. *Stamf.* 3. 33, 34. 1 *Ed.*6. 12. 5, 6 *Ed.*6. 12. 21 *Jac.* 6. *Weſtm.* 1. 12. *Co.* 11. 30, 40. upon *Littl.* 380, 381.

Judgment de paine fort & dure, what.

How his Goods ſhall be diſpoſed.

But in this caſe, this is to be known, That the Goods of the Felon, till his Attainder, are his own, and he may give or ſell them as he pleaſe, and neither the Sheriff nor any other Officer, or other, can ſeiſe or diſpoſe them, nor are they till his Attainder to be removed out of his Houſe: But after once he is attainted by Verdict or Outlawry, the Townſhip muſt look to, and ſecure the Goods, *Fitz Forf* 32. *Corone* 347. See *Seiſure.* 22 *Aſſ. pl.*8. 31 *Ed.*3. 3. 1 *R* 3. 3. And how he may ſue or be ſued in this Condition, ſee *Diſability*; ſee more for *Forfeiture*, the old Statutes, *Mag Charta* 22. 17 *Ed.*2. 14, 16. *De Catallis Felonum*, 34 *Ed.*3. 12. 11 *H.*7. 1. 24 *H.*8. 5. *Co.* 3 *part. Inſt.* 48.

Clergy, what.

But in ſome caſes for Felony, the offendor ſhall have (if he deſire it) the benefit of the Book for his life, and this is called *Clergy*, which is defined to be a benefit that ſome offenders have in ſome caſes of Felony, confirmed by divers Acts of Parliament. And is thus, when a man is araigned of Felony before a Temporal Judg, and the priſoner prayeth his Clergy, *viz.* To have his Book; then the Judg doth command the Ordinary to try, if he can read as a Clerk in ſuch a Book and place thereof, as the Judg ſhall appoint

appoint; and if the Ordinary ſhall certifie the Judg that he can read, then he is not to loſe his life, but is to be burnt in the hand onely, which was called *Auſer in le maine*. But if he could not read, and the Ordinary doth ſo certifie to the Judg, then he muſt be hanged: And if he pray his Clergy before Judgment given, (as he may) he is called a Clerk Convict, if after, he is called a Clerk Attaint. And this benefit of Clergy was at firſt given to Clergy men onely (for their ſcarcity to be found to be placed in Religious Houſes, and was allowable to them for all offences whatſoever, except Treaſon, and robbing of the Churches of their Ornaments: And then onely upon the requeſt of the Ordinary. But at this day it is grantable to all perſons, Laymen as well as Clergy-men, and that without any delivery of them to the Ordinary, which was the ancient courſe, for being found guilty, they are put to read at the Bar. *Terms of the Law*, *Co.* on *Littl.* 2. 11.

Auſer in le maine, what.

Clerk { *Convict* / *Attaint*

For Anſwer to this Queſtion, we are to know theſe things.

1. That a man cannot have his Clergy in caſes of High Treaſon, Petit Treaſon, nor in caſes of other Felonies, by Murder, Robbery, Sacrilege, burning of dwelling Houſes, or Barns of Corn, ſtealing of Horſes, Geldings, or Mares, Rape, taking away of Goods from the perſon of another privily, ſtabbing any perſon within the Statute of 1 *Jac.* 8. In caſe where a man is a Recuſant, and do not abjure according to 35 *Eliz.* 5. In caſe of Conjuring and Witchcraft, againſt 1 *Jac.* 12. In caſe of Buggery with mankinde or Beaſt, upon 25 *H.* 8. 6. 5 *Eliz* 17. In caſe of Acceſſary to Petit Treaſon, or Murder, 4, 5 *Ph. & Ma.* 4. In caſe of Forgery upon the ſecond Conviction, 5 *Eliz.* 14. In caſe of a Soldier or Marriner offending againſt 2 *Ed.* 6. 2. 5 *Eliz.* 5. 39 *Eliz.* 17. In caſe of a Counterfeit Egyptian, 1, 2 *Ph. & Ma.* 4. 5 *Eliz.* 20. In caſe of taking away a Woman againſt her will, 39 *Eliz.* 9. In caſe of relieving a Jeſuit, 27 *Eliz.* 2. *Stamf. pl. Cor.* 2. 43.

Where this is grantable, or not.

2. But in caſe of Acceſſary to ſtealing of Horſes and Mares, for Man-ſlaughter onely, and for ordinary Theft, and in all other Felonies not before named, this benefit is grantable.

3. This benefit is grantable but once, and therefore he that doth demand his Clergy, and hath it once, ſhall never have it the ſecond time, 4 *H.* 7. 13. 1 *Ed.* 6. 12. See for this matter more, 8 *Eliz.* 4. 14 *Eliz* 4. 6, 7. 23 *Eliz* 2. 29 *Eliz.* 2. 31 *Eliz.* 12. 39 *Eliz.* 9. 15. 29 *Ed.* 3. 34. 5 *H.* 4. 4. 4 *H.* 7. 13. 12 *H.* 7. 7. 4 *H.* 8. 2. 1 *Ed.* 6. 12. 5, 6 *Ed* 6. 4. 8 *Eliz.* 4. 18 *Eliz.* 6. 39 *Eliz.* 9. 1 *Jac.* 18. 25 *H.* 8. 3. *Crompt. Jur.* 80. 90. 126. *Co.* 11. 58. *Kelw.* 87. *Finches Law* 462. *Co.* 11. 31. *Co.* 3 *part Inſt. cap.* 50.

Sect. 16. *Corruption of Blood*, what.

The Corruption of Blood, which is part of the puniſhment for Treaſon, and other Felonies, is an infection of the Blood, growing to the eſtate of a man attainted, and his iſſue; ſo that as he cannot be Heir to any other above him, ſo can no other be Heir to him that is beneath him: And therefore it is that a Remainder to his right Heir can never take effect. And if the eldeſt ſon be attainted, during his fathers life, and then he over-live him, neither he nor his iſſue after him (if he die before) can inherit: So neither can the yonger Brother, but it will rather Eſcheat. But if the eldeſt ſon in this caſe die in his Fathers life, without any iſſue; in this caſe the yonger ſon may inherit as Heir to the Father, and the Corruption of Blood in the Brother will not hinder. By this Corruption of Blood, alſo the Nobleman and Gentleman doth loſe his Nobility and Gentility for ever, *Crompt. Jur.* 20. *Co.* upon *Littl.* 391. *Brov. Co.* 42. *Dyer* 48. 22 *H.* 6. 38.

Where it ſhall be, or not.

This puniſhment falls upon all Felonies by Common Law, but in caſes of Felony by Statute Law, the Statute doth uſually except it, and then it is prevented, it will be needful for the knowledg of this point to ſee the Statutes, by which the offence is made Treaſon, 25 *H.* 8. 6. 18 *Eliz.* 6.

Miſpriſon of *Treaſon*, or *Felony*, what.

Miſ-priſion may be either of Treaſon or Felony; and both theſe offences may be many ways. It is properly the Concealment of theſe offences, when one doth know of another man that hath committed the offence, and doth not diſcloſe it to a Magiſtrate; This if it be of a Treaſon, the offender doth thereby forfeit his Goods for ever, and the profits of his Lands, during his life, and his Body is to be impriſoned, during the Kings pleaſure. But if it be of a Felony onely, the offender is to be fined

at

at the diſcretion of the Juſtices, and impriſoned till he pay it, or put in Sureties for it. For this ſee *Crompt. Jur.* 70. 76. *D. & St.* 163. *Finches Law* 23. *Co.* upon *Littl.* 287. *Dyer* 296. *Stamf.* 1. 38. *Broo.* 311. 429. 464. 1, 2 *Ph. & Ma.* 10. 43 *H.* 8. 12. *Co.* 3 *part Inſt.* 65.

Theſtboot, what. Theftboot is where the owner of the Goods ſtoln, doth not onely conceal the Felony, but taketh his Goods again of the Felon, or amends for the ſame, to favor and maintain him, or not to proſecute him: This is worſe then Concealment. See for it *Co.* 3 *part. Inſt.* 61.

There are divers other offences of a lower nature, as Extortion, Night-walking, Barretry, Fornication, Quarrelling, Libelling, Spreading of falſe news, getting money by counterfeiting Letters, and many others which we ſhall ſay ſomewhat to in their proper places.

The way to bring a man in queſtion for his life, in Treaſon or Felony, is by Indictment or Preſentment; and for ſome Felonies, there is a third way by Appeal. For leſſer offences alſo a man may be convict by Indictment or Preſentment.

Appeal, what. Appeal is a Plaint or Writ made by one man againſt another, of purpoſe to attaint him of ſome offence committed: As if one commit a Robbery, Murther, or Maim upon my perſon, my Wife, or my Heir, after my death, for killing me, or my ſelf in my life time, for robbing or maiming me, may have this Appeal within the year and day after the offence; and if the party be attainted, he muſt be executed, and the King cannot pardon it: But if he be acquitted, the Appealor will be fined, and impriſoned, and the party appealed, will recover damages. For this ſee *Gloc.* 9. 3 *H.* 7. 3. *Weſtm.* 2. 12. 28 *Ed.* 1. *Co.* 3 *part Inſt.* 57. 1 *H.* 4. 14. *Stamf.* 2. 6. *Co.* 9. 119. *Co.* 4 47, 48. upon *Lit.* 287. *Plow.* 476. *Dyer* 50. *Broo.* 383. 445. *Crompt. Jur.* 80. *Mag. Chart.* 14. *Weſtm.* 1. 14. *Gloc.* 14. *Weſtm.* 2. 12. 1 *H.* 4. 14. Statute of *Appeals.*

Sect. 17. *Indictment, what.* Indictment is a Bill or Declaration formally made, containing an accuſation of a man for ſome offence done by a Jury, to be found of purpoſe to put the offender to anſwer to it. And to this the offender muſt plead, and thereupon ſhall be tried by another Jury, whether he be guilty of the thing whereof he is indicted, or not. And this differeth little from a Preſentment.

Preſentment, what. Preſentment is defined to be an enquiry and finding of ſome offence that hath been done againſt the King: This ſometimes called an Indictment. They both differ from an Appeal in this, That this is always at the ſuit of the party, and the other two are at the ſuit of the King. But ſee for theſe things more in my Books of *Juſtice of Peace*, *Co.* upon *Littl.* 126. *D. & St.* 135. *Dyer* 284. And in many other places, *Co.* 2 *part Inſt.* 739. *Co.* 3 *part Inſt.* 62.

Arraignment, what. Arraignment is the next ſtep of proceeding againſt an offender after the Indictment is found, or Preſentment made, for then muſt he be brought to the Bar of Juſtice to be tried; and this is called an Arraignment. The manner whereof ſee in Sir *Thomas Smiths Commonwealth*, *f.* 89. After this is the Attainder, which is the Conviction of the offender of the crime, whereof he was not before convict. And this is either before his appearance, which is by outlawry, or after appearance; and this is by Verdict or Confeſſion. And thereupon Judgment of death followeth, except he can pray his Clergy, and then he preventeth the Judgment, and is called a Clerk Convict. His Judgment where he doth plead, is, That he ſhall hang by the neck till he be dead. But if upon his trial he ſtand mute, and will not anſwer at all, or not directly, or challenge above twenty peremptory; in this caſe the Judgment is, That he ſhall be preſſed to death, which is called *Judgment de paine fort & dure*, *Co* 4. 124. *Stamf.* 2. 33. *Co.* 3 *part Inſt.* 47. For the falſifying of an Attainder, ſee *Co.* 3 *part Inſt.* 104. And for Judgment and Execution, *Co.* 3 *part Inſt.* 101.

Attainder, what.

Judgment { of life / of paine fort & dure.

Ignoramus, what. *Ignoramus* is a word uſed by the Grand Enqueſt, charged with the enquiry of cauſes criminal, and written upon the Bill, whereby any crime is offered to their conſideration, when as they miſlike their evidence as defective and too weak to make good the Preſentment; then they uſe to write upon the back of the Bill, *We are Ignorant*, and then he is delivered without further anſwer; but if they do like it, then they ſay, *A true Bill*, and then cry, *He ſtands indicted by it, and muſt anſwer to it, whether he be guilty, or not*: And if he deny it, it muſt then be tried by another Jury, and as they finde it, ſo it muſt ſtand. See *Indictment.*

Hue

Hue and Cry, it ſignifieth the purſuit of one that hath committed Felony by the High-way ſide or elſwhere: For if the party robbed, or any of the company of him that is murthered or robbed, come to the Conſtable of the next place, and willeth him to raiſe Hue and Cry, and to make purſuit after the offender, and deſcribe him, and which way he is gone, as near as he can; the Conſtable muſt call upon the Pariſh, and they muſt ſeek preſently there for him: And if he be not to be found there, they muſt tell the Conſtable of the next Pariſh, and there they muſt ſearch likewiſe, and ſo in every Pariſh, until the offender be taken or purſued to the Sea ſide: And if Officers or others, be negligent herein, they may be puniſhed. And in ſome caſes if the offender be not taken, as in caſes of Robbery, the Hundred may be charged to the party grieved, and he may recover his money loſt of it. And ſuch as raiſe theſe Hues and Cries, muſt take care againſt whom they ſend them; for if they do it, without cauſe, they may be puniſhed for it, *Co. 2 part of Inſt.* 173. See *Arreſt*, *Dyer* 137. *Weſtm.* 1. 9. 2. 46. *Wincheſter* 1. 6 23 *Ed.* 3. 11. 27 *Eliz.* 13. And in my *Firſt part of the Marrow of the Law*, 205. *Co.* 3 *part. Inſt.* 52. *Hue and Cry.*

Freſh-Suit is ſuch a preſent and earneſt purſuit, and following of an offender, as never ceaſeth from the time of the offence committed, or eſpied, until he be apprehended. And where this is done by the party robbed, he ſhall have his Goods again; and when the offender is tried, the Judg, before whom he is tried, may give him a Warrant to take, and have his Goods again; whereas otherwiſe, if he fail to make this Freſh Purſuit, the King ſhall have the Goods ſtoln as forfeit to him. See for this, *Stamf.* 3. 10. *Co.* 3. 52. 21 *H.* 8. 11. *Wincheſter* 1. 6. 28 *Ed.* 3. 11. *Sect* 18. *Freſh Suit*, what.

A Fugitive is, where one that is in queſtion, doth flie and will not abide the Tryal of Law; and this is either in Deed, when he doth actually flie; or in Law, when albeit he doth not flie, yet he doth not appear, till he be outlawed. In both theſe caſes, whether he be guilty of the Felony, or not, he doth forfeit his Goods. See for this, *Stamf.* 3. 21. 3 *Ed.* 3. 35. 4 *H.* 7. 18. 5 *H.* 4. 32. 29 *Ed.* 3. 3. *Co.* 3 *part. Inſt.* 84. *Fugitive*, what.

To Reprieve a priſoner, is to take him back from the proceeding, and execution of the Law, eſpecially for that time. *Reprieve*, what.

To Abjure, is to forſwear the Realm for ever, and depart into a Forein Land: For where one had committed a Felony, and did flie to a Church, or other privileged place, before he was apprehended, he might have abjured, and ſo avoided the Trial of Law: And this may be for a time onely, and then is called *Relegation*. *Abjuration* or *Exile*, what. *Relegation*, what.

The Sanctuary was a privileged place, which an offender might have fled to for the ſafety of his life. But theſe places, and this ſhift, are now taken away, *Stamf.* 2. 40. 2. 10. *Co. ſuper Littl.* 133. 22 *H.* 8. 14, 15. *Co.* 3 *part. Inſt.* 51. *Sanctuary*, what.

The Execution of the Corps, is the inflicting of the corporal puniſhment upon the Body of the offender, according to the ſentence of the Judg. *Co.* 3 *part. Inſt.* 101. *Execution* of the Corps, what.

Torment is the putting of a man, that is a ſuſpected Malefactor to exceſſive pain on a Rack, or otherwiſe to make him confeſs himſelf or his Complices guiltineſs. But this is ſeldom or never uſed amongſt us. *Torment*, what.

This is the clearing of a man from a crime, whereof he was ſuſpected, and for which he hath been once queſtioned: Wherein are theſe things to be known, Firſt, That if a man be accuſed by Preſentment of a Jewry, he cannot be clear, otherwiſe then by a Jewry. Secondly, If he be once legally acquitted, he can never afterwards be queſtioned again for the ſame offence, *Fitz Cor.* 44. *Finch.* 71. Sir *Tho. Smiths Commonwealth*, *f.* 88. *Purgation* or *Acquital*, what.

This Court was applied to the proceedings in the Spiritual Court alſo.

An Approver or an Appellor, is he which hath committed ſome Felony, which he confeſſeth, and now he accuſeth others that they were helpers with him, in doing the ſame or ſome other Felony; which thing, he ſaith, he will approve, and therefore is called an *Approver*, *Stamf.* 2. 52. *Fitz Corone* 231. *Co.* 11. 30. *Co.* 3 *part. Inſt.* 56. *Approver* or *Appellor*, what.

Burning in the Hand, is the puniſhment to be inflicted upon a man that hath the benefit of his Clergy, and can read; for having prayed his Clergy in caſes of Manſlaughter, *Aſſer in le maine*, or Burning in the hand, what.

ſlaughter, or Theft, and it being granted unto him, he is forthwith to be burned before the Judg in the Brawn of his Hand, with a hot Iron, marked with the Letter *T*, if it be for Theft, and *M*, if it be for Man-ſlaughter. If a Woman take away Goods by Felony above Twelve pence, and under Ten ſhillings, unleſs it be in caſe of Burglary, or from the perſon of another, ſhe is to be burned in the hand with a Roman T. Sir *Tho. Smiths Commonwealth, f.* 95. 21 *Jac.* 5.

See more for all theſe things in *Forfeiture*, *Enqueſt*, and *Wingates Abridgment*.

CHAP. LX.

Of Cuſtoms, Cuſtomer, and Comptroller.

Cuſtomer or *Comptroller*, and *Cuſtoms*.

FOr the Cuſtomer, Comptroller, or Receiver of Cuſtoms, and his Office, Faults, and Puniſhment, See the Statutes of 1 *Jac.* 22. 4 *H.*8. 6. 28 *H.*6. 5. 11 *H.*6. 16. 1 *Eliz.* 11. 1 *H.*4. 13. 4 *H.*4. 20. 13 *H.*4. 5. 1 *Eliz.* 11. 3 *H.* 6. 3. 4 *H.*4. 20. 14 *R.*2. 10. 11 *H.*4. 2. 20 *H.*6. 5. 3 *H.*7. 7.

Cuſtoms, what.

Cuſtom is ſometimes uſed for the Tribute or Toll, that Merchants pay to the King for carrying in, and out Merchandize: But ſome would have it a Toll paid for that which is carried; and that the Impoſt is for that which is brought in-

Impoſt, what.

to the Land, 14 *Ed.* 3. 1. 21. 31 *Eliz.* 15. See *Subſidy*.

Cuſtoms,

For the Cuſtoms to be paid; what, how, and when, and the means to recover them,

See 1 *Jac.* 33. 38 *Ed.* 3. 8. 1 *H.*7. 2. 11 *H.*7. 14. 22 *H.*8. 8. 14 *H.* 8. 4. 33 *H.* 8. 7. 2 *Ed.*6. 37. 3 *H.*7. 7. 11 *H.*6. 15. 1 *Eliz.* 11. 1 *H.*8. 5. 14 *Ed.*3. 21. 15 *R.*2. 9. 2 *Ed.* 6. 21.

For Wines, 1 *Eliz.* 11. 1 *H.*8. 5. 2 *Ed.*6. 22. 23 *H.*6. 18.

For Corn, 13 *Eliz.* 13. 35 *Eliz.* 7.

For Sea-fiſh, 5 *Eliz.* 5. 1 *Jac.* 25. 39 *Eliz.* 10.

For Leather, Tallow, and Calve-skins, 18 *Eliz.* 8.

For Wool, and Cloth of all ſorts, 14 *Ed.* 3. 21. 34 *Ed.* 3. 19. 31 *Ed.* 3. 9. 12 *Ed.* 4. 3. 11 *H.*6. 7. 34 *Ed.* 3. 19. 45 *Ed.* 3. 4. *Co:* 2 *part. Inſt.* 20.

For Beer, 3 *Jac.* 11.

For Braſs-mettal, 33 *H.*8. 11. 2 *Ed.*6. 37.

For all things, ſee *Co.* 2 *part. Inſt.* 20. See *Wingates Abridgment* of the *Statutes*. See *Subſidy*, *Tonnage* and *Poundage* in *Franchiſe*.

CHAP.

CHAP. LXI.

Of Cuſtom and Preſcription.

Sect. 1.

1. *Cuſtom*, what.

THis word Cuſtom is ſometimes uſed for the Tribute or Toll that Merchants pay to the King, for the carrying in and out of their Merchandiſes: But here it is taken for a Law or Rite not written, which being eſtabliſhed by long uſe, and the conſent of our Anceſtors hath been, and is daily practiſed, *Co.* 9. 75. *Co.* 1. 110. upon *Littl.* 58. 110. The word is taken in divers other ſenſes, *Co.* 2 *part. Inſt.* 58.

The kindes of it.

Cuſtoms within this Nation are innumerable; and of theſe ſome are general, and run all the Countrey over, and ſo they are but the Common Laws, which are but the Common Cuſtoms of the Countrey: And ſome are particular, uſed and applied onely to ſome Countries, as the Cuſtom of *Gavelkind* to *Kent*; others, ſome Cities and Burroughs, as the Cuſtom of *Burrow-Engliſh*, and the Cuſtoms of *London*, and other places; and others to Villages, Pariſhes, and Manors, *Co.* 1. 110. of *Copiholds*, 68, 69.

2. *Preſcription*, what.

Preſcription is, where a man claimeth any thing for that, he, his Anceſtors or Predeceſſors, or thoſe whoſe eſtate he hath, have had, or uſed any thing all the time, whereof no minde is to the contrary: And herein, the having, uſing, and enjoying of the thing, according to the thing, is needful to be ſhewed, *Co.* 4. 32. 9: 56. *Terms of the Law.* And ſo it is as good as a Grant; for it is *Titulus ex uſu & tempore ſubſtantiam capiens ab authoritate Legis, Co. ſuper Littl.* 113.

For Anſwer hereunto, theſe things are to be obſerved.

Wherein *Cuſtom* and *Preſcription* agree, and wherein they differ.

1. That Cuſtom, Preſcription, and Uſage, are couſin-germans, and much of one nature; and therefore Regularly, what is good in a Preſcription in one, is good in a Cuſtom in many: And ſo on the other ſide, what ever thing (for Subſtance) many men may claim by a Cuſtom, one man may claim and have by a Preſcription. For Preſcription is, where one man, time out of minde, hath right to have, and hath had ſomething of another: But Cuſtom is, where divers have time out of minde, a Right to have, and have had ſomething of another.

Preſcription.

Uſage:

2. Uſage is by continuance of time, the efficient cauſe of Cuſtom and Preſcription both; for there are two Eſſential parts of Cuſtom.

Firſt, Time out of minde.

Secondly, Uſage. *viz.* a peaceable Uſage without interruption, and to both long continuance is neceſſary.

3. But herein lieth the difference, between Cuſtom and Preſcription.

Firſt, That is and muſt always be alleaged to be in many perſons; and ſo it may be claimed by Copiholders or the Inhabitants of a place: This always in one perſon. That he and his Anceſtors, *&c.* And if all but one be dead, in the caſe of Cuſtom the Cuſtom is gone.

Secondly, That is always Local, claimed in the Land, as within a Country, City, Pariſh, Manor, or Neighborhood, and goeth with it: But this is perſonal, and goeth always with the perſon.

Thirdly, That needs not by common Intendment, a lawful Commencement; but is applied to things inſenſible, as the Cuſtom of *Gavelkind* and *Burrow-Engliſh*: But this muſt have a reaſonable Intendment by ſome Grant, Act, or Agreement.

4. Preſcription extends to Fee-ſimple; for Tenant for life, years, or in tail, cannot preſcribe in what eſtate: But Cuſtom doth extend to all Intereſts and Eſtates whatſoever, *Brownl. Rep.* 198. *Co.* 9. 56. *Broo.* 453. *Co.* 4. 32. *Dyer* 114. *Co. ſuper Lit.* 113. So that they agree in this, That both of them muſt have Poſſeſſion, Uſage, and Time, and the Poſſeſſion muſt be long, continual, and peaceable. They muſt be both preciſely proved by them that claim them; and they muſt be both of them alleaged

leaged as they can be proved: But a Preſcription is of more force; for that as to Commons, Ways, Rents, Franchiſes, and the like, will give a man as good a Title, as a Grant will do, *Plow.* 322. *Co. ſuper Littl.* 114.

Sect. 2. For Anſwer to this Queſtion, theſe things are to be known.

3. What *Cuſtoms* ſhall be ſaid to be good, and allowable, or not.

1. That a Cuſtom may be good for Subſtance, and bad for the manner of claiming of it.

2. That the Cuſtoms that are good and allowable, muſt have theſe Incidents: Firſt, They muſt be claimed, alleaged, and applied to ſome certain ſpecial Country, City, or place, as, within one County, a Hundred, Manor, Pariſh, City, Burrough, Hamlet, *&c.* For a Cuſtom alleaged or claimed, to be all *England* over, is not good. Secondly, They muſt be of long continuance, time out of minde, for a hundred years at leaſt: And therefore an Allegation or a Claim of any thing for any other time, is not good. Thirdly, They muſt be reaſonable according to Common Right, *viz.* It muſt have ſome appearance of conſideration, and lawful beginning in it; but in this the Law is not exact, for it is ſufficient in caſe of Cuſtom, that it be *ex certa cauſa rationabili uſitata*, though it cannot be well conceived how it began. But Cuſtoms that are againſt Reaſon, are uſurpations, and not to be admitted. Fourthly, They muſt be certain. Fifthly, They muſt be alleaged in the Affirmative, and not in the Negative.

3. The Cuſtoms that may be claimed, and good in one place, cannot be claimed, or good in another place, as Burrough-Engliſh cannot be claimed in Upland Towns, that are not Cities nor Burroughs: And yet ſuch Upland Towns may alleage a Cuſtom to have a way to their Churches, to make By-laws, or the like.

4. And being ſuch, they have the force of Laws, and may take away the force of other Laws that oppoſe them. For the Rule is in this, *Conſuetudo pro Lege quandoque ſervatur in partibus ubi fuerit more utentium approbata, & vicem Legis obtinet; longævi enim temporis & conſuetudinis non eſt vilis authoritas. Longa poſſeſſio ſicut jus, parit jus poſſidendi, & tollit actionem veri domini. Co. ſuper Littl.* 110. 113. 6. 60. *Dyer* 54. 35 *H.* 6. 25.

5. The Law doth allow for good Cuſtoms, theſe Cuſtoms that do follow, *viz:*

Common. That the Inhabitants of a Pariſh ſhall have Common in ſuch a Waſte of the Lords.

Modus decimandi. That the Inhabitants of a Pariſh ſhall pay no Tithe, but ſomething in lieu thereof.

Surrender. That if the Tenants of ſuch a Manor will alien his Lands, he muſt do it in the Lords Court by Surrender.

Herriot. That the Lord ſhall have the beſt Beaſt of his Tenant upon his death or Surrender, or elſe that the Lord ſhall enter and ſeize his Tenants Land.

That if any Tenant of ſuch a Manor do alien his Land by Deed or Will, that it muſt be preſented at the next Court of the Manor, or elſe that it be void.

Way. That every Inhabitant of *Dale* ſhall have a way to Church, Market, *&c.* over ſuch a ground.

Rent. That if the Freeholders do not pay their Rent, they ſhall loſe their Land.

Infant. That an Infant of ſixteen years old may Alien, or Deviſe his Land; that an Infant at any other age of diſcretion, under one and twenty years, may Alien or Deviſe his Land, ſo he name a certain age.

Woman Covert. That a Woman Covert and her Husband, may after examination of the Wife, by the Steward in the Lords Court make Surrender and diſpoſe of her Land; and that this ſhall binde as a Fine at Common Law.

Common. That one man may Ear and Sowe Land, and then that other men ſhall feed upon it, and have the Paſture of it.

Fiſhing at Sea. That Fiſhers on the Sea, and great Rivers, may go over any mans ground to fiſh.

Officers. That Pariſhioners ſhall chuſe their own Conſtables yearly.

Houſ-boot. That all the Tenants of a Manor, ſhall have and take ſufficient Houſ-boot in the Lords Woods.

Relief. That every Tenant of a Manor ſhall pay two ſhillings for a Relief when it happens.

Pound-breach. That if any of the Lords Tenants break the Pound, he ſhall pay three pounds to the Lord.

That a Jury may be amerced by another Jury, in a Leet for Concealment.

That

That if a ſtrangers Sheep do eat up of the Paſture of the Tenants by day, ſuch Tenants may Fold the ſame Sheep by night upon his Land. *Foldage.*

That none of the Inhabitants of ſuch a Village ſhall put in their Beaſts into ſuch a place, after the Corn is cut and carried, till *Michaelmas*. *Common.*

That the Tenants of the Manor ſhall chuſe their Bedle to be Collector of the Lords Rents. *Officer.*

That if one be in quiet poſſeſſion forty weeks, he ſhall not be outed, but by the Kings Writ.

That if a Tenant die that hath divers Houſes, which he holdeth of the Lord, that then the Lord ſhall have the beſt Beaſt for an Herriot, and the Parſon the next beſt Beaſt for a Mortuary. *Herriot.*

That the Heir of the deceaſed ſhall have Heirlooms, and that is the beſt of the Anceſtors goods, of every kinde ſome. *Heirlooms.*

That if any one finde any Royal fiſh, that he muſt bring him to ſuch a place, or elſe be preſented and amerced. *Royal Fiſh.*

That he that makes an Affray or Bloodſhed, within ſuch a place, ſhall loſe 20. s. *Affray.*

That ſuch as Ear Land, may turn the Plough upon the Head-Land of another.

That a Woman ſhall be barred of her Dower, if ſhe receive part of the money which was had for the Land ſold. *Joynture or Dower.*

That the owner of the ground ſhall have a Land-Bird out of an Eyrie of Cignets.

That a Woman ſhall have all or half her Husbands Land for her life, or Widows eſtate for her Dowre.

That the Lord of a Manor may amerce his Tenants, for doing Treſpaſs to him in his Leet or Court-Baron. *Treſpaſs.*

That if an Eſtray come into a Hundred, and any of the Reſiants therein eſloyn him, that the Lord may diſtrain him till he have brought it again, ſeems good. *Eſloyning an Eſtray.*

That men of ſuch a place, may not Deviſe their Land longer then for life; but it ſeems the Statutes have altered this. *Sect. 3. Deviſe of Land.*

That the Parſon of the Pariſh ſhall always keep a Bore and a Bull for the Pariſh, and every Pariſhioner that hath loſs by his Nonfeſant, may have an Action of the Caſe. *Parſon of a Pariſh.*

That a Copiholder for life, under a hundred pound, may name his Succeſſor to the Lord. *Copiholder.*

That every one that doth Land Goods to go by Sea, or carry Goods, and lay on ſuch a ground to be carried by Sea. *Toll.*

That every one that goeth over ſuch a ground ſhall pay a certain ſum of money for Toll. *Wharffage.*

That all that hold Land of the Lord of the Manor that hath a Griſt Mill, ſhall grinde at that Mill, and the Lord muſt grinde it. *Grinde at a Mill.*

That the Lord of a Manor may grant Copihold eſtates in Fee, tail, or for life, and in Poſſeſſion or Reverſion. *Copihold Manor.*

That the Copiholders may have Common in the Lords, or in anothers Soil. *To grant Eſtates.*

That the Inhabitants of *Dale* ſhall have Common in a great Waſte. *Common.*

That ſuch a Country or Hundred ſhall pay no Tithe. *Tithe.*

Theſe and ſuch like Cuſtoms as theſe, are good. *Co. 9.* 58. 6. 60. 4. 55. 5. 84. upon *Littl.* 139. 140. 110. 112. *Hubbard Rep.* 113. 129. 122. 229. 301. 313. 370. *March. Rep. f.* 3. 15. 16. 28. 54. 83. 91. *Goldsb. Rep. f.* 102, 103.

6. All theſe and ſuch like Cuſtoms that are good for the Subſtance and Matter, may be yet bad for the manner, if they be uncertain, or mixed with any other Cuſtom that is unreaſonable, and ſo entire, that they cannot be ſundred, may be bad for this, *Brownl* 2 *part. f.* 198.

7. The Cuſtoms of *London*, the *Iſle of Man*, of *Halifax*, of *Kent*, as Gavelkind, and of Towns, as Burrow-Engliſh, and the reſt, are allowed good, *Hubb. Rep. f.* 158. *Brownl. Rep. f.* 284. 217. 8 *H.* 6. 11. 3 *H.* 7. 9. *March. Rep. f.* 54, 55. *Burrow-Engliſh. Gavelkind.*

8. Thoſe Cuſtoms that are unreaſonable, and againſt Common Right, are void and diſallowed, as are theſe following.

That Fiſhers ſhall dig and fix ſtakes in other mens ground to tie their Nets. *To fiſh.*

That if one break the Pound, he ſhall forfeit three pound to the Lord, though he be a ſtranger. *Pound breach.*

That

Woman Covert. That a Woman Covert may devise her Land by Will.

Fraternity. That one Guild or Fraternity should make another.

Heriot. That the Lord of such a Manor shall have the best Beast of a stranger, Levant and Couchant on his Tenants ground at his Tenants death, if the Tenants have essoyned his best Beast.

Sell Wood. That the Lords Tenant may sell as much Wood as he will in the Lords Woods.

Distress. That a man may distrain anothers Cattle, Damage fesant in his ground, and keep them till the other give him what he will have.

Make Leases. That the Lords Bailiffs or Steward may make Leases of Freeholds.

Common. That the Inhabitants of a Village shall have Common in anothers ground, *Ratione commorantiæ & residentiæ*, in the Houses.

To make Leases. That all Leases, Devises, or Estates, made by him that hath the Fee-simple for above six years, are void.

To Amerce. So that if a Verdict in a Leet by a Petit-Jury be found false, by a Grand-Jury true, that the Petit-Jury shall be amerced.

To beat one. That one may beat another, that doth come upon his ground, or burn anothers House wherein his Goods are.

To retain Rent. That the Lessee shall retain his Rent, if the Lessor will not repair the Houses.

To be free from the Leet. That if men be sworn to the Constable, they shall be exempted from coming to any Leet.

Common. That no Commoner shall put in his Beasts into the Common, till the Lord put in his first.

To take away a Distress. That the Lords Bailiff may take the Beasts from the Kings Officers, distreined for the Kings debt, and put them three days in Pound, and then if the party agree, he may have them again.

To put Beasts in the Lords Pound. That every Tenant that doth distrain any Beasts Damage-fesant, shall put the Beasts in the Lords Pound, or else be amerced.

Estray. That if an Estray be unruly, he may be fettered.

To take the best Beast That the Lord shall have the best Beast of his Tenant, except it be as a Heriot.

To take Tithe. That all the Cattle of the Parish shall be cast together, and the Parson shall have the Tenth of the whole.

Copihold Manor. That a Copiholder for life shall sell all his Trees on his Copihold, seems not good; and yet this by a Custom in a Manor, some say is good, but not good by a Prescription.

That a man that dieth in one Parish, and is carried to be buried in another Parish, shall pay a certain sum to the Church-wardens of the Parish where he dies.

Tithe. That one Parish shall not pay Tithe, or any thing in lieu of it: But this Custom claimed for a Country, may be good.

All these and such like Customs as these are void, *Co.* upon *Littl.* 139, 140. *Co.* 5. 84. *Dyer* 199. 358 21 *H.* 7. 2. *Co.* 4. 6. *Hubb. Rep.* 471.

So that if any Tenant of the Manor shall marry his Daughter, without leave of the Lord, he shall pay a Fine to him, *Co.* upon *Littl.* 139.

To cut Grass to straw the Church. 8. It is a good Custom to alleage, that the Church-wardens or the Clerk, may cut Grass in the Soil of another, to straw the Church, *March. Rep. f.* 16.

To be discharged of Repair of a Church. 9. That the Inhabitants of such a place, that they have a Chappel at Ease, and use to Bury at the Mother Church, and have been used to repair part of the Wall of the Church, and for this to be discharged of the repair of the rest of the Church; or that they repair the Chappel of Ease, and therefore are discharged of the repair of the Church, are good Customs, *March. Rep. f.* 91. 150.

10. Custom, that none shall use the Trade of a Dier in such a Town, without leave of the Lord or his Bailiff: Or to have a Fair in his Town for ten days, and none in the next Town, during that time. That none shall Bake any Bread to sell in the Lords Bake-house. That all Ships laden and unladen in such a Haven, shall be unladen in such a place. These Customs have been allowed good, *Co.* 8. 125. 2 *H.* 4. 9. 4.

11. That

11. That the Steward of a Manor may make By-laws or Ordinances, for the well-ordering of the Common, and aſſeſs a penalty on the Breakers thereof, and diſtrain for it, is a good Cuſtom, *March. Rep. f.* 28. So a Cuſtom to make By-laws in, or out of a Court, by a Jury, or without a Jury by a Neighborhoods common conſent may be good. But ſee for this afterwards. To make By-laws.

12. Cuſtom, That none ſhall put in his Beaſts in the Common, till the Lord put in his: That none ſhall carry by Land but in his Coach, or by Water but in his Boat, theſe are not good; and yet a Cuſtom, That the Lord ſhall buy firſt in a Market or Fair, it ſeems is good: But a Cuſtom is good in many places, where a Preſcription will not be good. As a Preſcription, that a Copiholder of Inheritance may fell the Trees, is not good; but ſuch a Cuſtom amongſt Copiholders, is good: So if a Tenant that is a Freeholder, preſcribe to have Wind-falls, and all the Trees withered in the top; and if the Lord make them in Cole, to have ſo much in money; this is not good in a Preſcription in one perſon: But being alleaged as a Cuſtom, and to be burnt in the houſe, is good as Appendant, *Brownl. 2 Rep.* 198.

Out of all which may be collected, That no Cuſtom can be good that hath not theſe Properties in it,

1. It muſt be ſomewhat reaſonable and congruous, for Reaſon is ſaid to be the Father, and Congruence the Mother of it.

2. There muſt be uſage in the caſe, the thing claimed muſt be oft done before, for Cuſtom is ſaid to be *Conſtitutio ex diverſis actionibus ſæpe iteratis*; hence it is, that Uſage is ſaid to be the Nurſe of Cuſtom.

3. This Uſage muſt be time out of memory, for otherwiſe the other two will not ſerve, *Brownl. 2 part. f.* 198.

For Anſwer to this Queſtion, theſe things are to be known.

1. That a Preſcription may be good for the matter of it, and yet void for the manner of it: *Sect.* 4. What *Preſcriptions* ſhall be allowed to be good, or not.

And for this, theſe things are to be known.

Firſt, A Tenant in Fee-ſimple may preſcribe in his own name, but a Tenant for life, years, by Elegit, or the like Tenant, cannot preſcribe in his own name, but muſt preſcribe in the name of him in Reverſion, *Co. 6.* 60.

Secondly, If a Copiholder preſcribe for any Rent, or profit to be taken out of the Land of another, and not out of the Manor, he cannot do it in his own name, but muſt do it in the Lords name, and he cannot preſcribe againſt the Lord: But he may alleage a Cuſtom within the Manor, for himſelf, againſt the Lord, *Dyer* 70. *Co.* 4. 32.

Thirdly, If one that is Lord of a Manor preſcribe in his own name, and the name of his Tenants at will, it ſeems it is not good, *Broo. Preſcription* 3.

Fourthly, If one preſcribe for himſelf, and all thoſe who had his Tenure before him, this is not good, *Broo. Preſcription* 15.

Fifthly, If one preſcribe that all the occupiers of a ground are to be charged with the fencing of it; this is not good, for it is too general: But he muſt ſay, *All thoſe whoſe eſtate he hath, and he have been uſed, &c.* And yet ſuch a Preſcription, That all thoſe that are occupiers for payment of money have been diſcharged of Tithes, *M.* 37, 38 *Eliz. Co. B. Curia.*

Sixthly, One that hath onely an office for life, it ſeems cannot preſcribe for profits thereunto appurtenant in him, and his predeceſſors, *Dyer* 10. 40.

Seventhly, One cannot Regularly preſcribe in the Negative, *To pay no Toll*, but he muſt ſay, *They have been uſed to buy and ſell, without payment of Toll*, *Broo. Preſcription* 17, 44.

Eightly, When the Preſcription is for ſuch a thing as may be Appendant or Regardant to a Manor, it may be in him that doth preſcribe, and thoſe whoſe eſtate he hath: But if the Preſcription be for ſuch things, as cannot be granted without a Fine or a Deed, as a Villain in Groſs, Hundred Rent, or the like, there it muſt be in him and his Anceſtors, whoſe Heir he is, *Broo. Incident* 39. 19 *H.* 6. 34. 12 *H.* 7. 8.

Ninthly, One cannot (as it ſeems) preſcribe for eight loads of Wood to be cut and

and taken as appertaining to a Meſſuage: But one may preſcribe for Eſtovers to be imployed upon repair of the Meſſuage, or to be ſpent in it, *Brownl Rep.* 1 *part. f.* 35.

Tenthly, A Commoner (as it ſeems) may preſcribe thus, That he hath *Libertatem venandi*, the Coneys in the Common, *&c.* and this is good, *M.* 9 *Jac. B. R.*

Eleventhly, That the Lord of the Manor, for the time being, hath had and been uſed to have the beſt Beaſt, *&c. Dyer* 199.

Twelfthly, If it be for a way, through a private ground, he muſt ſay, *Unde, à quo, ad quem & per quem*, 39 *H.*6. 6. 28 *H.*6. 9. 20 *Aſſ.* 18.

Thirteenthly, If one preſcribe to be diſcharged of Tithes in kinde, for payment of about a peny an Acre of the Land, or for payment of not above one peny an Acre of Land; theſe Preſcriptions are void for incertainty, *Allens* caſe, *M.* 7 *Jac. Co. B.* By the Court.

2. Theſe Preſcriptions that follow, are inſtances and examples of good and bad, and they are particular, as they follow, *viz.*

For the Lord of a Manor. For the Lord of a Manor, To amerce his Tenants in his Leet or Court-Baron, if they do commit Treſpaſs againſt him, in the opinion of ſome; or to diſtrain for Amercements and Fines in a Leet or Court-Baron; or to have a free Warren in any of his Tenants grounds; or to have a Park belonging to his Manor, or twenty ſhillings Fine of all that do make an affray or bloodſhed within his Manor; or to have a Fine upon the Alienation of his Tenant; or to have a certain ſum of money of all the Reſciants within his Manor, *pro certo Letæ*; or ſo, and that he hath been uſed to diſtrain for it; or that all his Tenants muſt bake at his Bake-houſe, or grind at his Mill, and not elſwhere; or to have the folding of all the Sheep in the Village, within and without his Seigniory, and that none may Fold but him; or to have a Harriot after the death of every of his Tenants of his Manor for life, or years; theſe may be good Cuſtoms. But the Lord of a Manor may not preſcribe to have a Harriot of every one that doth die within the Manor, for a ſtranger may die there; this is not good. So to have three pound of any man-ſtranger or other that ſhall make a Pound breach: But to have it of his Tenants onely, may be good. So to have every mans Beaſts that come within the Manor, is not good. So to deliver the Beaſts that are diſtrained and take Bond; theſe and ſuch like are not good Preſcriptions, 12 *H.*4.8. *Dyer* 322. 14 *H.*4. 2. 3 *H.*6.13. *Broo. Incidents* 39. *Co.*6.77. 21 *H.*7.40. *Co.* 8.125. *Broo. Preſcription* 16. 9 *H.*6.44. 13 *H.*7.6. *D. & St.*55.

For a Parſon of a Pariſh. A Parſon of the Pariſh may preſcribe to a certain ſum of money for every one Buried in the Church: And a Parſon of a Pariſh may preſcribe for Tithes out of his Pariſh, but he cannot preſcribe for Tithes within his Pariſh, for that is due by the very Law without Preſcription, *New Book of Entries, f.* 9. *Broo.* 85. See my Book of *Tithes*.

For the Lord Chief Juſtice. The Chief Juſtices may preſcribe to diſpoſe the Offices incident to their Offices for the life of the Officer placed by them, and good, 22 *Ed* 4. 18.

For a Sheriff. The Sheriff cannot preſcribe to have of every one within his Leet twelve pence, for his good will or reward, nor a ſum of mony for holding of his Leet in ſuch a place.

For Fiſhers. Fiſhers may preſcribe to draw or dry their Nets upon the grounds adjoyning to the River, 8 *Ed.*4. 18. *Dyer* 267.

For any Man. Any Man may preſcribe for a Court, a Way, an Office, Rent, or ſum of money, Common, Eſtovers, a Waiff, an Eſtray, an Advowſon Appendant to a Manor, or Land to an Office, Wreck, Treaſure Trove, Market, Fair, Warren: But one cannot preſcribe to Land, or to the Goods of Felons, Outlawed perſons, or Fugitives, *Ajour & Waſte*, *Deodands*, or Conuſans of Pleas. And yet one may preſcribe *Tenere placita* in his own Court, and that ſhall be good, *Plow.* 322. *Co.*5.109. 9.27. 11.86. 1 *H.*7. 23. *Littl.* 40. *D. & St.* 24. *Co.* upon *Littl.*288. *Brownl. Rep.* 1 *part.*221. 213. 216. 35. 198. 217. 219. 2 *part.*329. 64. 101. 9 *March. Rep. f.*83. So any one may preſcribe in all ſuch like caſes as theſe. To have Toll of every Barge that ſhall paſs along ſuch a River, 21 *H.*7. 16. So that he onely hath the paſſage, and is to carry from ſuch a place to ſuch a place, and none others, *Dyer* 117. *M.* 5 *Jac.* Adjudg *B. R.* So that another muſt ſcoure the Ditches, and make the Mounds and Fences between him and me, *Broo. Preſcription* 16.

So

So that if a mans Beaſts may eſcape in the next ground, and be there Damage-feſant, and that they may not be taken Damage-feſant, if the ſtranger do make freſh purſuit after them, *Bro. Preſcrip.* 25. So to have a Rent out of anothers Land, and to diſtrain for it, is a good Preſcription, 19 *H.*6.34. 13 *Ed.*4.16. So to have a Leet or Court-Baron, and to diſtrain for Fines, Pains, and Amerciaments there, *Bro.* 34. So to ſtop or turn water, to repair his Mill or Banks, *Bro. Preſcrip.* 44. So to fold the Sheep at night, that do feed in his ground by day, 5 *H.* 7. 9. That the chief Pledg within the Leet ſhall pay him Ten ſhillings for all the Pledges, and that he ſhall have Contribution againſt the reſt of the Pledges, 9 *H.* 6. 44. So that he is Keeper of ſuch a Wood; and that every one that hath Common there, is to pay him Twelve pence a year; and he that hath a Gate, a Hen yearly, to look to it, 11 *H.*6. 10. *Pre. Bro.* 95. So to have a Penny of every one that doth go through his ground, 5 *H.*7.9.

But to have a ſum of money for going upon the High-way, is not good, unleſs it be to repair a Bridg there. So to have a Fair or Market, and ſet up a Booth in anothers Land, *Bro. Preſcrip.* 97, 98. So to have a ſum of money for Common, and to diſtrain for it being behind, *Bro. Preſ.* 1. So to have two Buſhels of Corn for ſuffering a Water-courſe to come to ſuch a Mill. *Dyer* 322. So to dig in a mans ſeveral ground next the Sea, to make Bulwarks againſt the Enemies, *Dyer* 60. So to pay a ſmall ſum of money in lieu of Tythes; or to be diſcharged of Tythes for a ſmall Tythe in lieu of payment of part, as the Tenth Fleece of Wooll in ſatisfaction of the Locks of Wooll, 36, 37 *Eliz. Co. B. Jeſſops* Caſe. So to pay a Buck and Doe for all the Tythes of a Park, or the Left-ſhoulder of every Deer, *Mich.* 4 *Car. B. R.* So to have an Iſle, or Seats in a Church, for repairing it. *New Book of Entries.* *Modus decimandi.*

3. Theſe Preſcriptions that follow, are particular Inſtances and Examples alſo of both kinds, but moſt of them bad. As, To be quit of Tythes in *Dale*, when every one there beſides him doth pay Tythes. For a Lay-man cannot preſcribe in *Non decimando*; but he may preſcribe in *Modo decimandi*. Alſo a Spiritual perſon, or his Farmer, may preſcribe in *Non decimando*. So to preſcribe to be diſcharged of Tythes in one place, becauſe he doth pay Tythe in another; or for one thing, becauſe he doth pay Tythe of another: As of Lambs, becauſe he payeth Tythe for Wooll; or of Cattel, becauſe he payeth Two pence for every Cow; theſe are not good, *Co.* 2.44. *Fleetwoods* Caſe, 7 *Jac. Co. B. M.* 5 *Jac. B.R.* So to preſcribe to have ſuch a Common in anothers Soil, as to exclude the Owner of the Soil all the year long, this is not good So for Eſtovers, or Fiſhing. And yet one may preſcribe for *Solam Veſturam*, and exclude the Owner for part of the year. So to preſcribe to Common without number, and not to ſay of Beaſts levant and couchant, or appurtenant to ſuch a thing, or to have Common appendant to Meadow or Paſture, or the like, it ſeems not good, *Co.* upon *Lit.* 122. See more in *Common. Mar. Rep.* 38. *Brownl. Rep.* 2. 45. 101. 65. *Co.* 4. 37. *Sect.* 5. For *Tythe.*

So a Preſcription to have a corporate or compounded thing to belong to a corporate thing, or an incorporate to an incorporate, are not good, *Co.* 4.37. *Plow.* 168, 26 *H.*8.4. Or one thing belong to another that by Law is not appendant, as Waſtes to a Leet, or Common to a Fair, or the like. Or for a thing not preſcribable, or againſt any Law, as to have *Silva cædua*, or the like: Or that is *malum in ſe*, as to be drunk, or the like: Or *malum prohibitum*, as to make a Pound-breach, or to lay Blocks in the High-way. Or to have one thing as belonging to another time out of mind, when the thing to which it doth belong is within the time of memory, as a Fee to an Office newly erect. All theſe Preſcriptions are naught, *Co.* 4.37. 9 *H.*6.44. 42 *Ed.* 3.4. *Co. ſuper Lit.* 115. *Bro. Preſcrip.* 2. *Doct. & Stu* 24. *Co* 11. 89: *Dyer* 10. 18.

So a Preſcription or Cuſtom, that an Infant may alien when he can meaſure a Yard of Cloth, is void for incertainty. So if one preſcribe to ſell the Beaſts he doth diſtrain Damage-feſant, or to keep them till the Owner of the Cattel pay him Three pounds, or to keep them until the Owner make him amends; or that he ſhall make himſelf amends, or the like: Theſe are not good Cuſtoms or Preſcriptions, *Dyer* 276. 8 *Ed.*4.18. *Co. ſuper Lit.* 140. 21 *H.* 7. So to preſcribe to do a thing one may do

by Law, as diſtrain for Rent, Service, or the like, is void, *Plow.* 545. So if one do preſcribe againſt that which another hath by Preſcription; as to ſtop his Light or Way, or diſturb his Leet, or the like; this is not good, *Co.* 9.56. *Bro. Preſcrip.* 41: So to be diſcharged from ſervice to a Leet, becauſe he is Conſtable; from paying Tythe of one Land, becauſe he doth ſow, ſever, and pay the Tythe of other Land, and the like, are not good Preſcriptions.

And out of all theſe things may be collected,

1. That no Preſcription can be good, that hath not theſe properties in it. 1. That it be reaſonable for the thing to be had or taken; and in the creation, that it may be conceived how at the firſt it did begin. 2. That it be certain. 3. That it be lawful to be done, which is claimed.

5. How a Cuſtom or Preſcription ſhall be taken.

2. That which in many will be good or bad in a Cuſtom, that regularly in one will be good or bad in a Preſcription. For Cuſtoms and Preſcriptions both, they are for the moſt part taken and expounded ſtrictly, and muſt be ſtrictly purſued. And therefore if a Cuſtom be, that an Infant may make a Feoffment; he may not by this Cuſtom make a Leaſe and Releaſe, or declare his Will upon the Feoffment. And yet the Cuſtoms of *London*, and *Gavelkind*, are expounded favorably. *Dyer* 262.196. 11 *H.* 4. 29. 21 *Ed.* 4.24.

6. Where and how a Cuſtom or Preſcription may be deſtroyed and gone, or not. *Cuſtom.*

For Anſwer to this Queſtion, theſe things are to be known.

1. Where the Cuſtom doth run with the Seigniory, as that the Tenant ſhall pay a Fine, Heriot, or the like to the Lord, or be his Collector of his Rents, or the like; there Unity of poſſeſſion in the Lord will extinguiſh it. But if the Cuſtom run with the Tenants in the Land, as the Cuſtoms of *Gavelkind*, and the like, there it is otherwiſe. 14 *H.* 4. 2.

2. For a Cuſtom of Common, how it may be extinct or ſuſpended by Unity of poſſeſſion or otherwiſe, See *Brownl. Rep.* 1 *par.* 181. 174. 120. 47. 2 *par.* 209, 210. 297.

3. How Copihold-Cuſtoms may be gone, See *Co.* of *Copihold* 77, 78, 79. and my Book of *Copihold*, *fol.* 148, 149. And ſee here *Suſpenſion* and *Extinguiſhment.*

Preſcription.

4. And a Preſcription may be determine divers ways alſo. As, 1. by a Grant; as if I have a Rent, Common, or the like profit out of anothers ground, and I take a Grant from him of it; this will determine it, 21 *H* 7 5. 2. By Unity of Poſſeſſion; as if I have Common out of anothers ground, and after I purchaſe the ground it ſelf, the Common is gone. See *Extinguiſhment.* 3. By alteration of the ſtate of things: As if I preſcribe to Eſtovers to ſpend in the Hall of my houſe, and after I convert this Hall into a Kitchin or Malt-houſe, it ſeems the Preſcription is gone. And yet if one have Eſtovers belonging to his houſe, and he alter any of the Rooms or Chambers, the Eſtovers doth continue ſtill. And if one have a Water-courſe by Preſcription to his Mill or Conduits, or Windows to his Houſe; and the Tucking-Mill is turned to a Griſt-Mill, or the Houſe be fallen or turned into a Barn; yet the Preſcription doth continue, *Co.* 4. 87, So if a Corporation that have a good Preſcription, change the name of their Corporation, yet the Preſcription doth continue, *Dyer* 270. *Mich.* 2 *Jac.* Agreed *per Curiam.* And if a man have been uſed to pay a Shoulder of a Buck for all manner of Tythes of his Park, and after it is diſparked and ſown to Corn, the Preſcription is gone, and Tythes muſt be paid in kind. But if ſome of the Park only be ſown, and the reſt remain a Park ſtill, it is otherwiſe. *Shipdams* Park, 37 *Eliz. M. Brown.* 1 *par* 31. 4. By alteration of the payment. If there be an antient Preſcription of payment, and of latter time the payment hath varied from the uſage, this will not hurt. *Co.* upon *Lit.* 114. by Baron *Henden* at *Glouceſter*-Aſſiſes, 17 *Car.* 5. By interruption in the paſſage; as if I have an antient Way to my houſe by Preſcription, and for twenty years together it hath been ſtopped, or I have had another Way ſet out for me which I have uſed, yet my Preſcription is not gone. So if one have a *Modus Decimandi* by Preſcription, and he hath of late for divers years paid Tythe in kind; this doth not determine the Preſcription. But otherwiſe it is when there is an Interruption of the Right, as in caſe of Extinguiſhment by Unity, *Co.* upon *Lit.* 114. See more in *Tythes*, *Franchiſes*, *Rents*, *Copihold.* *Brownl. Rep.* 1 *par.* 31, 32, 35: 2 *par.* 35:

By-laws

Sect. 6. By-laws, what.

By-laws are Orders made by the common consent of a Town, Parish, or Corporation, for the good of the place, and of them that make them, to tie them further then the publike Law doth bind. Of this sort are the Ordinances of the City of *London*, and of other Incorporations. *Co.* 6. 63. 5. 63. *Kitch.* 45.

What *By-laws* are good, or not; and who shall be bound by them, or not.

For the Answer of this, and the opening of this Learning, these things are to be known.

1. That the Inhabitants of a Village or Town, without any Custom or Prescription, may amongst themselves by common agreement, and out of, and without any Court, make any By-laws or Ordinances for the publike good, as the Repair of the the High-ways, Bridges, Church, or the like. And in this case the greater part, without Custom, shall bind the rest. But if it be for their own private profit, as for the well-ordering of their Commons, or the like; there without a Custom they cannot make By-laws. And if it be in such a case, the greater part cannot bind the lesser part, without a special Custom for it. *Co.* 5. 63. *Hob. Rep. pl.* 266. 44 *Ed.* 3. 19. *Dyer* 322. 21 *H.* 7. 20. 40. 11 *H.* 7. 13. 21 *Ed.* 4. 54. 8 *Ed.* 2. *tit. Assise*, 413.

2. Corporations by Prescription or Patent, may without question make Ordinances or Constitutions for publike good, without any Custom or Prescription. But if it be for any thing that concerns themselves only, some say they must have Custom or Prescription for it: Others say, by the very incorporating it is included and incident, as to sue and be sued, so to make By-laws for the better government of it self. And this I take to be the Law. *Hob. Rep. f.* 182. *Co.* 5. 63. *Doct. & Stu.* 74.

3. If a Lord of a Leet or Court-Baron claim a power to make By-laws in, or belonging to his Court, he must claim it by Prescription, and prove the usage by the making of those By-laws, and the punishment of offenders for the breaking of them. *Brownl. Rep.* 2 *par.* 180. *Goldsb. Rep. f.* 79.

4. In these cases where they have power, they may make an Order for a Rate to raise money to Repair, or the like: And they may appoint a common Officer to receive it, and give him power to distrain for it; who after demand may do it. Or they may make an Order, That such a man as is bound to repair, shall do it; or upon any man to do such a thing, and put a penalty on his head if he do it not, and appoint an Officer to levy it; and all this without any special Custom for it. And it is best to give the Penalty for not repairing of High-ways, to the Lord; and for not repairing of Churches, to the Churchwardens. 44 *Ed.* 3. 19. 11 *H.* 7. 14.

5. So by the very Common-Law, the Churchwardens with consent of the major part of a Parish, may tax the Inhabitants and all others that have Land in the Parish, towards the Repair of the Church; and they may make a By-law for the levying of it; and all this without any Custom alleaged for it. *Co.* 5. 66. 11 *H.* 7. 14. 21 *H.* 7. 20.

6. These Taxes and By-laws will not charge strangers, and those that dwell out of the Town, Village, or Precinct of the Leet, that hath not Land there; except it be in *London*, and some special places and cases for publike good. One Parish therefore cannot by a By-law bind another Parish. *Co.* 5. 63. *Brownl.* 2 *par.* 180. 22 *H.* 7. 40. 44 *Ed.* 3. 18.

7. By-laws made for a Parish, must be such as are for the common good of the Parish; or else they will not bind any body within, or without the Parish. And therefore such as are made for the good of the Lord of the Manor only, as that no man shall carry Hay on his Land; or for the good of one of the Parish only, as that no man shall break the Hedg of *J. S.* or the like; it seems these are not good. *Goldsb.* 79. *pl.* 13.

8. By-laws also that are against Common reason, or the Publike good, or the Fundamental Laws, are not good, or binding to any persons within or without the place, be it in a Corporation or elsewhere. And therefore a By-Law with a Penalty of Imprisonment, is adjudged void, *Co.* 5. 64. The Town of *Newbury* made a By-law, That none should exercise any Trade there, that had not been Apprentice there for seven years, and lived five years within the Town; was adjudged void, *Hil.*

14 *Jac. B. R.* The City of *London* made a By-law, That none there of ſuch a Trade ſhould take to his Apprentice the ſon of an Alien; and that the Obligations and Covenants for the binding of him ſhould be void. This will not make the Aſſurances void. *Trin.* 33 *Eliz.* 49. *Degrel verſ. Powk's* Caſe.

9. No By-law made by any Corporation againſt the Kings Prerogative, or the common profit of the people, is to be allowed or put in uſe, till it be allowed by the Lord Chancellor, Lord Treaſurer, or Chief Juſtices of either Benches, or three of them. *Stat.* 9 *H.* 7. 7. *Co.* 11. 53. *Co.* 63, 64.

10. When it is ſo allowed by them, if it be unreaſonable, or againſt Law, it may be afterwards diſallowed by the Judges, *Co.* 11. 54. See more, *Stat.* 33 *H.* 8. 27. 28 *H.* 8. 5. 19 *H.* 7. 7. See *Ordinance. Brownl.* 2 *par.* 284.

CHAP. LXII.

Of Debet *and* Solet, *Detainer or Retainer, and Departure out of the Realm.*

Debet and *Solet*, what.

Debet and *Solet* are certain formal words uſed in Writs, which are not to be omitted in them, that are uſed according to the diverſity of the caſe. As if one ſue to recover any Right whereof his Anceſtor was diſſeiſed by the Tenant or his Anceſtor, then *Debet* is uſed only in the Writ: But if he ſue for any thing that is now firſt of all denied, then he uſeth both theſe words. And ſo it is of *Debet* and *Detinet. Regiſt.* 140.

Detainer and *Retainer.*

Detainer or Retainer, is the keeping of a thing in the nature of a Pledg, till he ſatisfie a Duty. So an Inn-keeper may keep his Gueſts Horſe, till he be paid for his own and his Horſes meat: A Tailor the Garment made, till he be paid for the making of it: A Sheerman or Dyer the Cloth, till he be paid for ſheering or dying, as a Pledg only, *Co.* 8. 147. See *Action of the Caſe*, and *Detinue*, in my Firſt Part of the *Marrow of the Law*; and in *Victuallers. Brownl.* 2 *part.*

Departure out of the Realm.

It is ſaid by ſome, That if one depart out of the Realm without Licence, he doth forfeit his goods. But we find no ſuch Law at this day, nor any Reſtraint herein, but that men may go and come as they pleaſe, if there be no ſpecial Prohibition by the Lord Protector. But ſuch a Law there was, That none might go out of the Realm without the Kings leave, and ſome puniſhed in the *Star Chamber* for going without leave; which is repealed. But it is ſaid, if a Subject be out of the Land, and commanded home by the King, and he refuſe, that he may ſeiſe his goods. See for this, *Stat.* 5 *R.* 2. *cap.* 2. 7 *R.* 2. *c.* 14. 13 *R.* 2. *c.* 20. 21 *Jac.* 28. *Cromp. Jur.* 31. 84. 109. *Dyer* 375.

CHAP. LXIII.

Of a Deed.

A Deed is a Writing or Inſtrument written in paper or parchment, ſealed and delivered; to prove and teſtifie the Agreement of the Parties whoſe Deed it is, to the things contained in the Deed. *Terms of the Law. Co. ſuper Lit.* 35. *A Deed, what.*

All Deeds are either Indented, or Poll. The Deed indented (which is that which is called an Indenture) is, when the paper or parchment is cut and indented. And it is defined to be a Writing containing a Conveyance, Bargain, Contract, Covenant or matter of Agreement between two or more, and is indented in the top or ſide, anſwerable to another that likewiſe doth comprehend the ſelf-ſame matter. And this is ſo called, becauſe it is ſo indented; for albeit it be called an Indenture, and begin in theſe words, *Hæc Indentura, &c.* yet if it be not actually indented, it is no Indenture: And of the other ſide, if it be not ſo called, or theſe words be omitted, yet if it be indented, it is an Indenture. And this was antiently called *Charta cyrographata vel communis*, becauſe each party had his part. *Terms of the Law. Co. ſuper Lit.* 229, 143. 38 *H.* 6. 23. *The kinds. Indenture. Deed-Poll.*

The Deed-Poll is that which is plain without any indenting, when the parchment or paper is polled or cut even. And this was antiently called *Charta de una parte*: And this is ſingle, and but one; which the Feoffee, Grantee, or Leſſee for the moſt part hath.

The Deed indented is alſo ſometimes Bipartite, *i.* of two parts, when there are two parties, and two parts of the Deed. And then commonly the Feoffor, Grantor, or Leſſor hath the one part, and the Feoffee, Grantee, or Leſſee hath the other part. And ſometimes it is Tripartite, *i.* when there are three parties and three parts; and then commonly each party hath a part of the Indenture. And ſometimes it is Quadripartite, &c. And according to the parts, they do ſeal interchangeably one to another.

And amongſt theſe parts, the part ſealed by the Feoffor, Grantor, or Leſſor, is ſaid to be the Principal or Original; and the reſt are called but Acceſſary, Counterparts or Copies; and yet all of them in Law do make up but one entire Deed. *Lit. ſect.* 371, 372. *Counterpart.*

Theſe Deeds alſo are ſometimes in the Firſt perſon, as, *Know ye that I* A. B *&c.* And albeit it be an Indenture ſo made, yet it is good enough. And ſometimes they are made in the Third perſon; as, *This Indenture witneſſeth that* A. B. *hath granted, &c.* The Deed-Poll is uſually made in the Firſt perſon; but if it be made in the Third perſon, it is good enough. *Bro. Oblig.* 51. *Co. ſuper Lit.* 35, 36. *Weſt. Symb. lib.* 1. *par.* 1. *ſect* 46.

There are divers other diſtinctions of Deeds: For ſome are publike that do concern Countries, ſome of the Prince; and ſome are private between particular perſons, and thoſe private perſons or Subjects: And theſe only are intended here. And of theſe ſome are abſolute, and ſome conditional; ſome are inrolled, and ſome not inrolled; ſome concern the Realty, and ſome the Perſonalty; and ſome are mixt. And ſome of theſe alſo contain matter of Grant or Gift; amongſt which Feoffments, Gifts, Bargains and Sale, Grants and Leaſes are the chief. And ſome of them contain matter of Diſcharge, as Releaſes, Acquittances, and Defeaſances, and ſuch like: And ſome of them contain other matter, as Confirmations, and ſuch like. Or as others diſtinguiſh; ſome of them are conſtitutive and making, and ſome are remiſſory or liberatory. *Sect.* 1.

And

And the firſt ſort are ſome of them creating, (*i.*) ſuch whereby any Eſtate, Property or Obligation not having eſſence before, is newly raiſed and created; as the firſt Grant of a Rent, Common, Way, &c. Eſtate tail, for life, years, &c. And ſome of them are conveying, (*i.*) ſuch by which Eſtates, Properties, and the like, being already created, are conveyed to others; as Feoffments, Bargains and Sales, Grants over, or Aſſignments, Surrenders, and the like. Thoſe that are of the laſt ſort, are ſuch as do deſcribe and teſtifie ſome precedent Contract for a duty or fact to be paid, performed or done, releaſed or diſcharged: Of which ſort are all Acquittances, Releaſes, and other ſuch like matters of Diſcharge.

Note. But here by the way two things are to be obſerved.

1. That there may be, and are divers other kind of Deeds beſides thoſe which are named before: For every Agreement put in writing ſealed and delivered, becometh a Deed; and Attornments, Exchanges, Surrenders, Partitioners, Authorities, Commiſſions, Licences, Revocations, and the like, are uſually made, given, done and granted by Deed. And there are divers other Inſtruments concerning Merchants, and other affairs. If therefore any of theſe be done by Deed, ſuch a Deed is for the moſt part ſubject to the Rules of Deeds herein laid down. See *Weſt. Sym.* 1 *part.*

2. Albeit that Feoffments, Gifts, Bargains, Leaſes, Attornments, Exchanges, Surrenders, and ſuch like things, may in divers caſes be as well made and done without, as with a Deed: Yet if a man will make his Claim to any thing given or granted by ſuch Feoffment, Gift, &c. by Deed, the Deed muſt be ſuch a Deed as is a good and perfect Deed by the Rules herein after laid down.

3. The parts of a Deed. In every Deed or Writing there are two parts conſiderable: 1. The external or material part, *i.* the parchment or paper, wax and writing. 2. The internal or intellectual part, *i.* the ſenſe, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers Deeds, as Feoffments, Grants, Leaſes, and the like, there are certain formal or orderly parts which make up the whole; of which the Law doth take ſpecial notice; *Co. ſuper Lit.* 6. 229. 2, 3. As,

1. The Premiſſes; the office whereof is rightly to ſet down the name of the Feoffor, Grantor, Leſſor, &c. Feoffee, Grantee, Leſſee, &c. and to comprehend the certainty of the thing granted or leaſed. And herein in ſome Deeds there is alſo a Recital of ſome things; and in ſome Deeds an Exception of ſome part of the thing granted before by the Deed.

2. The *Habendum*; the office whereof is to name again the Feoffee, Leſſee, &c. and to ſet forth what Eſtate he ſhall have, and for what time he ſhall hold the thing given or granted.

3. There is ſet down and expreſſed upon what terms and conditions the Eſtate of the thing granted ſhall be held. And therefore there is ſometimes contained therein a *Tenendum*, to ſet forth by what Tenure the Grantee ſhall hold the Land granted. 2. A Reſervation or *Reddendum*, to ſet forth by what Rent he ſhall hold the Land. 3. A Condition. 4. A Warranty. 5. Covenants. 6. The Concluſion after this manner, *In cujus rei teſtimonium, &c.* Wherein is ſet forth the Date of the Deed, containing the day, moneth and year, and the ſtile of the King, or year of our Lord. And all theſe are ſometimes contained under the Premiſſes, and the *Habendum*.

4. The nature of a Deed indented, and a Deed-poll; with the difference that is between them. All the parts of a Deed indented, in Judgment of Law do make up but one Deed: and every part is of as great force as all the parts together; and they are eſteemed the mutual Deeds of either party, and either party may be bound by either part of the ſame. *Plow.* 134. 38 *H.* 6. 24, 25. *Lit. ſect.* 370. 9 *H.* 6. 35. 35 *H.* 6. 34.

And the words of the Indenture are the words of either party. And albeit they be ſpoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party, if they do more properly belong to him: For, every word that is doubtful, ſhall be applied and expounded to be ſpoken by him to whom they will beſt agree according to the intent of the parties; and they ſhall not be taken

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more ſtrongly againſt one, or beneficially for the other, as the words of a Deed-Poll ſhall.

If therefore *A.* by Indenture enfeoff *B.* upon Condition, and then doth enter for the Condition broken; in this caſe it hath been held, that *A.* in his pleading may ſhew forth the Deed that he himſelf ſealed, and that this is ſufficient. 11 *H.* 7. 22. *per Brian.* And therefore alſo it is thought, that an Indenture made in the Firſt perſon, is as good in Law as an Indenture made in the Third perſon, when both parties have to this put to their Seals. For if in an Indenture made in the Third perſon, or in the Firſt perſon, mention be made that the Grantor only hath put to his Seal, and not the Grantee; then is the Indenture only the Deed of the Grantor: But when mention is made that the Grantee alſo hath put his Seal to the Indenture, it ſhall be ſaid to be the Deed of them both. *Lit. ſect.* 373.

And although both parts of the Indenture are but as one part; yet the Deed of the Grantor is as the Principal, and the other is but a Counterpart. And therefore if the Leſſor only ſeal, and not the Leſſee, yet it is as good as if both had ſealed: And if there be any difference between the Parts, the Counterparts ſhall be made to agree with the Principal, and it ſhall be deemed the miſpriſion of the Clerk. *Finches Law*, 109.

This Deed is the ſtrongeſt kind of Deed of the two; for this worketh an Eſtoppel, *i.* doth bar and conclude either party to ſay or except any thing againſt any thing contained in it. For if a Leaſe be by Indenture, both parties are concluded to ſay, that the Leſſor had nothing in the Land at the time of the Leaſe made: So that if the Leſſor hap to have the Land after by purchaſe or deſcent, the Leſſee may enter upon him by way of concluſion, and the Leſſee by Eſtoppel ſhall be forced to pay his Rent. But it is otherwiſe of a Deed-Poll; for this is commonly but of one Part, which is ſealed by the Feoffor, Leſſor, &c. only. And this ſhall be expounded to be the ſole Deed of the Feoffor, Leſſor, &c. and the words therein contained ſhall be ſaid to be his words, and ſhall bind him only, and be expounded altogether in advantage of the Feoffee, Leſſee, &c. and againſt the Feoffor, Leſſor, &c. and this doth not work any Eſtoppel againſt either party; *Plow.* 434. 421. But if a Deed be indented or poll, and there be therein reciprocal Covenants between them from one to another; albeit there be but one Part, yet if each of them ſeal it and deliver it the one to the other, this is good for both parties; and each of them that can get the Deed into his hand to ſhew or plead, may take advantage thereof againſt the other. And in this caſe the Deed is uſually kept by one indifferent between them both, *Trin.* 38 *Eliz. Co. B. per Curiam. Co ſuper Lit.* 143. *Eſtoppel.*

Note here firſt of all, that ſome Deeds are void from the beginning, and do never take effect; and amongſt theſe ſome are abſolutely void, and void againſt all perſons, and ſome are void only to ſome purpoſes and againſt ſome perſons. Some alſo that are not void from the beginning, are notwithſtanding voidable; and that ſometimes by the party himſelf that made them, or any others; and ſometimes by others, and not by himſelf. And ſome Deeds are good in their firſt creation, and well made at the firſt, but become void by ſome matter *ex poſt facto.* And this may be either by an Extrajudicial act, as Raſure, or the like; or by a Judicial act, *i.* when by the ſentence of a Court a Deed is damned, and made void, which is called a Vacate of the Deed. *Sect.* 2. 5. When and where a Deed ſhall be ſaid to be good and ſufficient; and when and where not, but void or voidable *ab initio.* A *Vacate* of a Deed.

To the making of every good Deed containing any Agreement, theſe things are requiſite. Things requiſite to make a Deed good.

1. Writing, *i.* That it be written in parchment or paper, and that the Agreement be legally and formally ſet down, and be ſufficient in Law for the compoſition and frame of the words. And this is called the Legal part, the Judgment whereof belongeth to the Judges of the Law.

2. That there be a perſon able to contract, and to be contracted with, and a thing to be contracted for; and that all theſe be ſet down by ſufficient names.

3. Reading, *i.* That if it be an illiterate man that is to ſeal the Deed, and he deſire to hear it read, that it be truly read, or the Contents thereof truly declared to him.

4. Sealing,

4. Sealing, *i.* That the Deed ſo written be ſealed by the party, or ſome other by his appointment, for a further teſtimony of his conſent thereunto. See *infra.*

5. Delivery, *i.* That the Deed ſo written and ſealed be delivered by the party, or ſome other by his appointment, as his Deed, *Perk. ſect.* 137, *&c.* And theſe laſt things being matters of fact, are to be tryed by Jurors. And then a Deed doth begin to take effect, when it is firſt delivered. And therefore if a Bond be made by *J. S.* and dated whiles he is an Infant, but delivered when he becomes of full age, it is good, *Brownl.* 1 *par.* 30, 31.

6. That the ground, foundation, end and purpoſe of making the Deed, be good and not againſt the Law. Otherwiſe in moſt of theſe caſes the Deed is void *ab initio.* Alſo in ſome caſes to perfect the Contract, and make the Conveyance of the thing intended to be paſſed thereby good, ſome other ceremonies or complements are requiſite, as Inrollment, Livery of Seiſin, Attornment; otherwiſe the Deed in part at leaſt becometh fruitleſs and vain. For a Deed may be void, either for that the Writing is not in parchment or paper; or being ſo, is not legally and formally drawn; or being ſo, there doth want a perſon able to give or make, or capable to have or take, or a thing to be contracted for: Or if ſo, for that it is not duly ſealed and delivered; or if ſo, for that it is not truly read at the time of the ſealing and delivery; or if ſo, for that it is made void by ſome ſpecial Law, as being made upon an Uſurious contract, by Dureſs, or the like. Or it may at leaſt in part loſe his force afterwards by neglect of Inrolment, Livery of Seiſin, or Attornment, in caſes where theſe things are requiſite.

1. In reſpect of the writing of it.

Every Deed well made muſt be written, *i.* The Agreement muſt be all written before the ſealing and delivery of it: For if a man ſeal and deliver an empty piece of paper and parchment, albeit he do therewithall give commandment that an Obligation or other matter ſhall be written in it, and this be done accordingly, yet this is no good Deed, *Perk. ſect.* 118. *Co. ſuper Lit.* 171.

2. This Writing muſt be in paper or parchment: For if an Agreement be written on a piece of Wood, Linnen, the Bark of a tree, a Stone, or the like, and this be ſealed and delivered; this is no good Deed, *Co. ſuper Lit.* 229. *F. N. B.* 122. *Lit.* 27 *H.* 6. 9. But it may be written in any language, or in any hand. And therefore it is held, that a Deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a Deed written in Engliſh, and in a Secretary hand, *Co.* 2. 3. And albeit the writing be beſides the lines, or the lines be written crooked, yet this will not hurt the Deed, *Perk. ſect.* 123. And if there be any alteration, raſure, or interlining made in any part of the Deed before the delivery of it, this will not hurt the Deed, *Perk. ſect.* 155. *Co. ſuper Lit.* 225. But in ſuch caſes it is policie to make a *Memorandum* of it upon the back of the Deed, and to give the Witneſſes notice of it; for otherwiſe if it be in any place material, as in the name of the Grantor, Grantee, in the limiting of the Eſtate, or the like, and eſpecially if it be in a Deed-poll, the Deed is greatly ſuſpicious.

Sect. 3.

3. The matter written muſt be legal and orderly for manner and matter, *i.* There muſt be words ſufficient to ſet forth the Agreement, and bind the parties; for a Deed may be void and loſe its virtue in all or part, for repugnancie, incertainty, and divers other matters, (whereof ſee in expoſition of Deeds *infra*) *Co. ſuper Lit.* 225. But it is not material whether the Deed be in the firſt, or in the third perſon, ſo as the words be aptly applied, *Fitz. Fait & Feoffments*, 5. *Dyer* 6. For if a Deed-poll be in the third perſon, or an Obligation be in the third perſon, theſe are good Deeds, notwithſtanding the Statute of 38 *E.* 3. *cap.* 4. which is meant only of Obligations made beyond the Seas. So if the words of a Deed indented run in the firſt perſon, it is as good as if it were in the third perſon. Neither is it neceſſary that the Engliſh or Latine whereby it is made, be true or congruous; for falſe and incongruous Latine or Engliſh ſeldom or never hurteth a Deed: For the Rules are, *Falſa orthographia non vitiat chartam; Falſa grammatica non vitiat conceſſionem.* Neither is it neceſſary that every Deed have all the parts of a Deed before ſet down, as Premiſſes, *Habendum, &c.* For a Deed may be good without *Habendum*, Warranty, Reſervation, or Covenant. And a Deed is good, albeit theſe words in the cloſe thereof,

thereof, *In witneſs &c.* be omitted; and albeit there be no mention made in the ſame that the Deed was ſealed and delivered, ſo as in truth it be duly ſealed and delivered, and it can be proved. Alſo a Deed is good, albeit it mention no time or place of date or making, or have a falſe date, *i.* be dated at one time, and delivered at another; and albeit it have an impoſſible date, as the 30. of *February*, or the like: For anti-ently until the time of *E.*2. and *E.*3. the Deeds had no date, becauſe the Law was then held to be, That if a Deed were dated before the time of memory, it was not pleadable, except it were of Record, but it might have been given in evidence. But he that doth plead ſuch a Deed without any date, or with ſuch an impoſſible date, muſt ſet forth the time when it was delivered. *Co.*2.5. *Dyer* 19. *Kelw.*70. *Co.*2.5.5. 117. *Dyer* 8. *Perk. ſect.*120. *Co. ſuper Lit.* 6. *Date.*

The ſecond thing required in every well made Deed is, That the perſon making it be able to give, grant, make, or do the thing contained in it: That the perſon to whom it is made, be capable of the thing to be given, granted, made or done thereby. For if it be made by, or to any ſuch perſons as are diſabled, as Infants, Aliens, Women covert, Perſons attainted of Treaſon or Felony, Ideots, and ſuch like, it will be void in all or part. But any perſon natural, male or female; or politique, as ſole Corporations, or Corporations aggregate of many, Eccleſiaſtical or Temporal, not diſabled by Law, may give or take by Deed. Alſo there muſt be ſome matter whereabout the Contract may be converſant: It is therefore ſaid, that in every Grant there muſt be Grantor, Grantee, and a Thing to be granted; and in every Obligation an Obligor, Obligee, and Thing to which the Obligor is bound. And ſo of Feoffments and other Deeds. *Brownl.* 1 *par.* 120. *Co.*11.73. *Plow.* 555. *Perk ſect.* 1.119. *Feoffments infra Numb.*12. *See the Titles.* 2. In reſpect of the perſons parties thereunto, and matter therein.

A Leaſe was made, and the Leſſee was not made or named in the Premiſſes of the Deed, but in the *Habendum* only; yet it was judged to be good by the two Chief Juſtices, *Car. Rep. f.*85. There muſt be a convenient Certainty in all theſe things, the Perſons and Things; otherwiſe the Deed will be void. See *Grant*.

The third thing required in every well made Deed, is, That if the party that is to ſeal it be a blind or an illiterate man, and deſire to hear it read, that it be ſo: For if ſuch a man be to ſeal a Deed, and he deſire to hear it, or to hear the contents of it read or declared to him firſt, and it be not done, and he afterwards ſeal and deliver it, this is no good Deed. So if upon or without any ſuch requeſt made by him that is to ſeal and deliver it, the party himſelf to whom it is made, or a ſtranger ſhall read the Deed, or declare the contents thereof falſly and otherwiſe then in truth it is, the Deed will be void, at leaſt for ſo much as is ſo miſread or miſdeclared. But if the party himſelf that is to ſeal and deliver it, before the ſealing and delivery thereof cauſe another that is a ſtranger covinouſly to read it, or to declare the contents thereof falſly to him, and otherwiſe then it is, of purpoſe to make the Deed void; this will not hurt the Deed. So if the party that is to ſeal the Deed can read himſelf, and doth not, or being an illiterate or a blind man doth not require to hear the Deed read, or the contents thereof declared; in theſe caſes albeit the Deed be contrary to his mind, yet it is good and unavoidable. *Co.*2.9.3. 11.27. 14 *H.*8.26. 3. In reſpect of the reading of it.

The fourth thing required in every well made Deed is, That it be ſealed. But this ſealing of Deeds in times paſt was not uſed. For the *Saxons* uſed only to ſubſcribe their Names, and to add the ſign of the Croſs, and to ſet down a great number of Witneſſes. And afterwards the *Normans* brought in with them the Sealing of Deeds but by degrees: For firſt the Kings and a few of the Nobility uſed it, and to ſeal with their Seals of Arms; afterwards all the Nobility uſed it, and then the Gentlemen; and about the time of *E.*3. all men began to uſe Sealing of Deeds, which hath been continued ever ſince, ſo that now it is of neceſſity; inſomuch that if a Deed be never ſo well written before, and delivered afterwards, yet if it be not ſealed between the writing and delivery, it is not a good Deed. But if a ſtranger ſeal it by the allowance or commandment precedent, or agreement ſubſequent of him that is to ſeal it before the delivery of it, it is as well as if the party to the Deed did ſeal it himſelf. *Terms of the Law. Fait. Co. ſuper Lit.*225. *Co.*2.4,5. *Perk ſect.*129. *Perk ſect.*130. 131. 134. 4. In reſpect of the ſealing of it.

And therefore if another man ſeale a deed of mine, and I take it up after it is ſealed and deliver it as my deed; this is ſaid to be a good agreement to, and allowance of the ſealing, and ſo a good deed. And if the party ſeale the deed with any Seale beſides his own, or with a ſtick or any ſuch like thing which doth make a print, it is good. And although it be a Corporation that doth make the deed, yet they may ſeale with any other ſeale beſides their common Seale and the deed never the worſe. And if there be 20. to ſeale one deed, and they ſeale all upon one peece of wax and with one Seale, yet if they make diſtinct and ſeverall prints; this is a very ſufficient ſealing & the deed is good enough. *Perk. Sect.* 130. 131. 132. *Perk. Sect* 134.

5. In reſpect of the delivery of it. And what ſhall be ſaid a good delivery or not.

The fifth thing required in every well made deed is: That there be a delivery of it. And for this it muſt be known, that delivery is either actuall, *i.* by doing ſomething and ſaying nothing, or elſe Verball, *i.* by ſaying ſomething and doing nothing, or it may be by both. And either of theſe may make a good delivery and a perfect deed: But by one or both of theſe it muſt be made, for otherwiſe albeit it be never ſo well ſealed and written, yet is the deed of no force. And though the party to whom it is made take it to himſelf, or hap to get it into his hands, yet will it do him no good nor him that made it any hurt untill it be delivered. And a deed may be delivered by the party himſelfe that doth make it, or by any other by his appointment or authority precedent or aſſent or agreement ſubſequent, for *omnis ratihibitio mandato æquiparatur.* Every Ratification is equivalent to a command, And when it is delivered by another that hath a good authority and doth purſue it, it is as good a deed as if it were delivered by the party himſelfe: but if he doe not purſue his authority then it is otherwiſe. And therefore if a deed or the contents thereof be read or declared to a man that is to ſeale him; and he (being illiterate) doth deliver him to a ſtranger, and bid him examine him, and if it be ſo as it was read to him, then to deliver him as his deed, otherwiſe to redeliver him to him againe that made it; in this caſe if the deed be in truth, otherwiſe then it was read, and yet notwithſtanding he to whom it was delivered doth deliver him to him, to whom it is made, this delivery ſhall not availe, neither is the deed by this delivery become a good deed. *Co:* 2. 4. 5. *Perk. Sect.* 137. 9 *H.* 6. 37. *Perk. Sect.* 137. 9 *H.* 6. 37. *Co.* 11. 28. 3. 35. 47 *E.* 3. 3.

1 In reſpect of the perſon that doth make it.

2 In reſpect of him to whom it is made.

And ſo alſo a deed may be delivered to the party himſelf to whom it is made or to any other by ſufficient authority from him: or it may be delivered to any ſtranger for and in the behalfe, and to the uſe of him to whom it is made without authority. But if it be delivered to a ſtranger without any ſuch declaration, intention or intimation unleſſe it be in caſe where it is delivered as an Eſcrow, it ſeems this is not a ſufficient delivery: And yet if an Obligation be made to the uſe of a third perſon expreſſed by the deed, and the obligor deliver it to him to whoſe uſe it is made, this is ſaid to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be ſealed it is nothing worth. And where it is delivered before the date, yet in the pleading of it it muſt not be ſo ſet forth. *Dyer.* 167. *Perk. Sect.* 137. 8 *H.* 26. *Co. ſuper Lit.* 36. 3. 26. 5. 119. 10. *Hi.* 6. 25. 13 *H.* 4. 8: *Dyer.* 192. *Co.* 2. 4. *Plow.* 492.

3 In reſpect of the time.

4 In reſpect of the manner and order of delivery.

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If I have ſealed my deed, and after I deliver it to him to whom it is made, or to ſome other by his appointment and ſay nothing, this is a good delivery. So if I take the deed in my hand and uſe theſe or the like words; Here take him, or this will ſerve, or I deliver this as my deed, or I deliver him you; theſe are deliveries. So if I make a deed of land to another, and being upon the land I deliver the deed to him in the name of Seiſin of the land; this is a good delivery. So if the deed be ſealed and lying in a window, or on a Table, and I uſe theſe or the like words, there he is, take it as my deed; this is a good delivery and doth perfect the deed, for as a deed may be delivered by words without deeds, ſo may it alſo be delivered by deeds without words. But if a man ſeale and acknowledge before a Major or other Officer appointed for that purpoſe a writing provided for a Statute or a recogniſance this acknowledgment before ſuch an Officer ſhall not amount to a delivery of the deed ſo as to make it a good obligation if it happen not to be a good Statute or Recogniſance. *Co:* 9. 137. *Dyer:* 192. 167. *Co. ſuper Lit.* 36. 49. 35. *Aſſ. pl.* 6. *Adjudged Trin,* 37: *El. B: R*

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The delivery of a deed as an Eſcrow is ſaid to be where one doth make and ſeale a deed and deliver it unto a ſtranger untill certaine conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed. As an Eſcrow *Quid.*

And ſo a man may deliver a deed, and ſuch a delivery is good. But in this caſe two cautions muſt be heeded. 1. That the form of words uſed in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a ſtranger to it, and not to the party himſelfe to whom it is made. The words therefore that are uſed in the delivery muſt be after this manner. I deliver this to you as an Eſcrow to deliver to the party as my deed, upon condition that he doe deliver you 20l. for me, or upon condition that he deliver up the old bond he hath of mine for the ſame mony, or as the caſe is. Or elſe it muſt be thus. I deliver this as an Eſcrow to you to keep untill ſuch a day &c. upon condition that if before this day he to whom the Eſcrow is made ſhall pay to me 10l. or give to me a horſe, or infeoffe me of the Manor of Dale, (or perform any other condition) that then you ſhall deliver this Eſcrow to him as my deed. 19. *H.* 8. *Kelw.* 88. 14 *H.* 8. 22. 14 *H.* 6. 42. *Perk. Sect.* 141. 140, 142. 138. 143. 144. *Fitz. Feoffments & Fait.* 4. 13, 15. *Co* 9. 137. *ſuper Lit.* 48. 36.

For if when I ſhall deliver the deed to the ſtranger, I ſhall uſe theſe or the like words. I deliver this to you as my deed, and that you ſhall deliver it to the party upon certain conditions: Or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in theſe caſes the deed doth take effect preſently and the party is not bound to perform any of the conditions. So it muſt bee delivered to a ſtranger, for if I ſeale my deed and deliver it to the party himſelfe to whom it is made as an Eſcrow upon certaine conditions &c. in this caſe let the form of words be what it will, the delivery is abſolute, and the deed ſhall take effect as his deed preſently, and the party is not bound to perform the conditions; for, *Intraditionibus Chartarum non quod dictum ſed quod factum eſt inſpicitur,* (i) the Law looks upon what is done. But in theſe firſt caſes before where the deed is delivered to a ſtranger, and apt words are uſed in the delivery thereof, it is of no more force until the conditions be performed then if I had made it and layd it by me and not delivered it at all, and therefore in that caſe albeit the party get it into his hands before the conditions be performed, yet he can make no uſe of it at all, neither will it do him any good.

But when the conditions are performed, and the deed is delivered over, then the deed ſhall take as much effect as if it were delivered immediatly to the party to whom it is made, and no act of God or man can hinder or prevent this effect then if the party that doth make it be not at the time of making thereof diſabled to make it.

He therefore that is truſted with the keeping and delivery of ſuch a writing ought not to deliver it before the conditions be performed, and when the conditions be performed he ought not to keep it but to deliver it to the party. For it may be made a queſtion whether the deed be perfect before he hath delivered it over to the party according to the authority given him. Howbeit it ſeems the delivery is good, for it is ſaid in this caſe that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good, for there was *traditio inchoata*, delivery begun in the life time of the parties, *& poſtea conſummata exiſtens*, finiſhed by the performance of the conditions, it taketh his effect by the firſt delivery without any new or ſecond delivery, and the ſecond delivery is but the execution & conſummation of the firſt delivery. And therefore if an Infant, or woman covert deliver a deed as an Eſcrow to a ſtranger, and before the conditions are performed the Infant is become of full age, or the woman is become ſole, yet the deed in theſe caſes is not become good. And yet if a diſſeiſee make a deed purporting a leaſe for years, and deliver it to a ſtranger out of the land as an Eſcrow, and bid him enter into the land; and deliver it as his deed, and he do ſo, this is a good deed, and a good leaſe, ſo that to ſome purpoſes it hath relation to the time of the firſt delivery, and to ſome purpoſes not. *Brownl. Rep.* 1. *part.* 53. *See Acts, Fitz. Fait & Feoffement* 13. *Idem. Co.* 3. 35. *Co.* 5 84. 3. 36. *Co.* 3. 35, 36. Relation.

Double Delivery.

In caſe where a deed is meerly void and doth take no effect by his firſt delivery, as where a woman covert doth ſeale and deliver a deed, or the like, and ſhe after being ſole after her husbands death doth deliver the deed againe, in this caſe the deed is become good. So where a deed originally good doth becom void by matter *ex poſt facto*, as by breaking the Seale or the like, if the party to the deed ſeale and deliver it again; by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the firſt delivery doth take any effect at all, the ſecond delivery is void. *Brownl. 1. part.* 104. *Perk Sect.* 154. 11 *H.* 6. 27.

And therefore it is held that if an Infant or a man by dureſſe of impriſonment do make ſeale and deliver a deed &c. (in which caſes the deed is not void but voidable) and after the Infant being of full age, or the man impriſoned being at large, doth deliver this deed again the ſecond time; this ſecond delivery is void: *Debile fundamentum fallit opus.* See *Brownl. Rep.* 30. But if an Infant within age doe write and ſeale and deliver when he is of full age this is good. So if a man be diſſeiſed and make a leaſe for years in writing and deliver the deed, and after deliver it upon the ground, this ſecond delivery is void, for the firſt delivery made it his deed; but if he had delivered it as an Eſcrow to be delivered as his deed upon the ground, this had been a good ſecond delivery. And by all this that hath been ſaid it appeareth, that the putting to or ſubſcribing of the parties name or mark to the deed he is to ſeale is not eſſentiall, for a deed may be good albeit the party that doth ſeale it doth never ſet his name or his mark to it, ſo as it be duly ſealed and delivered. But it is the beſt and ſureſt way notwithſtanding to have the name or mark of the party ſubſcribed, for by this means the deed may be the better proved when the witneſſes are dead. *Perk. Sect.* 154. *Co.* 5. 119. *Co. ſuper Litt.* 48. *New Terms of the Law tit. Fait.* 9. *Jac Scots Caſe.*

Subſcribing of the parties name or mark not neceſſarie.

Note.

Note here, that albeit a writing or Eſcrow that is not ſealed and delivered in manner as aforeſaid may not be uſed nor pleaded as a deed, yet it may ſerve and be uſed as an evidence and proofe of the agreement contained therein. And whatſoever may be done by word without any writing may much more and better be done by writing unſealed or ſealed, though it be not delivered as aforeſaid.

Sect. 5. 6. In reſpect of the ground & end of it.

And the laſt thing required in every well-made deed is, that it have a good foundation, and be to a good end, for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, ſealed, and delivered, yet it may be void or at leaſt voidable for others cauſes, as when it is either unjuſtly gotten and obtained, or corruptly in purſuit and execution of ſome diſhoneſt agreement, or to a diſhoneſt end or purpoſe made. A deed therefore, whether it be a feoffment, gift, grant, leaſe, releaſe, confirmation or obligation that is made or obtained by *manaſſe*, or *dureſſe*, that is forced by feare of beating or Impriſonment, or made in purſuit of an uſurious contract or for that it was made fraudulently, or made againſt the ſtatute 23 *H.* 6. it may be voyd or voidable at leaſt. See the Titles and obligation. *Co.* 2. 9. *Perk. Sect.* 16. *Dyer.* 143. 45 *E.* 3. 6.

6 where a deed good in his creation may become void by matter *ex poſt facto*. And what wil make ſuch a deed void or not. 1. By Raſure.

If a deed that is well and ſufficiently made in his Creation ſhall be afterwards altered by raſure, interlining, addition, drawing a line through the words (though they be ſtill legible) or by writing new letters upon the old in any materiall place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted or in the limitation of the eſtate, or if it be in an Obligation, when the word [Heires] ſhall be inſerted, or the ſumme increaſed, or in the date of either, or the like; be the ſame either by the party himſelf that hath the property of the deed or any other whomſoever, except it be by him that is bound by the deed; and be the ſame with or without the conſent of him to whom it is made or doth belong; in this caſe and by either of theſe meanes the deed hath loſt his force and is become void. *Co.* 11. 27. 5. 11. 9. *Dyer* 59. 261. *Perk. Sect.* 123. 135. *Kelw.* 162. *Fitz Releaſe.* 27. 14 *H.* 8. 25. *Bro. Fait.* 9.

And if the alteration be made by the party himſelf that oweth the deed, albeit it be in a place not materiall, and that it tend to the advantage of the other party and his owne diſadvantage, yet the deed is hereby become void.

But

But if the alteration be made by the party himſelf that is bound by the Deed in any materiall or immateriall part thereof, or a ſtranger without the privity or conſent of the owner of the Deed ſhall make any ſuch alteration in any part of a Deed not materiall, (as if it be a Deed of a grant containing a leaſe for years, and there be inſerted between [To have and to hold] and [for 30 years] theſe words [from henceforth :] Or if it be an obligation and there be inſerted between [*Obligo me*] and [*per preſentes*] theſe words [*Executores meos*] in both which caſes thoſe words are needleſs and without any fruit at all ; hereby the Deed is not hurt, but it remaineth good notwithſtanding. But if the alteration be before the delivery of the Deed, be it whatſoever or by whomſoever, it will not hurt the Deed. And herein it muſt be obſerved that then a raſure, &c. is moſt dangerous, and the Deed thereby moſt ſuſpitious when it is in a Deed Poll and there is but one part of the Deed ; and when the raſure or other alteration is in any materiall part of the Deed ; and when the alteration makes to the advantage of him that doth owe the Deed, and to the diſadvantage of the other that made it ; and when there doth appeare ſome other thing to be written before, and when there is no other part of the Deed, recitall, defeaſance, or other matter to which this may be compared, and that may make it appeare to be before the delivery ; and when there be other parts of the Deed or other matters whereunto this being compared doth not agree in that part wherein the alteration is, and when the Deed hath been in the ſmoke, or any ſuch like means hath been uſed to cover the alteration. And in theſe caſes the matter was anciently uſed to be tried by the Judges upon the view of the Deed ; but it is now uſed to be tried by Jurors, whether the raſure, or other alteration were before the delivery of the Deed or not. *Perk. ſect.* 123. 124. *Bro. Fait* 6. *Perk.* 129. 127. 128, *Co. ſuper Litt.* 225.

2. By breaking or defacing of the Seale.

And if after the ſealing, delivery and perfection of a Deed, the ſeale thereof happen to be broken off, or to be utterly defaced, ſo that no ſigne or print thereof can be ſeen, or it appeareth to have been broken off and it is glued, or the wax new heat and ſet on again ; or the labell of the Deed hath been broken off from the Deed and is ſewed on again ; or the Deed is new ſealed with other wax, be the ſame by whatſoever means, or whomſoever, unleſs it be by him and his means that is bound by the deed ; in theſe caſes and by either of theſe means the deed is become void. If *A. B.* and *C.* be bound joyntlie and ſeverally in a Bond, and the Seales of *A.* and *B.* are eaten off with Mice and Rats, it ſeems by this the Deed is become void as to all 3 of them. *March* 127. *Pl.* 204. But if any piece of the ſeale remain fixed to the Deed, and there be any print left upon that peece, the Deed doth continue good. And if after the ſeale of a Deed be broken off the party that ſealed it doe ſeale and deliver it *de novo* ; by this means it ſeems the Deed is become good again. *Dier.* 59. *Co.* 11. 28. 5, 23. *Dier.* 112. *Perk ſect.* 135. 136. *Bro Oblig.* 83.

3 By redelivery or cancelling of it.

And if a Deed be delivered up to the party that is bound by it to be cancelled and it be ſo : or if he that hath the Deed doth by agreement between him and the other cancell the Deed ; by either of theſe means the Deed is become void. But if an Obligee deliver up an Obligation to be cancelled, and the obligor doe not afterwards cancell him, but the obligee happen to get him again into his hands, and ſue the obligor upon him, the obligor hath not any plea to avoid him, for the Deed remains ſtill in force. *Trin.* 38 *El. Co. B. Dier* 112.

4 By diſagreement.

And if an Obligation be delivered as an Eſcrow to a ſtranger to be delivered to the obligee on certain conditions, or to a ſtranger to the uſe of the Obligee, and when this is after tendred to the Obligee he doth refuſe it and diſagree to it ; or if an Obligation be made to a feme covert, and her husband diſagree to it, in all theſe caſes the Deed is become void. And like Law is of other Deeds in divers ſuch like caſes, but the party bound by the Deed may not in theſe caſes plead *non eſt factum* to the Deed. And in theſe caſes when the party hath once by his agreement made the Deed good, he cannot afterwards by his diſagreement make it void : and when once by refuſall and diſagreement he hath made the Deed void, he cannot by agreement on acceptance afterwards make it good. *Co.* 3. 26. 5. 119. *Dier* 167.

Agreement.

5. By Judgement of a Court, Vacat of a Deed.

A Deed alſo good in his Originall Creation may be afterwards damned or avoided by ſentence and order of a Court, and this is uſually done in the Starr-Chamber and in the Chancery, and it is when it appeareth that the Deed was obtained by ſome fraud, force, circumvention or ſuch like practiſe, or when it doth appear to be forged, or the like, or otherwiſe; ſee *Brownlows Rep.* 1 *part.* 45. 51. *Crom. Jur.* 29. 40. *Bro: Fait.* 38.

7. When and where a Deed may be good in part and void in part. Or good againſt one perſon and void againſt another. Or not.

For the anſwer of this queſtion theſe differences muſt be obſerved. 1. When a Deed is void *ab initio*, and when it doth become void by matter *ex poſt facto*. 2. When the Deed which is void in part from the beginning is entire, and when it doth conſiſt of ſeverall clauſes: and when it doth conſiſt of ſeverall clauſes when the ſeverall clauſes are abſolute and diſtinct, and when they are ſeverall and yet the one hath dependency upon the other. For if any of the Covenants of an Indenture, or the conditons of an Obligation be againſt Law, and the reſt of the Covenants or conditions be good and Lawfull; in this caſe thoſe that are againſt Law and the Deed as to that part are void *ab initio*, and the reſt and the Deed as for that part are good *ab initio*. So if three diſtinct Obligations are written upon a peece of parchments, and the one of them only, read to the Obligor, and he being an illiterate man ſeale and deliver the Deed, in this caſe this is a good Deed for that which was read; and void for the reſt *ab initio*. But if an Obligation be for 20 l. and it be read to the Obligor an Obligation of 20 s. this is void for the whole *ab initio*. *Co.* 11. 27. 14 *H.* 8. 27. 28. 29.

If a Deed be read as containing the grant or gift of an eſtate taile, and a Letter of Atturney to give Livery of Seiſin, and in that ſenſe the party doth ſeale it, and in truth it is a Feoffment and conveyance of an eſtate in Fee-ſimple; in this caſe albeit the Letter of Atturney were truly read, yet becauſe it hath dependence on the eſtate, it is void for all. *Co.* 11. 27. *Kelw.* 70. 3 *E.* 30. 31.

If a man be indebted to me 20 l. on a Contract, and 100 l. on an Obligation, and he pay me this 20 l. and I am to make a releaſe for it, and the intendment of the releaſe is no more, and it is read to me being an illiterate man, but in truth it is a generall releaſe, in this caſe it ſeems it is good for ſo much as it is intended, and was declared void for the reſt. *Co.* 11. 28. *Fitz. Feoffments & Faits.* 57. 47 *E.* 3. 3.

If the condition of an obligation be altered by raſure, &c. the Obligation alſo is hereby become void, becauſe the condition and obligation are one Deed, but if the raſure, &c. be in the defeaſance of on Obligation, this will not make the Obligation void, *Dier.* 27.

If a Deed containe divers diſtinct and abſolute Covenants, and any of theſe Covenants be altered by Addition, Interlineation, Raſure or the like, by this means the whole Deed and not that part only is become void. 14 *H.* 8. 25. 26. *Co.* 11. 28,

If there be divers Grantors, Obligors, &c, named in a Deed and one of them only doe ſeale the Deed, this is a good Deed as againſt him that doth ſeale and void as to all the reſt that doe not ſeale. And if divers enter into Covenants by a Deed ſeverally, and the ſeale of one of them is broken from the Deed; in this caſe the Deed is good ſtill as to all the reſt, but void as to him. But if an Obligation, or the Covenants of a Deed be joynt and not ſeverall, or joint and ſeverall, and the ſeale of one of the Obligors or Covenantors is broken, or the Obligation or Covenants be altered by raſure or the like, hereby the whole Deed is become void. *Co.* 5. 23. 11. 28. 3 *H.* 7. 5.

And it is a Rule that if an Obligee by his Act or his own Lacheſſe diſcharge one of the Obligors, where they are ioyntlie and ſeverally bound, this doth diſcharge them all. *March* 126. *pl.* 206.

If I be bound in an Obligation to a Monk and *I. S.* this Deed is void as to the Monk, but good as to *I. S.* So if a Monk and I be bound to another; this is good as againſt me, but void as againſt the Monk. And ſo it is in caſe of a Grant. 14 *H.* 8 29. *Perk. f.* 2.

By a power of revocation or a condition a Deed may be made void in part and continue in his force for another part. And therefore it ſeems in the uſuall caſe where a Deed is made upon condition that if ſuch a thing be, or be not done, that the

the Deed ſhall be void, or that theſe preſents ſhall be void; that in theſe caſes the whole Deed and all the Covenants therein contained are void; But if the frame of the condition be, that upon ſuch a thing to be or not to be done, it ſhall be lawfull for the Feoffor, Leſſor, &c. to re-enter, or that the demiſe ſhall be void, without more words; in theſe caſes the eſtate only and thoſe Covenants that are incident thereunto, as for quiet enjoying and the like, and the Deed as to that part only is void: and for other Covenants that are Collaterall and have no dependence upon the eſtate that the Deed doth remain in force and is good ſtill, for a man may grant two acres upon condition to re-enter into one of them. If it be intended that the whole Deed ſhall be void, the beſt way is to uſe theſe words[then theſe preſents and every thing therein contained ſhall be utterly void.] *Co.* 1. 173. *Dier.* 127. *See in Leaks Numb.* 13.

3 How and to what time a Deed ſhall have relation, and when it ſhall begin to take effect.

All Deeds doe take effect from, and therefore have relation to the time not of their date but of their delivery: and this is alwaies preſumed to be the time of their date unleſs the contrary doe appear. And hence it is, That if a Statute be acknowledged the 26. day of *May*, and the Conuſee make a releaſe of all demands dated the 25. day and deliver it the 27 day; that by this releaſe the Statute is diſcharged.

And if the defeaſance of a Statute doe beare date before, and the delivery of it be after the Statute; that the conuſor may ſhew this and take advantage of it in avoidance of the Statute. And that if a writing be dated in the minority of an Infant and be ſealed and delivered by him when he is of full age, that this is a good Deed and will bind him. And that if a releaſe be ſuppoſed to be made by a husband to barr a duty due to the Wife, and it be dated during the Coverture but in truth it is ſealed and delivered by the Husband before the Coverture, that this ſhall not barr the Wife: the time therefore of delivery of a Deed is materiall in all theſe and the like caſes, and this is alwayes to be tried by a Jury. And hence it is alſo, That if the next preſentation to a Church be granted to two ſeverall perſons by ſeverall Deeds of ſeverall dates, and the Deed that beareth the laſt date be firſt delivered; in this caſe he to whom this Deed is made ſhall have the Preſentation, and not the other whoſe Deed albeit it be dated firſt yet is delivered laſt. And hence it is alſo that if a Leaſe be made for years, to begin from henceforth, or *á confectione preſentium*, or *á die confectionis*; that this leaſe ſhall be ſaid to begin from the time of the firſt delivery and not from the time of the date. *Co.* 2. 4. 5. 5 *H.* 7. 26. *Plow.* 491. *Dier* 307. 315. *Fits Feoffments & faits* 87. 63. 95. *Fitz. Feoffment & Faits. Barre* 147. *Co.* 5. 1.

Relation.

And where Deeds have a kind of double delivery, as in Caſe of a delivery as an Eſcrow, there they ſhall take effect from, and have relation to the time of the firſt delivery or not, *utres valeat*, for if relation may hurt and for ſome cauſe make void the Deed (as in ſome caſes it may) there it ſhall not relate. But if Relation may helpe it, as in caſe where a feme ſole deliver an Eſcrow and before the ſecond delivery ſhe is married or dieth, in this caſe if there were not a relation the Deed would be void, and therefore in this caſe it ſhall relate. And yet in *Goldsb.* 163. *Gawdie Fennor and Popham* Judges doubted of a Deed delivered by an Infant, and after the condition is performed in the time of his full age. And they affirme that a Deed delivered by a woman that hath a Husband as an Eſcrow to be delivered as her Deed, when her Husband is Dead and he die, and then it is delivered as her Deed, this is not good, for in both theſe caſes they ſay the firſt Act is void. So if one diſſeiſe me of two acres of Land in *D.* and I releaſe to him all my right in my Lands in *D.* and deliver it to an eſtranger as an Eſcrow, &c. untill a time and before that time he diſſeiſe me of another acre there; in this caſe this releaſe ſhall not by relation extend to this other acre to barr me of that alſo. But as to collaterall acts there ſhall be no relation at all in this caſe. And therefore if the Obligee releaſe before the ſecond delivery the releaſe is void and will not barr the party Obligee of the fruit of his Obligation. *Co.* 3. 35. 36. 18 *H.* 6. 9. 27 *H.* 6. 7. *Plow.* 344.

See Relation.

The expoſition of Deeds.

It is further to be obſerved that Deeds for the moſt part conſiſt of theſe things. *viz.* the Premiſſes, *Habendum*, *Tenendum*, *Reddendum*, or Reſervation, Condition, Warranty, & Covenant. And in the Premiſſes there is ſometimes a Recitall, & ſometimes

times an Exception contained. But all theſe are not eſſential parts of a Deed; for a Deed may be good, albeit it it have not all theſe parts, or it be not ſo formal and orderly drawn and made.

1. *Premiſſes*, what. The Premiſſes of a Deed, is all the forepart of the Deed before the *Habendum*. And yet this word is ſometimes taken for the thing demiſed or granted by the Deed. And the office of this part of the Deed is rightly to name the Grantor and Grantee, and to comprehend the certainty of the thing granted, either by expreſs words, or by that which by reference may be reduced to a certainty; and the Exception, or thing to be excepted, if there be any. And in this part of the Deed is the Recital (if there be any in the Deed) for the moſt part contained. And herein alſo is ſometimes (though improperly) ſet down the Eſtate. *Co. ſup Lit.* 6, 7. 11. 51. 2. 55: *Plo.* 196.

2. *Habendum*, what. The *Habendum* of a Deed, is that part of a Deed which doth begin with, *To have and to hold:* And this doth properly ſucceed the Premiſſes. And the office hereof is to ſet down again the name of the Grantee, the Eſtate that is to be made and limited, or the time that the Grantee ſhall have in the thing granted or demiſed, and to what uſe. And herein alſo is ſometimes, though needleſly, ſet down again the thing granted. *Co ſuper Lit.* 6, 7, 10. 107.

3. Where a Deed is good, notwithſtanding ſome ſeeming fault in the Premiſſes or *Habendum*. But the Deed that doth uſually conſiſt of all theſe parts, may be good, notwithſtanding ſome of them be omitted, and it be not ſo formally made. For an Eſtate may be made by a Deed, without any *Habendum* at all: As if one give or grant Land to another and his Heirs, without any more words in the Deed: Or if one give or grant Land to another, and limit no Eſtate, without any *Habendum* in the Deed, and ſeal and deliver this Deed, and make Livery accordingly; in both theſe caſes the Deed is good; and in the firſt caſe an Eſtate in Fee-ſimple is made, and in the laſt caſe an Eſtate for life is made. And if the name of the Grantee be not contained in the Premiſſes, yet if it be in the *Habendum*, it may be good enough: As if one give or grant Land *Habendum* to *B.* and his Heirs, and he is not named in the Premiſſes, yet this is a good Deed to make an Eſtate in Fee-ſimple. *Butlers* Caſe, 22 *Eliz. per* two Chief Juſtices, accord. *Gar. Rep.* 85. And yet if the thing granted be only in the *Habendum*, and not in the Premiſſes of the Deed, the Deed will not paſs it. And therefore if a man grant Black-acre only in the Premiſſes of a Deed, *Habendum* Black-acre and White acre; White-acre will not paſs by this Deed, *Plo.* 152. *Dyer* 96 *Perk.* 251. But if the thing newly added be implied in the thing granted by the Premiſſes of the Deed, as being an Incident thereunto or otherwiſe; or it be the ſame thing, and expreſſed in other words only; in theſe caſes the Premiſſes and the *Habendum* may ſtand together. As if one grant a Manor, *Habendum* the Manor with the Advowſon appendant to the Manor; or if one grant a Reverſion of Land by the name of a Reverſion in the Premiſſes, *Habendum* the Land it ſelf; in both theſe caſes the Deed is good, and the Advowſon and Reverſion will paſs. So alſo if Livery of Seiſin be made of the thing newly added, in this caſe perhaps it may paſs by the Livery. And if the thing granted be left out in all, or part in the *Habendum*, yet the Grant is good. And therefore if one grant Land to *A. Habend.* to *A.* his Heirs &c. or if one grant White-acre and Black-acre to *A. Habend.* White-acre, and omit Black-acre; yet theſe Deeds are good, and all that is contained in the Premiſſes of the Deed doth paſs in both caſes. And if a Feoffment be made to one, *Habendum* to him and his heirs, without the word Aſſigns; this is a good Feoffment, and the Eſtate thereby made is aſſignable: As where a Leaſe is made to one, his Executors and Adminiſtrators, without the word Aſſigns, this is a good Leaſe and aſſignable. So if one grant Land to *A. Habendum* to him for 100 years, or *Habendum* to him and his Aſſigns for 100 years; theſe are as good Leaſes as the Leaſe that is made by theſe words, *Habendum* to *A.* his Executors, Adminiſtrators and Aſſigns for 100 years. So if a Leaſe of Land be made to *A. Habendum* the Land to him and his Heirs for 100 years; this is a good *Habendum*, and the word [Heirs] is void, and it ſhall go to his Executors, &c. As alſo where Land is granted to *A. Habendum* to him and his Succeſſors for 100 years; this is a good Leaſe, and the word [Succeſſors] void, for it ſhall go to Executors, &c. And if a Leaſe be made *Habendum* for years, and ſay not how many years; this is a good *Habendum*, and a Leaſe for two years. *Lit.* 1. *Co. ſuper Lit.* 46. *Co.* 6. 35. *New Terms of the Law, tit. Aſſigns.*

A Recitall is the ſetting down or report of ſomthing done before. 3. Recital. *Quid*

When a man is to take any new eſtate from the King of a thing whereof there is any eſtate in being, there the former eſtate if it be good and of record muſt be rehearſed and recited in the deed, or elſe the ſecond grant will not be good: but in caſe of a common Perſon there needs no ſuch recitall, neither when a man is to derive an eſtate out of a former, or aſſigne over a terme of years, is it needfull there ſhould be any recitall of the former eſtate in being: *Co* 1.45. *Dier*:77. 4. Where it is needfull; or not

If one recite or rehearſe an eſtate made for terme of years, and then after grant over that terme to another, and miſtake in the recitall; this miſtake may make all void. As if a *Fieri facias* come to a Sheriffe to levy a debt, and he by writing recite that the defendant hath a terme of years, and doth ſuppoſe it to begin 1. *Maii*, 2. *Iac.* when in truth it doth begin the 20. of *Auguſt*, and then ſell the ſame terme; in this caſe this ſale is void. But if he adde withall theſe words in the deed [And al the intereſt that the defendant had in the land] or if he make ſale of it for a certain number of years only; this grant may be good not withſtanding the miſrecitall: *Co*. 4.74. *Sect.* 8

5. Where miſrecitall will hurt a deed; or not.

If one recite a former leaſe to be made ſuch a day to *I S* and then make a new leaſe to begin after the end of the former leaſe, and miſtake the date of the old leaſe; in this caſe the deed is good notwithſtanding this miſtake: *Dier*:93.160.

If one grant a reverſion, and in reciting the leaſe in poſſeſſion miſtake the date of it only and recite all the reſt truly; this will not hurt the grant: No more then where a man doth recite that the leaſe came to him by forfeiture, and then doth grant it by fine: for in this caſe albeit it did not come to him by forfeiture but by ſurrender, yet this miſtake will not hurt. And yet in caſe of the King ſuch a miſrecital may make the grant void. 8 *H.7.3. Fitz. Grant.*

If I grant to *I S* all the lands in Dale which I purchaſed from *I D* or which came unto me by deſcent from *I D*, or I give all my goods to *I S* which I have as executor to *I D*. and in truth I have no ſuch lands or goods, but I had them by ſome other meanes or of ſome other; in theſe caſes and by this miſtake the deed is void. But if I grant to *I S* all my lands in Dale by name, as white acre, which I purchaſed of *I D* and in truth I did purchaſe them of another; in this caſe this miſtake will not hurt the deed. So if I grant 20. load of wood in Dale in the great wood which I had of the grant of my father, and in truth I had not of the grant of my father, but of the grant of another; in this caſe the grant is good. But of this matter ſee more in Grant, *Numb*: 4. *part*. 5. *Dier*. 50. 87. 376.

An Exception is a clauſe of a deed whereby the feoffor, donor, grantor, leſſor, &c. doth except ſomewhat out of that which he had granted before by the deed: And this doth moſt commonly and properly ſucceed the ſetting down of the things granted, and is made by one of theſe words *Except*, *Preter*, *Salvo*, *Si non*, or ſuch like. And hereby the thing excepted is exempted and doth not paſſe by the grant, neither is it parcell of the thing granted: as if a manor be granted excepting one acre thereof, hereby in Judgement of Law that acre is ſevered from the manor: But this may be in any part of the deed and ſo hath it bin reſolved. *Hil.* 17. *Car. Plo*. 361. 195: 6. Exception, *Quid.*

In every good Exception theſe things muſt alwaies concurre, 1: This Exception muſt be by apt words. 2. It muſt be of part of the thing granted and not of ſome other thing: 3. It muſt be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It muſt be of ſuch a thing as is ſeverable from the thing which is granted, and not of an inſeparable incident: 5. It muſt be of ſuch a thing as he that doth except may have and doth properly belong to him. 6. It muſt be of a particular thing out of a generall, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It muſt be certainly deſcribed and ſet downe. *B R Fregunnels Caſe. Perk. ſect*. 62. *&c. Plow*: 19. *Co. ſuper Litt*. 47. 7. what ſhall be ſaid a good exception; or not.

As for examples. If a man grant all his lands in *Eſſex* ſaving, beſides, or except his lands in Dale, or all his lands in Dale excepting one houſe, or one acre in certain; or one houſe excepting one chamber in certaine; theſe and ſuch like Exceptions are good. *Plow*. 195: *Perk. ſect*. 641.

And if one grant a manor excepting one Tenement (parcell of the manor) or excepting the ſervices of *I S* (who doth hold of the manor) or excepting one Cloſe

or excepting one acre, or excepting the advowſon appendant, or excepting the woods, or excepting twenty acres of wood or excepting all the groſſe trees; theſe are good exceptions. *Brownlo.* 1 *part.* 141. *Dier.* 103. *Plow.* 104. 361. 67. *Co.* 8. 63. 11. 47. 5 11. *Perk Sect.* 642. 3 *H:* 6: 35:

And if one grant a meſuage and houſes thereunto belonging excepting the barne or excepting the dove-houſe; it ſeemes this is a good exception, for they may paſſe by the grant of a meſuage &c. And if one grant land excepting the Timber trees thereupon, or excepting the trees thereupon; or if a man ſell a wood excepting 20 of the beſt oakes, and ſhew which in certain; theſe are good exceptions: So if one have a manor wherein is a wood called the great wood, and he grant his manor excepting all the woods and underwoods that grow in the great wood and all the trees that grow elſewhere, this is a good exception. 14 *H:* 8. 1. *Co.* 8. 63. 5. 23. *In the caſe of Haward & Fulcher. Hil:* 3: *Car: B: R: Co:* 11: 64:

And if one grant a meſſuage and all the lands and tenements thereunto belonging excepting one cottage; this is a good exception: And if one grant a reverſion excepting the rent; this is a good exception of the rent and doth keep it from paſſing by the grant: So if a man have a rent charge out of land and he releaſe his right in the land except the rent; So if the Lord releaſe to his Tenant *Salvo dominio ſuo, &c:* theſe are good exceptions. And if one grant all his horſes except his white horſe; this is a good exception of the white horſe: *Per Sect:* 118: 644: *Dier:* 57: *Plow.* 361:

And if a man be ſeiſed of a manor, and leaſe it by deed indented for life *exceptis & reſervatis quod bene liceat* to the leſſor *ſuccidere, dare, & vendere omnes groſſas arbors in dicto manerio creſcentes &c:* it ſeems this is a good exception of the trees: But if the exception be of another thing then the thing granted. As if one grant a manor or land excepting 12:d or excepting the Tithes, or excepting one acre of ground which is no parcell of the manor or of the land before granted; or if one grant the land deſcended to him of the part of his father excepting the land deſcended to him of the part of his mother; theſe exceptions are void. Or if the exception be ſuch as it is repugnant to the grant and doth utterly ſubvert it and take away the fruit of it, as if one grant a manor or land to another excepting the profits thereof; or make a feoffment of a cloſe o fmeadow or paſture, reſerving or excepting the graſſe of it; or grant a manor excepting the ſervices; theſe are void exceptions. 2 *H.* 6. 45. *Perk. Sect.* 643. *Perk Sect* 639 *Dier.* 59. *Plow.* 361: 67. 370. *Dier.* 97. 264. *Co. ſuper Lit.* 47. *Plow.* 153. 103, 104-14 *H.* 8. 1. *Doct. & ſtud.* 98. *Dier.* 59. 263.

So if one grant his houſe, chambers, cellars, and ſhops, excepting his ſhops; it is ſaid this is no good exception. And by the like reaſon if one grant his meadow and paſture grounds except his meadow grounds, this exception is not good no more then if one grant two manors or two acres excepting one of them. And of this opinion was the Chiefe Juſtice in *B. R. Hil.* 3. *Car.* in the caſe of *Haward* and *Fulcher.*

And yet if a man make a leaſe for yeares of a Mill excepting the profits thereof during the life of the leſſor; it is ſaid, this hath been adjudged a good exception:

But I doubt of this caſe, for the exception of the profits of a thing is the exception of the thing it ſelfe. And a man cannot grant an eſtate and reſerve a part of the eſtate as make a feoffment in fee and reſerve a leaſe for life, or grant an Advowſon and reſerve the Preſentation for his life. Or if the exception be of an inſeparable incident and a thing that cannot be granted by it ſelfe and from another, as if a manor be granted excepting the Court Baron, or land be granted excepting the common appendant thereunto belonging; theſe exceptions are void. But exceptions of ſeverable incidents are good. *Plow.* 524. *Dier.* 264: *Br. grant.* 60. 38 *H.* 6. 38. *Co ſuper Lit.* 150. *Co:* 5. 12. *Hil* 9. *Iac: B: R. per Curiam.*

Or if the exception be of ſuch a thing as the grantor cannot have nor doth belong to him by law; as if a leſſee for years aſſigne over all his terme in the land excepting the Timber trees, earth or clay; this exception is not good. *This difference hath been agreed.*

But

But if leſſee for life make a leaſe for years, or leſſee for 21. years make a leaſe for 20. years; or tenant by the courteſie or in dower grant over their eſtate excepting the Timber trees; theſe are good exceptions. And if a leſſee for life or years open a Cole-mine and then aſſigne over his eſtate excepting the mine or the profits thereof; theſe are void exceptions. Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre excepting white acre or grant 20. acres of land by particular names excepting one acre of them; theſe exceptions are void.

Or if the exception be ſet downe incertainly, as if one grant a houſe excepting one chamber; or grant a manor excepting one acre, but doth not ſet forth which chamber or which acre it ſhall be; theſe exceptions are void. *Co. ſuper Lit.* 47. *Plow.* 53. *Perk. Sect* 643. 641.

Sect. 9

A *Tenendum* is a clauſe of the deed whereby the tenure was heretofore created. And this doth moſt commonly and properly ſucceed the *Habendum*, and was made by this word *Tenendum per ſervicium &c.* But ſithence the Statute of *Quia emptores terrarum* when the fee ſimple doth paſſe the tenure is alwaies of the chiefe Lord and is thus ſet forth, *Tenendum de capitalibus dominis &c.* And this clauſe at this day is for the moſt part omitted altogether. *Co. ſuper Litt.* 6 *&* *Co.* 9. 130. 8. *Tenendum*, what.

A Reſervation is a clauſe of a deed whereby the feoffor, donor, leſſor, grantor &c. doth reſerve ſome new thing to himſelfe out of that which he granted before. And this doth moſt commonly and properly ſucceed the *Tenendum*, and is made by one or more of theſe words *Reddend'*, *reſervand'*, *ſolvend'*, *faciend'*, *inveniend'*, or ſuch like. This doth differ from an exception which is ever of part of the thing granted and of a thing in *eſſe* at the time, but this is of a thing newly created or reſerved out of a thing demiſed that was not in *eſſe* before; ſo that this doth alwaies reſerve that which was not before or abridge the tenure of that which was before. *Co.* 10. 107. *Plow.* 132. *Co. ſuper Litt.* 47. *Perk. Sect.* 625. 9. Reſervation or *Reddendum*, what.

In every good reſervation theſe things muſt alwaies concurre.

1. It muſt be by apt words. 2. It muſt be of ſome other thing iſſuing or comming out of the thing granted and not a part of the thing it ſelfe nor of ſome thing iſſuing out of another thing. 3. It muſt be of ſuch a thing whereunto the grantor may have reſort to diſtraine. 4. It muſt be made to one of the grantors and not to a ſtranger to the deed. As for examples, If a man grant land yeelding and paying money or ſome ſuch like thing yearly, this is a good reſervation. But if the grantee covenant to pay ſuch a ſumme of money, or to doe ſuch a thing yearly; this is no good reſervation, but a covenant to pay a ſumme of money in groſſe and not as a rent. If a leaſe be made for years rendering a reſt to the leſſor or his heirs, in the diſjunctive; or rendering a rent to the leſſor, without ſaying [and his heirs &c.] or rendring a rent during the ſaid term; and doth not ſay to whom; or rendering 10 l. to the leſſor and 5 l. to his heirs; all theſe reſervations are good. But if a leaſe be made rendering rent to the heires of the leſſor; this reſervation is void becauſe the rent is not reſerved to himſelfe firſt. *Plow.* 132. *Perk. ſect.* 626. *Co.* 8. 71. *Plow.* 132. *Co.* 5. 111. 8. 71. *ſuper Litt.* 214. 213. 99. 10. What ſhall be ſaid a good reſervation. And what not

Covenant.

If one grant land, yeelding for rent, money, corne, a horſe, ſpurres, a roſe, or any ſuch like things; this is a good reſervation: but if the reſervation be of the graſſe, or of the veſture of the land, or of a Common or other profit to be taken out of the land; theſe reſervations are void. If one grant a manor, meſuage, land, meadow, or paſture, or the veſture or herbage of land, meadow or paſture, rendring a rent; this is a good reſervation. *Co. ſuper Litt* 142. *Co. ſuper Litt.* 47. *Co.* 5. 3. *Perk. Sect.* 626.

But if one grant Tithes, rents, commons, advowſons, offices, a corody, mulcture of a Mill; a Faire, market, priviledge, or liberty, reſerving a rent; this reſervation is void: And yet ſuch a reſervation alſo in caſe of the King is good. And in caſe of a Subject alſo, if a leaſe be made by deed in writing of any ſuch thing for a terme of years reſerving a rent; this may be good by way of contract to produce an action of debt, though not as a rent to be diſtrained for: And thus by apt words an apt rent out of manors and ſuch like memorable things, or divers rents may be reſerved upon one grant: *Co.* 5. 55, *Dier.* 308, *Co. ſuper Lit.* 47. 164, 213.

Prerogative.

Debt

As if one grant the Manors of *A.* *B.* and *C.* rendring for *A.* 20s. for *B* 20s. and for *C.* 20s. theſe are good Rents and ſeverall. So if one grant the manors of *A.* *B.* and *C.* rendering 3 *l. viz.* for *A* 20 *s.* for *B* 20 *s.* and for *C* 20 *s.* this is a good reſervation, but in this caſe the rent is intire. Alſo one may reſerve one Rent one year and another Rent another year, as 10 *s.* one year, and 20 *s.* another year, or one may reſerve a Rent to be paid every ſecond or third year, and no Rent the other years; or one may reſerve one kinde of rent one year, and another kinde of rent another year; and theſe reſervations are good. *Co. ſuper Lit.* 225. 8 *H.* 7. 9. *Bro. Fine* 36. *Reſervation* 4.

And theſe reſervations may be by Fine as well as by Deed, or it may be in caſe where the Leſſor hath a reverſion of the land, or upon a partition to make an equality without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. If two Joint tenants joine in the grant of their land by deed indented, and the rent is reſerved to one of them; this is a good reſervation and ſhall goe to him alone. But if it be by word or by deed Poll that the leaſe is made the rent ſhall goe to them both. And if a man poſſeſſed of a Terme joine his wife with him, and they both aſſign over this Terme by indenture rendring a rent to them two and the ſurvivor of them, and ſhee doth not ſeale the deed; in this caſe the reſervation as to the wife is void. And if the reſervation be of the rent to a ſtranger that is no party to the deed and to him only, this reſervation is void. And therefore if the father and his ſon and heire apparant by indenture leaſe his land for years to beginne after the fathers death rendering rent to the ſon, it is void. *See Brownl.* 1. *part.* 0, 31. 39. 80. *Co. ſuper Litt.* 214. 143. 47. *Dier.* 222. *Adjudge Mich* 8. *Car. in Blands caſe. Hobarts Rep.* 274. *Oates & Fith Co.* 3.

10. Condition, what. A Condition is a clauſe of reſtraint in a deed or a bridle annexed and joyned to an eſtate ſtaying and ſuſpending the ſame and making it incertaine whether it ſhall take effect or no.

11. Warranty, what. A Warranty is a clauſe or covenant made in a deed by the one party unto the other, whereby the feoffor, donor or leſſor doth for him and his heires grant to warrant and ſecure land granted to the feoffee, donee or leſſee and his heires during the eſtate.

12. Covenant, what. A Covenant is a clauſe of agreement contained in a deed whereby either party is bound to doe, performe or give ſomething to the other. And of all theſe ſee at large afterwards.

Sect. 10

13. How & to what purpoſe a deed of grant in groſſe ſhall enure and be conſtrued and taken. In the Conſtruction of deeds it muſt be conſidered, 1. How a deed in the groſſe ſhall be taken and enure. 2. How it ſhall be taken and expounded in the ſeverall parts and pieces of it. And for the firſt theſe Rules are to be known. 1. If divers joine in a deed and ſome are able to make ſuch a deed and ſome are not, this ſhall be ſaid to be his deed alone that is able, as if divers joine in the grant of a thing by deed & one alone hath all the eſtate and the reſt have nothing in the thing granted; it ſhal be ſaid to be his grant alone that hath the eſtate. And ſo *é converſo.* If a deed be made to one that is uncapable and to others that are capable, in this caſe it ſhall enure only to him that is capable. 2. A deed that is intended and made to one purpoſe may enure to another, for if it will not take effect that way it is intended it may take effect another way. And therefore a deed made and intended for a releaſe may amount to a grant of a Reverſion, an Atturnement, or a Surrender, or *é converſo. Ce. ſuper Lit.* 302. *Perk. Sect.* 66. *Dier.* 251. *Co:* 2: 35: *& ſuper Litt.* 49:

And if a man have two ways to paſſe lands by the common law and he intendeth to paſſe them one way, and they will not paſſe that way; in this caſe *ut res valeat* it may paſſe the other way. As if a man be ſeiſed of two acres of land in fee, and letteth one of them for years, and after intending to paſſe them both by feoffment maketh a Charter of feoffment and maketh livery in the acre in poſſeſſion in the name of both the acres; in this caſe the acre in poſſeſſion only doth paſſe: but if the leſſee of the other acre atturne then the reverſion of that acre wil paſſe alſo. But where a man may paſſe lands by the Common law or by raiſing of a uſe and ſetling it by the Statute therein many caſes it is otherwiſe.

As if the father make a Charter of Feoffment to his ſon, and a letter of Atturney

to

to make livery, and no livery is made; in this caſe no uſe ſhall ariſe to the ſon. So if a man in conſideration of marriage make a Feoffment with a letter of Atturney to give livery, and no livery is made; in this caſe no uſe will ariſe. And ſo was it held by Ch. Juſtice *Popham B. R.* for the intention of the parties doth work much in the raiſing and direction of uſes. And therefore it is ſaid that when a man doth intend to paſs land one way it ſhall never paſs another way contrary to his intent: as if one covenant for good conſiderations to levy a fine of Land to the uſe of *I. S.* and his Heirs, if no fine be levied, no uſe ſhall ariſe upon the covenant. If one by words of Bargain ſell, give and grant, make a Feoffment of his houſe for money, and intending to paſs it by way of Bargaine and ſale and Inrolment the Deed being made there being a Maſter of the Chancery in the houſe whereof the Feoffment is made, he doth acknowledge and deliver the Deed before him, in this caſe if the Deed be not inrolled the conveyance is void and that delivery ſhall not amount to a livery of ſeiſin. *Dier* 96. 19 *Eliz. Thorold & Gordens caſe. Experientia.*

And yet when the intent is apparent to paſs it one way or another there it may be good either way, as where one doth make a Feoffment in Fee with a Letter of Atturney to make livery, and in the ſame Deed doth covenant in caſe livery of ſeiſin be not had to perfect the Deed to ſtand ſeiſed to the uſes of the Feoffment, in this caſe albeit no livery of ſeiſin be made or atturnement had to perfect the Feoffment or grant, yet if it be in ſuch a caſe where there is a conſideration ſufficient to raiſe the uſes by the covenant, the uſes will ariſe by the covenant. 3. When a Deed may enure to divers purpoſes, he to whom the Deed is made ſhall have election which way to take it and he may take it that way as ſhall be moſt for his advantage. As if a Deed of grant be made by the words *Dedi & conceſſi*; this in Law may amount to a Grant, Feoffment, Gift, Leaſe, Releaſe, Confirmation or ſurrender, and it is in the choiſe of the Grantee to plead or uſe it the one way or the other. So if a Leaſe for years be made to me of Land for money by the words Demiſe, Grant, bargain and ſell; I may take and uſe this by way of bargain and ſale, or by way of demiſe at my pleaſure. So if one have a Rent out of Land whereof I and my wife are jointly ſeiſed, and he doth by his Deed releaſe, give and grant this Rent to me, in this caſe I may uſe this as a releaſe to extinguiſh the Rent, or as a grant of the Rent as it may make moſt for my advantage. *Et ſic de ſimilibus.* But where any inconvenience may grow by ſuch an election, there the Grantee ſhall not have an election but it ſhall enure as it may, as where a man may paſs Land by the common Law or by raiſing of uſe and ſetling it by the Statute there ſometimes it is ſo. And therefore if in the ſame caſe before, a Father make a Charter of Feoffment to his ſon and a Letter of Atturney to make livery, and no livery is made; hereby no uſe will ariſe to the ſon as it will in caſe of a covenant. And if a leaſe for years be made of a Manor by the words bargaine, ſell, demiſe and grant, and this is to begin at a day to come; in this caſe it muſt paſs entirely as a demiſe at the common Law or entirely as a bargaine and ſale, and the Leſſee hath not election to take or uſe it otherwiſe or to uſe it for part one way and for part another way. *Co. Super Litt.* 301, *Dier.* 251. *Ci.* 2. 36. *Dier* 30. 302. *Dier* 109. 319. *Ce.* 2. 35. 36.

4. It ſhall enure as much as may be according to the apparent intent of the parties. And therefore it is that if a Feoffment be made of a Manor with an advowſon appendant; or a bargaine and ſale of Land in poſſeſſion and Land in reverſion together be made and the Feoffment is not well executed for want of livery of ſeiſin or Atturnement, or the Deed of bargaine and ſale is not inrolled; in theſe caſes albeit the advowſon may paſs without livery or Atturnement and the reverſion without inrolment, yet becauſe the intent doth appeare to be that all ſhall paſs together, therefore neither the advowſon nor the reverſion will paſs by this Deed. *Finches law.* 58.

5 When a Deed is made it ſhall enure as it may, and ſo as it may have and take the moſt and beſt effect that may be according to reaſon, as if Tenant for life or years and he in remainder or reverſion in fee joine in a Feoffment by Deed; this ſhall enure in the firſt caſe as the leaſe of the Tenant for life and the confirmation of him in the remainder or reverſion, and in the laſt caſe as the Feoffment of him in the reverſion, &c. and the ſurrender of the Leſſee for years to the Feoffee and no forfeiture of the eſtate in the Leſſee for life. But

But if in this caſe the Feoffment be by word, it ſeems it ſhall enure firſt as a ſurrender of the eſtate of the Tenant for life and then the Feoffment of him in reverſion *ut res valeat*. And if *A.* be Tenant for life the remainder to *B.* for life the remainder to *D.* in taile the remainder to the right Heirs of *B.* and *A.* and *B.* joine in a Feoffement by Deed, in this caſe this is the Feoffment of *A.* and confirmation of *B.* but a forfeiture of both their eſtates whereof the Tenant in taile may take preſent advantage. If Tenant for life grant a rent charge to him in reverſion in Fee, and he by his Deed doth grant this rent over to another and his Heirs; this is a good grant and confirmation alſo to make the rent paſs to the ſecond Grantee in Fee ſimple. So if a Diſſeiſor makea Leaſe for life the remainder to the Diſſeiſee and the Diſſeiſee doth grant the remainder over; this is a good grant and confirmation alſo. If *A* doe bargaine and ſell his Land to *B.* by indenture, and before inrolment they doe both grant a rent charge to *C.* by Deed and after the indenture is inrolled: in this caſe after the Inrolment this ſhall be ſaid to be the grant of *B.* and the confirmation of *A* and if the Deed be not inrolled it ſhall be ſaid to be the grant of *A.* and confirmation of *B.* If one make a Charter of Feoffment of one acre of Land to *A.* and his Heirs, and another Deed of the ſame acre to *A.* and the Heirs of his body, and deliver ſeiſin according to the forme and effect of both Deeds; it ſeemes this ſhall enure by moities, *viz.* he ſhall have an eſtate taile in the one moity with the Fee-ſimple ex pectant and a Fee-ſimple in the other moity.

Forfeiture.

If two ſeveral Tenants of ſeverall Land joine in a leaſe for years by Deed indented; theſe be ſeverall leaſes and ſeverall confirmations from each of them from whom no intereſt paſſeth and doth not worke by way of Eſtoppell. If *B.* Tenant for life of *C.* and he in remainder or reverſion in Fee of the ſame Land joine in a Leaſe for life or years by Deed indented; this ſhall enure during the life of *C.* as the Leaſe of *B:* and the confirmation of him in reverſion or remainder, and after the Death of *C.* as the leaſe of him in reverſion or remainder and the confirmation of *B* without any Eſtoppell. *Plow.* 140. 59. *Co. ſuper Litt.* 302. *Co.* 5. 15. *Co, ſuper Litt.* 147. *Co: ſuper Litt.* 21. *Co. ſuper Litt.* 45.

Eſtoppell.

If Tenant in taile and he in reverſion grant a rent-charge in Fee, it ſhall be taken the grant of the Tenant in taile and the confirmation of him in reverſion, but when the Tenant in taile dieth without iſſue, it ſhall be taken the ſole grant of him in reverſion. If two Jointenants bee in Fee of an acre of Land and they leaſe it to a ſtranger for life, and the Leſſee grant his eſtate to one of the Leſſors; in this caſe it ſeemes it ſhall enure for a moity by way of grant, and for the other moity by way of Surrender: ſee *Brownl.* 1. *part* 141. 2. *part* 51. 52. 291. *Perk. ſect.* 80.

If there be Lord and Tenant, and the Lord grant his Seigniory to his Tenant and to a ſtranger, this ſhall enure for a Moitie to the Tenant by way of Extinguiſhment, and for the other moitie to the ſtranger by way of grant. If Tenant for life of the grant of a woman ſole grant his eſtate to the husband of the wife, this ſhall enure for the whole by way of grant, *Perk. ſect.* 81. *Dier* 140. *Perk. ſect.* 82 83.

Sect. 11.

If a Leaſe be made for life the remainder for life to a ſtranger and the Leſſee grant his eſtate to his Leſſor; this ſhall enure by way of grant. If there be Lord and two Joint-tenants in Fee, and the Lord grant his Seigniory to one of his Tenants in Fee, it ſeems this ſhall take effect for the whole by way of extinguiſhment, If there be Leſſee for life and the reverſion deſcend to two coparceners, and one of them take a husband and the Leſſee grant his eſtate to the husband and wife; this ſhall enure by way of grant for the whole. If the Diſſeiſee and the heire of the Diſſeiſor (being in by deſcent) make a Feoffement by one Deed and livery of ſeiſin thereupon; this is the Feoffment of the heire only and the confirmation of the Diſſeiſee. *Co. ſuper Litt.* 372. *Co.* 7. 14. 1. 147. 148. 5 *E.* 4. 2.

6. If one have divers eſtates in Land and he make any charge or grant upon or out of it; this ſhall iſſue out of all his eſtate. And if one have a poſſeſſion and an ancient right, and grant a rent charge out of the Land, or make a Leaſe of the Land; this ſhall iſſue out of both the eſtates and it ſhall enure from him having ſeverall eſtates as it ſhall enure from ſeverall perſons having the ſame eſtates, *Per. ſ.* 592

6. If one that hath a rent charge out of a manor by grant reciting his grant,

grant

grant the ſame rent to a Leſſee for life of the manor out of which the rent doth iſſue to have and pertaine to him and his Heirs, and ſurrender to him the Deed; this ſhall not enure to extinguiſh the Rent but by way of grant, of which the Heir of the Leſſee for life may take advantage if he doe not by granting away the rent, purchaſing the reverſion of the manor or making a Feoffment of the manor and thereby committing a forfeiture, or by ſome ſuch like means prejudice himſelf, for by theſe means the rent will be extinct and determined. If a Diſſeiſor grant a Rent to the Diſſeiſee, and he by his Deed doth grant it over to another; or the Diſſeiſor make a Leaſe for life or gift in tayle the remainder to the Diſſeiſee, and the Diſſeiſee doth grant over this remainder, and the Tenant atturne; theſe grants of the Diſſeiſee ſhall be taken for a grant and a confirmation alſo *ne res pereat*. If there be Lord and Tenant of white acre and two other acres, and the Lord grant by Deed to his Tenant that he will not diſtrain his Tenant in white acre for his ſervice; this grant ſhall not enure to determine the Seigniory in any part, but as a covenant, ſo that if he doe diſtraine in white acre, the Tenant may have an action of Covenant. If a man have a wood of 100 acres, and he grant it to another for life or years, and that he ſhall cut therein 4 or 5 acres every year; in this caſe albeit the wood be granted and the grant ſhall enure to paſs it, yet the Grantee can cut no more but 4 or 5 acres by the yeare. And yet the Grantor as this caſe is, cannot himſelf cut any of the wood during the time, as in caſe where a man doth grant to another that he ſhall cut every year 4 or 5 acres in ſuch a wood; for in this caſe the grantor may notwithſtanding cut as much as he will. And here note that in all the caſes before according to the conſtruction that the Law makes of the Deed ſo muſt the party that is to uſe it, ſet it forth and plead it, as when it ſhall euure as a leaſe then it muſt be pleaded as a Leaſe, &c: See more in *Releaſe Numb.* 9 *Surrender Numb.* 7 *Confirmation Numb.* 7. *Co. ſuper Litt.* 302. *Perk ſect.* 69. *Mich.* 37 & 38. *Eliz. B. R. Curia.*

14. How a Deed or Grant ſhall be conſtrued and taken in all the parts and branches thereof, Generall Rules.

In the conſtruction of Deeds it muſt be obſerved that there are ſome generall rules that are appliable to all the parts of all kinds of Deeds, and ſome that are appliable only to ſome kind of Deeds and to ſome part of the Deed only. In the conſtruction therefore of all parts of all kinds of Deeds theſe rules are univerſally obſerved. *Co. ſuper Litt.* 313. *Litt ſect.* 563. *Plow.* 160. 154.

1. That the conſtruction be favourable and as neer to the minds and apparent intents of the parties as poſſibly it may be and law will permit. The interpretation of Deeds muſt be favourable for the ſimplicitie of lay men. And the words muſt follow the intent, and not the intent; the words, as if there be Lord and Tenant and the Tenant grant the Tenements to one man for Terme of his life the remainder to another in Fee, and the Lord grant the Services to the Tenant for life in Fee; in this caſe howbeit a grant may enure by way of releaſe, and a releaſe to the Tenant for life ſhall enure to him in remainder and is an extinguiſhment, yet becauſe this is contrary to the intent, it ſhall be taken for a ſuſpenſion only of the ſervices during the life of the Tenant for life, and the ſervices ſhall goe afterwards to his Heire. But if the intent of the parties be apparently againſt law then the conſtruction ſhall not apply the Deed to their intent, as if one give land ro another and his Heirs for 20 years; in this caſe the executor, and not the Heir, ſhall have this land after the death of him to whom it is given. So if one by Deed intending to give land to another, and his Heirs give the Land to him To have and to hold to him, or to him and his aſſigns for ever, without theſe words, [and his Heirs] this is but an eſtate for life at the moſt *Doct. & Stud.* 39 *Litt. cap.* 1 *Plow.* 161. 16 *H.* 8. 10. *Dier.* 15. *Fitz. Barr.* 237. *Bro. Don.* 14. 17 *E.* 3. 7. 46 *E.* 3. 17.

2. That the conſtruction be reaſonable and according to an indifferent and equall underſtanding, and therefore if I grant to another Common in all my Manor. this ſhall be expounded to extend to commonable places only, and not in my Gardens, Orchards, &c. And if I grant to one Eſtovers out of my Manor; he may not by this cut down my fruit-trees. And if one grant me (a Barreſter) a Fee *pro conſilio*; this ſhall be taken for counſell in Law only. And ſo in caſe of a Phyſitian. And if one grant to me to dig in all his Lands for tinne; I may not by this grant dig under his houſe. And if one grant me Common for all my beaſts; this ſhall be taken

for

for all my commonable beaſts, and not for goats and the like. And if one grant me all his trees in his manor; by this I ſhall not have his apple trees. And if one leaſe to me his houſe and Land to the end that I may make profit thereof in the beſt manner: by this grant I may not proſtrate the houſe or make waſt:

3. That too much regard be not had to the native and proper definition, ſignifications and acceptance of words and ſentences to pervert the ſimple intentions of the parties, for a manor may paſs by the name of a meſuage, or a Knights Fee, if it be uſed ſo to be called, *& ſic è converſo*, on the other ſide a meſuage by the name of a manor a remainder may be granted by the name of a Reverter, a Reverſion by the name of a Remainder: for the Law is not nice in grants, and therefore it doth oftentimes tranſpoſe words contrary to their order to bring them to the intention of the parties: neither falſe Latine nor falſe Engliſh will make a Deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives doe not make an affirmative when the apparent intent is contrary. *Plow.* 154. 170. 134 *Dier* 46. *Co. ſuper Litt.* 223. 146. 217. *Co.* 9. 48. 10. 143.

4 That the conſtruction be made upon the entire Deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none may be rejected, and that all the parts doe agree together and there be no diſcordance therein. If a man make a Feoffment of all his Land in *D.* with Common *in omnibus terris ſuis*; this Common ſhall be intended in the Lands granted in *D.* only, and not elſewhere, for it muſt be underſtood *ſecundum ſubjectam materiam*. The beſt expoſition is from the Coherence, and by that which doth goe before and follow after. It is an ill expoſition that doth corrupt the Text, according to the ſubject matter. *Plow* 160. 161.

5. That the conſtruction be ſuch as the whole Deed and every part of it may take effect and as much effect as may be to that purpoſe for which it is made, ſo as when the Deed cannot take effect according to the letter it be conſtrued ſo as it may take ſome effect or other; words muſt be underſtood with effect, and that the matter intended may have force. And therefore if an Annuity be granted *pro conſilio impendendo*, or a Feoffment made *ad erudiendum filium*, or *ad ſolvendum* 10s. theſe ſhall be conſtrued conditionall grants without any words of condition, for otherwiſe the party will be without remedy. *Lit. ſect.* 283. *Finches Ley.* 60 *Plow.* 160. 154.

6. That all the words of the Deed in conſtruction be taken moſt ſtrongly againſt him that doth ſpeake them and moſt in advantage of the other party, the words of Deeds are taken moſt ſtrongly againſt the ſpeaker. *Co. ſuper Lit.* 183. *Finches Law* 6. *Sect.* 12.

Forfeiture. And therefore if one ſeiſed of Land in Fee grant it to another, and ſay not for what time, this ſhall be taken an eſtate for life. But this is to be underſtood with this limetation, that no wrong be thereby done, for it is a Maxime in Law. *Quod legis conſtructio non facit injuriam.* The Law doth injurie to none. And therefore if Tenant for life grant the Land he doth hold for life to another, and doth not ſay for what time; this ſhall be taken an eſtate for his owne life, and not the life of the Grantee, for then it would be a forfeiture. So if one be ſeiſed of ſome Lands in Fee, and poſſeſſed of other Lands for years, all in one pariſh, and he grant all his Lands in that pariſh (without naming them) in Fee ſimple or for life; by this grant ſhall paſs no more but the Lands he hath in Fee ſimple. So if a man have a houſe wherewith there hath been Copyhold Land and other Land uſually occupied; and and he let this houſe and all his Land thereunto belonging; in this caſe and by this demiſe the Copy hold land doth not paſs; for in both theſe caſes then there would be a Forfeiture. But otherwiſe by theſe words all the Lands in both caſes would paſs. *Co. ſuper Litt.* 112.

7. That if there be two clauſes or parts of the Deed repugnant the one to the other, the firſt part ſhall be received, and the latter rejected, except there be ſome ſpeciall reaſon to the contrary, and therefore herein a Deed doth differ from a Will, for if there be two repugnant clauſes in a will, the firſt ſhall be rejected, and the latter received.

8. That that which is generally ſpoken be generally underſtood, unleſs it be qualified by ſome ſpeciall ſubſequent words, as it may be; for if one be ſeiſed of a manor

9. That if the words may have a double intendment and the one ſtandeth with law, and the other is againſt law, that it be taken in that ſence which is agreeable to law: and therefore if tenant in taile make a leaſe of land to *B* for term of life, and doe not mention for whoſe life it ſhall be; this ſhall be taken for the life of the leſſor and not for the life of the leſſee, as it ſhall be if ſuch a leaſe be made by tenant in fee ſimple. *9 Ed* 4:4.

10. That things doubtfully ſet down be applied to him to whom they doe properly belong. As if *I S* make a feoffment to one of his own name, and there is a covenant in the deed that *I S* ſhall deliver the deeds, this ſhall be taken of *I S* the feoffor and not *I S* the feoffee. *Co* 9.48 10.143.

11. That ſuch a conſtruction be made of abbreviations as the deed may not loſe his force, as if one grant *tot' ill' Maner' de D & C*, if it be but one manor, the words ſhall be taken for *totum illud Manerium*, if two manors, then it ſhall be taken for *tota illa maneria*. And here note that moſt of all theſe rules run through all the caſes of expoſition hereafter following, *Fit.Grant.*41:*Plow.*317. *Co.*5.12.22.*aſſ. Pl.* 61. *Perk:Sect.*110.

Touching things granted theſe rules are firſt to be known.

1. When any thing is granted all the means to attaine it and all the fruits and effects of it are granted alſo and ſhall paſſe *incluſive* together with the thing by the grant of the thing it ſelfe without the words *cum pertinentiis*, or any ſuch like words. As by the grant of Conuſance of pleas is granted the Ordinary proceſſe to bring cauſes to judgment. By the grant of a ground is granted away to it. By the grant of Trees is granted withall power to cut them down and take them away, by the grant of Mines is granted power to digge them; and by the grant of fiſh in a mans pond is granted power to come upon the banks and fiſh for them.

The expoſition of the ſeverall parts of the deeds of grant. And howthe words and ſentences therein ſhall be taken.

1. In the premiſſes, and what doth paſs by the grant of a thing.

2 The incident, acceſſary, appendant, and regardant ſhall in moſt caſes paſſe by the grant of the principall without the words *cum pertinentiis*, but not *è converſo*, for the principall doth not paſſe by the grant of the incident &c: *Co.ſuper Litt:*152:*Lit. Sect:*572.229:*Co.*4.86,87:8 *H:*7.4:*Bro:Grant:*86.144.43 *Ed:*3.22.*Co.*10.64:*ſuper .Lit.*307.

And therefore by the grant of a reverſion without naming the rent the reverſion after an eſtate taile, for life, or years and the rent reſerved upon the eſtate will paſſe; ſo as the tenant atturne to the grant: but by the grant of the rent the reverſion will not paſſe. So by the grant of a manor, the Court Baron thereunto belonging will paſſe; by the grant of a houſe or ground, the wayes thereunto belonging doe paſſe, by the grant of errable land, the common appendant thereunto will paſſe; by the grant of Mills, the waters, flood-gates, and the like that are of neceſſary uſe to the Mills do paſſe; by the grant of a houſe, the eſtovers appendant thereunto will paſſe; by the grant of a manor, the advowſons appendant and villaines regardant thereunto paſſe; by the grant of a Faire, the Court of Pipowders will paſſe; by the grant of homage or rent, the fealty will paſſe; and by the grant of Eſcuage, homage and fealty will paſſe. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, eſtraies, and the like, theſe will not paſſe by the grant of thoſe other things; and therefore if one have a Warren in his land, and grant the land, by this the warren doth not paſſe. And yet if in theſe caſes he grant the land *cum pertinentiis*, or with all the profits, priviledges &c. thereunto belonging; by this grant perhaps theſe things may paſſe. And here know that a reverſion may be parcell or appendant to a thing in poſſeſſion, and paſſe by the grant of it, but a poſſeſſion cannot be parcell or appendant to a thing in reverſion. And therefore if one make a leaſe for life of a manor excepting 20 acres of it, and after grant the reverſion of the manor; by this grant the 20 acres will not paſſe. 38 *H.*6.38. *Co.*11.47:50. *Plow.*103. *Bro: Grant:*60.129, *Co.*1:7 28.

So if one be diſſeiſed of an acre parcell of a manor, or of common appendant to the manor and before an entry or recontinuance of the acre or common he grant the manor to a ſtranger; by this the acre of land or common will not paſſe: But otherwiſe it is in caſe where a leaſe for years only is made of parcell of a manor.

And if a leaſe be made for life of 20 acres parcell of a manor, and after the manor it ſelfe is granted; by this the reverſion of the 20 acres is granted and will paſſe alſo. *See Brownlo:* 1 *part.* 184. 185. 2 *part.* 193.

And if a man make a feoffment in fee of an acre of land parcell of a manor, and after repurchaſe it, and then grant the manor; this acre will not paſſe by this grant, for it is not united by the new purchaſe: But it is otherwiſe of trees, for if a man make a leaſe for life of a manor or other land excepting the trees, and after grant the reverſion of the manor or land to another; hereby the trees doe paſſe. And if a man make a feoffment in fee of a manor excepting the trees, and after the feoffee buy the trees, in this caſe the trees are united againe, ſo that if the feoffee ſell the manor, the trees ſhall paſſe with it. If I leaſe an acre of land to which an advowſon is appendant for terme of life reſerving the advowſon, and after doe grant the reverſion of that acre with the appurtenances, hereby the advowſon doth not paſſe. But if I grant the advowſon for terme of life reſerving the acre, and after grant the acre with the advowſon *cum pertinentiis*; by this the advowſon doth paſſe. If land be appendant to an office, there by grant of the office with the appurtenances the land will paſſe without livery of ſeiſin. And if an office be appendant to land, there by the grant of the one the other will paſſe. 3. That which is parcell or of the eſſence of a thing albeit at the time of the grant it be actually ſevered from it, doth paſſe by the grant of the thing it ſelfe. And therefore by the grant of a Mill, the milſtone doth paſſe albeit at the time of the grant it be actually ſevered from the Mill. So by the grant of a houſe, the dores, windows, locks, and keyes, doe paſſe as parcell of it, albeit at the time of the grant they be actually ſevered from the houſe. 4. By the grant of the land, or ground it ſelfe, all that is *ſupra*, as houſes, trees, and the like is granted, alſo all that is *infra*, as Mines, earth, clay, quarres, and the like. And by the grant of a houſe, the ground whereon it doth ſtand doth paſſe. 5. When any matter of intereſt or profit is granted, the grant ſhall be taken largely. But when any matter of eaſe or pleaſure only is granted, as a walk, or the like, the grant ſhall be taken ſtrictly. 6. When a man doth grant all his lands, or all his goods; by this grant doth paſſe not only what he is ſole ſeiſed or poſſeſſed of, but alſo what he is joyntly ſeiſed or poſſeſſed of with another. And ſo *è converſo*. If two men joyn together and grant all their lands, or all their goods; hereby doe paſſe not only all they have joyntly and together, but all thoſe they have ſole and apart. 7. Some words in deeds are large and have a generall extent, and ſome have a proper and particular application; the former ſort may containe the latter, as *Dedi*, or *Conceſsi*, may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender: and it is in the election of the party to whom the deed is made, to uſe it to which of theſe purpoſes he will. And hence it is that if a Lord by the words of *dedi & conceſſi* grant to his tenant that doth hold of him his rent; or one that hath a rent charge out of land doth grant it to the tenant of the land; that in theſe caſes the rent is extinguiſhed albeit it be by way of grant. But a releaſe, ſurrender, confirmation &c. cannot amount to a grant &c. nor a ſurrender to a confirmation or a releaſe &c. becauſe theſe be proper and peculiar manner of conveyances and are deſtinated to a ſpeciall end. 14 *H.*8.25 *Co.* 11 50. 14 *H.*8. 1 *Co ſuper Litt.* 4. 12 *H.*7.25. *Plow.* 289. 19 *H.*6.4: *Co. ſuper Litt.* 301. *Lit: Sect:* 543: 544.

Sect. 13
The terms wherby things are granted, expounded.

Amongſt words whereby things doe paſſe ſome are collective, compound, or generall comprehending many things, as hereditaments, lands, tenements, honors, Iſles, villages and the like including lands of ſeverall ſorts and qualities. And ſome words are ſimple or particular, as Meadow, Paſture, Wood, Moore and the like. *Co. ſuper Litt.* 5: 6 *Co.* 4. 88.

Hereditament.

The word [Hereditament] is of as large extent as any word, for whatſoever may be inherited, be it corporeall or incorporeall, reall, perſonall or mixt, is an hereditament. By the grant therefore of all hereditaments do paſſe honors, Iſles, Caſtl's, Seigniories, Manors, Meſuages, Lands, Meadows, Paſtures, Woods, Moores, Mariſhes, Furſes, Heaths, Reverſions, Commons, Rents, Vicarages, Advowſons in groſſe, and the like things which the grantor hath in fee ſimple at the time of the grant, whether he hath it by purchaſe or deſcent.

And

And the word [Tenement] is of large extent alſo, and it ſeemes doth comprehend as much as the former. And therefore by the grant of all Tenements will paſſe as much as by the grant of all Hereditaments. *Co ſuper Litt:6; 16. Perk ſect.* 114,115. 11 *H.*6.22. *Bro.Grant*,143 *Co.ſuper Litt.*6.*Perk ſect.*411. Tenement.

The word [Land] ſtrictly doth ſignifie nothing but erable land, but in a larger ſenſe it doth comprehend any ground, ſoile, or earth whatſoever. And therefore by the grant of all Lands, doth paſſe errable lands, meadowes, paſtures, woods, moores, waters, mariſhes, furſes, heath, and ſuch like, and the Caſtles, houſes, and buildings thereupon, but not rents, advowſons, and ſuch like things. Alſo by grant of any land in poſſeſſion the reverſion thereof will paſſe. And yet by the grant of a reverſion of land the land in poſſeſſion will not paſſe. *Co.ſuper Litt.*4 *Co.*4.891. *Perk. ſect.*114. *Co.*11.47.50.10.107. Land.

But here it muſt be obſerved that in caſes of grants and gifts of all hereditaments, tenements, or lands, conſideration is had of the eſtate of the grantor, for if a man be ſeiſed of ſome lands in fee, and have other lands for life, or years only, and all theſe are lying within one pariſh, and he grant all his lands, tenements, or hereditaments in this pariſh to another in fee ſimple, fee taile, or for life, and give livery of ſeiſin in the lands whereof he is ſeiſed in fee, in the name of all the reſt; by this doth paſſe no more but his lands whereof he is ſeiſed in fee, for otherwiſe it would be a forfeiture for thoſe lands. But if the livery of ſeiſin be made in any part of the lands he hath for life or yeares, then that part wherein the livery is made will paſſe and no more. And if the conveyance be by bargain and ſale and deed inrolled, then the lands whereof he is ſeiſed in fee ſimple and for life ſhall paſſe, and not the land he hath for a terme of years. And yet if in this caſe the grant be for yeares, then all the lands will paſſe, for then there will be no forfeiture in the caſe. Howbeit it is ſaid in *Bro:Done* 42. *pro lege*. That if a man give or grant all his lands and tenements in *B*, that by this leaſes for years doe not paſſe, and that theſe words doe intend franktenements at the leaſt: *Edw:caſe Mich* 9:*Iac:curia* 9 *H:*7:25:*Bro:Grant*:87:11. *H:*6,22. Note. Forfeiture. Forfeiture.

Theſe words [*Honor*, *Iſle*, and *Commote*] are compound words and of large extent. And therefore by the grant of them may paſſe one or more ſeigniories, manors and divers other lands. Alſo a Caſtel may containe one or more manors. And therefore by the grant of a Caſtel may paſſe one or more manors. And ſo ſometimes *è converſo* a Caſtle may paſſe by the grant of a manor. But by a Caſtle moſt commonly is ſignified no more but the houſe or building and the parcell of ground incloſed wherein it doth ſtand: *Co ſuper. Litt.* 5. *Plow.*169. Honor. Iſle. Commote. Caſtle,

This word [Village or Towne] is of large extent alſo. And by the grant of it a manor, land, meadow, and paſture, and divers ſuch like things may paſſe. *Co.ſuper Litt* 5. *Plow.*168. Town or vilag

This word [Manor] is a word of large extent and may comprehend many things: And therefore by the grant of a manor without the words of *Cum pertinentiis* doe paſſe demeſnes, rents, and ſervices, lands, meadowes, paſtures, woods, commons, advowſons appendant, villaines regardant, Courts Baron and perquiſites thereof that are in truth at the time of the grant parcell of the manor. *Co. ſuper Lit.*5.58. *Perk:Sect.*116.*Co.*5.11:*Plow*:168: *Dier:*233:14 *H:*8:1:9: *Iac:*B R:*Dyer*: 30:8 *H:*7:4:*Baintons caſe*: *M:*9: Manor.

But nothing that in truth is not parcell of the manor, albeit it bee ſo reputed, will paſſe by the grant of the manor, and therefore if one have a manor, and after purchaſe the lawday or a warren to it, and then he grant away the manor, hereby the lawday or warren will not paſſe. And yet if by union time out of mind they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* theſe things may paſſe: By the grant of a manor alſo divers towns may paſſe:

An Honour alſo may paſſe by this name: And ſo alſo may a Caſtle or a hundred: And one manor alſo that is parcell of another manor may paſſe by the grant of that manor whereof it is parcell: *Brownlo:*1:*part:*155:*Co:ſuper Litt.*5:26:*Aſſ:Plow:*54: 2 *E:*3:36:

The word [Knights-fee] is a compound word alſo and may comprehend many things. And therefore by the grant of this may paſſe land, meadow, and paſture as parcell of it. And ſometimes by this doth paſſe ſo much land as to make a Knights fee. And ſome ſay it doth containe eight hides of land. And it ſeems alſo that a manor may paſſe by this name if it be uſually called ſo. *Co.ſuper Lit.*5.*Plow:*168 17 *E.*3.

Grange. The word [Grange] is a compound word alſo, and by the grant of a Grange will paſſe a houſe or edifice: not only where corne is ſtored up like as in barns but neceſſary places for husbandry alſo, as ſtables for hay, and horſes, and ſtables and ſties for other cattle and a curtilage and the Cloſe wherein it ſtandeth at the leaſt. And where land, meadow and paſture &c. belonging to ſuch houſes are called all together by the name of a grange, there perhaps by this word the whole may paſſe. *Co ſuper Lit.*5: *Plow.*167.

Farme. The word [Farme or Ferme] called in Latine *firma* is alſo a compound word and doth comprehend many things And therefore by the grant of a Ferme will paſſe a meſſuage and much land, meadow, paſture, wood &c: thereunto belonging or therewith uſed, for this word doth properly ſignifie a capitall or principall meſuage and a great quantity of demeſnes thereunto appertaining. Alſo by the grant of all Farmes or all Fermsit ſeems leaſes for years doe paſſe. *Co. ſuper. Litt.* 5.*Plow.*195 *Bro.Grants* 155

Oxgange of land. Halfe a Plow land. This word is a collective word alſo, for by the grant of *unam bovatam terre,* or of one, or of an oxgange of Land may paſſe land, meadow and paſture, and it doth properly intend as much as an Oxe can till. And *Iugum terre,* or halfe a Plow land is as much as two Oxen can till, and by the grant of halfe a plow land may paſſe meadow, and paſture *Co ſuper Litt.*5.

A Plow land or a Hide of land. The words [Plow land, and a Hide of Land] are *Synonyma* and are collective words alſo. And therefore by the grant of *Carucatam* or *Hidam terre,* or of a Plow land, or of a hide of land may paſſe 100 acres of land; meadow and paſture, and the houſes thereupon, but it doth properly intend as much land as one plow can till in a yeare. *Co:ſuper Litt.*5.*Plow.*167.

A yard of land Halfe a yard land. This word [A yard-land] is alſo collective and doth comprehend many things, but it is not certaine for in ſome Countries it doth containe 20 acres, and in ſome Countries 24 acres, and in ſome Countries 30 acres, by the grant therefore of *virgatam terre,* or a yard land will paſſe that quantity of land meadow and paſture that is called by this name. And ſo by the grant of halfe a yard, or a quarter of a yard land. *Co:ſuper Litt.*5.

Fold courſe. The word [Fold courſe] is alſo compound, for by the grant of a fold courſe lands and tenements may paſſe: *Et ſic de ſimilibus.* And finally by the grant of any ſuch compound thing as before for the moſt part there doth paſſe thereby ſo much as in common reputation is accounted part of that thing and is uſually called by that name. *Co ſuper Litt:*6.*Plow:*167.

Parſonage Rectorie, Vicarage. By the grant of a Rectory or Parſonage will paſſe the houſe, the glebe, the tithes and offerings belonging to it. And by the grant of a Vicarage will paſſe as much as doth belong unto it, as the Vicarage houſe &c. 8 *H.*7.1.*Bro. Grant.*86.

Meſuage. Curtilage, Houſe. By the grant of a meſuage, or a meſuage with the appurtenances doth paſſe no more but the dwelling houſe, barne, dove-houſe, and buildings adjoining, orchard, garden, and curtilage. *i.* a little garden, yard, field, or peece of void ground lying neer and belonging to the meſuage; and houſes adjoyning to the dwelling houſe, and the cloſe upon which the dwelling houſe is built at the moſt. *Plow.*85:15 171.178:569.*Litt:Bro. Sect.*31.185: *Co. ſuper Litt.*5. *Co:*10.65. *Kelw.*57:27 *H.* 6:2:

And ſo much alſo may paſſe by the grant of a houſe; ſo that the quantity of an acre of ground or thereabouts in Orchard, Garden, and out-let may paſſe by either of theſe names, but more then this will not paſſe by the grant that is made in either of theſe words, albeit more have been occupied with it, and albeit more be intended to be paſſed by the grant. And therefore if there be a meſuage or dwelling houſe and divers acres of land thereunto belonging called all together by the name of Hedges:

And

And a grant is made by theſe words; of all that meſuage with the appurtenances commonly called by the name of Hedges; by this grant nothing ſhal paſs but the meſuage, Garden, and curtilage.

And yet if a manor or farme be commonly called by the name of a meſuage, thereby the grant of a meſuage the whole manor or ferme may paſs. And by the grant of a meſuage or houſe and all the Lands thereunto appertaining will paſs all the Land uſually occupied therewith. Alſo by the name of a meſuage a Chappell or a Hoſpitall may be granted. *Brownl. 2 part. 53. See before: Litt. Bro. ſect. 185. 160. Bro. Leaſes 55. Plow. 170. 13 Aſſ. Pl. 2. Co ſuper Litt. 4.*

Cottage.

By the grant of a Cottage doth paſs a little dwelling houſe that hath no land belonging to it.

Errable land, Meadow, Paſture.

By the grant of all a mans errable land there doth paſs no more but that kind of land. And by the grant of all a mans meadow ground, or all a mans meadows, doth paſs no more but that kind of ground: And by the grant of all a mans paſtures doth paſs no more but the Land or ground it ſelfe imployed to the feeding of beaſts, and alſo ſuch paſtures and feedings as he hath in another mans ſoile.

Wood. Trees

If a man have divers acres or peeces of Wood, and grant to another *omnes boſcos ſuos*, or all his woods, or all his woods growing in ſuch a place; by this grant doth paſs all the high-wood and under-wood, and not only the wood growing upon the land or ſoile, but the land or ſoile it ſelfe wherein it doth grow.

But in this caſe if the grantor have in the ſame place divers peeces of wood and divers cloſes wherein there are divers trees growing in the hedges; it ſeems in this caſe theſe trees in the hedges ſhall not paſs by this grant in theſe words, eſpecially if the caſe be ſo that the cutting of them will be a waſt. And yet if the grantor have no peeces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this caſe it ſeems all the trees except the apple trees doe paſs, but not his hedges and hedg rowes. And in caſe where the trees only doe paſs, as where the grant is of all a mans trees, there ſhall paſs no more of the ſoile but ſo much as ſhall ſerve for the nutriment of the trees, and the owner of the ſoile ſhall have the graſs growing thereupon alſo.

If a man grant to another all his ſalable underwoods within his manor which have been uſually ſold by the owners of the manor with free entrie, egreſs and regreſs for felling, making and carrying the ſame away at all times convenient; in this caſe it ſeemes the ſoile doth not paſs, but the wood only. And yet if thoſe words with free entrie. &c. be omitted, *contra. 14 H. 8. 1. Perk. ſect. 116. Co. 5 11. Br. Done 14. Co 5. 11. 11. 50. Curia. Hill. 16. Jac. B. R. Pinchcombs caſe.*

If one deviſe, grant and to Terme let a farme with all maner of timber, wood, underwood and hedg rowes except the great oakes in ſuch a cloſe, to have and to hold the Farme for 21 years, in this caſe albeit there be the word Grant, and that the trees be not named againe in the *Habendum*, yet the other trees doe not paſs by this grant otherwiſe then in other leaſes, and if the Leſſee cut any Timber to fell, it is waſt in him *Dier 374. Co. 11. 48.*

Tofte.

A Tofte is a place where a meſuage hath ſtood; and by this name in a grant ſuch a thing will paſs.

Bruera Fraſſetum. Alnetum. Salicetum. Selda. Filicetum, Fraxinetum, Lupulicetum. Arundinetum. Roncaria. Iuncaria. Ruſcaria Mariſcus. Mora.

Bruera is a heath or heathy ground. *Fraſſetum* is a wood or peece of ground that is woody. *Alnetum* is a wood of Elders, or place where Elders grow. *Salicetum* a wood of willows or place where willows grow. *Selda*, a wood of ſallowes, willowes or withies, or place where ſuch things grow. *Filicetum* is a brakie ground or place where ſuch things grow. *Fraxinetum*, a wood of aſhes, or place where Aſhes grow. *Lupulicetum*, a hopyard or place where hops doe grow. *Arundinetum*, a place where reeds grow. *Roncaria* or *Runcaria* a place full of bryars or brambles. *Iuncaria* or *Ioncaria* or *Iampna* (which are all one) a place where ruſhes doe grow. *Ruſcaria* a place where kneeholme or butchers pricks or broom doth grow *Mariſcus* a fenne or mariſh ground. *Mora*, a more barren and unprofitable ground then a marſh.

And

Vacaria. Porcaria Stagnum. Gurges.

And by grant of theſe and ſuch like things, or of 20 acres of ſuch ground, theſe particular kinds only or ſo many acres thereof doe paſs. *Vacaria*, is a Dairie-houſe. *Porcaria*, a Swineſtie. *Bercaria* a Tann-houſe: and by theſe names theſe things will paſs. By the name of *Stagnum* or Pool, or *Gurges* a gulfe, the water, Land, and fiſh in the water will paſs. *Co. ſuper Litt.* 4. 5. *Co. ſuper Litt.* 5.

Stadium. Ferlingus. Quarentena terræ Selio terræ. Acre of Land, Rood of Land.

By the grant of *Stadium*, *Ferlingus*, or *Quarentena terre* doth paſs a furlong or furrow long, which anciently was the 8 part of a mile. By the name of *Selio* or *porca terre* doth paſs a ridge of land which is ſometimes longer and ſometimes ſhorter. By the grant of an acre of Land doth paſs ſo much as in an acre by meaſure in that Country by the Ordinary account and meaſure of the Country. By the grant of a Rood of Land doth paſs 10 pearches the 4 part of an acre. And by the grant of 6 foot in length and two foot in breadth, ſo much only doth paſs. And by theſe and ſuch like names land may be granted. *Co Idem.*

Mines.

By the grant of *Mineras* or *Fodinas plumbi &c.* or Mines of Lead, &c. the Land it ſelfe will paſs if livery of ſeiſin be made thereof, but otherwiſe it ſeems not, and then the Grantee hath by the grant a power to dig only granted unto him. *Co. ſuper Litt.* 6. *Co* 5. 12.

Trench.

If one grant to me to dig a Trench in his ground from ſuch a place to ſuch a place to convey water by a lead pipe, or otherwiſe; hereby alſo *incluſive* is granted a liberty at any time after to dig to amend it as occaſion ſhall be. *Perk. ſect.* 111.

Turfes.

If one grant to me to dig turfes in his land or ſoile and to carry them away at my will and pleaſure; by this is not granted the land it ſelfe, the houſes or trees thereupon or mines therein. *Co. ſuper Litt.* 4.

Common.

If one grant to another Common for all his beaſts in his Land; hereby is not granted Common for Goates, Pigges, and ſuch like beaſts and cattell that are not commonable. But if the grant be of common for all manner of beaſts *contra.* And if one grant to another common without number in his Land, the grantor is not hereby excluded to common there with the Grantee. *Brownl.* 1 *part* 53. *Co. ſuper Lit.* 4. *Perk. ſect.* 108. 109. *Brownlows rep.* 1 *part in toto.* 2. *part.* 53.

And if one grant to me common of paſture for 10 Kine in his Lands in Dale; by this grant I ſhall have common in his commonable grounds and lands only and not in any other lands. And if a man grant common of paſture to me for my beaſts *ubicunque averia ſua ierint*, and he occupie 100 acres of Land with his beaſts, and after he keep no beaſts: yet by this grant I may keep my beaſts in thoſe 100 acres. But if he grant to me Common, of paſture for my beaſts whereſoever his Cattle ſhall goe &c. by this grant I ſhall have no common but when the Grantor doth uſe his common with his Cattell, &c.

Eſtovers.

By the grant of Eſtovers will paſs houſe-boot, hay-boot, and plow-boot. But if a man grant to me Eſtovers out of his manor, I may not by this grant cut down any of the fruit trees within his manor. *Perk. ſect.* 116.

Way.

If Land be granted to me; hereby alſo implicitly is a way thereunto granted to me alſo. So that if one have 20 acres of Land and grant me one acre in the middeſt of it, hereby *incluſive* there is granted me a way to it. And yet if a man have two Cloſes and he uſe to goe over one of them for his eaſe to the other Cloſe by a new way; and after he grant the further Cloſe *cum pertinentiis*; by this grant the new way doth not paſs. 14 *H.* 8. *Clar. caſe Trin.* 5. *Jac. B. R. Per Williams & Yelverton Juſtices. Mic.* 3. *Jac.*

Foreſt, Park, Chaſe, Warren.

If a man have a Foreſt, Park, Chaſe, Vivarie, and Warren in his own ground, and he grant this Foreſt, Park, Chaſe, Vivarie or Warren; hereby not only the priviledge but the Land it ſelf doth paſs. But if the ground be anothers; or if it be his own and the grant be onely of the game, &c. in theſe caſes the Land or ſoil it ſelf will not paſs *Co. ſuper Litt.* 5. *Rice & Wiſemans caſe. Mic.* 9. *Jac.*

Fiſhing.

If a man be ſeiſed of a river, and by his Deed doth grant *ſeparalem piſcariam*, or *aquam ſuam* in the ſame, and maketh Livery *ſecundum formam cartæ*: by this grant doth paſs only a liberty to fiſh within the water, and not the ſoile nor the water it ſelfe: and therefore the grantor may take water ſtill, and if it be drie he may take the ſoile alſo. *Co. ſuper Litt.* 4. *Fitz. Barre* 237.

And

And if one grant all his fiſh in his pond; by this is granted a power to come and fiſh for them, but the Grantee may not hereby dig a trench, and let out the water to take the fiſh, albeit they may not be otherwiſe taken.

If one be ſeiſed of 20 acres of land, and he grant to another and his heirs the veſture, or the herbage of it, and maketh livery of ſeiſin in it *ſecundum formam cartæ*; by this grant doth paſs the corn, graſs, underwood, ſweepage, and the like; and for theſe things the Grantee may have an action of treſpaſs for any wrong done to him in them. But hereby the land it ſelf, the houſes, and great trees thereupon, and mines therein doe not paſs. And if one grant the herbage or veſture of a wood, hereby is granted the graſs and underwood onely, and not the timber or great trees. But if a man ſo ſeiſed of 20 acres of land, grant to another the profits of this land to have and to hold to him and his heirs, and maketh livery *ſecundum formam cartæ*; hereby the veſture, herbage, trees, mines, and all whatſoever parcell of that land doth paſs. *Co. ſuper Litt.* 4. *Dier* 285. *Trin.* 5. *Jac. B. R. accord.*

Veſture or Herbage of land.

Profits of lands.

If one grant to another all his Deeds, or all his muniments; hereby will paſs all his charters, Feoffments, Leaſes, Releaſes, Confirmations, Letters of Atturney and the like. 35 *H.* 6. 37.

Deeds.

If one give or grant to another *Omnia bona*, or all his goods; by this doth paſs all his moveable and immoveable, perſonall and reall goods as horſes and other beaſts, plate, jewels, and houſhold ſtuff, bowes, weapons, and ſuch like; and his money, and his corn growing on the ground, alſo all the obligations and bils that are made to him, and in his own name doe paſs by this, but not the debts due by ſuch obligations and bils. *Co. ſuper Litt.* 118: 39 *H.* 6. 25. *Dier* 59. *Perk: ſect.* 115. 12 *H.* 8. 4. *Bro. Grant* 96. 51 *Done* 39. 47. *Dier.* 5 *Co.* 8. 33.

Goods.

And ſome ſay that leaſes and tearms of years of Houſes, Lands, Rents, Commons, &c. Rents charge for years, Wardſhips of Tenants in Capite, and by Knights ſervice, and the intereſts that a man hath by Statute Staple, Statute Merchant, or Elegit, doe paſs by this grant, but of this others doubt. And if a man give or grant to another *omnia catalla ſua*, or all his chattels; hereby doth paſs as much as by the grant of all his goods, and by this without queſtion leaſes for years, &c. doe paſs. But by neither of the grants doe paſs thoſe goods or chattels which the grantor hath by delivery in keeping for another, or the like. Neither doth any eſtate of inheritance or freehold, or the charters concerning any freehold paſs under theſe words. Neither doth any thing in action, as debts or the like, nor hawkes, hounds popinjays, or the like paſs by this grant. And yet if an Executor grant *omnia bona & catalla ſua*, all his goods, hereby the goods and chattels he hath as Executor as well as his other goods and chattels will paſs. And if one grant all his leaſes for years which he hath by any conveyances; hereby the leaſes for years which he hath as Executor as well as other leaſes for years will paſs. *Per ch. Juſt. B. R.* 21 *Jac. Adjudged* 3 *Jac. Kelw.* 64. 10 *Col.* 4 1. *Per Flemming Juſt.* 7 *Jac. B. R.*

Chattels, *Sect.* 15.

If one grant to another all his Utenſils; hereby will paſs all his houſhold ſtuffe, but not his plate, jewels, or any ſuch like thing. *Dier* 59.

Utenſils,

If a man be ſeiſed of land in Fee-ſimple or for life, and have an eſtate in it for years by Statute Merchant, Staple, Elegit, or the like: and he grant all his eſtate, or all his right, or all his title, or all his intereſt of and in the land; by this grant all his eſtate, and as much as he is able to grant doth paſs. And if Tenant for life of land, the remainder to the ſtranger in taile, the remainder to the right heirs of the Tenant for life doe grant by theſe words; hereby both his eſtates do paſs. And if a Tenant in tail grant all his eſtate in the land, hereby doth paſs as much as he can grant. And all theſe words alſo do cary and paſs reverſions as well as poſſeſſions. And if a man have a terme of years of Land, and he grant his term, hereby doth paſs the term of years, and all his eſtate and intereſt of the Land. *Co. ſuper Litt.* 345. *Litt. ſect.* 613. *Plow.* 161. *Co.* 1. 153.

Grant of all a mans eſtate, right, &c.

And note that by all theſe names theſe things may be granted, and that for ſuch things as are grantable without Deed, when they paſs by a verball grant in any of theſe words, the words ſhall have the ſame expoſition as they have in Deeds. *Fitz. Brief.* 581.

Note,

If

Certeintie and Incertein-tie, Miſnaming how it doth hurt or not.

If one grant all his goods in ſuch a place *ſi quæ fuerint* if any be there, by this grant nothing doth paſs, but the goods that are in ſuch a place at the time of the grant, and not any other goods that ſhall be there afterwards. *H.* 6.

If two men have goods in common, and have other goods ſeverally, and they give me all their goods, by this grant is given all their goods they have in common, and likewiſe all the goods they have in ſeveralty. *Bro. Done* 12.

If two Tenants in common, or others ſeverally ſeiſed of Land, join in the grant of a rent of twenty ſhillings, or a horſe, out of the Land whereof they are ſo ſeiſed: by this grant the Grantee ſhall have two twenty ſhillings or two horſes. *Plow.* 171. 140. *Co.* 10. 106.

If a man grant a Rent of ten pound to me, To have and to hold during my life and my wives life, and after the death of my wife a rent of three pound to me for my life; in this caſe if my wife die, I ſhall have both the rents. But if there be any words of reſtraint or determination of the firſt rent, it may be otherwiſe. *Bro. Gr.* 64.

If one be ſeiſed of a garden plot in the pariſh of Sale, and grant it to *B.* for ten years, which being expired he doth grant his garden plot to *C.* for twenty one years, and *C.* doth build a houſe upon part of it, and leaveth the other part in a garden plot ſtill, and after the twenty one years ended, the leſſor doth grant to D. *totam illam peciam fundi ſive gardin' plott' nuper in tenura de* B *& nunc de* C. lying in the pariſh of Sale, by this grant the houſe newly built, and the plot of garden doth paſs. *Adjudg. M.* 20 *Jac. B. R. Burton verſus Brown.*

If one grant his Manor of Dale in Dale, which in truth doth extend into Dale and Sale; in this caſe no part of the Manor that doth lye in Sale ſhall paſs. So if one grant all his Tenements in Dale; hereby none of the Tenements in Sale will paſs. So if the Manor lie within the pariſhes of *A. B.* and *C.* and the grant is of the Manor of Dale, lying within the pariſhes of *A.* and *B.* by this grant no part of the Manor lying in *C.* will paſs. But if one ſeiſed of the Manors of *A* and *B.* in the County of *C.* grant thus, *totum illud Manerium de* A. *&* B. *cum pertin' in' Com'* C. or *totum illud Manerium de* A. *cum* B. *in Com'* C. by theſe grants in caſe of a common perſon both the Manors will paſs. *Bro. Grant* 53. 88. *Done* 26. *Co.* 1. 46.

If one grant all his land in Dale which he had of the gift of *I. S.* by this grant nothing will paſs but that which he had of the gift of *I. S.* But if one grant all his Lands in Dale called Hodges which he had of the giſt of *I. S.* by this grant all that which is called Hodges ſhall paſs, albeit the grantor had it not of the gift of *I. S. Bro. Grant Plow.* If I grant all my Land in *D.* in the tenure of *I. S.* which I purchaſed of *I. N.* ſpecified in a Deviſe to *I. D.* and I have ſome Land in *D.* which doth anſwer to all this, and other Land that doth not anſwer to it; in this caſe the firſt ſort of Land ſhall paſſe. If I grant my Manor of *F* to *I. S.* and in truth I have two Manors of that name, South *F.* and North *F.* this muſt be made certain and good by Averment which was meant of the two. But if I grant ten Acres of Wood in Dale, where I have 100 Acres; this is made good and perfect by my Election which 10 Acres I will have, and ſo it is perfected. But if I recite where I am ſeized of the Manor of North *F.* and South *F.* and I grant one Manor of *F.* in this caſe the Grantee may chooſe which of them he will. *See more in Grant. Election.*

If one grant all his Lands in the occupation of *I. S.* by this grant doth paſs not onely ſuch Land as *I. S.* doth occupy by right, but alſo ſuch Lands as he doth occupy by wrong, and not onely the Lands whereof he hath ſome eſtate, but alſo ſuch Lands as whereof he hath the paſturage onely. *Dockraies caſe Paſch.* 12. *Jac.*

If one grant all his Lands in *B.* and elſewhere in the County of *S.* in the Tenure of *I. S.* by this grant nothing doth paſs but that which is the Tenure of *I. S.* 2 *Jac. Br,*

If one grant his Manor of *S. nec non omnes mariſcos ſuos de S. ac omnia terra, tenementa &c. in S. & alibi dict' Manerio ſpectan'*; by this grant the marſh doth paſs though it be no part of the Manor. *Adjudge Seignior We ut worths caſe.*

If one grant all his demeſne Lands of his Manor of Dale, &c. it ſeems by this the cuſtomary land parcell of the Manor held by copy doth paſs: *Co.* 1. 46.

If

If one be ſeiſed of tithes which did belong to an Abbey, part of which were gathered by the Almoner, and part not, and he grant *omnes & omnimodas decimas granorum &c. infra dominium prædict' & præcinct' ejuſdem, in dict' Comit': Ac omnes alias decimas, proficua & commoditates &c. infra dominium prædict' & dict' Monaſter' &c: ſpectan' et quæ nuper per Elemoſynar' ejuſdem Monaſterii collect' fuer'*; by this grant ſhall paſſe all the tithes as well thoſe that were collected by the Almoner, as thoſe which were not, and thoſe words *quæ per Elemoſynar'* &c. ſhall refer onely to the laſt, and not to both ſentences. *Adjudg. Hil. 2 Iac: B: R: Bakers caſe.*

If one grant all his lands in *D*, containing 10 acres, whereas in truth his lands there doe contain 20 acres; by this grant the whole 20 acres will paſſe. *Dier.* 80.

If one grant the Scite of an Abbie *& omnes terras prat' paſturas & ſubſcript' cum pertinen' dict' Monaſter' pertinen' &c. viz.* ſuch a thing and ſuch a thing, &c. by this grant the grantee ſhall have all the lands belonging to the Monaſtery, and *viz.* ſhall relate to *Subſcript'* onely, and not to *omnia*. If one by deed grant all the lands that the King had paſſed unto him by letters patents dated 10 of *May* unto that deed annexed and the patent was dated 10 of *Iuly* being proved that that was the patent the grant wil be good, but if no patent had beene annexed, and no certaintie given but the reference to the Patent; this had beene naught. So if I grant to you by general words, the land which the King hath granted to me by his letters patents, the tenor whereof doth follow in theſe words, and there be ſome miſtake in the Rentall it may be good enough. If I grant my Tenement [or all my Tenements] in the pariſh of Saint Butolphs without Algate [where it is without Biſhops Gate] in the Tenure of *W*: this grant is void, and though in the Tenure of *W*. had beene firſt placed, yet it had beene naught. But it ſeemes otherwiſe. *Co:* 3. 10. 2. 33. *Dyer.* 50. But if I grant my tenement, which I purchaſed of *I S* in dale when in truth it was *I D* not *I. S.* bought it of, it ſeemes this is not good, though I have but one Tenement there. See more in Grant *infra* at *Num.* 4: and in Teſtament, at *Numb.* 8 and in Fine, at *Numb.* and in *Brownlows:* 1 *part* 32. 2: *part:* 331: 332. *Dier.* 77.

The Exception is always taken moſt in favour of the feoffee, leſſee &c. and againſt the feoffor, leſſor. And yet it is a rule, That what will paſſe by words in a grant, will be excepted by the ſame words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and neceſſary for the obtaining of it, are excepted alſo: as if a leſſor excepr the trees, he may bring his champman to view them if hee deſire to ſell them, and he or the Vendee may cut them and take them away. And by ſuch an exception the Leſſor will have the boughs, fruit, hierons, and hawks; that breed in them &c. *Co.* 10. 106, 14 *H.* 8. 1. 11: 52.

If a man be ſeiſed of a fiſhing from ſuch a place to ſuch a place, and hath a Mill upon the water, and hee grant *totam partem ſuam piſcariæ de D, quam diu terræ ſuæ ſe extendunt, ſalvo tamen ſtagno molendini*, this exception doth not take away the fiſhing of the grantee in the mill pond, but it ſhall have relation only to the pool to repair the Mill *Perk Sect.* 646. *Fitz. Aſſiſ:* 316.

If a man ſeiſed of a Manor make a leaſe of it excepting al the ſaleable underwoods now growing, or which hereafter ſhall grow on the premiſſes, which have been uſually ſold by the owners of the manor, with free entrie, egreſſe and regreſſe, for the felling, making, and carying away of the ſame at times convenient; in this caſe the ſoil is not excepted by reaſon of the ſubſequent words. *Hil.* 16. *Iac. B. R. per* 2 *Judges.*

If one be ſeiſed of a Manor and make a leaſe of it *cum pertin' una cum columbar' ac reddit' tenentium, decimis garbarum, finibus, heriot' perquiſit' Cur' & aliis omnibus proficuis, Advocat' Eccleſiæ & Wrecc' except'*, in this the exception doth begin at *Advocat,' Eccleſiæ*, and doth except that which followeth, and no more. *Dier.* 58.

If one grant in fee excepting the trees, or any other thing to the grantor without ſaying [and to his heires;] by this exception the thing excepted is ſevered only for the life of the grantor, and then it ſhall paſſe with the reſt of the things granted. *Dier.* 264.

But if the thing be excepted indefinitely without saying [for the life of the grantor &c.] nor how long; this shall be taken to be an exception during the estate. *Dyer.* 264.

The *Habendum* as all other parts of a deed for the most part, shall be taken most strongly against the grantor and most in advantage of the grantee, yet so as withall it shall be construed as neer the intent of the parties as may be, as in all the cases following doth appear.

In the *Habendum* or limitation of the estate, and how that shall be taken. Fee simple. *Sect.* 16.

If land be given or granted to one *habendum*, or to have and to hold to him and his heires so long as he pay 20l yearly to *I S* and his heires, or so long as such a tree doth stand, or the like, this is a kind of feesimple, but it is limited and qualified and determinable upon this contingent. And yet this may become a pure fee-simple, for if land be granted to one and his heires untill *I S* pay 100l and *I S* die before he pay it, in this case the estate is become a pure fee-simple. *Plow.* 557.

If lands be given or granted to a man, to have and to hold to him and his heires, this is a fee-simple, pure, absolute and perpetuall; and this is made by these words [his heires] for it is a generall rule that these words [his heires] only make an estate in fee-simple in all feoffments and grants. But this rule hath many exceptions, for if feoffment of land be made to *I S & haredibus*, without the word [*Suis*] this is a fee-simple. *Co: super Litt:* 8. 9: *Lit:* 1. 27 *H.* 8: 5: *Perk. Sect:* 239. 240, 241: 39 *H:* 6: 38: *Plow:* 28: *Bro: Estates* 4: 11 *H:* 7: 12: *Co: super Lit:* 15.

And yet if the grant be to *I S* and *I D & haredibus*, without this word [*Suis*] *contrà*, for this is only an estate for their lives. And if lands be given to a Bishop, Parson or the like, To have and to hold to him and his successors; this is a feesimple. And lands be given to a Maior and Communalty or other Corporation aggregate generally without the word Successors, or any other word, or if lands be given to such a Corporation for their lives, this is a fee-simple. But if lands be given to a Parson, or the like, To have and to hold ro him, without saying how long; or to have and to hold to him for life; by this he hath no more but an estate for life. And if lands be given to the King generally without any other words; this is a fee-simple. So if one grant *deo & ecclesiæ de D*; it is said this is a fee-simple in the Parson of *D*. So also of a grant *Ecclesiæ de D: per Thirne Iust*: So if a grant had beene to he Monkes of such a house, it had been a fee-simple in the house. *Co.* 6. 27: *super Lit:* 9: 15 *Ed* 4. 13. 9 *H:* 7. 11, 12 *H.* 8, 9 *H.* 4: 84. 33 *H.* 6: 20. *Co: super Litt. Ass. Pl.* 12. *Plow:* 130: 14 *H:* 4: 13.

And in like manner it is in other cases; As if one recite that *B* hath enfeoffed him of white acre To have and to hold to him and his heires, and then he saith further, that as fully as *B* hath given white acre to him and his heirs he doth grant the same to *C*. by this *C* the grantee hath the fee-simple of this acre. And if one grant 2 acres to *A* and *B* to have and to hold the one to *A* and his heires and the other to *B in forma predicta*; by this *B* hath a fee simple in this other acre, for an estate in fee-simple, fee-taile, or for life, may be made by such words of reference. Also if a rent be granted betweene Pareeners for to make an equalitie of partition; and it bee granted generally and without any words of heires, yet this is a fee-simple. So where lands are given in *Frankalmoigne*. And so also it is in the cases of a release of right, a fine, and a recovery. *See more in Brownlow. Rep.* 1 *part.* 32. 169.

If one give or grant land to another, To have and to hold to him and his heires males, or to him and his heires females; in both these cases there is a fee-simple made, but otherwise it is when these words are in a Will, for then it is but an estate in taile only. 27 *H.* 8. 27. *Lit. Sect.* 31. *Co.* 11. 46.

If one grant land to one, to have and to hold to him and his right heires; by this he hath a fee-simple, And so it shall be taken if it be by fine. So if one grant land to *I S* for life, the remainder to the heires, or to the right heires of *I S*, this is a fee-simple: so if one make a feoffment in fee to the use of himselfe for life, and after his death to the use of his heires; this is a fee-simple. 33 *H.* 6. 5: *Co. super Litt.* 22. *Co:* 1. 95. 66.

If one grant land to *I S*. To have and to hold to him and the heires of *I S*, this is a fee-simple, and all one with a grant to *I S* and his heires.

If

If one grant land to another to have and to hold to him for 20 years, and that after the 20 years the grantee ſhall have it to him and his heirs by 10l. rent, and give livery of ſeiſin; by this the grantee ſhall have the fee-ſimple: 20 *H.* 6.35: *Co. ſuper Litt.* 217.

If one grant land to the Wife of *I S* to have and to hold to her for life, and after to *I S* in taile, and after to the right heires of *I S*; by this *I S* hath a feeſimple. And if one grant land to *A* for life, the remainder to *B* for life, the remainder to the right heirs of *A*; by this *A* hath a feeſimple: *Co.* 2,91. *Dyer.* 156. *Co. ſuper Lit.* 22.

If land be granted to a man and his wife, to have and to hold to them and the heirs iſſuing of them, it ſeemes this is a feeſimple and not a feetaile: *Bro. Eſtates:* 86.

If land bee granted to one and his heirs by the premiſſes of a deed to have and to hold to him for life; by this he hath a feeſimple: So if by the premiſſes of a deed land bee granted to one and the heirs of his body to have and to hold to him and his heires; by this he hath an eſtate taile and a fee ſimple expectant. And ſo *via verſa. Brownlow. Rep.* 1. *part.* 45. *accord.* 169. If by the premiſſes of the deed the grant be to him and his heires to have and to hold to him and the heirs of his body; by this alſo he hath an eſtate taile and a feeſimple expectant: *Co.* 2. 21. 24 *ſuper Lit:* 21. 21 *H.* 6 7:

If lands be given or granted to a man to have and to hold to him and to the [or his] heires of his body, or the [or his] heires males of his body, or the [or his] heires females of his body; by this the grantee hath an eſtate taile: So if lands be given to a man, to have and to hold to him and the heires males, or to him and the heires females of his body begotten; in both theſe caſes it is an eſtate tail. *Brownlow. rep:* 1. *part.* 211. 1. *part. Terms of law, tit. tail. Lit tit Fee to to, & in Co. ſuper Lit.* 26. Fee taile.

If lands be given to a man and his wife, to have and to hold to them and the heirs males, or to them and the heirs females of their two bodies begotten; by this they both have an eſtate tail. And if lands be given to them and the heirs males, or heirs females of the body of the husband begotten on the wife; by this he hath an eſtate taile and his wife an eſtate for life only. And if lands be given to *A* to have & to hold to him and his heirs on the body of *B* begotten; by this *A* hath an eſtate taile and *B* hath nothing. So if lands be given to a man and his wife, to have and to hold unto them and the heirs he ſhall beget on her body; by this they have an eſtate taile in them both. If lands be given to a man and his wife and the heirs of the body of the husband; by this the husband hath an eſtate in general taile, and the wife but an eſtate for life. If lands be given to him to have and to hold to him and his heirs he ſhall beget on the body of his wife; by this he hath an eſtate taile and ſhe no eſtate at all. *Lit. idem Co.* 1. 140: *Co. ſuper. Lit:* 20. *Co.* 7:41.

If one give his land to his daughter or Couſin in Frankmariage; by this they have each of them an eſtate taile without any word of [heires, or heires of body] &c. *Lit. Sect.* 17:

If one give lands to *B* and his heires, to have and to hold to *B* and his heires, if *B* have heirs of his body and if he die without heires of his body that it ſhall revert to the donor; by this *B* hath an eſtate taile. So if one give lands to *B* and his heires if he have iſſue of his body; by this he hath an eſtate taile: So if lands be given to *B* to have and to hold to him and his heires, provided that if he die without heire of his body that the land ſhall revert. So if lands be given to *A & B uxori ejus & hered' eorum & aliis hered ipſius A, ſi dict' hered' de dict' A & B exeunt' obierunt ſine herede deſe &c.* by this they have an eſtate taile. And ſo in all ſuch like caſes where after a limitation of a feeſimple theſe or ſuch like words are added, *viz.* that if he die without heires of his body the land ſhall revert, for in all theſe caſes the *habendum* is conſtrued to be a limitation or declaration what heires are meant before. *Co. ſuper Lit.* 21. *Co.* 7.41: 5 *H* 5,6.

If lands be given to *A* and *B* (a young man and maid unmaried) to have and to hold to them and the heires of their two bodies; by this each of them hath an eſtate taile, and if they mary their heires may inherit it. *Co. ſuper Lit:* 26: *Plow.* 135:

If lands be given to the ſon to have and to hold to him and his heirs of the body of his Father; by this the ſon hath a fee-ſimple. But if the words

Will. be to have and to hold to him and the heires of the body of the Father engendred; by this it is an eſtate taile in a deed as it is in a Will. And if the Father be dead the Law is ſo alſo, but it ſeems the ſon ſhall have by this only an eſtate for life except he be iſſue in taile to his father *per formam doni*. So if there be grandfather, father and ſon, and the father dieth, and lands be given to the ſon to have and to hold to him and the heires of the body of the grandfather; this is an eſtate taile in the ſon: but neither the father nor the grandfather have either of them any eſtate in theſe caſes. If lands be given to *I S* and the heires of the body of his wife (being dead) begotten
Sect. 19. by this *I S* hath an eſtate taile. *Co. ſuper Lit.* 7: *Co.* 8. 87. *Aſſ: Pl.* 47. 5 *Aſſ.* 14: 12 *H.* 4. 1.

If one grant lands to *I S*, to have and to hold to him and the heires of his body iſſuing, the remainder to *I D* and his heires *in forma predicta*; by this *I S* and *I D* after him have each of them an eſtate taile. *Co. ſuper Litt.* 385.

If one grant lands to *A* to have and to hold to him for life the remainder to the firſt ſon of *A*, and the heires males of the body of that firſt ſon; by this the firſt ſon hath an eſtate in taile, and *A* his father but an eſtate for life only. But if lands be granted to *A* for life the remainder to the heires of the body of *A*, by this *A* hath an eſtate taile in him. And if lands be given to a man and his wife to have and to hold to them and one heire of their bodies lawfully begotten and to one heire of the body of that heire; by this there is an eſtate taile made, yet ſo as it ſhall laſt only during the lives of thoſe two heires: *Co.* 2, 91. *ſuper Litt.* 22: 39. *Aſſ. Plow:* 20.

If one grant lands to another to have and to hold to him and to his heires of the body of ſuch a woman lawfully begotten; by this he ſhall have an eſtate taile, for begotten ſhall be intended by the donee on that woman. *Co: ſuper Litt* 26.

If there be husband and wife and they have iſſue a ſon and daughter, and lands are given to the wife to have and to hold to her and the heires of her late husband on her body begotten; by this the wife hath an eſtate for life and the ſon an eſtate in taile, and if he die without iſſue it ſhall goe to his daughter *per formam doni. Co. ſuper Litt:* 26.

If lands be granted to the husband of *A* and wife of *B*, to have and to hold to them and the heires of their two bodys; by this they have each of them an eſtate in taile in them, for there is a poſſibility that one husband and wife may dye, and then the other husband and wife may intermary. *Co. ſuper Litt.* 20.

If there be father and ſon, and lands are given to the father to have and to hold to him and the heires of the body of his ſon; by this the ſon hath an eſtate taile, but the father as it ſeemes, but an eſtate for life. 12 *H.* 4. 3. *Dyer.* 247.

If lands be given to the mother for life the remainder to her ſon and the heires of the body of his father on her begotten (the father being dead) by this the ſon hath an eſtate taile. *Lit. Sect.* 352.

If lands be granted to *I S*, to have and to hold to him and the heires he ſhall happen to have of his wife; by this he hath but an eſtate taile and no feeſimple, and his wife hath no eſtate at all. 12 *H.* 4.

If lands be granted to *I S* and the heires that the ſaid *I* S ſhall lawfully beget of of his firſt wife, and he hath no wife at the time of the grant, by this he hath an eſtate taile. *Co. ſuper Litt.* 20.

If *A* have iſſue by *B* his wife *C* a ſon and *D* a daughter, and *A* die, and lands are granted to *B* to have and to hold to her and to the heires of *A* her late husband on her body begotten; in this caſe and by this deed *C* hath an eſtate taile and the woman hath only an eſtate for life, and if *C* die without iſſue, *D* his Siſter ſhall have the land *per formam doni.* But if one grant lands to *A* late wife of *I S*, to have and to hold to the ſaid *A* and the heires of *I S* on the body of the ſaid *A* begotten; in this caſe the ſon and heire ſhall take no eſtate by the grant. And the ſame conſtruction ſhall be upon the ſame words in his Will. *Co. ſuper Litt.* 26.

Will. If lands be granted to the husband and wife, to have and to hold to them and the heires of the body of the ſurviver of them; by this the ſurvivor ſhall have an eſtate taile after the death of the other. *Co. ſuper Litt.* 26.

If lands be granted to *I S* to have and to hold to him *& heredibus de carne ſua*,

or

or *heredibus de ſe*, or *heredibus quos ſibi contigerit*, in all theſe caſes *I. S.* hath an eſtate taile and no more. *Co. ſuper Litt.* 20.

If Lands be granted to Husband and Wife, to have and to hold to him and the Heirs of the body of the Husband, the remainder to the Husband and Wife and the Heirs of their two bodies begotten, this remainder is void, and therefore by this the Husband hath an eſtate in taile and the Wife a joint eſtate for life with her Husband and no more. *Co. ſuper Litt.* 28.

If Lands be granted to *I. S.* and his Heirs of the body of *Jane* a *Noke* begotten; by this *I. S.* hath an eſtate taile and no more. *Co.* 1. 140.

If Lands be granted to *I. S.* & *heredibus de corpore procreatis*; by this the Heires that ſhall be begotten afterwards ſhall take. And if Lands be granted to *I. S.* & *heredibus de corpore procreandis*, by this the Heirs of his body before begotten ſhall take *per formam doni* as well as thoſe that ſhall be begotten afterwards. *Co. ſuper Litt.* 20. *Sect.* 18.

If one grant to *I. S.* that if he and the Heirs of his body be not yearly paid 40 l. that he or they ſhall diſtraine in the Lands of the grantor; by this the Grantee hath an eſtate in taile in the Rent, as if he grant to *I. S.* that if he and his Heirs be not paid &c. that he or they ſhall, &c. he hath a Fee-ſimple in the Rent. *Co. ſuper Litt.* 146.

If one give or grant Land to another to have and to hold to him, or to him and his aſſignes, and ſay not for what time; and the grantor make livery of ſeiſin according to the Deed; by this the Grantee hath an eſtate for his own life. But no livery of ſeiſin be made no eſtate at all but an eſtate at will doth paſs by this Deed. And if he that doth grant the Land be but a Leſſee for years of the Land and he make no livery of ſeiſin upon the grant; by this his terme of years and that eſtate which he hath is granted. But if he make livery of ſeiſin upon the grant then an eſtate for the life of the Grantee will paſs, and it is a forfeiture of the eſtate of the Leſſee for years of which he in reverſion may take preſent advantage. And if one grant to another Common in his Land when he doth put in his own beaſts, or eſtovers in his Manor when he cometh there, and ſay no more, by this it ſeems the Grantee hath an eſtate for life. *Brownl.* 1 *part.* 153. 175. *Litt. ſect.* 283. 285. *Co.* 8. 85. 96. 2. 24. *Finches Law* 60. *Co. ſuper Lit.* 9. *Dyer* 307. *Co.* 7. 23. 17 *Aſſ. pl.* 17. For life. Forfeiture.

If one grant Land to *I. S.* to have and to hold to him or his Heirs, in the diſjunctive; this is but an eſtate for life and no more. So if one grant Lands to *I. S.* to have and to hold to him and his Heire, in the ſingular number; by this *I. S.* hath only an eſtate for life and no Fee-ſimple. *Co.* 5. 112. *ſuper Lit.* 8.

If one bargaine and ſell Land to another for money, and limit no time and expreſs no eſtate, by this the bargaine ſhall have only an eſtate for life. But otherwiſe it was before the Statute of Uſes, for then it had been a Fee-ſimple. *Co.* 1. 87. 130 *Plow.* 5 9.

If Lands be granted to *I. S.* for life, and after to the next Heir male of *I. S.* and the Heirs males of the body of ſuch next Heir male; by this *I. S.* hath but an eſtate for life. But if it be to the next Heirs males of *I. S.* it is an intaile. *Co.* 1. 66.

If one grant Land to *I. S.* to have and to hold to him in Fee-ſimple, or in Fee-taile without ſaying [to him and his Heirs, or to him and his Heirs males or the like] this is but an eſtate for life and no more. So if one grant Land to *I. S.* to have and to hold to him and his ſeed, or to him and his iſſues, generally without more words; by this is made only an eſtate for life. But in the conſtruction of a Will the law is otherwiſe in moſt of theſe caſes. 20 *H.* 6. 33. *Co. ſuper Lit.* 8: 20. Will.

If Lands be granted to two & *heredibus* without this word [*Suis*], by this they have an eſtate for their lives and no longer. 20 *H.* 6. 35.

If one grant Lands to *I. S.* to have and to hold to him and his Heirs for his own life, or for the life of *I. D.* by this *I. S.* hath an eſtate for life and no more. *Co.* 5. 112. 1. 140.

If one grant Lands to *A.* and *B. Habendum ſibi & ſuis* omitting all other words, or to have and to hold to them and their aſſignes; by this they have an eſtate for life only. So if Lands be granted to any naturall perſon to have and to hold to him and his ſucceſſors; by this he hath only an eſtate for his life. *Co.* 4. 29. *ſuper Litt.* 1. 8.

If

If one grant his lands to *I. S.* to pay his debts to have and to hold to him generally without limiting any eſtate; in this caſe *I. S.* hath an eſtate for life only. *Co.* 8. 96.

If Lands be granted to *A.* and *B.* to have and to hold to them for their lives to the uſe of *C.* for his life; by this *C.* hath an eſtate for his life if *A* and *B.* live ſo long. *Dier* 186.

If a Tenant in taile grant *totum ſtatum ſuum*; by this the grantee hath an eſtate for the life of the grantor and no longer. And if a Leſſee for life grant all his eſtate; hereby his eſtate for life doth paſs, for this is as much as he can lawfully grant. *Litt. ſect.* 613. *Co.* 1. 53. *ſuper Litt.* 345. *Plow.* 562. 162.

If a man have a Son and a Daughter and die, and Lands be granted to the Daughter and the Heirs Females of the body of the Father; it ſeemes by this ſhe hath only an eſtate for life. *Co. ſuper Litt.* 24.

If one grant Land to another to have and to hold to her whiles ſhe ſhall live ſole, or during her widowhood, or ſo long as ſhe ſhall behave her ſelf well, or ſo long as ſhe ſhall dwell in ſuch a houſe, or ſo long as ſhe pay 10 l. yearly, or ſo long as the coverture between her and her husband ſhall continue; or one grant lands to a man to have and to hold unto him untill he ſhall be promoted to a Benefice, or the like; in all theſe caſes if livery of ſeiſin be made according to the Deed, or if the grant be of ſuch a thing whereof no livery is requiſite; the Grantee hath an eſtate for his life and no more, and that determinable alſo. *Co ſuper Litt.* 42. 234. 235.

If one grant Lands to *I. S.* to have and to hold to him for life, and doth not ſay for whoſe life; this regularly ſhall be taken for the life of *I. S.* the Leſſee, and not for the life of the Leſſor. But if the Leſſor himſelf have but an eſtate for life in the Lands granted, then the Leaſe ſhall be conſtrued to be and endure during that life only by which the Leſſor did hold to prevent a forfeiture. And if he that doth make the Leaſe be Tenant in taile of the Land, this ſhall be taken to be a Leaſe for the life of the Leſſor. And if a Tenant for life of Land make a Leaſe for years of it and then grant his reverſion by the name of a reverſion to another, To have and to hold to him and his Heirs; by this he hath only an eſtate for life of the Grantor and no more. So if Tenant in taile of Land grant it to one for years, and after grant his reverſion to another, To have and to hold to him and his Heirs; this ſhall be conſtrued to be an eſtate for the life of the Tenant in taile and no longer, and the atturnement of the Tenants in theſe caſes will not alter the caſes. And ſo it is in caſe of a Releaſe alſo, as if Tenant in taile doth releaſe to *B* (being Leſſee for years of the Land) all his right to the Land, this ſhall be taken to enure but for the life of the Tenant in taile and no longer, as if a man retaine a ſervant, and ſay not how long; this ſhall be taken for a year. *Conſtructio legis non facit injuriam. Co. ſuper Litt.* 183. 42. *Plow* 161 *F. N. B.* 168.

If one grant to *I, S.* that if he be not paid yearly for his life 40 s that he ſhall diſtraine in the Land of the Grantor for it; by this *I. S.* hath an eſtate for life in the rent. And if a man by his Deed grant a rent of 10 l. iſſuing out of all his Land quarterly at the uſuall feaſts, this is an eſtate for life of the Grantee. *Co. ſuper Litt.* 147. *Co.* 8. 85.

If one grant Lands to *I. S.* and *I. D.* To have and to hold to them during their lives, omitting theſe words [and the longeſt liver of them] by this notwithſtanding they ſhall hold it during the life of the longeſt liver of them. And if Lands be granted to *A.* to have and to hold to him during the lives of *B. C.* and *D.* without any more words; by this *A* hath an eſtate during all their lives and during the life of the longeſt liver of them. *Co.* 5. 9. 11. 3. *See Brownlows Rep. f.* 30. But if it be to one during the lives of *A.* and *B.* if one of them die the Leaſe is ended. 39. 180. 181. 2 *part* 292. *Goldsb.* 71. *pl.* 16, If a Leaſe be to two for their lives, and one of them die, the other ſhall hold by ſurvivor. A Leaſe was made to the Father, during his Life and the Life of two of his ſons, this was adjudged to continue after the death of the father. *Ewdalls caſe* 31. *Eliz. Brownl.* 187, *pl.* 130. And if Lands be granted to *A*, To have and to hold to him during his life, and during the lives of *B.* and *C.* by this he hath a Leaſe for his own life and the lives of *B.* and *C*, and the longeſt liver of them. 38. *Eliz. B. R. in the caſe of Ros & Adwick*,

But

But if a Leaſe be made to *I. S.* of Land to have and to hold to him during the the time that *A.* and *B.* ſhall be Juſtices of Peace, or during the time that *A.* and *B.* ſhall be of the Inner Temple, or the like; in theſe caſes the failer of one doth determine the eſtate. And if a Leaſe be made to *B.* only to have and to hold to him and *C* for their lives; by this *B* hath an eſtate for his own life only and no more, and *C.* hath nothing at all. *Adjudged B. R.* 8 *Eliz. Hobart & Wiſemores caſe.*

For years: when ſuch a Leaſe ſhall begin and how long it ſhall continue.

When no time is ſet down for the beginning of an eſtate then it ſhall begin preſently, otherwiſe it ſhall begin at the time expreſſed if it may ſtand with Law. If a Leaſe for years be made bearing date the 26 day of *May*, To have and to hold for 21 years from the date, or from the day of the date; in theſe caſes the Leaſe ſhall begin on the 27 day of *May*. But if the words be To have and to hold from henceforth, or from the making hereof, in theſe caſes the Leaſe ſhall begin on the day in which it is delivered. And if it be to begin *à die confectionis*, then it ſhall begin the next day after the delivery. And if it be To have and to hold for 21 years, without mentioning when it ſhall begin, it ſhall beg n from the delivery if there be no former Leaſe in being, and if there be, then it ſhall begin from the time of the ending of that Leaſe. If the Deed have a date which is void or impoſſible, as the 30 of *February*, or 40 of *March*, and the terme be limited to begin from the date, then it ſhall begin from the delivery. So if a man by his Deed recite a Leaſe which is not, or which is void, or miſrecite a Leaſe that is in *eſſe* in point materiall, and then ſay, To have and to hold from the end of the former Leaſe; this Leaſe ſhall begin in courſe of time at the time of the delivery of the Deed. *Co. ſuper Litt.* 46. *Co.* 5. 1. 2. 5. *Dier* 286. 307. *Sect.* 19.

If one make a Leaſe of Land to *A*, for 20 years, and then grant it to *B*, To have and to hold to him from the end of the firſt terme, &c. in this caſe this ſecond Leaſe ſhall begin as ſoon as the firſt Leaſe by what means ſoever ſhall end. But if the words of the ſecond Leaſe be To have and to hold to him from the end of the 20 years, in this caſe the ſecond Leaſe ſhall not begin untill the 20 years be expired. And if one make a Leaſe of white acre to *A*, for 10 years, and of black acre to *B*, for 20 years, and then reciting both the Leaſes doth make a Leaſe to *C* to begin after the former Leaſes; this ſhall be taken reſpective, and ſhall begin for white acre after the end of the 10 years, and for black acre after the end of 20 years. And if one make a Leaſe to two for 60 years, provided that if the Leſſees ſhall die within the term, that then preſently after the deceaſe of the laſt of them longeſt living the Leſſor ſhall reenter, and one of them die, and after the Leſſor doth make a Leaſe to another *Habendum, &c. cum poſt ſive per mortem ſurſum redd' vel forisfacturam* of the firſt ſurviving Leſſees *acciderit vacare* for 40. years; in this caſe this ſecond Leaſe ſhall begin after the death of the Leſſee ſurviving, reentry of the Leſſor, or the effluxion of time of the firſt Leaſe which of them ſhall firſt happen, and the Leſſee cannot at his election make it to begin at any other time. *Co.* 1. 154. *Plow.* 198. *Co.* 6. 36.

If a man make a Leaſe for 30 years, and 4 years after make another Leaſe, to another man in theſe words. *Noveritis, &c. me* A. *de* B. *predictis* 30 *Annis finitis dediſſe & conceſſiſſe* B. *de* C, *&c. Habendum á die confectionis præſentium termino predicto finito uſque finem* 21 *Annorum*: by this the ſecond terme ſhall begin at the end of the 30 years. And if one make a Leaſe to *A* for 20 years, and after make a Leaſe to *B*, to have and to hold to him from the end of the firſt terme for 20 years to be accompted from the date of the laſt Deed; in this caſe the ſecond Leaſe ſhall begin at the end of the firſt Leaſe, and theſe words [to be accompted, &c.] ſhall be rejected *Dier* 261. *Craddocks caſe paſc.* 7. *Jac. Co. B.*

If one make a Leaſe of Land to *A*, for 10 years, and after by indenture grant it to *B* to have and to hold to him from Michaelmas next for 10 years, and after the firſt Leſſee doth purchaſe the reverſion by which his terme is drowned; in this caſe the ſecond Leaſe ſhall begin preſently when Michaelmas is come. *Dier.* 112.

If two Jointenants be, and one of them grant the Land to *I. S.* to have and to hold to him for 20 years, if the Leſſor and his companion ſo long live; by this

the

the Leaſe ſhall continue no longer then they both live together, and when either of them is dead the Leaſe is determined. And if one grant his Land to *I. S.* to have and to hold to him, his executors, &c. for the terme of 100 years if *A*, *B*, and *C*. live ſo long; and leave out theſe words [or either of them] in this caſe if either of them die the Leaſe is determined. But if the words be To have and to hold for 100 years if *A*, *B*, or *C*, [omitting or either of them] ſhall live ſo long, *contra*, If a Leaſe be made of Land to the husband and wife to have and to hold to them for 21 years if the husband and wife or any child between them ſhall ſo long live; this is a good Leaſe and ſhall continue for all their lives and for the life of the longeſt liver of them albeit the firſt words be in the copulative.

If a man make a Leaſe for years to 2. if they live ſo long; in this caſe if one of them dye; the Leaſe is at an end. If a Leaſe be made to *A*, and *B*, his wife for 21 years if he and ſhe or any child between them lawfully begotten ſhall ſo long live, and after marriage ſhe dye without iſſue, in this caſe the leaſe doth continue notwithſtanding her death, *Brownl.* 1 *part.* 180. 181. 2 *part* 292. *Mich.* 13. *Jac. B. R. Co.* 5. 9. *Paſch* 30. *Eliz. Co. B.*

If one poſſeſſed of Land for a Terme of years grant the ſame to another, To have and to hold to him, his executors and adminiſtrators, or to him and his aſſignes, or to him, without any more words: or if a man that is poſſeſſed of a terme grant his Leaſe to another, and doth not ſay for what time; it ſeemes in theſe caſes the whole terme is granted albeit no livery of ſeiſin be made. And in the firſt caſe if livery of ſeiſin be made, then it ſeems there doth paſs an eſtate for the life of the Grantee, and therefore that this is a forfeiture of the eſtate of the Leſſee for years whereof he in the reverſion may take advantage preſently. And if a Leſſee for years of Land grant a rent out of the Land generally without any limitation; this ſhall be conſtrued to enure for a grant of the rent ſo long as the eſtate of the Grantor doth continue. But if he grant a rent by expreſs words for the life of the Grantee: by this the Grantee ſhall have it for all the terme, if he live ſo long. *Dier* 307. 69. *Plow.* 520. 524, 525. 423. 424. *Co.* 7. 23.

If one grant Lands to *I. S.* To have and to hold to him for life reſerving the firſt ſeven years a roſe, & if he will hold the Land over that he ſhall pay a rent in money, and no livery of ſeiſin is made, by this it ſeems in certaine is made a Leaſe for ſeven years untill the condition be performed, and then alſo it ſeems it is a Leaſe for no longer time. And ſo perhaps it will be if livery of ſeiſin be made. *Co. ſuper Lit.* 218.

If one grant a rent of 5 l. *per annum* unto *I, S.* To have and to hold to him, &c. untill he ſhall receive 20 l. in this caſe he ſhall have a Leaſe for four years of this rent. But if Lands be granted to *I, S*, To have and to hold, &c. untill he ſhall receive 20 l. out of the profits of it, in this caſe if livery of ſeiſin be made, the Grantee hath an eſtate determinable upon the levying of the money, and if no livery be made he hath no eſtate at all but at will. *Co. ſuper Litt.* 42. *Plow.* 273.

If one make a Leaſe for life and ſay, that if the Leſſee within one year pay not 20 s, that he ſhall have but a term for 2 years; by this if he doth not pay the money he hath only a leaſe for 2 years, albeit livery of ſeiſin be made upon it. *Co. ſuper Litt.* 218.

If one make a Leaſe to *I. S*, To have and to hold to him, his Executors, &c. for 10 years if *I. D* ſhall live ſo long, and *I. D.* is dead at the time when the leaſe is made; in this caſe *I. S.* hath an abſolute leaſe for 10 years. *Co.* 9. 63. 60.

If one grant lands to *I, S*, To have and to hold to him, his Executors, &c. for 3 years, and ſo from 3 years to 3 years during the life of *I, S*, or from 3 years to 3 years during the life of the leſſee; by this it ſeemes *I, S.* hath a leaſe for 6 years and no more. And if one grant lands to *I, S*, To hold for 3 years and after the end of thoſe 3 years for 3 other years, and after the end of thoſe 3 years for 3 other years during the life of the leſſor; by this it ſeems *I.* S, hath a leaſe for 9 years and no more. And yet if in theſe and ſuch like caſes where a leaſe is made from ſo many years to ſo many for the life of any perſon livery of ſeiſin be made upon this deed *ſecundum formam chartæ*; this perhaps may be an eſtate for life. *Plow.* 273. *Co. ſuper Litt.* 45. *Dier* 24.

If

If a Leaſe be made to a widow for 40 years under this condition, that if ſhe ſhall be ſo long ſole and dwell in the houſe, and ſhe lived ſole and in the houſe all her life: it was agreed that the leaſe did continue after her death, *Gouldsb.* 179.

If Lands be granted To have and to hold from our Lady day *pro termino unius Anni, & ſic de uno Anno in unum Annum quamdiu ambabus partibus placuerit*; by this the Grantee hath a Leaſe for 3 years only in certain, and afterwards a leaſe at will: And if lands be granted to have and to hold from the Nativity of Chriſt next *pro termino unius Anni, et ſi in fine dict' unius Anni ambæ partes placerent, quod eadem præſens dimiſſio foret renovata, tunc habend' præmiſſa* to the leſſee, &c. *ab & poſt dictum feſtum Nativitatis Domini uſque terminum trium Annorum extunc prox' ſequen'*; by this the Grantee hath a Leaſe in certain but for one year only; and if the parties agree again, a leaſe for 3 years. 14. *H.* 8. 10. *Co.* 6. 35. 10, 106.

Sect. 20.

If one make a leaſe to *I. S*, To have and to hold to him for years, and ſay not how many years; by this the leſſee hath a leaſe for 2 years and no more: *Co.* 6: 35. 21 *H.* 7: 38.

If one grant his land to *I S* To have and to hold to him untill *I D* ſhall come to 21 years of age; in this caſe if *I D* die before that time, the leaſe is ended: *Co.* 3. 19.

If a man poſſeſſed of a terme of years of land doth grant the land to another and his Heirs, this by conſtruction will amount to a good grant of his intereſt. *Co.* 1: 44: 7 *H.* 4. 42.

If lands be granted to husband and wife, and to *I S* To have and to hold to them and to the Heirs of the husband and *I S*; by this the wife hath only an eſtate for life in a moity with her husband, and the husband and *I S* have the fee-ſimple in Jointenancy to them and their heirs. *Dyer* 263.

Limitation of eſtates to divers perſons.

If lands be granted to two brothers, or two ſiſters, or to a brother or ſiſter, or to a father and ſon or any others, To have and to hold to them and the heirs of their bodies begotten: by this they have joint eſtates for their lives, ſo that the ſurvivor of them will have the whole for his life, and ſeverall inheritances *i.* eſtates in general taile by moieties in common one with another. And if lands be granted to two men and their wives and the heirs of their bodies begotten, in this caſe they have joint eſtates for life, and afterwards the one husband and wife ſhall have the one moity, and the other the other moiety in common. And if lands be granted to a man and two women To have and to hold to them and the heirs of their bodies; by this they have each of them an eſtate taile in common with the other. *Co.* 8. 87. 10. 50. *ſuper Litt.* 25: *Dier* 145.

If lands be granted to husband and wife To have and to hold to them and their heirs of their bodies iſſuing, or in any ſuch like manner, by this the wife hath an eſtate taile as far forth as the husband. But if it be granted to them To have and to hold to them and the heirs of the body of the husband, or to the husband and wife and the heirs of the husband which he ſhall have by his wife, or in any ſuch like manner: by this the wife hath only an eſtate for life, and the whole eſtate taile is in the husband. So *via verſa*, if lands be granted to husband and wife, and the heirs of the wife upon her body begotten by the husband: by this he hath an eſtate for his life only, and his wife the whole eſtate taile. And if lands be granted to the husband To have and to hold to him and the heirs of his body on the body of his wife begotten, or to have and to hold to him and the heirs of his body begotten on the wife he ſhall firſt mary, or to have and to hold to him and his wife he ſhall firſt mary, and the heirs of their bodies begotten: in theſe caſes the husbands have the whole eſtate, and the wives nothing at all. But otherwiſe it is it ſeems, when the eſtate is limited by way of uſe to a man and his wife that he ſhall afterwards mary, for by this it ſeems the wife ſhall take alſo. *Lit. ſect.* 27. 28. 29. *Co. ſuper Lit.* 26. *Dier* 340. *Co:* 1. 100.

Uſe.

If Lands be granted to *A* a married man, and to *S* a married wife and to the heirs of their bodies engendred: by this they have each of them an eſtate taile preſently executed, and whiles the wife of the husband and the husband of the wife live they ſhall hold it for their lives, and if they happen to die, and theſe to intermary and have iſſues, their iſſues ſhall have it according to the intaile: 15 *H.* 7. 10.

When the *Habendum* ſhall be ſaid to be repugnant and void. And when not, but ſhall controll, divide or expound the premiſſes.

If Lands be granted to *A* and *B* To have and to hold to *A* for life the remainder to *B* in Fee: by this *A* ſhall have the whole for his Life and *B* the Fee-ſimple afterwards. *Dier* 126. 56

As touching this matter theſe differences are to be taken. Between things that are granted and between the eſtates, When the things that are granted are ſuch as lye in grant and take effect by the delivery of the Deed only without any ceremony, or take effect by the ſame ceremonie, and when not but another ceremony is required to the perfection of the grant and eſtate. *Co.* 2. 23. 8. 56. *Perk. ſect.* 181. 14 *H.* 8. 14. *Co. ſuper Litt.* 183.

And when there is an expreſs eſtate made by the Deed in the Premiſſes thereof, and when but an implied eſtate only, as for examples. If one grant Land, Rent common, or any ſuch like thing to one and his Heirs by the Premiſſes of the Deed To have and to hold to him for life, or To have and to hold to him and to his aſſignes, without more words; in this caſe the *Habendum* is repugnant and void, and by this the Grantee ſhall have an eſtate in Fee-ſimple if livery of ſeiſin and attornment, as the caſe doth require be duly made, for otherwiſe no eſtate at all but at will, will paſs. So if a man grant a Rent, or any ſuch like thing that lieth in grant to one and his Heirs, To have and to hold to him for years: this is a void *Habendum*, and the Grantee ſhall have the Fee-ſimple. But if a man grant Land to another and his Heirs. To have and to hold, to him for a certain number of years; in this caſe whether he may make livery of ſeiſin or not it is a good *Habendum*; and by this the Grantee ſhall have an eſtate for ſo many years and no more. So if one grant Land, Rent, Common, or any ſuch like thing to one in the Premiſſes of the Deed without limitation of eſtate (which in judgement of Law is an implied eſtate for life) To have and to hold to him for a certain number of years, or at will; this *Habendum* is good and ſhall ſtand with the Premiſſes and qualifie it; and by this the Grantee ſhall have but a Leaſe for years, or at will, as the *Habendum* is. And if one grant Land by the Premiſſes of a Deed to one and his Heirs of his body To have and to hold to him and his Heirs; this *Habendum* ſhall ſtand, and this ſhall be taken an eſtate taile and a Fee-ſimple expectant. So *vice verſa*, If Land be granted to one and his Heirs To have and to hold to him and his Heirs of his body; this ſhall be conſtrued an eſtate taile and a Fee-ſimple expectant and ſo both ſhall ſtand together. *Co.* 8. 154. 21 *H.* 6. 7. *Co. ſuper Lit.* 20. *Dier* 126. *& per curiam in Thurmans caſe. Paſc.* 16. *Jac. B. R.* 21 *H.* 6. 7. If Lands be given to *B* and his Heirs To have and to hold to *B* and his Heirs, and if he die without Heirs of his body that it ſhall revert to the Donor, it ſeems this is a Fee-taile only and no Fee-ſimple expectant, *Voluntas donatoris in charta doni ſui manifeſte expreſſa obſervanda eſt. Co. ſuper Lit.* 21.

If a Leaſe for years be made of Land, and then the Leſſor by the premiſſes of the Deed granteth the Land to another To have and to hold the reverſion of the Land to him, &c. for life; this *Habendum* ſhall ſtand. So if by the Premiſſes of the Deed the reverſion be granted To have and to hold the Land it ſelf, this is good and both ſhall ſtand together, but nothing is granted in either caſe, but the reverſion *Co.* 10. 107. 108.

If the next Advowſon of a Church be granted to three to have and to hold to them and either of them jointly and ſeverally; this is joint, and the *Habendum* is void. And yet if one grant Land to two by the premiſſes of the Deed To have and to hold to one of them for life, the remainder to the other for life, this is not repugnant, but ſhall ſtand together and make the eſtates ſeverall and in remainder one after another. So if a Leaſe be made to two To have and to hold the one moity to the one, and the other moity to the other; by this they have ſeverall eſtates, *Expreſſum facit ſemper ceſſare tacitum, Dier* 304. *Co.* 5. 19. *Co.* 2. 55. *ſuper Litt.* 183. *Dier* 106. If a man have a Leaſe for years of Land, and he reciting this, by the Premiſſes of the Deed doth grant all his eſtate in the Land, To have and to hold the Land or the term after his death, or for part of the time only; in this caſe the *Habendum* is void and the whole eſtate doth paſs immediatly by the premiſſes. *Dier* 272. *Plow.* 520. If a Tenant for life ſurrender a moity of his Land and the Leſſor grant it all to a ſtranger To have and to hold the one moity for life and the other moity for 40 years, after the death of the tenant for life; this *Habendum* ſhall ſtand and enure according to the grant. *Dier*, 256.

If

If a man ſeiſed of land in fee make a leaſe for life of it to one, and after grant the reverſion of it to another to have and to hold the reverſion and the tenements aforeſaid *cum poſt mortem forisfact' &c. vacare acciderit*; in this caſe the *Habendum* and premiſſes may ſtand together: It is uſuall in the *Habendum* of a deed to ſet down to what uſe the party to whom the deed is made ſhall have the thing granted. But touching this and the matters that doe concern uſes ſee *Vſe infra* at large. And ſee alſo more for the *Expoſition* of *Deeds* in *Teſtaments Numb*:8. *Grant Numb* 4: *Leaſes cap*:14. *Numb*.4. And here note that parol-agreements & conveyances have the ſame conſtruction for the moſt part made upon them as are made before upon deeds. And therefore if a man by word of mouth without any writing grant all his lands in dale to *I S* to have and to hold to him for life, but doth not ſay for whoſe life; this ſhal have the ſame conſtruction as ſuch a grant made in writing hath. *Curia paſ*:7 *Iac. Co. B.* Note.

This is alwaies taken moſt in advantage of the feoffee, grantee, leſſee, &c. and againſt the feoffor, grantor, leſſor, &c; and yet ſo as the rent be paid during the time. *Co*.5.111.10:106.8.71. *Co. ſuper Litt*.47:213,214. *Goldsb*.148.

In the reſervation of Rent. And how that ſhall be taken. *Sect*. 21.

And therefore if the reſervation be only to the feoffor, grantor, &c. and the deed doe not ſay alſo [to his heires, executors &c.] this reſervation ſhall continue only for the life time of the grantor and ſhall determine with his death. And ſo alſo it is where the reſervation is to the feoffor or his heires, in the disjunctive, for in this caſe the rent ſhall continue only during the life of the grantor. And yet if one make a leaſe for years rendring yearly during the ſaid terme to the leſſor or his heirs or executors; this is a good reſervation during all the terme, by reaſon of theſe words [during the terme.] So if the feoffor, or leſſor be ſeiſed in fee, and make a feoffement in fee, or leaſe for life or years, rendring rent to the feoffor or leſſor or his executors or aſſignes; in this caſe the rent ſhall continue only for the life of the Leſſor. *Plow*. 171. 21 *H*. 7. 25. 27 *H*. 8. 19. *Dier* 45.

But if the reſervation be to the Feoffor, or Leſſor, his Heirs and aſſignes, in the copulative, or in the disjunctive to him or his Heirs, or to him and his ſucceſſors (if it be the leaſe of a Corporation) during the terme; then all the aſſignes of the reverſion ſhall enjoy it. And if the reſervation be thus, yeelding and paying ſo much rent (without any more words,) this ſhall be taken for all the time of the eſtate and ſhall goe to him in reverſion accordingly. And if the reſervation be, rendring ſo much rent during the ſaid terme, and doth not ſay to whom; in this caſe it ſhall be conſtrued to be to him that hath the reverſion, and accordingly it ſhall be paid and ſhall continue during the term. *So held in the caſe of Bland M. 8. Car. B. R.*

But if *A* be ſeiſed of Land in Fee, and make a Leaſe for years of it rendring rent to *A* [without ſaying To his Heirs, &c.] during the ſaid terme; this rent ſhall continue only during the life of *A* and no longer. And yet if *A* be poſſeſſed of a terme only, and make an under-leaſe or aſſignement with ſuch a reſervation; *Quere.*

If the reſervation be thus. Yeelding and paying 20 s. during the ſaid terme, omitting the word [yearly] this ſhall be taken to be not once only but yearly during the terme, and accordingly it muſt be paid. And if a Leaſe be made for years, rendring in every middle of the yeare, *quolibet medio Anni* 20 l this ſhall be paid during the terme. 27 *H*. 8. 19. *Paſ*. 21. *Iac. Hudſon & Brent B. R.*

If one by Deed indented grant Lands to *A*, To have and to hold to him for life, the remainder to *B*, and the Heirs of his body, and for default of ſuch iſſue to remaine to *D*, in taile, or for life, yeelding therefore yearly, &c. in this caſe the reſervation ſhall extend to all the eſtates. *Co*. 10. 107.

If a Leaſe be made the 10 day of *Auguſt*, rendring rent at our Lady day and Michaelmas; in this caſe albeit our Lady day be firſt named, yet the firſt payment ſhall be at Michaelmas next after the making of the Deed. *Dier* 130. *Co*. 5. 111. *ſuper Litt*. 217.

If the reſervation be at Michaelmas or within 20 daies after: in this caſe the 20 day ſhall be taken excluſive. But if the rent be to be paid at Michaelmas or by the ſpace of 20 daies after, in this caſe the 20 day ſhall be taken incluſive. *Per Williams & Yelverton Inſt. Ch. Inſt. contra 9 Iac. B. R.*

If a leaſe be made in *December*, from the Nativity of Chriſt next for one yeare with this addition, *Et ſi in fine dicti Anni ambæ partes agrearent quod eadem dimiſſio foret renovata tunc habend' & tenend' premiſſa dicto I S* (the leſſee) *ab & poſt dictum feſtum tunc proxim' ſequen. uſque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dict. W: S: &c.* in this caſe the reſervation ſhall relate to both the terms, and the rent ſhall be paid the firſt yeare although they doe not agree to renew the leaſe. *Co.*10.106.

If two Jointenants by deed poll, or by word make a leaſe for life reſerving a rent to one of them; this ſhall goe to them both. So if one of them be tenant for life and the other in fee, and they joine in a leaſe for life, or gift in taile reſerving a rent; the rent ſhall enure to them both. But if tenant for life and he in reverſion joine in a leaſe for life, or gift in taile by deed reſerving a rent, the rent ſhall enure to the tenant for life only during his life and after to him in reverſion. *Co: ſuper Litt.*214.

If two tenants in common make a leaſe of their land rendring 20 s. rent; this ſhal be but one 20s and not two 20 s. So if the leaſe be rendring a Hawke or a Horſe; by this they ſhall have but one Hawke, and one Horſe, and not two Hawkes or two Horſes, as it ſhall be in caſes where they doe joine in the grant of ſuch things out of their land. *Plow.*171:289: *Co:*10:106.

If one make a gift in taile of two acres of land, the one at the common law, and the other in Burrow Engliſh rendring an oxe to him and his heires, and the donee having two ſons die, and the eldeſt ſon doth inherite the one acre, and the youngeſt ſon doth inherit the other; in this caſe the donor and his heires ſhall have but one oxe &c. *Co.*10.106.

If one make a leaſe of land for years if the leſſee live ſo long, and after the leſſor by his deed indented doth grant the land to another to have and to hold the reverſion to the grantee for his life *cum poſt mortem &c. aut aliter acciderit vacare reddend' inde Annuatim* to the grantor and his heires *cum reverſio predicta acciderit* 9s. 4d. *per Annum*; in this caſe this reſervation of rent ſhall not begin before the reverſion happen in poſſeſſion. *Co.*10.107.168:

In other reſpects. If rent be reſerved to be paid at two terms, and it is not ſaid by equall portions; yet it ſhall be ſo taken and it muſt be ſo paid. *See more in Brownlow.* 1 *part.*19:39: 63:87:105:108:2, *part:*221:273:

Deviſe. If one be poſſeſſed of a terme of years of land, and grant it by deed to *I S* for his life, and after his death to *I D*; in this caſe the whole terme is granted to *I S*,

Remainder. and his executors, adminiſtrators and aſſignes ſhall have it and not *I D*. But if a terme were ſo deviſed by Will *contra*. And if one give or grant to another his horſe, or his books for his life, and that after his death they ſhall remaine to another, the remainder is void, and the firſt ſhall have it for ever, for the gift or grant of ſuch a thing for an houre is a gift of it for ever. If I grant you that if you pay me 20 pound at *Eaſter*, that then you ſhall have an Annuitie of 40 pound to you and your heirs and you die before *Eaſter*, in this caſe the heire can never have it. *Geldſb.*64. *Pl:*2.

CHAP. LXIV.

Of an Action of Debt.

THis word Debt is ſometimes taken for a ſum of money, or other thing which *is* owing or due from one man to another, whether by writing or otherwiſe; And ſometimes it is taken for the mean it ſelf to recover this thing, and then it is ſaid to be an Action given, or a Writ lying where any ſum of money or other thing is due to a man, upon, or by reaſon of a Judgement or Recovery in Law, Obligation, or other Eſpecialty, Account, Loan or Contract to be paid at a certain day, at which day he payeth it not, then he to whom it is due ſhall have this writ to recover it. *New terms of the Law. F. N. B.* 119. *Ed.* 4. 1. In this place it is taken ſometimes in the one, and ſometimes in the other ſignification and conſidered as the Debt of a Common perſon and as the Debt of the *Lord Protector.* What it is. *Sect.* 1.

The Action of Debt (whereever it lyeth) is ſometimes grounded on matter of record, as either on an act of Parliament, or a Judgement, Statute, or Recognizance, or the like. And ſometimes it is grounded on matter in fait: And that either in writing, as an Obligation, Bill, Covenant, or other eſpecialty, or elſe without writing, as an Arbitrement, Eſcape, Receipt, Paroll-contract, or the like. This Action may be had and brought in any of the common Law-Courts as the upper Bench, or Common pleas, or other Courts that have Juriſdiction. But if the Debt be under 40 *s.* the proper places to ſue for it is in the County, or Hundred-Court, or a Court-Baron. And if the Debt be under 40 *s.* and owing by one that doth live within the City of *London*, or the liberties thereof, untoſuch a one alſo, and be not grounded on a reall contract, the party is bound by a ſpeciall Law to ſue for it in the Court of Requeſts for the City of *London*, for if he ſue for ſuch a petty debt in any other Court, he ſhall pay the Defendant Coſts, and yet ſhall recover no coſts in his ſuit againſt the Defendant, *F. N. B.* 119. 3. *Jac. ch.* 15.

No Action of Debt or Treſpaſs or other perſonall Action may be brought in the Common-pleas, where the Debt or Damages doth not amount to 40 *s.* or upwards. *Glouc. cap.* 18. *N. B.* 61. But by joyning two Debts together for divers contracts together in one writ, the force of this Statute is avoided, See *Cromp. Jur.* 101.

The party himſelf to whom the Debt is originally due, whileſt he doth live, muſt bring the Action for it in his own name, and after his death his Executors or Adminiſtrators may and muſt have the Action where there is cauſe. And if the Executor be under age, the Adminiſtrator *durante minori ætate.* And if there be divers Executors who have taken upon them the Executorſhip, after the death of ſome or one of them, the ſurvivor or ſurvivors muſt have the Action: And when they are all dead, the Executor of the laſt ſurvivor: And ſo when there is but one Executor, and he doth accept and die, the Executor of the Executor, and ſo *in infinitum* ſhall have the Action. And if an Executor die inteſtate, there muſt be an Adminiſtrator made *de bonis non adminiſtratis* of the firſt Teſtator, and he muſt have the Action; But the Ordinary or Adminiſtrator of the goods of an Executor may not have this Action for a Debt due to the firſt Teſtator, unleſs withall he have an Adminiſtration *de bonis non adminiſtratis* of the Teſtator which is uſuall, *Dyer* 24. 20. *Ed.* 4. 20. *Co.* 3. 9. *Dyer* 471. *Brownl.* 2 *part.* 207. 2 By whom this Action may and muſt be brought, and who may bring it, and who not. *Sect.* 2. Executor.

An Heir may not nor muſt have this Action for a Debt due to his Anceſtor, nay not albeit it be due upon an Eſpecialty made to him and his Heirs, but the Executors muſt have the Debt and ſue the Action, *F. N. B.* 120. Heir.

The Executors or Adminiſtrators, not the ſucceſſors of a Biſhop, Parſon, Vicar, Maſter of Hoſpitall, or the like, muſt bring this Action for the Debt due to the predeceſſor.

But

Executor. But if a Debt be due to a Corporation aggregate, as Mayor and Commonalty, Dean and Chapter, or the like, in their politique capacity, there the Succeſſor not the Executor muſt ſue for it. If there be divers Executors, and one of them ſell ſome of the goods (as he may if he will) in this caſe he alone may ſue in his own name for this. If one grant to me a Rent in Fee, and if it be arrear, to forfeit 40 s. to me and my Heirs, *nomine pœnæ*, and I die ; my Heir, not my Executor muſt have the Action for the penalty paſt, *Co.* 4. 65. *Old, N. B.* 62. 34 *Ed.* 2. 9. *F. N. B.* 120.

Heir.

Againſt whom it may or muſt be brought or not. *Sect.* 3. Executor. This Action may and muſt be brought againſt the party himſelf that doth originally owe the Debt, whilſt he is living. And after his death it may and muſt be brought againſt his Executor if he make any, and the Executor made do take on him the Executorſhip ; otherwiſe againſt the Adminiſtrator appointed by the Ordinary, or if he appoint none, againſt the Ordinary himſelf ; And if the Ordinary die poſſeſſed of the goods againſt the Executor of the Ordinary. And if the Executor die after he hath accepted the adminiſtration, then the Action muſt be brought againſt the Executor of the Executor ; and ſo *in infinitum* if any ſuch Executor be made. But if none ſuch be made, then againſt the Adminiſtrator *de bonis non ad-adminiſtratis*. And if the Adminiſtrator of the firſt inteſtate die inteſtate, alſo it may be brought againſt the Adminiſtrator of that Adminiſtrator, being Adminiſtrator *de bonis non adminiſtratis*. But it doth not lie againſt the Executor of an Adminiſtrator for the Debt of the inteſtate, *F. N. B.* 120. *Dyer* 271. 160. 174. 112. *Co.* 5. 9. *Weſtm.* 2 *Cap.* 19. *Brownl* 2 *part* 97.

Heir. It lyeth and may be had againſt an Heir upon an Eſpecialty made by his Anceſtor ; if thereby he hath bound himſelf and his Heirs, otherwiſe not.

Husband and Wife. It lieth and muſt be brought againſt the Husband and Wife for the Debt of the Wife, during the Coverture.

It lieth and may be had in ſome caſes upon a contract againſt an Infant : For which ſee *Contract*.

Heir. If one grant me a Rent-charge out of his Land, and the Rent is behind, and after the Grantor make a Feoffment of his Land to another, and then the Rent is behind again, and then the Feoffee makes a Feoffment of it to another, or makes a gift in tayl, Leaſe for life, or years, or at will, or makes a gift in tayl with the Remainder over in Fee, and then more Rent is behind. In theſe caſes if I or my Executor ſue for this Rent, I muſt bring my Action againſt every one of them for the Rent due in the time of his occupation of the Land only. So if the Land charged deſcend to the Heir of the Grantor, and from him to his Heir ; in this caſe every Heir ſhall be charged for the Rent due to his time., *Qui ſentit commodum ſentire debet & onus Co.* 7. 34. *Stat.* 32 *H.* 8. 37. *Co.* 4. 50. If I make a Leaſe for years to *A* and *B* rendring Rent: and *A* aſſign his part of the term to *C* and *B* die ; in this caſe I may have one Action of Debt againſt *C* and the Executors of *B*, and I am not bound to have ſeverall Actions. *Curia Co. B. M.* 4: *Jac. Bayly & Burgeſſe de Ipſwicks Caſe.*

Heir. An Action of Debt lieth not againſt the Heir of a Conuſor upon a Statute, nor againſt the Terre-Tenant, as it doth againſt the Conuſor himſelf, *Co* 3. 15.

Executors. It lieth not againſt the Executors or Adminiſtrators of a Leſſee for years, for a Rent reſerved on the Leaſe, where the Leſſee in his life time, or his Executors or Adminiſtrators after his death, have aſſigned over their whole tearm, *Co.* 3. 23.

If a Purveyor, Taker or Clark of the King, had contracted with me for any thing for the Kings houſe, in this caſe if he had been paid and allowed it from the King, I may ſue him, otherwiſe I muſt have ſued to the King for it, *Broo. Det.* 62.

Where it ſhall be laid in the *Debet*, and where in the *Detinet*. *Sect.* 4. *Debet & Detinet.* Where it may be had for parcell of a Debt, and where not. *Sect.* 5. Where this Action is brought for money due to a man in his own right, there he ſhall bring his Action in the *Debet*, *i.* the Writ ſhall run in this form ; it ſhall have both theſe words *Debet & Detinet* contained in it. But where the Action is brought for Rent, Corn, Cattel or Hens, or the like, reſerved on a Leaſe for years, or the Action is brought by or againſt Executors, there it ſhall be in the *Detinet* only *i.* it ſhall have this word only, and not *Debet* in the Writ. See for theſe matters 50. *Ed.* 3. 16. 11 *H.* 7. 5. 10 *H.* 7. 5. 19 *H.* 8. 8. *Co.* 5. 31. *Brownl.* 1 *part* 50. 56, 2 *part* 203. 204.

If one bind himſelf to me in a ſingle obligation, or by a verball Contract, to pay me money at ſeverall daies, as quarterly or otherwiſe ; or I make a Leaſe of perſonall

perſonall things, rendring Rent at ſeverall daies; in theſe caſes I may not bring this Action for any part of this Debt, untill all the daies be incurred, and then I may bring it for all together: And therefore if one bind himſelf ſo by bill to pay me xx l. a year during my life, in this caſe no Action may be brought for this untill I am Dead, and then my Executors may recover it all. So if I ſell another a Horſe to pay me five pounds a year, untill a 100 l. be paid, this Action will not lie untill all the money be due but (it ſeemes) I may have an Action of the Caſe upon every failer. But if one be bound to pay me money after this manner, by Recogniſance, the Condition of an Obligation, a Covenant, or the reſervation of Rent upon a Leaſe made of a reall thing; in all theſe caſes I may have this Action upon every failer of payment, *F. N. B.* 130. 267. *Co.* 4. 94. *& ſuper Litt.* 47. 292. *Dyer* 313.

Action of the Caſe.

5 Where and in what caſe this Action or Writ lieth & is maintainable, and in what manner and where not *Sect.* 6.

If an Act of Parliament give a Penalty or Forfeiture to any perſon, and this Action to recover it, there this Writ lieth, and the party may have it accordingly. As a Parſon may have this Action upon the Statute of 2 *Ed.* 6 againſt a Parochian for not ſetting out of his Tythes. So any man that is grieved by the falſe retorn of a Sheriff for a Knight of the Parliament, may have this Action and ſhall recover 100 l upon the Statute of 8 *H.* 6. *cap* 7. 1 *H.* 5. *cap.* 1. But where the Statute doth limit a time within which this Action muſt be brought, the Action cannot be had after that time, *Plow.* 78. 200. 113. 15. *Ed.* 4. 19. *Bro. Det.* 203. *Brownl.* 1. *part.* 70. 71. 81. 86. 99. 100. 123. 2 *part* 9.

Upon an Act of Parliament.

Upon a Judgment or other Record.

If I have a Judgement in any Court to recover any Debt, Damages or Coſts in any Action, Reall or Perſonall, againſt another man; before Execution be done, or the money paid, I may have this Action of Debt for the things ſo recovered, or ſo much of it as is unpaid and not levied by Execution, and recover it by that means, and refuſe to proceed or take my remedy on the Judgement. But then theſe three things muſt be in the caſe. *Co.* 5. 31. *Dyer* 21. 5. *H.* 7. 21. *F. N. B.* 122. 1 It muſt be a year after the Judgement be had, ere the Action be brought, 5 *Ed.* 4. 1. 20. *H.* 6. 11. 2 The Judgemeut muſt be of a thing certain; for if the demand be of a thing uncertain, as if one have a Judgement in an Action of Treſpaſs, or any ſuch like Action, before the damages be certain, no Action of Debt will lie for them, *Couper verſ. Longworth. Hill.* 40. *Eliz. B R.* 3 The Judgement muſt continue in force, for after it is actually reverſed, no Action will lie upon it; but untill then, albeit there be manifeſt error in it, I may have this Action well enough. But if a Woman the Wife of a Copyholder, recover her Dower by cuſtom of a Manor in the Lords Court of the Mannor and recover damages alſo; ſhe may not have this Action of Debt to recover theſe damages, *Co.* 4. *inter le Copyhold Caſes. f.* 30. 6. *Brownl.* 1 *part* 72.

If a man enter into a *Statute* Merchant or *Statute* Staple, or Recognizance to me, after it is certified by *Mittimus*, I may have a Writ of Debt upon it, and recover the Debt by this means, and refuſe to proceed upon the Statute or Recogniſance by any other means: or I may ſue Execution upon the Statute at my pleaſure. But if I once ſue Execution upon the Record, I cannot after have this Action of Debt, *Co.* 3. 15. *Dyer* 219. *F. N. B.* 222. *Dyer* 300. *p.* 34.

If I recover an Annuity in Fee againſt another, and after ſue a *Scire facias* upon this Judgement, and thereupon have Judgement to recover it with damages; in this caſe I may have this Action of Debt to recover theſe arrearages and damages, and wave my proceeding upon the Judgement. *F. N. B.* 122. *Litt. Bro. ſect.* 25.

If in account before Auditors the Bayliff be found indebted to his Lord, the Lord may have this Action againſt him for this Debt, and wave his proceedings in the Account, and then it ſeems the Bailiff muſt not be committed to Priſon, *Dyer* 21. 21 *H.* 6. 8.

If the Kings by their Patent had granted to me a ſum of money out of the Cuſtom of *London*, yearly for life or years, and hereupon I have a Writ of *Liberate* to the Cuſtomer to pay it, and this be delivered to him, and he have Aſſets at that time in his hands: if he refuſe to pay it me, I may have this Action to recover it: So if I had had a Taile out of the Exchequer to the Kings Collector, to receive a Debt due to me from the King, and I ſhew it to him, and he hath Aſſets at that time in his hands, and yet doth not pay me, I may have this Action to recover it, *F. N. B.* 121. 27 *H.* 6. 9. *Bro. Taile de Exchequer* 3.

If

Upon a contract by ſpecialty, either in writing or otherwiſe.

If one doe by Obligation, Bill, Covenant, or other Writing, undertake or bind himſelf to pay me money or deliver me Corn or the like by a day, and do not perform it accordingly, I may have this Action againſt him, his Heirs or Executors, as the caſe is. And if it be by Covenant, I may at my choiſe have this Action, or an Action of Covenant to recover the thing *F. N. B.* 120. *New Book of entries:* 191. *Plow.* 439. *Curia Hil:* 7. *Ja. Co. B.*

For a penalty.

If one grant a Rent to me and my Heirs in Fee, and grant moreover that if it be unpaid a certain time, that he will forfeit, and pay to me and my Heirs 40 s. *Nomine pœnæ*; in this caſe if he fail to pay the Rent at the day, I or my Heirs after my death, may have this Action to recover this penalty, *F. N. B:* 120. *Dyer* 24.

If a man by his Deed bind himſelf to do and perform divers things by ſeverall Covenants, and by the ſame Deed binds himſelf in twenty pounds *Nomine pœnæ* to performe the ſame Covenants; in this caſe if he break any one of them, I may have this Action for the 20 l. 22. *H.* 6. 5. If one borrow my Horſe untill ſuch a day, and do promiſe me to reſtore him that day, or elſe pay me ten Pounds for him; in this caſe if he do not reſtore the Horſe, I may have this Action for the 10 l. *F: N. B.* 121.

Executor.

But if *A* Covenant that his Executor ſhall within a year or ſuch a time after his death, pay 10 l. to *B*; in this caſe no Action of Debt will lie againſt the Executor,

Covenant.

becauſe it did not lie againſt *A* himſelf, but an Action of Covenant will lie. So if the Covenant be conditionall, as that if *A* do not pay to *B* 10 l, *A* will pay it: So if it be in the disjunctive to do ſuch an Act, or pay 10 l: if it be not done, an Action of Covenant lieth, not of debt; but if both be to be done by the Covenanter (*viz.*,) 10 l. if not 5 l. ſuch a day, *Contra. See Penots Caſe. Co. Paſch:* 33. *Eliz. Auſtines caſe. C: B.*

For Rent.

If I being ſeiſed in Fee-ſimple, Fee-tayle, or for life, of land, or of any incorporeall inheritance, as Common Advowſon, Fairs, Markets or the like, make a leaſe for years of this to another, rendring Rent, and the Rent be unpaid at the time of paiment; in this caſe I during my life, and my Executors or Adminiſtrators after

Executor.

my death, may have this Action for theſe Arrearages againſt the Leſſee, or if he be dead, againſt his Executors or Adminiſtrators: and ſo alſo may my Heir or Executor, as the caſe is, after my death, have this Action for the Rent to come.

Heir.

And albeit the leaſe be on condition to re-enter for not-paiment of Rent, and I do re-enter by force of the ſame condition, yet I may have this Action for the Arrearages due before; and albeit the leſſee ſurrender his Eſtate to me, and I do accept it, yet I may have this Action for the Arrearages due before the ſurrender; and albeit the Leſſee for years aſſign over his Eſtate to a ſtranger; yet I that am the leſſor may have this Action for the rent to come againſt the leſſee, while he doth live, or the Aſſignee, at my choice: but if after the Aſſignment I grant away the reverſion, or die, or the Leſſee die; in all theſe caſes neither I nor the Grantee of this reverſion ſhall have this Action: and yet if in this caſe the Aſſignement had been but of part of the land, or of all the land, but for a part of the time only; here the Grantee of the reverſion may have this Action for the rent paſt or to come againſt the firſt leſſee, and after his death againſt his Executors or Adminiſtrators: And if I grant the reverſion to a ſtranger, and the leſſee or Tenant attorn, the Grantee of the reverſion ſhall have this Action for the rent that ſhall grow due after the grant, *Co.* 10. 127: 20. *Ed.* 4. 9, *Co. ſuper Litt.* 47. *F. N. B.* 120. *Co.* 3. 23. 65: *F, N. B:* 121. 5. *H.* 6. 34. A man makes a leaſe for years to *I. S.* and after grants away the reverſion to *I, D,* and after *I, S.* aſſigne over his whole intereſt, and after aſſignement rent is behind; in this caſe the Grantee of the reverſion cannot bring Debt againſt *I, S, Goldsb.* 182.

And if I be poſſeſſed of a Tearm of years only, and make a leaſe for all or part of my time to another rendring rent, I may bring an Action of Debt for this Rent upon this Contract. So alſo if I make a Leaſe to another of my Land, to hold at will only rendring Rent; I may have this Action for the Rent; and in all theſe caſes it is not materiall whether the Leaſe be in writing or no, unleſs it be in caſe of the demiſe of incorporeall things, as Commons, Advowſons or the like, which will not paſs without Deed, *Litt. ſect.* 72.

But

But if I have a Rent-ſervice, Rent-charge, or Rent-ſeck in Fee-ſimple, Fee-tail, or for life; as if one make a Feoffment in Fee, Gift in Tail, or Leaſe for mine own or anothers life to me, rendring Rent; or one grant a Rent in Fee-ſimple, Fee-tail, or for life to me: In all theſe caſes, ſo long as this Rent doth continue, and I have any other remedy for it, I may not have this Action to recover the Arrearages by the Common-Law, unleſs it be in ſome ſpecial caſes. But if the Eſtate on which the Rent depended, or if the Rent it ſelf be ended, or the Land out of which it doth iſſue be come into another hand, ſo that all remedy doth now fail; in theſe caſes this Action will lie. *See for this divers Examples afterwards, and the Statute of* 32 *H.*8. *c.*37: which is, That the Executor or Adminiſtrator of him that hath Rent or Fee-farm, in Fee, in Tail, or for life, ſhall have this Action for this Rent againſt him that ought to pay it. So that now if one make a Leaſe for life rendring Rent, and the Rent is Arrear, and the Leſſor dieth, the Executors may have this Action during the life of the Tenant for life, *Dyer* 13.*p.*60. *Lit.*203. *Co ſuper Lit.*47. *Co.*4.50. 7.20. *Co.*7. 78,79. So if a Rent be granted to a man for his life, *Habendum* after the death of his wife, and he enter into a Statute to me, who after have an Extent, and the Rent delivered to me by a *Liberate*; in this caſe I may not have this Action for the Rent againſt the Terre-tenant ſo long as the Extent doth continue, but afterwards I may, *Brownl.* 1 *par.* 103. So if there be Lord and Tenant, and the Lord demiſe his Manor or Seigniory to me for years, and the Rent of the Tenants is behind; I that am the Leſſee of the Seigniory cannot have this Action for the Rent during the Leaſe, but afterwards I may. So if Leſſee for life be of a Manor, and the Rents be Arrear, and the Tenant ſurrender his Eſtate, he ſhall have an Action of Debt for the Arrearages. So if the Tenant die, his Executors or Adminiſtrators ſhall have this Action, 9 *H.*7.17. *Co.*7.79. *F.N.B.*121.

If a Feme be endowed of a Rent, or a Rent be granted for life, and the Tenant attorn to this Grant, and after the Rent is Arrear, and then the Tenant in Dower die, or Grantee die, or ſurrender his Eſtate; in theſe caſes the Executors of the Tenant in Dower, or Grantee for life, may have this Action for the Arrearages incurred before the death or ſurrender, *Co.*4 49. 9 *H.* 7.17. 34 *H.*6.20. If one have an Annuity or a Rent-charge for years, and it be behind during the Leaſe, and after it is ended; he may have this Action for it during the Leaſe, and after it is ended. *Per* three Juſtices, *Paſch.* 10 *Car.* at *Serjeants-Inne.* If a Parſon or Prebend, &c. have an Annuity, and the Annuity is behind, and the Parſon or Prebend reſign or die: In the firſt caſe he himſelf, and in the laſt caſe his Executors or Adminiſtrators ſhall have this Action for the Arrearages before. But as long as this Annuity, and the thing to which it belongs did continue, this Action will not lie for it, *Co.* 4. 48,49. *F.N.B.* 120, 121.

If the ſon be Lord, and the father Tenant by a certain Rent, and the Rent is Arrear, and the Tenant die, and the Tenancie deſcend to the ſon, ſo that the Rent is extinct; yet it ſeems the ſon may have this Action for the Arrearages by the Statute, *Co.* 4. 49. *Quære.* If my father grant a Rent-charge out of his Land to me his ſon in Fee, and the Rent is Arrear, and my father dieth, and the Land doth deſcend to me, (whereby the Rent is extinct:) In this caſe, if my father did not make his Election in his life-time by Diſtreſs and Avowry for this Rent, I may have this Action of Debt for the Arrearages incurred in his life-time againſt the Executors of my father, *Co.*4. 49. 45 *Ed.*3. *tit.Executors*, 71.

If one grant a Rent-charge to me out of his Land for his life, provided that it ſhall not charge his perſon, and then he die, ſo that this Land cannot now be charged becauſe the Eſtate is ended; in this caſe I may have this Action againſt the Executors or Adminiſtrators of this Grantor, notwithſtanding the Condition, *Dyer* 227. *Co. ſuper Lit.*146.39. If the Husband be ſeiſed of any Eſtate in any Rent or Farm in the right of his Wife, and he die, his Executors may have this Action for the Rent by the Statute of 32 *H.*8. *cap.*37.

If a Woman have a Rent for her life, and it is unpaid while ſhe is ſole, and after ſhe is married, and then it is Arrear again; in this caſe the Husband may have this Action for all theſe Arrearages before and after marriage, after the death of his wife. *Co.*4.51. *F.N.B.*12.

If I make a Leaſe to a Feme-covert for life, rendring Rent, and the Rent is Arrear, and ſhe die; in this caſe I may have this Action againſt the husband for the Rent during the coverture, and after his death againſt his Executors. So if a man grant a Rent-charge to me for life out of his Land, and the Rent is Arrear, and the Grantor make a Feoffment of this Land to another, and after the Feoffee make a Feoffment to another, and there is Rent behind again in both their times, and then I die; in this caſe I in my life-time, and after my death my Executor may have this Action for theſe Arrearages: But we muſt ſue every one ſeverally for the Rent due in his time, *F.N.B.* 121. 26 *E.*3.64. *Co.*7.39. *Co.*4.50. 11 *H.*4. *fol. ult. Vid. ſupra.* But if Tenant in Tail make a Feoffment in Fee, and the Diſcontinuee charge the Land with a Rent in Fee, and after infeoff the Iſſue in Tail within age, ſo that he is remitted; in this caſe no Action lieth againſt the Iſſue for this Rent. So in all caſes where he that comes to the Land, comes not to it by, but above him that granted the Rent; *Co.* 4.50.

If a Partition be made between me and another, and he promiſe or grant to me a certain ſum of money yearly to make the Partition equal; in this caſe I may have this Action yearly to recover it, *F.N.B.* 122.

But if I have a Rent-ſervice or Rent charge in Fee or for life, and the Rent is Arrear, and after I grant over the Rent to another, and the Tenant attorn, and then I die, in this caſe my Executors ſhall not recover this Rent by *Stat.* 32 *H.*8. *Co.*4.50.

If a man ſeiſed of Land *jure uxoris*, make a Leaſe for years rendring Rent, and the wife die, and had never any iſſue by the husband, and the Leſſee take the profits of the Land after the death of the wife; in this caſe ſo long as he take the profits, it ſeems the husband may have this Action and recover the Rent, 9 *H.*6.43. See more, *Brownl.* 1 *par.* 20, 34, 51, 55. *Goldsb.* 120. *pl.*6.

Upon *Accounts.* If there be Reckonings and Accounts between another and me, or another hath received my money to Account, and upon the caſting of our Accounts it doth appear he is indebted to me Ten pounds, I may have this Action for this debt. And it is ſufficient in this Action to ſay *pro diverſis mercimoniis*, without reciting particulars. *March, fol.* 102. *pl.* 175. *fol.* 125. *pl.* 182.

If in the Account before Auditors it appear the Lord is indebted to the Bailiff, the Bailiff may have this Action to recover it againſt his Lord, *F.N.B.* 121. *Dyer* 21.

Upon a *Loan.* *Mar. Rep f.* 102. *pl.* 175. If I lend another money to be paid me again upon demand, or upon a day certain, and he do not pay me; I may have this Action for the money, but I may not ſue for it before the day, *Co. ſuper Lit.* 209. If I lend another money, and after he mortgage Land to me for the ſecurity of it, upon condition to have the Land again upon repaiment of the money, and at the day of paiment he doth tender me the money, and I refuſe it, and thereupon he doth re-enter upon his Land (as he may) in this caſe notwithſtanding this refuſal, I may recover the money, and have this Action for it upon the Loan. But if the Mortgage had been without any ſuch Loan preceding for the paiment of money, as a Gratuity, there by this refuſal I am become remedileſs for this money, *Co. ſuper Lit.* 209.

Upon other Contracts. If a man come into my houſe who am an Inholder and Taverner, and there call for meat or drink for himſelf or his horſe; in this caſe I may have this Action for the money, *Co.* 8.147. But if *J.S.* owe me money, and another come to me and intreat me to take him Debtor for this money, and promiſe to pay me at *Michaelmas*, I cannot have this Action upon this Contract, 9 *H.*5.14. 44 *Ed.*3.21. If a man promiſe me Twenty pounds to marry his daughter, and I do marry her, I may have this Action for this Debt, *F.N.B.* 120. See *Brownl.* 1 *par.* 20. 74. 34. See *Contracts.*

If I buy twenty Quarters of Corn of another, or make a Leaſe of years rendring unto me a Quarter of Wheat weekly; in theſe and ſuch like caſes I may have this Action for this Debt. And in divers other caſes where a Contract that is Executory is good, and there is a good Conſideration for it, this Action will lie upon it, *F.N.B.* 119. *Dyer* 22. 9 *H.*7.5. See for this more in *Contract* and *Aſſumpſit.*

Upon a *Retainer.* If another retain me to do any lawful work or ſervice for him, and I do it accordingly, and he refuſe to pay me for it, I may recover it by this Action. And if we do agree for a ſum in certain, or the Law do ſet down the certain wages for that work;

as

as for a Serjeant his Fee for pleading, or an Attorney his Fee for profecuting of a cauſe, or the like; in ſuch caſes I muſt bring the Action for that certain ſum. But in other caſes where our Agreement is not ſo certain, as where I put my Cloth to a Tailor to make a garment, or the like; in theſe caſes I muſt bring my Action generally, and I ſhall recover as much as a Jury will give me, *F.N.B.*120. *Old N.B.* 62. *F.N.B.*121. *Co.*7.10. 8. 147. 12 *Ed.* 4. 9. A Barreſter cannot have this Action or any other for his Fees for giving of Counſel, as a Serjeant or Attorney may; and therefore he is not bound to give Advice before he have his Fees. So was the opinion of Mr. Juſtice *Bridgman*: *& Curia in le Marches de Wales*, 7 *Car.* Alſo in *Trin.* 8 *Car. B.R.* That a Sollicitor cannot have an Action for monies laid out upon any Suit, without an expreſs Retainer to lay out monies for him in ſuch a Suit, and an expreſs Promiſe to pay ſuch ſums, *Brownl.* 1 *par.* 73. 2 *par.* 99.

If a Sheriff, Gaoler, or other Officer that hath a man in Execution at my Suit for Debt or Damages, do after ſuffer him wilfully or negligently to eſcape, and do not take him again before I commence my Action; in this caſe I may have this Action againſt him that did ſuffer this Eſcape, and thereby ſhall recover as much of him as the Debt or Damage was. So if the Suit were for Treſpaſs, or for Debt upon a Deed, and the party deny his Deed, ſo that he is fined, and afterwards taken by a *Capias pro fine* within the year at the ſuit of the Keepers of the Liberty; if the parties that have taken him ſuffer him to eſcape, I may have this Action. But if the Arreſt be on a mean Proceſs, as *Latitat*, *Capias*, and the like; there this Action will not lie for the Debt of the Suit whereupon the Proceſs came, but an Action of the Caſe will lie: And if it be after Execution, yet it doth not lie for this Eſcape againſt the Executors or Adminiſtrators of him that ſuffered it, *Plow.* 35. *Co.* 3. 52. *Dyer* 278. *F.N.B.*121. *Dyer* 27. 21 *H.*7.23. *Brownl.* 1 *par.* 84. 119. *Upon an Eſcape.* *Action of the Caſe.*

If a Sheriff levy money upon a *Fieri facias* of another mans goods at my ſuit, I may bring this Action againſt him; or if he die, againſt his Executors for it. *March f.*13. *pl.*33.

See for Remedy againſt the Warden of the *Fleet*, if he take Bail of a Priſoner in by Judgment, or let him go at large. *Stat.* 1 *R.* 2. 12.

If one receive money of another to my uſe, or to deliver to me, or from me, to deliver to another, or to beſtow for me, and he doth not diſpoſe it accordingly; in all theſe caſes I may have this Action for the money, or I may have a Writ of Account, *Dyer* 21. 42 *Ed.* 3. 9. *Broo. Condition* 6. 38 *H.*6. 9. If the Lord levy Aid of his Tenants to make his Son Knight, or to marry his Daughter, and die before his Son or Daughter have received it; in this caſe the Son or Daughter may have this Action againſt the Executor of the Lord for it, and if he have not Aſſets, it lieth againſt his Heir, *Brownl.* 1 *part* 51. 82. *Upon a Receipt.*

If a Fine or Amercement be impoſed on a man in a Court Leet after any offence; or one do forfeit a ſum of money by the breach of a By-law; in theſe caſes and for this money, the Lord may have this Action of Debt, *Co.*8. 123. But a Lord of a Manor cannot have this Action for a Relief or Eſcuage due to him, but if he die his Executors may have this Action, for they have no other remedy; and it is as a flower faln from the ſtock; neither may the Lord have this Action for Aid to make his Son Knight, or marry his Daughter, nor for a ſum of money upon a pretence of an unreaſonable cuſtom, as to have thirty pound of every one that ſhall break the pound within his Lordſhip, or the like, *Co. ſuper Littl.* 47. 83. 7 *H.* 6. 13. *Littl. Broo. Sect.* 176. 21 *H.*7. 40. *For a Fine or Amerciament.* *For a Relief.*

If another and I do refer any differences between us to Arbitrement, and the Arbitrators Award the other to pay me ten pound, I may recover this money by this Action: But if we did enter into Obligation each to other, to ſtand to their Award, I cannot have this Action for the ten pound, and ſue him upon the Obligation alſo, *F. N. B.* 121. 33 *H.* 6. 2. But for the further opening of this, we muſt know this, *Brownl.* 1 *part* 55. 134. *Upon an Award.*

And as to this thing, theſe things are further to be known.

1. That Freemen of *London*, for Debts under forty ſhillings, have a ſpecial way to recover the ſame in the Court of Requeſts, *St.* 3 *Jac.* 15.

2. There is alſo a ſpecial way to recover Debts againſt them that make fraudulent Conveyances of their Eſtate to deceive their Creditors, and come not in upon Summons, by *Stat.* 2 *R.*2: *parl.* 2.3.

3. Remedy againſt the Priſoners in the *Fleet*, that to ſhift from others pretend debt to the King. See *Stat.* 1 *R.* 2. 12.

Sect. 8. What ſhall be ſaid a good Plea or Bar to this Action, and what not.

It is a good Plea to this Action grounded upon a Statute or Judgment, That the Plaintiff hath ſued out and made Execution upon the Judgment or Statute: But regularly no matter in fait, as Paiment or the like, is a good plea to this Action grounded on a Record, *Dyer* 299. *p.*34. 22 *Ed.*4.6. 6 *H.*4.6.

If the Action be grounded on a Real Contract, as if it be for Rent on a Leaſe of years, it is a good Plea in bar to the Action to plead any of the matters following, *viz.*

1. That the Leſſee was ejected out of the Land by a ſtranger that had title paramount, that entred and kept him out.

2. That the Leſſor entred upon all or part of the Land demiſed before the day of paiment of the Rent, and doth keep out the Leſſee always, ſo that he cannot take the profits; for if the Leſſee re-enter, this is no Plea.

3. That the Leſſor had nothing to do with the Land demiſed at the time of the making of the Leaſe; but if the Leaſe be by Deed indented, then this is no Plea.

4. That the Rent was paid at the day, and that there is nothing Arrear; and though the Leaſe be by Indenture, yet Paiment is a good Plea.

5. Or that the Plaintiff hath diſtrained for it, and recovered the money by that means, and ſo levy by Diſtreſs.

6. But it is no good Plea to ſay, That the Houſes demiſed were ſo ruinous, that the Leſſee could not dwell in them, and that the Leſſor by Covenant or Cuſtom ought to repair them, *Dyer* 299. *p.* 34. 22 *Ed.* 4.6. 6 *H.*4.6. *Dyer* 82. *Co. ſuper Lit. f.*47. *Dyer* 212. *p.*37. *Co.*3.22. 10.127. 37 *H.* 6. 10. *Dyer* 28. 27 *H.*6.10. *Dyer* 20.6.

If the Action be grounded on a Perſonal Contract in Writing, as upon an Obligation or other Eſpecialty, if it be ſingle, or with Condition to pay money at a day; it is a good Plea to ſay he paid or tendred, and the other refuſed the money at the day of paiment: Or that he hath performed the Condition of the Obligation; or that the Plaintiff ſued the ſame Obligation once before, ſuppoſing the Condition was broken, and was barred therein. But in caſe of a ſingle Bill, Paiment is no good plea, *Co* 5.43. *Dyer* 256.51. 1 *H.*7.14. So neither for a ſingle ſum in a Bill penal, 1 *H.*5.7. otherwiſe to the double ſum in a penal Bill, for there paiment of the ſingle ſum is a good Plea. And regularly no matter, unleſs it be in Writing, is a good Plea to an Action grounded on an Eſpecialty; as that the money was paid after the day, and the Obligation delivered up, and the Plaintiff came by him actually again. So Arbitrement or Accord with ſatisfaction, is no Plea, 21 *Ed.*4.41. *Lit. ſect.* 338. *Co.*1. 113. *Lit. Bro. ſect.* 106. 8 *H.*7.3. *Co.*5.43. *Dyer* 51. 1 *H.*7.17.

If it be a Debt on a Contract without Eſpecialty, in which Action wager of Law doth lie; it is a good Plea, That before this time the Plaintiff brought another Action for the ſame Debt, and the Defendant waged his Law and barred the Plaintiff therein: Or that the Plaintiff brought an Action of the Caſe for the ſame Debt before, and recovered the ſame therein; or that he oweth nothing, but hath paid the Plaintiff, *Co.*4.94. But in this caſe upon a Parol-Contract without Eſpecialty, it is no good Bar to ſay, That there is a Decree in Chancery, that the Plaintiff ſhall releaſe the Debt, and take no advantage of it: Or if it be for Goods ſold, That the ſame were taken from the Buyer by one that had right before the day of paiment, or that the Plaintiff agreed that the Defendant ſhall keep it for another Debt the Plaintiff did owe to him, or that a ſtranger hath made an Obligation to the Debtee for the ſame Debt, *Fitz. Bar* 75. *Co.* 3. 22. 28 *H.* 6. 4. And whether the Debt be grounded on an Eſpecialty or not, generally a good Releaſe of the Debt from the party to whom it is owing, his Executor or Adminiſtrator; or that the Defendant did give, and the Plaintiff accept ſomething elſe in recompence thereof, it is a good Plea in Bar. But to ſay that the Plaintiff upon a *Juſticies* had a Judgment for the ſame

ſame Debt in the County-Court, it ſeems is no good Plea, unleſs Execution be done upon it. Or in an Action for Rent, or a Leaſe, to ſay, That he hath beſtowed it in Reparations by the commandment of the Leſſor, is no good Plea. Or to any Action of Debt, That he did grant the Debtee that he ſhould levy it upon his Land, *Co.*6.49. 9 *Ed.*4.50. 34 *H.*6.17. *Bro. Det.*29. *Brownl.* 1 *par.* 70, 71.

Sect. 9. Where and by what means a Debt ſhall be diſcharged or extinct, where not.

If the Debtor make the Debtee his Executor, and he accept it; or if the Debtor take the Debtee to husband or wife; or if two or more be bound in an Obligation to a Feme-ſole, and ſhe take one of them to husband; in all theſe caſes the Debt is gone and diſcharged, *Co.*8.136. *Plo.*364. 11 *H.*7.4. 21 *H.*7.29. *Brow.*1 *p.*71.76.109.

If a Judgment be had on an Eſpecialty, the Debt upon the Eſpecialty is gone: And if a Debt be upon a Contract, or Arrearages of Account, and after the Debtee take an Obligation from the Debtor for the money; in this caſe the Debt upon the Contract is gone; (But if the Obligation be made by a ſtranger, *contra.*) For ſo long as the Judgment is in force, or the Obligation in being, the Creditor cannot ſue upon the Obligation in the firſt caſe, or the Contract or Account in the laſt, *F.N.B.* 120. *M. Dyer* 21. *Co.* 6. 45. 28 *H.* 6.4. See *Extinguiſhment*, *Releaſe*, *Apportionment*. But if one promiſe to a woman, That if ſhe will marry him, he will leave her worth an Hundred pounds at his death if ſhe overlive him: In this caſe their ſubſequent marriage will not determine this Debt, but that after his death ſhe may recover it of his Executor, *Smith verſ. Stafford*, *Paſch.* 17 *Jac. Co.B.*

If a Debt be due to me on an Obligation, and I take a Statute for this Debt from the Obligor; this doth not determine the Debt due by the Obligation, but I may ſue upon either of them at my election; and if I ſue upon the Obligation, it is no good Bar to plead the Statute, *Co.*6.45. *Brownl.* 1 *par.*71,72,&c. For Debt againſt a Hundred on a Robbery, ſee it in *Chap.*3. So much for the Debt of a Common perſon.

Debt of the *Lord Protector*.

Now as touching the Debts due to the *Lord Protector*, theſe things are to be known. 1. That his Debts ariſe commonly by Rents, Recogniſances, Fines, Iſſues or Amerciaments, and as Iſſues upon Jurors, and Accompts of Officers. 2. Theſe are all called in by, and brought in to the *Exchequer*; for they are ſent from all other Courts, and certified in thither, and by authority thence called and fetch'd in. 3. This is done for the moſt part by the Sheriff and his Under-Officers. 4. It is done ſometimes by Diſtreſs only, ſometimes by Diſtreſs and Sale of Goods, ſometimes by Seiſure of Lands and Goods, and ſometimes by Sale of Goods and Lands. 5. The Lord Protector hath a large remedy to recover his Debts. (See for this *Prerogative.*) 6. Yet the Sheriff and his Officers have many charges upon them in this. For,

The duty of the Sheriff and his Officers in the Collection hereof.

1. They are not to levy any Debt of his upon Lands or Rents, ſo long as the Debtor hath Goods and Chattels to ſatisfie. 2. They are not to meddle with the Surety, ſo long as the Principal is ſufficient. 3. They are not to ſell the Diſtreſs taken for his Debt, within fifteen days. 4. If the party diſtrained can ſhew a Tally, and will give Security for his appearance in the Exchequer upon the next Accompt, they are to deliver the Diſtreſs. 5. They may not take any mans Cattel without good authority and Order from ſome Court. 6, Nor take ſuch Diſtreſſes as are forbidden, nor abuſe them after they are taken. See for this *Diſtreſs*. 7. The Sheriff having received any Debt, muſt upon demand of the Debtor, and without Fee, ſhew his Proceſs for the levying of it, and give a Tally to the Debtor thereof. 8. He muſt anſwer that any of his Servants imployed by him do receive. 9. He having received any Debt, muſt ſee that upon his next Accompt he do diſcharge the Debtor thereof. See for theſe things *Mag. Charta* 8. 18. *Weſtm.* 1. 19. *Articuli ſuper chartas*, 12. *Stat.* 13 *Eliz.* 4. 14 *Eliz.* 7. 27 *Eliz.* 3. *Co.* 2 *par. Inſt.* 18. And for Accompts and Publick Debts, *Act* 7 *Oct.* 1653. *Act* 7 *Oct.* 1654.

CHAP.

CHAP. LXV.

Of Disability.

Disability and *Nonability*, what. The kinds.

DIsability (as we take it largely) is an incapacity, incapability, or impotencie of some persons for some causes to have and enjoy some benefit, or do some act, that another may have or do: As to give or convey Lands or Goods; to make a Will, and appoint an Executor; to have Land by discent, or to have and enjoy a Legacie, or any other Testamentory benefit; or to sue and bring Actions, or to have or enjoy dignities and honor. And this sometimes is absolute, as of an Infant, Monk, or other Religious person, or man attainted of Treason or Felony, who cannot by any means make any Conveyance or Gift of their Lands or Goods, but it will be avoidable. So the Heir of one attainted of Treason or Felony, is disabled to be Heir to his Ancestor. And sometimes this Disability is only *secundum quid*; as of a woman Covert, or man of Non-sane memory, who cannot convey or grant by Deed, nor be bound thereby: But if they do it by Fine or Recovery, (as they may) it is not avoidable. So the King cannot grant, nor take any thing but by matter of Record. A Bishop could not grant but for his life, without the Dean and Chapters Confirmation; nor the Parson or Vicar, without the Confirmation of the Patron and Ordinary, and the like. A man that hath one Benefice eight pounds in the Kings books, is incapable of another, unless he be first qualified according to the Statute.

Infant. Monk. Woman-covert. Ideot.

And this is sometimes personal or temporal only: As when by Act of Parliament one is disabled to have his dignity, or some other thing for his life only; or where a Monk is disabled to have lands or goods; in this case it reacheth not to any other. And sometimes it is perpetual, and shall extend and reach to the prejudice of others: As where one is attainted of Treason or Felony, this is an absolute and perpetual disability to any of his posterity to claim any Hereditament in Fee-simple, either as Heir to him, or to any other Ancestor paramount him, because the blood is corrupt by the Attainder. See more of this in *Wills and Testaments*, who may make an Execution, or give his Goods, and who may take, accept, and enjoy it. And some men are disabled in some particular things; as men that have no skill, to take upon them Offices they cannot execute: And no man is therefore capable of the Grant of a Judicial Office in Reversion, *Co. lib. Inst. fol.* 3. 1 *par.*

But Disability (as it is taken strictly and most properly) is an Exception taken against a Plaintiff by the Defendant in some Action, That the Plaintiff is not able to sue any Action against him, and for that he demandeth the Judgment of the Court whether he shall answer or no, and prayeth that the Writ may abate. And this Exception (for the most part) must be taken at the very first, before the Defendant have answered or delayed it by imparlance, or else it comes too late. And this Disability also is sometimes absolute, as of an Outlawed man that cannot sue by any means; or *secundum quid*, as of a woman Covert, who may sue, but it must be with her husband, for otherwise she is disabled to sue. See *Husband and Wife*, 26 *H.* 8. 1. 3 *H.* 6. 36. 44 *Ed.* 3. 27. 16 *Ed.* 4. 4.

Wife.

What are causes to disable a man to sue, or not.

If a man be condemned in a *Præmunire*, outlawed, excommunicated, or professed in Religion in any Abbey, Priory, or Friery; he can bring no Action real or personal in his own right, or as for himself; neither can he sue in any other Court of Equity, (but as Executor to another he may) so long as he remains so. But after the impediment removed, (*i.*) Pardon in the *Præmunire* or Outlawry, or Reversal of the Outlawry, Absolution in the Excommunication, or Dearraignment in case of Religious profession, he may bring any Action as before. See *Co.* upon *Lit. fol.* 12ª, 129, 130.

Person outlawed.

So

So a Villain in his own right could not ſue his Lord; but as Executor to another he might have ſued him, *Co. ſuper Lit.* 2. *H.* 6. 30. *Executor.*

So an Alienee cannot bring any real or mixt Action againſt any perſon; and an Alien-enemy cannot bring any Action real or perſonal at all: For which ſee *Alien* at large. *Co. ſuper Lit. fol.* 129. *Alien.*

A man attainted of Treaſon or Felony cannot ſue, *Co. ſuper Lit. f.* Nor can a perſon that is a convict Recuſant, ſue whiles he is ſo. *Perſon attaint. Recuſant convict.*

But there are divers Exceptions out of theſe general Rules: For every one of theſe in ſome ſpecial caſes may ſue; and in ſome caſes the Diſability is but for the time they are ſo, but in ſome it is perpetual. In ſome caſes the Writ doth abate, and the cauſe of Action is gone: As if he ſue for Debt on a Specialty, and is outlawed, then it is the Kings. In others the Writ doth not abate. See for this *Co. ſuper Lit.* 124. But if a man be outlawed, and bring a Writ of Error to reverſe that Outlawry, or any other Outlawry; theſe Outlawries in this caſe are no diſability to him. So in an *Audita Querela* brought by a Defendant in Priſon upon an Outlawry, that Outlawry is no diſability to him to ſue in this caſe; nor in a Writ of Error to reverſe the Outlawry. It is no diſability to the Mayor and Commonalty, that the Mayor is outlawed. An Outlawry in *Cheſter* or *Durham* is no diſability. Ideots, Mad-men, and ſuch as be deaf and dumb, be not diſabled to ſue: And when an Ideot doth ſue or defend, he muſt do it in perſon; but an Infant or Minor ſhall ſue by a Procheine-Amy, *(i.)* next Friend, and defend by Gardein, 29 *Aſſ.* 47. 7 *H.* 4. 39. *Co. ſuper Lit. f.* 128.

Many are not diſabled to purchaſe, that are diſabled to hold; as Aliens, and men that have committed Felony or Treaſon: But after Attainder in the laſt caſe, and Office found in the firſt, the King will have it from the Alien, the Lord from the Felon: And if he were attainted, yet he may purchaſe; but in that caſe the King will have it until he be pardoned, and after pardon he is capable: So of Corporations that purchaſe in Mortmain, 49 *Aſſ. pl.* 2. 49 *Ed.* 3. 11. *What perſons are diſabled to purchaſe, or not.*

A Monſter born within lawful matrimony, that hath not humane ſhape, cannot purchaſe, much leſs retain any thing: So neither can they that are *civiliter mortui*, as Monks, and the like. *Monſter.*

An Hermaphrodite may purchaſe according to the ſex which prevaileth: So may perſons deformed having humane ſhape, Ideots, Mad-men, Lepers, Deaf, Dumb, and Blind men, Minors, and all other reaſonable creatures, are able to purchaſe and retain Lands or Tenements. See more in *Grants*; and there alſo what perſons are diſabled to make Feoffments or Grants, *Co lib. Inſt.* 1 *par. f.* 42. *Hermaphrodite.*

See more *Capacity*, and *Stat. Articuli Cleri, chap.* 13. 25 *Ed.* 3. *Stat.* 2 *de natis ultra mare.* 42 *Ed.* 3. 10. 31 *H.* 8. 6: 33 *H.* 8. 29. 5 *&* 6 *Ed.* 6. 13. *Fine, Num.* 6. 8. *Recovery, Num.* 5. *Grant, Num.* 2, 3. *Teſtament, Num.* 4.

CHAP.

CHAP. LXVI.

Of Diſcontinuance of Lands.

1. *Diſcontinuance*, what.

The kind of it.

Sect. 1.

DIſcontinuance is either of a Proceſs, or of a Poſſeſſion. Of a Proceſs or Suit; where by ſome negligence or default, or the like, a Plaintiff hath loſt his time in his Action, and for that cauſe his Suit is diſmiſſed the Court, and put without day; and then the party hath no remedy, but to begin his Suit again. Or of a Poſſeſſion; which may be either of Demeſn, or of Copihold-lands, Tenements, Rents, Commons, Advowſons, &c. And that is, when the party that is preſent Owner of the Land doth grant ſome larger or greater Eſtate then he hath, and thereby doth diveſt the Inheritance or Eſtate which ſhould or ought to have come to another: As when Tenant in Tail, for life or in fee, in the right of his wife, or Church, or houſe, do alien their Lands or Tenements they do ſo hold, for longer time then the Law doth enable them; this is called a Diſcontinuance. And in this laſt ſenſe it is here taken; and it is properly where he in Reverſion is ſo out, as he cannot enter. But it is taken for the diſplacing of a Reverſion, where the Entry is not gone, *Lit.* 140. *Co.* upon *Lit.* 325. *Noy, ch.* 27.

2. The fruit of it.

The fruits and operations of this are divers and contrary: For ſometimes by this the Entry of him that hath right is gone, and he is put to his Action: Sometimes an Entry and Action are given, and may be had preſently after the Diſcontinuance: And ſometimes the Entry and Action both are gone, and the party whoſe Eſtate is deveſted is perpetually eſtopped and debarred to require the ſame, as in the Examples ſubſcribed may appear, *Co.* 1. 84. *Co.* 10. 96.

3. What ſhall be ſaid a Diſcontinuance to take away and bar Entry, or not.

By *Tenant in Tail.*

If a Tenant in tail make a Feoffment in fee, Gift in tail, or Leaſe for any other life then his own, (not warranted by the Statute of 32 *H.* 8. *c.* 28. *ut infra*) before or after he hath iſſue; this is a Diſcontinuance of the Eſtate-tail, and takes away Entry; and puts the Iſſue, if it be to go to him after the death of the Tenant in tail, to his Writ of *Formedon in Diſcender*; and if it be to go to him in Remainder, it puts him to his *Formedon in Remainder*; and if it be to revert, it puts him to his *Formedon in Reverter*. *Co.* 1. 84. *Plow.* 137. *Dyer* 12. *Lit. fol.* 140. See *Co.* 3. 89.

If there be Tenant for life, the Remainder in tail, and the Tenant for life levy a Fine to his own uſe, and after the Tenant for life and he in Remainder join in a Feoffment by Letter of Attorney; this is Diſcontinuance of the Eſtate-tail, and the Fee. *Dyer* 324.

If a Tenant in tail leaſe for years, and after make a Feoffment with Letter of Attorney, and the Attorney come to the houſe in the abſence of the Leſſee, and command the Servant of the Leſſee to come forth of the houſe, and he doth ſo, and the Leſſee doth after agree to it; this is a Diſcontinuance. *Dyer* 363.

Sect. 2.

If the Tenant in tail be diſſeiſed, and after releaſe with Warranty to the Diſſeiſee, this is a Diſcontinuance. So if one releaſe or confirm to the Tenant for life, *Lit.* 135. *Co.* 144. 3 *H.* 4. 9.

If a Tenant in tail make a Leaſe for the life of the Leſſee, and after grant the Reverſion, and the Leſſee attorn, and after the Leſſee for life die during the life of the Tenant in tail, and then the Grantee of the Reverſion enter; this is a Diſcontinuance. So in this caſe, if the Tenant for life after Attornment had aliened in Fee, and the Grantee of the Reverſion had entred for a Forfeiture, *Lit. f.* 134. 139.

If a man be Tenant in tail of an Advowſon in groſs, and another preſent by uſurpation, and the ſix moneths do paſs, and then the Uſurper do grant the Advowſons to a ſtranger in Fee, this is a Diſcontinuance *quodammodo*: For a Releaſe with Warranty to the Grantee, will bar the Iſſue, 21 *H.* 7. 40.

If

If there be Tenant in tail, the Remainder in tail, the Remainder in fee, and the Tenant in tail make a Feoffment to him in Remainder in fee; this is a Diſcontinuance of the middle Remainder in tail, *Co.* 1. *Chudleighs* Caſe.

If there be Tenant in tail, the Remainder in fee, and the Tenant in tail make a Leaſe for life, and after grant the Reverſion in fee to another, and the Leſſee attorn, and after the Grantee of the Reverſion die without heir, and the Reverſion eſcheat, and after the Tenant for life die, ſo that the Reverſion is executed; this is a Diſcontinuance, *Co.* 1.

If a Tenant in tail endow his Mother, and ſhe grant the Land to *A.* and *B.* for lives, and die, and after the Tenant in tail confirm their Eſtates with Warranty; it ſeems this is a Diſcontinuance, 3 *H.* 4. 9.

If a Tenant in tail of a Rent or Advowſon in groſs grant it away in fee, and a Collateral Anceſtor releaſe with Warranty to the Grantee; this is a Diſcontinuance, *Finches ly*, 193.

If one that holdeth Lands in the right of his Wife, alien them for longer time then his own, and his Wives lives together; this is a Diſcontinuance, and by the Common-Law ſhe was driven to her Writ of *Cui in vita*. But now ſhe may enter after her Husbands death, by the Statute of 32 *H.* 8. By the Huſband in right of his Wife.

If the Husband and Wife be Joint-purchaſers, and he make a Feoffment with Livery of the Land; this is a Diſcontinuance, though the Wife do ſtand upon the Land and diſagree to it, 21 *Aſſ. p.* 25.

If any Spiritual perſons, as Biſhops, Deans and Chapters, Maſters of Hoſpital, or the like, that have Lands in the right of their Churches or Houſes in fee, alien ſuch Lands for longer time then their own lives; this is a Diſcontinuance, and their Succeſſors are put to their Action to recover the Land, 21 *Ed.* 4. 76. 4 *H.* 7. 24. 32 *H.* 8. *Lit.* 146. 145. 144. By a Spiritual perſon.

All Fines and Recoveries levied and ſuffered by the Tenant in tail to bar the Eſtate tail, are Diſcontinuances; in which a man ſhall have no remedy, unleſs it be in caſe where the Reverſion is in the King. And for this ſee Fines and Recoveries, *Co.* 10. 96. *See* 3. 4. What ſhall be ſaid a Diſcontinuance that taketh away Entry and Action alſo, or not.

All Leaſes alſo for lives or years made by Tenant in tail, or in fee in the right of their Wives, or Churches, or Houſes warranted by the Statute of 32 *H.* 8. 28. are Diſcontinuances for the time, for the avoiding of which there is no remedy by Entry or Action. See *Leaſes*. But no Fine, Feoffment, or other Act by the Husband only of any Land being the Inheritance or Freehold of the Wife, ſhall be a Diſcontinuance, or prejudicial to the Wife, or ſuch as have intereſt after her death, (Leaſes within the compaſs of 32 *H.* 3. *c.* 28. excepted before-mentioned in the Statute) within which Law a Common-Recovery is: See *Co. ſuper Lit.* 326. *Stat.* 32 *H.* 8: *ch.* 28.

If Lands be given to Husband and Wife, and to the Heirs of their two bodies, and the Husband maketh a Feoffment in fee and dieth, the Wife is holpen and her iſſue by this Statute. So if a Woman Tenant in tail take a Husband, and the Husband make the Feoffment, and the Wife before entry die without iſſue, he in Reverſion or Remainder may enter.

An Eſtate is in tail to the Husband, the Remainder in tail to the Wife, the Huſband maketh a Feoffment; now in this caſe the Wife may enter. See more in *Co.* upon *Lit.* 326. *Womans Law. f.* 144.

For the moſt part, ſuch Conveyances as are without Livery of Seiſin, and do contain no Warranty, ſhall not make any Diſcontinuance, *Brook* 313. 5. What ſhall not be ſaid a Diſcontinuance to take away and bar Entry.

If a Tenant in tail make a Leaſe for life of the Leſſee, and after grant the Reverſion, and the Leſſee for life attorn, and then the Tenant in tail die before the death of the Tenant for life, and after the Tenant for life die; this is no Diſcontinuance, but the Iſſue or he that hath right may enter upon the Grantee of the Reverſion, *Co. ſuper Lit.* 173. *Lit. fol.* 139. By Tenant in tail.

If a Tenant in tail bargain and ſell his Lands by Deed indented and inrolled; this is no Diſcontinuance. And if the Tenant in tail do after levy a Fine with Proclamation and Warranty to the Bargainee; yet this is no Diſcontinuance: And if after the Conuſee in the Fine make a Feoffment in Fee, yet this is no Diſcontinuance, but he in Remainder or Reverſion may enter, *Co.* 10. 96. *Co.* 146. 48.

If a Tenant in tail grant *totum Statum ſuum* to one, and the Grantee make a Feoffment in Fee, this is no Diſcontinuance, *Co.* 10. 96.

Sect. 4. If a Tenant in tail grant any thing out of Land, as Common, Rent, or the like; this is no Diſcontinuance. So if a Tenant in tail of a Rent, Common, Advowſon, or the like, grant it in Fee without Warranty, this is no Diſcontinuance; and if it be with Warranty, it is at the pleaſure of the Iſſue, *Lit. fol.* 138. *Finches Ley*, 193.

If a Tenant in tail within age make a Feoffment in Fee, it ſeems this is no Diſcontinuance during his minority, becauſe it is avoidable, *Lit. f.* 149.

If one make a Leaſe for life, the Remainder in tail, and he in Remainder grant his Remainder by Deed, and the Tenant for life attorn; this is no Diſcontinuance, *Lit.* 138.

If a Tenant in tail make a Releaſe or Confirmation without Warranty, to a Diſſeiſor, Leſſee for life or years, or make another Conveyance which doth not paſs the Land, this is no Diſcontinuance. *Lit. ſect.* 598. 606. 509. *Co.* 3. 85. *Plow.* 556. 13 *H.* 7. 10.

If a Tenant in tail make a Feoffment to his Donor, and there be no Remainder between; this is no Diſcontinuance. *Dyer* 12. *Lit. f.* 140.

If a Feoffment be made by the firſt Tenant in tail, to him in the next Remainder in tail, this is no Diſcontinuance.

If a man have iſſue a ſon by one wife, and after have another wife, and have a ſon by her, and Lands are given to him and his ſecond wife in tail, and after the wife die, and the husband is diſſeiſed, and he releaſe with Warranty; this is no Diſcontinuance to the younger ſon, but he may enter notwithſtanding, *Lit. f.* 136.

If a Tenant in tail make a Feoffment in fee upon Condition, and the Condition is broken; the Iſſue may enter notwithſtanding this Diſcontinuance, *Littleton chap.* 632.

If a Leaſe be made for life, the Remainder in tail, and he in the Remainder in tail diſſeiſe the Tenant for life, and maketh a Feoffment in fee, and die without iſſue, and then the Tenant for life dieth; this is no Diſcontinuance to him in Reverſion, *Lit. f.* 146. See in *Brownl. Rep.* 1 *par.* 36.

If a Tenant in tail grant all his Eſtate to another, and give Livery of Seiſin, this is no Diſcontinuance. So if he grant *totum Statum ſuum* to one, that doth afterwards make a Feoffment in fee; this is no Diſcontinuance to take away the Entry of him in Remainder or Reverſion, *Lit. f.* 145. 137. *Co.* 146. 10. 97.

Sect. 5. If a Tenant in tail give the Land to one in tail, the Remainder in fee, and the Tenant in tail make a Leaſe for life, and after grant the Reverſion to one in fee, and the Tenant for life attorn, and after the Grantee of the Reverſion die without heir, and the Reverſion come to the Lord as Eſcheat; if the Tenant for life die, and the Lord enter in the life of the Tenant in tail, and after the Tenant in tail die; this is no Diſcontinuance to the Iſſue in tail, *Littleton fol.* 143.

If a Tenant in tail have iſſue two Sons, and the elder diſſeiſe his Father, and make a Feoffment in fee without clauſe of Warranty, and die without iſſue, and then the Father die; this is no Diſcontinuance to the younger Son.

So if a Grandfather be Tenant in tail, and he be diſſeiſed by the Father, who makes a Feoffment and dies, and after the Grandfather dies; this is no Diſcontinuance, *Lit. f.* 142.

If

If Tenant in tail make a Leaſe for life, and the Tenant in tail have Iſſue and die, and the Reverſion deſcend to his Iſſue, and after the Iſſue grant his Reverſion in Fee, and the Tenant for life attorn and die, and the Grantee of the Reverſion enter during the life of the Iſſue, after the Iſſue die, and hath Iſſue; this is no diſcontinuance, *Lit. fol.* 142.

If Tenant in tail make a Leaſe for his life and give Livery, or a Leaſe for years, and after releaſe to the Leſſee for life or years all his eſtate and right in the Land; this is no Diſcontinuance. So if he confirm to ſuch a Leſſee, *Lit.* 138.

If a Tenant in tail leaſe for years, and after grant the Reverſion to one and his Heirs, and the Leſſee for years attorn; this is no Diſcontinuance to him in Remainder or Reverſion, or to the Iſſue, if any be. *Co.* 1. 144. *Lit f* 136.

If a Tenant in tail deviſe his Land by Will, this is no diſcontinuance. See for this the Statute for Wills, *& Co.* 10. 96. 27 *H.* 8. 20. *Dyer.*

If there be Tenant for life, the Remainder in tail, the Remainder in tail, and the Tenant for life and he in the firſt Remainder levy a Fine; this is no Diſcontinuance of the ſecond Remainder. So if they two join in a Feoffment, 13 *H.* 7. 14. *Co.* 1. 76.

If there be a Tenant in tail, the Reverſion or Remainder in the King, and the Tenant in tail make a Feoffment or ſuffer a Recovery, this is no Diſcontinuance. *Stat.* 34 *H.* 8. *c.* 20.

Sect. 6. By the Huſband in right of his Wife.

If the Husband alone levy a Fine, make a Feoffment, Releaſe, or Confirmation with Warranty or any other Conveyances of the Land of his Wife, other then ſuch as are warranted by the Statutes; this is no ſuch Diſcontinuance, but that the Wife, or he that hath the next right after the Husbands death, may enter. *Stat.* 32 *H.* 8. *ch.* 28. *Co. ſup Lit.* 326. *See there the expoſition of this Statute. Lit.* 136. *Bro.* 122. 15 *Ed.* 4. 5.

If the Husband and Wife have Land in Fee or Fee-tail jointly, and the Husband alone convey it away; in this caſe the Wife, her Heirs, or he that hath the next right after the death of the Husband may enter, and this Diſcontinuance may not hinder, *per les Stat.* 32 *H.* 8 28. *Co.* 8. 72.

By a Spiritual perſon.

If the Husband and Wife purchaſe Land in Fee and make a Leaſe, and after the Husband alone releaſe to the Leſſee and his heirs; this doth not make a Diſcontinuance. So for any other act of the Husband alone, or of him and her together by Deed, *Co. ſuper Lit.* 326. *Bro. Releaſe* 81. But by a Fine, and five years after the Husbands death, the Wife is barred.

If a Parſon or Vicar alien in Fee, this is no Diſcontinuance to the Succeſſor, but he may enter. *Lit.* 143.

If a Spiritual perſon be diſſeiſed, and he releaſe to the Diſſeiſor with Warranty, this is no Diſcontinuance to the Succeſſor.

If a Spiritual perſon grant a Reverſion, Rent, or Common, or the like thing that lieth in Grant; this is no Diſcontinuance.

If a Dean alone had aliened the Land he hath in the right of him and his Chapiter, this is no Diſcontinuance, *Lit. f.* 145, 146.

6. What ſhall be ſaid ſuch a Diſcontinuance as to make a Forfeiture, or not.

If any Woman that hath any Eſtate in tail, for life, or in dower, by the purchaſe-money or means of her deceaſed Husband or any of his Anceſtors, made to her before or after her marriage, do after his death whiles ſhe is ſole, or with any other Husband after taken, alien ſuch Land by Fine, Feoffment, Recovery, Releaſe, or Confirmation with Warranty, and ſo diſcontinue the courſe intended; this is not good. And the Heir, or he to whom the next right is to come after the Woman, may enter preſently to the Land, as for a Forfeiture, by the Statute of 11 *H.* 7. *chap.* 20.

If there be Tenant for life, the Remainder for life, the Remainder in tail, and the two Tenants for life alien in Fee by Feoffment, or the ſecond Tenant join in the Livery of Seiſin; this is a Diſcontinuance cauſing a Forfeiture. See more in *Forfeiture, Co.* 1. 76, 77. *Dyer* 339.

If there be Tenant for life, the Remainder in tail to the King, the Remainder in tail to another, and the Tenant for life makes a Feoffment in Fee; this is a Forfeiture, and to that purpoſe is a Diſcontinuance. But theſe acts are void only as to the Heir, &c. but are good againſt the parties and all others, *Co.* 1.76: 3.59.

Forfeiture.

If there be Tenant for life, the Remainder in Tail, the Remainder in Fee, and the Tenant for life make a Feoffment to him in Remainder in Fee; this is ſuch a Diſcontinuance of the Eſtate-tail, as produceth a Forfeiture, *Co.* 3.59.

If two Joint-tenants in Fee of a Manor intermarry, and after levy a Fine of it to a ſtranger, which doth render it to them in tail, and they have iſſue three daughters; the husband die, the wife take a ſecond husband, and they levy a Fine and take back an Eſtate in ſpecial tail, and the wife die without iſſue by the ſecond husband: This firſt Eſtate-tail is within the Statute of 11 *H.* 7. for one moyetie, but not for the other. *Curia, Laughter verſ. Humphrey, Mich.* 3 *Eliz. Co. B.* See more in *Co.* 3.51.

Husband and Wife.

If a man ſeiſed in right of his wife, and his wife levy a Fine, and the Conuſee grant and render to the husband and wife in ſpecial tail, the Remainder to the right heirs of the wife; they have iſſue, and the husband dieth; ſhe taketh another husband, and they two levy a Fine, and die: This is not a Forfeiture within the Statute of 11 *H.* 7: *Co. ſup. Lit.* 365:

For Diſcontinuance of Proceſs, ſee Statutes, 11 *H.* 6.6. 1 *Ed.* 6.7.

CHAP. LXVII.

Of Diſſeiſin, Abatement, Intruſion and Deforcement, Rediſſeiſin.

Diſſeiſin, what: *Diſſeiſor, Diſſeiſee.*

Aſſiſe.

DIſſeiſin is, where a man entreth into the Lands or Tenements of another, and putteth him out where his Entry is not lawful; this is a Diſſeiſin, and he that doth ſo is called a Diſſeiſor, and he to whom it is done is called a Diſſeiſee; and for his relief he may have an Aſſiſe: But by this Entry he getteth the Freehold, and may hold it againſt all men but him that hath right and his heirs, *Co. ſuper Lit.* 154.

Abatement, what.

Abatement into Lands or Tenements, is, where a man dieth ſeiſed of Lands or Tenements, and one that hath no right entreth into the ſame before the Heir maketh his Entry; this is called an Abatement, and he is called an Abator that doth ſo enter; and then is he lawful Owner againſt all men but the right Heir. *Terms of the Law.*

Intruſion or *Extruſion*, what.

Intruſion is an unlawful Entry into Lands or Tenements by one that hath no right, whiles it is void of a Poſſeſſor, after an Eſtate for life or years is ended. *Terms of the Law.* It is ſometimes taken for a Writ brought againſt an Intrudor.

Deforcement, what. *Deforceors.*

Deforcement is the putting and holding out of a man from Land that hath right to it by deſcent or purchaſe, by the putting it by Intruſion, Abatement or Diſſeiſin, *Co. ſuper Lit.* 277. And he that ſo doth, is a Deforceor.

For theſe things, this only is to be known.

1. That if an Abator or Diſſeiſor have quiet poſſeſſion for five years next after the Diſſeiſin, and ſo live and die in the poſſeſſion, and the Land deſcend to his Heir, he hath gained the right of poſſeſſion to the Land againſt him that hath right, till he recover it by a fit real Action at the Common-Law.

2. If he ſue not this Action within threeſcore years after the Diſſeiſin or Abatement, the right Owner hath loſt his right by that negligence.

3. If

3: If it be a *Formedon* he is to bring, he muſt bring it within twenty years of his right to the Action accrued, if there be no impediment of Infancie, &c. If ſo, then within twenty years of the Impediment removed. *Stat. 21 Jac. 16.*

4. If one have divers Children, and the elder being a Baſtard doth enter into the Land and enjoyeth it quietly during his life, and dieth thereof ſo ſeiſed; his Heirs ſhall hold the Land againſt all the lawful Children and their Iſſues, *Stat. 21 Jac. 16.*

Rediſſeiſon, is a Writ lying where one is diſſeiſed and recovereth in an Aſſiſe, and after is diſſeiſed again by the ſame Diſſeiſor; then he may have this Writ to the Sheriff, and if this be found againſt the Diſſeiſor, he is to be ſent to Gaol. *Rediſſeiſon, what.*

CHAP. LXVIII.

Of a Diſtreſs.

DIſtreſs is either finite, which is where it is limited by Law, how oft it ſhall be made to bring the party to Trial, once, or twice: Or infinite, which is without limitation, which is until the party appear: Alſo it is the great Diſtreſs, which is of all the Goods and Chattels one hath in the County, which it ſeems is the infinite Diſtreſs: Or it is an ordinary Diſtreſs: *Old N.B.* 43. 113. *F.N.B.* 126. *Britton ch.* 6. 52. 2 *H.* 3. *ch.* 7. 9. 12. *Old N.B.* 71. *1. Diſtreſs, what it is.*

It is alſo ſaid to be Real, *i.* when Land is diſtrained upon a grand Cape, or petit Cape. And ſometimes (and moſt commonly) it is ſaid to be Perſonal; and that is where any moveable things are diſtrained: And of this kind of Diſtreſs is this following diſcourſe.

A Diſtreſs then thus taken, is, where one doth take and diſtrain the Beaſts, Cattel, or other things of another man in ſome ground or place, for Debt, Rent, or other duty behind, or for wrong or damage done. Which thing ſo taken, is by the Taker to be kept in Pound, until the party that diſtrained be ſatisfied his Debt, Rent, or Duty, or it be fetched forth by an Order of Law.

So that the end of this taking of the Diſtreſs, is, that by this means the party diſtrained may be enforced either to pay or perform the Debt, Rent or Duty, or elſe to anſwer the party diſtraining in a courſe of Law: For after the Diſtreſs is put in Pound, the Proprietor hath no means lawfully to come by it, but by agreement with the party, or by a *Replevin*, by which means the thing will come in queſtion. (And in ſome ſpecial caſes alſo, the things diſtrained may be ſold for the paiment of the Debt, and ſatisfaction of the party.) *Final cauſe of it.* *Replevin.*

And after the Diſtreſs is in Pound, it is ſaid then to be in *Cuſtodia Legis*; ſo that now the Owner of it hath no abſolute propriety in it: And therefore he cannot give, ſell or forfeit it, neither can it be taken in Execution; but it muſt lie as a Pledg to be a means to help the party to his Debt or Duty, and cannot be took away to other purpoſe. And therefore if the party commit Felony after, or ſuffer Execution againſt him, the Goods ſhall not be forfeit nor took by the King, or upon the Execution, unleſs the King or Plaintiff will ſatisfie the Duty to the Diſtrainer, *Co. ſup. Lit.* 196. *Finches law*, 135. *The nature of it.*

The power to diſtrain, is ſometimes incident to the duty, and of common right, as to a Rent. Service, or an Amerciament in a Leet, ſometimes is by Preſcription, and ſometimes by agreement of parties. *Sed quacunque via*, it is to the end, and in the nature aforeſaid. *Sect. 1.*

Note that all that is here ſaid after, muſt be underſtood of the Diſtreſs of a common perſon; for the King hath a Prerogative above all other men. Which ſee in *Prerogative.*

For

3. What ſhall be ſaid a lawful Diſtreſs, and lawfully taken, or not. In reſpect of the perſon diſtraining.

For this, theſe things are to be known.

1. If one ſeiſed of Land in Fee, demiſe it to one on Condition to pay to his Wife Three pounds Rent yearly, and if it be behind, that ſhe ſhall diſtrain for it; it ſeems by this Will ſhe is enabled to diſtrain, *Dyer* 34. 8.

2. If one make any Eſtate of Land in Fee, in Tail, for life or years, rendring Rent; or grant, and reſerve by the Deed, by apt words, a power to diſtrain upon Non-paiment; there he may diſtrain by that power, *Bro. Diſtreſs* 70. 11 *H.* 6.

3. Where a man hath power to diſtrain, he may appoint his Servant or Bailiff to do it, and he may do it by vertue thereof, *Co.* 48.

4. If there be Lord and Tenant by Fealty and Three pence rent, and the Lord die, and his Wife be endowed of the Thirds of the Seigniory; here ſhe may ſtrain for one Penny, and the Heir for Two pence notwithſtanding. So if a Rent be divided amongſt Partners, each of them may diſtrain for his part, *Bro.* 45.

5. If there be many Joint-tenants, and one only take the Beaſts of a ſtranger Damage-feſant upon the ground, it ſeems good, *Bro. Charge* 39. 11 *H.* 6. 33.

6. Any Commoner may diſtrain the Beaſts of a ſtranger Damage-feſant upon the Common. See *Common*, *F.N.B.* 128. *Co.* 9. 112. 8. 78.

7. If a Lord that hath a great Common-Moor, enfeoff another of part of it, and the Feoffee do not incloſe it, but ſuffer his Beaſts to come into the reſt of the Moor, the Lord may diſtrain them, *Dyer* 372.

8. He that hath but a Poſſeſſion, and no Title, may juſtifie the taking of a Diſtreſs Damage-feſant, *Plow.* 431. 546.

9. But if one make a Leaſe for years rendring Rent, and the Term is expired, the Rent being behind, and the Leſſor diſtrain after for it, this Diſtreſs is unlawful: For regularly one may not diſtrain for a Rent, after an Eſtate is ended upon which it is reſerved; but he muſt have another remedy, 14 *H.* 4. 31. *Doct. & Stu. lib.* 1.

10. If one have three Daughters, and grant a Rent-charge in Fee to one of his Daughters, and after ſhe die, and it deſcend to her Child, and after deſcend amongſt the two Daughters and this Child, (as it muſt equally) ſhe cannot diſtrain for any part till partition, nor after partition but for a third part, 34 *Aſſ.* 15. 22 *H.* 6. 58.

11. None but known and ſworn Bailiffs may diſtrain for the King, *Weſtm.* 2. 36 See more for this, *Rent*, *Debt*, and *Weſtm.* 2. 37. *Brownl.* 1 *par.* 82. 187.

Sect. 2. In reſpect of the perſon diſtrained.

For anſwer to this, take theſe Caſes.

1. If a Rent be demiſed by Will out of Land to *B.* for the life of *C.* and the Deviſor die, and after his Heir make a Leaſe of the Land to *B.* for life, the Remainder to *C.* in Fee, and the Rent is behind in the life of *B.* and he dieth: Now he may be diſtrained for this Rent and all the Arrearages, *Co.* 5. 118.

2. If one put his Beaſts to Paſture for Twelve pence by the week with another man, and after he gives him notice that he will not tack there any longer; then may the Owner of the Ground diſtrain them Damage-feſant: And he may be diſtrained in this caſe, though he be not a Tenant, and his Cattel were in lawfully at firſt, 43 *Ed.* 3. 21.

3. So where a Leſſee holds in poſſeſſion after his Eſtate ended, *Kelw.* 96.

4. A Commoner may be diſtrained by one of his Fellow-Commoners for Surcharger, or the like, *Co.* 7. 23.

5. If one have the ſixth part of a Ground in common with another, and grant a Rent-charge out of it, and after he and the other levy a Fine of the whole to a ſtranger: Now it ſeems the Grantee may diſtrain the ſtrangers Cattel for all the Rent before and after the Fine; and yet before the Fine levied, he could only have diſtrained the Beaſts of the Grantor, and not of the other Tenant in Common, *M.* 18 *Jac. B.R.*

6. If *A.* and *B.* be Tenants in Common, and *A.* leaſe his moyetie to *C.* for years rendring Rent, and *C.* leaſe it to *B.* and the Rent is behind; here *A.* may diſtrain the Cattel of *B.* his fellow in Common, *Co.* 7. 23. *M.* 18 *Jac. B.R.* Sir *H. Snelgars* Caſe.

7. The

7. The Executor or Adminiſtator of him which had Rent or Fee-farm for life, in Fee-ſimple or Fee-tail, may diſtrain the Tenant that ſhould pay it. So may the Husband after the death of his Wife, his Executor or Adminiſtrator. So may he that hath Rent for anothers life, *Stat.* 32 *H.* 8.

None may diſtrain one that is out of his Fee and Juriſdiction, to come to his Court, *Marl. chap.* 2.

9. If one ſeiſed of Land in fee take a wife, and after grant a Rent-charge in fee and die; the Grantor cannot diſtrain upon that Land the Wife hath in Dower, *F.N.B.* 150. *Bro: Diſtreſs* 72.

10. If the King be entitled to Lands by Office that be charged with a Rent, yet the thing cannot be diſtrained for the ſame, though the Rent is not loſt, *St.* 2 & 3 *Ed.* 6. *ch.* 8. 13 *Ed.* 4. 5.

11. If one grant a Reverſion rendring Rent, the Grantee cannot be diſtrained during the particular Eſtates, neither can the particular Tenant be charged with this Rent; but after the preſent Eſtate determined, the Grantee may diſtrain for all the Arrearages, 10 *Ed.* 4. 4.

12. If one Joint-tenant make a Gift in tail of the Land rendring Rent, and the Rent be Arrear, he cannot diſtrain the Beaſts of the other Joint-tenant for this Rent, 33 *H.* 6. 35.

13. So if one Joint-tenant grant a Rent-charge out of the Land, the Cattel of his Companion cannot be diſtrained by the Grantee, 35 *H.* 6. 39.

14. Tenant in Dower ſhall not be diſtrained for Debt due to the King by the Husband in his life-time, in the Lands which ſhe holdeth in Dower, *Co. lib. Inſt.* 1 *par.* 31.

15. None may diſtrain a Forreigner in any City, Town, Market, or Fair, for any Debt whereof he is not Debtor or Pledg; and if he do, he ſhall deliver the Diſtreſs under pain of grievous Amerciament, *Weſtm.* 2. 13.

For anſwer to this, take theſe Caſes.

Sect. 3. In reſpect of the cauſe of the Diſtreſs.

1. One may diſtrain without clauſe of Diſtreſs for Rent-ſervice, be it Money, Homage, Eſcuage, Fealty, Suit of Court, Reliefs, Horſe, Roſe, or the like. *Co. ſup. Lit.* 150.

2. If any Freeholder refuſe to pay his Rent, the Lord may diſtrain. *Co.* of *Copihold.*

Rent.

3. One may diſtrain for a Rent reſerved on a Leaſe for life or years, or at will, ſo long as he have the Reverſion in him: The Leſſor or Donor may diſtrain of common right, without any clauſe of Diſtreſs in the Deed, *D. & S. f.* 21.

4. One may diſtrain for an Amerciament in a Hundred-Court, or Court-Baron, if one have a ſpecial Cuſtom for it, *Noy* 51. *F.N.B.* 100. *h.*

5. One may diſtrain for an Amerciament or Fine in a Leet, or the Penalty of a By-law, of common right. 11 *H.* 7. 151. *Dyer* 322. *Co.* 11. 44. 21 *H.* 7. 40. *Br.* 1 *p.* 183.

Damage-feſant, what.

6. One may diſtrain for Damage-feſant, *i.* where the Goods of another man be upon his ground cumbring the ground, or the Cattel of another man, without lawful authority or licence of the Owner of the ground, and there do feed, tread, or otherwiſe ſpoil the Corn, Graſs, Wood, or other things; here the Owner of the ground may diſtrain them and put them in Pound as ſoon as ever they do come in, if he will, and that though the Owner do purſue them preſently to fetch them out: And this is called a Diſtraining for Damage-feſant, *Terms ley* 119. 7 *H.* 7. 1. *Bro.* 304. 399. *Kelw.* 96. 22 *H.* 6. 37. *Brownl.* 2 *par.* 101.

7. One may diſtrain for the Kings debt, or for Fifteenths in a Parliament, Iſſues to come into the Exchequer to account, and the like, and for Iſſues returned upon the heads of Jurors, 5 *H.* 7. 1. 16 *Ed.* 4. 10. *F.N.B.* 239.

8. One may diſtrain upon an Attachment of a County-Court, Hundred-Court, Court-Baron, or the like.

9. If a Rent be appointed to one Copartner from the other upon partition, for the making of an Equality, he may diſtrain for it of common right, 33 *H.* 6. 53. 11 *H.* 4. 3.

10. The Lord may diſtrain his Tenant for Aid for the marriage of his Daughter, *F.N.B.* 82.

11. If

11. If a Townſhip be amerced, and they tax every man, and appoint one to levy; he may diſtrain for it, *D. & S. f.* 74.

12. One may diſtrain for Fees for Knights of the Parliament, where they be due, 11 *H.* 4. 2.

13. If any Freeholder refuſe to do corporal ſervice, as Homage or Fealty, or to amend the High-ways, repair decayed Bridges, or the like tending to the profit of the publike; or to diſcharge the office of a Carver, Butler, Brewer, or the like; or pale the Lords Parks, tile or thatch his houſes, or the like, which by Tenure he oweth; the Lord may diſtrain, *Co.* of *Copihold* 49. See *Diſtreſs.*

14. No man may diſtrain within his Fee or elſwhere of his own head for revenge, or ſuch like cauſe; but in caſe where Diſtreſs is given, and then by order of Law, *Marl. ch.* 1. 2. 3.

Rent-ſork

15. A man cannot diſtrain for Rent-ſeck: As if one leaſe for twenty years, and the Leſſee leaſe over for ten years rendring Rent, and after grant away this Rent, this Rent cannot be diſtrained for. See *Rent-ſeck*, 2 *Ed.* 4. 11. Nor for any incertain ſervice the Lord cannot diſtrain, unleſs it be in ſome ſpecial caſes, *Lit. Co* upon it, 97.

16. One may not diſtrain for an Amercement in a Court-Baron, without a cuſtom or preſcription for it, *Co.* 5. 5.

17. One may not diſtrain for Debt on an Obligation or Contract, nor for Account, nor Arrearages of Account, nor for Treſpaſs, but as before. See *Stat.* 3 *Ed.* 1. *c.* 23. *D. & S.* 15.

18. The Lord cannot diſtrain for the ſervice in *Frankalmoin* where it is incertain; but where it is certain, he may, *Lit. Frankalm:*

So neither can the Lord diſtrain for any Services whatſoever that are incertain, and cannot be reduced to certainty, *Co.* upon *Lit. f.* 96. 142.

19. None may diſtrain any to come to his Court that is not of his Fee, nor upon whom he hath no juriſdiction, *Marl.* 2.

20. None may procure any to diſtrain another to make him appear at the County-Court, or any other inferior Court, of purpoſe to vex him and put him to charge and trouble; in pain to fine to the King, and to pay the party grieved treble damages, *Weſtm.* 2. 36.

For anſwer to this queſtion, theſe things are to be known.

Sect. 4. In reſpect of the ownerſhip of the thing diſtrained. *Levant and couchant.*

1. A Lord may diſtrain any thing of his Tenants upon the place out of which the Rent is to come, as ſoon as ever it is there; and alſo the Beaſts or Goods of any other mans after they have been levant and couchant, *i.* ſome reaſonable time; as if they be living Cattel, that they have fed and lien down, *D. & S.* 15. *Terms ley.* 10 *H.* 7. 21. *Dyer* 317. 1 *H.* 7. 1.

2. And if a ſtranger will put in his Beaſts or Goods into the Tenants ground wilfully and treſpaſs him, then the Lord may diſtrain it preſently before it have been levant and couchant, 15 *H.* 7. 17. 1 *H.* 7. 1. So it ſeems where the ſtranger is to pay the duty as Lord Meſne and Tenant, and the Meſnes goods come upon the Tenancie, 15 *H.* 7. 17.

Damage-feſant.

3. A man may diſtrain for Damage-feſant any mans goods, and it matters not who is Owner of them, nor by whom they are put on his ground, if they be doing him treſpaſs, 1 *H.* 7. 1.

4. So for Iſſues, a man may diſtrain any mans Cattel upon his ground upon whom the Iſſues are returned; that is, if he take them in the nature of a Diſtreſs only to impound, &c. there he may take any mans Beaſts levant and couchant: But if they be to be taken and ſold for Iſſues loſt upon a Warrant out of the *Exchequer* to levy them upon the Lands of him that loſt them, the Sheriff cannot do ſo, *Goldsb.* 140. *pl.* 50. 5 *H.* 7. 1.

5. *A.* hath a Cloſe adjoining to the Cloſe of *B.* *A.* leaſeth his Cloſe to *C.* for ſixty years; *C.* leaſeth it to *D.* for ten years, rendring Rent which is Arrear: *D.* being to make the Bounds between theſe Cloſes, ſuffers the Bounds to be ill, whereby the Cattel of *B.* come into the Cloſe of *D.* Now in this caſe *C.* may diſtrain them, and *B.* may have his remedy againſt him, *Court* in *B. R.*

6. If

6. If any be fined in a Leet or Court-Baron, or amerced, and he have other Beaſts in his ground, they may not be taken and diſtrained for this, as in the Caſe of Rent, 12 *H.*7. 15. 41 *Ed.*3. 26.

7. It ſeems that for Rent, one may not diſtrain the Cattle of a ſtranger, upon the ground, before they have been Levant and Couchant; but in caſe where the ſtranger doth wilfully put them into the ground of the Tenant: And that if they come in by Eſcape, they are not diſtrainable till they have been Levant and Couchant. Yet (me thinks) if they get in by default of the owner, as if the bound be his, and he let them lie open; in this caſe the Lord may diſtrain them aſſoon as ever they come in. See 22 *Hen.*6. 37. *Broo. Diſtreſs* 21. *Dyer* 317. *Doct. & Stud.* 15. 15 *Hen.*7. 17. 22 *Ed.*4. 49.

8. It ſeems to me alſo, That if a mans Beaſts be in his own ground, and the Tenant that ought to make the Cloſure ſuffer it to lie open, ſo that my Cattle come in his ground; that theſe are not diſtrainable when they are Levant and Couchant: But there muſt be either a default or conſent in the owner, that his Cattle ſhall be there, elſe they are not diſtrainable, *Dyer* 317. 15 *H.*7. 17.

9. Such things as the taking of them may be prejudicial to the Commonwealth, are not diſtrainable; as Cloth in a Tailors ſhop, in a Weavers or Fullers houſe, 10 *H.*7. 21.

10. The Goods of a ſtranger that are diſtrainable in their nature, yet may not be diſtrained, when they are in the cuſtody of the owner; as if a man ride his Horſe, or have him in his hand, in the place where the Diſtreſs may be taken, or one bring his Horſe to the Houſe to fetch things, and tie him while he is loading: In theſe caſes theſe things are not diſtrainable, Adjudg *Reads* caſe, 39 *Eliz. C.B.*

For the clearing of this point, take theſe things.

Sect. 5. In reſpect of the quality and nature of the *Diſtreſs.*

1. One may diſtrain any thing Damage-feſant, Shocks of Corn, or any thing elſe forbidden, to be diſtrained in other caſes, 22 *Ed.*4. 47. 15 *H.*7. 13. 21 *H.*7. 39.

2. One may diſtrain for other cauſes, all manner of Cattle, Oxen, Sheep, *&c.* all manner of Houſholdſtuff and movables, as Beds, Bedſteds, Peuter, Braſs; alſo a Wain laden, and the Oxen, though laden with ſuch things as otherwiſe are not diſtrainable; as a load of Corn in Shocks or Sheaves, and almoſt all Chattels perſonal are diſtrainable; a Fold of Sheep, *&c.* is diſtrainable, 20 *Ed.*4. 3. 2 *H.*4. 15. 21 *H.*7. 9. *Dyer* 281. 22 *Ed.*4. 51.

3. Alſo Windows, Doors, Mill-ſtones, and the like, when they are laid aſide, and are parted from the Freehold, and no more to be uſed with it, are diſtrainable, 14 *H.*8. 25.

4. Such things as whereof the Sheriff cannot tell how to make Replevin, and deliver them in as good plight as they were in the taking, are not diſtrainable for Rent, as dead Victuals, Fleſh, or the like, that will corrupt: So Sheaves and Shocks of Corn, are not diſtrainable; but for Damage-feſant, theſe may be diſtrained, *Co. Inſt.* 142 *f.* 41.

5. Such as cannot be diſtinguiſhed from others of the ſame kinde, as Money or Corn out of a Bag or Box, Sheaves or Shocks of Corn which is not in a Cart or Wain, Tithes, or the like, are not diſtrainable, 11 *H.*7. 15. *Kelw.* 126. 2 *H.*4. 15. 7 *H.*7. 11. 22 *Ed.*4. 47, 51. 11 *H.*4. 40. 9 *H.*6. 9. 13 *Ed.*4. 6.

6. Such things as are fixed to a Freehold, and parcel of it, are not diſtrainable, as Doors, Hinges, Windows, Milſtones uſed in a Mill, Furnaces, Fats faſtned to the houſe; Pales, Stancks, Gates, Evidences, and the like, 14 *H.* 8. 25. 21 *H.*7. 26.

7. Such neceſſary Tools and Inſtruments as are neceſſary to keep men in their Callings; and for their livelihood, as a Carpenters Ax, as a Smiths-Anvil, or the like, are not diſtrainable, 14 *H.*8. 25.

8. Such things as are for mens preſent neceſſity, as a Horſe when a man is riding, or the like, are not diſtrainable, 6 *R.* 2. *Broo. Diſtreſs* 16.

9. Such things as tend to the Common good, as a Draught, or Plough laden, Mens Plough Cattel, or Flock of Sheep, if they have others enough in the place, where Diſtreſs is to be taken, at the very time when a man comes to diſtrain, are not to be diſtrained, no not for the King, *Dyer* 312. But for Damage-feſant, theſe

may be diſtrained, 51 *H.* 3. And in the other caſe the Diſtreſs muſt be there at the very time, for before or after is nothing in it. *F. N. B.* 174. 22 *Ed.* 1. *Diſtreſs* 61. *Co. lib.* 1 *part* 147. 2 *part.* 133.

10. The Inſtruments of a mans profeſſion, as the Books of Scholar, and the like, are not to be diſtrained.

11. Such things as are diſtrained already, and are in Pound as a Diſtreſs, cannot be diſtrained again, whiles they are in Pound, 22 *Ed.* 4. 11. *Bro. Diſtreſs* 75.

goods in fair or market

12. Such things as are for the Commonwealth, or tend thereunto; as a Milſtone, when it is off from the Mill to be Pecked and Beaten. Things in a Common Hoſtery, or that are brought into a Fair or Market to be ſold, are not diſtrainable. *Vide infra & ſupra*, 14 *H* 8. 25.

valuable ppty

13. Such things whereof no valuable property is in any body, as Dogs, Does, Bucks, Coneys, and things that are *Feræ naturæ*, are not diſtrainable, *Co. lib. Inſt.* 1 *part*, 47.

14. Fetters upon a Horſe Leg, may be diſtrained with the Horſe, *March. f.* 91. *pl.* 149.

Powltry & Jewells &c. armor

15. Nor (as it ſeems) Powltry, or Fiſh, Veſſels, or Apparel, diſtrainable, nor Armor, nor Jewels, *Co.* 2 *part, Inſt.* 133.

Sect. 6. In reſpect of the quantity of the *Diſtreſs.*

The Diſtreſs muſt be reaſonable ſomewhat proportionable to the cauſe and duty, for which it is taken, and yet if the cauſe be ſo as one cannot take a Diſtreſs of leſs value, and the thing be after a ſort intire; as in the Diſtreſs of a Cart with his carriage, or with the Horſes or Oxen annexed to them there (it ſeems) though there be a great deal of inequality, as if one take two Chariots of Corn for twenty ſhillings Rent, it may not be unreaſonable, *Marlb.* 4. 22 *Ed.* 4. 15. 20 *Ed.* 4. 3. 41 *Ed.* 3. 26. So (it ſeems) one may diſtrain a flock of ſheep for two ſhillings, becauſe they are intire, 41 *Ed.* 3. 26. *Broo.*

the pigg of

One may take any Diſtreſs for quantity, if he diſtrain for Homage, Fealty, Expences of Knights in Parliament, or the like; for in theſe caſes, no Diſtreſs ſhall be ſaid to be exceſſive. *Co.* 4. 8. *Diſtreſs* 89. 27 *Aſſ.* 51. 28 *Aſſ.* 50. But ſuch Diſtreſſes as either are exceſſive for magnitude, as if one take two Sheep for two pence, or two Oxen for ſixteen pence, or the like, or elſe for multitude; as when one diſtrains very often for one cauſe, theſe are unlawful Diſtreſſes, for which the diſtrainer ſhall be puniſhed, *Exceſſus in re qualibet in jure reprobatur.* If the Lord diſtrain two or three Oxen for twelve pence, or the like ſmall ſum, and the owner Replieve, and the Lord avow for twelve pence; in this caſe he ſhall be fined upon his own ſhewing, or the party may have his action upon the Statute. But if he take a Horſe or Ox for a peny, where no other Diſtreſs is to be had, it is not exceſſive; but if there were a Sheep or Pig to be taken, there it is exceſſive and puniſhable, *Co.* 2 *part. Inſt.* 107. 51 *H.* 3. *Marlb.* 4. *Co.* 11. 44. 4. 8. 11. 4. *Marlb.* 4. *F. N. B.* 174. 45 *Ed.* 3. 26. But Horſes traced ſhall be ſaid to be but one Diſtreſs, *March. f.* 91. *pl.* 149.

In reſpect of the time of taking the *Diſtreſs.*

For Damage-feſant a man may diſtrain in any part of the day or night; and for other cauſes, as Rent, Amercement, and the like, any part of the night or day, 35 *H.* 6. 10. *Co. ſuper Littl.* 142. *Noy* 51. If one make a Leaſe, rendring Rent at *Michaelmas*, provided, That if it be behinde twenty days after he ſhall diſtrain; now it ſeems, by this he cannot diſtrain till the twenty days be paſt, 1 *Juſt. Haughton, Tem.* 14 *Jac. nullo contra dicente.* But the opinion of ſome is otherwiſe where Diſtreſs is incident, and the words are Affirmative, *Co ſuper Littl.* 204. That he may diſtrain at any time after the day, *Co.* 9. 66. But one cannot diſtrain for any cauſe but Damage-feſant by night, *Co.* 9. *En Mackallies* Caſe, *Super Littl.* 142. If a Diſtreſs be got out of Pound (it ſeems) the party may not diſtrain them again, unleſs he do it preſently after they are gone out, 9 *Ed.* 4. 2. If one diſtrain for Rent before, or at the day it is due, it is unlawful, 21 *H.* 6. 4. *Brownl.* 1 *part.* 176. If one have diſtrained once, and in the Sute the Seigniory is in queſtion, he cannot diſtrain again till this be decided, 7 *H.* 4. 4.

The Leſſor cannot diſtrain for the Rent due the laſt day of the Term, and therefore the beſt way is to reſerve the laſt half years Rent at *Midſummer*, and then he may diſtrain between that Feaſt, and the Feaſt of *Michaelmas*, *Co. Inſt.* 1 *part.* 47.

Though

Though generally a man cannot diſtrain for Rent out of his Fee and Seigniory, (*i.*) The ground or place out of which it doth iſſue; and if he do, the party grieved may either have Treſpaſs, ſue upon the Statute, or by Indictment; yet if he be coming to diſtrain, and the owner or another perceiving it, drive the Cattle or carry the thing out of the ground into another mans ground, or into another place: He that diſtrained them, may purſue them or it preſently, and upon his freſh purſuit may take and diſtrain them, or it, in any other place, *Plow.* 38. 33 *H.*6. 18. So (it ſeems) is the Law where one have diſtrained, and another drive them away; he may either take them again, or have a Writ of *Reſcous* at his Election. And yet if the Cattle, of themſelves, go out of the Tenancy without Inchaſement before the Lord can diſtrain them; there he cannot diſtrain them, though he have the view within his Fee, *Co.* 2 *part. Inſt.* 131. *Dyer* 44. 25. 33 *H.*6. 53. 11 *H.*7. 5. 21 *H.*7. 40. *Co.*9. 22. *& ſuper Littl.* 160, 161. 3 *H.*6. 53.

Sect. 7. In reſpect of the place of taking the *Diſtreſs.*

So if an Officer in a baſe Court take a Diſtreſs, or be coming to diſtrain, and another ſeeing it, drive the Beaſts out of the Hundred; (it ſeems) the Officer having them in his view upon freſh purſuit may take them out of the Hundred or Liberty, 3 *H.*6. 18. 33 *H.*6. 53.

For Iſſues a man may diſtrain in his Land upon whom the Iſſues were put, though he have ſold it away, or it be another mans Land, 5 *H.*7. *Broo. Diſtreſs* 40.

For a Fine or an Amercement, or a Pain forfeited in a Leet, or any other ſuch like Court, one may diſtrain in any place within the Juriſdiction, and Precinct of that Court as well without as within the ground of him that is fined, amerced, or pained, 11 *H.*4. 89.

One may diſtrain in a Common, as before is ſhewed.

If one grant a Rent out of a Manor, or Rent be otherwiſe iſſuing out of a Manor, one may diſtrain upon the Demeans, 12 *Aſſ.*4. 8.

If the Rent be iſſuing out of a Houſe and Land, one may diſtrain upon the Land, or in the Houſe, either if the doors be open that he may get in; but he cannot open the doors, *Co.*5. 91 92. 38 *H.*6. 26.

If one grant a Rent of one ground, and grant withal by that Deed or another, that the Grantee ſhall diſtrain for that Rent in any of his grounds in that Pariſh; in this caſe, though the Rent iſſue out of that ground onely, yet the Grantee may diſtrain in any ground of his within the Pariſh, *Co.*7. 23. 9 *H.*6. 9.

A Collector of Fifteenths may diſtrain in any place within the Village, where the man doth dwell that is to be diſtrained, 16 *Ed.*4. 16. 16 *Ed.*4. 10.

For Herriot Service, the Lord cannot diſtrain out of his Fee, no more then for a Rent: But he may ſeize a Herriot-Cuſtom out of his Fee, *Goldsb.* 97. *pl.* 14.

If one be diſtraining a Diſtreſs to Pound, and the Beaſts eſcape into another mans ground by the way that lieth overt (it ſeems) here he may follow them, and take them away to pound, 35 *H.*6. 10.

If one diſtrain Beaſts, and put them in the Pound, and after the owner take them out, the diſtrainer may take them in any place, and put them in Pound again, or have a *Parco fracto* at his Election, 34 *H.*6. 16. 7 *Ed.*4. 5.

If a Leaſe be made to be for ten years, rendring Rent, and after the Leſſor doth grant the Reverſion to *C.* for twenty years, and *B.* attorns, and the Rent is behinde, *C.* licences a ſtranger to put in his Cattle, yet he may diſtrain them, for his Licence is void, having no poſſeſſion: But if a Leſſor drive the Cattle of the Leſſee upon the Land, he cannot then afterwards diſtrain them, 5 *Chr. Heydens* caſe.

For the moſt part one may not diſtrain for any Rent, or other duty upon any place, but upon that out of which the Rent doth iſſue, *Marlb. cap.*2. *cap.*15. except it be by the Tenants own grant, 9 *H.*6. 9. But the King may diſtrain out of the place, any where in the High-way, Common, Street, or elſwhere, *Marlb.* 15.

One may not diſtrain for Damage-feſant in any place, but in the place or ground where the damage is done, *F. N. B.* 904. *Plow.* 38. *Co.*9. 22. though the party drive them out in his ſight, *Co. ſuper Littl.* 161. 9 *H.*6. 9. *Brownl.* 1 *part.* 87. 148, 149.

One may not take a Diſtreſs in the High-way or Common, Street, *Marlb.* 15.

9 *H.6.9.* Nor in the ancient Fees of the Church, unleſs it be for the King, *Art. Cler.9.* And if he do ſo, the party grieved may have remedy by Action upon this Statute: But a Herriot Cuſtom the Lord may ſeize in the High-way, for that is not a Diſtreſs but a Seiſure. But otherwiſe it is of Herriot Service, for he cannot diſtrain for this there. *Co.* 1 *part. Inſt. Sect* 69. 2 *part. fol.*122. But if the Lord coming to diſtrain, and ſee the Beaſts within his Fee, and the Tenant before he can diſtrain, drive them into the Highway; in this caſe the Lord may take them in the Highway.

One may not diſtrain Goods in a Fair or Market; nor Horſes in an Inn or Common Hoſtery, 7 *H.7.* 21. 21 *Ed.*4. 361., 22 *Ed.*4.49. But if the Diſtreſs in driving, fall into any ſuch place, the Diſtrainor may follow it thither, and take it thence; and ſo he may if it go into the Houſe of the owner of the Diſtreſs, if he follow them preſently, 22 *Ed.*4. 36. 9 *Ed* 4.2.

One may not diſtrain in the ancient Fees or Lands of the Church; but of thoſe that have been newly purchaſed, he may. *Articuli Cleri. cap.9.* 9 *Ed.*2.9.

One may not diſtrain Cloth at a Weavers, Fullers, Taylors, Sheermans; a Horſe at a Smiths being ſhooing, 10 *H.7.* 21. 22 *Ed.*4. 49. *Co. lib. Inſt. part. fol.* 47.

One may not diſtrain in a Sanctuary, *Co.*5. 92. 27 *Aſſ.* 35.

If a Diſtreſs eſcape out of Pound, he cannot take it again, unleſs he take him preſently, *Co. ſuper Littl.*142.

If a Rent be iſſuing out of Manor, it cannot be diſtrained for, upon the Tenants, that had their eſtates before the Creation of the Rent, 12 *Aſſ.*40.

Rent. One may not diſtrain men out of his Fee, to enforce them to come to his Court, upon whom he hath no Juriſdiction or Bailiwick, *Weſtm.*1.16.

A common perſon, though he be the Grantee of the King, cannot juſtifie the taking of a Diſtreſs for a Rent or Seigniory out of the Land whence the Rent doth iſſue, and in the Land holden of him, 9 *H.*6.9.

A Horſe cannot be diſtrained whiles the owner or other is riding on him; nor an Ax while he is in a mans hand, cutting of Wood, or the like; nor Goods that are in cuſtody of the Law, that are taken Damage-feſant: The Lord may not break the Gates or Hedges, to come in to diſtrain, *Co. lib. Inſt. f.*47. 161. *Brownl.* 1 *part.* 31.

If the Lord coming to diſtrain, and have not ſight of the Cattle within his Fee, and the Tenant had driven them away purpoſely; or if after he had ſight of them, the Cattle of themſelves go out of his Fee; or if the Tenant after view, for any other cauſe, and that the Lord might not diſtrain them, do remove them; in all theſe caſes the Diſtreſs by the Lord is not lawful, *Co. ſuper Littl.*461.

And in all theſe caſes of Diſtreſs taken unlawfully for time, place, *&c.* an Action will lie for the party grieved, againſt the wrong doer; albeit the party diſtrained, do agree or ſue Replevin, or the like: And if it be for Rent, and he pay the Rent; yet doth not purge the offence, *Co.* 2 *part. Inſt.*133:

Sect. 8. 4. How a Diſtreſs ſhall be uſed, when it is taken.

The party that doth diſtrain Goods or Cattles, may not ſell them (but in ſome ſpecial caſes hereafter ſet down) neither may he uſe them as his own; for in ſo doing, he ſhall make himſelf a Treſpaſſor; nor may he eſloyn them that they cannot be replieved, if he do, the owner may have Treſpaſs for it. But he muſt put the Diſtreſs altogether in ſome one lawful Pound (if one Pound will hold them) within the County and Hundred, where the Diſtreſs is taken, or elſe within ſome Pound overt within three miles of the place where the Diſtreſs is taken. And if the thing diſtrained be living and quick, and be put in any Pound overt within the ſame County, where the owner may poſſibly and lawfully come to it, without doing Treſpaſs to any man; and there, if it be live Cattle, they be ſuffered to periſh for want of meat; in this caſe the owner ſhall anſwer them, and the party may diſtrain again. But if he put them in a Pound cloſe, where the owner cannot come to them, either becauſe it is impoſſible as if they be in a Fort, or unlawful, becauſe they be in anothers ground; or if he drive them out of the County, or the Kings Writ come to deliver them, and he refuſe to deliver them or reſiſteth the Kings Writ; or if the Diſtreſs were for Damage-feſant, and before the impounding, the diſtrained perſon offer ſufficient amends for the Treſpaſs, and the other refuſe; and after this the Cattle be ſuffered

to ...

to periſh for want of meat; or if the Diſtreſs be of a thing that will corrupt, as an inanimate thing, and put in a Pound cloſe; in all theſe caſes, he that doth diſtrain, and not the owner muſt anſwer them.

If there be a clauſe in a Deed, that the party ſhall diſtrain and keep the Diſtreſs till he be ſatisfied; yet it ſeems he may not work the Diſtreſs; and if the words be, That he ſhall diſtrain without Gage or Pledg, yet it ſeems the Diſtreſs muſt be impounded, and may be replieved, *Co.* 8. 146. 9. 146. *Co.* 2 *part. Inſt.* 141. *D. & St.* 112. 22 *Ed.* 4. 47. 28 *Ed.* 6. 5. 30 *Aſſ.* 38. *Marlb.* 4. *Dyer* 281. *Broo. Diſtreſs* 72. *Plow.* 6. 8. *Kelw.* 71. 9 *Ed.* 4. 2. *Co. lib. Inſt.* 1 *part. f.* 47. *Weſtm.* 1. 16, 17. *Brownl.* 1 *part.* 145.

And if one diſtrain a Cow, yet he may not milk her, but let him put her in an overt place or Pound: And albeit he have the Cattle upon a Retorn Irreprieviſable, yet he cannot work them, *M.* 7 *Jac. Levets* Caſe.

And if the party diſtraining, do put an animate thing diſtrained into a Pound-cloſe, he muſt feed it at his peril, and yet he ſhall have no ſatisfaction for it. And if the Diſtreſs be the Utenſils of a Houſe, or the like, which may take harm by Reſt, or Weather, or be ſtoln away; in theſe caſes he muſt put them in a Houſe or other Pound-cloſe, within three miles in the ſame County: For if he put them in a Pound overt, he muſt anſwer them if any hurt come to them, *Co. ſuper Littl.* 1 *part. f.* 47. *Marlb* 1, 2, 3, 4. *Noy* 53.

One took a wilde Colt as an Eſtray, and becauſe he could not keep him in Pound, otherwiſe he did croſs-fetter him there, and for this the owner brought an Action of Treſpaſs: But the Chief Baron directed the Jury to finde againſt the Plaintiff; and he held it lawful in this caſe, but not otherwiſe, at *Sarum* Aſſize, 19 *Jac.*

If the party that diſtrained, put them in Pound out of the County, that the Sheriff cannot make a Replevin; in this caſe the party may have the Writ called *Withernam*; and if he put them in a Fort or Caſtle in the ſame County, that the Sheriff cannot Replieve them, then the Sheriff may take *Poſſe comitatus*, and demoliſh it, if he cannot otherwiſe do it, *Weſtm.* 1. 17.

If the Diſtrainer will of his own accord give the Cattle meat in a Pound overt, he cannot require it of the owner, nor keep the Beaſts till he have it; but if the owner did promiſe to pay him for it, he may have an Action upon that promiſe, 21 *Ed.* 4. 53. *Diſtreſs* 53. 5 *Jac. Bagſhaws* caſe, *B R.*

If one have Land in one County, of a Manor in another County; the Lord of the Manor there, if he diſtrain, may bring the Diſtreſs to the Pound in his own Manor, though it be in another County, notwithſtanding the Statutes of *Marlb.* 3. 1 *H.* 6. 3. 22 *Ed.* 4. 11.

If one diſtrain Beaſts for the King, he muſt put the Diſtreſs in Pound, and if the owner doth give them meat himſelf, he ſhall pay nothing for the keeping of them, and they may not be ſold within fifteen days after the taking; and if the party ſhew an Acquittance or Tail out of the Exchequer, or under the Sheriffs hands, and offer to put in Bail, to anſwer it in the Exchequer, upon the next Accompt day; then they muſt deliver the Beaſts again, 21 *Ed.* 1.

If one diſtrain for an Amercement or Fine in a Leet, he that diſtrained may ſell the Diſtreſs, and pay himſelf with the money, *Co.* 8. *Granſheys* caſe.

If Beaſts be unruly in the Pound, and will leap over the Diſtrainor (as it ſeems) in this caſe, it cannot binde them to the Pound, nor fetter them, 27 *Aſſ.* 64. *Broo. Treſpaſs* 250.

A Diſtreſs taken for the King, may not be ſold within fifteen days; and upon ſhewing a Tally, and giving Security to appear in the Exchequer upon the next Accompt, the Sheriff is to go no further, but to attach the party to be there that day. *De Diſtrictione Scaccarii.*

It is a Writ lying where one, or his Servant, doth diſtrain for Rent-ſervices, or Damage-feſant, Fifteenths, or for an Amercement, or the like, and being about to impound them, another taketh them from him, and will not ſuffer him to impound them; then he from whom this Diſtreſs is taken away, may have this Writ againſt him

Sect. 9. 5. *Reſcous*, what.

him that taketh them away, and ſhall recover his damages, *Terms Ley* 279. *F.N.B.* 101, 102. *Co. ſuper Littl.* 160.

There is a Reſcous of a perſon alſo, which is when a man attached or arreſted, is reſcued by himſelf or another; for which ſee *Reſcous*, *F.N.B.* 102. and *Retorn* of the Sheriff: For in that caſe one may have this Writ alſo, If he break or be taken away from under a lawful Arreſt: And this Writ ſometimes muſt be brought in his name that doth diſtrain, ſometimes in his name for whom the Diſtreſs is taken. See *F.N.B.* 101, 102.

How this *Writ* is to be brought.

Where this *writ* lieth, or not.

If one diſtrain Beaſts Damage-feſant, and drive them along the Highway, and going to Pound, they enter into the Houſe of the owner, and he withholdeth them, and will not ſuffer the Diſtrainor to have them to Pound; then he may have this Action againſt him. For this is a Reſcous in Law, *Co. ſuper Littl. fol.* 161. 315.

If a Lord be coming to diſtrain, and the owner drive away the Cattle, and the Lord diſtrain them upon a preſent purſuit (as he may) and the party will not let the Lord have them, but drive them away; in this caſe the Lord may have this Writ, 44 *Ed.* 3. 20.

If a Lord diſtrain his Tenant without cauſe, and unjuſtly, and a Reſcous be made upon him, it ſeems he may have this Writ of Reſcous, *F.N.B.* 102. 40 *Ed.* 3. 32. But in another caſe, where it is not between Lord and Tenant, it will not lye.

If any be coming to diſtrain onely, and the owner drive out the Beaſts before, or they go out themſelves, ſo as he is not poſſeſſed of the Diſtreſs; in this caſe this Writ will not lie againſt the owner, or any other, *Co. ſuper Littl. fol.* 160. And ſo alſo it ſeems it is in all caſes where the Diſtreſs is unlawful in time or place, *&c.* See before *Milloyal Diſtreſs*, 2 *H.* 4. 15, 22. 44 *Ed.* 3. 20. *Co. ſuper Littl. fol.* 160, 161.

6. *Pound*, what.

A Pound is a place of ſtrength, wherein Cattle diſtrained, are put for the time, till they be replieved or redeemed. And this is either

The kindes.

Overt, which is ſuch a place, as to which the owner may poſſibly and lawfully come to give his Cattle diſtrained, meat or drink: And this is either publick or common, as the Pounds in every Townſhip, Lordſhip, or Village, or elſe private and particular; as any Court, Backſide, Yard, or Ground where the Beaſts may be without doing Treſpaſs; and whither the owner may come without treſpaſſing any man to give them meat and drink.

Or elſe Cloſe, which is ſuch a place, as to which the owner of the Diſtreſs may not either lawfully or poſſibly come to give his Cattle meat and drink, as in another mans houſe or ground, or in a Court or Houſe invironed with high Walls, or cloſed. But *Co. lib. Inſt.* 1 *part. fol.* 47. makes the Pound-overt to be the Pinfold, made for that purpoſe, or his own Cloſe, or the Cloſe of another by his conſent; and the Pound-cloſe is, when it is ſome part of the houſe of the owner, *New Terms Law* 154. 9 *Ed.* 4. 2. *Broo.* 246. 20 *H.* 7. 1. *Diſtreſs* 112. *Dyer* 288. 21 *H.* 7. 39. 5 *H.* 7. 9. *Noy* 55. 52, 53.

The owner may give his Beaſts meat in the Pound, though taken for the Kings Debt, 51 *H.* 3. without giving any thing for their keeping.

7. *Aſſiſe de ſovent faits Diſtreſſe*, what.

It is a Writ where one hath cauſe to diſtrain, and he doth it ſo often for the ſame cauſe; as that the Tenant is grieved thereby, and is not able to manure his Land; then the party ſhall have remedy by this Writ, for in this Suit he ſhall have Judgment to hold his Land free, *Abſque multiplici Diſtrictione*. But when the cauſe of taking is for Homage, Fealty, Suit of Court, or other like Corporal Services, though a man do ſo diſtrain, yet this Writ doth not lie, *Co.* 4. 8. 11. 44.

8. *Parco Fracto*, what.

Parco Fracto is a Writ lying where a Diſtreſs is taken out of Pound, after he is impounded, either by the party diſtrained, or ſome other; then in this caſe the party for

for whom the Diſtreſs was taken, may have this Writ againſt him that took it out, and ſhall recover his damages, and then he may alſo diſtrain the Cattle again, whereſoever he finde them, or for this the party may be puniſhed, as for a Pound breach in a Leet. See *Leet*, *F. N. B.* 100. 20 *H.* 7. 1. 34 *H.* 6. 18. *Co. Inſt.* 1 *part f.* 4. 7. *Broo.* 402.

Diſtrain again. V. Leet

And this Action lieth, though the Cattle were impounded, unjuſtly, and without cauſe; as if one offer ſufficient amends before impounding for the Treſpaſs, and the party refuſe it, and after the owner take the Beaſts out of the Pound; this Writ lieth. Where it lieth, or not.

And if one that hath a Replevin, or other colour, take upon him to take out the Cattle; and in truth his Authority is not good, this Action lieth. So if a man that hath authority, break the Pound, before he demand the Beaſts of the Keeper of the Pound, and he refuſe or interrupt him in the taking of them, *D. & St.* 112.

And whether the Diſtreſs were taken Damage-feſant or for Rent, or Services, and whether they were taken out of a Common-Pound, or other private pound; ſo it be a lawful one, it is all one.

But if one diſtrain Cattle Damage-feſant, and put them in Pound, and the owner that had right there of Common, make freſh Suit, and finde the door unlocked, he may juſtifie the taking of them away in this Writ, *Co. Inſtitut.* 1 *part. fol.* 47.

See more of theſe things in *Prerogative*, *Retorn*, *Rent*, *Avowry*, *Treſpaſs*. And ſee the Statutes for *Diſtreſſes*, 1 & 2 *Phil. & Mar.* 12. *Articuli Cleri.* 9. *Weſtm.* 2. 37. 36. 1. 17. 16. *Marlb.* 15. 1, 2, 3, 4. And *De Diſtrictione Scaccarii.*

CHAP. LXIX.

Of Diviſion of Places.

IN Diviſion, the Law doth look upon Things and Places.

Sect. 1. *Provinces.*

For the Diviſion of Things, ſee *Apportionment*. And for Diviſion of Places, it had one Diviſion in Relation to the Spiritual Juriſdiction by Provinces, *&c.* and Dioceſſes, now gone, and Pariſhes; and another in Relation to the Civil Juriſdiction. For ſo it looks upon the whole Country, as divided into Counties, Hundreds, Cities, Towns, Pariſhes, or Villages, and Hamlets, and Burroughs.

Province, what.

The Provinces were the Circuits of the Juriſdictions of the Archbiſhops of *York* and *Canterbury*.

Dioceſs, what.

The Dioceſſes of the other Biſhops, the Circuit of their Juriſdiction.

Pariſh, what.

The Pariſh is a multitude of Neighbors, gathered together, and belonging to one Church, and under the charge of one Miniſter. And Pariſh Churches were thoſe that were inſtituted for the Service of God, for the people dwelling within a certain compaſs of Ground near it: Of which were in *England*, in the time of *Henry* the Eighth, 4500 or near thereabouts.

County or *Shire.*

A County is a certain Circuit, or part of the Country, into which the whole was divided for the better Government thereof; ſo as there is no part of the Country, but is in ſome County. And every County is governed by an Officer yearly choſen, called the Sheriff. And in *England* there are One and forty Counties, and in *Wales* Twelve Counties. And ſome Cities are Counties of themſelves, or with a little addition of places near them, as *Gloceſter*, and ſome others of the Cities, as *Cambridge*, *Ely*, *Weſtminſter*; and others are not ſo, but are within other Counties. *Co.* upon *Littl.* 109, 110.

Hundred, what. A Hundred is a certain circuit or part of a County, into which, the whole County for the better Government thereof, is divided, which at firſt were (as ſome ſay) an Hundred Towns; or (as others more probably affirm) becauſe they were made up of Ten Tithings, which were a Hundred houſholds of men, over which they had Juriſdiction, and over their Pledges, dwelling happily in two or three or more Pariſhes, Burroughs, or Towns, lying and adjoyning near together for the better Adminiſtration of Juſtices in their own diſtinct and proper Courts; and for the better Government of the whole Hundred, that they might not run out diſorderly into one anothers Hundreds, Laths, or Tithing, wherein they did not dwell; or ſo called, becauſe every Hundred did finde the King a hundred able men for his Wars. Sir *Tho. Smiths Commonwealth. Terms of the Law.*

Ville or *Village*, what. A Village and a Tithing, it ſeems to me, were in the conſideration of Law, one thing. By a Village is meant a little Neighborhood and company of Houſes and Houſholders compact together in one place.

Tithing, what. A Tithing did at firſt ſignifie the number or company of ten men, with their Families caſt or knit together in a Society, all of them being bound to the King for the peaceable and good behavior each of other, whereof one was chief, and an Officer, called Tithingman, and in ſome places by other names.

Tithing-man.

And of theſe Villages or Tithings, there are in many places many belonging to one Pariſh: There are more Towns in *England* then Pariſhes, for there is about Eight thouſand eight hundred and three Towns, and but Four thouſand five hundred Pariſhes.

Town, Burrough, City, what. And in Law, Towns, Cities, Burroughs, and Hamlets, ſeem to be included: And therefore ſome give one definition to a Tithing, and a Town, and a Burrough, and ſay, That they were heretofore taken for thoſe companies of ten Families, which were one anothers Pledg.

Every Burrough is a Town, but not every Town a Burrough: For a Burrough is an ancient Town holden of the King, or any other Lord, which ſendeth Burgeſſes to the Parliament. And of theſe Burroughs, ſome be Incorporate, and ſome not; and ſome be Walled, and ſome not.

So every City is a Town or *Ville*, but every Town is not a City: For a City is defined to be a Burrough Incorporate, which hath or have had a Biſhop, and though the Biſhoprick be diſſolved, yet the City remaineth; and with us, Town and City are commonly taken one for the other: There are ſeven and twenty Cities in *England*, and ſome of them are Counties, and ſome are not. And though Towns or Burroughs be decayed, ſo as no houſes remain, yet they are called ſo ſtill, and the Burrough doth ſend Burgeſſes to the Parliament. And ſome ſay it cannot properly be called a Town that had not a Church, the Celebration of Divine Service, Sacraments, and Burials, *Co.* upon *Littl. f.* 109, 110, 113.

Hamlet, what. A Hamlet is taken for a little Village, or that which was ſo and is now become, being depopulate, and but a Farm or entire Seat of one man: And of theſe Villages and Pariſhes are made up, for there may be many of them in one Pariſh, Town, or Village.

There are alſo in moſt Counties, ſome places that are not now known to be within any of thoſe Diviſions, *Finches Ley* 84. 2 *R.* 3. 1. *Co.* upon *Littl.* the ſame, *Co.* 11. 26.

There are ſome other Diviſions by Wards, and otherwiſe uſed in ſome great Towns and Cities.

CHAP.

CHAP. LXX.

Of Drapery, Cloth, Clothing, and Dogs.

THe Law takes great care of the making of Cloth of all ſorts. And therefore provideth and ordereth, *Sect.* 1: *Cloth* and *Clothiers.*

Firſt, Who ſhall make Cloth, and that all may not do it. For this ſee 4, 5 *Phil. & Ma.* 5. 25 *H.*8. 18. 1 *Eliz.*14: 27 *Eliz.*23: 18 *Eliz.* 15. 1 *R.*3. 9. 4 *Jac.*2.

Secondly, What Materials of Wool, Yarn, and Thrums, and other Stuff of all ſorts, ſhall be put in the Cloth; and that no bad Stuff be intermingled in it: For this ſee 35 *Eliz.* 10. 31 *Ed.*3. 8. 13 *R.*2. 9. 28 *Ed*3. 2. 37 *H.*8. 18. 23 *H.*8. 17. 6 *H.*8. 9. 7 *Ed.*4. 9. 8 *H.*5: 2. 4 *Jac.*2. 27 *Eliz.*18. 43 *Eliz.*12. 31 *Ed.*3: 2, 3. 5, 6 *Ed.*6. 7. 23 *Eliz.* 5. 33 *H.* 6. 16. 1 *Ed.* 6. 16. 5 *Ed.* 6. 7. 8 *H.*6. 23. 2, 3 *Ph. & Ma.*16. *Wooll, Yarn,* and *Thrums.*

Thirdly, That it be duly ordered and prepared in the making by Weavers, Spinners, Dyers, Dreſſers, *&c.* And that no unlawful devices by Gig-mills or Tentors, be uſed in it: For this ſee 6 *H.*8. 9. 3 *Ed.* 6. 2. 5 *Ed.*6. 6, 22. 4, 5 *Ph. & Ma.*5. 23 *H.* 8.3. 5 *Ed.*6. 6. 43 *Eliz.* 10. 39 *Eliz.* 20. 8 *Eliz.*7. 14 *Eliz.*12. 23 *Eliz.* 9. And that they be fit men to do it: See for this 2, 3 *Ph. & Ma.*11. 4, 5 *Ph. & Ma.*5. And that they be duly paid for their work by the Clothier: See for this 8 *Eliz.*7. 14 *Eliz.*12. *Gig-mills, Iron-cards, Pickards.*

Fourthly, That the Cloth have his due weight, length, bredth, and meaſure: See for this 6 *H.*8. 9. 3 *Ed.* 6. 2. For the Cloth of Ray, 2 *Ed.*3. 14: 47 *Ed.*3. 1: 7 *H.*4. 10. 13 *H.*4. 4. For the white Straits in *Devon* and *Cornwal*, 27 *Eliz.* 18. 35 *Eliz.*10. 4 *Jac.* 2. For the *Lancaſhire* Cotton, Frizes, and Rugs, 8 *Eliz.* 12. For the Waſher-cloth in *Yorkſhire*, 4 *Jac.* 2. For the Cloth made in *Kent*, *Suſſex*, or *Reding*, 5 *Ed.*6. 4. 5 *Ph. & Ma.*5. 4 *Jac.*4. For the Cloth made in *Worceſter* and *Coventry*, and the long and ſhort *Worceſters* made there, 5 *Ed.*6. 5. 4, 5 *Ph. & Ma.*5. 4 *Jac.* 2. For the Cloth called Cogware, Kendals, and Carptmeals, 4 *Jac.* 2. For the coloured Cloth, white Cloth, and ſhort Cloth in *Suffolk*, *Norfolk*, and *Eſſex*, 5 *Ed.*6. 6. 43 *Eliz.*10. 4 *Jac.* 2. 4, 5 *Ph. & Ma.*2. For the Northern Cloth beyond *Trent*, 39 *Eliz.* 20. 43 *Eliz.* 10. For all whites and reds in *Glocesterſhire*, *Wiltſhire*, and *Somerſetſhire*, 5, 6 *Ed.*6. 4. 4, 5 *Ph. & Ma.*2. 35 *Eliz.* 9. 4 *Jac.*2. For all Plunkets, Azures, Blews, and Kerſies: See the laſt Statutes. For Broad-cloth and Narrow-cloth made in *Taunton*, *Bridgwater*, and *Dunſtons*, 5 *Ed.*6. 6. 43 *Eliz.*10. 4 *Jac.* 2. For thick and ſtrait Kerſies, 5 *Ed.* 6. 4 *Jac.*2: For *Welſh* Linnen, and *Welſh* Frizes, 4, 5 *Ph. & Ma.* 5. 5 *Ed* 6. 6: For the Northern Cloth and Dozens, 5 *Ed.*6. 6. 43 *Eliz.*10. For the Penniſtone and Foreſt Whites, 5 *Ed.*6. 6. 4 *Jac.*2. For the Worſteed-cloth, 17 *R.*2. 3, 7. 17 *Ed.*4. 1. 15 *H*8. 4. 25 *H*8. 5. 14 *H* 8. 3. For the *Mancheſter* and *Cheſhire* Cottons, and Rugs or Frizes, 5 *Ed.*6. 6. 4, 5 *Ph. & Ma.* 5. For the Meaſures and Weights of Cloth and Wool, 6 *H.*8 9. 3 *Ed.*6. 2. 31 *Ed.*3. 2, 8. 13 *R.*2. 9. And thoſe Clothes that are not of thoſe Weights and Meaſures, *&c.* are not to be ſold, 6 *H.*8. 9. 3 *Ed.*6. 2. *Worſteed.*

Fifthly, The Clothier muſt put his Mark and Seal upon his Cloth, and for this ſee the Statutes of 3 *Jac.* 17. 39 *Eliz.* 20. 5 *Ed.* 6. 6. 27 *H.* 8. 12. 5 *H.* 8. 2. 25 *H.*8. 18. 6 *H.*8. 8. 7 *Jac.* 16.

Sixthly, There are Officers appointed to look to theſe things, and to view, and ſearch the Cloth, as the Aulnegeor, who is an Officer of the Lord Protectors; that is, by himſelf or his Deputy, to look to the Aſſize of all the Woollen-cloth that is made: And he hath two Seals for that purpoſe appointed him. And for him and his Office, ſee the Statutes of 25 *Ed.*3. 2. 27 *Ed.*3. 4. 3 *Ed.*6. 6. 8 *Eliz.*12. 13 *R.*2. 11. *Aulnegeor,* what.

Overſeers of Cloth. *Searchers of Cloth.*

and *Brownl.* 2 *part.* 301. The Overſeers of Cloth, and for them and their Office, 3 *Ed* 6.2: 39 *Eliz.*20. 21 *Jac.* 18. 35 *Eliz.*10. And Searchers of Cloth, and for them and their Office, 5 *Ed.*6.6. 4,5 *Ph. & Ma.*5. 4 *Jac.*2. 2,3 *Ph. & Ma.* 12. 3 *Ed.*6.2. 35 *Eliz.*10.

Seventhly, If there be fault in the Clothier, he is to be puniſhed, and make amends for bad Clothe, 4 *Ed.*6.6. 4,5 *Ph. & Ma.*1. 21 *Jac.*18. 4 *Jac.*2. 43 *Eliz.* 10. 35 *Eliz.*7.9. 5 *Ed.*6.6.

Weavers, Spinners, &c.

Eighthly, The Weavers, Spinners, Carders, Dyers, Dreſſers, Rowers, Raiſers, Shearers, and the reſt, are to be careful of their part of the work, or be puniſhed, 7 *Jac.*7. 4 *Jac.*2. 35 *Eliz.*10. 6 *H.*8.9.

Ninthly, For Tranſportation and Importation of Cloth, 7 *Ed.* 4.3. 5 *Ed.*6.6. 1 *R.*3.8. 3 *H.*7.11. 11 *Ed.*3.3. 4 *Ed.*4.1.

See more of theſe things in my Book of *Juſtice of Peace*, in the Chapter of *Clothiers*, and in *Wingates Abridgment of the Statutes.*

Of Dogs.

FOr Dogs, theſe ſpecial things are to be known.

1. If a man keep a Dog that doth uſe to kill Sheep or bite Cattle, and he hath notice given him hereof, and after this the Dog doth hurt to any man herein, the Maſter muſt anſwer for it: See for this *Action upon the Caſe.*

2. No Felony can be by ſtealing Hounds, Spaniels, Grey-hounds, or the like Dogs. But for a Blood-hound, or Maſtiff, perhaps it may be otherwiſe. And for Dogs of Pleaſure, the owner may bring an Action of Treſpaſs for them, againſt him that ſhall take them away; for in theſe a man hath a property, and they are valuable to him. See *Treſpaſs, Property.*

CHAP. LXXI.

Of Droit & Tort, or, Right and Wrong.

Sect. 1. *Droit* or *Right*, what.

DRoit, called in Latine *Jus*, in Engliſh *Right:* This in a general ſignification doth ſignifie and include a Right, for the which a Writ of Right doth lie; but alſo any Title or Claim to Land, by force of a Condition, Mortmain, or the like; for the which, no Action but an Entry is given by the Law. And this ſeems to be oppoſed to *Tort.* Right is moſt properly where the eſtate is turned to a Right; but it doth ſometimes include the eſtate in *Eſſe, Co.* on *Littl. ch.*8.

Tort or *Wrong*, what.

The kindes of it.

Right is ſaid to be of Entry, or of Action: For when a man is put out of his Land by Diſſeiſin, Diſcontinuance, or Ejectment, and layeth claim to it, he hath ſometimes a Right to an Action, the which he may have to recover it, and ſometimes he may enter and take it, ſometimes he may do either, ſometimes he hath an action, but cannot enter, ſometimes may enter, but cannot have any Action, ſometimes he is barred of Entry and Action both, and without remedy.

Droit of Entry, of Action.

There is *Jus proprietatis*, a Right of Ownerſhip, and a Right of Poſſeſſion: As if a man be diſſeiſed of Land, the Diſſeiſee hath the Right of Property, the Diſſeiſor the Right of Poſſeſſion: And if the Diſſeiſee releaſe to the Diſſeiſor, he hath both.

There is a Right, firſt, of Recovering, ſecondly, of Entring, thirdly, of Having, fourthly, of Retaining, fifthly, of Receiving, ſixthly, of poſſeſſing, *Co.* 8. *Altham's* Caſe, *Co.*2. 56.

This Right alſo is Preſent, or Future, when the Right one hath, is to be had hereafter.

A

A Pretenſed Right is where one is in Poſſeſſion of Lands, and another who is out of Poſſeſſion claimeth it. *Pretenſed Right*, what.

As concerning Right and Wrong, theſe general Rules are to be known. *General Rules concerning Right and Wrong.*

1. Right doth ſometimes ſleep, but it never dies, trodden down it may be, but it can never be trodden out; ſo much favor it hath in Law, *Co.* upon *Littl. Sect.* 478.

2. When twoare in poſſeſſion by divers Titles, the Law doth judg the poſſeſſion in him that hath the Right, in favor of Right, *Littl. Sect.* 158.

3. When due Rights do concur in one perſon, it is as good and effectual, and ſhall work, as if it were in divers perſons, *Co.* upon *Littl.* 278, *&c.*

4. In Rights the moſt ancient ſhall be preferred, *Idem.*

5. Rights do help them that do watch, and not them that do ſleep, *Plow.* 372.

6. Any man may be prejudiced in his Right by his delay, *Idem.*

7. The Law doth wrong to no man.

8. To him that doth agree to the thing, there can be no wrong.

9. Men are ſo to uſe their own Right, as thereby not to hurt another man.

10. None may have advantage, or take benefit by his own wrong, 13 *H.* 7. 1.

11. No man ſhall be twice puniſhed for any wrong.

In ſome caſes to recover a mans Right to Land, he hath an Aſſize which is given to a man for his Land, where he is diſſeiſed of the Freehold, as being Tenant in Fee-ſimple, Tail, or for life; and ſo if he be Tenant by Elegit or Statute: And if a man be diſſeiſed, aud then recover by this Writ, and after is diſſeiſed again by the ſame Diſſeiſor; then he may have a Writ of Rediſſeiſin. And if one recover by Aſſize of *Mort-danceſter, &c.* and then be again diſſeiſed, he may have a Writ called a Poſtdiſſeiſin. *Aſſize*, what. *Rediſſeiſin.* *Poſtdiſſeiſin.*

The party put out of Land may alſo have remedy by a Writ of Right, which is a Writ of the higheſt nature of all others: And wherein if a man have Judgment, and no Claim be made within a year and a day after; by this all perſons are barred for ever, *F.N.B.* 1. *Writ of Right*, what.

And this is either Open or Paten (that is) not incloſed within the Seal; or it is Cloſe, (that is) incloſed within the Seal. *Patent* or *Open*, or *Cloſe*, what.

And in *London* by their Cuſtom they have a Writ of Right, in this caſe much of this nature, *Co. ſuper Littl.* 158, 159. See *Proces.* *Droit in London*, what.

Eviction is, where one is caſt out of ſomething, whereof he had the poſſeſſion and property. And this may be either lawful or unlawful; and lawful either by Act of Law, which doth no man wrong, or by the Act of the party: And this alſo may be either Peaceable or Forcible. *Eviction*, what.

Forcible Entry into Lands, is a violent Actual Entry into Lands, Houſes, *&c.* by any perſon weaponed, whether he offer violence or hear of hurt to any there, or furiouſly drive out any out of the poſſeſſion thereof. And the Forcible Detainer is a Violent Act of reſiſtance, by a ſtrong hand of men, weaponed with harneſs or other action of fear in the ſame place or elſwhere, by which the lawful Entry of the Juſtice, or other is hindred. But as to this, ſee *Forcible Entry.* *Forcible Entry*, *Forcible Detainer*, what.

CHAP. LXXII.

Of Drunkenneſs, Dyers, and Dying.

FOr Dyers and Dying, theſe things are to be known.

1. That no man is to Dye any Cloths, Kerſies, or other things with Logwood, but the ſame is to be burned, 23 *Eliz.* 9. 39 *Eliz.* 11.

2. The Dyer muſt fix a Seal of Lead to his Cloth, 29 *Eliz.* 9.

3. No perſon that Dyeth Worſteeds, Stamins, or Sayes, is to Kalender them, 25 *H.* 8. 5.

4. In what manner Woollen-cloth, and Wools ſhall be uſed in the Dying; and with what Stuff they ſhall be died, 25 *H.* 8. 5.

Of Drunkenneſs and Alehouſes.

Sect. 1 Who muſt take *Licences.*

AS to Drunkenneſs, Alehouſes, and Alehouſe-keepers, theſe things are to be known.

1. That none may keep any common Alehouſe or common Victualling houſe, or uſe commonly to ſell Ale, Beer, Cider, or Perry, that is not licenced in open Seſſions, or by two Juſtices of the Peace, *Quorum Unus*, 5, 6 *Ed.* 6. 25.

Taverns, Inholders.

2. That Taverns keeping Victualling, Inn-keepers, and Victuallers, are within the Statutes, as well as Alehouſe-keepers; ſo that if they offend by ſuffering Tipling, or ſelling leſs for a peny, or two pence, then the Statute appoints; they are to be puniſhed as Alehouſe-keepers are. And they are to be bound for keeping of good order, as well as Alehouſe-keepers: And the Juſtices of Peace may require them to take Licences, and enter into Recognizance to keep good order; or elſe commit them as Alehouſe-keepers. And all thoſe Inns which were erected ſince 5 *Ed.* 6. and not Inns before, muſt have Licences, and be bound as well as others, *Cromp. Jur. p.* 77. *Dalt. J. P. ch. f.* 37. 1 *Car.* 4.

Commitment. Recognizances.

3. The Juſtices when they Licence Ale-ſelling to a man, muſt take Bond and Surety of him againſt the uſing of unlawful Games, and for the keeping of good order, which they muſt certifie at the next Quarter Seſſions. *Subpœna* three pound ſix ſhillings eight pence.

4. When they commit any man three days for ſelling without Licence, they muſt ere they deliver him, take Bond with two Sureties, that he ſhall not offend again. And this Recognizance, Diſcharge, and Offence, they muſt certifie at the next Quarter Seſſions: And this Certificate will be a ſufficient Conviction in Law, to make him liable to the twenty ſhillings fine upon the 5 *Ed.* 6. 25.

5. If two Juſtices of the Peace, diſcharge an Alehouſe-keeper of ſelling of Ale, and two others after, out of Seſſions, allow him again, it ſeems the firſt two may commit him. So if he be Convicted of any of the Offences in the Statutes, by which he is diſabled, and is, or is not ſuppreſſed for it: If he be licenced within three years after, the Licence is void, and he to be puniſhed as one unlicenſed. And he that is Convict for ſelling leſs then the Aſſize, for ſuffering Tipling, or that doth Tiple, or is Drunk, is diſabled to ſell again for three years; and being put down by two Juſtices, he cannot he licenſed, but in open Seſſions, *Dalt. J. P. ch.* 7. 1 *Jac.* 9. 4 *Jac.* 5. 21 *Jac.* 7.

Feme Covert.

6. If a Woman that hath a Husband, ſell againſt her Husbands will, they may be both puniſhed, in purſe, and ſhe, if the Juſtice think fit, may be impriſoned till ſhe finde Sureties for the Good-behavior, and that ſhe will not ſell again, *Dalt. J. P. chap.* 7. *Good-behavior.*

7. He

7. He that is not licenſed, may be puniſhed by 5 *Ed.6.* 25: or by the 3 *Car.* 3. But he cannot be puniſhed upon both, that is, if he be committed and pay his twenty ſhillings, he cannot be ſent to *Bridewel.* If he be ſent thither, he is not to be committed to Gaol, and pay twenty ſhillings; and yet he that is unlicenſed, may be puniſhed for ſuffering Tipling, or breaking the Aſſize, as thoſe that are licenſed may be, *Dalt. J. P. ch.7.*

8. The Traveller and other neceſſarily accompanying him, and invited by him, during his neceſſary abode in the Alehouſe, Handicraftmen, Workmen, and Laborers, that are there for an hour at dinner time; and ſuch as do ſojourn and lodg there, and ſuch as are licenſed by two Juſtices of the Peace, are not to be accounted Tiplers within the Statute: But all other men living in the ſame place, or elſwhere, except the ſtranger himſelf, are to be accounted Tiplers, *Dalt. J. P. ch.7.* 1 *Car.* 4 *Jac.*5. 1 *Jac.9.*

9. Brewers may not ſell more Ale or Beer to unlicenſed Alehouſe-keepers, then what will ſerve for their own uſe, 4 *Jac.*4.

10. Selling of Ale at Fairs, is not againſt the Statute of 5 *Ed.6.* 25. 3 *Car.*3.

11. All the Forfeiture of all theſe offences upon 4 *Jac.*7. 3 *Car.* 3. 21 *Jac.9.* are given to the poor of the place, where the Offence is done; and ſo is the one half upon the Statute of 4 *Jac.* 4. and muſt be delivered to the Church-wardens, who muſt account for it: But the twenty ſhillings on the Statute of 5,6 *Ed 6.* doth go to the Lord Protector.

12. It is held fit to hear the parties offending in theſe caſes, before the Forfeitures be levied in, *Dalt. J. P. ch.7.*

13: If any Alehouſe-keeper ſhall be lawfully convicted of any offence againſt any breach of 1 *Jac.9.* 4 *Jac.* 5. He is for the ſpace of three years next after the Conviction, to be utterly diſabled to keep any ſuch Alehouſe, 7 *Jac.*10.

14. A man convicted the third for his ſelling Ale or Beer of his own Brewing, and not compounding with the Commiſſioners of Exciſe, is to be puniſhed as an unlicenſed Alehouſe-keeper, and to be for ever diſabled to keep ſuch a common Houſe, *Act.* 14 *Aug.* 1649.

15. If a man be puniſhed on the 5,6 *Ed.* 6. that is committed and hath entred into Bond, and hath paid twenty ſhillings, he cannot be puniſhed on 3 *Car.*

16. He that is drunk, is for the firſt offence to pay five ſhillings, or be put in the Stocks ſix hours; for the ſecond offence, to be bound to the Good-behavior.

17. He that is Convict of Tipling, is to pay three ſhillings four pence, or be in the Stocks four hours.

18. The Innkeeper, *&c.* that ſuffers Tipling, is to pay ten ſhillings, or go to Gaol, till he pay it.

19. If he ſell leſs then meaſure, he muſt pay twenty ſhillings, or go to Gaol, till he pay it.

See more of theſe things in my Book of *Juſtice of Peace.*

CHAP. LXXIII.

Of Election.

THere is an Election of Things and of Perſons. That of things is where one hath a liberty or free choice, to have or do one thing or another, as he pleaſeth; and is by *Dyer* 281. thus defined, *Electio eſt interna, libera, & ſpontanea ſeparatio unius rei ab alia ſine compulſione, conſiſtens in animo & voluntate:* As if one be bound to pay a pound of Pepper, or a pound of Raiſons, he may do which he will; and if one give me one of his Horſes in his Stable, and ſay not which, I may take which I will, *Dyer* 281. 18: 21 *H.7.* 29. *Election,* what.

If

2. In what caſe an *Election* is given, or not.

If one for money make a Leaſe by the words Demiſe, Grant, Bargain, and Sell; the Leſſee may take it by way of Bargain and Sale, or Demiſe at Common Law at his pleaſure, *Co.* 236. *Dyer* 30. ſee *Deed.*

So if a Husband and Wife be joyntly ſeiſed of a Manor, out of which another hath a Rent-charge, and he do Releaſe, give and grant this Rent to the Husband alone; he may uſe this as a Releaſe, or a Grant, as will be moſt for his advantage at his own pleaſure: See more of this *Dyer* 251. 116. 302. *Dyer* 319. 109. *Co.* 4. 71. 6. 36. 19 *H.* 6. 45. 44 *Ed.* 3. 31. 22 *H.* 6. 42. 10 *Ed.* 4. 3. *Plow.* 156. 433. *Co.* upon *Littl.* 301, 302, ſee *Grant.*

Rent. Charge. If one grant a Rent-charge, the Grantee may chuſe either for to diſtrain for it, and ſo charge the Land, or to bring an Action, and ſo charge the perſon of the Grantor, or his Heirs, *&c.* and where this Election is given, and where not, ſee *Co.* 3. 29. 236. 448. 658. 724. *Dyer* 65. 140. 344. *Littl.* 48. ſee *Rent.*

Contract. If one be to pay one of two things for Rent, or by a Contract, or Obligation, he that is to pay it, may pay which he will at his choice, 1 *Rich.* 3. 2. 9 *Ed.* 4. 36. *Co.* 2. 37. 994. 21 *H.* 7. 19. See *Obligation* and *Contract*, 7 *Ed.* 4. 26. 9 *Ed.* 4. 48. 5 *H.* 7. 33. 7 *H* 6. 7.

If one give me one of his Horſes, I may take which I will, and the Law gives me Election to make the gift good, *Dyer* 23. 21 *H.* 7. 19. *Dyer* 91.

Rent. Aſſignee. If one make a Leaſe for years rendring Rent, and the Leſſee aſſign over his Term; the Leſſor may ſue the Leſſee, or his Aſſignee for the Rent, at his pleaſure, *Co.* 3. 23. 14 *H.* 7. 4. and *Rent.*

If a Tenant that held by Knights-ſervice be dead, his Heir within age, the Lord may either ſeize the Wardſhip, or wave it, and demand his Services; ſo alſo it ſeems he may accept or refuſe any of his Services at his pleaſure, *Dyer* 285. 39. *Co.* 2. 68. ſee *Services.*

Action. In ſome caſes when one hath cauſe of Action, he may bring one Action or another at pleaſure, *Co.* 2. 37. 61. 493. 5. 38. 6. 44. 9. 51. 72. *Kelw.* 61. 92. *Dyer* 20. 50, 51. 21 *Hen.* 7. 30, 37. *Dyer* 121. 140. 230. 344. 27 *Hen.* 8. ſee *Action.*

Dower. In what caſes a Woman may at her Election have Joyntor, or Dower, or both; and in what caſes not, ſee *Dower.*

In what caſes one may ſue one or another at his pleaſure, ſee *Dyer* 204. 207. 10 *H.* 7. 8. 22 *H.* 6. 4. and *Action.*

Leaſe. In what caſes by Acceptance, one hath Election to affirm or avoid a Leaſe, ſee *Acceptance* and *Leaſes.*

Executor. And know that a man hath Election in divers other caſes: As if one be a Legatee or Executor, to take as one or other. *Cum multis aliis*, *Plow.* 520.

But if a Leaſe be made to Commence after the death, Surrender, forfeiture of a former Leſſee of the Land; this Leſſee hath not any Election here, but his Leaſe ſhall begin, after the firſt of theſe Contingents when it hapneth, *Co.* 2. 36.

Deed. If one ſell Land to me by Bargain and Sale, and before Inrollment levy a Fine to me of the Land: Now I have not Election here to take by either, but I muſt take by the Fine, and the Inrollment afterwards will not relate to this purpoſe, *Co.* 4. 72.

Grant. Note. If one ſell to me two Acres of a great Wood of one thouſand Acres, and give me Livery of Seiſin in part of the Wood; it ſeems this is void, and I have no Election given to me now to help it, becauſe after the Livery it is too late, *Dyer* 281.

If one grant to me and my Heirs a Rent-charge, but doth not ſay in his Grant *proſe & haredibus ſuis*, and he die: Now here I muſt charge the Land, and I have not any Election given me to charge the perſon, becauſe the perſon of the Heir is not chargable, *Co.* 10. 128. *Plow.* 344. See more *Infant*, *Contract.*

3. Where *Election* is neceſſary, and in what time it ought to be made, or not.

If one be to have one of two things, by one title of Gift, Grant, or the like, and the Gift or Grant, is ſo uncertain at the firſt, that nothing paſſeth till Election be made; and the Election doth precede the property or intereſt of the Feoffee or Grantee

Grantee (as in ſuch caſes it doth) there Election is very neceſſary; for till then no intereſt or property is in the Feoffee or Grantee, neither can he grant it over.

And it muſt be done alſo in this caſe, in the life time of the party, that is to chuſe for his Heirs, Executors, or Adminiſtrators cannot chuſe, *Co.*2: 35, 36, 37.

Grant.

And if the Election be not in his life time, the Gift or Grant will be void: As if one make a Feoffment to another of White-acre or Black-acre, or of a Houſe and ten Acres of a great Wood of his of one thouſand Acres, or one give one of his Horſes: in all theſe caſes, till Election be made nothing paſſeth, and after the death of the Vendee or Donee, no Election can be made, *Dyer* 281.

Where an Election is given to ſeveral perſons, there Election is neceſſary, and nothing doth paſs till Election be made: As if one Leaſe two Acres for life, the Remainder of one to *J. S.* and of the other to *J. N.* till one of them chuſe, it ſeems nothing paſſeth; and therefore Election muſt be during life, *Co.*2. 36.

But if one be to have one thing onely, but by two ſeveral Titles, or in two ſeveral degrees or manners, and the eſtate paſſeth preſently (as in that caſe it doth) there Election is not ſo neceſſary, becauſe the thing is grantable before Election; and in this caſe Election may be made by the Heirs or Executors, after the death of the party: As in the caſes of a Grant of a Rent-charge, and of a Leaſe made by the words, Demiſe, Grant, Bargain, and Sell, there the Grantee or Leſſee, or his Executors or Adminiſtrators, may at any time make their Election, *Co.*2. 35, 36. *Dyer* 91. 70.

What thing is elegible, or not.

If one grant me ten load of Wood, in his Wood, to take at my Election, and he or a ſtranger cut down Wood; now I may not take that cut down, but I muſt ſerve my ſelf elſwhere in the Wood, *Co.*5. 25.

4. What perſon ſhall make the *Election*, or not.

In all caſes where an Election is given of two or more ſeveral things, he that is the firſt agent, and to do the firſt act, ſhall have the Election: As if one grant a Rent of Money or Robe, or a Leaſe be made, rendring a Rent or Robe, the Grantor or Leſſee before the day of payment hath the Election, and may pay which he will.

Grant.

So if one promiſe, or enter into obligation, with condition to do one of two or more things, the party, obligor, or promiſing hath the Election: But if he fail payment of his Rent at the day or performance of his promiſe, then the other party may ſue for one or the other, for then he hath the Election. But if the Grantee bring an Annuity for the Rent-charge, he muſt bring it for both, elſe he will loſe his own Election, *Co.*2.37. 9 *Ed.*4.3. 13 *Ed.*4 4. 5 *Ed.*4.6. *Kelw.*700. *Co.*10.128. *Co.*9. 94. *Dyer* 18. 21 *H.*7. 19.

Officer.

If a Warrant come from a Juſtice to an Officer, to require him to bring a perſon before him, or ſome other Juſtice, the Officer, not the offendor, ſhall chuſe to which Juſtice he will go, *Co.*5.59.

Gift.

If one give to me one of his Horſes in his Stable, I ſhall have the Election, and may take which I will: But if he ſay he will give me one of his Horſes, in the words of the future-tenſe; there it ſeems, I cannot chuſe, but he hath the Election; 21 *H.*7.19.

Condition of *Obligation.*

If one be bound in an Obligation, with a Condition, to pay fifteen pound at *Eaſter* next, or before at the requeſt of the Obligee, it ſeems here the Obligee ſhall have the Election: But if the Bond be with Condition, that the Obligor ſhall pay fifteen pound before *Eaſter*, at the requeſt of the Obligee, or at the ſaid Feaſt of *Eaſter*, here it ſeems the Obligor ſhall have the Election, *Dyer* 108.

If the Condition of an Obligation be to deliver up the Obligations that be in his hand, or to ſeal to the Obligee ſuch a Releaſe as he ſhall deviſe, before *Michaelmas* next; the Obligor muſt do one of them at his peril, and the Obligor hath no Election in this caſe, but the Obligee may tender a Releaſe, if he will. *Goldsb.* 142. *pl.* 55.

If one grant to another twenty Loads of Hazle, or twenty Loads of Maple, to be taken in his Wood of *D*; there the Grantee ſhall have the Election, 2 *H.*7. 23. *Co. ſuper Littl.* 146.

And

And when the thing granted, is of a thing Annual, and to have continuance, there the Election doth remain to the Grantor, when the Law doth give him the Election, as well after the day as before; as when one grants the Annuity of twenty ſhillings, or a Robe at *Eaſter*, but when it is to be performed *Unicâ vice* onely, *contrà*: And therefore if one contract with me to pay me twenty ſhillings, or a Robe at *Eaſter*, if he fail, I may ſue for either.

5. What Act ſhall amount to an Election, and be good and binding, or not. *Services. Dower.*

If an Election be given to divers perſons, and one of them make a choice; this ſhall binde all the reſt, though they agree not to it, *Co.* 2. 36. *Co. ſuper Littl.* 146.

If two be Joyntenants of a Manor, and a Wardſhip happen, and one of them ſeize the Ward; this will binde the other, and he cannot after wave him, and demand his Services, *Co.* 2. 63.

If a Rent-charge be granted to a man and his heirs, and the wife of the Grantee brings a Writ of Dower againſt the Heir, and the Heir to prevent the wife of Dower, claims it to be an Annuity, and not a Rent-charge; this is no good Election, and therefore ſhe ſhall recover her Dower; and after this Endowment, the Heir cannot have Annuity for the two parts, for he muſt have all as a Rent-charge, *Co. ſuper Littl.* 444.

6. By what means an Election may be gone, or not.

If two things paſs by one Gift or Grant, altogether uncertain at the firſt, and the Feoffee or Donee die before Election; this Election is gone, and the Grant void: As in the caſe of the Feoffment of one of two Acres, and of the Wood, and the gift of one of his horſes, *Co.* 2. 36, 37. *Dyer* 281.

If one have an Election to pay one of two things at a day, and he do not pay it at the day, then his Election is gone to the other, as in the caſe above, *Kelw.* 78. *Dennis* caſe, *Trin.* 8 *Jac. B.R.* And if after the Election given to the Grantee, he brings a Writ of Annuities for one onely, and have Judgment for that one; his Election is gone, and he can never demand the other, *Co.* 2. 36, 37.

If one enfeoff another of two Acres, to have the one for life, and the other in tail, and before Election the Feoffee make a Feoffment of both: Now his Election is gone, and the Feoffor may enter upon which he will for Forfeiture, *Co.* 2. 37.

If one grant a Rent-charge, and after the Grantee diſtrain and avow for it in a Court of Record, or bring an Annuity, and have a Judgment in it; in theſe caſes his Election is gone: So if the Grantee of the Rent, before Election, purchaſe the Land, or releaſe all Annuities, it ſeems his Election is gone, *Dyer* 344. 140. But in caſes where the Gift or Grant is of one thing, but by ſeveral Titles, or in a divers manner: As in the caſe of Leaſe that hath words of Bargain and Demiſe alſo; or of a Grant of a Rent; the alteration of the eſtate of him in Reverſion, or the death of either of the parties will not determine the Election: And if in the firſt caſe the Leſſee enter generally, and do not declare how he will take it; this is no Determination of his Election, *Co.* 3. 37.

If a Term be given to the Executor, and he enter generally, and do not declare how, whether as Legatory, or as Executor; this is no Determination of his Election, but he may afterwards make his Election well enough, *Co.* 2. 37.

Rent.

If a Leſſee for years be of Land, determinable upon the death of *J. S.* and he grant a Rent-charge out of his Land, and before the Election of the Grantee how to take this Rent *J. S.* die; ſo that now the Land cannot be charged; yet the Grantee his Election is not ſo gone, but he may charge the Grantor in an Annuity, *Co.* 2. 36.

If one give to a man two Acres of Land, to have one in Tail, and the other in Fee, and he make a Feoffment of both; in this caſe the Election is not gone, to the Heir in Tail; for he may bring a Formedon for either, *Co.* 2. 36.

If an Iſſue in Tail make a voidable Leaſe and die, and the Guardian of his Heir avoid him (as he may) yet, this notwithſtanding, the Election of the Heir at his full age remaineth, *Co.* 7. 7.

If one grant a Rent-charge in Fee, without the words *pro ſe & haredibus ſuis*, and the Grantee bring a Writ of an Annuity againſt the Heir, and after diſcontinue his Suit, yet he hath the ſame Election he had, and may diſtrain the Land, *Dyer* 344.

If

If a Grantee be in the diſ-junctive of two Annual things, and things of continuance; if the Election belong to the Grantor, and he fail of the day, his Election is not gone; otherwiſe it is of things that are to be performed *unicâ vice* onely: As if one grant by Copy, twenty Trees growing upon Black-acre, or White-acre to be cut down yearly by himſelf, and delivered to the Grantee ſuch a day, and the Grantor fail at the day, yet his Election is not gone, *Co.* of *Copihold*, 120.

In moſt of all theſe caſes before, when once a man hath made his Election, it is peremptory to him, and ſhall never after wave it, and chuſe again: So alſo after a Judgment for Debt or Damages, where a man hath an Election what execution to take; if he have taken Execution by Elegit, it ſeems he cannot afterwards take any other remedy for recovery of his Debt or Damages upon the Judgment, *Dyer* 229. 60.

7. Where an *Election* is peremptory, or not.

Where a Lord by Cuſtom may ſeiſe a Herriot, the beſt Beaſt, and he chuſeth one of the worſt; he is bound by this, and he ſhall not chuſe again. See more for this in *Contracts*, 16 *H.*7.4.

But where a man hath the Election of one Action of two, and he ſue, and the other appear, and after is non-ſute; this is no Determination of his Election, *Co.* upon *Littl.*146.

For Election of Perſons to any Office or place, theſe things are to be known.

8. *Election* of perſons.

1. Elections to Colledges, Churches, Hoſpitals, Schools, Halls, Benefices, Eccleſiaſtical Dignities, and Societies muſt be free.

2. So muſt the Admiſſions and Inſtitutions be into ſuch places, free.

3. None may by threats diſturb free Elections.

4. If any take any thing, or a promiſe of any thing to give his voice for an Election, it makes the Election void, and another may be choſen.

5. If a man take any thing, or a promiſe of any thing for reſigning a place, he that gives is hereby made uncapable of the place.

6. If any take any thing, or any promiſe of any thing for a Preſentation or Collation to a Benefice, by this he is made uncapable of it, ſee *Simony*.

7. So it is of Corrupt Exchanges and Reſignations, between Incumbents of their Benefices, if they be with cure of Souls, 31 *Eliz.*6. *Weſtm.*1. And *Articuli Cleri*, and *Wingate*, *Abridgment* of them: *Fit: Election.*

CHAP. LXXIV.

Of an Infant and Engagement.

BY an Infant, commonly and properly in our Law, is meant one that is in his Nonage, under the age of one and twenty years, whether Male or Female, *Co. ſuper Littl.* 171. But the word is ſometimes taken more largely: And the Law hath a great reſpect to Infants, to protect them from wrong, and to preſerve their eſtate; and therefore doth give them many Privileges, and Benefits above others; as in many caſes.

1. An *Infant*, what. *Nonage.*

Their Privileges.

Firſt, Not to be ſued, till they be of full age.

Secondly, Not to be bound by their Contract, or their other Acts, that may turn to their prejudice, but onely in ſome ſpecial caſes; for which ſee in *Age*. And wrongs done to them, are more ſeverely puniſhed then to others.

2. What acts done by an Infant ſhall binde him, and others, or not.

For the Anſwer of this Queſtion, take theſe things.

1. If the King be an Infant, yet moſt Acts that he doth, as King, are good, and will binde him and his Succeſſors, *Co.* 5. 27. *Dyer* 209.

2. If an Infant be the head of a Corporation, all Acts that he doth in that capacity, will binde him and his Succeſſors, as if he were of full age, 21 *Ed.*4.13. *Co.*5. 27. *Broo.*4 8.

3. If a Parſon, Prebend, or the like, had made any Leaſe of their Eccleſiaſtical Living, it ſeems it is good, and will binde them, as if they had been of age, *Broo.* 478.

4. If an Infant-male after fourteen years of age, and a Female after twelve years of age, Contract for marriage, or make any Will or Demiſe of their Goods and Chattels, it is good; and will binde them, as if they had been of full age: But by the new Act, the age of a Man to conſent, is ſixteen, and of a Woman fourteen, 35 *H.*6.41.

5. If he do any thing that by Law he is compellable to do, it is good and will binde him; as to Attorn to the Grantee of his Lord, or the like *Co.*10 43.

6. If an Infant after fourteen years of age, being a Patron, do preſent to an Advowſon the Church being void, or the like, it is good, and will binde him, *Perk* 15

Apprentice.

7. An Infant may in many caſes binde himſelf an Apprentice, and in ſuch caſes, his Covenants in ſuch an Indenture will binde him, 5 *Eliz.*4. 21 *Ed.*4.6. 21 *H.*6.31. 9 *H* 6.8.

8. All Acts done to an Infant, as Conveyances of Land, making of Obligations, or Statutes, or the like, the Infant may accept of it, and they are good to him, as if he were of full age, ſee *Grants* If Land be conveyed to him, he may agree to it at his full age, or diſagree and avoid it, and ſo may his Heirs before Agreement, *Co. lib. Inſt* 1 *part fol.*2 And therefore a Leaſe for years made to an Infant, rendring Rent, was adjudged good; and that an Action of Debt may lie againſt the Infant for the Rent, and yet this may be a prejudice. But if he do not enter and manure the Land, or take the profits, it is otherwiſe: For it is in his Election to make the Leaſe good, or not; for if he before the Rent day refuſe, and waive the Land, he ſhall not be charged with the Rent, but if the Rent be of greater value then the Land, and he ſhew it in pleading, he may perhaps avoid the Leaſe, *Brownl.* 1 *part.* 120.

Election.

Executor.

9. If an Infant be Executor, and do any thing according to the duty of an Executor, as ſue for, receive, or pay debts, and upon Receipt of a debt to make a Releaſe for it; all ſuch Acts are good, and will binde him, or others, as if he were of full age, *Co.*5. 27. *Perk Sect* 4. *Broo. Executor* 1 5. See *Executor.*

10. If an Infant Contract for neceſſary Food, Phyſick, or Apparel, or Schooling, or the Nurſing of his Lawful childe; ſuch a Contract will binde him, as if he were of full age, *Co* 9. 87. 13 *Ed* 4. . *Perk.*4, And a ſingle Bill given for ſuch money is good; but if the writing be with penalty, it is void, *Co ſuper Littl.* 172. *M.* 39, 40 *Eliz.* Agreed. And what is neceſſary, or not, ſhall be tried by the Judges, not by a Jury, *Goldb* 168. *pl.*99.

11. If a Feoffment be made to an Infant, and he make a Letter of Attorney to take Livery, this ſeems to be a good Warrant, *Perk.*48. *Sect.* 14 21 *H.*6.31.

12. If an Infant ſell a Horſe, or the like for money, and deliver him with his own hands, and after ſue for, and receive the money; this ſhould ſeem to make the Contract good, 18 *Ed.*4. 2. 21 *H* 7. 39. 26 *H* 8. 2. But that this oppugns a Rule of Law: *Quæ malè ſunt inchoata, &c. Ergo quære.* For no Acceptance will make a void Contract good.

13. If an Infant levy a Fine, he may declare uſes upon the Fine, and it will binde ſo long as the Fine is in force, *Co.*2.58.

14. If an Infant be Lord of a Mannor, and grant Copihold eſtates, according to the Cuſtom, it is good, and will binde him, *Co.*6.3. 8. 44.

15. An Infant may not ſubmit to an Award, nor ſhall it binde him as another man; nor will any Bond or Aſſumpſit of his to ſtand to an Award, binde him, *March.*4. 112. *pl.*189. He may preſent to an Advowſon, *Co. ſuper Littl. f.* 172.

16. But

16. But all ſuch Gifts and Grants, Deeds, and Acts, as are done by an Infant, during his minority, as are or may be to the prejudice and hurt of the Infant, are void, or at leaſt voidable: And amongſt theſe Acts, moſt commonly thoſe things that paſs from him without Delivery of them by his own hands, are void; and thoſe that paſs by the Delivery of his own hands, are voidable, *Co. ſuper Littl. fol.* 171. *Perk. Sect.* 12. *F. N. B.* 202. *Brownl.* 1 *part.* 120. 21 *H.* 6. 31. *Sect.* 2.

17. All Contracts made by him, though he be within a day of his age, and the bargain be never ſo much to his benefit, except it be for neceſſary Apparel as before, are void, and will not binde him; and in theſe caſes a man ſhall have no remedy in a Court of Conſcience, *per Curiam*, *Plow.* 364. *Co* 9. 37. 10 *H.* 6. 14. 11 *H.* 6. 39. 18 *Ed.* 4. 2. 21 *H.* 6. 31. 26 *H.* 8. 2. 21 *H.* 7. 39.

18. If an Infant deviſe Land by Will, it is void, *Co.* 6. 23. *Dyer* 143.

19. If an Infant be Executor and Releaſe Debts he hath not received, or do any other act contrary to the duty of an Executor, and prejudicial to himſelf, as pay Legacies before Debts, all ſuch Acts are void, *Co.* 5. 27.

20. If an Infant grant an Advowſon, or Rent, or Common, by Deed, it is void; and if the Grantee preſent, or diſtrain, or take the Common, the Infant hath the ſame advantages, as if no ſuch act had ever been made, 26 *H.* 8. 2. *F. N. B.* 102. *Perk. Sect.* 13. And yet an Infant may preſent to a Church for fear of Lapſe, *Dyer* 104.

21. All Bills, Bonds, Covenants, and the like, entred into by an Infant, may be avoided in pleading to any Action upon them, that he was within age, *Co.* 5. 19. 21 *H.* 6. 31.

22. If an Infant ſell a Horſe, or any other ſuch like thing for money, or elſe, and the Vendee take it of himſelf; in this caſe the Infant may have an Action of Treſpaſs for the taking: But if the Infant delivered the thing with his own hands, the Vendee is excuſed from any Action of Treſpaſs; yet the Contract is voidable at leaſt: And therefore the Infant may take his Horſe again, and cannot ſue for the money, but may ſue for his Horſe, if it be kept from him. If an Infant buy a Horſe, and give Earneſt, and the ſeller break with him, he may ſue him, becauſe of his Earneſt, which onely is recoverable in damages, and may be ſued for by Action of Accompt, *Hobb. Rep.* 96. 14 *H* 8. 29. 21 *H.* 7. 39. 22 *H.* 6. 3.

23. If an Infant make a Feoffment in Fee with a Warrant to give Livery of Seiſin to a ſtranger, and he do it accordingly, this is void, and the Feoffee when he doth enter as Diſſeiſor, and ſo the Infant may ſue him, or enter upon him: But if the Infant had given Livery of Seiſin, with his own hands, then had the eſtate been onely voidable; and the Feoffee not to be charged, as a Diſſeiſor or a Treſpaſſor, *Co.* 5. 119. 4. 125. 3. 422. *Dyer* 109. 36. 26 *H.* 8. 2. *Littl.* 400.

24. If an Infant make an Eſchange or a Partition, it ſeems this is voidable onely, for he may affirm it at his full age, *F. N. B.* 62. 18 *Ed.* 4. 2. 12 *H.* 4. 11.

25. So if an Infant make a Leaſe for years, rendring Rent, it ſeems this is voidable, onely becauſe the Infant at his full age, may accept the Rent, and make it good; which if the Leaſe were void, it ſeems he might not do; but if it be without any render of Rent, it ſeems to be void, 9 *H.* 7. 24. 18 *Ed.* 4. 2. *Plow.* 545. *Co.* 3. 65. It is ſaid that it hath been adjudged, That an Infant ſhall not be charged for Wares that he doth buy for his Trade, 14 *H.* 8. 29.

26. If an Infant levy a Fine, ſuffer a Recovery, enter into a Statute, or Recognizance, or Inrol any Deed, he may during his minority, avoid them; the firſt and ſecond by a Writ of Error, the third and fourth by an *Audita Querela*, and the laſt by Entry or Action: But after the Infant is of full age, theſe Acts are not to be avoided, 17 *Aſſ.* 17. *F. N. B.* 104. *Co.* 10. 43. *Kelw.* 19. *Co.* 1. 76. *Co.* 2. 57. *Perk.* 19.

27. If an Infant ſue or be ſued in any Court by Attorney, and Judgment be given for, or againſt him, it is Error; and for this the Judgment may be avoided, *Co.* 9. 76.

28. If an Infant Tenant in Tail make a Leaſe for years, within the Statute of 32 *H.* 8, Yet it is not good, though the Statute be general, *M.* 7 *Jac. B. R.*

29. An Infant is not bound by a Partition that is not equal, made by Agreement, or in *Chancery*, but if it were made by Writ, he were, *Co. ſuper Littl. fol.* 171. See *Crompt. Jur. f.* 37. But a Releaſe may be by Decree in *Chancery*, in ſome caſes againſt an Infant, when no other remedy can be had. See *Conſcience.*

30. If the Guardian of an Infant ſuffer a Decree in *Chancery* againſt him, by conſent, it ſhall not binde him; by all the Judges at *Reding*, *Term.* But a Decree involuntary upon the merits of the cauſe, ſhall binde him. Out of all which, it appeareth that all Deeds, Gifts, Grants, *&c.* made by an Infant, which take not effect by Delivery of the Infant, be abſolutly void. But matters in Fact or writing, which take effect by hand and Delivery, are onely voidable by the Infant, or by them which have the Infants eſtate. And yet Acts that are apparently of neceſſity or profit to the Infant, or which can be no diſprofit to him, as for Meat, Drink, neceſſary Apparel, and Schooling, the Obligation or Covenant of an Infant, is good, *Dyer* 104.

See more in *Agreement*, *Acceptance*, *Ability*, *Capacity*, *Teſtament*, *Numb.* 4. *Fine*, *Numb.* 6,7,8. *Grant*, *Numb.* 2,3. *Recovery*, *Numb.* 3.

Sect. 3. 3. What perſons ſhall take advantage of a voidable Act done by an Infant, and when.

Privies in Blood inheritable, as Heir General, Heir Special, or as Heirs General and Special, ſhall have advantage of Infancy, *Co.* 8. *Whittinghams* caſe, *fol.* 42. As if an Infant, Tenant in Fee-ſimple, make a Feoffment and die; his Heir may enter or bring an Action.

So if Lands be given to one, and the Heirs-Males of his Body, and the Donee within age make a Feoffment in Fee; his Son as Heir General and Special, may enter or have Action. So alſo may the Heir Special, as in the caſe before, *Co. ſuper Littl.* 337. *Co.* 8. 42.

If the Donee have Iſſue two Sons, and the Elder hath Iſſue a Daughter; and the Donee die, and the Elder Son within age, make a Feoffment, and die without Iſſue-male, the yonger Son being now Special Heir *per formam doni*, may avoid the Feoffment of his Brother.

So if Lands be given to a Man, and the Heirs-Females of his Body, and the Donee having iſſue, a Son and a Daughter, makes a Feoffment within age, and die, the Daughter may enter or bring Action; ſo the Heir in *Burrough-Engliſh.* For in theſe laſt caſes, the Heir General cannot enter; for there is no right that doth deſcend to him.

So if a Tenant in Tail, within age, make a Feoffment in Fee, and is attainted of of Felony; in this caſe the iſſue may enter, and avoid the Feoffment. See more in *Privies.*

If the Husband being an Infant, make a Feoffment of his Wives Lands, and die, the Son and Heir may avoid it after his Mothers death, but before he cannot; but ſhe may avoid it, during her life, *Co.* 8 42.

Alſo Privies in eſtate in ſome ſpecial caſes, may take advantage of Infancy; as if two Joint-tenants within age, make a Feoffment in Fee, and one die; the Survivor may enter or bring an Action for the whole, *Co.* 4. 42.

But Privies in Eſtate generally, ſhall not take advantage of the Infancy of another: As if a Donee in Tail, within age, make a Feoffment in Fee, and die without iſſue; the Donor can neither enter, or bring an Action.

So if two Joint-tenants are in Fee within age, and the one make a Feoffment in Fee of his Moyety, and die, the Survivor cannot enter nor bring Action for his Companions part, but the Heir of the Joint-tenants that is dead, may, *Co.* 8. 43.

If a Tenant in Tail, being an Infant, make a Feoffment in Fee, and die without iſſue; neither the Donor, nor Colateral Heir of the Infant can enter or bring Action, *Co.* 3. 43.

If an Infant be Tenant for anothers life, and make a Feoffment in Fee, and he for whoſe life he hold it, dies; in this caſe the Infant, or his Heir, ſhall never enter, or bring Action, but he in Reverſion or Remainder ſhall, *Co* 8. 43.

Privies in Law, as Lord by Eſcheat, *&c.* ſhall never have any benefit by any ſuch avoidable Act of an Infant: As if a Feoffment be made, and Livery given by the hands

hands of an Infant, and after he die without an Heir, or commit Felony, or the like: Now in theſe caſes the Feoffment is ~~an~~ avoidable by any body, *Co.* 8. 44.

For Anſwer to this, take theſe Caſes.

1. If an Infant after he is of the age of fourteen years or before, if he be of diſcretion (whereof the Juſtices muſt judg) commit Felony: He muſt ſuffer as another man, *Malitia ſupplebit ætatem*, *Co* 4. 127. *Plow.* 19.

2. If an Infant do any perſonal wrong, as Aſſault or Battery, or the like, it ſeems he ſhall be puniſhed, as another man: And ſo is the experience of our time, *per Yelverton, Juſt. Paſch.* 9 *Jac. Co.* 8. 44.

3. If an Infant be a Gaoler, and ſuffer an eſcape, he ſhall be puniſhed as another man, *Co.* 8. 44. *Broo. Coverture* 68.

4. If the Eſtate of the Infant be upon Condition to be performed by the Infant; and the Condition is broken, during his minority, the Land is loſt and the Infant is perpetually barred: As if a Feoffment or Leaſe be made to the Infant, or to his Anceſtor (whoſe Heir he is) upon Condition of Re-entry for non-payment of Rent, or the like; and the Rent is not paid, or the Condition broken, the Land is loſt, *Co.* 8. 44. 31 *Aſſ. pl.* 36. 36 *H* 6. 28.

5. So alſo in ſome caſes the Infant ſhall be barred, and bound by a Condition in Law, if it be ſuch a Condition, as is founded upon skill and confidence: As if Infants have an Office of Parkerſhip, or Stewardſhip (unto which the Law hath annexed this Condition, that they do diſcharge the duty of that Office) and they neglect their charge, or any way miſdemean themſelves. So if an Infant have Liberties or Franchiſes, and do any way abuſe or miſuſe, or diſuſe them; in theſe caſes, for ſuch cauſes as another man may forfeit ſuch Offices or Franchiſes, an Infant may forfeit it: See *Forfeiture.* The ſame Law is of a Woman Covert, *Co. ſuper Littl.* 233, 234.

6. If an Infant do actually Diſſeiſe another man of Land, he ſhall be puniſhed as a Diſſeiſor, *Perk. Sect.* 47.

7. If an Infant do commit Waſte or Leaſe, in payment of his ſervices, and the Lord or Revertioner recover the Land in an Action of Waſte, or a Ceſſavit (as he may) this ſhall binde the Infant for ever. And ſo in all caſes where a Statute doth give a Recovery upon a Condition in Law: But if ſuch an Infant at the time of his Anceſtors death, hath cauſe to enter into Land, and a Diſcent is caſt, during his Infancy; this will not bar him. And yet a dying ſeiſed of the King, and a Diſcent will bar an Infant, *Co.* 8. 44. *Co. ſuper Littl. f.* 245. 380. 246.

8. But when the Condition in Law is of that nature, as it is without any confidence or skill, and it be broken, it will not bar the Infant: As if the Infant be Tenant for life, in Dower, or by courteſie, and he make a Feoffment in Fee, and the Leſſor, or he in Revertion, enter for a Forfeiture, as he may; yet this will not bar the Infant, but he may after re-enter, *Co.* 8. 44. *Co. ſuper Littl. fol.* 234.

9. So if an Infant alien in Mortmain, and the Lord enter; yet the Right of the Infant is not barred, but he may enter again upon the Lord. So in all caſes where a Statute doth give an Entry, but no Action or Recovery upon a Condition in Law. *Co.* 8. 44.

10. If an Infant make a Feoffment in Fee, and after his full age the Feoffee die ſeiſed, and the Land diſcend; this doth bar him of his Entry, *Plow.* 364. *Perk. Sect.* 407, 408.

But if the dying ſeiſed were during the minority of the Infant; it will not bar him of his Entry, *Plow.* 364.

11. If an Infant make default as another man in a real Action, it ſeems he ſhall not loſe his Land as another man ſhall in ſuch an Action. So if he be non-ſuted in any Action, he ſhall not be amerced as another man ſhall, *Co. ſuper Littl. f.* 172. 3 *H.* 6. 10. *Dyer* 338.

13. An Infant ſhall not be barred by Non-claim in five years upon a Fine, and yet

4. Where an Infant ſhall be puniſhed for his fault or neglect, or not.

yet if the five years begin in the time of the Anceſtor, there he ſhall be barred, *Co. ſuper Littl.* 380.

13. An Infant ſhall not be barred or hurt by time in caſes of Wreck, Waiff, Eſtray, or ſale in a Market Overt, as another man of full age ſhall be, *Co. ſuper Lit.* 380. *Plow.* 364. *Co.* 5. 108. *Dyer* 153. 164.

14. If an Uſurpation be made upon an Infant, to whom an Advowſon is deſcended by Preſentment, the Infant is not barred as another man, but he at his full age may have a *Quare Impedit*: And yet if he preſent not to a Church in ſix weeks, there will be a Lapſe, *Co. ſuper Littl.* 246.

15. If Tenant for life alien with Warranty, his Heir within age, and after die, his Heir within age; in this caſe the not-Entry of the Heir will not hurt him, nor the Warranty bar him. But if after the Alienation, he become of full age, before the death of the Tenant for life, there he will be barred. And in caſe where a Warranty doth diſcend upon an Infant or Feme-Covert, and their Entry is not lawful; in this caſe they will be barred, *Co. ſuper Littl.* 380.

16. If one make a Feoffment to another, rendring Rent: And it is agreed, That if the Rent be not paid, he ſhall pay double the Rent, and the Land come to an Infant, and he fail; it is ſaid he ſhall not be charged. But *quere*, for in caſe of a Condition, he ſhall forfeit as another man. See the Caſes before, *Co. ſuper Littl. f.* 47. 6. 50.

17. An Infant before he is one and twenty years old, cannot be charged in an Accompt; and therefore till then, he cannot be a Bailiff or a Receiver, *Co. ſuper Littl. f.* 172.

18. If an Infant have Title to enter for Mortmain, and he enter not within the year; this will not prejudice him.

What acts he may be compelled to do, or not.

An Infant-Tenant may be compelled to Attorn to the Grantee of the Seigniory, or of the Reverſion, *Co. ſuper Littl.* 315.

And if one make a Leaſe, rendring Rent to him, and he occupy the Land, he muſt pay the Rent, 21 *H.* 6. 31.

But an Infant cannot be compelled to ſerve in a Jury, *Littl.* 259.

And by Statute Laws, how bound.

What Statutes ſhall binde him, or not. See *Plow.* 364. 236. 359. 376. 372. *Co.* 8. 44. 100. 3. 91. *Dyer* 104. 133. *Littl.* 246.

But this is a Rule, That an Infant is bound by all Statute Laws, if they be not by name excepted.

5. Where an Infant may ſue or be ſued, and how.

An Infant Regularly may both ſue, and be ſued in all Perſonal Actions; and ſo alſo in all Real Actions, but where the Sute muſt ſtay for Nonage: For which ſee *Age*.

Procheine Amy, what.

But the Infant may not ſue or be ſued, as another man; and therefore in moſt caſes where the Infant will ſue, he muſt ſue by his *procheine Amy*, (*i.*) his next friend, which is ſaid to be one that appeareth in any Court for an Infant which ſueth any Action, and is allowed by the Court to aid the Infant in the purſuit of his Sute; and

Gardein, what.

he is ſometimes called a *Gardein*.

And if an Infant be ſued in any Action, he cannot appear and defend it by Attorney, but it muſt be by a Guardian, which is one allowed by the Court to make defence for the Infant in that Sute. And this is commonly one of the Officers of the Court.

Guardian in *Chivalry* or *Soccage*.

And yet it ſeems, that an Infant in ſome ſpecial Caſes may ſue by Attorney; as where he is (*a*) Executor, or (*b*) Adminiſtrator, or in Waſte againſt his Guardian in Chivalry, for making Waſte in his Land, or an Accompt againſt his Guardian in Soccage, after the Infant is fourteen years old, (*c*) or in this caſe he may alſo, if he will ſue by his Guardian, *F. N. B.* 27. *Littl.* 123. *Co.* 4. 53. 124. 71. 8. 58. 9. 30. 21 *Ed.* 4. 78. *Dyer* 104. 262. 312. *Weſtm.* 2. *ch.* 15. 1. 47. (*a*) *Mich.* 7 *Jac. Co. B.* (*b*) *Trin.* 38 *Eliz.* Adjudg. (*c*) Allowed by the Judges. *Hil.* 6 *Jac. B. R.*

Attorney.

Alſo if an Infant be ſued upon his Contract for neceſſary Apparel, or for an Aſſault

Aſſault or Battery, or the like, there he may ſue by his Attorney, as other men do, *Co.* 9. 87. *F. N. B.* 118. *Co.* 8. 44. 58. *Dyer* 239. 27 *H.* 8. 11. *Co.* 4. 124. *Brownl. Rep.* 1 *part.* 151.

If a dumb man bring an Action, he muſt ſue by *Prochein Amy*, 10 *Ed.* 3. 53. See *Age.*

Dumb man

This is a Writ lying where an Infant, within age, alieneth his Land, which he hath in Fee-ſimple, Fee-Tail, or for life; in this caſe, when he cometh of full age, he (or if he die, his Heir, when he comes of full age) may have this Writ to recover the Land again.

Dum fuit infra ætatem, what.

Or in this caſe, the Infant may enter upon the Land, before he is of full age, or after he is of age, if there be no Diſcent to hinder him: And when he doth enter, he is ſaid to be remitted, and put in, as of his firſt eſtate.

Diſcent.
Remitter.

And where this Writ will lie, may be gathered by what hath been ſaid before, *F. N. B.* 27.

This is where a Woman is with childe, at the time of her Husbands death, with ſuch a childe, That if he had been born, had been Heir to ſome of the Husbands Land.

Infant in the Mothers Womb, called *En ventre ſa meere.*

And this is ſometimes privily and unknown, and then ſhe is ſaid to be *Priviment Enſeint*: And ſometimes it is open and viſible, when ſhe doth notoriouſly appear ſo.

Priviment Enſeint, what.

This Infant is called a *Poſthumus* or *Poſtnatus*; and is one that the Law doth much favor and regard, as appeareth by that which doth follow in the next Queſtion.

Poſthumus.

For Anſwer to this, take theſe Caſes.

Sect. 6.

1. In all Caſes where the Daughter or Female-heir, or other perſon, Heir, cometh into Land by Diſcent, or in the nature of a Diſcent; there the Son, or more immediate Heir that ſhall be born after, ſhall out her, and have the Land. And therefore if one ſeiſed of Land in Fee, and have but one Daughter, but his Wife is with childe of a Son, and he die, and the Daughter enter, and after the Son is born; in this caſe he may out the Daughter, and have the Land, and the Daughter can by no means prevent him of it. So where the Wife doth diſcontinue the Land, ſhe hath by her Husband, and ſo make a Forfeiture of it within 11 *H* 7. 20. And ſhe have at that time a Daughter, and is with childe of a Son by her deceaſed Husband, and the Daughter enter, the Son ſhall after out her. So if a Gift be in Tail to a Man and his Heirs-males of his Body, and the Donee die without iſſue having a Brother, that is next Heir *per formam Doni*, but the Wife of the Donee is Privily with childe of a Son, and the Brother enter; in this caſe, the Iſſue after he is born, ſhall have the Land, and put out his Uncle. So if a Tenant in Tail having iſſue two Sons, and the elder die in the life time of the Father, leaving his Wife with childe of a Son, and then the Tenant in Tail ſuffer a Recovery to the uſe of himſelf for life, and after his death to a ſtranger for twenty years, and after of the Heirs-males of the body of the Tenant in Tail, and after the Tenant in Tail die, and then the yongeſt Son enter, and after the Son of the eldeſt Brother is born; in this caſe he ſhall have the Land, and out his Uncle. So if a Son purchaſe Land, and die without Iſſue, and the Uncle, and after a Daughter is born, ſhe ſhall have the Land from him. So if there be Son and Daughter, and the Son purchaſe Land, and die without Iſſue, it ſhall go to the Daughter. But if there be a Son born, after he ſhall have the Land, and if he have another Daughter, ſhe ſhall be Copartner with her ſiſter. And if a Daughter have a Seigniory by Diſcent, and a Tenancy Eſcheat, and after a Son is born; in this caſe he ſhall have the Tenancy, and out her of it. *Co.* 3. 61. 9 *H.* 7. 25. *Co.* 1. *Shellies* caſe. *Broo. Age* 51. *Plow.* 375. *Co ſuper Littl.* 11.

6 Where an Heir born after, ſhall put out another Heir born before, or not.

Diſcontinue

2. But in all caſes where the Daughter and Female-Heir, or other Heir cometh into the Land by Purchaſe, or in the nature of a Purchaſer, or the like, there the Son or other, more immediate or next Heir that ſhall be born after him, ſhall not ouſt him. As if Lands be given to one for life, the Remainder to the right Heirs of *J. S.* and *J. S.* hath a Daughter, his Wife with childe of a Son, and the Remainder fall before the Son is born; in this caſe the Daughter ſhall have the Land for ever, and

Purchaſe

Remainder

never

Ravishment.

never be put out by the Son. So if one by a Ravishment forfeit his Land within the Statute of 6 *R.* 2. And a Daughter is the next Heir in being, but there is a Son in *Utero matris*, and the Daughter enter, the Son shall never out her. So in like manner, if an estate be made on Condition, that if the Feoffor or his Heirs pay twenty pound, that they shall have the Land again, and the Daughter pay the money, and after a Son is born, he shall never have the Land, *Qui sentit onus sentire debet & commodum:* But if the Condition were to be performed on the part of the Feoffee, or it were broken in the life time of the Ancestor; in these cases it seems the Son may enter afterwards, and put out the Daughter. If one by Will devise to *J. S.* and his Heirs, and the Devisee had then a Daughter, when the Devisor died, his Wife being privily with childe of a Son, and the Devisee dieth, and the Heir he doth enter; in this case the Son that is after born, shall not out her, but the daughter shall have the Land, *Co.* 3. 61. 9 *H.* 7. 24. 5 *Ed.* 4. 6. *Co.* 1. 95, 99. See *Purchase.*

Conditions

Devise

7. How the wrongs done to Infants, shall be punished. Felony. 21 years

As to this point, these things are to be known:

1. To lie with an Infant-Maid, though with her consent; this abuse of her is Felony, see *Crown.*

2. By force or fraud to steal, or cause to be stoln, or taken away any person under the age of one and twenty years, with intent to marry the same person: For this a man shall forfeit his whole estate; the one half to the childe, the other half to the Commonwealth, and he is to be imprisoned and kept to hard labor in some House or Correction, or other publick Working-house, during life. And all that are aiding and abetting herein, are to be imprisoned and kept at hard labor for seven years.

3. If any Marriage be so made by force or fraud, it shall be void.

4. If any Guardian or Overseer shall betray his trust, touching any childe, by seducing, selling, or otherwise wilfully putting such childe into the hands or power of any person who shall marry her, without his or her free consent; he shall forfeit double the portion, which of right did belong to such childe; the one half to the childe, the other half to the Commonwealth: The new *Act* of 24 *August*, 1653.

16 years

5. If any take or convey away any Maid, under sixteen years of age, out of the custody of her Parents Guardians or Overseers, against their wills, they are to be imprisoned two years without Bail or Mainprise, 4, 5 *Ph. & Ma.* 8.

6. If any take and marry any such yong woman against the will of them that have the Government of her, they are to be imprisoned five years without Bail or Mainprise, 4, 5 *Ph. & Ma.* 8.

7. Where an Infant shall have his age, you shall finde in *Age.*

8. Where an Infant shall be in Ward or not, you shall finde in *Gardian.*

See more in *Women Agreement*, and other Titles for Matters concerning *Infants.*

Engagement.

THE Laws touching the *Engagement*, are all now gone, and useless. See *Ordinance*, *Jan.* 19. 165

CHAP.

CHAP. LXXV.

Of Enheritance or Inheritance.

ENheritance or Inheritance is an Eſtate in perpetuity diſcendible to a man and his heirs. *Enheritance or Inheritance, what.*

And ſome do make three ſorts of Eſtates of Inheritance or Inheritances, which may be called Eſtates in Fee. The kinds.

The firſt is Fee-ſimple abſolute; and this is, where he hath Land to him and his heirs indefinitely without any limitation whatſoever of his Eſtate: This is an abſolute Eſtate in perpetuity, and this is moſt properly and aptly called Fee-ſimple.

Another kind of Inheritance or Fee-ſimple is, where one hath an Eſtate to him and his heirs ſo long as *J. S.* hath heirs of his body, or ſo long as he ſhall pay twenty ſhillings a year to the Grantor, or to *J. S.* or ſo long as *Pauls* Church ſhall ſtand: This is an Inheritance, but it is limited and determinable; for if *J. S.* fail of heirs of his body, the Rent be not paid, or *Pauls* Church fall or be taken away, this Inheritance is gone.

Another kind of Inheritance is, where a Donee in tail is attainted of Treaſon, ſo that he forfeits his Eſtate to the *Lord Protector*: He hath a Fee, but it ſhall be only for ſo long as the Tenant in tail hath iſſue of his body. So if Tenant in tail by Indenture of Bargain and Sale inrolled, bargain and ſell the Land to another and his heirs; this is a Fee-ſimple, but this is a baſe Fee, for this Inheritance is but during the life of the Tenant in tail: And in both theſe caſes there is a Fee-ſimple under a Fee-ſimple; for the abſolute and ſupreme Fee-ſimple is in the Donor. And yet this baſe Fee is ſuch a Fee as ſhall deſcend, as the Lord Protector or Bargainee may grant over to another: And ſo long as theſe Eſtates laſt, they ſhall be Aſſets in the Heir in Debt, or to render in value upon the Warranty of the Father, and the Wife ſhall be endowed out of it, *Plow.* 557. *Co.* 10. 96. See more of this in *Eſtates, Chap.*

Diſcent ſignifieth in our Common-Law, an order or means whereby Lands or Tenements are derived unto any man from his Anceſtors. And this is ſometimes Lineal, as when the diſcent is conveyed in the whole line of the ſame blood, as Grandfather, Father and Son, and ſo downward, *Old N. B.* 201. *Lit.* 1. And ſometimes it is Collateral; which is, when it is out in another branch above of the whole blood, as Grandfathers brother, Fathers brother, and ſo downwards. And by this means the Property of Land is gotten and transferred from one to another. And for the guiding of theſe Diſcents, there be three general Rules. *Diſcent, what. Lineal. Collateral.*

1. The eldeſt Male ſhall firſt inherit; and if it come to Females, then they being all in equal degree of neerneſs, ſhall inherit all together. *Sect. 1.*

2. That no Brother or Siſter of the half blood ſhall inherit to Brother or Siſter, but to the Parents. *Half Blood*

3. Land purchaſed by the party himſelf dead, is to go to the Heirs on the Fathers ſide; and if he have none, then of the Mothers ſide: But of Lands diſcended it is otherwiſe. *Co.* upon *Lit.* 1. 13. 237. 238. 164. *D. & S.* 17. *Purchaſe*

For anſwer to this, theſe things are to be known. That the Law of Inheritances preferreth the firſt Child; amongſt the Children, the Male before the Female; and amongſt Males, the firſt-born. If there be no Children, then the Brother; if no Brother, then Siſters; if neither Brother nor Siſters, then Uncles; and for lack of Uncles, Aunts; if none of them, then Couſins in the neereſt degree of Conſanguinity. So that if a man die ſeiſed of Lands or Tenements in Fee-ſimple, and do not diſpoſe them after his death, and appointeth that they ſhall deſcend in this manner as followeth. *3. To what perſons Land ſhall deſcend after the death of the Anceſtor.*

Eſcheat.

1. If there be any lineal Heir, it ſhall deſcend to him: And for want of ſuch, if there be any collateral Heir, it ſhall deſcend to him: And for want of either, it ſhall eſcheat to the Lord. *Linea recta ſemper præfertur tranſverſali. Noy* 26, 27. *D. & S.* 17.

Parceners.

2. If there be any ſons, it ſhall go to the ſons before the daughters: And if there be many ſons, it ſhall go to the eldeſt before any of the younger; for the Rule is, *Detur digniori.* And if there be no ſons, it ſhall go to all the daughters, who then are called Parceners. If a man have neither ſon nor daughter, then it ſhall go to the next Couſins Males lineal of the whole blood, (if any be;) and for want of Males to the Females. And if there be no lineal Couſins, then it ſhall go to the next Couſin Male collateral of the whole blood; and for want of Male, to the Female, (*Numb.* 27. *v.* 3, 6, 7, 8.) But by ſpecial Cuſtoms in ſome places, Lands ſhall go to all the ſons or next Heirs males; and in ſome places to the youngeſt ſon. See *Gavelkind, & Burrow-Engliſh.*

Cuſtom.

S. 2.

Demy-ſank, or Half-blood.

3. If Lands come to one by the Fathers ſide, and he die without iſſue, it ſhall go to the next Heir of the Fathers ſide, and not of the Mothers ſide. So *è contra*, if it comes by the Mothers ſide, it ſhall go to the next Heir of her ſide, and not of the Fathers ſide, *N.B.* 10. *Plow:* 132. 12 *Ed.* 4. 14.

Eſcheat.

4. If one purchaſe Land in fee, and die without iſſue, thoſe of the blood of his Fathers ſide ſhall inherit, if there be any; and for want of Heirs on the Fathers ſide, it ſhall go to the Heirs of his Mothers ſide. But if the Land come to the Son by deſcent, it ſhall never go to the Heirs of the Mothers ſide: For if there want Heirs of the Fathers ſide to take it, it ſhall eſcheat to the Lord; and ſo on the other ſide, if it come by diſcent from the Mother, *Lit. c.* 4. 12 *Ed.* 4. 14. 39 *Ed.* 3. 30. 1 *Ed.* 4. 14. *Co.* 3. 14.

Hæres juris Repræſentationis

5. If there be Grandfather, Father and Son, and the Father die before the Grandfather, and after the Grandfather die ſeiſed; the Land ſhall go to the ſon or daughter of the Father, if he have any, and not to any of the other children of the Father or Grandfather: And this Heir is called *Hæres juris repræſentationis*, becauſe he doth repreſent his Fathers perſon. But if in this caſe the Father die without any Child, it ſhall go to the next eldeſt Brother; or for want of a Brother, to the Siſters of the Father, *Bro.* 303.

Rowdiſtond

6. One hath iſſue two ſons, *A.* and *B.* and dieth: *B.* hath two ſons, *C.* and *D.* and dieth: *C.* the eldeſt ſon hath iſſue, and dieth: *A.* purchaſeth Lands in Fee-ſimple, and dieth without iſſue; in this caſe the iſſue of *C.* ſhall inherit it, *Co: lib: Inſt.* 1 *par. f.* 5 c.

Vide

7. If a ſon purchaſe Land and die, and have no other Heir but his fathers brother, he ſhall have it: But if after his father have any ſon or daughter born, that ſon or daughter ſhall have it, *Co.* upon *Lit.* 10. 12.

8. If a man ſeiſed of Land as Heir of the part of his Mother, make a Feoffment and take back an Eſtate to him and his Heirs; this is a new Purchaſe, and if he die without iſſue, the Heir of the part of the Father ſhall firſt inherit it, *Co. lib. Inſt.* 1 *par. f.* 12.

9. If there be three Brothers, and the middle purchaſe Land and die without child, the Land ſhall go to the eldeſt Brother, and not to the youngeſt: So if the youngeſt die, it ſhall go to the eldeſt, and not to the ſecond, *Litl.* 5. *Stamf. lib.* 3. *chap.* 523.

Coheirs *Sect.* 3.

Eſcheat.

10. If a man be ſeiſed of Lands, and have two Daughters, and one is attainted of Felony, and the Father die, both Daughters living; the one moyetie ſhall deſcend to one, and the other ſhall eſcheat, *Co. ſuper Lit.* 163.

Demy Sank

11. If there be two Sons or Daughters by two women, and the elder purchaſe Land and die without iſſue, or his iſſue die without iſſue; in this caſe the Land ſhall go to his or her Uncle, or the Kinſman of the entire blood, and not to the other Brother or Siſter, but ſhall rather eſcheat to the Lord; for none can have Lands in Fee-ſimple as Heir to another, unleſs he be Heir of the whole blood. But in this caſe if the eldeſt Son die before he enter or is actually ſeiſed of the Land, there the Brother by the other woman ſhall be Heir, *Lit. c.* 6. 37 *Aſſ.* 15. *Dyer* 291. *Lit. c.* 4.

actual ſeizure

12. If

12. If a man have iſſue only a Daughter, and die and leave his wife with child of a Son, and after the Son is born: Now in this caſe the Land ſhall go to the Son after his birth, but till then it is to go to the Daughter, *Perk.* c. 521. 9 *H.* 6. 23.

13. If a woman Covert an Inheretrix of Land die ſeiſed, and have iſſue by her husband, and the iſſue die without any iſſue; now one of the next of kin to the Mother ſhall have this Land, and not any of the other Children of the Father. So if the Land came by the husband, and he have iſſue by his wife and die, and after ſhe have iſſues by another husband, and the iſſue of the firſt husband die without iſſue: In this caſe ſome of his next Kin ſhall have the Land, not any of the other Children of the woman by other husbands, *Lit.* c. 4.

14. If there be two Brothers, and one of them hath one Son only, and no Daughter, and the Son doth die ſeiſed of Land in Fee: Now this Land ſhall go to the Uncle, and not to the Father; becauſe it is a Principle of Law, That Land cannot lineally aſcend. But if the Uncle after he is actually ſeiſed of it die without iſſue, then it may go to the Father as Heir to his Brother: But if he had not been actually ſeiſed, then it could not have gone to his Brother, *Co.* 3. 39. *Littl. ch.* 3. *Co.* 3. 14.

15. If there be a Son and Daughter by one woman, and a Son by another, and the eldeſt Son purchaſe Land and die ſeiſed of it; his whole Siſter, and not his half Brother ſhall have it: So alſo ſhall ſhe have the Land that came to the eldeſt Son by diſcent from their Father, if her Brother be actually ſeiſed of it by an Entry himſelf, or by another, a Leſſee for years, or a Gardein, (as he may) if the Land were leaſed, and the Leſſee enjoy it, or the Gardein enter.

16. But if their Father die ſeiſed, and the elder Brother die alſo before he be actually ſeiſed of the Land; in this caſe the Land ſhall go to the younger Brother, and not to the Siſter: For it is *Poſſeſſio fratris, quæ facit ſororem eſſe hæredem.* As if Land, Common, Rent, Advowſon, or the like deſcend, and the elder Brother die before Entry, Claim, receiving the Rent, or Preſentment to the Advowſon; in theſe caſes it ſhall go to the younger Brother, as Heir to his Father, *Co.* 3. 43. See the *Womans Lawyer*, *f.* 10, 11. & *F.N.B.* 36.

17. If there be two Sons by divers women, and the elder is ſeiſed in Fee and die without iſſue, and the Land go to the Uncle, (as it muſt *ut ſupra*) and after the Uncle die ſeiſed of it without iſſue; here the younger Brother may have the Land as Heir to the Uncle, though he might not have it as Heir to the Brother. But then the Uncle muſt be ſeiſed of it; for he muſt make himſelf Heir to him that was laſt ſeiſed of it, and that was his Half-Brother, to whom he cannot be Heir, *Co.* 3. 42, 43.

18. If a man have iſſue three Daughters by one woman, and one by another woman, and die ſeiſed of Land; the Land ſhall go to all the four Daughters equally, 20 *Aſſ. pl.* 27. And yet if two of the Siſters by the one woman die without iſſue, the third Siſter by that mother ſhall have all the Land of thoſe two Siſters, and the Siſter by the other mother ſhall have no part of it, 20 *Aſſ.* 27.

19. If a man hath one only Child, and he doth purchaſe Land and die, and the Land go to the Uncle, (as it muſt) and after he hath another Child; in this caſe the Land ſhall go to the Child that is after born, *D.* & *S.* c. 10.

20. If there be a Grandmother of the Fathers part, Mother and Son, and the Grandmother hath a Brother, and the Mother another, and the Son purchaſe Land and die without iſſue; it ſhall go to the Great-Uncle, and not to the Uncle, *Dyer* 314.

21. Land purchaſed (as appears in ſome caſes before) may go to the Heirs of the part both of the Father and Mother of the Purchaſor, unleſs it be once attached in the Heir of the part of the Father; for then the Heir of the part of the Mother ſhall never have it, becauſe they are not of blood to him that was laſt ſeiſed. But Lands deſcended go only to the Heir of that part from whence it doth deſcend: As if from the Father who did purchaſe it, then it may go to the part of the Heirs of the Mother of the ſame Father, but not to the Heirs of the part of the Sons Mother; for though they be of blood to the Son that was laſt ſeiſed, yet they are not

of blood to the Father which was the firſt Purchaſor, 49 *Ed.* 3. 12. *Finches ley*, 119.

22. In the Collateral Diſcent of any one that doth purchaſe Lands, and die without iſſue; the Heirs of the part of the Father, and that are of blood of the Anceſtors males, and in the lineal Aſcent by the Father, ſhall be preferred in the Diſcent, before the Heirs that are of the blood of the Females in the lineal Aſcent by the Father in the ſame degree: As the Brother of the Grandfather or Great-Grandfather of the part of the Father, and his Iſſues (be they male or female) ſhall be preferred before the Brother of the Grandmother or Great-Grandmother of the part of the Father and his Iſſues. But if one purchaſe Lands and die without Iſſue, having no Heir of the part of the Father, the Land ſhall deſcend to the next Heir of the part of the Mother; yet ſo, as to the Heirs of the race of the Males firſt: As if the Father of the Father of the Mother of the Purchaſor have one Brother, and the Mother of the Father of the Mother of the Purchaſor hath another; the Brother of the Grandfather, and not of the Grandmother of the Mother ſhall have it, *Plow.* 444.

23. If one have iſſue two Daughters, and die, each Daughter ſhall have alike? But if the eldeſt have iſſue three Daughters, the youngeſt one; the Daughter of the youngeſt ſhall have as much as the three of the eldeſt. And if the eldeſt have iſſue divers Sons, and the youngeſt divers Daughters; the eldeſt Son of the eldeſt, and the Daughters of the youngeſt ſhall have all alike; the eldeſt Son ſhall have a moyetie, and the Daughters of the youngeſt the other moyetie, *Co. ſuper Lit.* 164.

24. But if there be Father and Son, and the Son be attainted of Treaſon or Felony in the Fathers life, and overlive his Father; the Land ſhall not come to the Son, nor any of his Iſſues: But if the Son had died before the Father, it ſhould have gone to the other Iſſues of the Father. (See *Corruption of Blood.*) For if the Son die before the Father having Iſſue, neither the ſecond Son, nor the Iſſue of the firſt Son ſhall inherit it, but it ſhall eſcheat, 27 *Aſſ.* 11. *Co.* 3. 41. 4. 124.

25. If a man be attainted of Treaſon or Felony, his blood is ſo corrupt, that Land can neither deſcend to him from any Anceſtor, neither can any have Land from him that ſhall make himſelf Heir to him immediately, *Co. lib. Inſt. f.* 8. *par.* 1. And the Kings Pardon will not help this.

Sect. 5.

26. If a Purchaſor of Land have iſſue a Son, and die, and the Son enter and die without iſſue, and without Heir of the part of the Father; the Heir of the part of the Mother of ſuch iſſue ſhall never inherit, but the Heir of the part of the Mother of the Father may inherit it, *Plow* 446.

27. If a Purchaſor die without iſſue, and there be a Brother of the Grandmother of the part of the Father, and another Brother of the Great-Grandmother of the part of the Father; the Brother of the Great-Grandmother ſhall not have it, but the Brother of the Grandmother ſhall be Heir, *Plow.* 449.

28. A Monſter that hath not the ſhape of Mankind, ſhall not be Heir nor inherit any Land: But if he have ſome deformity only, as four or ſix fingers, or crooked parts; this will not hinder.

29. A Baſtard alſo ſhall not be Heir to another.

30. Nor ſhall an Alien born out of the Kings liegeance, inherit from his Father. See *Cromp. Jur. f.* 53. 6. *Cowlib. Inſt.* 1 *par. f.* 7, 8.

4. What Diſcent ſhall take away Entry, or not.

The Law doth much regard Diſcents, and every Diſcent ſeems to add ſome ſtrength to the Title. And therefore if one have right to enter into Lands which another enjoyeth, and he doth not enter, but ſuffer him to die ſeiſed of it, and the Land to diſcend; in this caſe his right of Entry is gone, and he hath no remedy but to bring his Action to recover his right. And this holdeth in moſt caſes, and almoſt in all where theſe particulars are in the caſe.

1. A dying ſeiſed by the Anceſtor of an Eſtate in Fee-ſimple or Fee-tail, and not for life only.

2. A dying ſeiſed of the Poſſeſſion and Frank-tenement alſo, and not a Reverſion or a Remainder only.

3. Where he that died ſeiſed, and he that hath right of Entry, do claim by ſeveral Titles, and not by the ſame.

4. Where

4. Where he that hath the right of Entry is of full age *infra quatuor maria*, of ſane memory, out of the Priſon, and ſole, and not a Woman covert.

5. Where the Diſſeiſor or Abator muſt have the quiet poſſeſſion of the Land five years before the Diſcent, without any Entry or continual Claim made by him that hath the title or right of Entry.

6. There muſt be a Diſcent, and not a Succeſſion only: As where a Corporation diſſeiſe, and there be twenty Succeſſions, this will not bar him that hath right of his Entry. For the illuſtration whereof, ſee the Caſes and Examples following. *Lit. l.* 1. *c.*6, *D. & S.* 24. *Lit. c.*387,388. *Finch* 46. *Lit.*397,398,402,412. *St.*32 *H.*8.33. *Co.*11.33. *Dyer* 219. *Lit.*413.448.

1. If one be ſeiſed of Land in Fee, and diſſeiſed by another, and he die, and the Land deſcend to his Heir, and he enter; in this caſe the Entry of the Diſſeiſee is gone, and he is put to his Writ of *Entry ſur diſſeiſon* for his remedy: But this Diſſeiſon and Diſcent muſt be in time of Peace; for if it be in time of War, *contra. Lit.*385.47.

2. If one be diſſeiſed, and the Diſſeiſor give the ſame Land to another in tail, and the Tenant in tail hath Iſſue and die ſeiſed of that Eſtate, and the Iſſue enter; in this caſe the Entry of the Diſſeiſee is gone, and he is put to his Action if he will have remedy, *Lit. c.*38.

If a Feoffee in fee, or Donee in tail be upon Condition, and he is diſſeiſed, and the Diſſeiſor die ſeiſed; the Feoffee or Donee hath loſt his Entry, and is put to his Action, *Lit.*392.

3. If a woman Diſſeiſor marry a husband and have iſſue, and after the wife die ſeiſed, and after the husband die, and then the Heir enter; it ſeems the Diſſeiſor is barred of Entry, 9 *H.*7. 37 *H.*6. And if a woman ſole be diſſeiſed, and after take a husband, and the Diſſeiſor die ſeiſed during the Coverture, the Entry of the Wife is gone, and ſhe is put to her Writ, *Lit.*404.

4. If an Infant diſſeiſe another, and alien the Land, and the Alienee die ſeiſed, his Heir within age; the Diſſeiſſee is barred of his Entry. But if the Diſſeiſor within age enter upon the Heir, (as he may) then may the Diſſeiſee enter upon the Infant, becauſe the Diſcent is defeated, *Lit.*407,408. If one diſſeiſe another, and make a Feoffment upon Condition, and the Feoffee die ſeiſed; then the Entry of the Diſſeiſee is gone: But if the Diſſeiſor enter for the Condition broken, then he may enter upon him, *Lit.*409.

5. If one diſſeiſe a man, and put out his Leſſee for years at once, and die ſeiſed; the Diſſeiſee cannot enter, but is put to his Action; but the Leſſee for years may enter. But if it were a Diſſeiſor of a Tenant for life, *contra. Lit.*411.

6. If a Daughter be diſſeiſed, and after there is a dying ſeiſed, and then the Son is born; this Diſcent will bar him of his Entry, *Bro.*450.

7. If a Diſſeiſor make a Leaſe for years, and after die ſeiſed; this will bar the Diſſeiſee of his Entry, *Bro.*453. If an Infant make a Feoffment, and after his full age the Feoffee die ſeiſed; or a Feoffee for life alien, and the Alienee die ſeiſed; or a Deviſe be of Land on Condition, and the Heir of the Deviſor enter, and die ſeiſed: In theſe caſes the Entry is gone, and they are put to their Action, 21 *H.*6.71. *Lit.*98. 9 *H.*6.25. If one bargain and ſell his Land, and the Bargainee enter, and after the Bargainor enter upon him and die ſeiſed; the Entry of the Bargainee is gone, *Dun & Carlton, M. Jac. B.R.*

8. If an Abator or Intrudor, or one that hath but title of Entry, or that may have an Action, die ſeiſed; this Diſcent taketh away Entry, *Lit. Diſcents. Plow.*47. See more of this in *Co.* upon *Lit.*238.

9. The dying ſeiſed of the Inheritance and Freehold together, whereby the Land deſcends unto his Heir, taketh away the Entry of every one that may have an Action, *Lit. Diſcents.*

10. The whole time from the Diſſeiſin to the Diſcent caſt, is conſiderable: For if the perſon be not priviledged at all times, the Diſcent binds: As if a Woman-covert be diſſeiſed, and the Husband dieth, and ſhe take a new Husband, and then the Diſcent is caſt; or a man *ultra mare* is diſſeiſed, and he return into *England*, and then go over, and then a Diſcent is caſt; this Diſcent doth bind, becauſe of the interim, 9 *H.*7.24. *Dyer* 143.

11. If

11, If one wrongfully enter upon anothers Poſſeſſion, and put the right Owner of the Freehold and Inheritance from it, he doth thereby get the Freehold and Inheritance by Diſſeiſin, and he may hold againſt all men but the diſſeiſed. And if ſuch Diſſeiſor or Abator having quiet poſſeſſion five years after Diſſeiſin or Abatement, die in poſſeſſion, and the Land deſcend to his Heir; hereby they have gained the right to the poſſeſſion of the Land againſt him that hath right, until he recover it by a fit Real Action: And if it be not ſued for within ſixty years after the Diſſeiſin or Abatement committed, the right Owner doth loſe his right for ever.

12. But if the Anceſtor do not die ſeiſed in Fee or Fee-tail, but of a Term of life only, this will not take away Entry, *Lit. c.*387. *Finches ley, f.*120. And if one be ſeiſed of a Reverſion or Remainder only, and die ſo ſeiſed, and it deſcend to his Heir, this will not bar him that hath right of his Entry, *Lit.c.*388.

13. If there be Lord and Tenant, and the Tenant be diſſeiſed, and he alien in Fee, and the Alienee die without Heir, and the Lord enter as in the Eſcheat; here the Diſſeiſor is not barred of his Entry, but may enter upon the Lord, for here is no Diſcent to the Heir, *Finches ley, f.*120.

14. If one be ſeiſed of Land in Fee or in Fee-tail upon Condition, and the Condition be broken, and the Feoffee or Donee die ſeiſed; yet this doth not take away the Entry of the Feoffor or Donor, but he may enter upon the Heir. So if the Feoffee or Donee on Condition be diſſeiſed, and before or after the Condition broken the Diſſeiſee die ſeiſed; yet the Entry of the Feoffor or Donor is not gone, but he may enter upon him, *Lit.*391. 21 *H.*6.11.

15. If a Diſſeiſor die ſeiſed, and after his Heir endow the Wife of the Diſſeiſor of a third part, and ſhe enter into it; now the Diſſeiſee after the Endowment is not barred of his Entry into this third part, but may enter upon the Wife, *Lit.*393. If a Diſſeiſor infeoff his Father, and he die ſeiſed, and the Land deſcend upon him, the Diſſeiſee may enter upon him notwithſtanding this Diſcent, *Lit.*395.

16. If any of the younger Sons enter by Abatement after the Fathers death, and have iſſue and die ſeiſed, or his iſſue die ſeiſed; this will not bar the eldeſt Son of his Entry: So if one Daughter enter upon all the Land deſcended, and die ſeiſed of it. But if after the eldeſt Son have entred, or all the Daughters have entred, one of the younger Sons, or one of the Daughters diſſeiſe the other and die ſeiſed, *contra. Lit.*397. *Plow.*306.

If an Infant have cauſe of Entry, and the Diſcent happen while he is within age, this will not bar him of his Entry. So if the right of Entry happen to a Woman-covert whiles ſhe is ſo, and the dying ſeiſed be before ſhe is ſole, her Entry is not loſt. So if the cauſe of Entry and Diſcent happen whiles a man is *de non ſane memorie*, yet the Heir of ſuch man ſo diſſeiſed may enter. So if the Diſſeiſee be in Priſon or out of the Realm at the time of the Diſſeiſon and dying ſeiſed, their Entry is preſerved for them, *Lit.*402,403,405, 21 *H.*6.17. *Lit.*437.

17. If a Diſſeiſor enter into Religion, whereby his Land comes to his Heir; this will not bar the Diſſeiſee of his Entry upon his Heir, *Lit.*410.

18. If a Tenant for life be, the Remainder to the right Heirs of *J. S.* and the Tenant for life is diſſeiſed, and a Diſcent is caſt, and after *J. S.* die, and after the Tenant for life die; in this caſe the Entry of the Heir of *J. S.* is not gone, but he may enter, for his Remainder was in *cuſtodia legis*, *Co.*1.134.

19. If one intrude upon the King, and after the King grant away the Land, and before Entry or Seiſure by the Patentee, the Intrudor doth die ſeiſed; this will not bar the Entry of the Patentee, *Dyer* 266.

20. If the Alienee in Mortmain die ſeiſed, yet the Lord or his Heir may enter upon the Heir of the Alienee, 21 *H.*6.17. 33 *Aſſ. p.*11.

21. The dying ſeiſed of a Diſſeiſor by ſtrength and without title, taketh not the Entry of him and his Heirs, which at the time of the Diſcent had good title of Entry, unleſs the Diſſeiſor had peaceable poſſeſſion by five years next after the Diſſeiſon. See the *Womans Lawyer*, *fol.*133. *Stat.* 32 *H.* 8. *chap.* 33. See *Enfant.*

If

If one have divers children, and the eldeſt being a Baſtard, he doth enter after his fathers death, and quietly hold the Land all his life-time, and hath iſſue and dieth ſeiſed, and the iſſue enter; in this caſe the Entry and Action both of the lawful Heir is gone, and he is without remedy. But if the right Heir had ever made his Entry or Claim upon the Baſtard, *contra. Lit. c.* 401. 409. 360. 36 *Aſſ.* 2:

Sect. 9. 5. What Diſcent doth take away Entry and Action alſo.

If one have iſſue a daughter Baſtard, and another daughter *Mulier*, and both of them do enter together and make partition, and the Baſtard die ſeiſed of her part, and her Heir enter; the *Mulier* ſhall never have any remedy for that part, 21 *Ed.* 3. 34.

6. *Heir*, what.

An Heir is he that ſucceedeth by right of blood in any mans Lands or Tenements in Fee: For nothing paſſeth *Jure hæreditatis*, but only Fee; and one may be *Hæres ſanguinis*, and yet not *Hæres hæreditatis*, being diſinherited. And this Heir is either General Heir, or Heir at Common-Law. And this (by our Law) is the eldeſt Son; and for want of Sons, all the Daughters: And in ſome places, and by ſome Cuſtoms, all the Sons are the Heir, as in *Gavelkind*-Land; and in ſome places the youngeſt Son, as in *Burrow-Engliſh*-Land. Or elſe he is Special Heir, which is he that is Heir only by ſome Conveyance (as we ſay) *per formam doni*, and not Heir at the Common-Law; as when Lands are given to *J. S.* and the Heirs females of his body, and ſo by any other ſpecial limitation. An Heir is alſo, as a Diſcent is, Lineal and Collateral: (*See it in Diſcent.*) And no man can be ſaid to be Heir to another, whiles his Anceſtor is living; for ſo long he is only Heir apparent, *Co.* 1. 66. *ſuper Lit.* 8. 10. 376.

The kinds.

7. Where the Heir ſhall be charged for his Anceſtor, or not; and how.

For anſwer to this, take theſe things. That every Heir having Fee-ſimple Land, be it by Common-Law, or by Cuſtom of *Gavelkind* or *Burrow-Engliſh*, is chargeable as far as the value thereof with the binding Acts of the Anceſtor: *Qui ſentit commodum, ſentire debet & onus.* For the opening whereof, take theſe Caſes.

Upon an *Eſpecialty.*

1. If a man bind himſelf and his Heirs by any Obligation, Bill, Covenant, Annuity, or other Eſpecialty, to pay money, or do any other thing, and his Heirs have any Land in Fee-ſimple deſcended to him from the ſame Anceſtor, and the Action be brought before he ſell away the ſame Land *bona fide*; in this caſe the Heir (be he Lineal or Collateral Heir) will be charged for ſo much as is ſo deſcended to him, and he may be ſued upon that Eſpecialty. And where there be many do make one Heir, as Daughters, or Sons, they may and muſt be all ſued; and if one alone of them be charged, he ſhall have remedy againſt the reſt by *Audita Querela*. Or the Creditor may in this caſe forbear to ſue the Heir, and ſue the Executor; for the Law gives him his choice to ſue which he will.

Audita Querela: Election.

Sect. 10. 3. Charged.

But to make an Heir chargeable in this caſe, there muſt be theſe three things. 1. The Heirs muſt be bound by name in the Eſpecialty, as, *I bind me and my Heirs.* And yet if a man do but bind himſelf to pay money, or do a thing, and do not name an Executor, as, *I bind me, my Executors, &c.* his Executors be bound as he is. But otherwiſe it is of Heirs: And therefore it is, that if one by any Writing bind himſelf, his Executors and Aſſigns, and do not name his Heir, the Heir ſhall not be charged, though he have never ſo much Land by Diſcent. So if one grant an Annuity to one and his Heirs, and do not ſay, [*For me and my Heirs*] or [*I bind me and my Heirs to pay it*] or the like. So if I by Deed bind my Heirs only to do a thing, and do not bind me and my Heirs; in this caſe it ſeems the Heir ſhall not be charged: Yet by a Warranty in Law, the Heir may be charged without being named:

Warranty

2. The ſecond thing needful to make an Heir chargeable to the Deed of his Anceſtor, is, that he muſt have Aſſets in Fee-ſimple deſcended to him from the ſame Anceſtor: And therefore although he have never ſo much Land come to him by Gift in Tail, or of any other Eſtate then Fee-ſimple, or Fee-ſimple Land; if it come by Conveyance of the Father, and not by Diſcent, it will not make the Heir chargeable.

3. The Land deſcended to the Heir, muſt continue in the hands of the Heir till the Action be brought: For if he after his Anceſtors death ſell away the Land deſcended to him before the Action brought on the Eſpecialty, he ſhall not be charged; for he is chargeable only in reſpect of the Land. And yet if an Heir ſhall fraudulently and

of

of purpoſe to avoid the force of a Suit, convey away the Land deſcended; this will not help him, but he may be chargeable notwithſtanding. 4. When he is chargeable, he may not be charged for more then the value of the Land deſcended to him, except it be by his own falſe Plea in the Suit; for ſo he may make himſelf chargeable further. See for all theſe things, *D. & S.* 170. 173. *F.N.B.* 120. *Co.* 3. 12. 6. 47. upon *Lit.* 102. 183. *Dyer* 204. 114. 149. 373. 344. 111. 239. *Plow.* 457. *Fitz. Grant* 85. 21 *H.*7. 4. 10 *Ed.*4. 10.

2. Thus an Heir may be charged upon the Bond, Bill, or Covenant of his Anceſtor, or by an Annuity granted, or Warranty made by the Anceſtor, *Plow.* 457. *Co.* upon *Lit.* 102. 376.

3. If a Judgment be had againſt me for Debt or Damages, and I leave Land to deſcend to my Heir in Fee-ſimple, the one half of theſe Lands will be liable to Execution in his hands by the Writ of *Elegit*. See *Elegit*.

4. All the Lands that come to the Heir as Fee-ſimple Land, and Fee-tail Land, from his Anceſtor, will be liable to pay the Debts due from the Anceſtor to the Lord Protector, albeit the Heir be not named, and albeit there be no Specialty, and albeit it come by Conveyance, and not by Diſcent, *Plow.* 439. 33 *H.*8. 39.

5. An Heir ſhall not be charged with an Annuity by a Preſcription only without Record or Writing; as that he and his Anceſtors time out of mind have paid: For this will not charge the Heir, 10 *Ed.*4. 10. *Bro. Preſcr.* 11.

8. What lands and eſtates of the Heirs ſhall be ſubject to this Charge, or not.

For this, take theſe Caſes.

1. None but Lands deſcended in Fee-ſimple ſhall be ſubject to the Charge of the Anceſtor, and put in execution. And therefore in the Suit againſt the Heir, the Judgment is only againſt the Lands deſcended, and not any other Lands, nor Body or Goods of the Heir, except it be by his falſe Plea. And upon the Lands he hath in poſſeſſion, Execution is to be made preſently, that the Plaintiff ſhall recover and hold the Land till he be ſatisfied the Debt. And for the Land in Reverſion, that he ſhall have Execution of it when it doth happen to be in poſſeſſion. And where Lands deſcend to divers Heirs, as on the part of the Father, and on the part of the Mother, in *Gavelkind*, or the like, they muſt all of them be equally charged. *Dyer* 393. *Kelw.* 61. *Co.* upon *Lit.* 102. 376.

2. The Heir is not chargeable in reſpect of any Frank-tenement diſcendible. And therefore if Lands be granted to *J. S.* and his heirs during the life of *J. S.* or Tenant for life doth grant his Eſtate to another during his own life, and he bind him and his Heirs to pay Debt, or do any other thing, and this Land deſcend to the Heir; this will not be chargeable. So neither will entailed Land be ſubject to ſuch a Charge, *Co.* 10. 98.

9. What Pleas the Heir muſt plead, and how.

For this, take theſe Caſes.

1. The Heir that is ſued upon ſuch a Deed of the Anceſtor, muſt take heed to his Plea: And his ſafe way is, to confeſs the truth, and ſhew what Land it is that is deſcended to him in Fee-ſimple; and then he cannot be charged further in his other Land, Body or Goods. But if he plead, That nothing came to him by diſcent, and it be found againſt him, or Judgment go againſt him by *Nihil dicit*, Confeſſion, Non-ſuit, or the like, or upon a *Non eſt factum* pleaded to the Deed of the Anceſtor; in all theſe caſes the Plaintiff after Judgment given may have Execution againſt the Body, Goods, or other Lands of the Heir, *Plow.* 440. *Co.* 5. 36. 8. 53. *Dyer* 85. 62. 344. 149.

2. If a Judgment be given againſt the Heir by *Nihil dicit*, Confeſſion, or the like, and after a *Scire facias* is ſued to have Execution; the Heir cannot now plead he had nothing by Diſcent, *Dyer* 344.

3. If a Debt be paid by the Executor, or releaſed to him, and after the Heir is ſued for this Debt; the Heir may plead this in Bar of the Action, *Co.* 10. 93.

Sect. 11.

4. If the Plaintiff be Executor to the Debtee, and hath enough of the Goods and Chattels of the Anceſtor to pay himſelf; he may plead this in bar to the Action, *Fitz. Bar,* 188.

Eſcheat

Eſcheat is, where a Tenant of Fee-ſimple Land is dead, and there is no Heir capable of the Land, then it ſhall eſcheat to the Lord. And as to this, take theſe things. *Eſcheat, what*

1. When the Heirs be all dead, ſo that there is no Heir general or ſpecial: Or when the blood of the Anceſtor is corrupt, as where the Anceſtor is attainted for Felony or Treaſon, ſo that now no body can be Heir to him; in theſe caſes the Lord may enter and take the Land by Eſcheat. Or if a Baſtard die without iſſue of his body, and leave Land to deſcend, in which caſe he can have no Heir; the Lord ſhall have the Land by Eſcheat. *(See Baſtard.)* And if the Tenant or Baſtard in theſe caſes be diſſeiſed and die, the Lord may enter. But if the Diſſeiſor die, or alien the Land to another *bona fide* before Entry, the Lord may not enter. *Baſtard. can have no heir but of his body*

2. In caſes of Treaſon, the *Lord Protector* is to have the Land by Eſcheat; but in caſes of Felony and other Eſcheats, the Lord of whom the Land is held ſhall have it. *Treaſon eſcheats to K. Felony to y^e Lord*

3. Conditions, Uſes, Rights of Entry and Action, regularly cannot eſcheat.

4. By this Eſcheat the Property of the Land is altered, and given to the Lord of the Land, who may enter or have an Eſcheat. For all theſe things, ſee 29 *Aſſ. pl.*61. *Co.* 8. 42. *Lit.* 2. 22 *Aſſ. pl.* 49: 6 *H.* 7. 9. *Co.* 3. 1. upon *Lit.* 268. 312. 314. 13: See *Forfeiture.*

For anſwer hereunto, take theſe things.

11. What things ſhall come to the Heir from the Anceſtor, or not, but to the Executor or ſome other.

1. Pigeons in a Dove-houſe, Fiſhes in a Pond, Conies in a Warren, Deer in a Park, where the Anceſtor had the Inheritance, or but for life in the Pond, Warren, Park or Dove-houſe, will not go to the Executor, but to the Heir, or other that hath the Land wherein theſe things are.

2. Rents reſerved on Leaſes made of the Lands deſcending, ſhall go to the Heir, not to the Executor. *Executor. ſhall have Damages recovered*

3. If the Anceſtor recover Land and Damages in an Action, or a Deed and Damages, and die before Execution; in this caſe the Heir ſhall have Execution for the Land or Deed, and the Executor for the Damages.

12. *Heir-looms* what.

4. Heir-looms do ſignifie in ſome Countries all Implements of Houſhold, as Tables, Preſſes, Cupboards, Bedſteads, Wainſcotes, and ſuch like, which by the Cuſtom of that Country have belonged to a Houſe certain diſcents; and theſe by that Cuſtom are not to be inventoried, nor ſhall go to the Executor, but to the Heir with the Houſe, *Co.* upon *Lit.*185. *Goldsb.*129. *pl.*24.

But ſee for a more full anſwer to this queſtion in *Teſtament, ſect.*25. and *Chattels, ſect.*

CHAP. LXXVI.

Of an Entry into Lands, or into Religion.

Entry, what.

ENtry into Lands is taken two ways. It is moſt properly taken for the taking or having of poſſeſſion of Lands or Tenements: But it is alſo uſed for a Writ of Poſſeſſion. The firſt is either in deed, or an actual *Entry*; when a man doth by himſelf, or ſome other by his appointment, actually enter into Lands, which is by ſetting his foot upon it, and claiming the Land. Or it is in Law; and ſo a continual Claim is an *Entry*, for it amounts to, and is of the ſame force with an *Entry* in deed. The actual *Entry* may be made by a mans ſelf, or by his Attorney by warrant from him that hath right of *Entry*; for which ſee *Attorney*. And he that hath a lawful power to enter, is ſaid to have a Right or Title of *Entry*: For ſometimes a man doth it by a Right of *Entry*, as a Diſſeiſee put out; and ſometimes by a Title of *Entry*, as upon a Condition, or the like. And by this *Entry*, if he have Right, he brings the Poſſeſſion and Right together: But if he have no Right, he doth gain no Property in the Land by the *Entry* in any caſe, but in the caſe of an Occupancie, whereby the Freehold is gained. See *Occupant. Terms of Law. Co.* upon *Lit.* 253. 257. 243. 258. *Dyer* 337.

The kinds.

Attorney.

Right or Title of Entry.

Sect. 1. Where it is lawful, or not. Where the Entry of one ſhall give advantage to another, or not.

Where an *Entry* is lawful or not, See in *Diſcontinuance*, *Forfeiture*, *Diſſeiſin*, *Condition*, and other Titles. And where it is neceſſary, *Co.* upon *Lit.* 238.

If one Coparcener or Jointenant enter generally, or enter for himſelf and the reſt, or in his own name and the names of the reſt of the Jointenants or Coparceners, and the reſt do agree to it, or do not diſagree to it; this Entry will give advantage to the reſt, and put them all into poſſeſſion of the Land. But if one of them enter ſpecially to his own uſe; as if Tenant in tail die, having two Daughters, and one of them enter and make a Feoffment of all the Land with Warranty, this Entry of the one Daughter will do the other Daughter no good at all, *Lit.* 160. *Dyer* 128. 53. 4 *H.* 7. 9. So if there be Tenant for life, the Remainder in Fee; the Entry of the Tenant for life ſhall enure to him in Remainder. (*Idem.*) So the Entry of the Husband ſhall avail to the Wife to put her in poſſeſſion, *Noy* 97.

And ſo it is if one have iſſue a Son and a Daughter by one woman, and a Son by another, and is ſeiſed of *Capite*-Land, and deviſe all to the youngeſt Son and die, and then the youngeſt Son enter into all and die; in this caſe his Entry ſhall avail the eldeſt Son for a third part. And the Entry of one Tenant in Common ſhall be the Entry of the other; and that ſo to give him poſſeſſion, that he may have an Action of Treſpaſs. Adjudg. *Smalls* Caſe, *M.* 14 *Jac. Com. B.* And in all caſes where the Entry is not lawfull, the *Entry* of one ſhall not benefit or advantage another, 1 *H.* 6. 5. 8 *H.* 6. 16.

Sect. 2. Where an Entry into part ſhall gain the poſſeſſion of the whole, or not.

If one have cauſe to enter into any Lands lying in divers Villages within one County, and he enter into a parcel of the Lands or Tenements that are in one Village, in the name of all the Lands and Tenements to which he hath right to enter within all the Villages of the ſame County; by this Entry he ſhall get the poſſeſſion of all the ſame Lands, unleſs it be in ſome ſpecial caſes hereafter ſet down; and much more, if all the Land lie in one Village. If therefore one diſſeiſe me of two Acres of Land, (though it be at ſeveral times) and I enter into one of them in the name of both; this is good for both. *Lit. ſect.* 417. *Dyer* 337. 227. *Co. ſuper Lit.* 252 9 *H.* 7. 25.

The Entry muſt be made as the Action muſt be brought: And therefore if the Land lie in ſeveral Counties, as there muſt be ſeveral Actions, ſo there muſt be ſeveral Entries, 9 *H.* 7. 25. *Co.* on *Lit.* 15.

If

If one make a Feoffment of ſeveral parcels of Land in one County on Condition, and the Condition is broken; in this caſe an Entry into parcel in the name of all the reſt, is good for all. But if the Feoffment were made of ſeveral Lands at ſeveral times with ſeveral Conditions; there ſuch an Entry is not good for any more but what he doth enter upon, 9 *H.*7.25. *Co.* upon *Lit.* 252.

If Lands be in the occupation of *A. B. C.* and a ſtranger enter into the Land in the occupation of *A.* generally, and without any ſpecial Declaration in the name of all the Lands in the occupation of *B.* and *C.* this Entry doth not gain the poſſeſſion of the Lands in the occupation of *B.* and *C.* But by a ſpecial Declaration it may be good for all, by Juſt. *Hutton*, 21 *Jac.* at *Sarum*-Aſſiſes. *Co.* upon *Lit.* 252. And yet if one diſſeiſe me of two Acres of Land, and he let the ſame to three ſeveral perſons for life; in this caſe if I will enter, I muſt enter upon ſome of the Land in every one of their occupations, and no ſpecial Entry will ſerve here. But if the Leaſes were made to three perſons for years; in this caſe a ſpecial Entry upon one of them in the name of all the reſt, will gain the poſſeſſion of the whole, *Co. ſuper Lit.* 252.

If one diſſeiſe me of Land lying in three Villages in one County, and he levy a Fine of the Land in one Village, and after I enter into the Land of one of the other Villages in the name of all the reſt; this is no good Entry for to reduce the Poſſeſſion of the Land of which the Fine was levied, but there muſt be a particular Entry upon that Land, becauſe the Conuſee is in by Title, *Dyer* 337.

If two men ſeverally do diſſeiſe me of two Acres, and I enter into one of theſe Acres in the name of both; this is good only for that whereupon I put my foot, and not for the other. But if theſe two Acres come after into one hand, then the Entry upon one in the name of both, will reduce the Poſſeſſion of both, 9 *H.* 7. 25. *Co. ſuper Lit.* 252. And therefore if in the firſt caſe I enter, and make a Leaſe of the two Acres; this Leaſe will be good only for the Acre I do enter upon, and not for the other, *Curia M.* 8 *Jac.*

If my Father die ſeiſed of Land in *B.* he had in his own right, and of other Land he had jointly with my Mother, my Mother being alive, I enter into that he had in his own right in the name of both Lands; this Entry will not give me a poſſeſſion into the other Land to which I have neither Right nor Title, 39 *Aſſ. pl.* 16. And in all caſes where-ever a man doth intend by his Entry into part to gain the Poſſeſſion, he muſt be ſure to make his Entry ſpecially, (that is) in that part in the name of the whole, *Co* upon *Lit* 252.

He that hath right to enter into Land, muſt enter within twenty years of his right firſt accrued, if there be no let by Infancie, Coverture, Impriſonment, Non-ſane-memory, or his being beyond Sea. If ſo, then within twenty years of that Impediment removed. And after this time he cannot enter, his Entry is gone, 21 *Jac. ch.*16.

When a man muſt enter that hath Right. *limitation 20. years*

Of Entry in Religion.

ENtry in Religion is, where a man doth enter into a Profeſſion of any Religious Popiſh Order of Friars, Monks, or the like. This Religious life, in judgment of our Law, is a Spiritual or Civil death; and he that doth intend ſo to do, may then make his Will and appoint an Executor. And yet if at any time after he ſhall leave this Profeſſion again, then he ſhall have all his Lands and Goods *in ſtatu quo prius*; and this is called a Dearraignment, *St.* 31 *H.*8.6.

Entry in Religion, what.

Dearraignment, what.

CHAP. LXXVII.

Of Error.

Error, what.

THis word is taken two ways. 1. Either for ſome fault committed in ſome Suit, or for a *Writ of Error*; which is a Writ given to the party grieved, for the relief of the party grieved by this Error. In the firſt ſenſe Error is ſometimes in matter of fact, as when one of the parties were dead at the time when Judgment was given: And this point, if it come to iſſue, is to be tryed by Jury; and ſo of the like Errors.

The kinds.

Or it is where there is any diſcontinuance or undue proceeding in the Suit, which appeareth by the Record it ſelf. And ſometimes in matter of Law, which is when it appeareth by the Record as the Caſe is there, that Judgment was not given according to Law. And theſe two laſt ſorts of Errors appearing upon the Records themſelves are to be tryed and determined by the Judges themſelves of the ſame, or of ſome other Court.

Sect. 1.

Alſo the Error is ſometimes in the proceſs and proceeding of the Suit before Judgment; and then it will overthrow and nullifie the whole Record. And ſometimes it is in the very Judgment it ſelf; and then alſo it marrs all the Record. And ſometimes it is in the Execution after Judgment only; and then the Execution only ſhall be avoided, and the Proceedings before the Judgment, and the Judgment are good, and a new Execution may be made out. And where there are two Judgments, as in ſome caſes there are, there the laſt may be avoided, and the firſt may ſtand good. And in caſe where Execution is avoided, Reſtitution muſt be made of all that the Sheriff hath levied by vertue of any ſuch Reſtitution, *F.N.B.* 120. *Co.* upon *Lit.* 259. 288. *Finches ley* 468. 12 *Ed.*4. 11. *Stat.* 9 *R.* 3. *c.* 3. 29 *Eliz.* 2. 27 *Eliz.* 3 *Jac.* 8. *Cromp. Jur.* 12. 13. 29. 30. 53. Errors may be alſo in Fines and Common-Recoveries, *St.* 23 *Eliz. c.* 3. 27 *Eliz.* 9.

What ſhall be ſaid to be Error, or not.

For this, what ſhall be Error in any Suit, or not, See *Hob. Rep.* 7, 8. *Brownl. Rep.* 1 *par.* 3. 65. 69. 128. 201. and in very many other Books. And what ſhall be ſaid Error in Fines and Common-Recoveries, See *Brownl. Rep* 1 *par.* 3. 65. 66. 128. 30. 35. 36. *Co.* 3. 1. 2. 15. 4. 93. 11. 38. 5. 39. 44. 111. 9. 16. 11. 40. 8. 58. *March Rep f.* 7. 15. 20. 24 25. 56. 88. 121. 140. and divers other places.

In Suits.

In Fines and Recoveries.

Sect. 2.

How it ſhall be reformed.

Some Errors (as before is ſhewed) may be reformed in the ſame Court where the Suit is depending: Some muſt be reformed in other Courts. The Errors in the Court of *Common-Pleas* are to be reformed in the *Upper-Bench*: The Errors in the *Upper-Bench* are to be reformed in the *Exchequer-Chamber*: The Errors in the *Exchequer-Chamber*, or in any other Court, may be examined and reformed in the *Parliament*. The Errors in the Courts of Corporate-Towns, Cities, County-Courts, and Hundred-Courts, may be reformed in the *Upper-Bench* or *Common-Pleas*: And an Error in Proceſs in a Suit, may be reformed in the ſame Term in the Court where the Suit is depending, *Stat.* 27 *Eliz.* 8. *Dyer* 250. *F.N.B.* 21. *Plow.* 393. 14 *H.*7. 1. 7 *H.* 6. 28. 23 *Eliz.* 3. 31 *Eliz.* 1. 31 *Ed.*3. 12. 28 *Ed.*3. 10. 1 *H.*4. 15: *Co.* 3. 70. 111. 34. 4. 53. and other Books.

Amendment, what.

Amendment is, where there is ſome Error eſcaped in the Proceſs and Proceedings of a Suit. There in ſome caſes the Judges may amend it, and prevent the bringing of the Writ of Error. For this ſee *Stat.* 14 *Ed.* 3. 6. 9 *H.* 5. 4. 4 *H.* 6. 3. 8 *H.* 6. 12. 15.

What Errors are fatal, or not; and where Amendments may be thereof, or not.

In Suits.

There are ſome Errors in the Proceedings of Suits, that the Judges of the Courts where the Suits are ought to take notice of, and to ſtop the Proceedings of the Suit for them. And therefore the Rule is, That of all apparent faults proceeding from the Action, as in falſe Latine, default of Form in the Writ, Inſufficiencie in an Office or Indictment, miſawarding of Proceſs, (as if an *Exigent* go forth where none lieth) Impoſſibility in the Plea, as in Account ſuppoſing him to be his Receiver for

for ſeven years, and the Defendant pleads fully accounted ſuch a day, which is the first day of the ſeven years. In theſe caſes the Court *(ex officio)* is to take notice of it to abate the Writ, award *Superſedeas* upon ſuch Offices, Indictments, or Proceſs to ſtay Judgment, if the Defendants Plea be found againſt him, &c. and this without exception taken, or motion made by the party. And therefore although he that caſteth an Eſſoin cannot plead in Abatement of the Writ by way of Plea, yet if it be a matter apparent to the Court, any ſtranger as *Amicus Curiæ* may do it, and the Court is bound to abate it, though the Tenant or Defendant make default. And on the other ſide, the Judg is to ſee that either party in a Suit is to be hurt, by any Error of a Clerk of the Court and by his miſtake; as where a good Original Writ is ill entred in the Roll, as where the Writ is againſt *A.* and *B.* and the whole Proceſs againſt *B.* and *C.* Or a *Scire facias* out of a Fine and part of the Land omitted: Or where the Clerk writeth a ſyllable or a letter too little, or too much. Or where any Error is aſſigned by razing, enterlining, adding, ſubſtracting, or diminiſhing of words, letters, titles, or parcel of letters in any Record, Proceſs or Warrant of Attorney, Original Writ, or Judicial Pannel or Return, though it appear ſuſpitious to the Judges. For, for ſuch things as theſe no Judgment or Record is to be reverſed or adnulled for Error aſſigned therein; but the Judges of the ſame Court, before or after Judgment, may and muſt amend it.

Sect. 3.

But in caſe of Appeals and Indictments for Treaſon and Felony, and Outlawries thereupon, and after Demurrer joined and entred; the ſame Court wherein the Suit is depending may amend all imperfections and want of form, other then thoſe which the party demurring ſhall particularly ſet down in his Demurrer. And after Verdict given in any cauſe on the one ſide or the other, no prejudice ſhall be to either party becauſe of any variance in form only between the parts of the Record, or for lack of Averment of any life, ſo the party be alive, and it be proved upon examination: Or by reaſon any Writ of *Venire facias*, *Habeas corpora*, or *Diſtringas* is awarded to a wrong Officer: Or by reaſon the *Viſne* is miſawarded; or by reaſon that any of the Jury are miſnamed; or in any Retorn, ſo as upon examination it appear to be the ſame perſon; or by reaſon of lack of Entry of the Retorn, or Miſ-retorn, ſo as upon examination it appear it was duly done: Or by reaſon that the Plaintiff in an *Ejectione firme*, or any perſonal Suit, being an Infant, did appear by Attorney therein. For all theſe things muſt be amended by the Judges of the ſame Court. But for all theſe things, See more *Stat.* 21 *Jac.* 13. 4 *H.*6.3. 14 *Ed.*3.6. 9 *H.*5.4. 4 *H.*6.3. 8 *H.* 6. 12. 15. 32 *H.* 8. 10. 18 *Eliz.* 13. 11 *H.*4.3. 2 *&* 3 *Ed.* 6. 32. *Co* 11.6,7. 4.62. 8.133. 5.37.45. 27 *Eliz.*11.5. 23 *Eliz.*3. *Dyer* 367. 18 *Ed* 4.3. 4 *H.*6.16. 5 *Ed* 4.7. 7 *H.*6.5. and divers other places.

In Fines and Common-Recoveries.

Moſt Miſtakes and Errors in Fines and Common-Recoveries, are not fatal, but amendable: For there the Rule is, *Conſenſus tollit Errorem*; Conſent takes away Error. But ſee for this, *Brownl. Rep. f.* 30. 35. 36. 80. 57. 130. 144. 151. 149. 136. 200. 233. 2 *par.* 102. 103. 270. 273. *Co.*5.44.38. 2 57. 77. 1. 76. 8. 58. 11. 69. 77. 23 *Eliz* 3. 27 *Eliz.*9.

Sect. 2. Where and how the Writ of *Error* will lie, or not.

Where this Writ lieth and may be had, and how, See *Co.* 1. 34. 42. 3. 1. 4. 89. 5. 32. and divers other places.

Writ of *Error*, and Proceeding in it.

The manner of Proceeding herein, is: Firſt, the Record is removed out of the Court wherein the Suit is, into that Court where the Error is to be redreſſed: And there in ſome caſes Bail is to be put in by the Proſecutor in the Writ of Error; and then he is to aſſign his Errors, and the Court is to allow of them as fit to be queſtioned: And then the Plaintiff in the firſt Suit for whom the Judgment was given, is to be warned by a *Scire facias* to come in, and to defend it and maintain his Judgment. And to this he may plead, That there is no Error; or what he will elſe. 3 *Jac.* 8. 27 *Eliz.* 8. *F.N.B.* 120. *Plow.* 393. *Dyer* 250. But the Act of *March* 11. 1649. is at an end.

Aſſignment of Errors.

Diminution, what.

Diminution is where a Record is certified, but not all certified, but there is ſome Diminution in part of it, then the party concerned may have a Writ directed to the Court to ſend the whole Record, *F.N.B.* 25.

Falſe

False Judgment what.

False Judgment, is a Writ lying where an erroneous Judgment is given in any inferior Court that is not a Court of Record, as County, Hundred-Court, or Court-Baron, then the party grieved by the Judgment may have this Writ, and remove all the Proceſs of the Suit into the Common-Pleas, and there it ſhall be examined: And if it be found, the Judgment ſhall be reverſed, and the Suitors or Judges of the Court ſhall be amerced. And the Errors in this Court are and may be in the kinds thereof, as the Errors of other Courts, *Marl.c.*20. *F.N.B.*18. *Co.* on *Lit.*188.

CHAP. LXXVIII.

Of an Exchange.

1. *Exchange* or *Eſchange*, what.

AN Exchange is the mutual grant of equal Intereſts the one in exchange for the other. Or it is, where a man is ſeiſed or poſſeſſed of Land in Fee-ſimple, Fee tail, for life or years, or is poſſeſſed of Goods, and another is ſeiſed or poſſeſſed of other Lands, or poſſeſſed of other Goods in the like manner, and they do exchange their Lands or Goods the one for the other. And in this there is a double Grant; for each of them doth grant that which is his, to the other. *Terms of the Law, tit. Exchange. Finches ley* 27.

This manner of onveyance (which heretofore was very frequent) is ſometimes made by word without any writing; and ſometimes it is made by Deed or in writing: And which way ſoever it be made, it muſt be made by this word [*Exchange*,] which is a word ſo appropriated to this thing, as the word [*Frankmarriage*] is to a gift in Frankmarriage; neither of which can be made or deſcribed by any circumlocution, *Brownlows Rep.*1 *par.*40. *Co. ſuper Lit.* 50. *Perk. ſect.* 253.

2. The effect and fruit of it.

The fruit and effect of an Exchange is, that it doth give the intereſt, and after the property of the things exchanged to either party, according to the Agreement. And if the Exchange be of Lands or Tenements of any Eſtate of Inheritance or Freehold, whether it be by word or deed, it hath a Condition and a Warranty in Law incident and annexed to it as a thing made by the word *Exchange*, and *tacitè* implied in every grant of Exchange: A Condition to give a Re-entry upon all the Land given in exchange, if he be put out of all or part of the Land taken in exchange, and a Warranty to enable him to vouch and to recover over in value ſo much of his own Land again given in exchange, as ſhall be recovered from him of the Land taken in exchange, if he be ſued for it, *Co.*4.121. 15 *E.*4.3. 9 *E.*4.21. *Bro. Eſchange in toto. Fitz. Eſchange in toto.*

Condition.

Warranty.

So that upon every Exchange, either party, if he be put out of or loſe by Action the Land he taketh in Exchange, hath a double remedy againſt the other. And yet this remedy doth go only in the Privity, and ſhall not go to an Aſſignee: As if *A.* exchange Land with *B.* and *B.* be put out of all or part of the Land upon a Title paramount by a Recovery in a real Action or otherwiſe; in this caſe *B.* may either enter upon his own Land again which he gave in Exchange, or elſe if it be in an Action brought, he may vouch *A.* upon the Warranty in Law, and ſhall recover as much in value againſt him of the Land he gave, as he hath loſt of the Land he took in Exchange. But if *B.* alien his Land taken in Exchange to *C.* and *C.* be put out of all or part of the Land upon a Title paramount; *C.* in this caſe can neither enter upon the Land given to *A.* in Exchange upon the Condition in Law, nor vouch *A.* to Warranty and recover over in value upon the Warranty in Law. And yet *A.* in this caſe ſhall have the like remedy againſt *C.* the Alienee upon the Condition and Warranty both, as he had againſt *B.* But if *A.* himſelf implead *C.* for the Land he gave to *B.* in Exchange, *C.* may make uſe of this Warranty in Law by way of Rebutter againſt *A.*

Aſſignee.

Rebutter.

And in all theſe caſes, where one of the parties is put out of all or part of the Land, or out of part of the Eſtate by Entry, and the other party enter upon the others

when y^e eſtate is avoided by entry & it in part or y^e whole & other part or any other Land
& void y^e whole exchange but contra when impleaded

Land upon the Condition in Law, he may enter upon the whole Land, and avoid the whole Exchange. But if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this caſe he ſhall recover ſo much in value of the other Land only as he hath loſt, and no more. As if an Exchange be of three Acres for three Acres, and after one of the parties is put out of one of the Acres by the Entry of a ſtranger; in this caſe he may enter upon the whole three Acres he had given in Exchange, and ſo avoid the whole Exchange if he will. And if *A.* and *B.* be Jointenants for life, and the Fee-ſimple to the Heirs of *A.* and *A.* exchange this Land with *C.* in Fee, and then die, and *B.* enter and avoid the Exchange for his life (as he may) in this caſe *C.* may avoid the whole Exchange, and enter upon his own three Acres again. So if he in Reverſion diſſeiſe his Tenant for life, and then exchange the Land, and after the Tenant for life enter; in this caſe the other party may defeat the whole Exchange. But in this caſe of an Exchange of three Acres for three Acres, if one of the Acres were gained by Diſſeiſin, and the Diſſeiſee bring an Action and doth recover it againſt the Diſſeiſor; in this caſe if he vouch over the other party to the Exchange, he ſhall recover ſo much in value only of the three Acres he gave in Exchange, as the Acre he hath loſt, and no more.

To the perfection of an Exchange, and to make things to paſs by this kind of Conveyance, theſe things are requiſite. 1. That the perſons or parties thereunto be able to give and take, and not diſabled by any ſpecial impediment. And for this it muſt be known, that ſuch perſons as may be Grantors and Grantees, may make Exchanges; and ſuch perſons as are diſabled to grant, are diſabled to make Exchanges. See *Grant Numb.* 4.

3. How an Exchange muſt be made, and what ſhall be ſaid a good Exchange, or not.

1. In reſpect of the parties thereunto, and their eſtates.

An Exchange made between the King and a Subject is good, albeit the King hold his Land in one capacity, and the Subject in another, *Co. ſuper Lit.* 51.

An Exchange made between an Infant and another is not void, but voidable only; for the Infant at his full age may affirm or avoid it at his election, *Idem.*

Infant.

An Exchange made between a Tenant in tail and another, is not void, but voidable; for it is good againſt himſelf during his life, and his Iſſue at his full age may affirm or avoid it at his election, *Bro. Eſchange* 9. *Perk. ſect.* 279.

Tenant in tail.

An Exchange made between a man *de non ſane memorie* and another, is not void, but voidable; for it is good againſt him, but his Heir may avoid or affirm it at his election, *Bro. Eſchange* 9.

De non ſane memorie.

A man that doth hold Land in Fee-ſimple, Fee-tail, or for life in the right of his wife, may exchange this Land, and the Exchange will be good as long as he and his wife doth live. And he with his wife may exchange it for longer time, and the Exchange is good againſt him; but his wife after his death may affirm or avoid it if ſhe will, *Bro. idem. Perk. ſect.* 279.

Husband in right of his Wife.

One Parſon or Vicar may exchange his Church or Benefice with another, and this Exchange is good, *Perk. ſect.* 288.

Parſon.

The Diſſeiſor and Diſſeiſee may joyn together and exchange the land whereof the diſſeiſin was made with a ſtranger for other land: but if it be made out of the land and before the entry of the diſſeiſee it ſhall not bind the diſſeiſee, for he may avoid it. And a diſſeiſor cannot exchange the land he hath gotten by diſſeiſin with the diſſeiſee for other land, for this exchange is void, unleſs it be by indenture, or fine, that it may work by way of eſtoppel, *Perk. Sect.* 280. 273.

The Leſſor and Leſſee may joyn together and exchange the Land leaſed for other Land, and this is good; for it ſhall be ſaid to be the ſurrender of the Leſſee to the Leſſor, and the *Exchange* of the Leſſor; and therefore the Leſſee (as it ſeems) ſhall have nothing to do with the Land taken in exchange. *Sed quære* of that. *Perk. ſect.* 279.

Surrender.

Jointenants for life, the Fee to one of them, may exchange their land with a ſtranger for other land to hold in the ſame nature, and the *Exchange* is good. But Jointenants, Tenants in common, and Coparceners cannot exchange the lands they do ſo hold with another, before they have made partition, *Perk. ſect.* 277. 281.

Jointenants. Tenants in common. Coparceners

If *A.* and *B.* be Jointenants for life, the Fee to *A.* and *A.* exchange the whole land with another for other land; this is good only for his moity, as ſome have ſaid: But it ſeems notwithſtanding it is good for the whole, until it be avoided by the other Jointenant, *Perk. ſect.* 277.

The

2. In reſpect of the matter whereof it is made, or the nature of the thing exchanged. And of what things and eſtates an Exchange may be made,

The ſecond thing required in a good Exchange is, that the things exchanged be ſuch as whereof an Exchange may be made. And for this it muſt be known, that an Exchange may be made of things of the ſame nature, as of a temporal thing for a temporal thing, a ſpiritual thing for a ſpiritual thing; as a houſe for a houſe, land for land, a Manor for a Manor, a Church for a Church, Rent for Rent, Common for Common, a Horſe for a Horſe, one Piece of Plate for another, or the like: Or it may be made of things of a divers nature; as of a temporal thing for a ſpiritual, as of a Houſe for Land or Rent; a Chamber in a houſe for Common, or for a Reverſion, Seigniory, or Advowſon; of Land or Rent for a Right of Land, or Releaſe of Right; of an Advowſon for Land; of a Rent for a Way; of a Horſe for a Piece of Plate; of a Gown for a Horſe, or the like. And *Exchanges* made of theſe things, albeit the things exchanged do lie in divers Counties, are good. Alſo a Seigniory by Homage and Fealty, or the like, which is not valuable, may be exchanged for Land, Rent, or any other ſuch like thing. So may a Seigniory by Divine ſervice. But a Seigniory in Frankalmoigne cannot be exchanged with any but the Tenant of the Land that doth hold by the Tenure. And Houſes, Manors, Lands, Rents, Commons, Seigniories, Reverſions, and the like, may be exchanged in Fee-ſimple, Fee-tail, for life or years. So that an *Exchange* may be of an Inheritance for an Inheritance, of a Frank-tenement for a Frank-tenement, and of Chattels real for Chattels real. *Perk. ſect.* 263. 261. 262. 266. 258. *Lit. ſect.* 62. *Co. ſuper Lit.* 51. 52. *Perk. ſect.* 259. 260. 258.

If one grant White-acre in *Exchange* for Black-acre lying within the ſame, or in two Counties, this is a good *Exchange*. So if I grant a Rent-charge iſſuing out of my land in *Exchange* to *J. S.* for an Acre of his land, &c. this is a good *Exchange*. So if I have a Rent iſſuing out of the land of *J. S.* and I grant this to *J. K.* in *Exchange* for Land or other Rent; this *Exchange* is good, when the Tenant hath attorned to the Grant of the Rent. So if one have a Rent out of my Land in Fee, and I have the Land in Fee, and I grant the Land in *Exchange* for the Rent; it ſeems this is a good *Exchange*. But if one grant me a Manor or Land, and I in *Exchange* for the ſame Manor or Land grant unto him a Rent *de novo* iſſuing out of the ſame Land or Manor, this cannot take effect as an *Exchange*. So if one releaſe his Eſtovers that he hath in ſuch a Wood, and deliver the Releaſe in *Exchange* for Land given to him in *Exchange* for the ſame Releaſe; this is a good *Exchange*. *Perk. ſect.* 244. *Idem* 263. 3 *E.* 4. 10. 9 *E.* 4. 21. 9 *E.* 4. 21. *Perk. ſect.* 262. 266. *Fitz. Eſchange* 16.

If there be a Diſſeiſor and Diſſeiſee, and the Diſſeiſee releaſe his right to the Diſſeiſor in *Exchange* for other Land, this is a good *Exchange*. So if the Diſſeiſor of an Acre of land enfeoff a ſtranger of the ſame Acre of land, and the Feoffee give to the Diſſeiſee an Acre of land in Fee in *Exchange* for a Releaſe of all his right in the Acre of land of which he was diſſeiſed; this is a good *Exchange*. *Perk. ſect.* 271. *Idem* 282. But if the Diſſeiſee grant his right to a ſtranger that hath nothing in the land, in *Exchange* for an Acre of land; this *Exchange* is not good, neither ſhall the ſtranger take any thing by this Grant, *Idem ſect.* 271. If there be Lord and Tenant by Fealty, and Twelve pence Rent, and the Lord exchange the Seigniory with the Tenant for the Tenancie, or *è converſo*, by Deed indented; this is held by ſome to be a good *Exchange*, *Perk. ſect.* 260. If I have a Rent iſſuing out of the land of *J. S.* and I grant or releaſe the ſame land to *J. S.* in *Exchange* for other land; this is a good *Exchange*. So if I releaſe the ſame Rent unto him in *Exchange* for a Way over his ground; this is a good *Exchange*, *Perk. ſect.* 267. If I be ſeiſed of lands to which *J. S.* hath a right of Action, and I give to him other land for a releaſe of his right; this is a good *Exchange*. And the ſame Law is of an *Exchange* of Land, and an Advowſon by Deed indented, for a Releaſe of right in another Advowſon to an Uſurper, when his Incumbent hath been in poſſeſſion of the Church ſix moneths, *Idem* 268, 269. If two Parſons of a Church make an *Exchange* of their Benefices by words of *Exchange*, and each of them reſign his Benefice into the hands of the Biſhop to the ſame intent, and the Patrons preſent accordingly, and the Preſentations are *per viam permutationis*; this is a good *Exchange*, *Perk. ſect.* 257.

If

If three Acres of Land with an Advowſon Appendant be given in Exchange by *T. K.* to *J. S.* for a Chamber to be aſſigned by the ſaid *J. S.* at the election of *T. K.* and he aſſign two Chambers, and *T. K.* chuſe and enter upon one, and *J. S.* enter upon the Land; this Exchange is good, notwithſtanding the incertainty. So if *J. S.* give his Manor of *A.* to *T. K.* in Exchange for his Manor of *B.* or for his Manor of *C.* and he enter upon one of theſe Manors, and *T. K.* enter upon the Manor of *A*; this Exchange is good, *Perk. ſect.* 264, 265.

Out of all which, theſe things by the way, may be obſerved.

1. That the things exchanged need not to be in *eſſe* at the time of Exchange made, for a man may grant a Rent *de novo* out of his Land in Exchange for a Manor. And yet if I grant to another the Manor of *A.* for the Manor of *B.* which he is to have after his Fathers death by deſcent, it ſeems this Exchange is void, *Co. ſuper Littl.* 50. *Perk. ſect.* 265.

2. There needs no Tranſmutation of Poſſeſſion, for a Releaſe of Rent, Eſtovers, or Right of Land, for Land is good.

3. The things exchanged need not to be of one nature, ſo as they concern Lands or Tenements, for Land may be exchanged for Rent, Common, or any other Inheritance which doth concern Lands or Tenements, or Spiritual for Temporal things, as Tithes: A Tenure by Divine Service for Land, or a Temporal Seigniory. But Annuities, and ſuch like things, which charge the perſon onely, and do not concern Lands or Tenements, or Goods and Chattels, cannot be exchanged for Land.

The third thing requited in a good Exchange is, That it be made in that manner and order, that Law doth require, wherein theſe things are to be known.

3. In reſpect of the manner of the making of the *Exchange*: And where it ſhall be good without *Deed*, or not.

1. That if all or part of the things whereof the *Exchange* is made, do lie in ſeveral Counties; or if all or part of the things whereof the *Exchange* is, be ſuch as lie in grant and not in Livery, albeit it be in the ſame County; in theſe caſes the *Exchange* muſt be made by Deed indented in Writing. But where the *Exchange* is of Lands, and of Lands lying in the ſame County, albeit it be of any *Eſtate* of Inheritance or free hold, yet it may be by word of mouth without writing. And ſo alſo may it be when the things exchanged do lie in divers Counties, when the *Exchange* is made onely for a term of years: And therefore if an *Exchange* be made between *J. S.* and *T. K.* of Lands lying in one and the ſame County in Fee, or for life, it may be by word of mouth: But if all or part of the Lands of *J. S.* lie in one County, and all or part of the Lands of *T. K.* do lie in another County, the *Exchange* muſt be made by Deed indented. If an *Exchange* be made of Rent for Land, and the Land out of which the Rent is iſſuing, and the Land given in *Exchange* for it do both lie in one County; this *Exchange* cannot be good without Deed. So if an *Exchange* be made of the Reverſion of an Acre of Land for three ſhillings of Rent iſſuing out of another Acre of Land, and both Acres are in one County; this *Exchange* muſt be made by Deed indented, or it will not be good. So if an *Exchange* be made of an Acre of Land, and a Rent out of another Acre, for another Acre of Land and Common for three Beaſts, and all is in one and the ſame County, this *Exchange* muſt be by Deed indented, or it will not be good. But if I be ſeiſed of a Manor to which I have Common Appendant or Appurtenant, and *T. K.* is ſeiſed of another Manor to which he hath a Villain Regardant, and both the Manors are in one County, an *Exchange* may be made of theſe Manors by word of mouth without writing, and the Common and Villain will paſs as incidents well enough. And yet if *J. S.* hath an Office whereunto Land doth belong, and *T. K.* hath Rent iſſuing out of the Land of a ſtranger, and all the Land is in one County, and the Office is to be uſed and occupied in the ſame County; if theſe things be exchanged, it muſt be by Deed indented, *Perk. ſect.* 244. *Co. ſuper Littl.* 51, 52. *Littl. ſect.* 62. *Co.* 9. 14. *Perk. ſect.* 247, 248, 229, 250, 246.

2. The word [*Eſchange*] or [*Exchange*] muſt be had and uſed between the parties in the making of the *Exchange*: As I grant to you Whiteacre, To have and to hold to you and your Heirs in *Exchange* for Blackacre: And in conſideration hereof you grant to me and my Heirs Blackacre in *Exchange* for Whiteacre, for this word is ſo individually requiſit, as it cannot be ſupplied by any other word, neither

Averment

will any Averment that it was in Exchange, help in this caſe. And therefore if *A.* by Deed indented, give to *B.* an Acre of Land in Fee ſimple, or for life, and by the ſame Deed *B.* doth give to *A.* another Acre of Land in the ſame manner, this cannot

Livery of Seiſin.

enure as an Exchange: And therefore if no Livery of Seiſin, ſo as it may take effect by way of Grant, it is utterly void. But by this means, Lands may be granted from one to another, for there needs no Livery of Seiſin. So if an Exchange be made by words between two of Lands in one County, and before their Entry, Indentures are made between them of the ſame Lands without words of Exchange, and no Livery of Seiſin is made; this ſhall not paſs by way of Exchange: And yet it hath been held by ſome, that *Permutatio*, or ſome other word of like effect may ſupply this word Exchange, *Co. ſuper Lit.* 50,51. *Perk. ſect.* 252,253. 9 *Ed.* 4. 21. *Fitz. Exchange* 12.

Attornment.

3. That if any Rent, Reverſion, Seigniory, or the like, be granted by either party, that then the Tenant do Attorn to the Grant, for that Attornment is requiſit in this caſe. And yet in the caſe of the Grant of Land, in Poſſeſſion, in Exchange, no

Livery of Seiſin.

Livery of Seiſin is needful. Neither is it needful that either party to the Exchange come to the thing given to him in Exchange, by the ſame mean and manner of Aſſurance: For if Leſſee for life of one Acre, give another Acre to his Leſſor, in Tail, in Exchange for a Releaſe from him of that Acre, To have and to hold in Tail in like manner; this is a good Exchange, *Perk. ſect.* 259. 263. 289. 276.

In future

An Exchange may be made to take effect in *futuro*, as well as in *præſenti*, for if an Exchange be made between me and *T. K.* That after the Feaſt of *Eaſter T. K.* ſhall have my Manor of *Dale* in exchange for his Manor of *Sale*, this is a good Exchange, *Perk. ſect.* 265.

Limitation

Vide infra

If an Exchange be made in writing of Land, and it doth limit and expreſs no eſtate, that either party ſhall have in the thing exchanged, yet this is a good Exchange. But if an eſtate for life be limited expreſly to one, and no expreſs eſtate is limited to the other; this is not a good Exchange, as ſhall be ſhewed in the next place, 19 *H.* 6. 27. *Perk. ſect.* 275.

4. In reſpect of the quality or equality of the Eſtates or Intereſts exchanged.

The fourth thing required in a good Exchange, is Equality of Eſtate, *viz.* That either party have the like kinde of eſtate of the thing exchanged; ſo that if one have an eſtate in Fee-ſimple, the other have ſo likewiſe, and ſo for other eſtates: For if the one grant that the other ſhall have his Land in Fee-ſimple, for the Land which he hath of the other in Fee-tail; or that the one ſhall have in the one Land Fee-tail, and the other in the other Land but for term of life; or that the one ſhall have in the one Land Fee-tail general, and the other in the other Land Fee-tail ſpecial; or that the one ſhall have in the one Land for life, and the other in the other Land but for years; theſe Exchanges are void, and cannot take effect as Exchanges, *Fitz. Exchange* 15. *Littl. ſect.* 64,65. *Co. ſuper Littl.* 50, 51. *Perk. ſect.* 276. And therefore if the Lord releaſe to his Tenant his Services in Tail, in Exchange for other Lands given to the Lord in Exchange in Tail alſo; this Exchange is void, for by this Releaſe made by the Lord the Services are gone for ever, *Perk. ſect.* 283. So if Tenant for his own life exchange with him that is Tenant for life of another; this is not a good Exchange. (And by the ſame reaſon it ſhould ſeem if Leſſee for twenty years of his Land Exchange with another for other Land for forty years, that this ſhould not be a good Exchange, *Perk. ſect.* 275. *Finches Ley* 27.) But if Leſſee for life be of an Acre of Land, and he give another Acre of Land to his Leſſor in Fee-tail in Exchange for a Releaſe of all his Right in the Acre that he holdeth for term of his life, To hold to him and the Heirs of his body engendred; this is a good Exchange, *Perk. ſect.* 276. Or if Tenant for his own life exchange with him that is Tenant in Tail after poſſibility of Iſſue extinct; this Exchange is good, *Co.* 11. 80. And yet if an eſtate for life be expreſſed to the one party upon the Exchange, and no eſtate is expreſſed to the other party; it is ſaid, that this Exchange is not good, and yet where no eſtate is expreſſed, the party ſhall have an eſtate for his own life, *Perk. ſect.* 275. 19 *H.* 6. 27.

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Husband and Wife. Tenant in Tail.

But in theſe caſes it is not neceſſary that the parties to the Exchange, be ſeiſed of an equal eſtate at the time of the Exchange made, for if Tenant in Tail or Husband in right of his Wife, exchange their Land in Fee-ſimple, with another for Lands he hath in Fee-ſimple; this is a good Exchange until it be avoided by the iſſue or the

the Wife, *Co. ſuper Littl.* 51. *Perk. ſect.* 289. *Littl. ſect.* 65. *Perk. ſect.* 280, 281: Neither is it neceſſary that both Eſtates be in poſſeſſion, for one may grant an Acre in poſſeſſion in exchange for an Acre in Reverſion, and this Exchange is good, *Idem.* Neither is it neceſſary that there be an equality in the value or quantity of the Lands exchanged, for if the Land of one of the parties be worth one hundred pound, and the Land of the other but ten pound, or the Land of one of the parties be one hundred Acres, and the Land of the other but ten Acres, if the eſtates given be equal, the Exchange is good, *Idem.* Neither is equality in the quality or manner of the eſtates requiſite, *Idem.* For if two Joyntenants be in Fee of an Acre of Land, and they grant that Acre to another in exchange for other Lands, To have and to hold a Moyety to one of them and his Heirs, and a Moyety to the other and his Heirs, which is an eſtate in Common; or two men give Lands in exchange to *A.* and his Heirs, for Lands from *A.* to them two and their Heirs, albeit the one party hath a Joynt eſtate, and the other a Sole eſtate, yet the Exchange is good. The like Law is if the Land of one of the parties be of a defeaſible Title, and the Land of the other of an undefeaſible Title, this Exchange is good till it be avoided.

The fifth and laſt thing required in a good Exchange is, That there be an execution and perfection of the Exchange by Entry or Claim in the life time of the parties, *viz.* That both the parties to the ſame Exchange, do enter into the things taken in Exchange, if they be ſuch things as they may enter into, for until the Exchange be executed by Entry, or the like, the parties thereunto have no Freehold in Deed, or in Law, in the things exchanged, albeit the ſame things do lie in one County: And if either of the parties die before he enter into the Lands by him taken in Exchange, hereby the whole Exchange is become void, if his Heir will; but if one of the parties enter, he ſhall not firſt begin to avoid the Exchange. But if the parties enter at any time, during their lives, it is ſufficient, unleſs the poſſeſſion be before diveſted by an elder Title, as by Entry for a Condition broken, Entry by a Diſſeiſee or his Heir, or the like, and not reveſted again before the Entry. As if an Exchange be had between two of Land, and before their Entry by force of the Exchange they are, or one of them is diſſeiſed of the Land exchanged, and the Diſſeiſor die ſeiſed thereof, and then they enter according to the Exchange, and put out the Heir of the Diſſeiſor, this ſhall not be ſaid to be an execution of the Exchange; but if the Diſſeiſee have recovered the ſame Land againſt the Heir of the Diſſeiſor by Writ of Entry, and have Execution, then he may execute the Exchange by Entry. And in caſe where a Reverſion, Rent, or Seigniory, is granted in Exchange, it muſt be perfected and executed by the Attornment of the Tenant in the life time of the parties, otherwiſe the Exchange is not good; but in this caſe after Attornment is made, it ſeems the Exchange is perfect without any Entry or Claim, *Co. ſuper Littl.* 50, 51. *Co.* 1. 98. 105. *Perk. ſect.* 284. 286. 292. 289.

5. In reſpect of the Execution of it.

If two Parſons exchange their Churches, and reſign them into the Biſhops hands, this is not a perfect Exchange until they be inducted; and therefore if either of them die before they be both inducted, the Exchange is void, *Perk. ſect.* 257.

Where a Deed ſhall take effect as an Exchange, there muſt be all the Conditions before mentioned in the caſe. And yet note that where one thing is granted for another in the nature of an Exchange, and for ſome of the cauſes aforeſaid, the things cannot paſs by way of Exchange, there they may paſs notwithſtanding by way of Grant, and the Deed may take effect to other purpoſes, albeit it may not enure and take effect as an Exchange. And therefore if two be ſeiſed of ſeveral Acres of Land, and the one of them by Deed doth give his Acre to the other, and the other his Acre to him without any word of Exchange, and each of them doth make Livery of Seiſin to the other; in this caſe albeit the Acres will not paſs by way of Exchange, yet will they paſs by way of Grant. And in this caſe, if no Livery of Seiſin be made, either of them ſhall hold the Lands granted at will onely. And in like manner it is if two agree to exchange Land, and after each of them levy a Fine or make a Feoffment of the Land to other; by this the Land will paſs each to other, but not by way of Exchange. So if *A.* and *B.* his Wife, and *C.* and *D.* his Wife agree to

4. When a Deed ſhall take effect as an *Exchange*, or not.

Nota

Exchange Lands, and *A.* and *B.* enter into the Land, they are to have in exchange, and then they do make a Feoffment of their own Land unto *C.* and his Father, and not to *C.* and *D.* his Wife; this ſhall not enure as an Exchange, and therefore *C.* and *D.* may enter upon their own Land again, but the Feoffment is good. And if one aſſign a Woman her Dower in exchange for Land; this ſhall not take effect as an Exchange, but it ſhall enure to be a good Aſſignment of Dower, *Perk. Sect.* 255, 256. *Fitz. Exchange* 14. *Perk. Sect.* 272.

Aſſignment of Dower

5. How an *Exchange* ſhall be conſtrued and taken,

If two do exchange Land by Deed, and limit no Eſtates, this ſhall be taken for Eſtates for life, and the Exchange is good; but if an Expreſs eſtate be limited to one, and no Expreſs eſtate to the other, it is ſaid this is not good, and that conſtruction of Law will not help it. 19 *H.* 6. 27. *Perk. Sect.* 275.

If an Exchange be made between two men of two Acres of Land by Deed, and in the *habendum*, it is ſet down that each of them ſhall have the Acres given in exchange with divers other Acres not expreſſed in the premiſſes; this addition ſhall be taken as ſurpluſage, and the Exchange ſhall be good for the two Acres. See more in *Expoſition of Deeds*, *Perk. Sect.* 251.

Surpluſage

6. Where an *Exchange* ſhall be determined, or the nature of it changed by matter *Ex poſt facto*, and how, and where not.

If after an Exchange is made before or after the parties enter, all, or part of the Land given to either party be recovered from him upon an elder Title, as by an Entry upon a Condition broken, alienation in Mortmain, or upon a Diſſeiſin; in theſe caſes if that party enter again upon his own Land, which he gave in exchange (as he may) hereby the whole Exchange is determined. But if after the Exchange is perfect, one of the parties do enter upon the Land, he doth give in exchange, this doth not make void the Exchange, neither may the other party hereupon enter upon the Land he doth give in exchange, but he may have an Aſſize, or an Action of Treſpaſs againſt the other: And yet if an exchange of a Common for a Way, or a Rent, or the like, if the one party deny the Common, it hath been ſaid the other party may deny the Way, or the Rent. *Sed quere.* *Perk. Sect.* 286. *Co.* 4. 122. *Perk. Sect.* 299. *Broo. Exchange* 12. *Perk. Sect.* 299.

Aſſize Treſpaſs Way Rent

If an Exchange be made of Fee between two of a Manor, whereof the one half is in Tail, and the other half is in Fee-ſimple, and the Tenant in Tail that made the Exchange, die; and his iſſue diſagree to it, ſo that the Exchange of the tailed Land is become void; this doth determine the whole Exchange, for when an Exchange becometh void in part, it becometh void in all, and until it be avoided it is good for all. As if one be ſeiſed of White-acre, and he exchange White-acre and Black-acre (which is none of his) with another for two other Acres, this ſhall continue for a good Exchange, and not be avoided until he that hath right to Black-acre doth evict him that hath it in exchange, *Broo. Exchange* 8. *Perk. ſect.* 297.

If an Exchange be made by Tenant in Tail, and his iſſue after his death wave the poſſeſſion of all or part of the Land taken in Exchange, and diſagree to the Exchange, hereby the whole Exchange is determined. So if the Wife after the Husbands death, the Infant at his full age, or the Heir of him that is *de non ſane memorie* diſagree to the Exchange of the Husband, the Infant, or him that is *de non ſane memorie*, hereby the whole Exchange is determined, and no ſubſequent Agreement can make it good again, *Co.* 4. 122. *Perk. ſect.* 296. 294. 290. 298.

Parol Indenture Grant

If two do made an Exchange by word of mouth, and after before either of them enter, they make Indentures of the Lands exchanged, and grant the ſame from one to another; it ſeems hereby the nature of the Exchange is changed, and the Exchange determined, 15 *Ed.* 4. 3.

7. Who may take advantage of a void or avoidable *Exchange*, or not. and when.
Infant.
Tenant in Tail.
Husband and Wife.
Home de non ſane memorie.

The parties themſelves, and all privies and ſtrangers for the moſt part may take advantage of ſuch Exchanges as are void for the defects before-named; but when the Exchange is onely voidable, *contrà*. And therefore when an Exchange is made by an Infant; the Infant himſelf at his full age, or his Heir, and none other may avoid it: And when an Exchange is made by a Tenant in Tail, the Iſſue in Tail after the death of his Anceſtor, and none other may avoid it. And when an Exchange is made by the Husband, or Husband and Wife of the Wives Land, the Wife after the Husbands death, or Heir of the Wife after her death, and none other may avoid it. And when an Exchange is made by a man of *non ſane memorie*, his Heir after his death and

and none other may avoid it. But in all theſe caſes of Infant, Tenant in Tail, Woman Covert, and a man *de non ſane memorie*, and where Lands are recovered by an elder Title, the other party may not enter and avoid the Exchange until the Infant, Iſſue in Tail, Woman, or Heir of him that is *de non ſane memorie*, or him that doth loſe the Land, by an elder Title, doth firſt enter, *Perk. Sect.* 285. *Co.* 1. 105. *Dyer* 285. *Perk. Sect.* 290. 294. 298. *Co.* 1. 98.

If an Infant exchange Lands, and after at his full age occupy the Lands taken in Exchange for his own Lands, hereby the Exchange is made good. So if Tenant in Tail exchange his intailed Lands with another, and after his death the iſſue occupy the Lands taken in exchange by his Anceſtor, hereby the Exchange is made good for the life of the iſſue in tail. So if the Husband and Wife exchange the Lands of the Wife for other Land, and ſhe after her Husbands death agree to it, and enter into and agree to the Lands taken in Exchange, hereby the Exchange is made good: But if the Husband alone make an Exchange of his Wives Land, and ſhe after his death agree to this, and enter into the Land, it ſeems this will not make the Exchange good. And if a man ſeiſed of Land in right of his Wife in Fee thereof Infeoff a ſtranger, and take an eſtate back again to him and his Wife, and a third perſon in Fee, and they three joyn in exchange of the ſame Land in Fee for other Lands to a ſtranger in Fee, and the Exchange is executed, and the Husband dieth, and ſhe doth occupy the Land taken in exchange with the other third perſon, hereby the Exchange is made good. If a man *de non ſane memorie* make an Exchange, and his Heir after his death enter into the Land taken by his Anceſtor in Exchange, and agree to the Exchange, hereby the Exchange is made good. And in all theſe caſes, when the Exchange is once by Agreement made good, it can never by any ſubſequent diſagreement be afterwards made void. *Co. ſuper Littl.* 51. 12 *H.* 4. 11. *Perk. Sect.* 290. 294. *Fitz. Exchange* 13. *Perk. Sect.* 291. 279. 293. 298.

81. Where an Exchange voidable at firſt doth become good by matter Ex poſt facto, or not.
Tenant in Tail.
Husband and Wife.

CHAP. LXXIX.

Of Eſtates.

AN Eſtate is, that Title, Time, or Intereſt, that a man hath to Lands or Tenements. *Terms of the Law.*

Sect. 1.
1. *Eſtate*, what.

Eſtates are either of Freehold, that if they continue go to the Heir, or are Chattels that go to the Executor.

The kindes of it.

Eſtates of Freehold, are either Eſtates of Inheritance, or Franck-tenement.

Eſtates of Inheritance, are either Fee-ſimple or Fee-tail. Fee-ſimple is either abſolute and indeterminable, as where Land is given to a man and his Heirs, or it is determinable: And then it is either Expreſs, when it is derived out of an abſolute and pure Eſtate in Fee. As firſt, where it is upon Condition, as in caſe of Mortgage; and this is called Fee-ſimple Conditional: And for this ſee *Condition*. Or ſecondly, it is by Limitation, as where Land is given to *A.* and his Heirs, ſo long as *B.* hath Heirs of his body; this is called Fee-ſimple limited or qualified: And for this ſee *Limitation*. Or elſe they are implicite and derive out of an Eſtate-tail: As where Tenant in Tail doth bargain and ſell his Land by Deed, indented and inrolled, and after levy a Fine of it to the Bargainee and his Heirs, with Proclamations; by this the Bargainee hath an Eſtate in Fee-ſimple ſo long, as the Tenant in Tail hath Heirs of his body.

Heir.
Executor.

V. Condition

V. Limitation

Fee-tail is either General, as where Lands are given to *J. S.* and the Heirs of his body; or Special, as where Land is given to *J. S.* and the Heirs of his body begotten on the body of *J. D.*

Franck-tenement is alſo Expreſs or Implied, Expreſs is where Land is granted to one

Franck Tenant

one and his Heirs, during the life of *J. S.* Or where Tenant for life doth grant his eſtate to another and his Heirs; in theſe caſes the Leſſee or Grantee hath an eſtate of Franck-tenement diſcendible: Or it is Implied, as where Tenant in Tail doth paſs his Land by way of Bargain and Sale, to another and his Heirs; by this the Bargainee hath an eſtate diſcendible, and determinable upon the death of the Tenant in Tail.

Chattels. Eſtates that are called Chattels, and go to Executors, are either Leaſes for years, Leaſes at Will, or at Sufferance; or heretofore Wardſhips *in Capite*, and Knights Service now aboliſhed, *Co.* 10. 97. 4. 30. 82. of *Copihold*, *ſect.* 47. *Plow.* 555, *&c.*

All Eſtates may be Conditional, as well as Fee-ſimples. Some divide Eſtates into Certain, as Fee-ſimple, and for life or years; and Incertain, as Eſtates at Will or Sufferance.

2. *Fee-ſimple*, what: The nature of it. Fee-ſimple is where one hath any Lands or Tenements inheritable by a perpetual Right, to him and his Heirs for ever: And this is of all kinde of Eſtates, the greateſt, largeſt, and moſt excellent; and therefore no Remainder can depend upon this. And he that hath this Eſtate, may give, grant, or charge it by his Deed, or will at his pleaſure. He may make what waſte or ſpoil upon it he pleaſeth; he may charge it in his Heirs hand by any Obligation or Warranty, he ſhall make in his life time. The Wife of him that hath it, will be endowed of a third part of it; the Husband of her that hath ſuch an Eſtate, will be Tenant by the Courteſie. But this Eſtate is forfeitable by Treaſon or Felony. See for all this in *Treaſon*, *Felony*, *Dower*, *Tenant by the Courteſie*, *Heir*, *Littl. f.* 1. *Co. ſuper Littl.* 273. *Dyer* 33. 330. *Perk. ſect.* 276. *Crompt. Jur.* 214, *&c.* To what Execution it ſhall be liable, ſee *Execution*.

Sect. 2. What ſhall be ſaid a *Fee-ſimple*, or not. And how words of Limitation of an Eſtate ſhall be taken. *Expoſition* of *Deed.* For Anſwer hereunto, take theſe things.

1. It is a Rule, that Fee-ſimple is commonly made by a Deed, and by this word (Heirs) and cannot well by Deed be made without it. But in a Will it may be made by other words. And when it is made by Deed, it is commonly made by Livery of Seiſin, and cannot otherwiſe be made; and yet it may be, and ſometimes is made without Deed, without the word Heirs, and without Livery of Seiſin, *Littl.* 1. *Co.* 1. 62. *ſuper Littl.* 22. 94.

2. If Lands be given or granted by Fine, Deed, or Will, in Poſſeſſion, Reverſion, or Remainder, *Plow.* 134. to a man and his Heirs; this is a Fee-ſimple.

3. If Lands be given or granted by Deed, or Fine, or any ſuch like way to *J. S.* and his Heirs Males, or to *J. S.* and his Heirs Females; theſe are Fee-ſimples. But if it were by Will, it would be Eſtates Tail; and ſo if it were the Kings gift, 27 *H.* 8. 27. *Littl. ſect.* 31.

4. If Lands had been given to *J. S. & haredibus*, without the word *Suis*; theſe words make a Fee-ſimple: But if it be to two *& haredibus*, it maketh but an Eſtate for life, 20 *H.* 6. 35.

5. If Lands be given or granted to *J. S.* and to the Heirs of *J. S.* this doth make an Eſtate in Fee-ſimple, 20 *H.* 6. 35.

6. If Land be given or granted to *J. S.* and his right Heirs; this is a Fee-ſimple, *Co.* 2. 91. 33 *H.* 6. 5.

7. If Lands be given or granted to *A.* for life, the Remainder to *B.* for life, the Remainder to the right Heirs of *A.* By this *A.* hath a Fee-ſimple, 40 *Ed.* 3. 9. *Broo. Donee* 55. So if Lands be given or granted to the Wife of *J. S.* for life, after to *J. S.* in Tail, and after to the right Heirs of *J. S.* By this *J. S.* hath a Fee-ſimple, *Co.* 2. 91.

8. If Lands be given or granted to a man and his wife, and the Heirs of them iſſuing, or their Heirs iſſuing; this is a Fee-ſimple, and not a Fee-tail, *Broo. Eſtates* 34.

Leaſe for years Livery & Seiſin

9. If one make a Leaſe of Land to another for twenty years, and that after the twenty years the Leſſee ſhall have it to him and his Heirs by the Rent of ten pound a year; if in this caſe Livery of Seiſin be made upon the Deed, this will be a Fee-ſimple, otherwiſe but a Leaſe for twenty years, *Co. ſuper Littl.* 217.

10. If Lands be given or granted to a Corporation *aggregate* of many; this is a Fee-

Inability of Corporation aggregate & ſole

Fee-ſimple without words of [*Heirs or Succeſſors*] But if it were to a ſole Corporation, as a Biſhop, Parſon, or the like; by this he hath onely an eſtate for life, *Co.* upon *Littl.* 24.

11. If one ſeiſed of Land in Fee, make a gift of it in Tail, or Leaſe for life, the Remainder to the right Heirs Males of the Body of the Donor; it ſeems this Remainder is a Fee-ſimple, and not a Fee-tail, becauſe the Donor cannot make his right Heir to come in as a Purchaſor, unleſs he put the Fee-ſimple out of his perſon, *Dyer* 156.

12. If one by Deed, or Will, give or grant Land to *J. S.* and his Heirs, and if *J. S.* die without Heirs, that *J. D.* ſhall have it to him and his Heirs; by this *J. S.* hath a Fee-ſimple, and *J. D.* no eſtate at all, *Dyer* 4. 33.

13. If one by the firſt part of a Deed, called the Premiſſes give or grant Land to one and his Heirs, and in the *Habendum* ſay, To have and to hold to him for life or years onely, and make Livery of Seiſin upon the Deed; this is a Fee-ſimple, *Co.* 2. 21, 24.

14. By a Will an Eſtate in Fee-ſimple may be made without the word (*Heirs.*) And therefore if one by Will deviſe any Land or Rent, *&c.* to *J. S.* and his Aſſigns for ever, or to *J. S.* for ever, or to *J. S.* paying ten pound to *J. D.* in all theſe caſes there is a Fee-ſimple made, *Co.* 3. 21. 1. 44. 85. *Dyer* 4. 33. *Littl. ſect.* 1.

15. Upon a Partition a Fee-ſimple may be made without the word (*Heirs.*) See *Partition*, *Plow* 134. *Co.* upon *Littl.* 94. 22.

16. If a Grant or Gift, or Deviſe, be of a Reverſion, Common, Rent, or the like things which lie in Grant, there the like words do make the like Eſtate. And then it paſſeth by the Sealing of the Deed without any Livery of Seiſin, *Co.* 2. 21. 24. But for this point, ſee much more in my Book of *Common Aſſurances*, *fol.* 101, 102, 439, 440. *Brownl. Rep.* 1 *part* 47, 49, 167, 169. 2 *part.* 271, 272. Who ſhall take by ſuch an Eſtate, or not, ſee *Diſcent.*

Fee-tail is a kinde of Fee-ſimple, but limited in it ſelf, and cut off from the pure and abſolute Fee, *Terms of the Law.* And this kinde of Eſtate may be made of any Manors, Lands, Tenements, Commons, Rents, Advowſons, Meſnalties, Services, and of ſome Offices and Dignities, as the Offices of a Steward, Bailiff, or Receiver of a Manor; the dignity of a Duke, County, or the like. Alſo Uſes, Offices, and Dignities that concern Land, and certain places; as the Office of the fourth part of the Serjeant; the Office of keeping the Church of our Lady in *Lincoln*; and ſo likewiſe of all other things that favor of the Realty: But an Annuity is not to be Intailed, nor Copihold Land, but by Cuſtom, *Brownl. Rep.* 2 *part.* 42, 43. *Co.* 9. 105. upon *Littl.* 20.

This is the next great Eſtate to a Fee-ſimple; and therefore he that hath this Eſtate, however he cannot give, grant, or charge it by his Deed or his Will, as he may a Fee-ſimple eſtate; for he cannot ſo grant or charge it for longer then his own life: Nor can he make the Land in the hands of his Iſſues liable to his Warranty, or Obligations, or Debts, unleſs it be the Kings debts; yet by a Fine, or Common Recovery, he may diſpoſe his Eſtate and bar his Iſſues, and all the Remainders to come after his own eſtate. And he is not puniſhable for any ſpoil or waſte he doth upon the Land, his Wife ſhall be endowed, and her Husband that hath it, ſhall be Tenant by the Courteſie; and if he commit Felony, he doth not forfeit it; and yet if he commit Treaſon, he forfeits his Land, ſo long as he hath Heirs of his Body, *Weſtm.* 2. *chap.* 1. 5, 6 *Ed.* 6. 11. 32 *H.* 8. 36. *Co.* 6. 40. 7. 41. 10. 39. And ſee the Titles of *Heir*, *Felony*, *Treaſon*, *Recovery*, *Fine*, and *Warranty*.

And to what Execution it will be liable for payment of the Debts of the owner thereof, ſee *Execution*.

3. *Fee-tail*, what. Of what it may be made, or not. Realty The nature of this Eſtate. Kings Debts Waſte Felony Treaſon Vide of Execution *Sect.* 3.

For Anſwer to this Queſtion, theſe things are to be known.

1. If Lands be given or granted to one, and the Heirs Males of his Body, or his Heirs Males of his Body, or to the Heirs Females of his Body, or his Heirs Females of his Body, or to the Heirs Males of his Body begotten, or to one and to his Iſſues Males begotten, or to one, and his Iſſues Females begotten, or to *J. S.* and his

4. What ſhall be ſaid an *Eſtate-tail*, or not. And how words of Limitation ſhall be taken herein.

General Tail. Deed.

his Heirs, if he ſhall have any Heirs of his Fleſh, and if none, that then the Land ſhall Revert, or to *J. S.* and his Heirs, if he have iſſue of his Body, or to *J. S.* and the right Heirs Males of his Body, or to *J. S.* and his Heirs; provided, that if he die without Heir of his Body, that the Land ſhall Revert; or to *J. S.* and the Heirs of his Body iſſuing, the Remainder to *J. B. in forma prædicta.* In all theſe caſes there is, whether it be in a Deed or Will, by theſe words made an Eſtate in Tail in General; and ſo to him in the Remainder, in the laſt caſe, by the words in form aforeſaid, *Lit Sect.* 13, 14, *&c.* 18 *Ed.* 3. 45. 37 *Aſſ.* 15. *Dyer* 156. *Plow.* 540. *Co.* upon *Littl.* 20. 385. 26. And by theſe words *in forma prædicta* any other Eſtate may be made, Adjudge, *Hil.* 17 *Jac. B. R.* And ſo if it be to *J. S.* and his Heirs, To have and to hold to him and the Heirs of his Body; but in this caſe he hath a Fee-ſimple after the Eſtate-tail, 35 *Aſſ.*

2. If Lands be given or granted to *J. S.* and *M.* his Wife, and the Heirs of the Body of the Survivor of them; by this the Survivor hath an Eſtate in General-tail after the others death, *Co.* upon *Littl.* 26.

3. If one give or grant to *J. S.* that if he and the Heirs of his Body be not yearly paid forty ſhillings, that he ſhall diſtrain in the Land of the Grantor; this is an Eſtate-tail of this Rent, *Co* upon *Littl.* 147.

will.

4. If one by Will give Lands to *J. S.* and his Heirs Males, or his Heirs Females; this makes an Eſtate-tail in either of theſe caſes, otherwiſe it is if the words were in a Deed, 27 *H.* 8. 27. 20 *H.* 6. 35.

5. If one Deviſe Land by Will to *J. S.* and his Children; this if he have no Children at the time, will make an Eſtate-tail: But if he have, they will all have Eſtates for their lives joyntly with the Father: And ſo it is if the Land be given to him and his iſſues, *Co.* 6. 17.

6. If one Deviſe to his Wife for life, and after to his Son; and if his Son die without iſſue, having no Son, then that the Land ſhall go to another; this is an Eſtate-tail to him, and the Heirs Males of his Body: So if the words had been, if he die having no Male, Adjudge, *Trin.* 7 *Jac. Co. B. Robinſons* caſe.

7. If one by Will Deviſe Land to *J. S.* *& ſemini ſuo* to his Seed, theſe words do make an Eſtate in Tail. But if it be to him *& ſanguini ſuo*, to his Blood; theſe words make a Fee-ſimple, Adjudge, *Mich.* 40, 41 *Eliz. Downhal* and *Gatesbies* caſe. *Broo. Tail* 21.

8. If one have iſſue three Sons, and Deviſe his Land (to wit) one part to one Son, another to another, another to another in Tail, and that neither of them ſhall ſell his part, but that every one of them ſhall be Heir to the other; this is an Intailed Eſtate: So as if one of them die without iſſue, his part ſhall not Revert, but ſhall go to the other for it is an implied Remainder, *Broo. Deviſe fol.* 38.

Sect. 4. *Tail Special.*

9. If one give or grant Lands to *J. S.* and *M.* his Wife, and the Heirs [or *Heirs Males*, or *Heirs Females*] of their two Bodies begotten; or to the Heirs [or *Heirs Males*, or *Heirs Females*] of the Husband begotten on the Wife, or to *J. S.* and *M.* his Wife, and the Heirs he ſhall beget on the body of his Wife, or to *J. S.* and his Heirs, which he ſhall have by his Wife *M.* or to *J. S.* and *M.* his Wife, and the Heirs of their two Bodies: All theſe Limitations, whether it be by Deed, or Will, make Eſtates in Special Tail, *Littl. Sect.* 13, 14, *&c. Co.* 1. 140.

10. If Lands be given by Deed to *J. S.* and *M.* his Wife, To have and to hold to the uſe of the Husband and Wife, and of the Heirs of their two Bodies, this is an Intail in them; otherwiſe it were if the uſe were limited to a ſtranger, Adjudge, *Hil.* 6 *Car. B. R.*

11. If Lands be given or granted to a Man and Woman unmarried, and the Heirs of their two Bodies; by this they have an Eſtate-tail, *Co.* 1 *part.* 26. 5 *H.* 7. 10. So if Lands be given or granted to the Husband of *M.* and Wife of *K.* and the Heirs of their two Bodies; this is an Eſtate-tail to them, *Co. ſuper Littl. fol.* 20.

12. If

12. If Lands be given to another, and to his Heirs on the Body of ſuch a Woman lawfully begotten; this is an Eſtate in Special Tail, and begotten ſhall be intended begotten by the Donee, *Co.* on *Littl.* 26.

13. Husband and Wife be, and they have iſſue a Son and Daughter, and the Husband die, and Lands are given to the Wife, and the Heirs of her late Husband on her body begotten; by this the Wife hath eſtate for life, and the Son a good Eſtate-tail, and if he die without iſſue, the Daughter ſhall have it, *Co.* upon *Littl.* 26.

14. If Lands be given or granted to the uſe of a man and his wife for their lives, and after to the uſe of their next Iſſue Male to be begotten in Tail, and after to the uſe of the Husband and Wife, and of the Heirs of their two Bodies begotten, they having then no Iſſue Male; in this caſe the Husband and Wife are Tenants in Special Tail executed, and after they have Iſſue Male, they are Tenants for life; the Remainder to the Son in Tail, the Remainder to them in Special Tail, *Co.* upon *Littl.* 28.

15. If Lands be given or granted to a man and his wife, and to one Heir of their Bodies lawfully begotten, and to one Heir of the Body of that Heir onely; this is an Eſtate-tail, but it is for ſo long onely, *Co.* on *Littl.* 22.

16. If Lands be given with ones Daughter or Couſin in Franck-marriage; this is an Eſtate in Special Tail. See for this *Littleton, Sect.* 17. *Co.* upon *Littl.* 21. *Franck-marriage.*

17. If Lands be given by Will to *J. S.* and *M.* his Wife, and the Men-children of their Body begotten, and at this time they have no children, this is an Eſtate-tail, *Co.* 6. 17.

18. If one have iſſue, a Son, and die, and Lands are given to the Son, and the Heirs of the Body of his dead Father; this is a good Eſtate-tail: But it ſeems in this caſe the Son ſhall have it but for life, unleſs he alſo be the Iſſue in Tail to the Father *per formam doni.* So if the gift were to the Father, and the Heirs of the Body of the Son, *Littl. cap.* 30. *Co.* 8. 87. *Dyer* 247. 12 *H.* 4. 1. So if there be Father, Mother, and Son, and the Father die, and the Limitation is by Deed, To the Son and the Heirs of the Body of the Father and Mother; it ſeems this is a good Eſtate-tail, *Littl. Sect.* 352. So if Lands be given or granted to *J. S.* and the Heirs, that he ſhall happen to have of his Wife; this is a good Intail to *J. S.* but the Wife hath nothing in it, 12 *Hen.* 4. 1. So if Lands be given or granted to *J. S.* and the Heirs of the Body of his Wife (ſhe being then dead) engendred; this is a good Eſtate-tail, 12 *H.* 4. 1. 5. What ſhall be ſaid a good manner of Intail, or not.

19. If one Leaſe Land to a Woman ſole for years, and then ſhe take a Husband, and the Leſſor doth releaſe and confirm to them, and the Heirs of his Body, or the Heirs of her Body; theſe are good Eſtates in Tail, 6 *Ed.* 3. 19.

20. If one give or grant Land to *J. S.* and *M.* his Wife, and one Heir of his Body lawfully begotten, and one Heir of that Heir onely; this is a good Intail, 39 *Aſſ. pl.* 20.

21. If one give or grant Land to *J. S.* and *M.* his Wife, and their Heirs, and other Heirs of the ſaid *J. S.* If the ſaid Heirs of the ſaid *J. S.* and *M.* iſſuing ſhall die without Heir *de ſe* (that is) of them, *&c.* this is a good Eſtate-tail, 5 *Hen.* 5. 6.

22. If one give or grant Land to *J. S.* and the Heirs he ſhall beget of his firſt Wife, or the Heirs he ſhall beget of his Wife; theſe are good Eſtates in Tail, albeit there be no Wife at the time. So if it be to *J. S.* and the Heirs of his Fleſh, or the Heirs *de ſe* from him, or to the Heirs that he ſhall happen to have, or that ſhall happen to him, *Co.* 1. 20. *Sect.* 5.

23. If Lands be given or granted to the Husband and Wife, and to the Heirs of the Body of the Husband, the Remainder to the Husband and Wife, and the Heirs of their two Bodies begotten; this Remainder in Special Tail is void, *Co.* upon *Littl.* 28.

24. The words begotten, and to be begotten, do extend to Iſſues begotten before or after.

But for all theſe things, ſee much more in my Book of *Common Aſſurances, fol.* 102, 103, 104, 440, 441, 442.

For Anſwer to this Queſtion, theſe things are to be known.

6. What Acts ſuch a Tenant in Tail may do to Alien or Bar his own Eſtate, or not.

1. Regularly, he that hath this Eſtate can lawfully grant no longer time, but for his own life: And therefore if he grant by way of Bargain and Sale, indented and inrolled more then that as Fee-ſimple or Fee-tail, no more will paſs, but what he may lawfully grant. But if he make ſuch an Eſtate in Fee-ſimple or Fee-tail, by Fine, or Feoffment; this will make a Diſcontinuance, and raiſe another Eſtate, but a tortious one, *Co.* 1. In *Alton Woods* caſe, *Broo. Diſcontinuance* 35.

2. But he that hath an Eſtate-tail of Land, may levy a Fine, or ſuffer a Recovery of it, and by this ſo convey his eſtate, that the Iſſues in Tail and all Remainders may be barred, and a good Eſtate made of the Land to another: And for this ſee *Co.* 9. 140. 3. 50. and *Littl.* 371. and in my Book of *Common Aſſurances, fol.* 41, 42, 43, 44. 24, 25, 26.

3. This Eſtate may be barred by a Lineal or Colateral Warranty and Aſſets, *Co.* upon *Littl.* 371. See for this in my Book of *Common Aſſurances, fol.* 190, 191, 192, *&c.*

4. The Tenant in Tail may make a Leaſe for three lives, or one and twenty years of the Land, ſo uſually let. See 32 *H.* 8. 28. and my Book of *Common Aſſurances, fol.* 277, 278, 279, *&c.*

5. Tenant in Tail of a Copihold Manor, may grant Copihold Eſtates according to the Cuſtom of the Manor, as well as any other man. See my Book of *Copihold.*

Releaſe

6. If another man have Right to his Intailed Land, and he grant a Rent-charge out of the ſame Land to him, for a Releaſe of his Right to the Land; and this will binde the Iſſues in Tail.

Tenant in Tail for Felony forfeited

7. If the Tenant in Tail do commit Treaſon, he doth forfeit his Land Intailed, whether it be in Poſſeſſion, or in Right onely; but otherwiſe it is in the Caſe of Felony. See for this *Co.* upon *Littl.* 372. 392. 34 *H.* 8. 20.

Grant or Recovery

8. But Regularly, no Grant, Gift, or Charge, made or done by a Tenant in Tail, of or upon the Land Intailed, if it be executed by Deed, will binde or be good longer then for the life of the Tenant in Tail, and will not conclude the Iſſues; and yet if Tenant in Tail make a Leaſe for life or years, or grant a Rent-charge out of the Land, and after this he levy a Fine, or ſuffer a Recovery of the Land; this may make good the Leaſe, or Charge for all the time, *Co.* 1. 48. 62. upon *Littl.* 173. 3. 83. 14 *H.* 8. 5.

Tenant in Tail in poſſeſſion & Reverſion

9. If there be Tenant in Tail in Poſſeſſion, the Remainder to another in Tail: in this caſe, he in the Remainder may do for the moſt part, all that he in the Poſſeſſion may do, and it will bar him and his Iſſues when it hapneth, as it will him in the firſt Eſtate, and his Iſſues: But if the Tenant in Tail in Poſſeſſion, ſuffer a Recovery; this will utterly bar and overthrow the Remainder Eſtates, and all that the owners thereof have done upon them. And if both of them make Leaſes of, or Charges upon the Land, the Leaſes and Charges of the Tenant in Tail in Poſſeſſion, ſhall be preferred before the Leaſes and Charges of him in Reverſion or Remainder, *Co.* 1. 61.

Fine not barr to him in Remainder if entry or claim w^thin 5 years

10. If Tenant in Tail levy a Fine with Proclamation, according to the Statute; it is true, this is a Bar to the Eſtate-tail; but it is no Bar to him in Reverſion or Remainder, if he make his Entry or Claim, or bring his Action within five years after the Eſtate-tail ſpent.

Nota

And if a Gift be to the eldeſt Son, and the Heirs of his Body, the Remainder to his Father, and the Heirs of his Body; the Father dieth, the eldeſt Son levieth a Fine with Proclamations, and die without Iſſue; by this the ſecond Son is barred, *Co.* on *Littl.* 372.

Tenant in Tail diſſeiſed

And if Tenant in Tail be diſſeiſed, or have a Right of Action, and the Tenant of the Land levy a Fine with Proclamations, and five years paſs, the Eſtate-tail is barred. See *Diſcontinuance.*

For

For Anſwer to this, take theſe Caſes.

Sect. 6. 7. What perſons ſhall take and inherit by an Intail upon Gift, or not.

1. If the Limitation be to the Heirs Males, then the Heirs Females can never enjoy it. And if it be to the Heirs Females, the Heirs Males ſhall never have it: And therefore if Lands be given to one, and the Heirs Females of his Body, and he have a Son and Daughter; in this caſe his Daughter, and not his Son, ſhall have it, *Co.* on *Littl.* 25. 164. *Littl. ſect.* 21, 22. 9 *H.* 6. 23.

2. And whoſoever will make his Claim as Heir *per formam doni*, to ſuch an Eſtate, he muſt make his Diſcent by ſuch Heirs, as if it be to Heirs Males, he muſt derive his Pedigree by Heirs Males, one after another; and ſo if it be by Heirs Females. And therefore if a Gift be to one, and the Heirs Males of his Body, or to a man and his wife, and the Heirs Males of their Bodies, and he or they hath or have Iſſue a Daughter, who hath Iſſue a Son, and die; in this caſe this Son ſhall not inherit it, becauſe he cannot make his Diſcent by Heirs Males, *Co.* upon *Littl.* 376, 377. And if Lands be given to one and his Heirs Males of his Body, and he hath two Sons, and die, and his eldeſt Son enter, and hath Iſſue a Daughter, and die; in this caſe the eldeſt Sons Daughter ſhall not inherit the Land, but the yongeſt Brother ſhall have it: And yet the Daughter is next Heir at Law, and were it Fee-ſimple, would have it, *Littl. ſect.* 22, 23.

3. If Lands be given to the Husband and Wife, and Heirs of their two Bodies begotten, and they have two Sons, and the eldeſt die, and leave a Daughter; in this caſe, ſhe and not the yongeſt Son, ſhall have it. So if the Limitation be to a man, and the Heirs of his Body iſſuing, and he die and have two Sons, and the eldeſt die, leaving a Daughter; in this caſe, ſhe and not the other Son, ſhall inherit the Land, *Littl. ſect.* 23.

4. If Lands be given to one, and the Heirs Males of his Body, the Remainder to him, and the Heirs Females of his Body, and the Donee hath Iſſue a Son who hath Iſſue a Daughter, who hath Iſſue a Son; in this caſe, the Son is not inheritable to either of theſe Eſtates-tail, but the Land ſhall Revert to the Donor for lack of Heir: For in caſe where there is no Heir to inherit and take *per formam doni*, as when Iſſues fail, then the Land ſhall return to the Donor, or go to him that is to have it after the Eſtate-tail, determined and ſpent, *Co.* upon *Littl.* 25. *Littl. ſect.* 24. And if the King had given Lands to one and his Heirs Males, which is a Fee-ſimple in caſe of a common perſon, and he die without Heirs Males; the Land (as it ſeems) ſhall Revert to the King, *Lovels* caſe.

5. If Lands be given to Husband and Wife, and the Heirs of their two Bodies, or in any ſuch like manner, and the Husband alone levy a Fine, or is attainted of Treaſon or Felony; in this caſe, the Iſſues they have are barred to Claim the Land, for they cannot make themſelves Heir to them both, as he muſt do that will Claim the Land by Inheritance; for the Husbands Blood is corrupted by the Felony, and no man can be Heir to him, *Co.* 9. 138. *Plow.* 351. *Dyer* 332. 351. But ſee more for this in *Diſcent*.

Sect. 7. 8. Tail after Poſſibility of *Iſſue extinct*, what.

An Eſtate-tail after poſſibility of Iſſue extinct, is where Lands are given to a man and his wife in Poſſeſſion or Remainder, and to the Heirs of their two Bodies engendred, or to him and his Heir of the Body of his wife iſſuing, or in any other manner in Special Tail, and one of them die, having no Iſſue between them, or the Iſſue die, living the Father or Mother; ſo that now there is no Iſſue to inherit it *per formam doni*. In theſe caſes he or ſhe that doth ſo ſurvive, hath this Eſtate, and it is called an Eſtate-tail after poſſibility of Iſſue extinct, *Co.* 11. 82. 26 *Hen.* 6. 77. 2 *H* 4. 17. *Co.* 9. 139. 8. 75.

The nature of this Eſtate.

This Eſtate is an Eſtate made by the Act of God, and the Law together, and not *ex proviſione hominis*, doth much reliſh of the nature of an Eſtate-tail, out of which it is derived; and of which, it is the Remain and Reſidue: And therefore as to the qualities of it, it hath more Privileges then any other Eſtate for life hath. For firſt, the Tenant of this Eſtate of Land is not puniſhable in Waſte. Secondly, If he alien the Land, he in Reverſion cannot have a Writ of Entry in *caſu conſimili*. Thirdly, He ſhall not be compelled to Attorn. Fourthly, He ſhall not have need to require aid. Fifthly, No Writ of Intruſion lieth after his death. Sixthly, He may joyn the Miſe in

in a Writ of Right in a ſpecial manner. Seventhly, In an Action brought by or againſt him, he ſhall not be named Tenant for life; and all theſe run in the Privity, for if he grant away his Eſtate, they are all gone: But in reſpect of the Quantity of the Eſtate, this Eſtate hath no privilege above other Eſtates for life. And therefore if a Tenant of Land by this Eſtate, make a Feoffment of the Land; he in Reverſion may enter upon him for the Forfeiture. 2. If the Fee-ſimple, or any greater Eſtate then this diſcend upon him; this Eſtate is drowned. 3. If he be impleaded for the Land, he in Reverſion ſhall be received upon his default. 4. If he exchange his Eſtate with a Tenant for life, it is a good Exchange. 5. A Confirmation by him in Reverſion to him, is good to enlarge his Eſtate, *Co.* upon *Littl.* 28. *Co.* 9. 139. 10 *H.* 6. 1. 45 *Ed.* 3. 22: *Littl. ſect.* 534.

For Anſwer to this Queſtion, take theſe caſes.

9. How a Limitation to divers perſons, and of divers Eſtates ſhall be taken; and what manner of Eſtates every one ſhall have.

1. If a Grant or Gift be to a Husband and Wife, and a third perſon; and to the Heirs of the Husband, and the third perſon: By this the Wife hath onely an Eſtate for life in a Moyety with her Husband, and the Husband and the third perſon, Eſtates in Fee, in Joyntenancy of the reſt by Moyeties, *Dyer* 203.

2. If Lands be given to a man and his wife, and the Heirs of the Body of the Husband; by this the Husband hath an Eſtate in General Tail, and his Wife but an Eſtate for life, *Littl. Sect.* 27.

3. If Lands be given to two Siſters [*or two Brothers, or to a Brother and a Siſter*] and to the Heirs of their Bodies begotten; by this they ſhall have Joynt-Eſtates for lives; ſo that the Survivor will have all for his life, and after both their deaths, their Heirs have ſeveral Inheritances (that is) Eſtates in General Tail by Moyeties in common one with another. So if Lands be given to Father and Son, and the Heirs of their two Bodies engendred, or to two men that have wives, and their wives and the Heirs of their Bodies engendred; in theſe caſes they have Joynt-Eſtates for lives, and after the one Husband and Wife ſhall have one half, and the other Husband and Wife the other half of the Land in Common. So if it be to a man and two women in Tail; by this all three of them ſhall take ſeverally; ſo in other like caſes, *Co.* 1. 140. 8. 87. 10. 50. 8 *Aſſ.* 33. *Dyer* 145. 7 *H.* 4. 16, *Co.* on *Littl.* 25.

4. If Lands be given in Tail in the Premiſſes of a Deed, To have and to hold to the Donee and his Heirs; by this Limitation there is made an Eſtate-tail firſt, and a Fee-ſimple upon it: But otherwiſe it is where the words of Fee-ſimple be in the Premiſſes, and the words of Intail in the *Habendum*, for then there is made by it onely an Eſtate-tail according to the *Habendum*, and no Fee-ſimple Expectant upon it, *Co.* 8. 154. *Dyer* 126. 45 *Ed.* 3. 19.

5. If Lands be given to a man and the Heirs he ſhall beget upon the Body of his Wife; by this he hath an Eſtate-tail, but ſhe hath no Eſtate at all. But otherwiſe it is where it is a Gift to a man and his wife, and to the Heirs they ſhall beget, *&c.* So if Lands be given to the Husband and Wife, and to the Heirs of the Wife upon her Body, begotten by the Husband; by this the Husband hath but an Eſtate for life, and the Wife an Eſtate in Special Tail. So if Lands be given to Husband and Wife, and the Heirs of the Husband, which he ſhall have by his Wife; by this the Wife hath onely an Eſtate for life, and the Husband an Eſtate in Tail, *Littl. ſect.* 26, 28, 29. *Co.* on *Littl.* 26.

6. If Lands be given to a married man, and the wife of another man, and the Heirs of their two Bodies, or in any ſuch wiſe; by this is made and executed a good Eſtate-tail preſently, and whiles the Husband and Wife of the Donees live, they hold for life; and if they happen to die, and the Donees to marry and have Iſſues, then their Iſſues ſhall have it according to the Intail, 15 *H.* 7. 10.

7. If a Gift be made to a man, and to ſuch a woman as ſhall after be his wife in Tail; this may be a good Eſtate-tail, but the Wife whom he doth after marry, hath nothing by it: But if a Feoffment be made to the uſe of a man, and the wife he ſhall after marry, and after he take a wife; in this caſe the Wife may happily have a good Eſtate joyntly with her Husband, *Co.* 1. 101. *Dyer* 340.

8. If Lands be given to two men, To have and to hold to the one for life, the Remainder to the other in Fee; this is good, and ſhall enure according to the Deed, *Dyer* 126. 50.

9. If

9. If one by his Will Deviſe his Land to his two Daughters, and the Heirs of their Body engendred; by this they are Joyntenants in Tail, and if one of them die before Partition made, the Survivor will have all the Land, *Dyer* 350. 20.

10. And ſo it is of Remainders, as it is of Poſſeſſions: For if a Remainder be limited to two Brothers in Tail, they ſhall have ſeveral Inheritances by it, *Dyer* 299. And if a Remainder be given by Will to two Siſters, and the Heirs of their two Bodies to be equally divided; by this they have ſeveral Eſtates-tail, and ſhall hold the Land in Common, *Co.* 10. 37. See more of this in my Book of *Common Aſſurances, fol.* 111; 112.

10. *Eſtate for life, what.*

An Eſtate for life, is where one hath any thing for his own, or for anothers life: This is but a Particular Eſtate derived out of the Inheritance, upon which a Reverſion or Remainder may depend. And this ſome call a Franck-tenement, and is an Eſtate in ſome caſes diſcendible to the Heir; as when Lands are granted to *J. S.* and his Heirs, for the life of *J. D.* In this caſe if *J. S.* die, his Heir ſhall have it, during the life of *J. D.* And this is called a Franck-tenement diſcendible, whereas in theſe and ſuch like caſes of Grants for anothers life, if it be not ſo contrived to be made to the Heirs of the Grantee after his death, it will be an Occupant, and he that can firſt get into the Poſſeſſion, after the death of the Tenant for life, ſhall have the Eſtate: And this Eſtate is next in order to an Eſtate-tail, and may be made without Deed, but not without Livery of Seiſin.

The nature of it.

He that hath this Eſtate may charge or grant it, during the time, for which he hath it, and not longer: He may have Fire-boot, Plough-boot, Houſe-boot, *&c.* (ſee *Houſe-boot.*) He cannot do Waſte upon it, and if he make any Feoffment of the Land a man holdeth for life, he doth forfeit it; his Wife that hath this Eſtate, is not to be endowed of the thirds, nor her Husband that hath it, to be Tenant by the Courteſie, no, though it be an Eſtate diſcendible to his Heirs. It will be liable to Execution for the Debt of the owner, but it muſt be by Extent onely, for the Sheriff cannot ſell it, as he may a Leaſe for years. It will not be forfeited by an Outlawry againſt the owner, as a Leaſe for years will be: But if the owner commit Felony, or be Outlawed for Felony; by this it will be forfeited. Nor is it forfeited by *Petit Larceny*, nor upon a *Fugam fecit*, nor in caſe of Premunire, nor for departing the Realm without Licence, *Co.* 1. 140. *Dyer* 253. *Finches Ley* 22. 39 *Edw.* 3. 25. See the Titles in their places; and ſee in my Book of *Common Aſſurances, chap.* 14.

Houſe-boot, Hedge-boot, Fire-boot, &c.

For this matter, take theſe caſes.

What ſhall be ſaid an Eſtate for life, and how words of Limitation herein ſhall be taken.

1. If a Gift, Grant, or Feoffment, be made to another by Deed in Fee-ſimple, or Fee-tail, in the intent of it; but there are no words [*Heirs, or Heirs Males*] or other words equivalent in the Deed, ſuch as are in the caſes above; this will make onely an Eſtate for life. So if one bargain and ſell to another by Deed indented and inrolled, and the word [*Heirs*] be omitted; by this no Eſtate but for life onely is made, 20 *H.* 6. 35. *Co.* 1. 100.

2. If Lands be given or granted to two *& heredibus*, without the word [*Suis*;] by this they take Eſtates for their two lives onely, 20 *H.* 6. 35.

3. If Lands be given or granted by Deed, To have and to hold to him or his Heirs, in the diſ-junctive; by this he hath onely an Eſtate for life, *Co.* 5. 112.

4. If a Tenant in Fee-ſimple, or Fee-tail, grant all his Eſtate without the word Heirs; it ſeems this is but an Eſtate for life, in the firſt caſe of the Grantee, in the laſt of the Grantor, *Littl.* 1. *Plow.* 562.

5. If one give or grant to *J. S.* and to his Succeſſors; this is but for life: But this grant to a Body Politick, will make a Fee-ſimple, *Co.* 1. *part.* 8.

6. If one give or grant to *J. S. & ſemini ſuo*, or to *J. S. exitibus, vel prolibus de corpore ſuo*, or the like; by this is granted no more but an Eſtate for life, *Co.* upon *Littl.* 20.

7. If one give or grant to *J. S.* and his Heir (in the ſingular number) by this he hath onely an Eſtate for life, *Co.* on *Littl.* 8.

8. If Land be granted to *A.* and *B.* for their lives, to the uſe of *C.* for his life; this is an Eſtate for the life of *C.* if *A.* and *B.* ſo long live, *Dyer* 186.

9. If one have a Son and Daughter, and dieth, and Lands be given to the Daughter,

and the Heirs Females of the Body of her Father; by this the Daughter hath onely an Eſtate for life, *Co.* upon *Littl.* 24.

10. If one give or grant to a Woman *dum ſola fuit*, or *durante viduitate*, or *quamdiu ſe bene geſſerit*, or to *J. S.* and *M.* his Wife, during the Coverture, or as long as the Grantee ſhall dwell in ſuch a houſe, or ſo long as he pay ten pound a year, or until he be promoted to a Benefice, or for any ſuch incertain time: In theſe and all ſuch like caſes, if it be of Land, the Leſſee hath onely an Eſtate for life, when Livery of Seiſin is made. But if it be of a Rent, or any ſuch like thing that lieth in Grant, there by the Sealing, and Delivery of the Deed he hath the Eſtate for life. And ſo it is to be underſtood of moſt of the Caſes here, *Co.* on *Littl.* 42. 234, 238.

11. If one grant Land worth twenty pound a year to *J. S.* till one hundred pound be paid; by this, if Livery of Seiſin be made, there paſſeth an Eſtate for the life of *J. S.* determinable upon the payment of the one hundred pound. But if it be of a thing Certain, as of a Rent of five pound a year till twenty pound paid; this were a Leaſe for four years, *Co.* on *Littl.* 42.

12. If one ſeiſed in Fee of Land, make a Leaſe to another for life, and doth not ſay for what life; this ſhall be taken for the life of the Leſſee. But if he be ſeiſed of an Eſtate-tail, it ſhall be taken for the life of the Leſſor: And ſo if he have onely an Eſtate for his own life, *Co.* on *Littl.* 42. 183.

13. If one Deviſe by Will to *A.* for life, the Remainder to *B.* and *C.* his Wife, and after their deceaſe to their Children, and they have Children at the time of the Deviſe; by this *B.* and *C.* ſhall take for their lives, and their Children they then had ſhall have it for their lives after them, *Co.* 6. 16.

14. If a Gift or Grant be to *J. S.* and doth not ſay for what time, nor doth limit any Eſtate; this makes an Eſtate for life of the Grantee, *Co.* 85. *Dyer* 300. *Co.* 8. 96.

15. If one have a Leaſe for anothers life, and he in Reverſion confirm to him for his own life; by this he hath for his own life, *D. & St.* 20.

16. If one grant to *J. S.* and to his Heirs and Aſſigns for his life, and for one year over; this is but an Eſtate for his life, *Co.* 5. 111. 39 *Ed.* 3. 25.

17. If a Grant be to two *& ſuis*, or to two *& aſſignatis ſuis*; this is but an Eſtate for life, *Co.* 4. 29.

18. If one grant to *J. S.* and *M.* his Wife, and to the men-children of their Bodies begotten; this maketh an Eſtate for life to the Parents, and thoſe children they then have, *Co.* 6. 17.

19. If one grant his Land to another to pay his debts, and ſay not for what time; this is an Eſtate for life of the Grantee, *Co.* 8. 96.

20. If Tenant for life be the Remainder to an Infant, and they two joyn in a Fine to a ſtranger of this Land, and after the Infant doth Reverſe it for Minority; yet the ſtranger hath an Eſtate left, during the life of Tenant for life, *Co.* 1. 76.

21. If a Leaſe be made to *A.* for life, the Remainder to *B.* in Tail, the Remainder to *C. in forma prædicta*; by this it is ſaid *C.* hath onely an Eſtate for life, *Dyer* 15. 81. *Co.* on *Littl.* 42.

22. If a Feoffment be made to two *& hæredibus ſuis*, to the uſe of the Feoffer and *J. S.* and ſay no more; it ſeems that by this the Feoffor and *J. S.* have onely Eſtates for their lives, *Dyer* 169. *Ch. Inſt. Trin.* 14 *Jac. B. R.* And ſo of other Declarations of Uſes, *Co.* on *Littl.* 42.

23. If one grant that if *A.* be not paid yearly for his life twenty pound a year, he ſhall diſtrain for it; this is a good Grant of it for life, *Co.* on *Littl.* 147. And if one grant an Annuity to another and his Heirs; but the Grantor doth not ſay for him and his Heirs, nor is it chargable upon any Land; it is ſaid this ſhall be taken for a Grant onely for the life of the Grantor, 21 *H.* 7. 4. *Dyer* 344.

24. If one grant to *J. S.* Common in his Land, when he doth put in his own Beaſts there, or Eſtovers when he comes to his Manor; this is for life of the Grantee, 17 *Aſſ. pl.* 7.

11. *Dower, what.* Dower hath two ſignifications, Firſt, That which the Wife bringeth to her Husband in marriage: Secondly, (and ſo it is moſt commonly in this place taken) A Portion

Portion of the Husbands Lands given to the Wife, after his death, for the Term of her life; which is in five manners, 1. By the Common Law, and then it is a third part of all his Fee-ſimple Land. 2. By Cuſtom, and then it is a Moyety, or all his Land, as the Cuſtom is. 3. *Ex aſſenſu patris*, and then it is ſo, as is agreed upon. 4. *Ad oſtium Eccleſiæ*, and then it is of as much as is agreed. 5. *De la pluis Beale*, and then it is of a third part onely. *Terms of the Law. Littleton, Tit. Dower.*

Dower by the Common Law is a third part of all the Fee-ſimple, and Fee-tail Lands of the Husband, which the Law doth give to the Wife after her Husbands death, for her livelihood. And this ſhe may not enter, and take her ſelf; but the Heir, or he that hath the Land, may aſſign it to her by Deed in the Country: Or if it be not done, but ſhe be denied, or delayed, and ſhe have no part of it, ſhe may have her Writ of Dower, *unde nihil habet*; or if ſhe have received part ſhe may have her Writ of Right, of Dower, for the reſt: And by theſe means ſhe ſhall recover her Right. The kindes of it.

Dower by Cuſtom, is a Portion that the Wife is to have of the Husbands Lands after his death, by the Cuſtom of ſome place; as in *Burrough-Engliſh*, all, in *Gavelkinde*, a Moyety; and this ſhe muſt take and enter to, according to the Cuſtom of the place, *Perk. ſect.* 435, 436.

Dower *ad oſtium Eccleſiæ*, is where one of full age is ſeiſed in Fee-ſimple, and about to be married, when he cometh to the door of the Church to be married, doth thereafter affiance between them, endow his Wife of all, or part of his Land, and openly ſhew the quantity and certainty of it: In this caſe the Wife after the death of her Husband, may enter into the ſaid quantity of Land aſſigned to her without any other Aſſignment, *Perk. ſect.* 437, *&c.* *Sect.* 10. *Ad oſtium Eccleſiæ*, what.

Dower *ex aſſenſu patris*, is where the Father is ſeiſed of Tenements in Fee; and his Son and Heir apparent (when he is to be married by a Deed of his Fathers conſent alſo) endow his Wife at the door of the Church, of part of his Fathers Lands, and declare the certain quantities: In this caſe alſo, the Wife after the death of her Husband, may enter into the Land aſſigned to her, without any other Aſſignment, *Perk. ſect.* 441. *Ex aſſenſu Patris*, what.

Dower *de la pluis beale*, is in caſe where a man ſeiſed of twenty Acres, ten in Capite, and ten in ſoccage, held of ſeveral Lords, and hath iſſue a Son, within age and die, and the Lord of whom the Land *in capite* is held, enter into that Land as Gardein, and the Mother of the Iſſue enter into the reſt as Gardein in Soccage; and ſhe brings Dower againſt the Gardein in Chivalry. In this caſe the Gardein in Chivalry may ſhew all this matter, and pray that Judgment may be given, that ſhe ſhall endow her ſelf *De la pluis beale*, *i. e.* that ſhe may take her whole Dower out of that Land; and after ſuch a Judgment given, ſhe may in the preſence of her Neighbors, endow her ſelf accordingly; and this ſhe ſhall hold for her life, *Perk. ſect.* 450. *De la pluis Beale*, what.

And if in the caſes before of Dower *Ex aſſenſu patris, & ad oſtium eccleſiæ*, the Wife after the death of the Husband do enter into the Land aſſigned her, and ſo agree to it, then ſhe is concluded to claim any other Dower by the Common Law of any of the Lands of her Husband; but if ſhe will refuſe ſuch Dower, then ſhe may be endowed according to the courſe of the Common Law, *Engliſh Lawyer fol.* 91.

In all caſes where the Wife ſhall be endowed, theſe things muſt neceſſarily concur. 12. In what caſe, and of what Inheritance and Poſſeſſion of the Husband, the Wife ſhall have Dower after the Husbands death, or not.

1. There muſt be a good marriage.

2. There muſt be a Seiſin or Poſſeſſion in Deed, or in Law in the Husband, of that thing whereof ſhe demandeth Dower.

3. The Franck-tenement and Inheritance muſt be *Simul* and *Semel* in the Husband, at ſome time, during his life.

4. The Husband muſt be dead when ſhe doth demand her Dower.

5. The Husband muſt be ſeiſed of an Eſtate of Fee-ſimple or Fee-tail, at the leaſt, *Plow.* 373. *Co.* 10. 49.

If

If the Husband be Sole ſeiſed, during the Coverture of any Lands or Tenements in Fee-ſimple, or of ſuch an Eſtate-tail, as by poſſibility the iſſue had between the Husband and Wife, during the Coverture, might or may inherit it, though they have no iſſue, yet the Wife ſhall be endowed, and though the Eſtate-tail be determined, yet the Wife ſhall be endowed, *Co.* 1 *part.* upon *Littl.* 35. *Co.* 8. 34. *Perk. Sect.* 302.

Per metas & Bundas.

If the Husband be ſeiſed of Land in Common, with others, the Wife ſhall be endowed of it; but here the Judgment ſhall not be, That ſhe ſhall hold *per metas & bundas* in ſeveral, as in other caſes upon the Writ of Dower, but ſhe ſhall hold in Common her part, with the Tenants in Common, *F. N. B.* 149.

If one ſeiſed in Fee, make a Leaſe for years, and after take a Wife, and die, ſhe ſhall be endowed; but ſhe muſt ſtay the end of the Leaſe for Execution. If a Leaſe be made for years, the Remainder to *B.* for life, and after to the right Heirs of *B.* and after *B.* takes a Wife, and dies, during the years; in this caſe his Wife ſhall have Dower, but ſhe may not injoy it, till the Leaſe for years be ended. So if a Leaſe be made to *J. S.* for life the remained to a ſtranger for years, the Remainder to *J. S.* in Fee, and *J. S.* take a Wife, his Wife ſhall have Dower; but ſhe cannot have the Execution of it, till the Leaſe for years be ended; and if there be any Rent reſerved, it ſeems ſhe ſhall have her thirds of that in the *interim.*

If Lands be given to *A.* and *B.* in Special Tail, the Remainder to *A.* in General Tail; and his Wife die without iſſue, and he take a ſecond Wife, and die, this ſecond Wife ſhall be endowed, *Broo.* 372. *Co.* upon *Littl.* 321. *Co.* 10. 46. *Perk. Sect.* 343.

Election.

If the Husband after the Coverture exchange Land, his Wife may have Dower of the Land given, or the Land taken in exchange at her Election, but ſhe cannot have Dower out of both. So if a Lord purchaſe the Tenancy after the Coverture, ſhe may chuſe to be endowed of the Tenancy or Signiory: So if a Husband were ſeiſed in Fee of a Rent, and after purchaſe the Land out of which the Rent did iſſue, ſhe may chuſe to have her Dower out of the Land, or out of the Rent, *F. N. B.* 149. *Perk.* 319.

If a Tenant in Tail that hath a Wife, die without iſſue, ſo that the Land Revert to the Donor; yet his Wife ſhall be endowed, *F. N. B.* 149 *Co.* 8. 34.

If one Deviſe his Land for payment of his Debts, or until his Debts be paid, to his Executors, and die, and his Heir take a Wife, and after the Debts are paid, or the Heir die before the Debts: After the Debts paid, ſhe ſhall recover and have her Dower in this Land, *Co.* 8. 96. 36.

Sect. 11.

If a Father die ſeiſed of Land, and his Son having a Wife die before any actual Entry made into the Land, yet the Wife ſhall be endowed upon this poſſeſſion in Law. And ſo is the Law, if the Father be a Diſſeiſor and die ſeiſed, and his Son enter not, 4 *H.* 7. 1. 1 *H.* 7. 17. *Littl. Sect.* 448. 681.

If I make a Feoffment to *J. S.* on Condition, That if I pay him ten pound ſuch a day, the Feoffment to be void, and *J. S.* take a Wife, and I fail to pay the money at the day; in this caſe his Wife will have Dower, and *J. S.* and *J.* cannot defeat her of it by Agreement, to accept the money after, *Perk. Sect.* 392. *Kitch.* 161.

If the Kings Tenant die, and his Son die before any Entry made, or Livery ſued, yet the Wife of the Son ſhall be endowed; and ſo where the Son entreth and dieth before Livery ſued, and Office found, and ſo of any Seiſon in Law, for which *vide Franck-tenement*, 1 *H.* 7. 17. 17 *Ed.* 2. 17.

If one give Lands to *J. S.* and the Heirs, that he ſhall beget on the Body of *M. S.* his Wife, and he die, his Wife ſhall be endowed, *Littl. ſect.* 53.

If Lands be given to *A.* and to the right Heirs of *A.* and *A.* take a Wife, and die, ſhe ſhall be endowed of this Land, *Perk.* 337, 338.

If a Lord take a Wife, and after his Tenant die without Heir, ſo that the Land Eſcheat, and a ſtranger abate, and the Lord die before this Entry; yet it ſeems his Wife ſhall be endowed of the Tenancy, becauſe ſhe hath a poſſeſſion in Law:

So

So if a Leaſe be made for life, the Remainder to *J. S.* in Fee, and *J. S.* take a Wife, and the Leſſee for life die, and a ſtranger enter, and after *J. S.* die, it ſeems his Wife ſhall be endowed, *Perk. ſect.* 372. 871.

If a Tenant in Tail Covenant to ſtand ſeiſed to the uſe of himſelf for life, with the Remainder over, and the Tenant in Tail die; his Wife ſhall be endowed notwithſtanding this Covenant for *Nihil operatur*, *Co.* 2. 52.

If a Feoffment be made on Condition to reinfeoff, and the Feoffee take a Wife, and die, ſhe ſhall have Dower till the Reinfeoffment be made, or an Entry for Forfeiture: So if a Tenant in Tail grant *Totum ſtatum ſuum*, or bargain and ſell his Land, and the Grantee or Bargainee, their Wives ſhall hold their Dower till the Iſſue in Tail out them. So of other Defeaſible Eſtates, *Co.* 2. 59. 384. 96. *Perk. Sect.* 420. 303.

If there be a Lord and a Feme-tenant, and the Lord inter-marry with his Tenant, and he die, the Wife ſhall be endowed of a third part of the Services by way of a Retainer.

A. is a Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *A.* in Fee, *A.* Bargain and ſell the Land to *C.* and his Heirs; now in this caſe the Wife of the Bargainee ſhall have Dower determinable upon the death of the Tenant in Tail, *Co.* 10. 96.

If a Tenant in Tail commit Treaſon, and the King have his Land, and grant it away, and the Grantee die, his Wife will have Dower; and ſo the Wives of the Heirs, as long as any Iſſue live of the Tenants in Tail, *Plow.* 557.

If the Tenant after the Coverture alien in Mortmain, and the Lord enter, and then the Tenant die, his Wife ſhall be endowed of the Tenancy. *Perk. Sect.* 390.

So alſo it ſeems, if the Tenant ceſſe, and the Lord by a Ceſſavit recover the Tenancy, and the Tenant die; yet the Wife of the Tenant ſhall be endowed. *Idem.*

If a Rent be granted to one in Fee, and the Grantee accept the grant, and take a Wife, and at the day of payment the Tenant of the Land tender the Rent, and the Grantee refuſe it, and doth not take Seiſin, and die; yet his Wife (as it ſeems) ſhall be endowed of it, 11 *H.* 4. 88. *Perk. Sect.* 373.

If the Baron be ſeiſed of a Rent, and after Releaſe it to the *Terre* Tenant; yet the Wife ſhall have her Dower out of it, *Co.* 7. 38.

If a Man alien the Land, he is ſeiſed of, after he hath a Wife, and after Diſſeiſe the Alienee, and the Alienee bring an Aſſiſe and recover the Land; in this caſe the Wife ſhall notwithſtanding be endowed of the Poſſeſſion that her Husband had before the Alienation, 1 *H.* 7. 17.

If there be Grand-father, Father and Son, and the Grand-father hold of the King, and the Father take a Wife, and the Grand-father die, and the Father have Iſſue, and die before Office found, or any Entry made, and after an Office is found of this; in this caſe the Wife of the Father ſhall be endowed, Statute of 1 *H.* 7. 17.

If a Rent be diſcended to the Husband, and he die before any day of payment happen; ſo that he is never ſeiſed of it, yet his Wife ſhall be endowed of this Rent, *Idem.*

But if ſhe were onely his Concubine, or in the Caſe there were never any good marriage: If the Husband had never any poſſeſſion in Fait, or in Law; if the Franck-tenement were never *ſimul & ſemel* in the Husband, during the Coverture; if the Baron be not yet dead; if either of theſe things be in the caſe, the Wife ſhall not be endowed. And the Exception, That ſhe was not married, is called *Concubinage*. For all which ſee the *Examples*, *Plow.* 373. *Co.* 10. 49. *Dyer* 224.

If a Tenant in Special Tail, (*i. e.*) to him and his wife, and the Heirs of her Body begotten by him, and ſhe die, and he take another wife and die; this ſecond wife ſhall have no Dower out of this Land. See *Co.* 8. 38. *Dyer* 41.

If the Husband held his Land in Joyntenancy with another, and die, his wife ſhall have no Dower of this Land, *Co.*3. 27. *Littl. Sect.* 45.

So if a Tenant in General Tail make a Feoffment, and take back an Eſtate to him and his wife, and the Heirs of their two Bodies, and they have iſſue, and the wife dieth, and he taketh another wife, and dieth; in this caſe the wife ſhall not be endowed, *Dyer* 41. 41 *Ed.*3.30.

Sect. 14. If a Tenant in Tail diſcontinue in Fee, and after take a wife, and then the Diſcontinuor maketh Feoffment in Fee to the Diſcontinuee, or is diſſeiſed by the Diſcontinuee and dieth; in this caſe the wife of the Tenant in Tail ſhall not have Dower. *F. N. B.* 149. *Dyer* 41.

If one make a Gift in Tail, rendring Rent to him and his Heirs, and after take a wife and die, and after his death the Tenant in Tail, dieth without Iſſue, and the Land doth Revert; in this caſe the wife ſhall not have Dower either of the Rent, for that is determined; or of the Land, for her Husband was not ſeiſed of it, during the Coverture.

And ſo it is, if the Gift in Tail be on Condition, and after the Donors death, the Condition is broken; neither ſhould ſhe have had Dower of the Rent, if the Eſtate had continued. *Perk. Sect.*317. *Co.* upon *Littl.* 1 *part. fol.*32.

If a man make a Leaſe for life, rendring Rent, and after take a wife, and die, and after the Leſſee for life die; in this caſe the wife ſhall have no Dower, either of the Land, or of the Rent: So neither could ſhe have had, if the Tenant for life had lived Dower of the Rent or Reverſion, *Co.*8. 96.

If a man Leaſe for life, rendring Rent, and after take a wife, and die; his wife ſhall not be endowed of this Rent, neither ſhall ſhe ever have any Dower out of the Land, if the Tenant for life do not die, during her life, *Bro.* 372.

Sect. 15. If one be diſſeiſed, and after take a wife, and die before Entry, his wife ſhall not be endowed of that Land.

So if one die ſeiſed, and a ſtranger abate, and the Heir die before his re-entry, his wife ſhall not be endowed.

So if a Tenant ceaſe in doing his Services, or commit Waſte, and the Lord die before he recover the Land; his wife ſhall not be endowed of this Land.

So upon a Condition broken, if the Husband die before he have entred, his wife ſhall not have any Dower of this Land.

So if one Exchange his Land with another, for other Land, and then take a wife, and die before any Entry made into the Land, taken by him in Exchange; here the wife ſhall not have Dower of this Land.

So if a man have recovered Land in any Real Action, and before any Entry or Execution he die; here his wife ſhall never be endowed of this Land, *Broo.* 115. *Littl. Sect.* 53. *Co.* 2. 59. 56. *Perk. Sect.* 366, 367. 1 *Hen.*7. 17. *Co.* 6. 34. 21 *Ed.*4. 60.

If the Husband be Tenant for life, the Remainder for life to another, the Remainder in Fee to the Husband, and he die; here in this caſe the wife ſhall not have Dower; for the Franck-tenement and Inheritance is divided by the Intervenient Eſtate for life, *Co.*1. 112.

If a Leaſe be made to one and his Heirs, during the life of another, and this Leſſee die; his wife ſhall not be endowed upon ſuch an Eſtate of her Husband, for this is no greater Eſtate, then an Eſtate for life.

So the wife of a Leſſee for life or years, though a thouſand years, ſhall not be endowed, *Plow.*556. *Co.*10, 52.

If Lands be conveyed to *A.* and *B.* and the Heirs of *A.* and *A.* take a wife, and die, his wife ſhall not have any Dower out of this Land, *Bro.* 115.

If the Husbands Eſtate be ſuch, as by no poſſibility, the Iſſue begotten by him on his wife, may inherit as Heir to them; in this caſe the wife ſhall not have Dower: As if one give Lands to one, and the Heirs he ſhall beget on his preſent wife, and ſhe die and he take another wife; ſhe ſhall not have Dower of this Land, *Littl. Sect.* 53.

The

The Wife of a Copiholder in Fee, or in Tail, ſhall not have Dower, unleſs it be by a Special Cuſtom of the place, *Co.* 4. 21.

If a Copihold become void after the Coverture, and fall into the Lords, her Husbands hands, and he grant a new Eſtate, according to the Cuſtom of his Manor; in this caſe the wife ſhall have no Dower out of this Copihold; and this becauſe of the Cuſtom, which is Paramount, her Title, *Co.* 4. 24.

If one Exchange Lands before the Coverture, and after his Land given, is recovered, and he recovereth over (as he may) his own Land again; in this caſe the wife ſhall have no Dower out of the Land recovered from her Husband. So upon a Recovery *pro rata*, between Parceners, *Perk ſect.* 309, 310.

If an Heir after Office found, enter and intrude upon the poſſeſſion of the King, and after die before he ſue Livery; in this caſe the wife ſhall not have Dower. *Co. lib. Inſt.* 1 *part. fol.* 30. but the Husband of an Heir Female, in this caſe ſhall be Tenant by the Courteſie, *F. N. B.* 149. *Pr. Reg. c.* 12.

If a Man have two Wives, or a Woman two Husbands, the ſecond wife ſhall not have Dower, in the firſt caſe; nor the wife of the ſecond Husband, in the laſt caſe: For *non valent nuptiæ* the ſecond marriage is not good, but void *ab initio*; but *contrà* when there was onely a Precontract before; for then they are onely voidable, and therefore till they are avoided, the marriage is good, and the wife dowable. *Perk ſect.* 304, 305.

If there be Grand-father, Father, and Son, and the Grand-father [illegible] and take a wife and die, and the Father enter, and take a wife [illegible] and the Son endow his Grand-mother of a third part; the wife of the Father ſhall never have any Dower out of this third part which the Grand-mother hath. *Contrà* if the Grand-father had made a Feoffment of the Land to the Father. And if in this caſe the wife of the Father be firſt endowed of the whole, and after the Grand-mother ſue the Mother, and recover of her when the Grand-mother dies, the Mother may enter again, and retain that ſhe had before, *Dos de dote peti non debet. Co. Lib. Inſtit.* 1 *part. fol.* 31. *Perk. Sect.* 315, 316. *F. N. B.* 149. *Co.* 4. 121.

If a Man have a Title of Action to recover any Land, and after he enter and Diſſeiſe the *Terre*-Tenant, and die ſeiſed, and his Heir enter; in this caſe his wife ſhall not have Dower, becauſe the Heir is remitted, and the Eſtate the Baron had, is determined, *F. N. B.* 149.

If a Joyntenant make a Feoffment of his part, and die, his wife ſhall not have Dower out of it. *F. N. B.* 150.

If the Husband or Wife be not nine years old at the time of his death, the wife ſhall have no Dower, *Dyer* 313. *Littl. ſect.* 36. *F. N. B.* 149.

If there ſhall be no good marriage in the Caſe, the wife ſhall have no Dower; and if ſhe demand it, this Plea may be given, *Ne unques accouple in loyal Matrimonie*: And this was uſed to be tried by the Certificate of the Biſhop, *Co.* 9. 49. *Dyer* 213. 369.

If the Wife be an Alien born, and not made Denizen by Parliament, it ſeems ſhe ſhall have no Dower. So if the Husband be an Alien, *Co. lib. Inſt.* 1 *part. fol.* 31.

If Lands be given to two men, and the Heirs of their two Bodies begotten, and one of them taketh a wife, and dieth, ſhe ſhall not be endowed, *Co. lib. Inſt.* 1 *part. fol.* 30.

If the Heir of the Kings Tenants that holdeth of him by Knights Service *in capite*, after Office found, intrude; the wife ſhall not be endowed, *Co.* upon *Littl. fol.* 30.

If Lands be to the Husband and Wife, and the Heirs of their Bodies, and he have Iſſue, and then ſhe die, and he have another wife, and then he make a Feoffment, and take back an Eſtate in Fee, and die; the wife ſhall not have Dower of this, *Co. lib. Inſt.* 1 *part. fol.* 31.

If one have an Eſtate for life, the Remainder to another in Tail, the

Remainder to his own right Heir; in this caſe his wife ſhall have no Dower, 40 *Ed.* 3. 15.

If a Tenant for his own life make a Leaſe to him in Reverſion, or Remainder in Fee or Fee-tail for the life of him in Reverſion or Remainder: Now he is not by this ſo ſeiſed of the Freehold and Inheritance, as to make his wife dowable, *Fitz. Dower* 95. *Co. lib. Inſt.* 1 *part, fol.* 42.

Sect. 18. 13. Of what things the wife ſhall have Dower, or not.

The Wife ſhall have Dower almoſt of all things of profit, of which the Husband may have an Inheritance, that by poſſibility may come to the iſſue between them. And therefore ſhe ſhall be endowed of Meſſuages, Houſes, Lands, Meadows, Paſtures, Rent, Commons, Advowſons, Reverſions, Seigniories, Towns, Iles, Woods, Old Mines of Coals, Predial Tithes, Villains, Eſtovers that are certain, Wind-Mills, Water-Mills, Offices, Chambers, Rectories, Fairs, Markets, Veſture of the Land or Ground, *Perk. ſect.* 3.

The Wife of a Donor ſhall be endowed of a Rent, reſerved upon the Gift in Tail. See more above, *Perk. ſect.* 348. *Co. ſuper Littl. fol* 144. *F. N. B.* 148, 149, 150. *Plow.* 40.

But of ſuch things as are of no value or certainty, the wife ſhall not have Dower, as Common, and Eſtovers, without number, Annuity, Homage, nor of matters of pleaſure onely, nor of a Caſtle, nor a Houſe that is *Caput Baroniæ* or *Comitatus*. If they be for the defence and honor of the Kingdom, elſe ſhe may be endowed of them, *Co. lib. Inſt.* 1 *part*, 31. 9 *H.* 7. 4. *Perk. Sect.* 342.

The Wife ſhall not be endowed of a Rent reſerved by the Baron, on a Leaſe for years or life. See more *Supra*, *Perk ſect.* 348.

The Husband having onely a Seiſin for an inſtant, as *Cey que Uſe*, and where a Joyntenant makes a Feoffment, the wife ſhall not be endowed of this, *Co. lib. Inſt.* 1 *part. fol.* 31, 32.

If the Freehold of Rents, Common, *&c.* be ſuſpended and ſo continue, during the Coverture, ſhe ſhall not be endowed of them; but a Releaſe after the Coverture will not bar the wife. *Sect.* 89.

Sect. 19. 14. *Aſſignment of Dower.*

Where a Woman hath title to have Dower, in ſome caſes there is no need of any Aſsignment of it to her, but ſhe may enter and take it without Aſsignment. But in moſt caſes, Aſsignment muſt be made to her, and ſhe cannot take it without Aſsignment; and this is ſometimes before an Action brought, and ſometimes after Action brought, and ſometimes by the Heir, ſometimes by the Alienee or Purchaſor, ſometimes by the King, ſometimes by the Gardein, ſometimes by a Diſſeiſor or Abator, and ſometimes by a Sheriff or Eſcheator. And this hath favor in Law; and therefore if the Heir aſsigned Dower to the Feme of the Anceſtor, where ſhe is not dowable; yet ſhe ſhall hold in Dower. See for *Aſſignment of Dower*, *the Womans Lawyer*, 243.

In what caſe the wife may aſsign Dower to her ſelf, or enter without *Aſſignment*, or not.

In caſe of Dower *De lapluis Beale*, the Wife may aſsign her Dower to her ſelf by Metes and Bounds before her Neighbors, *ut ſupra*, *Littl. ſect.* 49.

In all caſes where the Certainty appeareth, what Lands or Tenements the wife ſhall have for her Dower, there the wife may enter after the death of her husband, without any Aſsignment to her. As where the wife is to have all her husbands Lands, by ſome Cuſtoms; and where ſhe is endowed *Ex aſſenſu patris*, or *Ad oſtium eccleſiæ*, *vide ſupra*. *Littl. ſect.* 43.

If ſhe have a Judgment, and the Sheriff offer her the thirds, by Metes and Bounds, and ſhe then refuſe; yet ſhe may afterwards enter her ſelf, and take it when ſhe will, *Dyer* 278.

In all ſuch caſes wherein the Certainty doth not appear what the wife is to have for her Dower: As when ſhe is to have a Moyety by the Cuſtom, or a third part by the Common Law.

In ſuch caſes her Dower muſt be aſsigned to her before ſhe can enter into it; and if ſhe enter before, and after ſue for her Dower; this may for that time be pleaded in Bar

Bar to her, that ſhe hath entred into part of the Land, which will be a Bar, ſo long as ſhe holdeth the Poſſeſſion, *Littl. ſect.* 43. *Co. lib. Inſt.* 1 *part. fol.* 22. 6. *Dyer* 76.

If the Wife have obtained a Judgment to recover her Dower, yet ſhe may not enter, and take it her ſelf, but muſt wait till Execution, *Plow* 529.

If a Feme diſſeiſe the *Terre*-Tenant, ſhe cannot endow her ſelf by way of Retainer, *Dyer* 343.

If one ſeiſed of three ſhillings Rent-charge in Fee, and take a wife and die, ſhe cannot take this Rent, nor Diſtrain for it before Aſsignment. And if ſhe recover it in a Writ of Dower, yet ſhe cannot diſtrain before Execution.

But in other caſes where one demands a thing in Certain, Land, or Rent, the Demandant after Judgment, may enter or diſtrain before any Seiſin, delivered him by the Sheriff, upon an *Habere facias Seiſinam*, 10 *Ed.* 3. 22. *Perk. ſect.* 416. *Co. lib. Inſt.* 1 *part. fol.* 34.

Where the Wife of a Tenant in Common, demands a third part of a Moyety, yet after Judgment ſhe cannot enter until the Sheriff deliver her a third part, though the Delivery of the Sheriff do not alter the caſe.

To make a perfect Aſsignment of Dower, theſe things are required.

1. Regularly the Aſsignment muſt be Certain.
2. It muſt be either of ſome part of the Land, whereof ſhe is dowable, or of a Rent, or ſome other profit iſſuing out of the ſame, either before Judgment or after.
3. It muſt be abſolute, not ſubject to Condition or Limitation.
4. It muſt be made by him that is Tenant of the Land.
5. If it be by a Diſſeiſor, it muſt be without Covin.
6. And it muſt not be prejudicial to the Diſſeiſee.
7. It muſt be by him, againſt whom the Writ may be brought.
8. The Gardein in Chivalry may do it, ſo the Heir before the Gardein enter; as in the caſes beneath, *Co. lib. Inſt.* 1 *part. fol.* 34, 35.

If the Father endow the Wife of his Son and Heir at marriage, this is Aſsignment is enough, as before. See *Dower ex aſſenſu patris.* And this is a good Aſsignment without any other.

And if the Heir of the Husband aſsign the Woman her Dower (as he may) by a Deed in the Countrey, and ſhe accept of it; this is good, and will bar her from demanding any Dower by Writ, *Co.* 3. 27. *Perk. ſect.* 493.

If there be a Lord and Woman Tenant, and they intermarry, and he die, ſhe may endow her ſelf by a third part of the Services by way of Retainer. *Perk. ſect.* 303. 417.

Sect. 20. What ſhall be ſaid a good *Aſſignment* of *Dower*. In reſpect of the perſon that doth aſſign it.

If a Woman have a Right of Dower to Land, that is in the hands of two or three Joyntenants, and one of them endow her by Aſsignment of part of the Land it ſelf for her Dower; this will binde the reſt. But *contrà* if it were of a Rent out of the Land, 7 *H.* 6. 34. *Title Dower* 169. *Perk. ſect* 396. *Co.* 2. 67.

If a Diſſeiſor or Abator, do aſsign Dower to the wife that hath Title of Dower, and it be not by Covin (as in the caſe beneath) it is good and lawful, and will binde him that hath right: But then it muſt be of the Land it ſelf, and not any thing out of the Land, in lieu of it, 44 *Edw.* 3. 46. *Co.* 3. 78. *Co. lib. Inſt.* 1 *part. fol.* 35.

If a Man ſeiſed of Land in the right of his wife, or joyntly with his wife, aſsign a third part to a woman, that hath right of Dower; this is a good and lawful Aſsignment, and will binde his wife after his death, *Perk. ſect.* 399.

If there be two or three ſeveral Feoffees of Land, to which a woman hath Title of Dower, and one of them aſsign Dower for the whole Land; it ſeems this is good, and ſhe cannot demand Dower of the reſt. *Perk. ſect.* 78.

A Gardein in Chivalry may aſſign Dower to a Woman, and it is good; and though the Woman have no right to Dower, yet it ſeems to be good till it be avoided:

ed: And he may aſſign a Rent out of the Lands he hath in Ward in Recompence, and it is good, *Fitz. Dower* 75. 155. *Weſtm.* 2.

It ſeems Aſſignment of Dower by any one that hath a Freehold, againſt whom an Action of Dower may be brought, is good, and with the Wives acceptance will bar her; and therefore if it be done by a Tenant for life, it ſeems to be good, *Perk. Sect.* 404.

If the King have the Wardſhip of the Land, he may endow the Wife by Aſſignment, upon or without a Petition, in *Chancery*; and if he do ſo before, or after the full age of the Heir; it is good and lawful, and will binde the Heir, 1 *Ed.* 4. 1. *Co.* 9. 16. *Dyer* 228,

If the Husband make a Feoffment of divers Parcels to divers perſons, and die, and leave ſome to diſcend, and the Heir endow the wife of ſome of the Lands diſcended, in full ſatisfaction of all ſhe is to have out of all the Land; this is a good Aſſignment for all the reſt of the Lands, and the Feoffees may take advantage of it, *Co. lib. Inſt.* 1 *part. fol.* 35.

The Sheriff or Coroner upon a Writ and Authority given, and ſent to them, may aſſign Dower; and if they do ſo, it is good, and will binde all parties, *Perk. Sect.* 414.

Sect. 21. In reſpect of the perſon to whom the *Aſsignment* is made.

If the Wife be married again to another Husband, and Aſsignment be made to him and his wife, and accept it; it ſeems this is good, and ſhall binde the wife. But *Quere. Fitz. Dower.* 33 *Ed.* 1. *Dower* 177. 32 *Ed.* 1, *Dower* 121.

In reſpect of the thing aſsigned.

An Heir, or any other that hath a Sole, and lawful right to Land; out of which a Woman is to have Dower may endow her of a Rent, Common, or Profit iſſuing out of the ſame Land, and if ſhe accept it, it will bar her of any other Dower, *Perk. Sect.* 405:

But the Aſsignment of Parcel of the ſame thing, is the moſt proper Aſsignment; and that any one may do that may aſsign; and it matters not whether ſhe have a third part, for if ſhe accept leſs, it is good enough.

So neither is it material what part of the Capital Houſe, *&c.* for if ſhe accept any other part, it is ſufficient.

So if ſhe accept a Chamber, it is good, *Dyer* 361. *&* 91.

If a man ſeiſed of two Acres in one County, infeoff *J. S.* of one Acre with Warranty, and die, and his wife is endowed by the Heir, out of the other Acre, for the whole; now this is a good Aſsignment to bar her of any Dower in the other Acre.

So if the Heir make a Leaſe of part, and endow her for the whole out of the reſidue, 3 *H.* 6. 17. *Perk. Sect.* 400.

In reſpect of the manner of the *Aſsignment.*

For the moſt part, it muſt be aſsigned by Metes and Bounds, and when it is ſo, it is a good Aſsignment, *Perk. Sect.* 411.

If the Wife be endowed by Aſsignment of the third part of a Mill or a Bailiwick, it ſeems this is good; but the beſt Aſsignment of a Mill, or the like; is the whole every third moneth; and of Tithes, the third Cock; and of an Advowſon, the third Preſentment; of a Villain, the endowment ſhall be the third days, weeks, or moneths work; of a Dove-houſe or Fiſhing, the third part of the profit, and ſo of divers other things, *Perk. Sect.* 415. *Co* 11. 25. 15 *H.* 1. 7. *Co. lib. Inſt.* 1 *part. fol.* 32.

Any Aſsignment of Dower, may be good without writing or Livery of Seiſin, *Co. lib. Inſt.* 1 *part. fol.* 35:

If it be with a Condition annexed, it is good (as it ſeems) but the Condition is void. By two Judges, *Mich.* 37, 38 *Eliz.*

Sect. 22. 15. What ſhall be ſaid to be no good *Aſsignment* or *Dower.*

If *J. S.* be Tenant to the Land, of which a wife hath right to have Dower; and the wife, or ſhe and another diſſeiſe the *Terre*-Tenant, and after the wife is aſsigned her Dower by one that comes to the Land from her, or from her and the other Diſſeiſor; this is no good Aſsignment, but the *Terre*-Tenant may avoid it, *Perk. Sect.* 404. *Co.* 9. 16:

In reſpect of the perſon that doth it.

Aſsignment of Dower by a Gardein in Soccage to one that hath Title, is not good, *Perk. Sect.* 404:

So

So an Aſsignment by a Leſſee for years, Tenant by Statute or Elegit, *Perk. ſect.* 404. *Co.* 9. 16.

If the Husband make ſeveral Feoffments of ſeveral Parcels, and die, and one Feoffee aſſign Dower to the wife, of Parcel of Land in ſatisfaction of all her Dower in all the Lands of the other Feoffees; this will not bar her of her Dower in the reſt, neither may they plead it in Bar to her: But if the Heir aſſign Dower ſo, *contrà*. See above, *Co. lib. Inſt.* 1 *part. fol* 35.

If an Intrudor or Diſſeiſor endow a Feme of a Rent, or profit out of the Land, it is not good, *Perk. Sect.* 349. *Co.* 2. 67. In reſpect of the thing which is aſſigned.

So if one Joyntenant aſſign a Rent out of the Land, in which the Wife hath Title of Dower; this is no good Aſſignment to binde his Companions, neither may their Cattle be diſtrained for ſuch a Rent, *Perk. Sect.* 397.

If the Demand be of divers Manors, and the Sheriff one Manor to her, for her Dower; this is good. 12 *Ed.* 4. 2.

If other Lands be aſsigned to her in recompence of her Dower, or a Rent iſſuing out of other Land; this is no good Aſsignment, neither will it binde her, though ſhe accept it. But of a Rent out of the ſame Land *contrà*, and that Rent may be aſsigned by word; and if it be after Judgement, in a *Scire facias*, it may be pleaded, *Perk. Sect.* 407.

If a Woman that hath Title of Dower, cauſe the *Terre* Tenant to be Diſſeiſed of purpoſe, that he may endow her either upon an Action brought, or by Agreement; this is no good Aſsignment made by him, thus by *Covin. Non facias malum ut inde fiat bonum Dyer* 266. *Perk. ſect.* 410. *Co.* 6. 58. 3. 78. In reſpect of the manner of the *Aſſignment*.

If the Husband were Tenant in Common, the Aſsignment muſt not be by Metes and Bounds; for if it be, it is not good: But the Woman muſt hold in Common with the other Tenants in Common.

So if ſhe be endowed of Land that doth belong to Coparceners: But if they make a Partition firſt, then the Aſsignment may be, *Per metas & bundas*, *Perk. ſect.* 411, 412.

If an Heir enter and aſsign to his Mother a third part, to hold with him in Common; this is not a good manner of Aſsignment, *Perk. ſect.* 413.

So if a Sheriff do aſsign Dower, and do not do it in Severalty, *Per metas & bundas*; it is not good, if it may ſo be done, *Perk. ſect.* 414.

If the Husband be attainted of High, or of *Petit* Treaſon (as it ſeems) his wife ſhall loſe her Dower; and though he had made a Feoffment of it to a ſtranger, before the Fact done, yet ſhe is barred, and cannot recover her Dower of it, 5 *Ed.* 6. 11. *Stamf. lib.* 3. 33. *Sir Simon Sect.* 23: 16. Where the Wife ſhall be barred of her Dower perpetually.

If the Husband be attainted of Murder or Felony, and the Land Eſcheat to the Lord or King; the wife is perpetually barred of her Dower: But this it ſeems is altered by the Statute of 1 *Ed* 6. 12. in the caſe of *Treaſon*; for in that caſe ſhe loſeth her Dower, *Co.* upon *Littl. fol.* 31. *Littl. ſect.* 55. *Perk. ſect.* 387. 5 *Ed.* 6. 12. By the Means of the Husband.

If the Baron have cauſe to recover Land for Waſte or Ceſſer, and doth not, but dieth before it be recovered; by this delay of his, the wife is perpetually barred.

So if the Husband have Land, and is impleaded for it, and he voucheth, and the Demandant recovereth againſt him, and he hath Judgment to recover over, and die before Execution; the wife in this caſe is barred of her Dower.

So if he do not enter when he may; as when he is Diſſeiſed, or a ſtranger doth abate upon him after his Fathers death. See *Supra.* 1 *Hen.* 7. *chap.* 17. 21 *Ed.* 4. 60.

If a Rent be granted to one in Fee, and the Grantee will not diſtrain, but brings an Annuity againſt the Grantor, and recovers it, hereby the wife is perpetually barred (as it ſeems) of this Dower. *Perk.* 373.

If the Husband alone levy a Fine, and die, and ſhe do not bring her Action, nor make her Claim in five years after his death; hereby ſhe is barred of her Dower in that Land for ever, *Co.* 2. 93. 8. 100. *Dyer* 224. 72. By the Means of the Wife her ſelf.

If

If ſhe depart from her Husband and live with another man, in *Avowtry*, and be not reconciled unto him of her own accord before his death, without compulſion of the Church, ſhe hath loſt her Dower for ever. *Sponte virum mulier fugiens & adultera facta, Dote ſua careat, niſi ſponſo ſponte retracta.* And this ſeems to be cauſe of Forfeiture of Dower, though ſhe do not dwell with the Advowterer, *Co. lib. Inſt.* 1 *part.* 32. *Perk. Sect.* 354. *F. N. B.* 150. *Dyer* 106. *Weſtm.* 2. *chap.* 35.

If ſhe after her Husbands death will enter upon the Heir, and make a Feoffment of the Land whereof ſhe is to be endowed, 11 *H.*7. 20.

If the Husband lie dying in the ſame Houſe, wherein the Wife is, and hath need of her, and deſireth her, and ſhe doth wilfully refuſe to come to him; it ſeems reaſonable ſhe ſhould loſe her Dower by this. But *Quere. Perk. Sect.* 364.

Sect. 24. If ſhe detain the Heir that is a ward, from the Gardein; this will bar her of all the kindes of Dower, ſo long as ſhe doth ſo detain him, 2 *H.*7. 6. *Fitz. Dower* 174. 187.

So if the wife be an Heretick, and will not receive the Chriſtian Faith, *Co. lib. Inſt.* 1 *part. f.*32.

So if ſhe conſent to a Raviſher after he had raviſhed her; in all theſe caſes ſhe loſeth her Dower. 6 *Rich.*2. 6.

By their mutual Act and Agreement. By a *Joynture.* If ſhe had a Joynture made to her before marriage, and ſhe is not evicted out of it, 27 *H.*8. 10. *Vide* beneath Joynture, *Co* 45. 59.

And ſo alſo it is, if ſhe had a Joynture made after marriage, and after her Husbands death ſhe hath by any means accepted it; in theſe caſes ſhe ſhall never be received to demand Dower alſo; and in theſe caſes it is not material what the quantity of the Lands made in Joynture be; if it be but an Acre, if it were intended a Joynture, it is ſufficient Joynture, *Co.*4. 2.

If the Husband and Wife during the Coverture, levy a Fine, or ſuffer a Common Recovery of the Land; the wife is perpetually barred for any Dower in this Land, whereof the Fine or Recovery is, *Co.* 10. 49. 2. 74.

Where an Eſtate is made in poſſeſſion, or uſe to Husband and Wife, and his Heirs, or the Heirs of their two Bodies, or to them for their lives, or for the Wives life for her Joynture; in theſe caſes ſhe ſhall not have any Dower, unleſs ſhe be lawfully evicted, then ſhe ſhall be endowed according to the rate of Land of her Husbands, whereof ſhe was Dowable. But ſuch a Joynture being made after marriage, the Wife after her Husbands death may refuſe it, and betake her to her Dower, unleſs the Joynture be made by Act of Parliament, 27 *H.*8. 20.

If ſhe were endowed *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, and after the Husbands death ſhe accept it; by this ſhe is barred of Dower. *Litl. Sect. Dower.*

If ſhe have a Joynture made her before marriage, and after the Husband and ſhe do levy a Fine, or ſuffer a Recovery, and grant it all away, and the Husband take back an Eſtate of this Land again to him and his Heirs, or he have other Land, ſhe ſhall not have any Dower of any of theſe Lands, but is barred. By three Counſelors opinion.

By *Act of Law*: If there be a perpetual Divorce made by Law between them, ſhe is perpetually ouſted of Dower. *Co. lib. Inſt.* 31. *Co. lib. Inſt.* 1 *part. fol.* 32. *Perk.* 313. *N. B.* 7.

If the Husband be the Kings Villain, the wife ſhall not be endowed, *contrà* of the Villain of a common perſon; if ſhe be entituled to her Dower before the Entry of the Lord upon the Villain, *Co. lib. Inſt.* 1 *part. fol.*31:

Sect. 25. Where the Wife ſhall not be barred of *Dower.* If the Baron enter into Religion, the Wife ſhall have her Dower, notwithſtanding after his natural death, and is not barred of it: But ſhe ſhall have no Dower till his natural death.

By the *Act* or *Default* of the *Husband.* So if the Baron be attainted of Felony, Hereſie, Premunire, or the like, if it be a Felony of the Common Law, or for an Offence made Felony by Statute Law, unleſs the Statute do except this, as commonly it doth. See *Perk. Sect.* 307. *F. N. B.* 150.

If

If the Husband do commit Felony, and after purchaſe a *Charter of Pardon*; now ſhe is not barred of her Dower by this, but of all ſuch Inheritance as he ſhall have after the purchaſe of his Charter; it ſeems his wife ſhall be endowed. See *Womans Lawyer, f.* 149, 150, 151, 152, 153.

If the Baron after the Coverture make a Feoffment of his Land, and after commit Felony; in this caſe the wife is not barred againſt the Alienee, neither ſhall ſhe loſe her Dower, *Littl. Sect.* 55. *F.N.B.* 150. Nor if the Baron kill himſelf, *Plow.* 262.

In ſuch Felonies as are made ſo by Acts of Parliament, wherein the Wives Dower is ſaved, if the Husband do any ſuch Felony, his wife ſhall not loſe her Dower by it: So it ſeems of Felony by the Common Law, committed at any time, that it will not bar the wife of her Dower, *Dyer* 263. 97. 1 *Ed.*6. 11.

If the Baron ceaſe, or alien in Mortmain, and the Lord enter; hereby the wife is not barred of her Dower, but ſhe ſhall have it as before, *Perk. Sect.* 308, 309.

If the Baron be out-lawed by Treſpaſs, this is no bar to the wife for her Dower, *Perk. Sect.* 388. So if he be out-lawed in Felony, *Co. lib. Inſt.* 1 *part. fol.* 31.

The wife ſhall not be barred of her Dower, by the Laches of her husband in pleading, unleſs it be in ſome ſpecial caſes, *Perk. f.* 73, 74, 75.

If ſhe being *de non ſane memorie* kill her husband, or another man; ſhe ſhall not be barred of her Dower by this, *Perk. Sect.* 365. — By the Means of the Wife herſelf.

If ſhe do not, or will not go to her husband in another County, where he lieth wounded, and he die of that wound; it ſeems ſhe ſhall not loſe her Dower for this, *Perk. Sect.* 364. — *Non ſane memorie.*

If ſhe Elope, and continue in Avowtry, in the Lands or Manors of her husband: As when her husband is at one of his Houſes or Manor, ſhe go to the other; or if after her Elopement, ſhe be reconciled to her husband by his good will, or lie with him in Bed, though they never cohabit; in theſe caſes ſhe ſhall not be barred of her Dower, *F.N.B.* 150. — *Elopement.*

If ſhe take a Joynture after marriage, this will not bar her of her Dower, if ſhe wave it after her husbands death, (as ſhe may) *Co.* 4. 2. — By their Mutual Agreement.

If a Joynture were made to her after marriage, and during the Coverture, ſhe and her Husband levy a Fine, or ſuffer a Recovery of it; yet ſhe is not hereby barred to demand her Dower in the reſidue of his Lands, *Co.*4. 2. *Dyer* 358. *Co.*2.27. *Trin.* 9 *Jac. B. R.*

If a Free-man take a Neiff to wife, ſhe ſhall be endowed, *Co. lib. Inſt.* 1 *part. fol.* 31. — By the *Act of Law.*

The wife of an Idiot, *Non comp' mentis*, ſhall be indowed, *Co. lib. Inſt.* 1 *part. fol.* 31.

When a Divorce is onely *à menſa & toro*, as for Adultery, or the like, and not *à vinculo matrimonii*; there the wife ſhall be endowed. *Co. lib. Inſt.* 1 *part. fol.* 32.

If ſhe have entred upon any part of the Land, out of which ſhe doth demand Dower, and doth hold the Poſſeſſion of it; this is a bar to her for her Dower, ſo long as ſhe doth hold the Poſſeſſion of it, unleſs it be in the caſe of *Quarentine hor*, which ſee *Infra*, *Dyer* 76. — 17. In what caſe the Wife ſhall be barred of her Dower for a time onely, or not. *Sect.* 27.

If the Woman detain the Charters and Evidences that belong to the Heir, and concern the Title of his Land; this will bar her of Dower, for ſo much as the Charters doth concern, ſo long as ſhe doth detain them, and he may plead Detainment *Des Charters*. But this Plea and Bar, is onely given to the Heir, and not to any other, though he be Tenant of the Land, and the Charters were delivered to him. See *Infra. Co.* 9. 17. *Dyer* 250. 127. — *Detainment of Charters.*

If ſhe detain the Body of the Heir from the Gardein in Chivalry, ſhe ſhall be barred of Dower, ſo long as ſhe doth detain him, 2 *H.* 7. 6. *Co.*9. 19.

If ſhe take a Leaſe for years or life, of the Land whereof ſhe is to be indowed after her husbands death, ſhe is barred during that time, to ask any Dower out of that Land, *Perk.* 350. *F. N. B.* 149.

But Detainment of Charters is no Plea for the Heir, neither will it bar the Woman, in theſe caſes following.

Firſt, Where the Heir doth come to the Land by Purchaſe, and not by Diſcent.

Secondly, Where the Heir himſelf delivered the Charters to the Woman.

Thirdly, Where the Heir is immediately, and not immediately vouched by the Tenant in the Writ of Dower.

Fourthly, Where the Heir doth come in as Vouchee, having no Land in the County where the Dower is demanded.

Fifthly, Where the Heir comes in to the Sute onely, as Tenant by Receipt, *Co.* 5. 75. 7. 9. *Dyer* 230. 251. 33 *Hen.* 6. 15. 2 *Hen.* 7. 6. *Perk. Sect.* 355, *&c.*

Sect. 27. So if ſhe detain Charters from the Heir that do not concern the Land, in which ſhe demand Dower, *Perk.* 356.

Quarentine, what. If ſhe take her Privilege and Liberty of Quarentine, (*i. e.*) where her Husband died ſeiſed of any Manor or Manſion-houſe, whereof ſhe is to be endowed; that ſhe may abide in that Houſe forty days after his death, and live of the ſtore and profits thereof, which benefit the Law doth give her.

Quarentina Habenda, what. If the Houſe be not a Caſtle, and ſhe marry not within the time; and if the Heir evict her within the time; ſhe may have a Writ called *De Quarentina habenda.* And within this time the Heir ought to aſſign to her Dower. See *Womans Lawyer* 242. *Co.* 2 *part. Inſt.* 17.

18 *Writ of Dower,* what. It is a Writ and lieth where the Woman hath right to have Dower in her Husbands Lands, and cannot have it; then ſhe may have this Writ to recover it. And this is of two ſorts.

The kindes of it. One whereof is *Unde nihil habet*, when ſhe hath received no part of her Dower.

Writ of Dower *Unde nihil habet.* And the other is called the Writ of Right of Dower, and lieth where ſhe hath recovered part of her Dower already in one place; and ſhe is to recover more in that place, then ſhe may have this Writ for the recovery of it.

Writ of Right of Dower, what. And in theſe caſes, if the Husband did die ſeiſed, ſhe ſhall recover Damages from his death.

But if any Alienation or Eſtate were made, during the Coverture, ſo that he die not ſeiſed, ſhe ſhall not recover Damages. *Terms of the Law. Dower.*

In what caſe this Writ lieth, or not. In all caſes where the Wife is to have Dower, or hath right to Dower; there ſhe may have this Writ to recover Dower.

And where ſhe hath right to Dower, ſee before.

She may have this Writ for Dower, *Ad oſtium Eccleſiæ, Ex aſſenſu patris,* and for Dower by the Cuſtom, as well as for any other Dower. *Co. lib. Inſt.* 1 *part, fol.* 35.

Sect. 28. 19. Againſt whom this Writ may be had, or not. This Writ lieth, and may be brought againſt any of them that have power to aſſign Dower (for which ſee before) excepting onely the King, againſt whom no Action will lie: But to him ſhe muſt ſue by Petition, as an Heir, an Alienee, a Gardein, Diſſeiſor, or Abator, *&c.* againſt any of theſe this Writ lieth; and during the minority of an Heir, as long as he is in the Kings Cuſtody ſhe muſt ſue to him by Petition in *Chancery.* And after he hath committed him, ſhe may ſue the Patentee by this Writ, or another Gardein in Chivalry; and when the Heir is of age, ſhe muſt ſue him himſelf.

And if divers have ſome of the Land, the Heir and others, ſhe may ſue any one of them: But if ſhe ſue a Purchaſor, ſhe ſhall recover but a third part of his own Land; whereas, if ſhe ſue the Heir, ſhe ſhall recover a third part of the whole.

And it ſeems this Writ doth lie againſt the Committee; of the King, of a Wardſhip and Ward, and Executors of a Gardein in Chivalry, See the Statute of 1 *H.* 7. 17.

But

But this Writ doth not lie against the Heir as long as he is within age, and in the Kings custody; and therefore if any woman bring this Writ against him in this case, the Heir may have a Writ called *Circumspectè Agatis*, which is in the nature of a Prohibition to forbid the Judges to proceed any further against the Heir at the Common Law, *Co.* 9. 16. 4 *H.* 7. *Age. Infant. Circumspectè Agatis*, what.

It lieth not against a Gardein in Chivalry, after the Heir is of full age, though the Gardein hold the Land over for a Forfeiture of marriage: Neither doth it lie against the Heir, during his Minority and Wardship, but against the Gardein, *Co.* 9. 16. *Plow.* 141.

It lieth not against a Gardein in Soccage, Lessee for years, nor a Lessee for years of a Gardein in Chivalry, nor against a Tenant by Statute or Elegit, nor against a Gardein in Chivalry, till he have entred, and after his entry it lieth not against the Heir, *Co. lib. Inst.* 1 *part. fol.* 39. *Co.* 9. 16. *Co.* 6. 57. *F. N. B.* 147.

It is a good Plea for the Defendant to say she is endowed already by the same party, or some other for the Land that she doth now demand Dower of: And what else is a good Plea, or not, see before, where Dower is barred temporally or eternally, and where not, *Co.* 9. 16. 20. What matter is a good Plea to a *Writ* of *Dower*, and who may plead it.

So to say that her Husband was never seised of any such Estate, as whereof the wife may have Dower, *Dyer* 41.

So to say she hath accepted a Rent out of the Land in recompence of her Dower, *Dyer* 19. These are good Pleas.

A Gardein in Chivalry may plead in Bar of Dower, Detainment, or Eloigning of the Body of the Ward; and this is a good Bar to the Woman, so long as she do detain: And if the Heir come in as Vouchee, he may plead the same Plea: But he cannot plead Detainment of Charters, *Co.* on *Littl. fol.* 39. Never lawfully married, is a good Plea, and was triable by the ordinary: So that the Husband is yet living, *Co. lib. Inst.* 1 *part. fol.* 39.

It is a competent livelihood of the Franck-tenement of the Husband, made and assured in consideration of marriage for the wife, to take effect forthwith after the Husbands death, to endure for her life at the least, if she by her own act do not forfeit or determine it before. And this is made sometimes before, and sometimes after marriage; if it be made before marriage, it will bar the Wife of Dower, but if it be made after marriage, the wife after her Husbands death, hath power either to wave it, and demand her Dower at Common Law, or to accept it; and thereby to be barred of her Dower at Common Law. But that Joynter made before marriage, that must be a Bar to the wife of Dower, must be such a Joynture, as within the words or meaning of the Statute of 27 *H.*8. 10. Or else the Wife may have that, and demand Dower also, *Vide Womans Lawyer*, see *fol.* 182, *&c.* *Sect.* 29. 21. *Joynture*, what.

A Joynture may be made of such things, as whereof a Woman may be endowed, and not of any other things. 22. Of what things a *Joynture* may be made, or not.

If an Estate be made to the wife before marriage, in either of the forms hereafter following, it shall be adjudged within the Statute, and be a Bar of Dower, as to the Husband and Wife, and Heirs of their two Bodies begotten; or to the Husband and Wife, and their Heirs, or to the Husband and Wife, and Heirs of one of them, or to the Husband and Wife for their lives, or to the Husband and Wife, for the term of the life of the Wife, or to the Husband for life, the Remainder to the wife for life, or for life upon condition to perform his Will, or *durante viduitate sua*, or to the wife in Fee-simple, or in Fee-tail, or to the Husband and Wife, and the Heirs Males of their two Bodies. What shall be said a good *Joynture* before marriage to Bar *Dower*

And so all such like Estates as beneficial to the Wife, as the least of all these. *Co.* 4. 2. 27 *Hen* 8. 10. *Dyer* 316. *Co.* 5. 26. *&* 7. 40. *Dyer* 96, 228. 317. *Plow.* 307.

So that to the making of a Joynture good by this Statute of 27 *H.*8. theſe things are requiſite.

1. The Joynture by the firſt Limitation, muſt take effect for her life, in poſſeſſion or profit, preſently after her Husbands death.
2. It muſt be for her life, at leaſt.
3. It muſt be made to her ſelf, and not to another.
4. It muſt be made in ſatisfaction of the whole, and not a part of her Dower.
5. It muſt be expreſſed or averred to be in ſatisfaction of her Dower, *Co.* upon *Littl.* 1 *part.* 35.

But if the Eſtate be not ſo made in his firſt Creation, as the wife may take immediately after her husband, though after it fall out ſo; yet this is not a Joynture within the Statute to Bar Dower: As if an Eſtate were made to the Baron for life, the Remainder to another for life, the Remainder to the wife for life; and after it falleth out, that he in Remainder for life, die before the husband: So that now by this matter *ex poſt facto* ſhe ſhall take immediately after her husband, yet this is not a Joynture within the Statute. *Quod ab initio non valet, in tractu temporis non convaleſcat; & quæ mala ſunt inchoata principio, vix eſt ut bono peragantur exitu, Co.* 4. 2. *&* 4. 3.

If Lands be conveyed to be a Womans before marriage, for part of her Joynture; and after more Land is conveyed after marriage, in full ſatisfaction of her Joynture; this is no Bar of Dower for Incertainty: And therefore if ſhe refuſe that conveyed after marriage, ſhe may have her Dower in all, ſaving that conveyed before marriage, which ſhe may alſo keep.

And if an Eſtate be made to the Wife, for one or more lives of others, or for one thouſand years, if ſhe live ſo long, or for a thouſand years; theſe Eſtates are not within the Statute, *Co. lib. Inſt.* 1 *part. fol.* 36.

If an Eſtate be made to others in Fee, or for her life, upon truſt for her benefit, by her aſſent, and expreſs in full ſatisfaction of her Dower; this will not Bar her, *Co. Idem.*

If one Covenant to ſtand ſeiſed to the uſe of himſelf in Tail, and after of his wife for life; this is not a Joynture within the Statute, *Paſche,* 16 *Jac. B. R. Woods* caſe.

Sect. 30. What ſhall be ſaid a *Joynture* after marriage to Bar *Dower,* or not.

Such a Joynture as will be a Bar of Dower, being made before marriage, will be a Bar of Dower, if it be made after marriage; ſo as the wife do accept it and agree to it, after her husbands death: As in the examples before, if ſuch a form of a Joynture be made after marriage, and accepted after the husbands death by the wife, it will be a Bar of Dower, *Co.* 4. 4.

If the Husband Deviſe Land to his Wife for ever in Tail, or for life, for her Joynture, in ſatisfaction of Dower, and ſhe accept it after his death, this will be a Bar of Dower, *Co.* 4 4. *Dyer* 220.

But if one ſeiſed in Fee of Soccage Land, and in Tail of *Capite* Land, Deviſe by his Will a third part of his Lands and Tenements to his wife in recompence of her Dowes, and die, and ſhe enter into the third part of the Fee-ſimple Lands onely; by this ſhe is barred of having any more Dower, *Dyer* 220.

Averment.

If one Deviſe Lands by Will to his Wife generally; this will not Bar her of Dower, neither can it be averred to be intended for a Joynture (but upon a Deed of Lands granted in general, ſuch an Averment will lie) unleſs the Will expreſs ſo, *Co.* 4. 4. *Broo.* 421.

If

If a Man makes his Wife a Joynture after marriage, and after in his Will deviſe, that his wife ſhall have a third part of all his Land with her Joynture; in this caſe ſhe will have a third part of the whole as a Legacy, and then if ſhe will wave her Joynture, ſhe may have a third part out of all the Reſidue for her Dower, *Dyer* 61.

If the Husband make a Leaſe of Lands to his Friends for any number of years, in truſt for his wife and children, that ſhe ſhall have a hundred pound a year out of it, or in any ſuch manner; in this caſe ſhe may have her Dower out of this Land, and yet have this Proviſion alſo. *Bridgman* Juſtice.

If an Eſtate be made to the Husband in Tail, the Remainder to the wife for life, the Remainder to others; this is no ſuch Joynture, as with her Acceptance within the Statute will bar her of Dower; though the Husband die without iſſue, yet this will not help, but the wife may have Dower in his other Land: But if an Eſtate be made to the husband and wife for their lives, *contrà* By three Juſtices in *Sherleys* caſe, *M.* 13 *Jac. B. R.*

If her Joynture, after marriage, be made to her by Act of Parliament, ſhe cannot wave it. 27 *H.*8. 10. *Crompt. Sect.*4.

And note that in all the caſes above, where the Joynture is not within the Statute, the wife ſhall have that Eſtate, and her Dower alſo, by *Co. lib. Inſt.* 1 *part. fol.*36.

If the wife be endowed, and after be evicted out of her Dower, ſhe ſhall be re-endowed again, in theſe caſes following, *viz.*

If ſhe be endowed of the immediate Eſtate of the Heir of her Husband, and be after impleaded and evicted, ſhe may vouch the Heir, and be newly endowed of the reſt of the Land ſhe hath from her husband, as if the Anceſtor had two Acres by a good Title, and one by a bad; and the wife is endowed of the bad Title Acre, and ſhe is ſued for it, and loſe it: Now ſhe ſhall recover her Thirds out of the other two Acres.

Sect. 31, 32. In what caſe upon the *Eviction* of the Wife, ſhe ſhall be endowed again, or more *Re-endowment.*

And ſo if ſhe were endowed by the Heir of the Father, and after ſhe be impleaded, and pray in aid of him, and he make default, and ſhe loſe the Land, ſhe ſhall be newly endowed.

So if a Tenant in Tail diſcontinue, and the Diſcontinuee die, and the wife recover Dower againſt his iſſue, after the Iſſue in Tail brings a Formedon againſt the wife, and ſhe vouch the ſame, and that is loſt; in this caſe ſhe ſhall be re-endowed of the reſt, till it be recovered alſo by the Iſſue in Tail, *Perk. Sect.* 420.

If there be Great Grand-father, Grand-father, Father and Son, and the Great Grand-father being ſeiſed of Land in Fee, and having a wife, doth give it by Deed to the Grand-father in Tail, and he die, and the Father endow his wife, after the Father and Great Grand-father die; the Great Grand-mother brings Dower againſt the wife of the Grand-father, and recovers: Now in this caſe it ſeems the Grand-mother ſhall be re-endowed of as much as ſhe loſt, but *contrà* if it were in caſe of Diſcent. As *Supra.* See *Crompt. Juriſd. fol.* 43. *Co.* 4. 122. 5 *Ed.* 3. 9.

But if the Heir have no Land in the ſame County where her Dower doth lie, it ſeems ſhe ſhall not be re-endowed by him after Eviction. *Co.* 9. 17. & 4 122.

If ſhe be endowed by the Alienee of the Husband, or of the Heir, and ſhe be afterwards evicted, ſhe ſhall never be re-endowed againſt either of them, unleſs it be in caſe, where her Judgment for her Dower were Conditional, upon the Voucher of the Heir (as the manner is) and after the Judgment is avoided by a Writ of Diſceipt, and hereby the Heir being Vouchee, reſtored to his Land. *Idem. Perk. Sect.*421.

But

But if she sue the Feoffee of the Husband, and he vouch the Heir in what County soever she shall be endowed of the Heir, to that end, That if she lose, she may be newly endowed, which she could not, if she were not endowed by the Feoffee of her Husband. *Coke*, Justice in *Throckmortons* case.

Sect. 32. 24. To whom the wife shall be *Attendant*, and by what *Services*.

The Wife most commonly shall be Attendant to the Heir in Reversion, and not to the Lord; and she shall Bar a third part of the Services: But if she be endowed by the Gardein in Chivalry, she shall be Attendant to him during the Minority of the Heir for a third part of the Services.

And if she be endowed by a Disseisor, she may be Attendant to him till the Disseisee have the Land again.

And if the Heir grant away the Reversion, and she Attorn to the Grantee, then she shall be Attendant to him.

And if her Husband die without Issue, or Heir, being Tenant in Tail, or in Fee, she shall hold of the Donor or Lord, by the third part of the Services.

But if the Lord purchase the Tenancy, and after the Wife is endowed, she shall hold it discharged of any Services, *Perk. Sect.* 424, *&c. Co.* 8. 36. 9. 135. *Co. super Littl.* 241. 34 *Ass.* 1.

If the Husband hold of *J. S.* by three pence, and he hold over by twenty pence Rent, and *J. S.* Release to the Husband, so that now he doth hold by twenty pence, the Wife being endowed of this Land shall hold it by the third part of three pence; for she shall be endowed of the best. *Fitz. Dower*, 131.

Sect. 33. *Admeasurement* of *Dower*, what.

It is a Writ lying where an Heir within age, or Gardein doth endow a Woman, that is dowable of more then she should have; then the Heir at his full age may sue the Woman again, and shew this, and get her endowed again more equally, and Restitution made.

[9] And if the Heir within age, enter and assign before the Gardein enter (as he may) the Heir at his full age may have this Writ; or the Gardein after his Entry, but not the Assignee of the Gardein; and this Writ lieth upon an Assignment in *Chancery*. *Co. lib. Inst.* 1 *part. f.* 39. *West.* 2. 7. See for *Dower*, *Statutes*, *Merton.* 1. *Westm.* 1. 48. 2. 4. 1 *Ed.* 6. 12. 5 *Ed.* 6. 12.

Tenant by the *Courtesie*, what.

Tenant by the Courtesie, is where a man taketh a wife, seised in Fee-simple, or Fee-tail, General or Special, and hath Issue by his Wife, Male or Female, and the Childe be living or dead, if the Wife die, the Husband shall hold this Land, during his life by the Courtesie of the Law of *England*; and then is he Tenant by the Courtesie. *Terms Ley* 118.

Sect. 34. 25. Of what things the Husband shall be *Tenant* by the *Courtesie*, or not. In what case the Husband shall be *Tenant* by the *Courtesie*, or not.

And the Husband shall be Tenant by the Courtesie of Lands or Tenements in Demesn, and of Commons, Advowsons, and the like; also of Honors and Offices (as it seems) and of a Castle and Common *sans* number. *Vide Extinguishment*, *English Lawyer*, *fol.* 79. *Co. lib. Inst.* 1 *part. fol.* 29, 30.

In all cases where the Issue of a Woman (Inheretrix of Lands) begotten by her Husband, might by possibility inherit that Land as Heir to the Wife of her Estate there, the Husband shall be Tenant by the Courtesie, yea, though the Wife had Issue inheritable to the Land by a former Husband, *Littl. sect.* 52. *Co.* 4. 61. 834.

But then these things must be in the case.

1. The Birth must be a Childe, not a Monster; but though it have some deformity or defect in the Hand or Foot; if it have Humane shape, it sufficeth.

2. It

2. It muſt be born living, not dead.
3. It muſt be born before, not after the Mothers death.
4. The wife muſt have an Actual Seiſin of the thing, whereof he would be Tenant by the Courteſie before her death, if it be to be had, as in theſe caſes.

If a Man have iſſue by a Woman Inheretrix, that hath iſſue by a former Huſband, and the laſt iſſue be dead; or if the Inheritance diſcend to the wife, after the iſſue born, or after the iſſue is dead, or the Eſtate-tail determine by the death of the Woman Tenant in Tail, without iſſue; yet in theſe caſes the Husband ſhall be Tenant by the Courteſie, *Co.* 8. 34. *Littl.* 35. 52. *Dyer* 25. 95. *Co. lib. Inſt.* 1 *part. fol.* 29.

If a Woman have a Rent or Advowſon in Fee, and die before any day of payment, or Avoidance come; yet the Husband ſhall be Tenant by the Courteſie, for here he could not have Seiſin, *Co.* 192. *Kelw.* 104. *Sect.* 35.

But if the Inheritance whereof the wife is ſeiſed, be ſuch, as by no poſſibility, the Iſſue between them may inherit the Eſtate the wife had, as Heir to the wife, or the childe be a Monſter, or born dead, or born after the Mothers death, as if it be ripped out of the Mothers Belly, or the wife have no actual Seiſin, or the wife have onely a Right, or the Eſtate is in ſuſpence at her death, he ſhall not be Tenant by the Courteſie.

And yet if the Suſpenſion of a Seigniory, Rent, or Common, be but for years; as if a Tenant make a Leaſe for years of the Tenancy to the Seignioreſs, who taketh a husband and hath Iſſue, and the wife dieth; now he ſhall be Tenant by the Courteſie, *Co. lib. Inſt.* 1 *part.* 29.

And therefore in all theſe caſes following, the husband ſhall not be Tenant by the Courteſie: As if the Intail be on the Heirs Males, and they have onely Heirs Females; or the wife be diſſeiſed, and ſhe die before any re-entry made; or a Wife-Lady, and a man her Tenant, and they inter-marry, and they have iſſue, and the wife die, the husband ſhall not be Tenant by the Courteſie of the Seigniory; or if the Anceſtor die ſeiſed of the Land, and before the Woman enter, ſhe die; or if he be attainted of Felony, and after get a Pardon, and after his wife dieth; or the wife have onely a bare Title, Uſe, or Reverſion, or Remainder, Expectant on a Freehold; in all theſe caſes he ſhall not be Tenant by the Courteſie, *Co.* 4. 81. 8. 34. *Perk. ſect.* 457, 458, 459. *Co.* 1 98. 3 *H.* 7. 5. *Co. lib. Inſt.* 1 *part fol.* 29. 40, 338. *Co. lib. Inſt. fol.* 29.

An Occupant or Occupancy is either General or Special; the General Occupancy, is where an Eſtate is made or granted of Lands or Tenements to *J. S.* (or to *J. S.* his Executors or Aſſigns) during the life of any other perſon or perſons, and he that hath this Eſtate dieth, during the life or lives; in this caſe, now he that can firſt get into the poſſeſſion, by Entry into theſe Lands or Tenements, ſo granted after the death of the Tenant, he ſhall have it during the ſame life or lives, and then he is ſaid to be a General Occupant, and his Eſtate a General Occupancy. So that in this caſe the Law is, *Capiat qui capere poteſt.* 26. *Occupant or Occupancy, what. The kindes.* The nature of it.

And this Eſtate, he that gaineth it, he may grant away to another, and if he do not ſo but die, and leave it ſo, then it will be in the ſame caſe as before, and ſo as oft as it ſo hapneth; but otherwiſe it is of ſuch a Grant of Rent, Common, or ſuch like thing.

The Special Occupancy and Occupant, is where Lands or Tenements are granted to *J. S.* and his Heirs, during the life of any other perſon or perſons; in this caſe, if he that hath this Eſtate, dieth, the Heir ſhall have it, and no other perſon can gain it by Entry, as in the firſt caſe; and this is called a Franck-tenement Diſcendible. *Franck tenement Diſcendible, what.*

So that it doth much concern all them that take Eſtates for others lives, to have the Eſtate limitted to them, and their Heirs.

And both theſe kinde of Eſtates are in the nature and quality of other Eſtates for lives; *Caveat Emptor.*

lives; for neither he to whom it is made, his Heir, nor the Occupant, ſhall have aid: This Heir ſhall not be charged by a Specialty, whereby this Tenant doth binde him, and his Heirs, he is puniſhable for Waſte or Forfeiture, and liable to pay Rent, and perform the Service of the Tenant, as another Tenant for life is; the wife ſhall not be endowed, the husband ſhall not be Tenant by the Courteſie, and the Occupant is bound to pay the Rents, and perform the Covenants annexed to the Eſtate, as another Tenant for life is bound.

Feræ naturæ.

Property.

And the right that men have to Beaſts and Birds that are *Feræ naturæ*, is but a kinde of Occupancy, whiles they keep them they are their own, though they have no Property in them; and when they are gone, they are any mans that can catch them. See *Property*. *Co.* 10. 98. on *Littl.* 41. *Littl. Sect.* 167. 41. 339. 388. *Dyer* 264.

Sect. 36. Of what things it may be, or not. *Rent, Common, &c.*

A Special Occupancy may be of a Rent, Annuity, Advowſon, Common, or the like thing that lieth in Grant. But a general Occupancy (as it ſeems) can be of nothing but of Houſes, Lands, and ſuch like things. And therefore if a Rent, Common, or the like thing be granted to *J. S* during the life of any other perſon or perſons, and *J. S.* die, during the life or lives of that perſon or perſons, or thoſe perſons; in theſe caſes, it ſeems the Rent doth ceaſe, and the Common cannot now be enjoyed by any other perſon or perſons, the firſt Grantee being dead, *Littl.* 168. *Plow.* 556. *Co.* upon *Littl. part.* 41. Nor can an Occupancy be of a Copihold. And therefore if a Tenant for his own life, of Copihold Land, Surrender his Land to the Lord, to the uſe of *A. B.* and the Lord admit *A.* for the life of *A* This is a Surrender of all his Eſtate, and when *A.* dieth, the Eſtate is ended, and the Copiholder ſhall not have it again, *Co.* 1. 41. *Mich.* 7 *Car.* Agreed by all the Judges in the *Exchequer Chamber*.

Copihold.

27. Where a man ſhall be ſaid to be an *Occupant*, and adjudged to be in as of an Eſtate in Occupancy, or not.

For Anſwer to this Queſtion, theſe things are to be known.

1. If one make a Leaſe to *J. S.* (without more words, or to *J. S.* his Executors and Aſſigns,) during the life of any other perſon or perſons; this after the death of *J. S.* will be an Occupancy; and if in this, and ſuch like caſes, the firſt Leſſee for life make a Leaſe for years, or at Will to a ſtranger; and this ſecond Leſſee is in Poſſeſſion, and the Leſſee for life die, the Leaſe for years, or at Will, not ended; it ſeems this Leſſee for years, or at Will, ſhall be the Occupant, albeit he never claim as Occupant. But if in this caſe the Leſſee for years, or at Will, be out of Poſſeſſion, and the Heir, Executor, or Adminiſtrator of the firſt Leſſee, can firſt get into Poſſeſſion, he may be the Occupant. So if one Diſſeiſe the Tenant for anothers life, and the ſame Tenant die before his Entry; the Diſſeiſor will be the Occupant. So if he in Remainder for life Diſſeiſe the Tenant for life, and then the Tenant for life dieth, he in Remainder ſhall have it, and the wrong is purged, *Hill.* 38 *Eliz. B. R. Roſſes* caſe. *M.* 17 *Jac. B. R. Whorewoods* caſe. 38 *H.* 6. 28. *Plow.* 28. 558. *Fitz Bar.* 303. *C.* 10. 98. *Dyer* 321.

2. If Tenant by the Courteſie, or Tenant in Dower grant his Eſtate to *J. S.* and *J. S.* die; in this caſe there will be no Occupancy, and therefore it ſeems theſe Tenants ſhall have it again, for they are Tenants to the Lord notwithſtanding the Grant, Adjudg, *Stanhops* caſe. *Mich.* 17 *Jac. B. R.* So if Tenant in Tail Grant *totum ſtatum ſuum*, (*i. e.*) all his Eſtate, *Mich.* 17 *Jac. B. R.* But *Quere*.

3. If a Tenant for anothers life, Grant away his Eſtate for life to *J. S.* and ſay not to him and his Heirs; this after the death of the Grantee, will be a general Occupancy: And the like is ſaid of Tenant in Dower, and by the Courteſie, *Plow.* 556. 28. *Fitz Bar.* 303.

4. If one ſeiſed in Fee of Land, or ſeiſed of it for his own life, or the life of another, and he grant it to *J. S.* and his Heirs for his life; this is not a General Occupancy, but a Special Occupancy. So if a Leaſe be to *J. S.* and his Aſſigns, for the life of *J. D.* and *J. S.* aſſign it to *K. L.* and his Heirs for the life of *J. D.* this is a Special; and by this the miſchief of the General Occupancy is avoided, *Co.* 10. 98. *Dyer* 321. *Bakers* caſe. *Hill.* 37 *Eliz. Co. B.*

5. If

5. If a Tenant in Tail bargain and ſell his Land by Indented Deed to another and his Heirs, the Bargainee hath but a Franck-tenement diſcendible to his Heirs, determinable on the death of the Tenant in Tail; this is not an Occupancy, nor after that nature; for the Wife of the Bargainee will be endowed, as long as the Eſtate doth continue, and the Bargainee cannot be puniſhed for Waſte or Forfeiture, *Co.* 10. 98.

6. No Occupancy ſhall be againſt the King, neither ſhall Entry before him; prejudice him, *Co.* on *Littl.* 41.

7. Every Entry or coming upon the Land after the death of the Tenant, will not give a man this Eſtate as an Occupant, but it muſt be a purpoſed Entry: And therefore if a man follow his Hauk or Hounds over the Ground; by this he is not an Occupant, *Vdals* caſe, 32 *Eliz. B. R.* Adjudged.

8. An Executor cannot be a Special Occupant, but he that firſt enters, though he never Claim the Land, ſhall be the Occupant: And therefore if Leſſee for three other lives, make a Leaſe for years, and then die; the Leſſee for years is the Occupant, and the Leaſe for years is drowned. By Baron *Thorpe* at *Gloceſter* Aſſizes, 1654.

9. The way to prevent the miſchief of a General Occupancy is to take in the word Heirs, or for the Tenant that hath an Eſtate of Land lyable to this miſchief, to grant it away, and make Livery upon it, or bargain and ſell it by Deed indented and inrolled, or to Covenant to ſtand ſeiſed of it to the uſe of his Wife, or ſome of his Blood, or to make a Leaſe for years of it determinable upon the lives, by which the Eſtate is held.

An Eſtate for years is, where one holdeth Lands or Tenements for a time, or number of years in Certain. And this is one of the leſt and loweſt kinde of Eſtates; (for this though it be a Leaſe for one thouſand years) yet is it (in Judgment of Law) but a Real Chattel that ſhall go to the Executor or Adminiſtrator, and may be forfeited upon an Outlawry in any Action, as a mans Goods and Chattels may be; and this may be made without Deed. And yet this in many things is like to a Leaſe for life; for he that hath this Eſtate, ſhall have Houſe-boot, Fire-boot, Plough-boot, *&c.* (for which ſee *Houſ-boot.*) He may charge or grant it, during his Term, and no longer; he may not make Waſte in it, or make any Eſtate of the Land he ſo holdeth for longer time, then he hath in it; and if he do make any Eſtate of Freehold of it, and it be executed by Livery of Seiſin, it is a Forfeiture of the Eſtate. No Wife in this caſe ſhall have Dower, nor Husband be Tenant by the Courteſie, 14 *Hen.* 7. *chap.* 3. *Finches Law* 44. *Littl. Sect.* 38. *Co.* upon *Littl.* 46.

Sect. 37. 28. *Eſtates for years*, what. The nature of it.

Houſe-boot.

For this, take theſe things.

1. A Leaſe for life or years, may be made with, or without a Deed, or by way of Fine, Record, Bargain, and Sale, or Covenant to ſtand ſeiſed to Uſes upon good conſideration of marriage, and the like.

What ſhall be ſaid to be a Leaſe for years, or not.

2. If one by writing, make a Leaſe of Land for years in the Premiſſes, *Habendum* to the Leſſee, and his Heirs; this, if Livery and Seiſin be made upon it is a Fee-ſimple. But if it be, To him and his Heirs for a certain number of years, and no Livery of Seiſin made; this is but a Leaſe for yeares, *Co.* 2. 24. 34 *H.* 6. 27.

3. *A.* by Articles in writing, covenanted and agreed to and with *B.* that he ſhould occupy and enjoy White-acre for ſeven years; this is a good Leaſe for ſeven years, Adjudge, *Hobbard, Rep.* 49. 5 *Hen.* 7. 2. 21 *Hen.* 6. 37. *Dyer* 150.

4. If one grant a Rent of twenty pound a year, until one hundred pound be paid; this is a Leaſe for five years of the Rent. But if it be of a Manor of the value of twenty pound a year, that ſuch a Leaſe were made of in this manner; this were a Leaſe for life of the Leſſee, determinable upon the payment of the money, *Co.* upon *Littl.* 42.

5. If one grant the next Advowſon of a Church to *J. S.* and his Heirs; this is

but in the nature of a Chattel, 34 *H.* 6. 27. But ſee much more of this thing in my Book of *Common Aſſurances*, *fol.* 110, 111. and *Chap.* 14. *fol.* 267.

Eſtate at Will, what.

The kindes.

An Eſtate at Will, is either by Cuſtom, and ſo are all Copihold Eſtates; for which ſee *Copihold*, or by *Common Law*: And this is where a Leaſe is made, during pleaſure. And this is either at the will of the Leſſor; and this is moſt Common: Or at the will of the Leſſee, or during the pleaſure of the Leſſor and Leſſee both together: As when it is made at will indefinitely, and ſay not of the Leſſor or Leſſee. And ſo are all Leaſes at Will, though it be expreſt onely to be at the Will of one of them, yet the other is implied.

The nature of it.

And this is the leaſt and loweſt kinde of Eſtate that can be made, yet the Leſſee may enter upon, or have Action againſt a ſtranger that doth enter upon him. It is a Chattel alſo that will go to the Executor or Adminiſtrator, if the Leaſe be not determined, (as commonly it is by the death of the party;) but if he have a Copihold Manor, he may make Eſtates according to the Cuſtom. But this Eſtate is neither grantable over, nor chargable; yet if the Leſſee ſow the Land, and die, his Executors ſhall reap the Corn: And the Leſſee here, muſt take heed he do not make voluntary Waſte; for this is puniſhable: And yet it ſeems he may take the Shrouds of the Trees. This Eſtate may be made, rendring Rent or Service.

Election.

And for this the Leſſor may diſtrain as long as the Leaſe doth continue; and when it is determined, have an Action of Debt for it. And during the Leaſe, he may diſtrain or bring Action of Debt at his Election. And this differeth from the Eſtate of the Tenant by Sufferance, for he holdeth always by wrong; but Tenant at Will holdeth always by right. If the Leſſor enter and determine the Will, he ſhall not hurt the Leſſee, for he ſhall have the Corn, and time to take his Goods, *Co.* upon *Littl.* 56. 551. 57. 270. 14 *H.* 8. 17. *Littl.* 14. 72. 27 *H.* 6. 3. 21 *Ed.* 4. 5. *Co.* 2. 24. 20 *H.* 6. 30.

Sect. 38. 29. What ſhall be ſaid an Eſtate at Will, or not.

If a Feoffment be made in Fee, Gift in Tail, or Leaſe for life, and no Livery of Seiſin is made upon the Deed, to perfect the Eſtate; this is but an Eſtate at Will, *Co.* 2. 24.

So if a Leaſe be made for years, and it is not expreſſed for what number of years; this is a Leaſe at Will, 21 *H.* 7. 38.

So if one Leaſe a ground to *J. S.* for a year, and after by conſent of the Leſſor *J. S.* doth continue it for many years, as the courſe is; ſome would have this a Leaſe from year to year, at the firſt years Rent by Implication; but this (it ſeems) is nothing but a Tenancy at Will.

If one enter upon anothers Land, and occupy it, and Claim onely an Eſtate at Will; this is no Eſtate at Will, but a Diſſeiſin.

So if a Bargain and Sale be made that is void, as if it be by a Corporation, and done by a wrong name, or the like; in theſe caſes there is no Eſtate at Will made, but they are Diſſeiſins, *Littl. ſect.* 461. *Plow.* 537.

By what means it is, or may be determined, or not.

This Leaſe at Will, may be determined by his Will, at whoſe Will it was made: Or if it be made indefinitely at Will, and it ſay not at whoſe will, it is at both their Wills, and either of them may determine it.

But this may be determined by the Act of God; As where the Party by whoſe will the Leaſe is held, die; but otherwiſe it is, if onely one of them, if it be at the will of two, die; or by the Act of the Law, when the Law doth make a Conſtruction upon ſome Acts to be a Determination of the Will, as if the Leſſee do make voluntary Waſte; or the Leſſor doth take the Cattle of the Leſſee upon the ground for Rent, and impound them; by this the Will is determined. And yet if a Femeſole make a Leaſe at Will, and after take a Husband; this doth not determine the Will. So if a Woman-ſole be Tenant at Will, and take a Husband; the Leaſe at Will, is not determined by this. So (it ſeems) the Law is where two Joyntenants make a Leaſe at Will, and one die; the Leaſe at Will is not ended, but the Rent ſhall go to the Survivor. So if it be made to three, and one of them die, the Leaſe is not determined. And by the Act of the Parties themſelves, it may be determined many ways; as by an Actual Countermand in writing, or by word, made by him, at whoſe Will the Eſtate is held: Or by his making of a Feoffment, or Leaſe to another of the

the ſame Land; or by the Entry of the Leſſor upon the Leſſee; or by the Leſſees leaving of the poſſeſſion; theſe and other things will determine the Eſtate. But when the Determination is, be it by what means it will, no prejudice ſhall be to either Party; for if the Leſſee ſow the Land, he ſhall not be prevented of the reaping of it, unleſs he turn out himſelf by his Determination of the Will. And if there be a Rent reſerved, the other Party cannot determine the Leaſe a little before the Rent day, to prevent him of his Rent. See for all theſe things, *Co.* upon *Littl.* 55, 56, 57. 11. 18. 2. 25, 55, 59. *Kelw.* 65. 162. 9 *H.* 7. 24. 13 *H.* 8. 25. *Co.* 8. 17. 21. 6. 35. *Dyer* 62. 4 *Hen.* 6. 11. 21 *Hen.* 6. 37. 11 *Aſſ.* 14. 8 *Edw.* 3. 63. 8 *Aſſ.* 28.

Sect. 39. *Eſtate at Sufferance*, what.

An Eſtate at Sufferance (if it be any Eſtate at all) is (ſtrictly taken) where a mans Entry into Land was once lawful, or by Authority, or he had an Eſtate, which is now ended, and yet he doth continue in the Poſſeſſion of the Land: As where one is Leſſee for years, and the years are expired, or Leſſee for anothers life, who is dead, and yet the Leſſee keeps in Poſſeſſion, and keeps out him that hath next right; in this caſe, if it be an Eſtate, it is an unlawful one. And the Party in Reverſion or Remainder kept out, may have againſt him that is in Poſſeſſion, the Writ called *Ad terminum qui præteriit.* And yet if the Leſſor, or he in Reverſion, have once entred upon the Leſſee, then he may not have this Writ, but muſt have ſome other Remedy; nor will this Writ lie after the death of Tenant in Dower, or by the Courteſie. But if ſuch a Tenant hold himſelf in the Land, after his Term ended, unleſs it be againſt the Leſſors will, he is no wrong doer, till the Leſſor have made his Entry. But for all this, ſee *Co.* upon *Littl.* 270, 271. 7 *Ed.* 4. 6. 11 *Aſſ.* 14. 21 *H.* 7. 38. 22 *Ed.* 4. 38. 14 *H.* 8. 11. 37 *Aſſ.* 8. *Brownl. Rep.* 338. 30.

Ad terminum qui præteriit, what.

Entry Dower Courteſy

This Tenant by Sufferance (more largely) is any one that entreth into, and taketh the profits of my Lands by my Sufferance: For which ſee *Plow.* 537, 538. *Co.* 4. 24. *Dyer* 28. 57. 62. 328. *Co.* upon *Littl.* 270, 271.

Quare Ejecit infra terminum, what.

Quare ejecit infra terminum, is a Writ lying where a man maketh a Leaſe for years; and after the Leaſe made, and before it be expired, he himſelf putteth out the Leſſee; or he maketh a Feoffment, or Leaſe to another, and the Leſſee or Feoffee doth put out the Termor; in this caſe he may have this Writ againſt him, that ſo putteth him out, and therein ſhall recover his Term, and his Damages. *Weſtm.* 2. *ch.* 24. *F. N. B.* 197.

Ejectione Firme, what.

This Writ of *Ejectione Firme*, is now become one of the moſt common Actions in Uſe, and is uſed frequently for Tryal of Titles, and is the common rode that men go to the Recovery of the Poſſeſſion of thoſe Lands wherein, or whereto they have a Right or Title, the which they do in this method. They firſt enter upon the Land, and then they make a ſhort Leaſe of it to ſome Friend, and this they Seal and Deliver to him upon the Land, and then he enters, and being put out, brings this Action, and thereby recovers his Leaſe, and the Poſſeſſion of the Land. To this Action (being of every days uſe) we ſhall therefore ſpeak ſomewhat largely, and eſpecially to theſe things. 1. The Entry of the Leſſor that hath the Right. 2. The Leaſe made by him for the Tryal of the Title. 3. The Entry of the Leſſee. 4. The Entry upon him and his Ouſter and Ejectment. 5. The Proces or Pleading in the Action or Suit.

As touching the Entry of the Leſſor that hath right to the Land, there are two things conſiderable; Firſt, Whether he hath any Right or Title to the Land at all: For if it appear the Defendant to have Right to the Land, the Plaintiffs Action will fail. But this is a point too large and general to be diſcuſſed here: And yet take here theſe few things by the way; 1. That a man may have a Right or Title to that Land whereof, and wherein he hath not the poſſeſſion or property. 2. Right is where Land is taken wrongfully from another by Diſſeiſin, or the like, the Challenge or Claim of him from whom it is taken, is called a Right. 3. There is a Right of Action, which is when there is no Remedy left but an Action to recover the Land, and there is a Right of Entry, when the party claiming, may for his Relief, either enter into the Land, or have an Action to recover it; and there is a Title of Entry, which is where no wrong is done, and yet one hath a lawful courſe to enter upon the Land which another hath, but hath no Action to recover it: As where Entry is given to a man for a

Right of Entry

Title of Entry

condition broken, upon an Escheat, the dying of a Tenant without Heir; in all which cases he must make his entry before he can bring any Action, *Plow.* 558. 255. *Finchesley* 105. *Coo.* 10.48. 8.153.4 The property and title of Land is made and may be gained, either by entry, as in case of occupation, where Land is granted to *I. S. pur auter vie*, and *I. S.* die, in this case he that gets first in possession shall have the Estate. By descent where a man hath Land of Inheritance, and dieth not disposing of it. By Escheat where the Owner dieth seised, without any Heir, which may be because he is a Bastard, or because he is attainted of Treason or Felony. By Conveyance, and so the property of Land is transferred, and so it is passed by ten manner of waies, or by ten kinde of Conveyances, Fine, Recovery, Feofment, Grant, Bargain and Sale, Lease, Exchange, Surrender, Release or Confirmation. Of all which *see my Book of Common Assurances at large.* A man may come by a property of Land by an Execution also, as by an Elegit or Extent, of which *See in Execution.* And *Just. Dodridge* 2 *part.f.*28. *Coo.* upon *Litt.* 10. 2 If he ever had a right of entry into the Land, the next thing considerable is, whether it do continue and be not taken away: for one may have a right of Action and no right of Entry to recover his Land, and he that will maintaine this Action must make himself a title under the Lessor that had a right of entry into the Land when he made the Lease; for he that makes the Lease must have a power and right of entry at the time of the Lease made, otherwise neither the entry nor the Lease will be good. We shall therefore insist a while upon this point, to shew when a Descent will take away an Entry. For the opening whereof let these things be observed.

When an entry is gone by a descent or not. *Sect.* 2

1. That the Law doth much regard descents, which seem to adde some strength to the Title. And therefore if one wrongfully enter upon the possession of my Land, as being a Disseisor, Abator or Intruder, and put me out of my Free-hold and Inheritance by Disseisin, Abatement, *&c.* he may hold it against all men but me, and if I suffer him in quiet possession five years after his entry, without entry or continuall claim, and then he die in possession and this Land descend to his Heir, by this means he hath gained the right of possession against me, and I have lost my right of entry; and have no remedy left me by which to recover the Land, but by a reall Action, Writ of entry, Assise, or the like. And this Action if I bring not in the time appointed by the Statutes of Limitation, I shall lose also, and consequently my right to the Land it self, having no means to recover it, and so be without remedy, *Litt. lib.*1.*Chap.*6. *Plow* 47. *Finchesley* 120. *D. & St.*24.32 *H.*8.33.

If I be seised of Land in Fee, and disseised by another, and he continue in possession five years without entry or claim, and then die, and his Heir enter; in this case my entry is gone, and I am put to my Writ of entry *Sur Disseisin* for my remedy, *Litt.Sect.*385. So if the Disseisor give the Land in tayle, and the Tenant in tayle die seised, having issue, and it descend to his issue, *Litt. Sect.*386. So if I be Feoffee in Fee, or Donee in tayle, and be disseised, and the Disseisor die seised, *Litt.* 392. So if a Feme sole be Disseised, and after take a Husband, and the Disseisor die seised during the coverture; the entry of the wife is gone, and she is put to her Writ, *Litt.*404.

If one be disseised of Land, and the Disseisor give the same Land to another in tayle, and the Tenant in tayle hath issue and die seised of that Estate, and the issue enter; in this case the entry of the Disseisee is gone, and he is put to his Action if he will have remedy, *Litt. chap.*386.

If a Feoffee in Fee, or a Donee in tayle be upon condition, and he is Disseised, and the Disseisor die seised, the Feoffee or Donee hath lost his entry and is put to his Action, *Litt.*392. If a Feme Disseisor marry a husband and have issue and after the wife die seised, and after the husband die, and then the Heir enter, it seems the Disseisor is barred of entry, 9 *H.*7.33.*H.*6.

If an Infant Disseise another, and Alien the land, and the Alienee die seised, his Heir within age; the Disseisee is barred of his entry, but if the Disseisor within age enter upon the Heir, as he may, then may the Disseisee enter upon the Infant because the descent is defeated, *Litt.*407,408. If one Disseise another, and make a Feoffment upon condition, and the Feoffee die seised, the entry of the Disseisee is gone:

gone: but if the Diſſeiſor enter for the condition broken, then he may enter upon him, *Litt.*409.

If one Diſſeiſe a man and Ouſte his leſſee for years at once, and die ſeiſed, the Diſſeiſee cannot enter, but is put to his Action; but the Leſſee for years may enter But if it were a Diſſeiſon of a Tenant for life, *Contra. Litt.*411. If a Daughter be Diſſeiſed, and after there is a dying ſeiſed, and then the Son is born; this Deſcent will barre him of his entry, *Broo* 450. If a Diſſeiſor make a Leaſe for years, and after die ſeiſed, this will barre the Diſſeiſee of his entry *Broo.*453. If an Infant make a Feoffment, and after his full age the Feoffee die ſeiſed; or a Leſſee for life Alien, and the Alienee die ſeiſed; or a Deviſe be of Land on condition, and the Heir of the Deviſor enter and die ſeiſed; in theſe caſes the entry is gone, and they are put to their Action, 21 *H.*6.7: *Litt:* 96: 9 *H:* 6:25: If one bargain and ſell his Land, and the Bargainee enter, and after the Bargainor enter upon him and die ſeiſed, the entry of the Bargainee is gone.

If an Abator or Intruder, or one that hath but title that may have an Action, die ſeiſed, this deſcent taketh away entry, *Litt: Diſcents Plow.*47: *Litt:*96. *Coo. ſuper Litt.*238. If the Anceſtor do not die ſeiſed in Fee, or Fee-tayle, but tearm of life only, this will not take away entry, *Litt. Cap.*387. *Fincheſley.F.*120. If one be diſſeiſed of a Reverſion or Remainder only, and die ſo ſeiſed, and it deſcend to his Heir, this will not barre him that hath right, of his entry, *Litt. cap.* 388.390. If there be Lord and Tenant, and the Tenant be diſſeiſed, and he Alien in Fee, and the Alienee die without Heir, and the Lord enter as in his Eſcheate, here the Diſſeiſee is not barred of his Entry, but may enter upon the Lord, for here is no deſcent to the Heir, *Fincheſley f.*120. If one be ſeiſed of Land in Fee, or in Fee-tayle upon condition, and the condition be broken, and the Feoffee or Donee die ſeiſed, yet this doth not take away the entry of the Feoffor or Donor, but he may enter upon the Heir. So if the Feoffee or Donee on Condition be diſſeiſed, and before or after the condition broken the Diſſeiſee die ſeiſed; yet the entry of the Feoffor or Donor is not gone, but he may enter upon him, *Litt.*391. 22 *H.*6.11. If a Diſſeiſor die ſeiſed, and after his Heir endow the Wife of the Diſſeiſor of a third part, and ſhe enter into it; now the Diſſeiſee after the endowment is not barred of his entry into the third part, but may enter upon the Wife, *Litt:*393. If a Diſſeiſor infeoff his Father, and he die ſeiſed, and the Land deſcend upon him, the Diſſeiſee may enter upon him, notwithſtanding this deſcent, *Litt.*395. If any of the yonger ſons enter by abatement after the Fathers death, and have iſſue, and die ſeiſed, or his iſſue die ſeiſed, this will not barre the eldeſt ſon of his entry. So if one daughter enter upon all the Land deſcended, and die ſeiſed of it: but if after the eldeſt ſon have entred, or all the daughters have entred, one of the younger ſons, or one of the daughters diſſeiſe the other and die ſeiſed *Contra. Litt.*397. *Plow.*306. If an Infant have cauſe of entry and the Deſcent happen while he is within age; this will not barre him of his entry. So if the right of entry happen to a Feme covert whiles ſhe is ſo; and the dying ſeiſed be before ſhe is ſole; her entry is not loſt. So if the cauſe of entry and deſcent happen whiles a man is *de non ſane memory*, yet the Heir of ſuch man ſo diſſeiſed may enter. So if the Diſſeiſee be in priſon, or out of the Realm at the time of the diſſeiſon, and dying ſeiſed, their entry is preſerved for them, *Litt.*402. 403.405.21. *H.*6:17. *Litt.*437. If a Diſſeiſor enter into religion, whereby his Land comes to his Heir, this will not barre the Diſſeiſee of his entry upon his Heir, *Litt.* 410. If a Tenant for life be, the remainder to the right Heirs of *I. S.* and the Tenant for life is diſſeiſed, and a deſcent is caſt, and after *I. S.* die and after the Tenant for life die; in this caſe the entry of the Heir of *I. S.* is not gone, but he may enter, for his remainder was in *Cuſtodia Legis*, *Coo.*1.134. If one had intruded upon the King, and and after the King grant away the Land, and before entry or ſeiſure by the Patentee the intruder doth die ſeiſed, this will not barre the entry of the Patentee, *Dyer.*266. Out of all which it appeareth that if one man do wrongfully enter upon another mans poſſeſſion, and put the right Owner of the Freehold and Inheritance from it, he doth thereby get the Freehold and Inheritance by Diſſeiſin, and he may hold it againſt all men but the Diſſeiſee. And if ſuch a Diſſeiſor or Abator having

having the poſſeſſion five years after the Diſſeiſin or abatement, die in poſſeſſion and the Land deſcend to his Heir, by this the Heir hath gained the poſſeſſion of the Land againſt him that hath right untill he can recover it by a fit reall Action. And if this be not brought within 60 years after the Diſſeiſin or abatement, the right Owner doth loſe his right for ever. But then that deſcent which taketh away entry, muſt be a deſcent and not a ſucceſſion; as if a Corporation diſſeiſe me, and there be tweuty ſucceſſions, this will not hurt me. And this deſcent muſt be ſuch as hath in it theſe things.

1 It muſt be a dying ſeiſed of an Eſtate in Fee-ſimple or Fee tayle, and not for life only.

2 It muſt be a dying ſeiſed of the poſſeſſion and Franktenement alſo; and not of a Reverſion or Remainder only. 3 He that dieth ſeiſed, and he that hath right of entry do claim by ſeverall Titles, and not by the ſame Title

4 The Diſſeiſin and deſcent muſt be in time of peace, for if it be in time of war, it doth not prejudice to him that hath right.

5 The Diſſeiſor or Abator muſt have the quiet poſſeſſion of the Land five years before the deſcent without any entry or continuall claim, made by him that hath the right of entry or title.

6 He that hath the right of entry is of full age *infra quatuor Maria*, of ſound memory, out of priſon, and ſole; for if the party be within age, beyond ſea, *non Compos mentis* in priſon, or a Feme covert at the time of his deſcent, it will not Bar.

7 But herein the whole time from the Diſſeiſin to the deſcent caſt is conſiderable; for if the perſon be not priviledged at all times, the deſcent bindes: As if a Feme covert be Diſſeiſed, and the husband dieth, and ſhe take a new husband, and then the deſcent is caſt: or one *ultra mare* is diſſeiſed, and he return into *England*, and then goeth beyond ſea again, and then a deſcent is caſt, in theſe caſes the deſcent will bar the entry becauſe of the *interim*, 9 *H.* 7. 24. *Dyer.* 143. *Co.* upon *Lit. Deſcent. Stat.* 32. *H.* 8. 33.

If one have divers children, and the eldeſt being a Baſtard doth enter after his fathers death, and quietly hold the Land without re-entry or claim all his life time, and hath iſſue, and dieth ſeiſed, and the iſſue enter, in this caſe the Action and Entry both of the *mulier* are gone, and he is without remedy.

So if one have two Daughters, one a Baſtard, they divide, and the Baſtard die ſeiſed of her part, and her iſſue enter, the other Daughter is without remedy. *Litt. ſect.* 401. 499. 500.

An entry alſo may be gone by lapſe of time, and therefore if the right or title of entry did firſt accrue to a perſon more then twenty years ſince, and he were at that time of full age, not a Feme covert, nor in priſon, nor beyond the ſeas, or *Non Compos mentis*; and if he were ſo, and have not made his entry within ten years after his full age, diſcoverture, coming, of ſound mind, enlargement out of priſon, coming into the Realm or death; the entry is gone and the party barred thereof for ever, 21. *Jac.* 16.

Entry good or not. *Sect.* 3. Entry of one gives advantage to another.

Now having ſhewed where this entry is given, we are to ſhew how it muſt be made, and when it is well made or not; for if it he not well made, this Action is not maintainable. And for the clearing of this point, take theſe rules and caſes following.

1 This entry is to be made by the party that hath right.

2 It is a purpoſed going into or ſetting his foot upon the Land as upon his own Land, *Co.* upon *Lstt.* 243. *Dyer.* 337.

3 This may be done by the party himſelf that hath right to enter, or by his Attorney by warrant from him, or by another to his uſe, and if it be done by Attorney he muſt have a good authority, and ſee he do duely purſue it, *Co.* on *Lit.* 257. 258.

4 The Leſſor muſt have a right of entry; for if the right of entry be taken away the Leaſe is not good. And for this ſee the caſe before.

5 He or one of them at leaſt that hath the right, or one for him muſt make the entry. But for the opening of this branch, theſe things muſt be known.

1 That

1 That one Joyntenant, Tenant in Common or Coparcener having right to enter may if he will, enter for all the reſt.

2. If ſuch a perſon enter generally, or for or in the name of himſelf and the reſt, and the reſt do not after diſagree to it, this is a good entry for himſelf and the reſt. And therefore if one have iſſue a ſon and daughter by one venter, and a ſon by another, and being ſeiſed of *Capite*-Land deviſe all to the youngeſt ſon, and die, and he enter into all, this entry ſhall avail the eldeſt ſon to put him in poſſeſſion of the third part, *Adjudg. Smals Caſe: M.* 14 *Jac. Co.B.* But if he enter ſpecially to his own uſe; as if two have right of Entry, and one of them enter, and make a Feoffment of all the Land with warranty; this Entry will not help the other. So if the other do after diſagree to it, he ſhall have no advantage by it, *Lit.*160.*Dyer.* 53.128.*Coo.upon Litt.*243. 3: If the Tenant for life enter he in remainder may take advantage by it, 4 *H.*7.9.*Dyer.*53.4. By the entry of the husband into that Land he claimeth in right of his wife, the Freehold and poſſeſſion is in the wife, *Noy* 97.

5. When the entry is not lawfull, the Entry of one will not advantage another, 1 *H.*6.5. 8 *H.*6.16.31 *Aſſ.*33.

4. The Entry into one part may be ſufficient to gain the poſſeſſion of the reſt of the Land. But for the further opening of this branch theſe caſes muſt be laid down; 1. If a man have right to enter into Lands or Tenements in divers Villages within one County accrewed to him at one, or at ſeveral times, and he enter upon one part of it in one Village in the name of all the reſt, to which he hath right to enter within all the Villages of that County; By this he hath gotten the poſſeſſion of the whole, *Litt.Sect.*417. *Dyer.*337.227. *Coo.upon Litt.*252. 9 *H.*7.25. And yet ſome make a difference here, and grant this only where an Eſtate is to veſt, as where the Free-hold in Law is in one, as in an Heir by deſcent, and the poſſeſſion is in no man, nor no Eſtate to be diveſted, that here only entry into part reduceth all into poſſeſſion: And therefore, that if the Lord be to enter for a mortmain, or the Feoffor for a condition broken or the diſſeiſee upon a Diſſeiſin, and he enter upon part for all; that this is not ſufficient to reduce all. But I take it the experience is otherwiſe, however therefore it is ſafeſt to enter upon every part of the Land, *Coo. upon Litt.*15:6.252. 2. If three ſeveral men ſeverally diſſeiſe one of three Acres in one County, and he enter into one of them in the name of all the three Acres, this is good only for that he doth enter upon, and will not reduce them all in poſſeſſion. And yet if theſe three Acres come after the Diſſeiſin into one mans poſſeſſion, there perhaps an Entry upon one may reduce all. But if one man diſſeiſe me of three Acres in one County at ſeveral times; My Entry into one of them in the name of all the reſt will reduce them all, 14. & 15. *Eliz. Earl of Arundels Caſe. Coo.upon Litt:*152.9 *H.*7.25. But for Land that lies in ſeveral Counties there muſt be Entries made in every County, 4 *H.*7.25. *Litt:*417. 3. If one man diſſeiſe me of three Acres, and make a Leaſe thereof to three perſons for life, and I enter upon one of them in one mans poſſeſſion in the name of all the reſt, this will reduce that Acre only, and is not good for the reſt. And if one diſſeiſe me of three Acres lying in three Villages in one County, and he levy a Fine of the Acre in one Village, and after I enter into one of the other Acres in the name of all the three Acres; this doth not reduce the Acre whereof the Fine was levied, without a ſpecial Entry into it. *Dyer.*337. But if Leaſes were made for years of three Acres and gotten by Diſſeiſin to ſeveral Tenants, and Entry into one in the name of the reſt will recontinue, and reveſt all the three Acres, *Coo. upon Litt.*252. And ſo *à fortiori*, where three Acres are in the poſſeſſion of three men, and I having right to them enter into one of them in the name of them all, this will reduce all the three Acres: The courſe is in the caſes where Entrie is needfull upon every parcel, as where Leſſees claim by ſeveral Titles, *&c:* to enter upon every parcel, and leave a friend upon it to keep the poſſeſſion, and then to ſeal the Leaſe upon the principal parcel where his laſt Entry is made, and then the Leſſee doth enter upon all, and the men depart; for if he enter in one part only, and ſeal a Leaſe of the whole, this is not good for the reſt, *M.*8.*Jac.Curia.* But otherwiſe it is where Entry into a part is good for all, as where a diſſeiſor hath made ſeveral Leaſes for years

Sect. 4 *Entry into part gains the Poſſeſſion of the whole.*

yeats, there the Diſſeiſee doth enter into any part in the name of all, and ſeal a leaſe of all, and this is good for all. And if the leſſees do continue in the poſſeſsion, this is an Ouſter upon which the Leſſee may have an *Ejectione Firme*, *Curia Paſch 9 Jac. B. R. Lovets Caſe.* 4. If I enfeoffe one of one Acre of ground upon condition, and enfeoffe him of another Acre upon condition, both Acres in one County, and both conditions are broken; in this caſe an Entry into one Acre in the name of both is not good to reduce both. 5. The entry into parts muſt be in the name of all. For if one that is diſſeiſed of two Acres in one County, enter generally into one of them without ſaying in the name of both; this will only reveſt that Acre wherein the Entrie is made, 5 *H. 7: 7. Coo. ſuper Litt.* 252. And therefore if Lands in one County be in the occupation of *A. B.* and *C.* and I have right to them, and I enter into one of them generally, and do not declare my intent to reduce all; it is ſaid this is a good Entry only for that one Acre wherein I put my Foot, *Per Juſtice Hutton at Sarum Aſſiſes*, 22 *Jac.* If one reſtrain his own Entry, and make it ſpecial, and ſay that it ſhall be to that Acre only, wherein he puts his foot, in this caſe it reduceth the poſſeſſion of no more but of that part, *Coo. upon Litt.* 15: 6. If a Leaſe be made to *A.* and delivered to *B.* to the uſe of *A.* and *B.* enter to the uſe of *A.* and after is ouſted, *A.* may bring this Action upon the Entry, *P.* 44. *Eliz. B: R. Purrel verſ: Biſhop.*

Ouſter.

Condition Broken

Leaſe to try the Title.

Sect. 5.

And now having done with the matter of Entry of the Leſſor, we are to ſpeak of Leaſes; for to maintain this Action a good Leaſe muſt be ſhewed forth. For the opening of the learning thereof, take theſe Obſervations. 1. The Leaſe to try the Title muſt be well made, ſealed and delivered as other Deeds and Leaſes are to be done. For this *See my Book of Common Aſſurances*, *Chap.* 4. & 14. 2. The Leaſe and Entry may be made by the party Leſſor himſelf, if he be of full age, and not a *feme covert*, or by his Attorney by a Letter of Attorney thus. The Leſſor may ſeal and ſign the Leaſe, and ſeal and deliver a Letter of Attorney at the ſame time to ſome friend, and in this he muſt recite the Leaſe and give the Attorney power to enter into the Land, and there to deliver the Leaſe to the Leſſee as his Deed, and then the Attorney muſt do it in ſuch ſort as the Leſſor himſelf is to do it, and he muſt not deliver it till he come to the Land. 3. The Leaſe muſt be delivered upon the Land; For if the Leſſor ſeal and deliver the Leaſe before his Entry, it is void.

And for this cauſe, if a wife and *I. S.* be Jointenants in Fee, and being ouſted they make a Leaſe to try the Title, and *I. S.* and the husband enter and deliver the Leaſe upon the Land, or the wife after and before the ouſter deliver the Leaſe out of the Land, this is not a good Leaſe by the wife. But if the husband and wife make a leaſe and Letter of Attorney to enter and deliver it upon the Land, this may be good, *Trin. 9. Jac. B. R. Burnel and Merediths Caſe.* A Copie-holder may make a Leaſe for a year without licenſe to try the Title: So may a Tenant in common make a Leaſe of his part for this end. *See more Brownl.* 1 *part.* 129.

If a Leaſe be made of white Acre to *B:* from off the Land, and in the Leaſe is a Letter of Attorney to a ſtranger to deliver it as his Deed upon the Land, but the Leaſe is not delivered, this is not a good Authority, *B. R.* 4 *Car.* If *A.* Leaſe his Land to *B:* from off the Land, and ſeal and deliver it as his Deed off from the Land, *C.* being then in the Land, by Diſſeiſin, and after this the Attorney that hath power by another Deed to deliver it as his Deed upon the Land doth ſo, this is not a good Leaſe to maintain an *Ejectione firme*, *Curia B. R.*

Authoritie Verball in writing.

A woman Covert, or an Infant, cannot make a Letter of Attorney to ſeal a Leaſe to try a Title, as a man of full age may do; but the husband alone may make a leaſe of his wives Land, *Per Juſt. Turner at Lent Aſſiſes*, 23 *Car.* And ſome hold that where a Letter of Attorney may be made, that this power may be given and executed by paroll without writing, *Juſt. Jones*, 5 *Car.* If the Declaration be of a Leaſe made by husband and wife, and it is made by Letter of Attorney from the husband and wife; this is not good. But if he declare in this caſe upon a Leaſe made only by the husband, it is good. *Brownl.* 2 *part.* 248.

If one that hath right to land enter & make a leaſe for years to one to try the Title, and

and the Tenant continue in poſſeſſion, and then he that hath right doth enter and make another Leaſe to another, the firſt Leaſe continuing, and the ancient Tenant continuing in poſſeſſion, the ſecond Leſſee cannot maintain this Action upon this Leaſe, *Curia Brownl:* 1 *part.* 128. 129. 130. 134.

Entry of the Leſſee. *Entry*, General or Special.

3. The next thing is the Entry of the Leſſee, for unleſs it be proved that the Leſſee after the Leaſe made, did enter, this Action will not be maintainable: wherein theſe things are to be known; 1 He muſt make ſuch an Entry, as to gain the poſſeſſion, for he cannot be ejected out of the poſſeſſion of that wherein by Law he was never in the poſſeſſion. 2. His poſſeſſion muſt continue, and not be removed. *Brownl.* 1 *part* 130.

Ejectment. *Sect.* 6.

4. The next thing to be weighed is the ouſter and Ejectment of the Leſſee, for if it do not appear that the Defendant in the Action did out and Eject the Leſſee, this Action will fail. For this then obſerve theſe caſes; 1, The ouſter muſt be real and involuntary: for if one enter by licenſe and agreement of the Leſſee, and (as ſome ſay) of the Leſſor; this is no Ejectment in which the Action will lie. 2. The ouſter ſhall be taken largely againſt the Ejector: It is ſaid therefore, that if *A* Leaſe two Acres to *B*, and *C* enter upon one of them, that this is an ouſter out of both Acres, *Juſtice Hutton at Sarum Aſſiſes*, 22 *Jac. Quære of this.* 3. If a woman do enter and continue in poſſeſſion, and after the husband cohabit with her, he is no Ejector, unleſs he agree to it; and therefore in this caſe the Action is to be brought againſt them both. But if the husband agree to it, the Action is to be brought againſt him alone. And yet a Leaſe was made to try a Title of a houſe, and the Leſſees enter into it; and the wife of the party that is in poſſeſſion out him, and ſhut the door, and after the husband cometh and entreth in the houſe, and the Action was brought againſt the husband alone, and ruled to be good, *M.* 44. 45. *Eliz: B. R. Clent verſ. Claſſy.* 4. The continuance of the ſame Tenant in poſſeſſion that was in at the time of ſealing of the Leaſe, is an Ejectment by him. 5. The Entry of a man upon the Land, or the putting in of a beaſt into the Land after the ſealing and delivery of the Leaſe, is an Ejectment. 6. If a Leaſe be made to try the Title, and the ſervants of the former poſſeſſor enter with their Maſters Carts to do their ordinary buſineſs, and the Action is brought againſt the Maſter, it is maintainable without proof of the Maſters Commandment for this Entry, *P.* 1. *Car. B. R. Cally verſ. Fiſh.* 7. A Tenant in common may by an actuall Ejectment be an Ejector to, and ſued by his companion: The thing in Leaſe was two houſes, *I S* was in poſſeſſion of one of them, and *I D* in the poſſeſſion of the other, and the Leaſe was ſealed in the houſe of *I S* and the Action was brought againſt *I D* only, the principal Ejector not ſued, and the Plaintiff was forced to be non-ſute. *Per Juſt. Aske at Summer Aſſiſes at Glo.* 1650. 8. A ſervant that doth dwell with the pretended owner is a ſufficient Ejector, *Brownl.* 1 *part* 143.

Pleading. *Sect.* 7.

5, The laſt thing is the Proceſs and pleading; for, admitting a good power and form of Entry, a Leaſe duly made and executed, an Entry and Ejectment upon the Leaſe, yet there may be in the proceedings in the Action fatal errours. For this then take notice. 1. This writ lyeth not in every cauſe, or for any thing, for it lieth not upon a Leaſe of a ſtock of Cattel, nor upon a Leaſe of a Summ of money, *in modo decimandi*; nor of a water-courſe, *M. 6. Jac. B. R. Challoner, verſ. Moor.* But it lieth of a Mannor, Houſe, Land, Medow, Paſture, Tithe, or ſuch like thing, *Co.* 11. 25: It lieth *de pomario. M:* 43. 44. *Eliz B. R Wright verſ. Wheatly.* So it lieth *de Coquina, Trin.* 2. *Jac. Co. B.* So alſo *de Cubiculo.* It lieth alſo of a Colemine, *P.* 5. *Jac. B. R. Comin, verſ. Wheatly.* It lieth alſo of a Bailery, of *Salt Hill.* 6. *Jac. B. R. Saunders Caſe.* It is not good for a Courſe of water, nor for Common of paſture nor a ſheep gate. But it is good for 10 acres of peaſe. *Brownl:* 1. *part* 129. 146. 149. 150. 2. The writ muſt ſet forth the thing in certain for quantity and quality, as one Meſſuage, two Cottages. 7 Acre *ter.* 4 Acr: *prati.* 5 Acr: *paſture*, and ſo of Tithes. And it is not ſufficient to ſay *de Tenemento*, or *de uno repoſitorio*, or of Meſſuage and the Lands thereunto belonging, or of ſo much of a Meſſuage in the occupation of *I S* as doth ſtand upon the bank, *&c.* or of one cloſe called *D* containing 3 Acres to a Meſuage belonging, or the like, for this is uncertain.

Error

certain. And yet an *Ejectione Firme* of a Gate-houſe one Acre parcel of a Manner, a Moity, or a third part of a Mannor, or of a room of a houſe certainly deſcribed, is good, *Co.* 11, 59. 25. *Dyer* 84. 305. *F. N. B.* 220. *Finch.* 107. *Paſch.* 17. *Car. B. R. Trin.* 17. *Car.*

3. The Leaſe and the Declaration upon it muſt agree. If a *Feme Covert*, and *A* be Jointenants in Fee, and *A* and her husband, and the other Jointenant make a Leaſe for years by Deed indented, and the husband and *A* enter, and deliver his Leaſe upon the Land, and the Leſſee declare upon a Leaſe from them three, this is nought. *9 Jac. B. R. Curia.*

If the Leaſe be for ninety years, if three lives ſo long live, and the Declaration be upon a Leaſe for ninety years without limitation, this is nought, *Per Iuſt: Turner at Lent Aſſiſes* 23, *Car.*

CHAP. LXXX.

Of an Eſtoppel.

1 *Eſtoppel* what.

IT is where a man is concluded and barred, by ſome thing he hath ſaid or done, to ſpeak and make uſe of the truth for his own advantage: where a mans mouth is ſtopt, and his hands bound that now he cannot ſay or doe, that which otherwiſe he might have ſaid or done: And this may be in divers things, and by divers means: As in pleading, or in Deeds and writings under mens hands; when they ſhall aſſent to or confeſs any thing therein that is not true, or in their own diſadvantage, now they are in many of theſe caſes afterwards forbidden to ſay the contraty, if they have need for their advantage: ſo where a man hath election by law: to have one of two things, and he make his choyce of one of them; or to ſue one of two perſons and he ſue one; or to have one of two remedies for the recovery of a thing and he make his choice: now in all theſe caſes, he is concluded ever after to take, or demand, or uſe the other. And ſome of theſe Eſtoppells are by matter of Record. Some by matter in writing, and ſome of matter by fact; of which there are infinite examples: ſome of which ſee below. And ſee *Election*, and *Acceptance*, and in other titles where many caſes of Eſtoppell will fall out. *Co.* 2. 4. 3. 88. *Plow.* 397.

The Kinds.

2 Where it may be or not.

For Anſwer to this, take theſe things.

1. Note that by a bare ſuppoſall or unneceſſary recitall, or by words or ſayings of another partie, an Eſtoppell ſhall never be produced. 35 *H. 6.* 33. 3 *H. 6.* 15. 9 *H. 6.* 8. for which ſee examples below. So when it appears in the very Deed that the Grantor had no power to grant, *Co.* 1. 155. *Dier.* 244. So when it enures by way of paſſing an Intereſt. *Co. 6.* 15. So when it is to cover wickedneſs and defeate an Act of Parliament. *Co.* 5. 64. For Eſtoppells are odious in law. *Co.* upon *Litt.* 365. See divers rules for *Eſtoppels in Co.* upon *Litt.* 352.

By matter of Record.

2. A Record is of that high and excellent nature that the Law will not admit any deniall of that which is apparently within the Record. But that which the parties doe ſay and do there in the Law, doth give great heed unto. And therefore if the Daughter and right Heir will admit a Baſtard of her Fathers

Fathers, or any other to ſue a Livery out of the Kings hand with her; by this means the Baſtard, or other, will get the one half of the Land, and the right Heir ſhall never be afterward received to ſay the Baſtard is not Heir; becauſe ſhe hath allowed the contrary to be true by the Record.

So if two Joyntenants be that do hold *in capite*, and one Releaſe to the other, and yet after they both Reſpite Homage together in the *Exchequer*: Now hereby the other Joyntenant hath gained his Moyety again of the Land, and the other Joyntenant ſhall not be received to ſay the contrary.

So if one plead the Kings pardon for his Alienation without Licence, and *rei veritat'* the Land is not held *in capite*; now he cannot afterwards ſay, that it is not held *in capite*, *Co.*7. 1. 8. 16. *Plow.* 396. *Dyer* 202. 33 *H.*6. 7. *Doct. & Stud.* 33. *Littl. Sect.* 175. *Broo.* 306. *Co. ſuper Littl.* 122. *Crompt. Juriſd.* 49: *F. N. B.* 97.

3. If one acknowledge upon Record, to hold of his Lord by more ſervices then he doth; he is barred to ſay after that he holdeth by leſs, though it be true.

So if one plead a Releaſe or a Pardon to an offence, he ſhall not ſay after, he is not guilty of the offence, *Stamf.* 555. 22 *Edw.* 4. 39. 9 *Hen.* 4: 8. 11 *H.*4. 69.

If a Tenant in Tail, Leaſe for life, and die, and the Tenant for life is impleaded, and he doth vouch the Iſſue in Tail, and he do enter into the Warranty generally; now the Iſſue is concluded and cannot afterward bring any Formedon to recover this Land. But if he had entred into the Warranty ſpecially, *contrà*. Tenant in Tail *Warranty.*

4. If the Husband do diſcontinue the Wives Land, and die, and after his death ſhe brings a Writ of Dower, and doth recover againſt the Diſcontinuee; now by this ſhe is concluded to demand the whole Land, as otherwiſe ſhe might, *Co.* 4. 5. *Dower.*

5. If *A.* and *M.* his Wife, by the name of *A.* and *B.* levy a Fine, ſhe ſhall not avoid it, and ſay againſt the Record, her name is not *B. F.N.B.* 97. Tenant in Tail *Recovery.*

If a Tenant in Tail ſuffer a Recovery that his Iſſues may avoid; yet he himſelf is concluded by it, and cannot demand the Land againſt his Recovery, *Co.* 3. 3. 1. 9.

6. If a Tenant in Tail make a Feoffment, or be diſſeiſſed, and levy a Fine with Proclamations to a ſtranger, the Iſſues of the Tenant in Tail are barred for ever of the Land. Tenant in Tail *Fine.*

So if an Iſſue in Tail before his Right diſcended, in the life of his Anceſtor, levy a Fine of the Land, whereof he hath poſſibility, and the Proclamation be paſſed; this will bar the Iſſues by Concluſion, *Co* 3.944.

If Lands be conveyed to a Woman in Tail, within the Statute of the eleventh of *Henry* the Seventh, and her Husband die, and their Iſſue levy a Fine to a ſtranger, and after the Woman diſcontinue within the Statute, and forfeit: Now the Iſſue by the Fine is eſtopped that he cannot enter; but perhaps the Conuſee may. See more of theſe matters in Fines and Recoveries. And how a Leaſe by a Fine may be good by Eſtoppel, *Co.*4. 53. *Plow.*434. 21 *H.*7. 24. *Co.*4. 71.

7. If one bargain and ſell Land to another, and before Inrollment levy a Fine of it to the Bargainee. Now the Bargainee muſt take by the Fine, and cannot take by the Deed inrolled.

8. If one in pleading doth confeſs the thing that he is charged with, or accuſed for; he is barred now of denial of it afterwards, although it be not true he hath confeſſed: As if one endited of Treſpaſs, confeſs it, and after be ſued in an Action of Treſpaſs for the ſame Treſpaſs; he is concluded now to plead not guilty by his Confeſſion before. By Confeſſion, or *Nihil dicit.*

9. If the Defendant after Appearance and Declaration, do not plead to the Action, or maintain his Plea, but maketh default, then Judgment ſhall be given againſt him; and this will be peremptory, and as great an Eſtoppel to him as a Confeſſion.

But where one ſhall be eſtopped by matter of pleading, and where not. See the Books at large, *Dyer* 287. 21 *H.*7. 24.

10. If a Plaintiff or Defendant be barred in any Sute upon a Demurrer, or Verdict; they are concluded to begin any new Sute, or to move again, but in ſpecial Caſes, *Co.*6. 7. 44.

Judgment. 11. If one have a Judgment for a thing already in a Court of Record, he is barred to begin a Sute again for the ſame thing, for which he hath a Judgment, *Co.* 6. 45. *Trin.* 3 *Jac. Brown & Wolſton.*

So Judgment againſt another for the ſame cauſe, ſo that it be ſuch a cauſe as wherein Damages be to be recovered.

If a Tenant for life make a void Leaſe for life, and the Leſſee make a Leaſe at Will, and the Tenant for life levieth a Fine to the Tenant at Will: Now both theſe parties are eſtopped to ſay againſt this Fine, *Quod partes ad finem nihil habuerunt*, *Co.*2. 55.

Fine. If a Precipe be brought againſt one for Land, and he ſince the Statute of *Conjunctis Feoffatis*, plead Joyntenancy with another by Fine; and now by this the other may take advantage, and he is eſtopped to ſay the contrary at another time, *Plow.* 6.

12. If a Feoffment be made to two and their Heirs, and after the Feoffor levies a Fine to them two, and the Heirs of one of them: Now this is no Eſtoppel to the other to demand Fee-ſimple according to the Deed, for the Fine doth enure as a Releaſe, *Co.* 6.7.44. *Co.*2.74. 6 *R.* 2.

13. If a Lord Paramount diſtrain the Leſſee of his Tenant, and he in pleading ſay, he holdeth for ten years by a Leaſe from the Tenant, when in truth it is by a Leaſe for twenty years: Now he is not eſtopped hereby to demand his Term of twenty years, *Dyer* 289.

14. If a Fine be levied *Sur Releaſe* onely, a man may ſay, that the Conuſee had nothing at the time of the Fine levied in the Land, and to Letters Pattents, one may ſay that nothing was granted by them; and in this caſe there is no Eſtoppel, *Co.* 3.

15. Though in all Perſonal Actions Regularly, when one is barred by Judgment, Confeſſion, *Verdict*, *&c.* He is barred for ever (as above) yet in Real Actions he is not ſo concluded; for if he be barred in a Real Action, he may have another Real Action upon the ſame cauſe, ſo it be an Action of a higher nature, as he may have.

So alſo where the Plaintiff hath miſtaken his Action onely, as hath brought a Formedon in Remainder for a form in Reverſion, or the like, and the Defendant doth plead to the Action of the Writ, ſuch an Action brought without Judgment upon Verdict or Demurrer, or where the Plaintiff is Non-ſuit, or the Plea be diſcontinued will not conclude him, but he may bring the ſame Action again.

So where the Plea is to the Writ onely in Abatement of that, and that be abated by Judgment, or a Demurrer, or Verdict; yet there he is not eſtopped, but may have the ſame Writ again.

So if the Sute be onely diſcontinued, or the Plaintiff be Nonſute; in this caſe he is not barred to begin the ſame Sute again: But if the Plaintiff enter a Retraxit, he is barred for ever, *vide Retraxit. F. N. B.* 48.

16. If one have uſed as Adminiſtrator, and it have been put in Iſſue, and found againſt him; yet he is not barred by this to ſue as Executor, *Co.*5. 32. Though a Judg-

Judgment given for the ſame thing againſt the ſame perſon or another, is an Eſtoppel for the ſuing again upon the ſame cauſe (as before,) yet if the ſame Judgment be reverſed that was at firſt, or it were for ſome thing elſe, or not for all, that which is in the new Sute; in this caſe the Party is not eſtopped. So where the Judgment is not in a Court of Record, *Co.* 6. 45.

17. If a Woman covert levy a Fine as a Feme-ſole, her Husband is not eſtopped, but may avoid it by Entry or Claim for him, his wife, and her Heirs without any Writ of Error.

So if *J. S.* with another mans wife, by the name of *J. S.* and *Jean* his wife levy a Fine of the Land of the wife, the right Husband may avoid it ſo, but it ſeems the wife is eſtopped, *Keble Whites* caſe, *Trin.* 7 *Jac.* *Co.* 8.

18. One ſhall not be eſtopped to ſay any thing againſt that which before he hath ſaid in a Writ, or Court, as in a Formedon, 21 *H.* 7. 24.

19. If one Claim by Diſcent from *J. S.* yet in another Formedon he may Claim from *J. D.* but one ſhall be eſtopped to ſay any thing contained in his Plea, in Bar, or Replication; yea, though the Plaintiff be afterwards Nonſute.

20. If the King Licence to another, to alien the manner of Dole, which is held of him *Ut dicitur*; this is not any Eſtoppel to him to whom the Licence is made to ſay, the Land is not held of the King, for it is no preciſe Affirmance of the Tenure, *Plow.* 398.

Hitherto of Eſtoppels by Records, now by Deeds.

1. If one ſeiſed of Land in Fee, take a Leaſe of the ſame Land from a ſtranger by Deed indented, now during the Term (and no longer,) this is an Eſtoppel to him, and he cannot to avoid it, ſay it was his own; and if there were any Rent reſerved, he muſt pay it alſo to the Leſſor, during the Term. So if one make a Leaſe of Land by Deed indented, and at that time he had nothing in the Land, but after he purchaſe it, or it doth diſcend to him; this is a good Leaſe by Concluſion, *contrà* in both caſes, if it were by Deed Poll. *Co.* 4. 53. *Dyer* 256. *Plow.* 344. 14 *H.* 6. 23. 4 *H.* 7. 14. *Plow.* 434. 1. By Matter in Writing.

2. If two men do make an Exchange by word, and after before Entry, by either of them, they make Indentures of the Land, each to other; now it ſeems they are bound by theſe Indentures, and they ſhall have ſuch Eſtate as doth paſs by the Indentures, and not by the Exchange, *Perk. ſect.* 264. *Plow.* 433.

3. If one Leaſe to one man for eighty years, and after make another Leaſe by Deed indented, to another for the ſame time; this ſecond Leaſe is good by Eſtoppel onely; and if the firſt do determine by Surrender or Forfeiture, or the like, the ſecond Leſſee ſhall have it; whereas otherwiſe, if it were, by Deed Poll, the ſecond Leaſe were void, *Co.* 1. 155.

4. If a Leſſee for thirty years of Land, aſſign it over, and after make a Leaſe for ſix years by Deed indented, and then repurchaſe the Leaſe again: Now this Leaſe for ſix years ſhall be good againſt him by Eſtoppel, and he cannot avoid it, *Co.* 5. 53.

5. If one by Deed indented, make a Partition of Land with another that hath nothing to do in the Land; by this he hath gotten a part of the Land, and the other is concluded to ſay ought againſt it, *Broo.* 306.

6. If one make a Defeaſance by Indenture of a Deed; now he is hereby eſtopped to ſay, that there is no ſuch Deed, *Plow.* 397. But if there be any thing put in the Deed by way of Recital, he is not concluded to gainſay that, *Broo. Eſtoppel* 5.

7. If one that hath nothing in Land make a Leaſe of it by Indenture, rendring Rent, the Leſſee is eſtopped to ſay, that the Leſſor had nothing in the Land at the time

time of the Leaſe made, and ſo by this cannot Bar in an Action of Debt; but if it were in a Deed Poll, he might, *Littl.*

8. If the Husband make a Feoffment of the Land of the Wife, and the Feoffee make a Leaſe to the Husband and Wife for life or years, and the Husband commit Waſte, and the Leſſor brings an Action of Waſte; now the Husband is eſtopped to ſay that the Leſſor hath no Reverſion (as the truth is) for it is in the Wife, *Littl. ſect.* 666, 667.

9. If one have a Rent common, or the like, by Preſcription, and take a Pattent from the King, or Deed from a common perſon for it; now by this he is concluded ever after to Claim it by Preſcription, 21 *H.*7. 5.

10. If one in conſideration of one thouſand pound, bargain and ſell Land, and *rei veritate* no ſuch money was paid; yet this being expreſſed upon the Deed of Bargain and Sale, and a Receipt of the money; the Bargainor, it ſeems, is concluded to ſay the contrary, *Dyer* 169.

11. If one do make a Deed *per dures*, and after when he is at large, he do make a *Defeſonis* to it, it ſeems, he is eſtopped to ſay it was *per dures*, *Broo. Def.* 17. If one by the name of *J. S.* of *W.* binde himſelf in an Obligation, or Bill, or the like: Now he is concluded by this, and he cannot ſay that his name is otherwiſe, or that he is of another place, and ſo avoid his Deed; for which ſee 10 *H.*6.8. 3 *H.*6.25. 22 *H.*6. 53.

So where a Condition of an Obligation is in the particularity, as to infeoff *J. S.* of the Manor of *J.* or to pay ſuch a ſum as *J. S.* doth ſtand bound by Obligation to pay to *W. S*, or to ſtand to the ſentence of *M. S.* in a matter of Tithes, in Queſtion between them, there the Obligor is eſtopped to deny any of theſe things, which in the Condition of the Obligation he did grant: But if the Condition be in the generality, as to infeoff one of all his Lands in *B.* or to the Nonſute in all Actions; here he is not concluded, but may ſay, That he hath no Land there, or that there be no Actions depending, and the like, *Dyer* 196. 18 *Edw.* 4. 21 *Ed.*4. 54.

12. If a Condition be to perform an Indenture, the Obligor is eſtopped to ſay, there is no ſuch Indenture, 28 *H* 6. 7. *Bro. Rep.* 57.

13. If one binde himſelf by the Condition of an Obligation, to give the third part of his Goods, which his Father Deviſed to him, he is eſtopped to ſay, in pleading gave him none, 8 *Jac. Co. B.*

14. If one Recite in the Condition of an Obligation where *A.* doth Demiſe to *B.* and *B* to the Obligor. If now the Obligee ſhall hold it quietly, *&c.* now the Obligor is eſtopped to ſay *A.* did not Demiſe to *B.*

So if it be a Condition to pay the Rent reſerved on ſuch a Leaſe, he cannot ſay no ſuch Rent, *Trin.* 9 *Jac. Sherleys* caſe.

15. If one be bound to perform the Award made by *J. S.* he is eſtopped to ſay *J. S. Nullum fecit arbitrium* King & *Percival. B.R. Hil.* 14 *Jac.*

16. If the Condition of an Obligation be, That the Obligor ſhall grant to the Obligee all the Lands mentioned in certain Indentures, bearing date with the Obligation, the Obligor cannot plead no ſuch Indentures; but if the Condition were to infeoff the Obligee of all his Land in *S. Contrà per totam Curiam, M.* 18 *Jac. B. R: Sur.* 28 *H.*6. 7. 21 *Ed.*4. 4,54.

So if *A.* be bound to *B.* in one hundred pound with Condition that *A.* before *Michaelmas* ſhall ſeal a Leaſe to *B.* under the Covenant contained in an Indenture, bearing date, *&c. A.* cannot plead that there is no ſuch Indenture. But if the Tenant do confeſs by Deed indented, That he holdeth by other Services, then he doth of his Lord; it ſeems this is no Eſtoppel, neither ſhall the Services be increaſed hereby, 39 *Aſſ. pl.*3.

17. If the Lord by Deed indented, reciting, that whereas his Tenant holdeth of him by ſuch and ſuch Services (otherwiſe then he doth hold by) doth confirm to his Tenant (ſaving his Services) this is no Eſtoppel to the Tenant, *Plow.* 136. 35 *H.*6. 33.

18. If

18. If a Leſſee for life, and he in Reverſion make a Feoffment, by Deed indented; this ſhall not enure by way of Eſtoppel, becauſe it doth enure by way of paſſing an Intereſt; and whereſoever any Intereſt paſſeth from a man, there a Deed ſhall never work by way of Eſtoppel againſt him. *Co. lib. Inſt.* 1 *part. fol.* 45.

19. If a Husband make a Feoffment of his Wives Land, and after the Feoffee make a Leaſe to the Husband and Wife for life or years; this is no Eſtoppel to the Wife, after her Husbands death, but ſhe ſhall be remitted to her firſt Eſtate, *Littl. ſect.* 667. *Remitter.*

20. If *A.* Leſſee for life of *B.* make a Leaſe for years by Deed indented, and after purchaſe the Reverſion in Fee, and *B.* dieth; in this caſe *A.* is not eſtopped to avoid his own Leaſe, by Confeſſion and Avoidance: But if *A.* had nothing in the Land, and made a Leaſe for years ſo, and after purchaſe the Land *contra*, *Co. lib. Inſt.* 1 *part. fol.* 47.

21. If one take a Leaſe of the Herbage of his Land, and not of the Land it ſelf by Deed indented; this is no Eſtoppel, *Co. Idem.*

22. If one by Deed call himſelf *J. S.* Heir of *W. S.* Now he is not hereby concluded, but in another caſe he may deny himſelf to be Heir of *W. S.* for it was a ſuperfluous Addition, 35 *H.*6. 33.

23. If one Recite, that whereas he is ſeiſed of the Manor of *W.* he doth after grant a Rent-charge out of it: Now this Recital in the Deed, ſhall not prejudice him at another time, but he may ſay he is not ſeiſed of the Manor of *W.* for theſe Recitals are not material, *Plow.* 18. 397. 33 *H.*6. 10.

24. If one by Deed Poll recite that he hath leaſed Land for ten years; and then Leaſe the ſame to another, for the ſame time; this will not work by way of Eſtoppel. So if one recite that he hath a poſſibility, or a thing not grantable over, and then grant it away; this ſhall never enure by way of Eſtoppel, nay, though it were by Deed indented, becauſe it appears by the Deed it ſelf, the Grantor had nothing to grant, *Co.* 155. *Dyer* 244.

25. If a Deed be of a Contract, which in truth is Uſurious, and the Deed acknowledge; yet in this caſe a man ſhall not be concluded to ſay the truth, *Co.* 5. 69. *Uſury.*

26. If one have a debt due to him by Contract, and he take an Obligation for it; he is barred to ſue upon the Contract. *By other means.*

So if it be a debt due by Specialty, and he get a Judgment, he is eſtopped to ſue upon the Obligation again, whiles the Judgment is in force, *Co.* 6. 45.

27. Sometimes by Acceptance of one thing, one is concluded to demand another, (For which ſee *Acceptance*;) As if a Woman enter upon, and accept a Joynter made to her after marriage, after her Husbands death; now hereby ſhe is barred of her Dower.

So if ſhe bring a Writ of Dower, and demand, and recover Dower; ſhe is barred of having any Joynter made to her after marriage, *Co.* 4. 5. *Dyer* 317.

28. If one have a Judgment, and have choſen an Execution by Elegit; it ſeems he is eſtopped to have any other Execution after. See *Execution* for this matter.

29. If an Exchange be between two, and one of them enter; now he is eſtopped and concluded, and he cannot avoid Exchange firſt made. See for this, *Exchange*, *Co.* upon *Littl.* 170.

30. If one have his choice of one of two Actions, and he hath choſen one: Now he is barred of the other. So if one have choice of two Remedies, as if one have brought an Appeal of Maime, and recovered Damages, he is barred after to bring any Action of Treſpaſs for the ſame, *Et ſic è converſo.* So upon an Executory Contract if he bring Debt, and recover, he is barred of any Action of the Caſe, *Et ſic è converſo*, *Co.* 4. 43. *Co.* 4. 94.

31. If

31. If a Tenant make a Feoffment by Colluſion and the Lord accept the ſervices of the Feoffee; hereby he is Eſtopped of the Wardſhip, and of this Averment of Colluſion. So if the Husband ſell his Wives Land and die, and ſhe accept part of it in Dower; ſhe is barred of her, *Cui in vita* for the whole, *F.N.B.* 142. 144.

32. If the Husband do diſcontinue the Wives Land, and the Alienees make a Leaſe to the Husband and Wife for their lives, and the Leſſor bring Waſte againſt the Husband; he is Eſtopped by the Feoffment and Waſte, to ſpeak of the Remitter to his Wife, *Littl. ſect.* 667.

33. If a man ſeiſed of Land in Fee, take a Wife, and then grant a Rent-charge, and after make a Feoffment in Fee, and taketh back an Eſtate-tail, and die, and the Wife recovereth Dower againſt the Iſſue in Tail by Reddition, the Wife ſurmiſeth that her Husband died ſeiſed, and pay a Writ, to enquire of Damages, and hath it; in this caſe ſhe ſhall hold the Land charged with the Rent; for by her prayer ſhe accepteth her ſelf dowable of the ſecond Eſtate, and ſhe is Eſtopped to be endowed of the firſt, 14 *Ed.* 3. 28.

34. *J. S.* ſeiſed of Land in Fee hath two Daughters, a Baſtard *eigne* and *mulier puiſne*, and die, and they both make Partition, the *mulier* is hereby concluded for ever, *Co.* upon *Littl.* 170.

35. But if one bring Action of Treſpaſs, the Caſe, or the like, where the things are uncertain, and Damages is onely to be recovered, and he hath no Judgment, yet, this is no Eſtoppel to him, but he may bring any other, or the ſame Action at another time. But if he have obtained a Judgment upon the firſt, he is Eſtopped, and the other may plead it in Bar to the ſecond Action, Adjudg, *Bridges* and *Diſſey*, *M.* 5 *Jac. B.R.*

36. If Partners do make Diviſion of the Lands they have in Tail, and one of them hath the worſt part, though ſhe be concluded, yet it is no Eſtoppel to her Iſſue.

So if Husband and Wife be Tenants in Special Tail of certain Lands in Fee, and they have Iſſue a Daughter, and the Wife dieth, and he take another Wife, and have a Daughter by her; and both theſe enter and make Diviſion, though this be an Eſtoppel to the eldeſt Daughter, during her life, yet it is none to her Iſſue, *Co. ſuper Littl.* 170

3. What perſons are concluded by an Eſtoppel, or not.

37. Eſtoppels do commonly conclude none but ſuch as be Parties or Privies; and no ſtrangers are bound by them, unleſs it be in ſome ſpecial caſes; as when the Eſtoppel is by Act of Parliament, or the like. And therefore a Jury upon Oath, are not concluded and bound up as the Parties be: As if an Obligation be delivered before the date, and dated after the Delivery, the Obligee cannot plead it ſo, but muſt plead it after; yet if the other plead *Non eſt factum*, the Jury will and may finde it to be his Deed, *Co.* upon *Littl* 352.

38. The Heir at Common Law is commonly to be barred by the Eſtoppel, not another Heir, though the Land be to go to him: As if there be Father and Son, and the Son have Iſſue a Son and Daughter by one Woman, and a Daughter by another, and the Grand-father do an Act of Eſtoppel by Deed, the Father die, and the Son die, and his Son alſo die without Iſſue; his Daughter now that muſt have the Land, ſhall not be barred by this Eſtoppel: So an Eſtoppel on the part of the Mother, ſhall not binde the Heir on the Fathers part. And therefore if Bonds be given to Husband and Wife, and the Heirs of the Husband, the Husband makes a Gift in Tail, and dieth, and the Wife recover in a *Cui in vita* againſt the Donee, ſuppoſing ſhe had Fee-ſimple, and make a Feoffment and die, the Donee die without Iſſue, and the Iſſue of the Husband and Wife bring *Formedon* in the Reverter againſt the Feoffee; he is not Eſtopped, but may ſo do, *Co.* upon *Littl.* 365. So if the Husband and Wife be Tenants for life, the Remainder to the Heirs of the Baron, and the Husband give in Tail, and die, the Wife Recover in *cui vita*, ſuppoſing that ſhe had the Lands to her and her Heirs in Fee; and after recovery Infeoff another, and die, the Donee die without Iſſue. Now the Heir of the Donor

ſhall

ſhall recover this Land, and is not barred by the Eſtoppel of his Mother, becauſe he was Heir to them both, and therefore the Eſtoppel of one of them, could not Bar him, 35 *H.6.* 33. *Broo. Eſtoppel* 22. *Co.* 8. 53. 18 *Ed.*3. 9. *Co. lib. Inſt.* 1 *part. fol.* 12.

39. If one Joyntenant in Fee take a Leaſe for years of a ſtranger, the Survivor ſhall not be bound by this, *Co.* upon *Littl. f.* 185.

If one make a Leaſe of part of a Term, whereby he is eſtopped, and after aſſign away the Term, the Aſſignee is eſtopped alſo; and Regularly none but Parties and Privies ſhall take advantage of an Eſtoppel (and not ſtrangers) and therefore none may take advantage of any Eſtoppel in any Fine or Recovery; but Parties or Privies, or ſuch as Claim the Land, or the Eſtate, or part of it under him that was party to the Fine or Recovery, 30 *H.6.*2. 4. What perſons ſhall take advantage of an *Eſtoppel*, or not.

But of ſuch Acts by matter of Record, as trench to the diſinheritance of him, in Reverſion or Remainder: There he in Reverſion or Remainder may take advantage, though he be no party to the thing; as if Leſſee for life or years, pray in Aid of a ſtranger, or levy a Fine, *Co.*4. 53.

Privies in Blood as the Heir, Privies in Eſtate as the Feoffee, Leſſee, *&c.* Privies in Law as the Lords by Eſcheat, Tenant by the Courteſie, in Dower, the Incumbent of a Benefice, and others that come under by Act in Law, or in the Poſt ſhall take advantage, and be bound by Eſtoppels, *Co.* upon *Littl.*352.

It is where one Eſtoppel is pleaded againſt another; and that doth put the matter at large, *Co.* upon *Littl.*352. *Eſtoppel* againſt *Eſtoppel*, what.

How an Eſtoppel muſt be pleaded, and the manner of the Concluſion of the Plea, *Co.*4. 53. 11. 52.

CHAP. LXXXI.

Of Eſtovers, Exchangers of Gold and Silver, Exciſe and Eveſdroppers.

ESTovers is a word that hath many ſignifications: For ſometimes it ſignifieth the Suſtenance that a man that hath done Felony, is to have out of his Lands and Goods, for himſelf and his Family, during his Impriſonment. Sometimes it ſignifieth an Allowance in Meat and Cloath. Sometimes an Allowance of Wood, to be taken out of anothers Wood. Sometimes it ſignifieth Houſ-boot, Hay-boot, and Plough-boot: But moſt properly it ſignifieth the Right that a man hath to cut and take Houſ-boot, Hay-boot, and Plough-boot, to expend and uſe in and upon his Houſe, and Tenement, out of the Wood of another man, *i. e.* Which is either Certain, as ten or twenty load; or Incertain, ſo much as he ſhall ſpend in ſuch a Houſe; or in Groſs, *F. N. B.* 181. 28 *H.* 8. 28. See *Co.* 2 *part. Inſt.* 17, 18. *Eſtovers*, What.

Exciſe.

FOr the Exciſe, who muſt pay it, what, and how it is to be paid; See the *Ordinances*, and *Act* at large. *Act*, 14 *Auguſt*, 1649. and *March* 17. 1653. *June* 12. 1649.

Of Exchangers of Gold and Silver, or Bankers.

SEe for this the Statute of 25 *Ed.* 3. 12.

Of Eveſdroppers.

EVeſdroppers are ſuch as lie about Mens Houſes or Windows to hear Tales, and to carry them about to breed Diviſion, and do ſo; they are to be puniſhed for this in a Leet, or may be puniſhed by Juſtices of the Peace, by the Good-behavior, or Indictment.

CHAP. LXXXII.

Of an Execution.

Sect. 1.

1. *Execution*, what it is.

EXecution is the laſt performance of ſome Act, it is moſt commonly taken for the next Act which doth purſue the Judgement, which is the Sentence that a Judge doth make at the end of a Cauſe or Sute, ſpeaking the Law in the caſe, as it appears upon the proofs before him.

In Civil Cauſes it is, where a Judgment is given in any Court for the Recovery of any Debt or Damage, or any Lands, or Tenements, or other things: Or a man doth acknowledge a Debt by a Recognizance or Statute (which is in the nature of a Judgment) and the Party by a Writ, is put into the Poſſeſſion of the thing, ſo recovered by the Judgment, or acknowledged by the Statute. Briefly, It is the obtaining of an Actual Poſſeſſion of any thing acquired by Judgment of Law, *Terms Ley*, *Co.* upon *Littl.* 154.

How many kindes there are.

And ſome of theſe Executors are ſmall and valuable, as where the Sheriff doth take the Defendants Lands or Goods, and deliver them to the Plaintiff in ſatisfaction of his Debt; or not valuable, or *quouſque* tending onely to an end: As when the body of the Defendant onely is taken and put in priſon, where it is to lie as a pledge till the Debt be ſatisfied; but this doth not ſatisfie the Plaintiff, *Co.* 6. 87.

The means whereby this is done, are by Writs, which are called Writs of Execution; and theſe are ſome of them againſt the perſon, and ſome of them againſt the Goods, and ſome of them againſt the Lands, and ſome of them againſt them all, *Co.* 8. 141.

The Writs whereby Execution is done, are for Recovery of Land in a Real Action; as, *Habere facias Seiſinam*, and an *Habere facias Poſſeſſionem*. And for Recovery of Debt or Damage in a Perſonal Action; a *Capias ad Satisfaciendum*, *Fieri facias* and *Elegit*, *Co.* 6. 51. *F.N.B.* 265. *Weſtm.* 2. 18.

Extendi facias, *Levari facias* *Liberate.*

There are other Writs of Execution, which ſee in *Detinue*, *Chap.* 37. And for all the Writs of Execution of a Statute; as, *Levari facias*, *Extendi facias* and *Liberate*; and for a Statute and Recognizance, and that which doth concern it: See in *Statutes* in my Treatiſe of *Common Aſſurances*, *cap.* 20.

Habere facias Seiſinam, what it is.

It is a Writ Judicial, and it lieth where one hath recovered certain Lands in the Kings Court, then he ſhall have this Writ directed to the Sheriff, commanding him to put him in Actual Seiſin of that Land, *Perk ſect.* 206, 207, 208. *Terms Ley* 217. *F. N. B.* 220.

Habere facias Poſſeſſionem, what it is.

It is a Writ Judicial, and lieth where one that was Evicted out of his Farm, hath recovered the ſame in an *Ejectione Firme*, or, *Quare ejecit infra terminum*, there he ſhall have this Writ directed to the Sheriff, to command him to put the Plaintiff

Plaintiff into Actual Poſſeſſion of the Term again ; and in Execution of both theſe Writs, the Sheriff may juſtifie the breaking of a Houſe to do it, if he cannot do it otherwiſe, *F. N. B.* 220, 221. *Co.* 104. 5. 91. 6. 51. *Dyer* 278.

Capias ad Satisfaciendum, what it is.

It is a Writ Judicial, and lieth where a man hath recovered any Debt or Damages in any Action perſonal in the Kings Court ; then he that hath recovered, may have this Writ unto the Sheriff to command him to take the Body of the Debtor, and thereupon he ſhall be put in priſon, and there ſhall ſtay without Bail or Mainpriſe, until he hath made ſatisfaction to the Plaintiff, the Debt or Damages recovered. This Writ was given by the *Stat. of Weſtm.* 2. *ch.* 11. *Marlb.* 23. *Terms Ley* 256. *Co.* 8. 141. *ſuper Littl.* 289, 290.

Fieri facias, what it is.

It is a Writ Judicial, and lieth where a man hath recovered any Debt or Damages in any Action Perſonal in the Kings Court, then he that hath recovered may have this Writ to the Sheriff, commanding him to levy the money of the Goods and Chattels of the Defendant, and to bring it into the Court, that the Party Plaintiff may have it, *Co.* 3. 9. *Dyer* 306.

And if the Sheriff take Goods and return ſo, and that he cannot finde buyers for the Goods, or delay to deliver it to the Party, then he may have a *Venditioni exponas*, and compel the Sheriff to ſell the Goods, and bring in the money. And if he ſay the Goods were taken by his Predeceſſor, he muſt have a *Diſtringas nuper vic'* to the Precedent Sheriff to command him to ſell them, and bring in the money, *Dyer* 363. 13 *H.*7. 1. 34 *H.*6. 6.

Elegit, what it is.

An Elegit is a Judicial Writ that lieth for him that hath recovered Debt or Damages in the Kings Court againſt another, directed to the Sheriff to command him to make Delivery of the one half of the Parties Lands and Tenements, and of all his Goods, except his Oxen and Beaſts of his Plough to the Plaintiff for ſatisfaction of his Debt. *Old N. B.* 152. *Co.* upon *Littl.* 289. *Dyer* 306. It lieth alſo upon a Recogniſance in any of the Kings Courts.

Sect. 2. *Scire facias*, what it is.

But theſe Writs of Execution muſt be had within a year after the Judgment ; otherwiſe it cannot be had till there be firſt ſued out a *Scire facias*, which is a Judicial Writ going out of a Record, and lying where one hath recovered Lands or Tenements, Debt or Damages, and the Demandant or Plaintiff doth not ſue out Execution within a year after the Judgment had ; in this caſe he cannot ſue Execution, till he have firſt ſummoned the Party to ſhew cauſe why Execution ſhould not be done ; and if now he neglect to anſwer, or cannot be found to be ſummoned, then a ſecond Judgment ſhall be given, that Execution be done on the firſt Judgment. And in this caſe the Defendant may plead any matter growing after Judgment, as Outlawry, Releaſe, *&c.* to prevent Execution, *Co.* upon *Littl.* 290. *Dyer* 148. *Co.* 3. 12. And yet if he ſue out Execution within the year, it ſeems he may continue it after the year without a *Scire facias*, *Old N. B.* 163. *Dyer* 207. 271. *Finches Ley* 477.

Sect. 3. 3. What *Execution* the Plaintiff may have upon a *Judgment*, to recover Debt or Damage, and how, or not.

After Judgment had in the upper Bench or Common Pleas, the Plaintiff may have Execution, either of the Body of the Defendant by a *Capias ad ſatisfaciendum*, or upon his Lands by Elegit, or upon his Goods and Chattels by *Fieri facias*. But a *Capias ad ſatisfaciendum* will not lie in Execution, unleſs it be in ſuch an Action wherein, and againſt a perſon, againſt whom a *Capias* doth lie at the beginning, as Debt, Account, Action upon the Caſe, Action of Treſpaſs, *Vi & Armis*, Annuity, and Covenant ; in all which caſes *Capias ad ſatisfaciendum* doth lie, but no Execution by *Capias ad ſatisfaciendum* may be had for Recovery of Damages in a Real Action, nor in any Action againſt a Duke, Earl, or Baron, or their Wives, unleſs it be in ſome ſpecial caſes : Nor againſt an Heir, or an Executor, but in ſome ſpecial caſes, *Magna Charta* 2. 18. *Co.* 3. 12. *Weſtm.* 2. 11. *Co.* 5. 88. 6. 53. *Co.* 8. 141. 11 *H.* 7. 15. 2 *H.* 4. 6, 7.

If one have a Judgment againſt divers for one cauſe, and take out a *Capias ad ſatisfaciendum* againſt one of them, it ſeems, that after this he can have no other Execution againſt any of the reſt of the Defendants, *Trin.* 9 *Jac. B. R.* The Plaintiff after a *Fieri facias*, if Execution be not done upon it, may have an Elegit

or a *Capias ad ſatisfaciendum*. But after he hath taken out a *Capias ad ſatisfaciendum*, and the ſame be entred upon Record or retorned, he can have no other Execution. So alſo it ſeems after an *Elegit* ſued out and retorned, the Plaintiff can have no other Execution by *Fieri facias* or *Capias ad ſatisfaciendum*; but he muſt have an *Alias Elegit*, or he may have an *Elegit* in another County, 13 *H.*7. 1. *Co.* 5. 87. 15 *H.*7. 15. 33 *H.*6. 47. 28 *H.* 8. 9. 19 *H.*6. 4. 17 *Ed.* 4. 4. 21 *H.*7. 19.

If one have recovered part of his debt by a *Fieri facias*, he may have a *Capias ad ſatisfaciendum* to recover the reſidue, *Mich.* 4 *Jac. B. R. Carrs* Caſe, 18 *Ed* 4. 11.

If the Defendant be arreſted on a *Latitat*, and lie in priſon for want of bail, and after the Plaintiff do get a Judgment againſt him; in this caſe, if he will, he may wave his body, and take Execution of his Lands or Goods, *M.* 4 *Jac. B. R. Curia.*

If a Judgment be had againſt the Defendant, and he having Land, die, and the Land deſcend to his Heir, after a *Scire facias*, he may have Execution by *Elegit* againſt the Heir for this Land, *Dyer* 208. If a Judgment be given in the Common Bench, and removed from thence into the Upper Bench, by Writ of Error, and there affirmed within the year; in this caſe the Plaintiff ſhall have the ſame Proces of Execution in that Court, as he might have had in the Common Pleas without any *Scire facias*, *Co.* 5. 88.

If a Judgment be for Damages againſt two Defendants, and the Plaintiff take out an Execution by an *Elegit* againſt one of them: In this caſe it ſeems he can have no other Execution againſt the other, 33 *H.*6. 47. The ſame Proces of Execution as a man may have before a *Scire facias* ſued out upon a Judgment, the ſame he may have after the *Scire facias*, and none other. And therefore where a *Capias ad ſatisfaciendum* will not lie before a *Scire facias* upon the firſt Judgment, it will not lie upon the ſecond Judgment, 48 *Ed.* 3. 48. 34 *H.*6. 45.

If one be condemned in Treſpaſs, and taken *Pro fine Regis*, and the Plaintiff pray he may be in Execution for him; in this caſe he cannot after have an *Elegit*, or a *Fieri facias*, unleſs the Defendant die in Execution before the Plaintiff be ſatisfied his debt, *F. N. B.* 246. *Co.* 5. 77. After Judgment had in an Annuity, the Plaintiff upon a *Scire facias* may have a *Fieri facias* to levy it as it becomes due, 11 *H.* 4. 34. *Broo* 119. After the Sheriff upon a *Fieri facias* hath retorned a *Fieri feci, ſed non inveni emptores, &c.* The Plaintiff cannot have a *Capias ad ſatisfaciendum*, or an *Elegit*, 13 *H* 7. 1. When the Defendant was outlawed after Judgment, the Plaintiff muſt have prayed when he was taken for the King, that he may ſtay in Execution for him alſo; for he hath no other Proces of Execution afterwards, nor hath he any other Remedy, unleſs it be by a new Action of Debt, brought upon the Judgment, *Co.* 5. 88. No Execution can be had againſt Executors on a Judgment againſt the Teſtator, but by *Fieri facias*, and that *De bonis Teſtatoris* onely, unleſs it be in caſe where he hath waſted theſe Goods. But for this ſee in *Executors* in my Treatiſe of *Common Aſſurances*.

Sect. 4. 4. For and againſt whom Execution ſhall be had upon Judgments for Land, Debt, or Damage, or not; and when, and how it ſhall be done. Heir. Executor.

If one have a Judgment to recover Land, and die before he have Execution, his Heir after his death, may and muſt have Execution. And if there be Tenant in Tail, the Remainder in Fee with Warranty, and he have Judgment to recover in value, and die before Execution without Iſſue, in this caſe he in the Remainder may ſue Execution. If one have Judgment to recover a Term, or any Goods, or a Debt, or Damages, and he die before he have Execution; in theſe caſes the Executor or Adminiſtrator, not the Heir, ſhall have the Execution. And if one have a Judgment to recover Land and Damages together, he may have Execution of both together: But if he die, his Heir muſt have the Execution for the Land, and his Executor or Adminiſtrator muſt have the Execution for the Damages. And ſo it is in caſe of a Judgment to remove a Nuſance, and to recover Damages for the times paſt. And if a Judgment be to recover a Deed belonging to his Land, or twenty pound, and the Plaintiff die before Execution; in this caſe the Heir muſt firſt have a *Diſtringas* for the Deed, ere the Executor ſue Execution for the money; and if the Deed may be had, the Heir is to have him. But if the Deed cannot be had, the Executor ſhall have Execution for the money, *Terms Ley Proces*, *Dyer* 208. 19 *Ed.* 45. *Co.* upon

Litt. 251. 22 *H.* 6. 41. But in all theſe caſes neither the Heir nor the *Executor* nor Adminiſtrator may have *Execution* of the Judgement till firſt they have ſued out a *Scire facias* againſt the party againſt whom the Judgement was had, to warn him in, to ſhew cauſe why *Execution* ſhould not be had againſt him. And then if he either make default, or appearing can ſhew no good cauſe why Execution ſhould not be done againſt him, the Execution ſhall be done for the Plaintiff, as it ſhould have been for him under whom he claims. 19 *Ed.* 4. 5.

If an Adminiſtrator get a judgement on the behalf of the inteſtate, and die; neither his Executor (if he have any) nor his Adminiſtrator ſhall have Execution of this Judgement, but the Adminiſtrator *de bonis non Adminiſtratis* of the firſt inteſtate, ſhall have Execution. And if an Executor get a Judgement on the behalf of the Teſtator, and then die; If he make an Executor he ſhall have Execution upon this Judgement. But if he die inteſtate, his Adminiſtrator, unleſs he have alſo an Adminiſtrator *de bonis non Adminiſtratis* of the Teſtator, cannot have *Execution* upon this Judgement, *Co.* 5. 9. If an *Executor durante minore ætate*, get a Judgement, and before *Execution* the *Executor* doth come of age; in this caſe the *Executor* himſelf may have *Execution* of this Judgement. So if one be *Executor* till *A* be married, and get a Judgement, and before *Execution* *A* is married; in this caſe it ſeems the firſt *Executor* may ſue out *Execution*, *M* 9 *Jac. B. R. Darrets* Caſe. Adminiſtrator

If Judgement be given againſt a Tenant in tayl, and he die before *Execution*, it may be done by *Habeas facias ſeiſinam* againſt the iſſue in tayl, *Co.* 1. 94. 1[illegible]. Haberi

If a Judgement be againſt two Diſſeiſors, and one of them die before *Execution*, the whole damages ſhall not be levied of the ſurvivor, but a part of it ſhall be levied upon the Heir of him that is dead, *Co.* 3. 13.

If the principall upon a ſpeciall Bayl do not after Judgement pay the money or yield his body; then and not before, Execution is to be ſued againſt the Bayl, *Co.* 5. 70. An Heir or an Executor ſhall never be charged by an Execution, but for ſo much in Land, Goods or Chattels, as are come to his hands from the debtor, unleſs it be by his own falſe or fooliſh pleading. If the Defendant be taken upon a *Capias ad ſatisfaciendum* upon a Judgement, and he die in Execution; in this caſe the Plaintiff may have a new Execution againſt his Heirs, Executors or Adminiſtrators (as the caſe is) and ſhall recover his Debt upon his lands, goods, or chattels, *Co.* 5. 86. 87. *F. N. B.* 267.

But no Execution can be had againſt an Heir, Executor, or Adminiſtrator, upon a Judgement given againſt another under whom he comes, and in whoſe room he ſtands, albeit it be within a year after the Judgement had, but there muſt be firſt a *Scire facias* againſt him to ſhew cauſe why it ſhould not be had, *Co.* 3. 11: *Dyer* 208. *Scire facias.*

If two or more be bound in an Obligation jointly and ſeverally (as the manner is) and the Judgement is given againſt them all, in this caſe the Plaintiff may take them all in Execution by a *capias ad ſatisfaciendum*. But he can be ſatisfied the debt but once: and therefore if one of them pay the debt, and any of the reſt be in Execution; in this caſe he and all the reſt are to be diſcharged of the Execution. So if he recover the Debt or value thereof by *fieri facias* or *elegit* of one of them, the Lands and goods of the reſt are to be diſcharged; for he ſhall have *Execution* with ſatisfaction but once. So if the Judgement be on a joint-bill, it ſeems the Law is the ſame; And if in theſe caſes the Judgement and Execution be had againſt one only, the Sheriff may levy the whole debt of him, *Co.* 11. 7. 5. 87. 119. 4 *H.* 7. 8. And yet if one have a Judgement for damages againſt divers men for one joint-Treſpaſs, in it this caſe he can have but one Execution againſt them all. But upon this, if it be againſt the bodies by *capias ad ſatisfaciendum*, the Sheriff may take all or any of them at that time in Execution, and if it be againſt their goods by *fieri facias*, he may levy it once of all or any of them. But it muſt be levied but once, and they muſt bear it equally amongſt them. And therefore if in the caſe before, Execution be firſt ſued out againſt one of them, and the damages is levied, and after another of them is ſued for the ſame Treſpaſs, he may pleade Execution with ſatisfaction againſt the other, *Co.* 11. 43. 3 *H.* 4. 13. 20 *H.* 6. 11. 34 *H.* 6. 33. *Paſch.* 3. *Jac. B. R. Hutchins* Caſe.

Upon

What things ſhall be liable to Execution, and the Sheriff may take by vertue thereof *Sect.* 5.

Upon a Judgement given for debt or damages in the two Courts of Record at *Weſtminſter*, generally all the Land that the Defendant hath *tempore redditionis Judicii*, or at any time after, and all the goods and chattels he hath *tempore executionis* ſhall be ſubject and liable to the Execution. And all theſe may be taken in Execution by the Sheriff, in whoſe hands ſoever they be, *Di.* 306. 34 *Co.* 3. 12. 34 *H.* 6. 45:

Upon a *Capias ad ſatisfaciendum.*

Upon a *capias ad ſatisfaciendum*, the Sheriff can take nothing but the body of the defendant, for the writ is to doe no more but to take his body: and to detain him in priſon till he hath ſatisfied the Debt. *Co.* 5. 8.

Upon a *fieri facias.*

Upon a *Fieri facias* the Sheriff may take in Execution any Goods or Chattels reall or perſonall, that the Defendant hath at the time of the Execution awarded, as Leaſe for years, wardſhips, cattell, corn, houſholdſtuff, apparrell, and the like, and this having taken he may ſell and make money of it, and this money pay to the Plaintiff, *Co.* 8. 171. 7: 39: But the goods or Chattels a man hath as Executor or Adminiſtrator, cannot be taken in Execution, for the Executor or Adminiſtrators own debt, as they may and muſt for the Debt of the Teſtator, *Plow.* 525. And yet it hath been held that the goods I have to the uſe of another are liable to Execution for my Debt, becauſe they are mine by Law, and his only in equity, *M.* 7. *Jac. C. A. B.* So if the defendant deliver his goods to me, to deliver over to another, that in this caſe before the delivery they are liable to Execution, *Co.* 9. 171. If a man have a Leaſe for years in the right of his wife, & a Judgement be had and Execution awarded againſt him, and he die before it be executed, yet it is ſaid, the Leaſe is liable to the Execution. So likewiſe if the Defendant have a Leaſe for years in Jointenancy with another, *Plow* 224. And yet if the defendant die before Execution awarded out, the Term is diſcharged and ſhall goe to the ſurviver. But goods pledged and not redeemed, or leaſed for any time and the time not expired, goods diſtrained and continuing as a diſtreſs, goods taken in Execution for another man and another Debt, are not liable to Execution. So offices of Truſt which are not grantable over, may not be taken in Execution, *Dyer* 363. 7 *H.* 6. 11. *Dyer* 67. *Co.* 8. 171. 2 *H.* 4. 14: But ſome ſay that if there be other goods enough that the Sheriff may not take in Execution the Beaſts of the Plow, if the other goods be then and there preſent and to be had, whether it be an Execution for the Lord *Protector*, or a ſubject, Therefore let the Sheriff take heed to this, *Co.* 2 *part Inſt.* 133:

Executor.

Upon an *Elegit.*

Upon an *Elegit* the Sheriff is to make Execution of the one half of all the Houſes, Lands, Medows, Paſtures, Rents, Verſions, and Hereditaments, whereof and wherein at the time of the Judgement had, or after the Defendant had any ſole eſtate or intereſt in Fee tayl, or for life, into whoſe hands ſoever the ſame doe afterwards come; ſo alſo the one half of all ſuch Lands he doth hold in Jointenancy, ſo long as the Defendant doth live, and of all, if he do out-live his companion: So alſo if the husband and wife hold Lands for their two lives, this is extendable upon this Writ. But a right only to Land, an Annuity, Copiehold Land, Land the Husband had in right of his wife in Fee, or for life after her death, is not extendable, nor liable to Execution. And all the Goods and Chattels (except only the beaſts of the Plough) which the Defendant hath at the time of the Execution made, are liable to Execution on this writ, as on a *Fieri facias.* But none of the Goods or Chattels before Execution, *Bona fide* made away, are liable to Execution on this writ, *Weſtm:* 2, 18. *Co.* 6. 78. 8: 171. *Dyer* 206. 335: *Co.* 7, 59. 38. 4. 67: 78, *F, N, B.* 48: *Plow.* 224. 178, 2 *H,* 4, 14:

How the Sheriff is to do *Execution*, and what ſhall be ſaid to be well done by him, or not. *Sect.* 6.

And if the one halfe be extended by one elegit, and then another elegit comes, the one half of the Reſidue only, and not the one half of the whole ſhall be extended upon this ſecond writ. *Brownl.* 2 *part* 97. As to this purpoſe, theſe things muſt be premiſed, 1. That if a Sheriff enter into a Franchiſe to do execution, it is good, *Fieri non debet, factum valet:* But the Lord of the Franchiſe may have an Action of the caſe againſt him for it. But if the Bailiff of a Franchiſe do Execution without this Franchiſe, it is void, and he a Treſpaſſor in all he doth, 11 *H.* 4. 7: 2. If the Sheriff open or break any houſe to do Execution at the ſuite of a common perſon, the Execution is good, but the party whoſe houſe is broken may have an Action of Treſpaſs againſt him for the breaking of the houſe, *Co.* 5. 93.

Action of the *Caſe.* Treſpaſs.

3 If

3. If a Sheriff do make Execution upon a *Capias ad ſatisfaciendum*, *Fieri facias*, *Habere facias ſeiſinam*, *Habere facias poſſeſſionem*, a *Liberate*, or any ſuch like final Proces, upon which no further Proces is to go, though he never return the Execution, yet is the Execution good. But if the Execution be made by Inqueſt, as upon an *Elegit*, or the like, there Execution is not well done, if it be not retorned. If the Sheriff levy the money, and give it to the party Plaintiff, though he never make any return to the Court, it is good enough, *Co.* 5. 90. 4. 67. 11. 40. 20 *H.* 6: 24.

4. If the Sheriff have a *Fieri facias*, or *Capias ad ſatisfaciendum* againſt a man, and before Execution he pay him the money; in this caſe he cannot do Execution after: If he do, an Action of Treſpaſſe or falſe Impriſonment lieth againſt him, *Per Juſt. Jones. & Juſt. Berkly, B. R. Paſch. 12 Car.* *Treſpaſſe. Falſe Impriſonment.*

Upon an *Habere facias ſeiſinam*, or *poſſeſſionem*, the Sheriff is to put the Plaintiff into poſſeſſion of the Land recovered according to the Writ; and if it be of a houſe, and he cannot otherwiſe do Execution of the houſe, he may break open the houſe to do it, *Co.* 5. 93. If the Judgement be for Rent, the Sheriff may make Execution by word, or by any part of the Land out of which the Rent doth iſſue, *F. N. B.* 179. *Sect.* 7. Upon an *Habere facias ſeiſinam*, or *poſſeſſionem.*

The Sheriff upon this Writ is to do his beſt to take the body of the party in Execution, and for this purpoſe he is to ſeek for him, and if the door of his houſe be open he may go into his houſe, and take him out of the houſe. But he may not break open the houſe, nor (as it ſeemes) may he pull the latch, and open the dore if it be ſhut, *Co.* 5: 91. 93. *Dyer.* 67: 224: And yet if the Officer do ſo, and by that means doth apprehend and arreſt the party, the Arreſt is good, but the Officer may be puniſhed for his exceſſe, *Per ch. Juſt. Hobart. Paſch.* 21 *Jac.* And if the Sheriff cannot find him he muſt retorn upon the Writ a *non eſt inventus*, and thereupon the Plaintiff may have a Writ of Exigent, and ſo out-law him, *Dyer.* 67. 224. *Sect.* 8. Upon a *Capias ad Satisfaciendum.*

The Sheriff upon this Writ is to do his utmoſt endeavour to levy the money upon the Goods and Chattels of the Defendant, and for that purpoſe to enquire and ſeek if he can finde out any Goods or Chattels of his, whereof Execution may be made; And it will be wiſdome in the Plaintiff to make a diligent ſearch to ſee if he can finde out any thing to be taken hold of, and if he can diſcover any, to direct the Sheriff to it, who *ex Officio* is to take it, and to ſell it; and if he cannot ſell it, he is to retorn it ſo, and therupon a Writ called a *venditioni exponas* ſhall be ſent to the Sheriff to force him to ſell them, and pay the Plaintiff. But for the opening hereof, theſe things are to be known. *Sect.* 9. Upon a *fieri facias.*

1. If the out-dore of the houſe be open, the Sheriff may go into the houſe, and take any thing there liable to the Execution, and being come in at the open door, it ſeemes he may break open any of the inner doors 18, *Ed.* 4. 4. *Co.* 5. 90. *Co.* 4. 74.

2: If any of the Defendants Goods or Chattels be made away by fraud and covin of purpoſe to deceive Creditors, the Sheriff may notwithſtanding take them in Execution, *Co.* 5: 90. *Fraud.*

3: If the Sheriff take Leaſes for years or other Chattels real in Execution, he may ſeiſe and ſell them without taking an Enqueſt by a jury of them, and the ſale will be good, *Co.* 5. 90: 4. 74.

4. If a Sheriff after Execution made, ſell Goods or Chattels and after the judgement whereupon the Execution was had is reverſed by Writ of Errour, yet the ſale made by the Sheriff is good and unavoidable, *Co.* 5. 90.

5: If the Sheriff ſell the Goods under foot, yet the ſale is good, and the Defendant hath no remedy; And yet if there be Covin between the Sheriff and the buyer, perhaps the owner may have remedy by an Action of the Caſe, or by ſome other means, *Kelw.* 64. *Action* of the Caſe.

The Sheriff upon this Writ is to purſue the charge and direction of the Writ (that is) to deliver to the Plaintiff the one half of the Defendants Lands he had, at, or after the time of the Judgement, and all the goods and Chattels the Defendant hath at the time of the Execution done. But in this caſe the Sheriff may not do all himſelf, as he doth upon the *Fieri facias*. For in this caſe, the Lands, Goods and Chattels muſt be found and prized by an Inquiſition, and the verdict of a jury, and the ſame, and the value thereof returned before he can deliver them to the party or ſell any of them *Sect.* 10: Upon an *Elegit.*

them away, and then if there be any Leaſe for years, the Sheriff may either ſell it, and deliver the money to the Plaintiff, or he may deliver it to the Plaintiff at a yearly value, which he will, *Coo.6.73.4:75.7.39. Plow:524.441. Dyer:*1c0. *Weſtm.2 ch:* 2c:

If there be two ſeveral Judgements againſt one man, he that firſt ſues out the *Elegit* ſhall have the one half of the whole, and he that ſueth out the *Elegit* laſt ſhall have but the one half of that which is left, *Trin.38.Eliz. Co.B. Curia in Hints Caſe.*

If an Action be brought againſt one upon the Deed of his Anceſtor, Binding his Heirs to do any thing, and Judgement be had againſt the Heir, in this caſe the Plaintiff may either have this Execution of the one half of his Land upon the *Sta: of Weſtm.2.* or (as it ſeems) he may have Execution of all his Land by a Writ at the Common Law, *Plow.440:*

7. In what *caſe* the *Defendant* in *Execution* ſhall be ſaid to be diſcharged, or not,

If a man be in Execution for a Debt upon a *Capias ad ſatisfaciendum*, and die under Execution, the Debt unpaid; in this caſe the Execution is not diſcharged. But the Plaintiff ſhall have as much remedy to take his Execution upon his Lands, Goods or Chattels, as if he had never taken his body in Execution, *Stat. 21. Jac ch.24. Co:*5.86.

If two be in Execution for one Debt, and one of them die under Execution, this doth not diſcharge the other, *F. N. B.* 146.

Sect. 11 By Act of God. By Act of Law

If one be in Execution upon a *Capias ad ſatisfaciendum*, and the Court adjudge the Judgement or the Execution erroneous, and ſo Null it; by this the Defendant ſhall be diſcharged of Execution, *Coo* 8.143.38 *H.*6 4:

If one taken in Execution eſcape, and the Plaintiff bring his Action againſt the Sheriff, or have a *Cepi* returned upon the *Capias ad ſatisfaciendum*, and this is filed; in this caſe the Defendant as to the Plaintiff is diſcharged of Execution for ever; But if no *Cepi* be returned, nor Action brought againſt the Sheriff; in this caſe the Law doth judge him to be out of Execution, 13 *H.7:* 1. *Plow.*36. 33 *H* 6:47:

If divers be in priſon for one cauſe, and the Plaintiff receive ſatisfaction from one of them, all the reſt are to be diſcharged, *Co.*11. 7. 2: *R.*3. 9. But if two be bound in a bond, and Judgement and Execution againſt them both, this will not diſcharge the other, nor ſhall he be diſcharged till the Plaintiff have recovered the Debt of the Sheriff, *Co.*5:86. If one be taken by a *Capias pro fine*, in ſuch a caſe wherein he ſhall be ſaid to be in Execution for the Plaintiff alſo, and he do after ſue Execution againſt the Defendant by *Fieri Facias*, or Elegit; in this caſe the body is diſcharged from Execution, as to the Plaintiff, 13 *H.7.6.* If one be in Execution by a *Capias pro fine*, and he is after taken in Execution for a felony; in this caſe he is diſcharged of the firſt Execution, 6 *Ed* 4.4. *Dyer.*60. If a priſoner be delivered out of Execution by priviledge of Parliament, this is no diſcharge, but after the priviledge is determined he may be taken again, *Stat.* 1 *Jac. ch.*13.

By the Act of the parties.

If the defendant pay the money, he is hereby to be diſcharged of the Execution: But if the Plaintiff make any releaſe, defeaſance, or other ſuch like Act to the Defendant being in Execution, amounting to a diſcharge of the Execution; this is not a diſcharge *ipſo facto*, but by this means the party may procure a diſcharge: and yet if the Plaintiff himſelf ſhall deliver the priſoner out of Execution, hereby he is *ipſo facto* diſcharged of the Execution for ever. So if the Plaintiff acknowledge ſatisfaction of Record, by this the Defendant is for ever diſcharged, Co.5.86.6.13. *Co.*8.152. *Dyer.* 152. *Trin* 9. *Iac. B.R.*

Sect. 12 8. When a man ſhall be ſaid to be in *Execution*, or not.

If the Sheriff have a man in his cuſtody by Proceſs of law, and after this a Writ of *Capias ad ſatisfaciendum* is delivered to him; in this caſe in Judgement of Law he ſhall be in Execution preſently upon that Writ, though he never make any actual Arreſt thereupon, *Co.* 5. 89: 11 *H.* 4. 12. 14. In all caſes where the Plaintiff may have a *Capias ad ſatisfaciendum* in the ſuit, and the defendant is taken by a *Capias pro fine*, or a *Capias ut legatum* after Judgement, there the Defendant ſhall be in Execution preſently at the ſuite of the party, alſo without prayer or motion to the Court: And in all caſes where he may have a *Fieri facias*, and no *Capias ad ſatisfaciendum*, as in Aſſiſe, Rediſſeiſin, and the like, and the party is taken by a *Capias pro fine*, and committed to priſon at the Keepers of the Liberties ſuite; in all theſe caſes alſo, upon a prayer and motion to the Court, the Defendant ſhall be in Execution for the party alſo, but not without prayer. And in caſes where the Plaintiff hath a Judgement,

Judgment, and doth ſurceaſe his time, ſo that now he cannot have Execution by *Capias adſatisfaciendum*, or *Fieri facias*, but he is put to his *Scire facias*; in theſe caſes if the Defendant happen after to be taken by a *Capias pro fine* for the Keepers of the Liberty, or by a *Capias ut legatum*, he ſhall not be in Execution for the Plaintiff, without Prayer or Motion to the Court, *Co.* 5. 89. *F. N. B.* 121. 7 *H.* 6. 6. *Dyer* 306. 11 *H.* 7. 15. 13 *H.* 7. 1.

If a man arreſted by a *Latitat* be in priſon for lack of Bail, and the Plaintiff get a Judgment againſt him; in this caſe he ſhall not be ſaid to be in priſon, unleſs the Plaintiff deſire it, *M.* 4 *Jac. B. R. Carrs* caſe. So in caſe where a priſoner is committed to a wrong priſon, or unduly committed to priſon, *Dyer* 197. 306.

If after a Judgment given, the Judges of their own heads, or at the requeſt of a Gaoler, or the like, without any Prayer of the Plaintiff, do commit the Defendant to priſon; by this the Defendant ſhall not be ſaid to be in Execution at the Sute of the Plaintiff, *Dyer* 297.

And in all theſe, and ſuch like caſes where the Law doth once adjudg the party to be in Execution at the Sute of the Plaintiff, if the Sheriff ſuffer him to eſcape, he is chargable for the ſame to the Plaintiff in an Action of Debt, or the caſe, *Dyer* 306. *Debt. Action of the Caſe.*

If a Defendant die, his body being in Execution, the Plaintiff may have a new Execution againſt the Lands or Goods of the Defendant as he pleaſeth. But the Plaintiff whiles he hath the body of the Defendant in Execution, can have no other Execution againſt his Lands or Goods, *Co.* 5. 65, 66, 86, 87. *Sect.* 13. 9. Where and in what caſe a man ſhall have a new Execution, or not, and how.

If a man have Lands in Execution by an Elegit, and he be wholly evicted out of it; in this caſe he may have a new Execution, either againſt the Defendants Lands or Goods, as he might have had before the firſt Execution, onely he muſt firſt have a *Scire facias* againſt the Defendant, or he that comes in under him: But if a man be evicted out of part of the Land, or for a time onely, ſo that he may take his full Execution by holding it over afterwards; in this caſe he ſhall not have a new Execution, for a man ſhall never have a new Execution by the Statute of 32 *H.* 8. 5. But in caſe where he is clearly evicted out of all that which he had in Execution, *Co.* 4. 66. A new Execution may be ſued againſt any man, who by Privilege of Parliament ſhall be ſet at liberty, 5 *Jac.* 13. *Scire facias.*

It is a Writ lying where a man hath a Judgment in the County-Court, Court-Baron, or Hundred-Court, againſt Plaintiff or Defendant, and the Execution is deferred in favor of him, then the party grieved may have this Writ to haſten it, *F. N. B.* 120. *Executione Judicii*, what it is.

See the old Statutes of *Executions*, *Weſtm.* 2. 18. 15. 31 *H.* 8. 5. 1 *Jac.* 13. 3 *Jac.* 8. 21 *Jac.* 24.

CHAP. LXXXIII.

Of Extinguiſhment.

IT ſignifieth the effect of Conſolidation, and is uſed for a perpetual ſtop of a mans right; as for example, If one have a Rent-charge, iſſuing out of Land for ever, and after he purchaſe the ſame Land for ever; now hereby the Rent is extinct for ever. So if a Leſſee for years obtain the Fee-ſimple of Land, ſo that both Eſtates are *ſimul & ſemel*, in him, now by this the leſſer Eſtate for years, is extinct; and this differeth from Suſpenſion; becauſe in that caſe the right ſuſpended doth revive again: But in this the right extinct dieth for ever; but in this they both agree, that whiles the thing ſuſpended or extinct, doth ſo remain, it is as if it were not, and cannot be uſed or diſpoſed, or had as before; as a Debt ſo Suſpended or Extinct, cannot be ſued for, or had by Executors: A Term of years ſo ſuſpended or extinct, cannot be had, or diſpoſed, or deviſed, neither ſhall go to Executors *Sect.* 1. 1. *Extinguiſhment*, what. *Reviver.*

as another Term, and ſo for the reſt; for this operation of Law makes a kinde of nullity of it: And yet in ſome ſpecial Caſes, a thing ſuſpended, or extinct, ſhall be ſaid to be in *eſſe*, as to a third perſon; as if one that is Leſſee for years, charge his Land he holdeth, ſo for his Term with a Rent, and then ſurrender to his Leſſor. Now howſoever his Term be extinct, as to his Leſſor, and to himſelf, yet as to the Grantee of the Rent it hath his *eſſe* ſtill: So if an Executor have a Leaſe for years, and purchaſe the Fee-ſimple of the Land, as to the Executor, and others; this is, and ſhall be ſaid to be extinct; but as to Creditors to be accounted Aſſets, this ſhall be ſaid to be in *eſſe*, and the Executor ſhall anſwer for it. See *Extinguiſhment. Co.* 10. 52.

1 *Suſpenſion*, what.

This word is ſometimes uſed *Prominori Excommunicatione.* For which ſee the Statute of 24 *H.*8. 12. But more commonly, and ſo in this place it is uſed for a Temporal Stop of a Mans Right. As for example, When one hath a Rent or Service out of Land in Fee, and then Purchaſe an Eſtate in the Land for life or years; now by this, the Rent for the time is ſuſpended, and the Purchaſor cannot have it, *Co.* upon *Littl.* 313. 379. 147. *Co.* 2. 61.

3. What things may be Extinguiſhed or Suſpended, or not.

All kinde of Rent, Seigniories, Services, Commons, Ways, Cuſtoms, Franchiſes, Liberties, Immunities, Uſes, Executions, Warranties, Debts, Statutes, Obligations, Rights, Titles, Actions, Conditions, Preſcriptions, Authorities, and Eſtates for life or years, may be Extinct, and ſome of theſe ſuſpended. But Eſtates in Fee-ſimple, or Fee-tail cannot be ſuſpended, nor extinguiſhed by a greater Eſtate. See *Infra*, *Dyer* 281. *Co.* upon *Littl.* 102. 389, 390. And this Suſpenſion may be of any of Seigniory, Rent, Profit, Apprender, *&c.* By reaſon of the unity of poſſeſſion of the ſame, and of the Land, out of which it doth iſſue, and then it ſleepeth onely, and may be awaked or revived; but when they are extinguiſhed, they die, and cannot be revived, and ſo long no benefit can be taken of the Poſſeſſion, by Rent, Wardſhip, or the like; but of an Eſcheat, or any thing touching the Right, *Contrà*, *Co.* upon *Littl.* 313.

4. In what caſe an *Extinguiſhment* ſhall be, or not. Of an *Eſtate.*

Where a greater and leſſor Eſtate do come together, by what means ſoever in one perſon *ſimul & ſemel*, and the one is leſs then the other, and that other ſo great, as it is able to ſwallow up the leſſer; in this caſe the leſſer ſhall be drowned in the greater, and utterly extinct: As for example, If an Eſtate for life, or years, and the Fee-ſimple, or Fee-tail, come together, the Eſtate for life or years, is extinct. So if a Leaſe for years, and a Leaſe for life, come together, the Leaſe for years (though it be for never ſo many years) is extinct. *Broo. Extinguiſhment* 51. 34. *Co.* upon *Littl.* 300.

So if an Executor have a Leaſe for years from his Teſtator, and then purchaſe the Fee-ſimple, or the Fee diſcend upon him, the Leaſe for years, is extinct. So if one have an Eſtate for his own life, and an Eſtate, (*i. e.*) for anothers life at once, the Eſtate *pur auter vie*, is extinct, and drowned in the Eſtate for his own life. So if a Leaſe be made to *A.* for the life of *B.* the Remainder to *A.* for his own life; the Eſtate for the life of *B.* is extinct, and drowned, *Co.* 1. 87. *Bro.* 409. *Dyer* 11. *Co.* 11. 87.

If one be poſſeſſed of a Term of years, and do by his will deviſe it to *A.* for life, the Remainder to *B.* and after *A.* purchaſe the Fee, or it do diſcend upon him; in this caſe the Leaſe is extinct, becauſe the Remainder to *B.* is void, *Co.* 10. 52.

If the Tenant for life or years, and a ſtranger purchaſe the Fee-ſimple, the Term is extinct; as to one Moyety of the Land, *Co.* 2. 61.

If a Leſſee for years be ouſted, and he in Reverſion diſſeiſed, and the Leſſee do Releaſe to the Diſſeiſor, the Term is extinct, and the Diſſeiſee may enter: But *contrà* if he that Releaſe had an Eſtate for life, *Co.* upon *Littl.* 276.

If an Eſtate be to *A.* for life, the Remainder to *B.* for life, the Remainder to *A.* in Fee, and *A.* die; now the Eſtate for life to *A.* is extinct, 46 *Ed.* 3. 16.

If one that hath an Eſtate, as Tenant in Tail after a poſſibility of Iſſue extinct come by an Eſtate in Tail, or in Fee; the Eſtate he hath as Tenant after Poſſibility, is extinct. *Bro. Eſtate* 25.

If

If one that hath an Eſtate for his own life, get after an Eſtate for two other lives, his laſt Eſtate for two other lives, is extinct. But ſuch Eſtates may be one in Remainder after another, *Co.* 5 11. *Sect.* 2.

If a Tenant by Elegit take a Confirmation from the Conuſor, for the Term of his life, his Eſtate he had by the Elegit, is extinct; and the Tenant that was by Elegit, hath now an Eſtate onely for life, from the Confirmor, ſubject to his charges before the Confirmation as other Eſtates for life. *Bro. Extinguiſhment* 30.

If a Tenant by Statute obtain the Fee-ſimple of the Land, his Eſtate he had by the Extent, is extinct. *Bro. Extinguiſhment* 30. 56.

If an Eſtate in Fee Conditional, and an abſolute Fee-ſimple come together, and they are united, the abſolute Eſtate hath drowned the other, *Co. lib. Inſt.* 1 *part. fol.* 18.

If one after his Title, begun to be Tenant by Courteſie, make a Feoffment in Fee upon Condition, and enter for the Condition broken; yet by this he hath extinct his Eſtate, ſo that though his Wife die, yet he ſhall not be Tenant by the Courteſie.

But to make an Extinguiſhment of an Eſtate, theſe two things muſt be.

1. The two Eſtates muſt be together in the ſame perſon *ſimul & ſemel* in poſſeſſion; and there muſt be no intervenient Eſtate between them. Of *Rent, Services, Way, Common,* and the like.

2. The one of them muſt be greater and higher then the other, able to drown and ſwallow up the other, or elſe there will be no Extinguiſhment of either; as for Examples.

If there be a Leſſee for ten years, the Remainder for ten years, or the Leſſor grant to another for twenty years, and the firſt Leſſee for ten years, have or purchaſe an Eſtate for life, or in Fee: Now in this caſe his Leaſe for ten years is not extinct. *Bro. Extinguiſhment* 1. 54. *Bro. Sect.* 409.

If the Leſſor make a Deed of Feoffment, and a Letter of Attorney to the Leſſee for years, to make Livery, and he doth it accordingly; this will not extinguiſh the Term, *Co. lib. Inſt.* 1 *part. fol.* 52.

If Lands be given to two men, and the Heirs of their two Bodies, though here they have an Eſtate for life joyntly, and ſeveral Inheritances; yet the Eſtate for life, is not extinct: But if it were by ſeveral conveynces, *contrà*; as if a Leaſe were made to two for lives, and after the Leſſor grant the Reverſion to them two, and to the Heirs of their two Bodies, the Eſtate is drowned, *Co.* upon *Littl. fol.* 182. *Sect.* 3.

If an Eſtate-tail, and a Fee-ſimple come together, they continue divided in him, and the one of them doth not drown the other, *Co.* 1. in *Altonwoods* caſe.

If an Eſtate in Tail after poſſibility of Iſſue extinct, and an Eſtate for life, otherwiſe come together, they are neither of them extinct; for they are all one in quantity.

So if a Fee-ſimple, and a Fee tail Eſtate meet together, the Eſtate-tail is not extinct. *Co.* 12. 81. 3. 61.

If a Man or Woman Leſſee for years, take a Husband or Wife that hath the Reverſion, it ſeems this Term by this is not extinct.

If an Eſtate be to a Husband and Wife for the life of the Wife, the Remainder to the Husband in Tail, the Remainder to the right Heirs of the Husband, the Eſtate for life here, is not extinct, 8 *Ed.* 4. 20.

If a Leaſe be made to one for his life, and twenty years over, theſe two Eſtates will ſtand together well enough, and there ſhall be no Extinguiſhment. But if it were a Leaſe for twenty years, the Remainder to him for life; here the Eſtate for years were extinguiſhed, *Bro. Extinguiſhment.*

If a Leſſor make Livery upon the Land of his Leſſee for years Rendring Rent, and the Leſſee give him leave to do it; it ſeems this is not Extinguiſhment of the Term, *Dyer* 33.

If one that hath a Leaſe for years, grant it to his Wife that hath the Reverſion, and to a ſtranger; by this the Moyety, that the Wife hath, is not extinct, *Plow.* 67.

If one that hath Execution by a Statute, get a Judgment againſt the Conuſor,

and Execution of the ſame Land by Elegit; here is no Extinguiſhment. *Bro. Extinguiſhment* 67.

If *A.* makes a Leaſe to *B.* for years, and after Covenant with *C.* to levy a Fine to *B.* and do ſo till a Recovery be had, to the intent onely that *B.* might be Tenant to the Precipe, and that a Recovery might be had, which was to be to the uſe of *C.* and his Heirs, and a Fine and a Recovery is had accordingly; in this caſe the Term is not drowned, but ſaved by the Statute of 27 *H.* 8. of *Uſes*, *Hill.* 20 *Jac. B. R. Fermors* caſe. See *Acts.*

Of *Rent, Services, Way, Common*, and the like.

Where one hath as high, as good, and durable Eſtate in any Land, as he hath in any Rent, Common, or other profit, Apprender in or out of the Land, there the Rent, Common, or other profit, is extinct: As if the Lord do purchaſe the Land, or the Land do diſcend to him from his Tenant; now the Services are extinct.

So if one have a Rent-charge iſſuing out of the Land to him, and his Heirs, and he purchaſe the Fee-ſimple of the Land, out of which the Rent doth iſſue, or of any part of it, the Rent is extinct.

So if the Lord and another do purchaſe the Land, out of which he is to have Services, the Services are extinct. But if in that caſe the Grantor by his Deed, reciting the ſaid purchaſe of part, doth grant that he may diſtrain for the Rent; in the Reſidue this will amount to a new grant, *Co.* upon *Littl. fol.* 147, 148.

Sect. 4. If a Lord diſſeiſe the Tenant: and make a Feoffment of the Land on Condition, and enter on the breach of him; yet the Seigniory, is extinct. *Co. lib. Inſt.* 1 *part*, *fol.* 30. *Co. Rep.* 1 *part.* 38. 134.

By Releaſe, Services may be extinct, *Co. lib. Inſt.* 1 *part. fol.* 76.

If three Joyntenants hold by an Entry yearly Rent, as a Horſe, *&c.* and the Tenant *ceſſe* by two years, and the Lord recover two parts againſt two of them, and the third ſues his part by tendring, and giving Sureties; now hereby the Entry, Annual Rent, is extinct, *Co.* upon *Littl. fol.* 149.

If there be Lord and Tenant by Fealty and Herriot Service, and the Lord purchaſe part of the Land, the Herriot-Service is extinct, but *contrà* of an Herriot Cuſtom, *Co.* upon *Littl.* 149. And ſee Knights Service; for in theſe caſes, the Service doth continue: But Eſcuage ſhall be Apportioned, and is not extinct. *Co.* on *Littl.* 149.

If the Grantee grant the Rent to the Tenant of the Land, and a ſtranger, it is extinct for a Moyety, *Co. idem.*

If there be Lord Meſn and Tenant, and the Lord purchaſe the Tenancy in Fee; the Meſnalty is extinct; but if the Tenant infeoff the Lord, and his Wife, and their Heirs, here it is but ſuſpended; for if the Wife ſurvive, both Seigniory and Meſnalty are revived, *Co.* upon *Littl. f.* 155. See more there.

So if the Tenant purchaſe the Seigniory, the Meſnalty is extinct: So if one that hath Common Appendant in another Land, purchaſe all that Land; this unity of that Land doth extinguiſh the Common. So if one have a Way Appendant to his Mill, or Houſe, or to Church, or the like, through another mans ground, and he purchaſe the ground, through which his Way is, whiles he hath the ground, or Houſe to which it is Appendant; now by this, the Way is extinct: And therefore if he ſell this ground, after it will be wiſdom for him to take care, that he do except and reſerve his Way again which he may do *de novo*, if he will: But if a whole Pariſh had ſuch a Way, through a ground to Church, and one purchaſe the ground; this would not extinguiſh the Way.

If *A.* have White-acre and *B.* Black-acre, and *A.* have a Way over Black-acre, belonging to White-acre, and he purchaſe both the Acres, hereby the Way is extinct. And therefore if *A.* afterwards infeoff *C.* of Black-acre without exception, his Way is gone, *B. R. Trin.* 2 *Car. Mich.* Mr. *Davers* caſe, 11 *H.* 4. 5. 21 *Ed.* 3. 2. So by a Releaſe of Rent or Services, they may be extinct: For which ſee *Releaſes. Co.* upon *Littl. fol.* 147. *a. b. &* 312. *Co.* 2. 73. *Co.* 4. 38. *D. & St.* 35. *Dyer* 45. *Plow.* 72. 3 *Aſſ. pl.* 15.

If

If there be Leſſee for life, the Remainder in Fee, and he in Remainder die without Heir; now hereby the Services are extinct.

If a Father grant a Rent-charge to his Son in Fee out of his Land, and the Rent is behinde, the Father die, and it doth diſcend to the Son; in this caſe both the Rent and Annuity are determined, and yet an Action of Debt lieth for the Arrearages, *Co.* 4. 49. *Bro. Extinguiſhment* 3. *Sect.* 5.

If there be any Joyntenants or Coparceners that are to do Sute, and the part of one come to the Lord; now the Sute is extinct. See *Cromp. Jur. f.* 50. *Perk. Sect.* 591, 592, 593. *Bro. Sute* 1.

If the Lord and another purchaſe the Tenancy in Fee, and the other ſurvive the Lord; yet by this the Seigniory is extinct, 34 *Aſſ. pl.*15.

If one that hath Common by Preſcription in twenty Acres, Releaſe his Common in part of this Land; by this he hath extinct his Common in all, Adjudg. *Rotterams* caſe, 39, 40 *Eliz.*

A Lord by Diſclaimer of Services or Seigniory, doth extinguiſh them, *Co.* upon *Littl. fol.* 102. If it be in a Court of Record, to make an Extinguiſhment of Rent, *&c.* theſe three things are requiſite,

1. That the Land and Rent, *&c.* to be had out of it, be in one hand.
2. That he have both by a good Title.
3. That he have a like Eſtate in both, for otherwiſe there ſhall be no Extinguiſhment. *Plow.*419. *Littl. ſect.*561. As for examples.

If a Woman have a Rent out of three Acres, and after ſhe recover one of the Acres by a Title of Dower; now hereby it ſeems the Rent is not extinct, but ſhall be Apportioned. *Bro. Extinguiſhment* 52. Homage and Fealty are not extinct by the Lords purchaſe of part of the Land, *Co.* upon *Littl.* 149.

If one make a Leaſe for years, rendring Rent, and after make a Feoffment of the Land, and give Livery without the leave of the Leſſee; this is no Extinguiſhment of the Rent. *Bro. Extinguiſhment.* So alſo of a Leaſe for life: But if one be ſeiſed of a Rent in Fee, and Diſſeiſe the Tenant of the Land, and make a Feoffment in Fee, the Rent is extinct, and will not be revived by the Regreſs of the Tenant. *Co.* 5. Sir *Moyl Finches* caſe. *Co.* upon *Littl.*319.

If a Commoner alien part of his Land, to which the Common doth belong, by this his Common is not extinct, but it ſhall be divided. See *Common.* If one that hath Common Appendant, purchaſe part of the Land, in which he hath the Common, is not extinct, but ſhall be Apportioned, *contrà* of Common Appurtenant, *Co.*8.78.

If one have Common Appendant in a great Waſte belonging to his Tenant, and the Lord improve part of the Waſte, and leave ſufficient (which he may do) and after make a Feoffment to the Commoner of this; this is no Extinguiſhment, *Dyer* 339.

If a Copiholder by Cuſtom claim Common in a great Waſte, and the Lord grant part of it to another, and then make a Copihold Eſtate, yet the Tenant will have Common ſtill, *Co.*8. 64.

If one have a Warren in other Land, and he after purchaſe the Land; this Unity of Poſſeſſion alone, doth not extinguiſh the Warren; but if he make a Feoffment of the Land without excepting his Warren, it ſeems it is extinct, *Co.* 11. 13. *Bro. Extinguiſhment* 5.

If one make a Leaſe of three Acres of equal value, yielding three ſhillings Rent, and the Leſſor grant the Reverſion of one, the Grantee ſhall have part of the Rent, *Co.*8. 79.

If a Pariſh hath Way through a ground to Church or Market, and one of them purchaſe it, the Way is not extinct; for this is of neceſſity, otherwiſe it is for other ways, Adjudged, *Jordens* caſe, *Hill.* 4 *Jac. B. R. Cromp. Jur.*95. *Co.*517.

If a Leſſee for years grant a Rent-charge, and then doth Surrender, yet the Rent doth continue.

If one that hath a Service in Chivalry, purchaſe Parcel of the Tenancy, yet the Service is not extinct, but remaineth entire, *Co.* 26.

So if one purchaſe of his Tenant, that holdeth by Rent, Service, Parcel, the Rent ſhall be divided, and is not extinct, *Co.* upon *Littl.*149.

If

If one that hath a Rent-charge of twenty ſhillings, Releaſe to the Tenant of the Land ten ſhillings, or more, or leſs; this doth not extinguiſh the reſt: So if ſuch a Grantee grant over ten ſhillings parcel of the ſame to another, and the Tenant Attorn; and yet theſe are good, and hereby the Rent is divided, *Co.* upon *Littl. fol.* 149. 9 *H* 6. 12, 53. *F. N. B.* 152.

If the Land out of which Rent-charge is granted, be recovered by an elder Title, the Rent is not extinct, but the party hath this Writ of Annuity for yet, though the Land be diſcharged, *Co.* upon *Littl. f.* 148. So if *ceſtuy que vie* of Land grant a Rent out of it for one and twenty years, and he for whoſe life it is, dieth within the one and twenty years, yet the Rent ſhall continue as an Annuity, *Co.* upon *Littl.* 148.

If *B.* make a Leaſe of one Acre to *A.* for life, and *A.* is ſeiſed of another Acre in Fee, and granteth a Rent-charge to *B.* out of both, and doth Waſte in the Acre, which he holdeth for life, or maketh a Feoffment of it, and *B.* recovereth or entereth; in this caſe the whole Rent is not extinct, but ſhall be apportioned, *Co.* upon *Littl. fol.* 148.

If one deceaſe the Term-Tenant, that hath a Rent in Fee, or take a Feoffment on Condition; this will not extinct the Rent, *Littl.* 58.

Of *Debts, Cauſes of Action, Obligations, Condition,* or *Right.*

If Cauſes of Sute, or other matters arbitrable, be put in Arbitrement, and a legal Award made thereupon; now by this, theſe Cauſes and Matters are extinct, ſee *Award, Plowd.* 6.

If a Debtor marry with his Debtee, or a Debtee with his Debtor; now by this the Debt is extinct; ſo if a Woman Obligee marry with one of the Obligers, *Co.* 8. 136. *Plow.* 36. 4 *H.* 7. 3. 11 *H.* 7. 4. 21 *H.* 7. 29.

If a Debtee by Obligation, or otherwiſe make a Debtor his Executor, or the Debtor, and another, his Executors; by this the Debt is Releaſed, in Law, and extinct; and that alſo, though the other Executor do ſurvive the Debtor: But as to other Creditors and Legates, this ſhall be ſaid Aſſets, *Simons* caſe. *Trin.* 7 *Jac. B. R.* Adjudg. *Plow.* 36. 334. *Co.* 8. 136. 21 *H.* 7. 29. *Kelw.* 63.

If a Debtee to whom a Debt is due by Contract, take an Obligation from the Debtor for this Debt, or part of it; by this the Debt is extinct, *Bro. Contract* 8.

If an Executor or Adminiſtrator make a Bond to the Legatee for his Legacy, the Legacy is extinct. *Curia, M.* 17 *Jac. B. R.*

If a man promiſe to a Maid, that if ſhe will marry him, he will leave her one hundred pound at his death, if ſhe ſurvive, and after they do marry together; this will not extinguiſh this Debt. *Smiths* caſe, *Paſche,* 15 *Jac. B. R.*

If an Executor give an Obligation for the payment of a Legacy, it ſeems this doth not extinguiſh the Legacy, but the party may ſue for which he will. By Juſt. *Dodridge,* 18 *Jac.*

Condition.

If one make a Feoffment in Fee, or Leaſe for life or years, on Condition, and after make a Feoffment, or levy a Fine of the ſame Land; by this the Condition is extinct, unleſs by ſpecial words of Agreement it be ſaved. *Co.* on *Littl.* 379. So if a Leſſee or Feoffee, on Condition make a Feoffment to his Feoffor or Leſſor; the Condition is extinct, *Co.* 4. 52.

If a Debtee upon a Debt due to him, obtain a Judgment, hereby the Debt is extinct.

If one after he hath Execution of the Land of the Conuſor, purchaſe the Land, or any part of it; by this the Statute, Debt, and Execution, is extinct. See *Statute.* But if it were before Execution, *contrà. Fitz. Execution* 21. 88.

If a Feme-ſole deliver Goods to one, and after marry with the Bailee, the Cauſe of Action is extinct. 21 *H.* 7. 29.

If a Debtee take one of the Executors of the Debtor to Wife, who hath accepted of the Executorſhip, the Debt is gone; but if ſhe had not accepted, *contrà* he may ſue the other Executor. *Fitz. Executor* 58. See for this of the *Debtor* or *Creditor,* being made *Executor. New Book of Executors* 47, 48.

If a Debtor makes his Debtee his Executor, this doth not extinguiſh the Debt, or Duty, but it doth the Action, whether he accept or refuſe; and if he do accept, he may pay himſelf firſt: But if the Debtor make his Debtee, and others his Executors, and the Debtee refuſe, and the reſt adminiſter; it ſeems in this caſe, the Debt is extinct, for how ſhall he ſue? *Plow.* 184.

If

If a Debtor by Obligation, or otherwiſe be made Adminiſtrator to the Debtee; this doth not extinguiſh the Debt, *Co.* 8. 136. *Trin.* 7 *Jac.* *Simons* caſe, Adjudg. *Sect.* 6.

If a Feme-Executrix take the Debtor of the Teſtator to Husband, this is no Extinguiſhment, nor Releaſe of the Debt, but it is a Suſpenſion of it, during the Coverture, *Co.* 8. 136. on *Littl* 264.

If an Obligation be given, and taken for a Debt due, or a Judgment, or another Obligation; this doth not extinguiſh the former Debt. So neither an Obligation for a Debt due before Auditors on an Accompt. See *Debt*, *Co.* 8. 135. *Broo. Oblig.* 23.

If an Obligation be made to a Feme-ſole, and three Executors be, and one of them marry the Feme-ſole; yet it ſeems the Debt is not extinct, and that he and his Wife may ſue the other Executors, and himſelf, *Fitz Executors* 82.

If a Lord of a Leet do purchaſe Land within the Juriſdiction of his Leet; this doth not extinguiſh his Leet, *Co.* 11. 13. Of a *Leet.*

If I have a Water-courſe, that time out of minde hath run to my Houſe or Cloſe, unity of poſſeſſion in the Cloſe, through which it doth run, and in the Water-courſe doth not extinguiſh it: So of a Gutter. Of a *Water-courſe.*

Unity of poſſeſſion in one perſon of Tithes, and the Land which is to pay it, will not extinguiſh them as Rents, Commons, and other ſuch like things, *Co.* 11. 8. Of *Tithes.*

If one make a Feoffment of Land with power of Revocation of Uſes, and after make a Feoffment, or levy a Fine of the ſame Land; concerning which, he hath that power of Revocation or Alteration; this power is extinct, and he cannot after revoke or alter any of them: But if he levy a Fine, but of part, his power is not extinct for all, as it is in the caſe of a Condition, *Co.* upon *Littl.* 215. Of a power of *Revocation* of *Uſes.*

If a Verbal Agreement be put in writing, this doth determine the Agreement by word. See *Contract.* Of a *Parol Contract.*

If one have Liberties or Franchiſes by Preſcription, and he take Letters Pattents of it; now hereby the Preſcription is gone and extinct. *Bro. Extinguiſhment.* For things of a higher, do determine things of a lower nature, 21 *H.* 7. 5. Of an *Preſcription.*

If one recite by his Deed, that where by Preſcription he hath uſed to finde a Chaplain, becauſe ſome controverſie is about it, he granteth by the ſame Deed to do it; this doth not determine the Preſcription, *Idem.*

How a Uſe or a Truſt may be extinct or ſuſpended. See *Co.* in *Cludleights* caſe.

If an offence of a lower nature, be made of an higher nature, the leſſer offence is gone: As if that which is murder at Common Law be made Treaſon, the offence of murder is gone, and no Appeal will lie for it; for things of a higher nature do determine things of a lower nature, *Dyer* 50. Of an *Offence.*

In all caſes, for the moſt part, where a Feoffment will make an Extinguiſhment of an Eſtate, Condition, Rent, or the like, there a Leaſe for years will make a Suſpenſion, *Co.* 8. 79. See above and beneath. 5. In what caſe a *Suſpenſion* ſhall be, or not.

And Note, that where there is a Suſpenſion there is no Extinguiſhment: As if one that hath Common Appurtenant in Land, take a Leaſe of part of the Land; this doth ſuſpend his Common, *Co.* 8. 79. Note.

If one have a Rent or Services out of any Land in Fee, and he purchaſe the ſame Land for life or years, by this the Rent or Service is ſuſpended for that time: So if one have a Rent-charge in Fee, and grant it for life to the Tenant in Fee of the Land, or in Fee to the Tenant for life of the Land; this is a Suſpenſion of the Rent, *Finches Ley* 134. But it is no Extinguiſhment, and therefore in the firſt caſe, it may be with a Remainder over; in the next, the Tenant may grant it in his life; if he do not, his Heir ſhall have it. Of *Rent, Services, Way, &c.*

If the Tenant that holdeth by Rent-ſervice, make a Gift in Tail, or Leaſe for life, or years to his Lord; now hereby all the Rent is ſuſpended, and ſhall not be apportioned; *Contrà*, if the Lord purchaſe in Fee, *Co.* upon *Littl.* 148.

If a Leaſe be made rendring Rent, and the Leſſor, and Leſſee agree, that the Leſſor ſhall occupy part of the Grounds; this is no Suſpenſion of the Rent. *Sect.* 7.

So

So when the Leſſor doth enter upon his Leſſee, and before the day of payment, the Leſſee doth re-enter; this ſhall be no Suſpenſion of the Rent, *Co.* 2. 31. *Packhurſt* caſe. *Paſche*, 7 *Jac. B R.*

If a Feoffee or Leſſee Covenant to pay a yeerly ſum, as a ſum in groſs, and not as a Rent, and the Leſſor enter upon the Leſſee, or the Leſſee redemiſe to the Leſſor; this is no Suſpenſion of this payment, as it were, if it were a Rent, *Co.* 4. 52.

The Entry of the Leſſor by Right, as upon a Forfeiture, or the like, into part of the Land, will not ſuſpend the Rent, but it ſhall be apportioned, *Co.* upon *Littl. fol.* 148.

If a Feoffment be made in Fee or Leaſe for years, rendring Rent, and the Feoffee, or Leſſee make a Leaſe for years, to the Feoffor or Leſſor, of all or part of that which paſſes by the firſt Leaſe or Feoffment; by this the Rent is ſuſpended, *Co.* 4. 52.

Rent. If a Leſſor do enter upon his Leſſee for life or years, wrongfully, and keep him out of Poſſeſſion: Now by this, the Rent is ſuſpended till the Leſſee re-enter again; and if he enter upon his Leſſee, and make a Feoffment (and this be a good Feoffment) till the re-entry of the Leſſee, the Rent is ſuſpended. So if he enter upon part onely, and keep out the Leſſee; this is a Suſpenſion for the whole. So if he keep the Poſſeſſion at firſt, and the Leſſee never enter. But if the Leſſor re-enter ſeverally, the Rent is revived, if he enter ſpecially *contrà*, where the Leſſor doth enter lawfully, as upon a Surrender, Forfeiture, or the like, there ſhall be Apportionment of the Rents, *Co.* 2. 31. *&* 4. 5. 21. *Plow.* 421. *Co.* upon *Littl. fol.* 148. *Co.* 4. 52. *Brownl* 80. *pl.* 18.

If a Lord have a Wardſhip of the Body and Land of the Heir of his Tenant, now during this time the Services are ſuſpended, *Plow.* 104.

Rent. If an Infant that hath a Rent, purchaſe the Land, out of which it is iſſuing, during the Minority, the Rent ſhall be ſuſpended, but not extinct. *Bro. Extinguiſhment.*

If one have Common Appendant in Land, and he take a Leaſe for life or years, of all or part of that Land; now hereby the Common is ſuſpended

Way. If one have a Way Appendant to any place, through another's ground, and he take a Leaſe of that ground; now by this he hath ſuſpended his Way.

Rent. If Leſſor grant a Rent-charge, and die, the Tenant for life, being his Heir, he ſhall hold it diſcharged for his life; and therefore the Rent is not extinct to all purpoſes; but if the Tenant for life purchaſe the Fee, *contrà*, 9 *Edw.* 4. 18. 11 *H.* 7. 12.

If Tenant for life make a Leaſe for years, rendring Rent, and after this, the Reverſion diſcend to the Tenant for life, the Rent is not gone, Adjudg, *Winſors* caſe: But if he purchaſe the Reverſion, *contrà*, *Co.* 1. 96.

If there be Lord and Tenant, and the Tenant letteth Tenements to a Woman for life, the Remainder to another in Fee, and the Lord grant the Services to the Huſband and his Heirs; theſe Services are ſuſpended, during the Coverture; but when the Wife dies, are revived, *Littl. ſect.* 58.

Of Debts and Cauſes of Action and Condition, &c. Condition. If a Debtor marry with a Debtee Executrix, hereby the Debt is ſuſpended, during the marriage. See before.

If one make a Feoffment of Land in Fee, on condition that the Feoffee ſhall reinfeoff the Feoffor of it, and before it be done, the Feoffor make a Leaſe of all or part of this Land to another; now by this the Condition is ſuſpended: So if the Feoffee had made a Leaſe to the Feoffor of all or part of the Land; this had ſuſpended the Condition, during the Leaſe, if the Condition were to pay Rent, or the like: But if the Condition were for a Collateral thing, the payment of a ſum in groſs, or the like, *contrà*. If a Feme-ſole Infeoff a man of Land by Deed indented, reſerving Rent to her, and her Heirs, at *Eaſter*, on Condition to re-enter for non-payment, and then they intermarry; now hereby, during the Coverture, the Rent and Condition are ſuſpended; and if the Condition had been to pay him ten pound at a day, and before he marry her, the Condition is gone, *Co.* 4. 52. 2. 59. *Co.* upon *Littl.* 217, 218.

A Rent-ſervice may be extinct or ſuſpended in part by purchaſe of the Land, but not a Rent-charge; but by a Releaſe, part of a Rent-charge (as it ſeems) may be extinct. *Bro. Extinguiſhment, Perk. ſect.* 71. 6. Where a thing may be extinct or ſuſpended in part, and how.

A Condition cannot be extinct or ſuſpended in part, but muſt be ſo in all, *Co.* upon *Littl.* 215. *Co.* 2. 50.

A Seigniory Rent, or the like, cannot by any rightful or wrongful act of the party be ſuſpended in part, and in *eſſe*, for another part, in reſpect of the Land, out of which it is iſſuing: So neither can it by ſuch act be ſuſpended for a Remainder, and in *eſſe* for the particular Eſtate; but by the act of Law, or of a third perſon, ſuch a Suſpenſion may be, *Co.* 9. 129. *Sect.* 8. *Seigniory.*

By act of the party, a Rent-ſervice cannot be ſuſpended in part, and in *eſſe* for another part, but by act of Law it may: As when the Gardein in Chivalry entreth into his Wards Land within age; now is the Seigniory ſuſpended, and yet if the Wife of the Tenant be endowed of a third part of the Tenancy, ſhe ſhall pay to the Lord the third part of the Rent, *Co.* upon *Littl.* 148. So if the Tenant give part of his Land in Tail to the Father of the Lord, and he die, and it diſcend to the Lord; and ſo it is of a Rent-charge. *Idem.*

A Seigniory may be ſuſpended in part, by the act of a ſtranger, as if two Joyntenants or Coparceners be of a Seigniory, and one of them doth Diſſeiſe his Tenant, the other may diſtrain for his part, *Co.* upon *Littl* 148.

All the things noted before to be ſuſpended, it ſeems, may be revived again, unleſs it be Eſtates; and perſonal things, for they being once ſuſpended, can never be revived, unleſs it be in ſpecial caſes; as the caſe of marriage of a Feme-Executrix with a Debtor (before) and as ſome hold, if a Feme-Obligee marry with the Obligor, and after they be divorced, that now here ſhall be a Reviver of this Debt: But Rents, Seigniories, Services, Conditions, and the like, being once ſuſpended, may be after revived; and therefore if the Tenant Infeoff his Lord on Condition, and after enter; for the Condition broken, the Seigniory is revived, *Perk.* 19. 7. Where a thing once ſuſpended, may be revived, or not.

If one have a Rent-charge in Fee going out of his Land, and marry with the Woman-Tenant in Fee of the Land, after the marriage diſſolved, the Rent is revived; and if the Husband grant it away, during the Coverture (as it ſeems he may) the Grantee may diſtrain for it preſently. See more *Co.* upon *Littl.* 312, 313, 314. 5 *Ed.* 3. 16. *Co.* 8. 136. *Plow.* 36. 72. 154.

If the Heir make a Leaſe for life, reſerving Rent, and the Wife recover Dower againſt his Leſſee, and dieth, and the Leſſee have the Land again; now the Rent is revived, *Co. lib. Inſt. fol* 42. 1 *part.* 7 *H.* 5. 4.

If a Man Leaſe a Houſe and Cloſe, rendring Rent, and the Leſſor enters into the Houſe, and pulleth it down, and then the Leſſee doth re-enter in the Cloſe; in this caſe the Rent once extinct, is not revived, *Goldsb.* 125. *pl.* 15.

If one hold 3 Acres by three Rent, and Leaſe one to his Lord for years, here the whole Seigniory is ſuſpended, *Bro.* 133. If a Feoffment or Leaſe be of divers Parcels of Land, rendring ſeveral Rents out of every Parcel, with Condition of re-entry for non-payment, and the Feoffor or Feoffee make a Leaſe or Feoffment of one Parcel onely, or a Leſſee in ſuch a caſe Surrender one Parcel onely; in theſe caſes the whole Condition is extinct or ſuſpended, *Co.* 2. 59. 5. 54. 8. Where all or part of the thing onely, ſhall be extinct or ſuſpended.

If a Lord do purchaſe Parcel of the Land that his Tenant doth hold by Herriot-ſervice, the whole ſervice is extinct, *contrà* if it were by Herriot Cuſtom, 8 *H.* 7. 10.

If the Lord and another purchaſe the Land of his Tenant, out of which his ſervices do come; the whole ſervices are extinct, 34 *Aſſ.* 15.

If the Lord purchaſe or accept Parcel of the Tenancy, out of which an entire ſervice is to be paid, or done, or Releaſe his Right in Parcel, the whole Service (whether it be matter of pleaſure, or profit) is extinct, if it be onely ſuch a thing as for the benefit of the Lord; but if it be *pro bono publico*, then no part of it is extinct, *Co.* 6. 1. 8. 105.

If one that hath twenty pounds due by Contract, take an Obligation for ten pounds, the whole Debt of twenty pounds is extinct. See more of theſe matters in *Apportionment*, and other Titles here and there. *Bro. Contract* 80.

CHAP. LXXXIV.

Of Farm-Farmers, Fee-farm, Faſting-days, Feoffment, Fairs and Markets.

Of Fairs and Markets.

AS to Fairs and Markets, theſe things are to be known.

1. He that hath a Fair or Market, muſt have it by the Kings Grant or Preſcription, ſee *Franchiſe*.

2. They are not to be kept in Church-yards, *Weſtm cap.* 6.

3. By an old Law they were forbidden to be held upon Aſcenſion-day, *Corpus Chriſti*, *Whitſunday*, *Trinity* Sunday, the Aſſumption of the Virgin *Mary*, *All-Saints*, *Good-Friday*, nor any Sundays, (the four Sundays in Harveſt excepted) in pain to forfeit the Wares ſo ſhewed to the Lord of the Franchiſe, 27 *H.*6. 5. But they may be kept three days before, or three days after Proclamation being thereof made before-hand, *Idem.*

4. Every Lord at the beginning of his Fair, is to cry and publiſh how long it ſhall endure, in pain to be grievouſly puniſhed, 2 *Ed.*3. 15.

5. No perſon may keep a Fair longer then he ought to do, in pain to have it ſeiſed into the Kings hand, until he hath made Fine for ſo doing.

6. Merchants after the Fair ended, ſhall cloſe their ſhops, and ſell no more after, in pain to forfeit the double value of the Ware ſo ſold, 5 *Ed.*3.5.

Pi-powder Court.

7. No Action ſhall be admitted in the Pipowder Court, (which is incident to every Fair) but where the Plaintiff, or his Attorney firſt ſwear, That the matter contained in the Declaration was done within the Juriſdiction, and at the time of the Fair, to which Oath the Defendant may joyn iſſue. And if it be tried and go againſt him, or he refuſe to be ſworn, the Defendant ſhall be diſcharged, 17 *Ed.*4. 2.

8. Any *Londoner* may carry to and ſell Wares in any Fair or Market, 3 *H.*7. 9.

9. Every owner of Fair muſt have a Toll-taker, or if no Toll be paid, a Book-keeper, that muſt ſit there from ten a clock till Sun-ſet in pain of forty ſhillings.

10. He muſt within one day of the Fair, give to the owner of the Fair, a Note of all the Horſes there ſold in pain of forty ſhillings, which the owner muſt ſubſcribe in pain of forty ſhillings.

11. Sale of a ſtoln horſe, and ſold there without Entry in this Book, making him known, *Voucher*, *&c.* will not change the property of it. See *Property* and *Statutes*, 2, 3 *Ph. & Ma.*7. 31 *Eliz.*12.

Toll in a Fair or Market.

12. Toll to the Fair or Market, is a reaſonable ſum of money due to the owner of the Fair or Market upon ſale of things, tollable within the Fair or Market, or for Stallage, Vicage, or the like.

As touching which, theſe things are to be known.

1. If the King had granted to a man a Fair or Market, and granted no Toll, the Patentee ſhould have had no Toll; and this is a free Fair or Market: And after the King could not have granted Toll without *Quid pro quo*, (*i.e.*) ſome proportionable benefit to the Subject.

2. If the Toll be outragious that the King grants, it is void, and it is a free Market or Fair.

3. No Toll is to be paid for any thing brought into a Market or Fair to be ſold to the owner of the Fair, before ſale of the thing, without eſpecial Cuſtom for it time out of minde.

4. It ought to be taken of the buyer onely, when the thing is ſold, but in ancient Fairs and Markets, Toll may be paid for a ſtanding in a Fair or Market, though nothing be ſold, *Co.* 2 *part. Inſt.*220, 221.

5. If

5. If the King had granted to any generally or ſpecially to be diſcharged of this Toll; this will diſcharge him from all Tolls, to the Kings own Fairs or Markets, and if the Tolls of any Fair or Market, granted after ſuch Grant of Diſcharge, but cannot diſcharge Tolls formerly due to ſubjects, either by Grant or Preſcription. *Exemption from Toll.*

6. Tenants in Ancient Demeſn for the Lands in their own poſſeſſion, are to pay no Toll; but if he be a common Merchant, and uſe buying and ſelling of things that riſe not upon the Manurance and Husbandry of thoſe Lands, for theſe he muſt pay Toll.

7. The King was not to pay Toll for any of his Goods. *Prerogative.*

8. The reaſonableneſs or unreaſonableneſs, is to be tryed by the Judges, *Co. 2 part Inſt. 222.* *Tryal.*

Of Farm-Farmers.

THe word Farm is moſt properly taken for the chief Meſſuage in a Village or Town, whereunto doth belong great Demeans of all ſorts, and hath been uſed to be let for life, years, or at Will: So that it is a Collective word, conſiſting of divers things gathered into one, as a Meſſuage, Land, Meadow, Paſture, Woods, Commons, and the like. And he that is Leſſee of ſuch a Farm, or occupieth it, is called the Farmor; but the Rent reſerved upon a Leaſe of ſuch a Farm, is called a Farm or Ferm. And a Farmor doth ſometimes ſignifie any Leſſee for life, years, or at Will, of Lands or Houſes, though never ſo few: So ſometimes by Farm or Ferm, is underſtood any Houſe or Land, taken by Indenture of Leaſe or Leaſe-Parol: And Fee-Ferm properly is where the Lord upon the making of the Tenancy, doth reſerve to himſelf and his Heirs the Rent, for which it was before let to Ferm, or at leaſt the fourth part thereof, and is always a great Rent, and reſerved upon an Eſtate in Fee for ever, *Plow. 295: Co. 2 part. Inſt. 44.*

The Laws of Holidays, 5, 6 *Ed. 6.* 3. 2, 3 *Ed. 6.* 19. And are now repealed, or out of uſe, 1 *Jac.* 25. And Religion: And for Faſting-days, 2, 3 *Ed. 6.* 19. 5 *Eliz.* 5. *Holidays. Faſting-days.*

Of a Feoffment.

FEoffamentum, i. e. *Donatio feodi*, ſtrictly and properly is the Gift or Grant of any Honors, Caſtles, Manors, Meſſuages, Lands, Houſes, or other Corporal Immovable things of like nature, which be hereditable to another in Fee-ſimple, *i. e.* to him and his Heirs for ever, by the Delivery of Seiſin and Poſſeſſion of the things given. And from hence comes the word Infeoff, for by this word and the words Give and Grant (as the moſt apt words for that purpoſe) is this kinde of conveyance moſt commonly made. Hence alſo it is that he that makes this Feoffment is called the Feoffor, and he to whom it is made the Feoffee. Alſo it is ſometimes, but improperly, called a Feoffment, when an Eſtate of Freehold onely doth paſs, *New Terms Ley. Co. ſuper Lit. 9. Littl. ſect. 57.* 1. *Feoffment.* what. *Infeoff. Feoffor. Feoffee.*

This kinde of Conveyance, albeit it may be made in moſt caſes by word without any writing, yet it is moſt commonly done by writing, and this writing is then called a Deed or Charter of Feoffment, but hence is the diviſion of a Feoffment by word, or a Feoffment by writing. The ancient Forms and Examples of theſe Deeds are very brief, and yet they had theſe parts contained in them. 1. The Premiſſes. 2. The *Habendum.* 3. The *Tenendum.* 4. The *Reddendum.* 5. The Clauſe of Warranty. 6. The *In cujus rei Teſtimonium.* 7. The Date. 8. The clauſe of *His teſtibus. Hæc fuit candida illius ætatis fides & ſimplicitas, quæ panculis lineis omnia fidei firmamenta poſuerunt.* See *Weſt Sym. 1 part. ſect. 235. Co. ſuper Lit. 6.* 2. The kindes.

And this manner of Conveyance, as it is the moſt ancient kinde of Conveyance, ſo is it the beſt and moſt excellent of all others, and in ſome reſpects doth excel the Conveyance by Fine or Recovery: For it is of that nature and efficacy by reaſon of the Livery of Seiſin evermore inſeparably incident to it, that it cleareth all Diſſeiſins, Abatements, Intruſions, and other wrongful and defeaſible Titles, and reduceth the Eſtate clearly to the Feoffee when the Entry of the Feoffor is lawful, which neither Fine, Recovery, nor Bargain and Sale by Deed indented and inrolled 3. The nature and operation of it.

will doe when the Feoffor is out of poſſeſſion. And it paſſeth the preſent eſtate of the Feoffor, and not only ſo, but barreth and excludeth him of all preſent and future right and poſſibility of right to the thing which is ſo conveyed, inſomuch that if one have divers eſtates all of them paſs by his Feoffment, and if he have any intereſt, Rent, Common, or the like into or out of the Land, it is extinguiſhed and gone by the Feoffment. And further it barreth the Feoffor of all collaterall benefits touching the Land, as condition, power of revocation, writs of error, attaint and the like, inſomuch that if a man make an eſtate of his land upon condition, or with power to revoke it, and after he make a Feoffment of the Land; by this he is barred for ever of taking advantage of the condition or power of revocation. It deſtroyeth contingent uſes, gives away a future uſe incluſively, gives away a Seigniory incluſively, and gives away a right of action: for both the Feoffment and livery of ſeiſin incident thereunto are much favoured in law, and ſhall be conſtrued moſt ſtrongly againſt the Feoffor and in advantage of the Feoffee. And beſides all this, becauſe it is ſo ſolemnly and publiquely made, it is of all other conveyances moſt obſerved, and therefore beſt remembred and proved. *Co. ſuper Lit.* 49. 9. *Co.* 1, 111. 112. *Plow.* 554. 9 *H.* 7. 24. 39 *H.* 6. 43. *Co. ſuper Lit.* 237. *Perk. Sect.* 210. 24 *E.* 3. 70. *Co.* 1. 121. *Co.* 6. 70. *Bro. ſcire facias.* 88. *Plow.* 423. 424.

4 Who may make or take a Feoffment. And what ſhal be ſaid a good Feoffment. Or not. And what things are requiſite thereunto.

If the Feoffment be made by Deed, then muſt the Deed be ſo made, written, read, ſealed, and delivered as all other Deeds that are well made muſt be. For which ſee *Deed ſupra cap.* 4. *Numb.* 5.

1. In reſpect of the perſons thereunto and the quality of their eſtate. Men *de non ſane memorie.* Feme covert. Infant. Attaint perſons. Outlawed perſons.

And in every good feoffment that is made there muſt be a Feoffor, *i.* a perſon able to grant the thing paſſed by the Feoffment; a Feoffee. *i.* a perſon capable of it and able to take it, and a thing grantable, and it muſt be granted in that manner as law requireth. And for this therefore obſerve that whoſoever is diſabled by the common law to take, is diſabled alſo to make a Feoffment, gift, grant, or leaſe, and many alſo that have capacity to take by ſuch conveyances, have no ability to grant by them, as men attainted of treaſon, felony, or in a Premunire, aliens borne, the Kings villaines, Ideots, mad men, a man deafe, blind and dumbe from his nativity, a Feme covert, an infant, and a man by dureſſe, for the Feoffments, gifts. &c. of ſuch perſons may be avoided. But ſuch perſons as have committed treaſon or felony if attainder doe not follow, ſuch as are attaint of hereſie, a leper removed by the Kings writ from the ſociety of men, baſtards, ſuch as are deafe, dumbe or blind, that have underſtanding and ſound memory, albeit they cannot expreſs their intentions otherwiſe then by ſignes, thoſe that are drunken; the villaines of a common perſon before entry, &c. alſo excommunicate perſons, and outlawed perſons, albeit the King take the profits of their lands, all theſe may make Feoffments, gifts, &c. and all theſe have capacity to take by ſuch conveyances. *See Grant Numb.* 4. *Co. ſuper Lit.* 2. 42. 43. *Perk. ſect.* 182. 183. 185. *Bro. Feoffments.* 2. 7. 8, 9. 17. 39 *H.* 6. 43, 21 *H.* 7. 7.

Feme covert.

A woman that hath a husband alone and by her ſelfe without her husband cannot make a Feoffment of her own land, and if ſhe doe ſo, it is void, albeit her husband agree to it. *Perk. ſect.* 185. 186.

Corporation.

Neither the head alone, nor any one or more of the members of a Corporation aggregate of many alone may make a Feoffment of any of the Land belonging to their corporation. But all of them together may make a Feoffment: and if any of them be ſeiſed of Land in his own right and in his naturall capacity, he may make a Feoffment of this land as another man may doe; yea he may make a Feoffment of this Land to the ſame corporation whereof he is a head or member, and ſo give and take alſo in a divers capacity, *Fitz. faits & Feoffments* 29. *Perk. ſect.* 205, 224. 225.

Eccleſiaſticall perſons.

Eccleſiaſticall perſons cannot make Feoffments, gifts, &c. of their Eccleſiaſticall Lands for longer time then three lives, or twenty one years, for all Feoffments, gifts, grants and leaſes by Biſhops. albeit they be confirmed by Deane and Chapter, or by any of the Colledges or halls in either of the Univerſities or elſewhere, or by Deane or Chapters, maſters or gardians of any hoſpitalls, Parſons,

Vicars

Vicars, or any other having ſpirituall or eccleſiaſticall living, are avoidable. *Co. ſuper Lit.* 43.

A man cannot make a Feoffment to his own wife after the marriage is conſummat: But after a contract made, and carnall knowledge had he may make a Feoffment to her, and ſuch a Feoffment will be good, *Perk. ſect.* 194. Husband and Wife.

One Jointenant cannot make a Feoffment of his part of the Land to his companion, for a man cannot give a poſſeſſion to him that hath it before. And hence it is alſo that the Leſſor cannot make a Feoffment to his Leſſee for life, years, or at will. And yet perhaps a Feoffment in this caſe if it be in writing, may work as a confirmation: But one Tenant in common, or one coparcenor may make a Feoffment of his part of the land to his companion. *Perk. ſect.* 197. *Fitz. faits & Feoffments* 26. Jointenants. Tenants in common.

If a man make a Feoffment of anothers land, it is a Diſſeiſin, but a good Feoffment againſt all men but the Diſſeiſee himſelf. And if foure joine in a Feoffment of Land, and three of them have nothing in the Land, and the fourth hath all the eſtate; this is a good Feoffment. *Bro. Feoffment* 4. *Perk. ſect.* 222. Diſſeiſor and Diſſeiſee.

A Diſſeiſor cannot make a Feoffment of the Land to the Diſſeiſee, but it will be void, for the Diſſeiſee will be remitted. But a Diſſeiſee may make a Deed of Feoffment and a letter of Atturney to enter and give livery; and if the Atturney doe ſo, this will be a good Feoffment, *Perk. ſect.* 197. *Co. ſuper Lit.* 48. 49.

No Feoffment, or livery of Seiſin can be made to the King, for he doth alwaies give and take by matter of record. *Fitz, faits & Feoffments* 21.

A Feoffment may be made at this day of any thing which doth lie in livery, by whatſoever tenure it be held, notwithſtanding the Statute of *Magna Charta, cap.* 32. Prerogative.

But in ſome caſes where a man doth alien his Land held of the King, he muſt have the Kings licence beforehand to doe it, or elſe he muſt pay a fine to the King afterwards for not having a Licence. But of ſuch things whereof no livery of ſeiſin can be made no Feoffment can be made. *Co. ſuper Lit.* 49. 21 *H.* 7. 7 *See, infra at Numb.* 9. *Grant.* 5. 2 In reſpect of the matter whereof it is made.

One may make a Feoffment of a moity, third, fourth, or fifth part of his Manor or other land, and that by the name of a moity, third, or fourth part. *Co. ſuper Lit.* 190.

A Feoffment may be made of an upper chamber over another mans houſe beneath *Co. ſuper Lit.* 48.

If there be a meadow of one hundred acres which time out of minde hath been divided amongſt divers perſons, and each perſon hath a certaine number of acres, but in no certaine place; the cuſtome being to allot each perſon his number one yeare in one place, and another in another *alternis vicibus*, in this caſe either of theſe perſons may make a Feoffment of his part by the name of ſo many acres lying in ſuch a meadow without any bounding or deſcribing of it. *Co. ſuper Lit.* 4. 48.

If parceners have made partition of their Land, that the one ſhall have it from Eaſter to Lammas to her and her heirs, and the other ſhall have it from Lammas to Eaſter to her and her heirs, or that the one ſhall have it one year, and the other the other yeare *alternis vicibus*: Or if they have two Manors deſcended, and they agree that the one ſhall have the one Manor one year, and the other the other Manor the ſame year, and the next year that he that had the one ſhall have the other *alternis vicibus* for ever; in theſe caſes the parceners may either of them make a Feoffment of this Land or Manor. *Co. ſuper Litt.* 4. 48.

If there be any leaſe for life or years in being of that land or thing whereof the Feoffment is made, and he that hath this leaſe for life or years, or in his abſence his bailiff or ſervant keeping in the houſe or land whereof the Feoffment is to be made doth give leave and agree that livery of ſeiſin ſhall be given upon the houſe or Land by the Leſſor himſelf or by his atturney, and for this cauſe doth leave the poſſeſſion of the houſe or land, and thereupon livery of ſeiſin is made; this is a good Feoffment and a good livery of ſeiſin, and yet it doth not prejudice the eſtate of the Leſſee. And if the leſſor make a Feoffment of the Land to a ſtranger by aſſent or licence of the Leſſee, the Leſſee then being on the land; this is a good Feoffment. In like manner as it is, where the Leſſor doth enfeoffe a ſtranger to which the Termor doth 3 In reſpect of the preſence or poſſeſſion of other perſons on the Land at the time of the Feoffment made.

doth agree ſaving his terme. And if the Leſſor make ſuch an entry upon the Leſſee for life or years as to put him out of poſſeſſion of the Houſe or Land, and then he doth make a Feoffment and livery of ſeiſin of it, or if the Leſſor in the abſence of the Leſſee, his Wife, Servants and Children enter upon the thing in Leaſe and make a Feoffment and livery of ſeiſin thereof; in theſe caſes there is a good Feoffment to paſs the reverſion, for in theſe caſes when the Leſſee for life or years doth re-enter, the law doth adjudge this to be an atturnement in law. But if a Leſſor will enter upon his Leſſee, and againſt his will (the Leſſee being ſtill in poſſeſſion of the land) make a Feoffment of the Land and give livery; this is void and can never take effect as a Feoffment. And therefore if there be a conveyance made of a houſe and Land thereunto belonging in Leaſe, and the Feoffor come into part of the Land without the leave of the Leſſee, and there make livery of ſeiſin of that part in the name of all the reſt of the Land, (the Leſſee himſelf, his Wife, Child, or ſervant being then upon any other part of the Land, and eſpecially if they be in the houſe) this is no good Feoffment for any part of the Land, but void for the whole. And yet if the Leſſee for years make an under-leaſe of part of the Land to another, and the Feoffor doth make a Feoffment of this part, and give livery of ſeiſin upon this part, in this caſe the poſſeſſion of the firſt Leſſee in the reſidue will not hurt the Feoffment or livery for this part, but it is a good Feoffment. *Veynors caſe Trin. 7 Jac. B. R.*

Atturnement.

Allo if the Leſſee give the Leſſor leave to make livery and depart and leave a ſervant of the Leſſee upon the Land; in this caſe it ſeems his preſence upon the Land whiles the livery is made, will not hurt. *Co. ſuper Lit.* 48.

And ſo if the Leſſee leave the poſſeſſion and leave nothing upon the Land but his cattell; they will not keep his poſſeſſion not prejudice the livery of ſeiſin.

If a Leaſe be made of one acre to one, and another acre to another, and the Leſſor make a Feoffment of both theſe acres, and make livery in one of them in the name of both acres; this is no good Feoffment for the other acre, for by this livery he is not put out of poſſeſſion of that acre. 21 *H.* 7: 7, *Dier* 18.

So if one make a Feoffment of two Manors, the one in poſſeſſion, and the other in Leaſe, and give livery of ſeiſin of the Manor in poſſeſſion in the name of both the Manors; this is no good Feoffment for the other Manor, neither will it paſs by this Feoffment. So if one make a leaſe for years of a houſe, and after Feoffment in Fee of the houſe, and of a cloſe adjoining, and give livery of ſeiſin of the houſe, the termors wife and children being then in the houſe; in this caſe this is no good livery neither to paſs the houſe nor the cloſe. 21 *H.*7.7.*Dy*,18.

Forfeiture.

If Leſſee for life, or years make a Feoffment of the Land, the Leſſor being then upon the Land and not contradicting it; it ſeemes this is a good Feoffment, and that the preſence of the Leſſor upon the Land, eſpecially if he doe not contradict it, will not hinder the virtue of the Feoffment as againſt the Feoffor and all others: but the Leſſor may enter afterwards for the forfeiture notwithſtanding if he pleaſe. *Perk. ſect.* 222. *Dier* 362.

Husband and Wife.

If the Husband alone make a Feoffment of the Land, he hath in the right of his wife, or that he hath jointly with his wife, his wife being then upon the Land and diſagreeing to it; in this caſe the Feoffment is good againſt the Feoffor and all others but the wife notwithſtanding her preſence and diſagreement, but the wife may after his death avoid it. *Perk. ſect.* 223.

Iointenant.

If one iointenant make a Feoffment of the whole Land, his companion being then upon the Land; by this there doth paſs no more but a moity, and the Feoffment is void as to the moity of his companion, for the Feoffment doth not give his moity. *Perk. ſect.* 229.

If a man enter into my Land by wrong, and make a Feoffment of it to a ſtranger, I being then upon the Land; this Feoffment is void, for in this caſe the law doth adjudge me to be alwaies in, and never out of the poſſeſſion, *Perk. ſect.* 210.

Prerogative.

If the King have any poſſeſſion of the Land by wardſhip or otherwiſe, the owner of the land can make no feoffment of it. And therefore if the King be entituled

tuled to land by wardſhip, or primere ſeiſin after office found after the death of an Aunceſtor of one of his tenants; in this caſe it is ſaid the feoffment of the heire is void and paſſeth nothing, for the King is ſtill in poſſeſſion. And if it be before office found it will be all one, for the office ſhall relate to the death of the Aunceſtor. And yet in theſe caſes the feoffment is good againſt the heire himſelf, and all others beſides the King. If the heir before office found, enter and make a feoffment, and then the King doth pardon the feoffee; in this caſe the feoffment is good. And yet ſuch a feoffment after office with a pardon is void. And the like law is if the entry bee before office, and the pardon after the office; for this is void alſo. But if a man bee out-lawed for debt or treſpaſſe, and thereupon the King hath the profits of the lands, in this caſe the owner may make a feoffment of this land notwithſtanding. *Perk. Sect.* 219. *Bro. Feoffment:* 3. 17: 21 *H.* 7. 7. 2 *H.* 6. 5. 1 *H.* 7. 5. *Stamf. prer. Regis*, 40. *Outlawed* perſons.

Divers perſons cannot make a feoffment but it muſt be by deed, as corporations, and ſuch like: Alſo divers things cannot be granted by a feoffment, but the feoffment muſt be made by deed, for a feoffment cannot be made of a reverſion of land but it muſt be by deed. But a leaſe may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only. Alſo a feoffment may be made of the moity, third, or fourth part of a manor, or of a peece of land without deed. And yet if one be ſeiſed of a manor, whereunto an Advowſon is appendant, and he make a feoffment of three acres parcell of the manor, together with the Advowſon to two men, *Habendum* the one moity with the Advowſon to one of them, and the other moity to the other, in this caſe the feoffment cannot be well made unleſſe it be by deed. *Fitz. Faits & feoffments.* 32 *See Grant Numb.* 4. *Litt. Sect.* 60. *ſuper Litt.* 190. 4. In reſpect of the manner of making of it. *Reverſion.*

If a leaſe be made for five years, on condition that if the leſſee pay to the leſſor within the two firſt years ten pound, then that he ſhall have the land to him and his heires, or otherwiſe but for five years; in this caſe if livery of ſeiſin be made to the leſſee before his entry, this is a good feoffment. *Et ſic de ſimilibus. Litt. Sect.* 250.

Every feoffment alſo whether it be made by deed or without deed, muſt be made with livery of ſeiſin, and this livery of ſeiſin muſt be made according to the rules of livery and ſeiſin herein after laid downe, for this is of the eſſence of a feoffment, and a feoffment is not accounted perfect untill livery of ſeiſin be made, for untill then the feoffee hath only an eſtate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of ſeiſin be made, the feoffment is void, and no warrant of atturney to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this caſe to get the aſſurance to be made perfect but in a Court of Equity. But in caſe where there are many feoffees, there the death of one or ſome of them will not hinder the livery but it may be made to him or them that doe ſurvive, we muſt ſee therefore in the next place what this livery of ſeiſin is. *Litt. Sect.* 59. 66. *Co. ſuper Litt.* 52. *Doct & Stud.* 13 Livery of *ſeiſin* *Equity.*

Livery of ſeiſin, or giving of poſſeſſion is a ſolemnity or overt ceremony required by law and uſed for the paſſing of lands or tenements corporall as an evidence or teſtimoniall of the willing departing by him that makes the livery from the thing whereof livery is made, and the willing acceptance thereof by the other party. And this is as ancient as a feoffment, for no feoffment is made without livery of ſeiſin, albeit livery of ſeiſin be ſometimes made upon other conveyances. And it was firſt invented as an open and notorious act to this end, and that by this meanes the country might take notice how lands doe paſſe from man to man and who is owner thereof, that ſuch as have title thereunto may know againſt whom to bring their actions, and that others may know that have cauſe, of whom to take leaſes, and of whom to require wardſhips &c. And by this means if the title come in queſtion, the jury can the better tell in whom the right is. And of this livery of ſeiſin there are two kinds, 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed is when the feoffor, donor &c. by himſelfe or another, taketh the 5. Livery of *ſeiſin*. what 6. the *Kinds*.

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ring of the door of the houſe, or a turfe, or twig of the land, and delivereth the ſame upon the land unto the feoffee, donee, &c. in the name or ſeiſin of the houſe, or ſeiſin of the land. And this is done ſometimes by the parties themſelves if they be preſent, and ſometimes in their abſence by their atturnyes or procurators The livery in law is where the feoffor ſaith to the feoffee being in view of the land, I give you yonder houſe to you and your heires, goe enter into the ſame and take poſſeſſion thereof accordingly, or the like. *New terms of the law. Weſt 2. part Symb. Sect.* 251. *Co. ſuper Litt.* 48.

7. The nature and operation of it.

Becauſe this manner of conveyance by feoffment is ſo ancient, therefore this ceremony (being inſeparably incident to a feoffment) is much favoured in law. And therefore it is expounded and taken ſtrongly againſt him that doth make it, and beneficially for him to whom it is made. And for this cauſe it worketh not only to tranſmit the preſent eſtate, but alſo to barre all preſent and future rights and poſſibilities. If therefore one make a leaſe for life to *I. S.* the remainder to the right heires of *I. D*, (which *I. D.* is then living) and give livery of ſeiſin according to the deed; in this caſe albeit he in remainder be not capable of this remainder, yet by the livery it ſhall paſſe out of the feoffor, and ſhall be in Abeyance during the life of *I. S.* So if a feoffment be made to one *& hæredibus*, without the word [*Suis*,] and livery of ſeiſin be made of the deed; this livery perhaps may make the eſtate good. *Bro. eſtates* 4. *Plow.* 28. 29.

8. Where and in what caſes it is requiſite. Or not.

Livery of ſeiſin is needfull and muſt be had and made in all caſes where any eſtate of fee-ſimple, fee-taile, or for a mans owne or another mans life is made or granted by writing, or word in the country of any lands or tenements corporall. And ſo alſo where one doth make a leaſe of land to another for years the remainder to a ſtranger in fee ſimple, fee taiſ, or for life; in theſe caſes livery of ſeiſin muſt be had and made to the leſſee for years or elſe nothing will paſſe to him in remainder; and yet the leaſe for years will be good. And ſo alſo where a leaſe for years is made upon condition that if ſuch a thing happen the leſſee ſhall have the feeſimple; in this caſe the leſſee muſt have livery of ſeiſin before his entry, otherwiſe the eſtate will not increaſe: And ſo alſo if the King make a feoffment of the land he hath in the right of the Duchy of Lancaſter that is not within the county Palatine; in this caſe livery of ſeiſin muſt be made as in the caſe of a Subject. And in all theſe caſes where livery of ſeiſin is requiſite and it is not made, there doth paſſe no eſtate by the conveyance, but an eſtate at will at the moſt. *Co.* 5. 92. *Lit., Sect.* 70. *Co.* 6. 26. *Doct. & Stud.* 13. *Co. ſuper. Lit.* 49. *Co ſuper Litt.* 216. *Plow.* 214. 219.

But livery of ſeiſin is not needfull or requiſit to bee had and made in caſes where any eſtate of fee-ſimple, fee-taile, or for life is made or granted of any lands by matter of record, as by the Kings Letters Patents, Fine, Recovery, Deed indented and inrolled, and the like; nor is it needfull where any ſuch eſtate is created by way of covenant and raiſing of uſe, by way of Exchange, Indowment *ad oſtium Eccleſiæ* or *ex Aſſenſu patris*; nor is it needfull where any ſuch eſtate is paſſed or granted by way of ſurrender, deviſe, releaſe, or confirmation, or by way of increaſe or executory grant, as when the fee-ſimple is granted to the leſſee for life or years in poſſeſſion; neither is it requiſite or can be made where any incorporeall hereditaments, as reverſions, rents, commons, or the like are granted in fee-ſimple, fee-taile, or for life: for in ſome of theſe caſes there is an atturnement to be made that doth ſupply a livery: Neither is it requiſite in ſome caſes where an eſtate of freehold is made of a corporall thing, as if a houſe or land belong to an office, and the office be granted by deed; in this caſe the houſe or land doth paſſe as incident thereunto. So if a houſe or chamber belong to a corody; in this caſe by the grant of the corody the houſe or chamber paſſeth without any livery of ſeiſin. Neither is it requiſite upon a leaſe for years, for if a man make a leaſe for one thouſand years; this leaſe is perfect by the delivery of the deed without any livery of ſeiſin. Neither is it needfull where one doth grant to me and my heires all the trees growing on his ground, for theſe will paſſe without any livery of ſeiſin at all. *Co.* 2. 23. *Litt. Sect.* 59. *Co. ſuper Litt.* 49. *Co.* 8. 137. 11. 49.

Nor is it needfull when an eſtate is made to one that is in poſſeſſion alreadie, be he

he Tenant at will or ſufferance only, or (as it ſeemes) but a Diſſeiſor only. But if an eſtate be made to *A* in poſſeſſion of the lands and to *B.* out of poſſeſſion of the land; this without livery of ſeiſin cannot execute any Eſtate in *B.*

Livery of ſeiſin may and muſt be made either by the party himſelfe that maketh the eſtate, or if it be a livery in deed, it may in his abſence be made by his atturney ſufficiently authorized by writing. And he that may make an eſtate, to the perfection whereof livery is requiſite, may himſelfe and in his owne right make livery thereupon: and in the right of another, and as attorney to another, ſo divers that cannot make any eſtate may notwithſtanding make livery of ſeiſin. And therefore the husband albeit he may not make a feoffment in fee, or leaſe for life, &c. of land to his wife, yet he may as an atturney make livery of ſeiſin to her upon a conveyance made by another. And ſo alſo may the wife upon a conveyance made to the husband or her: And ſo alſo Monks, Infants, Aliens, and ſuch like Perſons diſabled to make feoffments &c. may notwithſtanding make livery of ſeiſin as atturneys upon conveyance made to others. And ſo likewiſe may he in remainder in fee make livery to the leſſee for years. *Et ſic de ſimilibus.* And this livery of ſeiſin may and muſt be made to the party himſelfe that taketh the eſtate, or in his abſence to his atturney or procurator ſufficiently authorized: and in this caſe any one may be an atturney to take that may be an atturney to give livery. If a feoffment be made to divers by deed and livery of ſeiſin is made to one or ſome of them; this is a good livery to execute the eſtate to them all. But if a feoffment be made to divers without deed, and livery of ſeiſin is made to one or ſome of them in the name of all the reſt; in this caſe the feoffment is good to execute the eſtate in him or them to whom the livery is made, and void as to the reſt. If a leaſe for years be made to *A.* and *B:* without deed, the remainder to *D* in fee, and livery of ſeiſin is made to *A:* or *B.* in this caſe this is a good livery to make the remainder to paſſe to *D.* But if a leaſe be made for years to *A.* the remainder to the right heires of *I. S.* in fee, *I. S.* being then living, and livery of ſeiſin is given to *A.* this remainder is void, for *nemo eſt hæres viventis.* One Jointenant cannot make livery of ſeiſin to his companion as a tenant in common may. And a leſſor cannot make livery of ſeiſin to his leſſee for life or years. See before *Numb.* 4: *Perk. Sect.* 184. *Co. ſuper Litt.* 48. 49. 52. *Co. ſuper Litt:* 48. 49. *Dier.* 35. *Co. ſuper Litt.* 49. 359. *Co.* 5. 95. *Co. ſuper Litt.* 217. *Perk.* 40. 10 *E.* 4. 3.

5. How it may & muſt be made. And what ſhall be ſaid a good livery of ſeiſin or not. 1. In reſpect of the perſons that make it & to whom it is made, and the quality of their eſtate. woman covert Infant.

In all caſes where this ceremony is requiſite, whether it be done by the parties themſelves in perſon or their deputies it muſt be done and made, 1. in the life time of the feoffor, donor, or leſſor, and in the life time of the feoffee, donee, or leſſee for if either of them die it cannot be done afterwards, neither can a warrant of atturney be made to deliver ſeiſin after the death of the feoffor &c. But if there be more feoffees, donees, or leſſees, then one; in ſuch caſes albeit all of them die but one, the livery of ſeiſin may be made to that one that doth ſurvive, and it will be good to him to execute the eſtate in all the land. And ſo it is if there be a warrant of atturney made by a Corporation aggregate, as a Mayor and Communalty, Deane and Chapter, or the like, to give livery of ſeiſin, in this caſe the death of the Mayor, &c. will not determine the authority, and therefore in that caſe the livery of ſeiſin may be made after his death. 2. If it be a leaſe for years with a remainder over in fee, the livery muſt he made to the leſſee for years before his entry or at the time when he doth enter for that purpoſe, for afterwards it cannot be made. *Quod ſemel meum eſt, amplius meum eſſe non poteſt.* *Quære* alſo whether the law be not ſo in all other caſes, and let men take heed they doe not (as commonly they doe) enter into the land before they have livery of ſeiſin made thereof unto them: And yet it ſeemes the livery of ſeiſin is good when it is made afterwards by *Co.* 2. 55. 3. It muſt not be made before the eſtate begin, for if a leaſe be made for years to begin at Michaelmas with a remainder over, and the livery of ſeiſin is made before Michaelmas; this livery of ſeiſin is void; for if a livery worke at all, it muſt worke preſently, and ſo it cannot in this caſe, becauſe it is before the eſtate doth begin. *Co. ſuper Litt.* 52. *Co. ſuper Lit.* 49. 216. *Perk. Sect.* 205. *Co. ſuper Litt.* 217.

2. In reſpect of the time when it is made.

A caveat.

If an eſtate be made of divers peeces of land in divers villages in the ſame county,

3. In reſpect of the place or thing wherein it is made.

in this caſe the making of livery of ſeiſin of land in any part thereof in the name of all the reſt, or of one parcell according to the deed, albeit he doth not ſay in the name of &c. ſufficeth for all, if all the peeces be in the grantors poſſeſſion and out of leaſe. But if the peeces of land lie in divers counties, or in the ſame county and they be in leaſe, or out of the poſſeſſion of the feoffor *contrà*, for in that caſe the making of livery in one part in the name of all the reſt is not ſufficient for the reſt, for in this caſe it is requiſite that livery of ſeiſin be made upon and in ſome of the land in both counties, and upon every parcell of land that is out of poſſeſſion, or at leaſt in ſome parcell of the land in the occupation of every ſeverall tenant. And yet if one part of a Manor be in one county, and the other part in another county in view of that part; in this caſe it ſeemes livery of ſeiſin in the one part in the one county in view of the other part in the other county is good and ſufficeth for all. So if the ſcite of a Manor lie in one county, and the reſt of the Manor in another county; in this caſe the making of livery in the ſcite of the manor is ſufficient for the whole Manor. If a feoffment be made of the Manor of Dale in Sale, the which Manor doth extend in Dale and Sale, and livery of ſeiſin is made accordingly in Dale only and not in Sale alſo; by this feoffment there doth paſſe no more of the Manor but that which is in Dale only. If I be ſeiſed of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of ſeiſin in that acre whereof I am ſeiſed in fee in the name of both acres; in this caſe it ſeemes this ſufficeth to paſſe both the acres. But if I be ſeiſed of one acre in fee, and poſſeſſed of another acre for years, & I make a feoffment of both acres and livery of ſeiſin in that acre only whereof I am ſeiſed in fee in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am ſeiſed, and of other land whereof I am not ſeiſed &c. If I be ſeiſed of two acres of land, and let one of them for years, and then make an eſtate of both of them to another, and make livery of ſeiſin in that I have in poſſeſſion in the name of both the acres; this will not ſerve to paſſe the other acre, but livery muſt be made in that acre alſo. And accordingly it was agreed in a caſe in the Kings Bench *Hil.* 38. *Eliz.* which was, that a man was ſeiſed in fee of a Manor and other lands called Groves, and he made a feoffment of it (Groves being then in leaſe for years) and a letter of atturney to give livery, and the atturney made livery of the Manor in the name of the reſt, the leſſee being ſtill in poſſeſſion of Groves, in this caſe it was agreed that this was no good feoffment for Groves. *Co. ſuper Lit.* 48. *Perk. Sect.* 227. 228. *Doct. & Stud.* 3. *Lit. Sect.* 61. 418. *Perk. Sect.* 226. *Fitz. Feoffments & Faits.* 111. *Perk. Sect.* 228. 9 *H.* 7. 25. *per Frowick. Fitz. Faits & Feoffments.* 2. *Mountague verſus Jefferies.*

When a feoffment is made of a houſe and land, the livery of ſeiſin is moſt aptly to be made of and in the houſe in the name of the reſt, and at the door of the houſe &c. And when a feoffment is made of a Rectory or Parſonage; the livery of ſeiſin may be made in the Parſonage houſe; or if there be no houſe, it may be made upon the Glebe; or if there be neither, it may be made at the ring of the Church door. *See infra.*

4. In reſpect of the preſence or poſſeſſion of others.

In the making of every livery of ſeiſin it is requiſite that all perſons that have any lawfull eſtate and poſſeſſion in the thing whereof livery is to be made, as leſſees for life, years, and ſuch like joine in the making thereof or be removed thence, for every livery ought to bring an immediate poſſeſſion to the feoffee, donee, &c. *See before Numb.* 4.

If leſſee for years make a feoffment and a warrant of atturney to give livery of ſeiſin, and the atturney make livery of ſeiſin the leſſor being preſent upon the land and not contradicting it, it ſeemes this is a good livery of ſeiſin. *Dier.* 362.

The preſence of the feoffor, donor, &c. upon the land after he hath delivered ſeiſin to the feoffee, donee, &c. albeit he ſtay upon the land a while and doe not depart and leave the feoffee &c. in poſſeſſion, will not hurt the livery. See more *ſupra Numb.* 4. *Bro. Feoffments.* 24.

5. In reſpect of the matter whereof it is to be made.

Livery of ſeiſin may be made of any corporall thing, as Manors, houſes, lands, meadowes, paſtures, woods, chambers, or the like. And theſe things therefore are ſaid to lie in livery. But of incorporall things; as rents, advowſons, commons, eſtovers, and

and ſuch like things livery cannot be made. And theſe things therefore are ſaid to lie in grant and not in livery. And therefore when a livery is made of theſe *nil operatur*. See more above *Num* 4 *Co. ſuper Litt.* 49.

6. In reſpect of the manner & order of making it. And how livery of ſeiſin is to be made.

To every good livery of ſeiſin is requiſite either ſuch an act as the law doth adjudg to be a livery, or apt words that doe amount unto it, for a livery may be good by words without any act or deed at all. But it cannot be good by an act or deed without any words at all: howbeit that livery that hath an act or ceremony in it is the beſt, becauſe it taketh the deepeſt impreſſion in the witneſſes. *Co.* 9. 137. *ſuper Litt.* 49.

The moſt uſuall formall and orderly manner of making of livery of ſeiſin is thus, that the feoffor, donor, &c. and the feoffee, donee, &c. if they be preſent, or in their abſence their atturneys or ſervants that have authority doe come to the door, backſide or garden if it be a houſe, if not, then to ſome part of the land where ſeiſin is to be delivered, and there in the preſence of many good witneſſes doe ſhew the cauſe of their meeting, openly and plainly, doe read the deed or declare the contents thereof and of the letter of atturney if there be any. And then the feoffor, &c. or his atturney (if it be a houſe) doe take the ring, latch or haſpe of the door (all the people, men, women and children being out of the houſe,) or (if it be of a peece of ground) doe take a clod of the ground or a bough or twig of a tree or buſh growing thereupon; and (all the people being out of the ground) the ſame ring &c. clod, bough &c. with the deed doe deliver to the feoffee, donee, &c. or to his atturney: and in the delivery hereof doe uſe theſe or ſome ſuch like words, *viz.* I deliver theſe to you in the name of ſeiſin of all the lands and tenements contained in this deed, To have and to hold according to the forme and effect of the ſame deed. Or, I deliver you ſeiſin and poſſeſſion of this houſe or ground in the name of all the lands contained in the deed according to the forme and effect of the deed. And then if it be a houſe, the feoffee, &c. doth enter in firſt alone and ſhut to the door, and then he doth open it and let in others. And if the feoffment, gift, or leaſe be made without deed, then they doe and muſt withall expreſſe the very eſtate it ſelf, which the feoffee, donee, or leſſee is to have: as for example, the feoffor, donor, or leſſor muſt come to the houſe or land which is to be granted and where livery of ſeiſin is to be made, and there muſt by apt words grant the houſe or land to him that is to have it in fee-ſimple, or in taile, or for life, (as the agreement is) and in ſeiſin thereof muſt deliver him the ring of the door, or a turfe or twig of the land. And if the feoffment &c. be made by writing, then it is wiſdome to indorſe and ſet downe on the back of the ſame, how, when and where the ſame is made, and the names of the witneſſes thereunto. But a livery of ſeiſin that is not ſo exactly made, may be good notwithſtanding. And therefore if the feoffor, donor, &c. or his atturney take any thing elſe that comes from off the land, as a ſtone, or the like, and therewithall doth make the livery of ſeiſin; or if he take a turfe, or twig from off another mans ground, and not from the ſame whereof poſſeſſion is to be given, and deliver that upon the ground in the name of ſeiſin; or if he take a peece of ſilver or gold, or a rod, ſtick or the like, and deliver this upon the land in the name of ſeiſin; all theſe are good deliveries of ſeiſin and poſſeſſion. So if the feoffor &c. be at the door of the houſe, or by the land, or in the houſe, or upon the land, and after he hath delivered the deed, he ſay to the feoffee, donee, &c. [Here I deliver you ſeiſin and poſſeſſion of this houſe or land in the name of ſeiſin and poſſeſſion of all the lands and tenements contained in the deed.] Or [have and enjoy this houſe or land according to the deed.] Or [enter into this land or houſe, and God give you joy of it.] Or [I am content, you ſhall enjoy this land;] in all theſe caſes there is a good livery of ſeiſin, *Et ſic de ſimilibus. Weſt. Symb.* 1 *part. Sect.* 251. *Perk. Sect.* 209. 210. *Co. ſuper Litt.* 48. *Co.* 9. 137. *Fitz. feoffments & faits.* 111. *Co.* 6. 26. 41. *E.* 3. 17.

If I being ſeiſed of a houſe in fee make a feoffment of it and of divers lands to a man then preſent with me in the ſame houſe, and there deliver him the deed in the name of ſeiſin of all the lands contained in the deed; in this caſe this is a good delivery of the deed, and a good livery of ſeiſin alſo, albeit I continue in poſſeſſion of the houſe ſtill and goe not out of it. And if I be Lord of a Manor, and lying ſick within ſome part of the Manor I make a feoffment of the Manor, and deliver the deed to the

feoffee ſaying to him, I will that you take ſeiſin preſently, and thereupon command all my tenants of the manner to atturne to him, and they doe ſo; this is a good livery of ſeiſin. So if I make a deed, and after I have read it, being upon the land I deliver it to the feoffee, donee, &c. and ſay, Here I deliver you this charter as my deed in the name of ſeiſin of all the lands therein contained, or the like. this is a good delivery of the deed and of ſeiſin. But if I doe only ſeale and deliver the deed upon or in view of the land without ſaying or doing any more; this will not amount to a livery of ſeiſin. And therefore if a man make a feoffment with a letter of atturney to give livery of ſeiſin, and then he deliver the deed upon the land, this is no good making of livery of ſeiſin. And ſo alſo if there be no letter of atturny. *Bro. feoffment* 28. *Perk. Sect.* 211 212. *Perk. Sect.* 215. *Co.* 6. 26. *Cromwals caſe Adjudged in the exchequer* 15 *Eliz.*

If I be ſeiſed of a houſe in fee, and being in the houſe ſay to *I. S.* Here *I. S.* I demiſe you this houſe for terme of my life; this will not amount to a livery of ſeiſin; and therefore it is no good leaſe untill livery of ſeiſin be made, but it is a good beginning of a leaſe. *Co.* 6. 26.

If the father infeoffe his ſon of land, and the ſon ſuffer his father to enjoy it, and after the ſon doth come to the Pariſh Church where the land doth lie, and there in the audience of the pariſhioners uſeth theſe words to his father, [Father you have given me ſuch and ſuch lands (and doth name them) as freely as you gave them to me I give them to you againe;] this is no good livery of ſeiſin, neither doth any eſtate paſſe hereby. So if one being upon his land ſay to *I. S.* [*I. S.* ſtand forth, I doe here reſerving an eſtate to me for mine owne life give this land to thee and thy heires for ever;] this is no good livery of ſeiſin, neither doth any eſtate paſſe thereby. So if one make a charter of feoffment to me and make no livery of ſeiſin thereupon, and after I make a feoffment of the land to *I. S.* and the feoffor hearing and having notice of it ſaith [I doe willingly agree to it and am contented that *I. S.* ſhall have it,] or I doe agree to the feoffment, or the like, in this caſe this doth not make the feoffment that was made to me good. *Perk. Sect.* 216. *Hil.* 37 *Eliz. B. R. Callards caſe. Fitz. Fait. & feoffments.*

If divers parcells of land be conveyed and livery of ſeiſin is made in one; or there be divers feoffees, and livery of ſeiſin is made to one of them according to the deed without uſing any more words; this is good. But the beſt forme and order of making of livery in this caſe is to adde theſe words, [in the name of all the reſt &c.] *Co. ſuper Lit.* 48. *Fitz. Eſtopell.* 177.

Livery in law, or within the view.

If the feoffor, donor, &c. deliver the deed in ſight or view of the land, and uſe theſe or any ſuch like words, [I will that you ſhall enter into the land and have it according to the deed;] Or, [take and enjoy the land according to the deed;] Or, [I deliver you this deed in the name of ſeiſin;] Or, [enter you into the land and take ſeiſin of it;] Or [take the land, and God give you joy of it;] Or, (if the eſtate be made without deed) [I give you yonder land to you and your heires and goe and enter into the ſame and take poſſeſſion thereof accordingly;] Or [enter into the land and enjoy it in fee-ſimple to you and your heires, or for your life &c.] in all theſe caſes the eſtate and the livery is good, albeit the feoffor &c. ſtand in one county, and the land in view be in another county. But an Advowſon will not paſſe by livery made in view of the Church without deed, there being an Incumbent in the Church *per. ch. Juſt. & Juſt. Manwood.* 18. *Eliz. in Carys. Rep.* 52. And in all theſe caſes of livery within the view, 1. It muſt be made by the perſon himſelf that doth make the eſtate, for it cannot be made by his atturny. 2. There muſt be a relation to the land: for if the feoffor doe deliver the deed only to the feoffee in ſight of the land; this is not a good livery within the view. 3. The parties muſt ſtand within view of the land, for if the feoffor &c. being out of the ſight of the land ſay to the feoffee &c. Goe and enter and take ſeiſin of the land and God ſend you joy of it; this is no good livery of ſeiſin: 4. There muſt be ſome body capable of a freehold to take by the livery, for if it be made to a leſſee for years the remainder to the right heires of *I. S.* and *I. S.* is then living, it is void. 5. The feoffee &c. muſt enter preſently, for if either the feoffor, donor &c. or feoffee, donee &c. die before entry; the livery cannot be made good. And yet if the party dare not enter for feare, in this caſe if he claime it only

only, and doe not enter it is ſufficient. *Co.* 9. 137. 6. 26. *ſuper Lit.* 48. 253. 1] *New terms of the Law. Co. ſuper Lit:* 48. *Dier.* 18. 2] 18 *H:* . 16. 3] *Co. ſuper Litt.* 48: 5] *Co.* 1. 156. *Perk. Sect.* 214. *Fitz. faits & feoffments.* 47.

Livery of ſeiſin in deed may be made or taken by the deputies or atturnyes of the parties, and this livery by them is as good as that livery of ſeiſin which is made by the parties themſelves; and that alſo, as it ſeemes albeit the parties themſelves be upon the land at the time of the making thereof if they doe not contradict it. *Co ſuper Lit.* 52. *Celw.* 1. *Co* 9: 76. *terms of the Law. tit: Livery.*

10. Where livery of ſeiſin made or taken by an atturney ſhall be good: And where not. And what warant is ſufficient:

But in the making of this livery care muſt be had,

1. That there be a Deed of Feoffment, for otherwiſe a letter of Atturney to deliver poſſeſſion avaleth nothing.

2. That there be a good Authority in writing, which may be either in the Deed of Feoffment it ſelf, whether it be Poll, or Indented. and that albeit the Atturney be not party to it, or elſe by a ſingle Deed beſides the Feoffment, &c. *The opinion therefore in Co. ſuper Lit.* 52. 6. *as to this point is held not to be law.*

3. That the Atturny doe purſue his Authority at leaſt in the ſubſtance and effect of it.

4. That the Atturney doe it in the name of the Feoffor, Donor, &c. who doth give the Authority. 5. That it be done in the life time of the parties. But a livery in Law may not be made by an Atturney. And therefore if a Letter of Atturney be to deliver ſeiſin, generally and the Atturny by virtue thereof deliver ſeiſin in view; this livery of ſeiſin is void. *ſee Brownl. 2 part* 158. 159 *&c.*

If an Infant, or woman covert make a Feoffment and letter of Atturney to make livery, and the Atturny doe ſo; this is void, for they are not able to give ſuch an Authority. And if a man whiles he is of ſound memory make a Feoffment with a letter of Atturney to give livery and after he become paralytique and ſo dumbe, but by ſignes he doth declare himſelf to be willing to have livery of ſeiſin made, and it is made; this is a good livery of ſeiſin. But if a letter of Atturney be made to deliver ſeiſin of certain land by one that is *de non ſane memorie*, and the Deed of Feoffment was made whiles he was of ſound memory, and afterwwards he doth come to his memory again, and then the livery is made upon the firſt warrant without any new aſſent, &c. in this caſe the livery is not good. *Bro. Feoffments.* 25. *Aſſ. pl.* 4. *Perk. ſect.* 23.

Infant. Woman covert.

De non ſane memorie.

That for the moſt part which for the manner and order of making it is a good livery of ſeiſin if it be made and taken by the parties themſelves is good being made and taken by their Atturnies or Deputies that have a good Authority and doe well purſue it. And therefore if the conveyance be made of divers Lands, and they lie in one county, and a warrant of Atturney is made to give livery generally, and the Atturney doth make it in one part of the Land in the name of all the reſt; this is a good livery. *Et ſic de ſimilibus* Dyer 283.

If a man be ſeiſed of black acre, and white acre, and he make a Deed of Feoffment of both theſe acres and a letter of Atturney to enter into both theſe acres, and to deliver ſeiſin of both of them according to the form and effect of the Deed, and he doth enter into black acre and deliver ſeiſin *ſecundum formam chartæ*; in this caſe the livery of ſeiſin is good, albeit he doe not enter into both the acres, nor into one acre in the name of both. And if the Feoffment be made to two or more, and the warrant of Atturney is to make livery to them both, and the Atturney doth make livery of ſeiſin to one of the Feoffees *ſecundum formam & effectum chartæ*; in this caſe the livery is good to both, and yet he that is abſent may wave the livery, *Co. ſuper Litt.* 52.

And yet if a man be diſſeiſed of black acre and white, and a warrant of Atturney is made to one to enter into both theſe acres, and to make livery, and the Atturney doth enter into one acre onely, & make livery of ſeiſin there *ſecundum formam chartæ* in this caſe the livery of ſeiſin is void for all, for in this caſe he doth leſſe then his Authority. So if a man make a letter of Atturney to deliver ſeiſin to *I S* upon condition, and the Atturney doth deliver ſeiſin abſolutely; this livery of ſeiſin is void. And ſo in all ſuch like caſes where the Atturney doth leſs then the authority and com-

commandement, all that he doth is void. But for the moſt part where the Atturney doth that which he is authoriſed to doe, and more alſo, it is good for ſo much as is warranted, and void for the reſt. And therefore if the letter of Atturney be to give liveryof ſeiſin to *I S* and the Atturney give it to *I S* and *W S*; this livery is good to *I S* and void to *W S*: So if the letter of Atturney be to give livery of ſeiſin of white acre only, and he make livery of white acre and black acre alſo, this livery is good for white acre, and void for black acre. *Co. ſuper Litt.* 52. 258. *Perk. ſect.* 187. 188. 189.

So if the letter of Atturney be abſolute, and the Atturney give livery upon condition; ſome hold this to be good, and the condition to be void. *Perk ſect.* 109. *Co. ſuper Litt.* 258.

If a letter of Atturney be made to two jointly to make or take livery of ſeiſin, and one of them alone doth it without the other; this is a void livery. But otherwiſe it is when it is made to two jointly or ſeverally, for there one of them alone may doe it. *Co. ſuper Litt.* 49.

If a Letter of Atturney be to make livery of ſeiſin after the death of another man, and the Atturney doth make livery of ſeiſin during that mans life; this livery is void. *Perk. ſect.* 39.

If I make a letter of Atturney to *I S* to give livery in the Capital meſſuage, and he doth it in another place, or to doe it between two 2 or 3 a clock, and he doth it at another time, or a Feoffment be made to 2 *A* and *B* and the letter of Attorney is to give ſeiſin to *A*, and he give it *B*, in all theſe Caſes it is not good: But if the Feoffment be to *I S* and a letter of Attorney to make livery to him and the Attorney doth make it to his Attorney this is good. 10 *H.* 7. 19. *Dyer* 337. 283. 68.

11. How it ſhall enure, and be taken, andconſtrued.

Livery of ſeiſin is ſometimes made ſingle, and without any Relation to the Deed whereby the eſtate upon which the livery is made is created at all: and ſometimes and moſt commonly it is made with reference to theDeed in theſe or ſuch like words [*ſecundum formam chartæ.*] In the firſt caſe the eſtate is oftentimes made upon the livery; and then there may be one eſtate contained in the Deed, and another made by the livery, alſo there may paſs more Land by the livery, then is in the Deed, and by this means when there is a fault in the Deed, ſo that the Land will not paſs by the Deed, it may perhaps paſs by the livery: but in this caſe then there muſt be apt words uſed in the making of the livery to create the eſtate alſo; as well as to give the poſſeſſion. But where the livery of ſeiſin is made with relation to the Deed, there it muſt take effect according to the Deed, or not at all, for theſe words *ſecundum formam chartæ*, are to be underſtood according to the quantity and quality of the effectuall eſtate contained in the Deed. And therefore if one make a Deed of Feoffment to another, and in the Deed there is contained no condition at all, and when the Feoffor doth make livery he doth make livery upon condition; or if the Deed contain an eſtate to him and his Heirs, and he maketh livery of an eſtate in taile or for life; in theſe caſes there doth paſs nothing by the Deed. And yet if there be apt words uſed to create ſuch an eſtate at the time of the livery made; ſuch an eſtate may be made by the livery without the Deed, and then the Deed ſhall be void. But if in theſe caſes the Feoffor ſay when he doth make livery on condition in taile, or for life, *ſecundum formam chartæ*; in this caſe there is a good Feoffment made according to the Deed, and the additionall words are void. So if a man make a Leaſe for years, and make livery *ſecundum formam chartæ*; this is but a Leaſe for years ſtill. And if *A* give land to *B* To have and to hold after the death of *A* to *B* and his heirs; this is a void Deed, and therefore if the livery of ſeiſin be made *ſecundum formam chartæ*, the livery of ſeiſin is void alſo. But if when he doth give livery of ſeiſin, he give it to him and his heir, without theſe words, *ſecundum formam, &c.* or if in the making of livery he ſay Here I deliver you ſeiſin of this Land, To have and to hold to you and your Heirs for ever, or the like; this may make a fee-ſimple. So if one make a Deed of Feoffment of 2 acres, & after make livery of ſeiſin of 4 acres; in this caſe if there be words in the livery of ſeiſin ſufficient to make a new eſtate, the other two acres may paſs alſo *Litt. ſect.* 359. *Co. ſuper Litt.* 48. 122. *Fitz. Eſtoppel* 177. 7 *Ed.* 4. 25. *Co. ſuper Litt.* 49. *Fitz. feoffmente & faits* 23.

If

If *A* by Deed give Land to *B* to have & to hold after the death of *A* to *B* and his Heirs; this is a void Deed, and therefore if upon this Deed livery of ſeiſin be made before the day by the party himſelf, or at, or after the day by his Atturney *ſecundum formam & effectum chartæ*; the livery is void alſo, for it cannot enter ſo: And yet if a Leaſe be made for life to begin *in futuro*, and at, or after the day come, the Leſſor himſelf in perſon doth make livery of ſeiſin *ſecundum formam chartæ*; in this caſe the Leaſe perhaps may become good by this livery of ſeiſin. *Co.* 2. 55. 5, 94. *& Greenwoods* caſe. *B, R. Mich.* 17. *Iac.*

If an agreement be between two, that the one ſhal enfeoff the other upon condition for ſurety of money, and afterwards livery of ſeiſin is made generally without any ſuch condition; in this caſe it is ſaid by ſome the eſtate ſhall be on condition ſtill. *Co. ſuper Lit.* 222.

If there be a fault in the Deed, as by the miſ-naming of the Feoffor, &c. Feoffee &c. or the like, and afterwards the Feoffor, &c. doth himſelf in perſon make livery of ſeiſin upon this Deed to the Feoffee, &c. by this the fault of the Deed may be holpen and cured. *Perk ſect.* 42.

If one make a Feoffment to himſelf and another, and give livery of ſeiſin to the other; this is a good Feoffment and ſhall enure to the other wholly, and he ſhall take the whole by the Feoffment and the livery. And ſo if the livery be made to one that is capable, and to another that is not capable; he that is capable ſhall take the whole, and the other ſhall have nothing. So if a Feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the ſurvivor; in this caſe the livery ſhall enure to the ſurvivor only, and he ſhall have all the eſtate thereby. So if a Feoffment be made without Deed to a Corporation, and to *I S*, and livery is made to *I S* alone; in this caſe *I S* ſhall have the whole and the Corporation nothing at all. *Perk. ſect.* 204. 203. 7 *H.* 7. 9.

If a Feoffment be made to four, and livery of ſeiſin is made to one, two or three of them; this ſhall enure to them all. But if the Feoffment be without Deed, it ſhall enure to him wholly to whom the livery is made. And if one of them give warrant to the reſt to take livery for him, and they doe ſo; this ſhall enure to them wholly, and not to him at all for any part. *Dier.* 35. 10 *E.* 4. 1. *Co.* 5. 95.

If the Tenant make a Feoffment to his Lord and another, and give livery of ſeiſin to the other; this ſhall enure wholly to the other untill the Lord agree to it, and then to them both. 10. *E.* 4. 12.

If one make a Deed of Feoffment of one acre of Land to *A* and his Heirs, and another Deed of the ſame Land to *A* and his Heirs of his body, and deliver ſeiſin according to the form and effect of both Deeds; in this caſe it ſhall enure by moities, *i.* he ſhall have an eſtate taile, and the Fee-ſimple expectant in the moity, and a Fee-ſimple in the other moity. *Co. ſuper Litt.* 21.

If two ſeverall Deeds of Feoffment be made to two ſeverall perſons of one and the ſame thing, he that can get the ſeiſin firſt ſhall have it. *Rem domino vel non domino vendente duobus; In jure eſt potior traditione prior.*

If Leſſee for life make a Feoffment, and a Letter of Atturney to the Leſſor to make livery, and he doth make livery accordingly; in this caſe this ſhall not enure to bar him of his entry upon the Feoffee for the forfeiture of his Leſſee. But if Leſſee for years make a Feoffment in Fee, and ſuch a letter of Atturney to the Leſſor, and he doe deliver ſeiſin accordingly; this livery ſhall bind him, for it ſhall be ſaid as in his own right, becauſe the Leſſee had no freehold whereof to make livery. *Co. ſuper Lit.* 52.

If a Leſſor make a Deed of Feoffment, and a letter of Atturney to the Leſſee for years to give livery, and he do accordingly; this ſhall not be conſtrued to extinguiſh or hurt his term. See more in *Expoſition of Deeds, ſupra ch.* 5. *Co. ſuper Lit.* 52.

CHAP.

CHAP. LXXXV.

Of a Fine.

Fine, what.

THis word is ambiguously taken in our Law, for ſometimes it is taken for a ſum of money or mulct impoſed or laid upon an offender for ſome offence done, and then alſo it is called a ranſome. And ſometimes it is taken for an Income or a ſum of money paid at the entrance of a Tenant into his Land. And ſometimes it is taken for a final agreement or conveyance upon Record for the ſettling and ſecuring of Lands and Tenements. And in this ſenſe it is taken here; and ſo it is defined by ſome to be, an acknowledgement in the Kings Court of the Land or other thing to be his right that doth complain. And by others, A Covenant made between parties and recorded by the Juſtices. And by others, A friendly, reall and finall agreement amongſt parties concerning any Land or Rent or other thing whereof any ſuit or writ is hanging between them in any Court. And by others more fully, An inſtrument of record of an agreement concerning lands, tenements or hereditaments, duly made by the Kings licenſe and acknowledged by the parties to the ſame, upon a writ of covenant, writ of right, or ſuch like, before the Juſtices of the Common Pleas or others thereunto authoriſed, and ingroſſed of Record in the ſame Court, to end all controverſies thereof both between themſelves which be parties and privies to the ſame, and all ſtrangers not ſuing or claiming in due time. And in every Fine there is a ſuit ſuppoſed, wherein the party that is to have the thing is called the Plaintiff, and ſometimes alſo in another reſpect the conuſee or Recogniſee, and the other that doth depart with the thing is called the Deforceant, and ſometimes in another reſpect the Conuſor or Recogniſor. And it was anciently the end of a ſuit indeed, for after there had been ſome contention about the thing by ſuit, the parties became agreed who ſhould have it, and ſo a fine was levyed of it, and there was an end of the matter; and hence it is ſaid to be *fructus* or *effectus legis*, becauſe it gives a man the fruit or effect of his ſuit. And to this day therefore a writ doth alwaies goe forth before a fine can be levyed, and this is now one of the common Aſſurances of the Kingdom. *Co.* upon *Litt.* 126, 127. *Plow.* 357.

Conuſee or *Recogniſee*. *Conuſor* or *Recogniſor Deforceant.*

The partsof it.

There are five eſſentiall parts of a Fine. Firſt, the originall writ taken out againſt the conuſor, for without this a fine cannot be levyed: Secondly, the Kings licenſe for the levying of the fine, and for this the King is to have a fine or ſum of money, which is called Kings ſilver, for this is properly that money which is due to the King, in the Court of Common Pleas, in reſpect of a licenſe there granted to any man for paſſing a fine. And this is part of the revenues of the Crown. Thirdly, the Conuſance or Concord it ſelfe which is the very agreement between the parties that intend the levying of the fine how and in what manner the thing ſhall paſs: and doth begin thus; *Et eſt Concordia talis, &c.* (*i. e.*) And the Concord is ſuch, &c. And this is the foundation or ſubſtance of the fine, for if upon this the Kings ſilver be entred, albeit the Conuſor die afterwards, yet the fine is good, and the note or foot of the fine are but abſtracts out of this. Fourthly, the note of the fine, which is an abſtract of the originall Contract or Concord, and doth begin thus, Between *A* plaintiff and *B* and *C* deforciants, &c. *Inter A. querentem & C. deforcientes, &c.* Fifthly, the foot of the fine, which doth begin thus. *Hæc eſt finalis Concordia, &c.* this is a finall Concord, &c: and containeth all the matter, the day, yeer, and place, and before what Juſtices it was levied, which is therefore called the Foot of the fine becauſe it is the laſt part of it, and when this is done all is done: And for this there are indentures made by the Chirographer and delivered to the party to whom the Conuſance is made, which is called the Ingroſſing of a fine, for then a fine is ſaid to be ingroſſed when the Chirographer makes the indentures of the fine, and delivers them to the party to whom the conuſance is made. doth

Kings ſilver what.

Concord what.

Note of the *Fine*, what.

Ingroſſing of the *Fine*, what.

A Fine is either without Ploclamations, which is alſo called a Fine at the common Law, and this is ſuch a Fine as is levyed after ſuch manner and forme as Fines were uſually levyed before 4 *H.*7. upon which no Proclamations were made, which Fine doth ſtill remain of the ſame force as it was at the common Law to diſcontinue the eſtate of the Cogniſor if it be executed. Or it is with Proclamations, which is alſo called a Fine according to the Statute, and which is ſuch a Fine as is levyed with Proclamations after the forme and manner ordained by the ſtatute of 4 *H.* 7. *chap.* 24. (and ſuch a Fine ſhall every Fine that is pleaded intended to bee if it bee not ſhewed what Fine it is, and of this ſort were and are moſt Fines ſince 4 *H.* 7. as being the beſt kinde of Fine of all; and it is in the election of him that ſueth out the Fine as long as he liveth to have it with, or without Proclamations. A Fine alſo whether with or without Proclamations, is either executed, which is ſuch a Fine as of his owne force giveth a preſent poſſeſſion (or at the leaſt in Law) unto the Cogniſee, ſo that he needeth no writ of *Habere facias ſeiſinam* or other means for the execution thereof; but he may enter: of which ſort is a fine *Sur Cogniſance de droit come ceo que il ad de ſon done*, an acknowledgment of Right &c. which is in every deed the beſt and ſureſt kind of Fine of all, and this kind of Fine doth alwaies ſuppoſe a feoffment, or gift precedent of the ſame thing whereof the Fine is had, which the Fine is to corroborate and ſtrengthen. Or it is Executory, which is ſuch a Fine as of his own force doth not execute the poſſeſſion in the Cogniſee, and of this ſort is a Fine *Sur Cogniſance de droit tantùm*, when the party that doth levy the Fine is ſeiſed of the thing, and hee to whom the Fine is levyed hath no freehold therein, but it paſſeth by the Fine: and a Fine *Sur Done, Grant, Releaſe ou Confirmation.* And if theſe kind of Fines be not levyed or ſuch Render made unto them that be in poſſeſſion at the time of the Fines levyed, the Cogniſees muſt enter or have writs of *Habere facias ſeiſinam*, according to their ſeverall Caſes for the obtaining of their poſſeſſions. But if at the time of levying of ſuch an executory Fine the party unto whom the eſtate is limited be in poſſeſſion of the lands paſſed, he ſhall not need any writ of execution to put him in poſſeſſion, for then the Fine will enure by way of Extinguiſhment of right, and doth not alter the eſtate or poſſeſſion of the Cogniſee, however perchance it doth better it. The fine *Sur conuſance de droit tantùm*, alſo doth ſerve ſometimes to make a ſurrender, and then it is therein recited that the Conuſor hath an eſtate for life, and the Conuſee the reverſion: and ſometimes it doth ſerve to grant a Reverſion, and then the particular eſtate is recited to be in another, and that the Conuſor willeth that the other ſhall have the reverſion, or that the Land ſhall remain to the other after the particular eſtate ſpent: A Fine alſo is either ſingle, which is ſuch a Fine by which an Eſtate is granted to the Cogniſee and nothing granted or rendred back again to the Cogniſor by the Cogniſee. Or it is double, which is ſuch a Fine as doth contain a grant, and render back again either of the Land it ſelfe, or of ſome rent, common, or other thing out of it to the Cogniſor for ſome eſtate, limiting thereby many times remainders to ſtrangers which be not named in the writ of covenant, which alſo is ſometimes with reſervation of rent, clauſe of diſtreſſe, and grant of the ſame over. *Weſt. Symb. part.* 2. *Sect.* 19, *Dyer.* 216. *Plow.* 265. *Co.* 3. 86. *ſtat.* 32. *H.*8. 36. 4*H.* 7. 24. 1 *R.* 3. 7.

The kinds of it.

A Fine is a Record as of great antiquity, ſo of a high nature, great force, and much credit and eſteem, and it is now become and ſerves for a formall conveyance of land, and one of the common Aſſurances of the Kingdome, for by this meanes a man may convey his land to another in fee ſimple, Fee-taile, for life or years, with reſervation of rent alſo. It is therefore called a Feoffment of record, for it doth countervaile a Feoffment with livery of ſeiſin in the country, and it includeth all that the Feoffment doth; and worketh further of his own nature, and it is indeed for many purpoſes the beſt and moſt excellent aſſurance of all others, for by the ancient common Law it was ſo high a barre, and of ſo great force, and of ſo ſtrong a nature in it ſelfe, that it did conclude and barre not onely ſuch as were parties and privies thereto, and their heirs, but all others of full age, out of priſon, of good memory, and within the four Seas the day of the fine levyed, if they did not make their claim within a year and a day. And it is ſtill of that force, albeit it be ſomewhat enfeebled by ſome Statutes, that

5. The nature, uſe, and fruit of a Fine.

either it passeth all the right and interest of the Conusor to the Conusee, or else it worketh by way of extinguishment and Estopell, and doth perpetually barre the Conusor and his heires of all present and future right and possibility of right or other collaterall benefit to the thing whereof the fine is levyed. And if it be a fine with Proclamations, it doth in time become a perpetuall barre to all others also, that have right, except they doe take care to prevent the barre by their claime, Action or entry within five years after the proclamations ended. And it barreth Intailes peremptorily whether the heire do claim within five years or not, if he make his claime by him that levied the fine. *Statute of Fines.* 18: *E.* 1. *Co.* 1. 3. *Plow.* 358. 265.

.6 What shall be said a good Fine, or not: and how.

Any person male or female, body sole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a Conusor therein, but there are certain persons prohibited by Law, which the Judges or Commissioners that take the Conusance of fines ought not to admit or receive, and yet if they doe admit them, and a fine be levyed by such persons, the fine is good and unavoidable, and of this sort are mad men, lunatikes, villaines, Ideots, men that have the Lethargy, doting old persons that want discretion, drunken men, and men that are forced to it by threatning, imprisonment or the like, also such as are born blind, deafe and dumbe, but a man that becomes so accidentally may be received and ought not to be refused.

1 In respect of the persons thereunto and their capacity. And by, or to whom a Fine may be levied, and who may be conusors or conusees. And by what names.

Persons ataint. *Non sanæ memoriæ.*

Infants.

Also persons attainted of felony or treason ought not to bee received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the King and the Lord, of whom their lands whereof the fine is levied, are held for their times: but persons waived or outlawed in personall Actions only, ought not to be refused. *West. Symb. in his Tract of Fines.* 17 *E.* 3. 52. 17 *Ass. pl.* 17 *Litt. Sect.* 731. *Perk. Sect.* 24. *Fitz. Fines.* 120. *See in grant infra chap.* 12. *Numb.* 4. 17 *E.* 3. 52. *Cromp. Jur.* 37. 10 *E.* 4 13. Also Infants ought not to be received to levy a fine, and yet if an Infant be admitted to levy a fine, and he doe not avoid it by writ of error during his minority (as he may if it be not a fine *Sur Grant & Render* in taile or for life, the fine will be good for ever against him and all others. And if he die during his nonage, before he hath avoided it, it seemes his heir can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a solemn argument, and of this Just. *Dod. in* 17. *Jac.* made a Quere. *Perk. Sect.* 19. *Dyer.* 220 *et per Just. Bridgmans opinion in private.* 17 *E.* 3. 52. 30 *E.* 3. 5. 27 *Ass. pl.* 53. *Perk Sect* 19, 20. *Co.* 7. 8.

Women covert.

Also women that have husbands ought not to be admitted alone without their husbands to levy fines, and yet if such a woman alone levy a fine of her own land she hath in Fee simple, and her husband doe not avoid it (as he may if he will) by writ of Error, entry, or otherwise during her life, or after her death during his own life, if he be Tenant by the Curtesie, this is now a good fine, and will bind her and her heires for ever, except she be an Infant at the time of the fine levyed, and her husband happen to die during her minority, for then in that Case, if it be not a fine *Sur Grant & Render* to her in taile or for life, she may avoid it during her minority; but if the converture continue untill her full age, in that case she cannot avoid it except her husband joyn with her in it, but the husband and wife ought to be received together to levy any fine of her Land.

Corporations.

If such persons as are civilly dead, as Fryars, Monkes, and the like, be admitted to levy a Fine, the Fine is void. But such civill bodies as have absolute estate in their possessions, as Maior and Commonalty, Dean and Chapter, Colleges, and other Societies corporate, may levy Fines of the Lands they hold in common, even by the Common Law, and such Fines are good, but Ecclesiasticall persons, as Bishops, Deans, Masters of Hospitals, Parsons, Vicars, Prebends, and such like, are by divers Statutes restrained to levy Fines of their spirituall inheritances. *West. Symb. part.* 2. *Sect.* 9. *Plow.* 538. 575. *Co.* 11. 78. 1. *in Magdalen College case.*

Any person that hath capacity to take by grant, or may be a Grantee by deed, may take by Fine and be a Conusee therein, as any person male or female, of full age or under age, whether it be a *Feme Covert*, mad person, lunatike, Ideot, any person in prison, or beyond the Sea, also any person attainted of felony or treason, or outlawed in any personall action, a Bastard, Clark convict, or Alien, may be Conusee in a fine

and

and a Fine levyed to ſuch perſons is good. 3 *H.*6. 42. 41 *Ed.* 3. 7. 50 *Ed.* 3. 9.

Alſo Corporations ſpirituall and temporall may be Conuſees in Fines, and Fines levied to them are good, but before the ingroſſing of ſuch Fines there goeth alwaies a writ to the Juſtices of the Common Pleas, *Quod permittant finem illum levari*. But ſuch perſons as are civilly dead, as Fryers, Monkes and the like, cannot be Conuſees in a Fine, and therefore a Fine levyed to ſuch perſons is void. *See Grant. Numb.* 2.

The names of Cogniſors and Cogniſees in Fines muſt bee certainly ſet downe, and they muſt for the moſt part bee deſcribed by their right names of Baptiſm and Surname, whether they be King, Prince, Dukes, Marqueſſes, Earls, Vicounts, Barons, Lords, or Knights, which be names of dignity; but ſome of theſe are ſometimes deſcribed without their ſurname, as *Georg' Comes Salop. Iohannes Dux Lancaſtr.* Or whether they be Eſquires or Gentlemen, which be names of worſhip and honour. But theſe additions of names of dignity and honour given to ſuch perſons or any others, as Biſhops and the like, are uſed in Fines, rather of curteſie then neceſſity, for they are not needfull in Fines. But in caſe where there bee two of one name it is ſafe to make ſome addition by way of diſtinction, as *Senior* and *Junior* and the like.

If a woman, living her firſt husband, take a ſecond husband and with him and by his name knowledge a Fine; it ſeemes this is void, becauſe of this miſtake; but if a woman with her right huſband, by a wrong Chriſtian name, levy a Fine, ſhe is concluded by it, and cannot avoid it during her life. And yet if a Fine be levyed to a man and his wife by a wrong name, as to *A.* and *Sybill* his wife, when her name is *Iſabell*; this is holden to be void. But if a Fine be levyed by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it ſeemes this Fine is a good Fine. *Brownl.* 1. *part.* 30. 7 *H.* 4. 22. 1 *Aſſ: pl.* 11.

3. In reſpect of the thing whereof the Fine is levied, and of what things a Fine may be levyed or not, and by what names.

A Fine may be levied of all things whereof a *Precipe quod reddat* lieth, and of all things which are inheritable and in *eſſe* at the time of the Fine levied, whether the thing be Eccleſiaſtical and made Temporal or Temporal: As of an *Honor*, Manor, Iſland, Barony, Caſtle, Meſſuage, Cottage, Mill, Toft, Curtilage, Dove-houſe, Garden, Orchard, Land, Meadow, Paſture, Wood, Underwood, Chappel, River, Chauntry, Corrody, Office, Fiſhing, Warren, Fair, Rectory, Mines, a view of Frank pledge, Waife, Eſtray, Felons goods, Deodands, Hoſpitall, Furzes, Heath, Moor, Rent, Common, Advowſon, Hundred, Way, Ferry, Franchiſe, Seigniorie, Reverſion, Toll, Tallage, Pickage, Pontage, Aquitaile. Services. Portion of tithes, Oblations, or the like. 32 *H.*8. 7. *Weſt. ymb.* his Tract of *Fines, ſect.* 25. 50. See *Expoſition* of *Deeds, infra.*

4. In reſpect of the eſtate of the parties thereunto.

If either the Cogniſor or Cogniſee at the time of the Fine levyed be ſeiſed of any eſtate of Freehold in Fee-ſimple, Fee-taile, or for life, in poſſeſſion, reverſion, or remainder, whether the ſame be by right or wrong, the Fine will bee a good Fine in this reſpect. And therefore if one that is ſeiſed of Land in Fee-ſimple, or Fee-taile, generall or ſpeciall, levy a Fine of this Land to a ſtranger, this is a good Fine. So if a ſtranger levy a Fine to him of this Land, this is a good Fine. So alſo a Fine levyed by, or to a tenant for life of the Land he doth ſo hold is good in this reſpect: but hee muſt take heed of a Forfeiture in this caſe, for if tenant for Life levy a Fine *Sur Cogniſanc' de droit come ceo, &c:* to a ſtranger, or levy a Fine *ſur Grant & Releaſe* to a ſtranger, to hold to the Cogniſee for a longer time then for the life of the tenant for life, howſoever in this caſe the Fine be a good Fine, yet this is a forfeiture of the eſtate of the tenant for life whereof he in reverſion or remainder may take preſent advantage. And yet if ſuch a tenant for life levy a Fine *ſur Grant et Releaſe*, to hold to the Cogniſee for the life of the tenant for life, or grant his eſtate by ſuch a Fine to him in reverſion or remainder; or by Fine; grant a rent out of the Land for longer time then for his own life, in theſe caſes the fine is good, and there is no forfeiture of the ſtate of the tenant for life. So likewiſe if a Fine be levyed to a tenant for life by a ſtranger, who doth thereby acknowledg all his right to be in the tenant for life, and releaſe and quite claim to him and his heirs, and go no further, this is a good Fine and no forfeiture of the eſtate of the tenant for life, for his eſtate is not changed thereby, and it may enure to him in reverſion, but if the ſtranger ſay further in the Fine *Come ceo que il ad de ſon done*, this is a Forfeiture. *Stat.* 27 *Ed.* 1. 1.

Forfeiture.

But if neither the cogniſor nor cogniſee be ſeiſed of any eſtate of Freehold in poſſeſſion or reverſion of the lands whereof the Fine is levyed at the time of the levying of

the ſame, but have only a leaſe for years, or not ſo much, the Fine is void and of no force as to any ſtranger, howſoever it may be good between the parties by way of Eſtopell. And therefore if a leſſee for years, or a diſſeiſee, or one that hath right onely to a remainder or reverſion levie a Fine to a ſtranger that hath nothing in the Land, this Fine is void, or at leaſt voidable as to, and by any ſtranger thereunto, and he that hath cauſe may ſhew that the free-hold eſtate and ſeiſin of the land was in another before and at the time of the Fine levied, and that *Partes finis nihil habuerunt tempore levationis finis*. The parties to the Fine had nothing when they levied the Fine, and by this avoid it. And yet a vouchee after he hath entred into the warranty may levy a Fine unto the demandant, but not to a ſtranger. And a diſſeiſor may levy a Fine to a ſtranger that hath nothing in the land; and this is a good Fine, for he hath the Fee ſimple by wrong in him. Alſo the iſſue in taile may be barred by way of Eſtoppell, by a Fine levyed by Anceſter being tenant in taile, albeit neither conuſor nor Conuſee have any Eſtate of Freehold in the Land. *Co.* 5. 123. 3. 88. 90. *Super Lit.* 251. 3 *H.* 7. 9. 5 *H.* 7. 41. 3 *H.* 6. 21. 27 *H.* 8. 4. A Joint Tenant, Tenant in Common or Coparcenour, may levy a Fine of his part to a ſtranger, and this will be a good Fine: And ſo alſo as it ſeemes, may one Coparcenour or tenant in common to another. 26 *H.* 8. 9. *Dyer.* 334. 69. *Plow.* 375. 538. *E.* 4. 13. 11. *E.* 4. 68. One ſingle member of a corporation aggregate of many cannot levy a Fine of the Lands of the corporation, as the Major or Maſter of a College cannot levy a Fine without the communalty, or his fellows, &c. But ſuch perſons may levy Fines of the Lands they are ſolely ſeiſed in their own right as other men may doe. Such as have Eſtates of freehold in Eccleſiaſticall Lands in the right of their Churches, houſes, &c. as Biſhops, Deanes, and Chapters, Prebends, Parſons & the like, may not levy a Fine of ſuch lands, for if they doe it wil not bind the ſucceſſor. *Co.* 11 78.

He that hath an Eſtate of fee-ſimple in lands in the right of his wife ought not to levy a Fine thereof without her, and if he doe, ſhee and her heires may avoid it after his death. Alſo he that hath an Eſtate of Lands given in taile by the King, or by the proviſion of the King ought not to levy a Fine of this Land, for it is void as againſt the iſſue in taile and the King. Alſo he that hath an Eſtate of Lands that are prohibited to be ſold by Act of Parliament, ought not to levy a Fine of ſuch Land. Alſo ſhe that hath an eſtate of Lands of her husband, or of any of his anceſtors aſſured to her for her Jointure Dower, or in taile by the meanes of her husband or any of his anceſtors, may not levy a Fine of this Land; for if ſhe grant a greater eſtate then for her own life, this worketh a preſent Forfeiture. *Stat.* 32 *H.* 8. *chap.* 28. 12 *E.* 4. 12. *Co.* 6. 55. *Broo. Fines.* 121: *Stat.* 32 *H.* 8. *ch.* 36. *Co.* 5. 3. 4 *Stat.* 1 *H.* 7. *chap.* 20.

8. What perſons ſhall be barred by a Fine, or a Fine and Non-claime. And in what time. Or not. And how.

A Fine at the common Law, or a Fine without Proclamations was once a perpetuall bar to all perſons that had right and no impediment at the time of the Fine levied, and that did not claime within a year and a day after the execution of the Fine by poſſeſſion; but now this Law is changed, and this kind of Fine will barre none but ſuch as are parties and privies thereunto. But a Fine by the Statute, or a Fine with Proclamations is now much of the ſame virtue and force as a Fine at the common Law was, for by the Statute of 4 *H.* 7. it is provided, that every Fine after the ingroſſing thereof ſhall be proclaimed in the Court the ſame Terme, and the three next following Termes, four ſeverall daies in every Terme; which Proclamations ſo made, the Fine ſhall conclude all parties, privies and ſtrangers, except women covert, perſons within 21 years of age, in priſon, out of the Realme, or of *non ſane memorie*, (being no parties to the Fine) ſo as they or their heires take their Action or Lawfull entrie within five yeares after theſe imperfections removed. Saving to all perſons and their heires (other then parties) the right claime and intereſt which they have at the time of the Fine, ſo as they purſue it by Action or entrie within five yeares after the Proclamations. And ſaving to all other perſons ſuch right, title, claime and intereſt as firſt ſhall grow or come to them after the proclamations by force of any matter before the Fine, ſo as they make their claime or entrie within five years after the ſame grow due; or if at that time there be any impediment as aforeſaid, within five yeares after the impediment removed. And by the ſtatute of 32 *H.* 8. (which is an expoſition of this ſtatute) it is provided, that all Fines with Proclamations levied according to 4 *H.* 7. by any perſon of 21. yeares of age of any

land

land, &c. before the fine levied entailed to him that doth levy the fine or any of his Anceſtors in poſſeſſion, reverſion, remainder, or uſe, immediately after Proclamations had, ſhall be a bar againſt him and his Heirs, claiming only by force of any ſuch entaile, and againſt all others claiming only to the uſe of him or any Heir of his body. By which Statute it doth appear, that all the parties to the fine, Conuſors and Conuſees, whether they be femes Covert, men *de non ſane memorie*, or others, (Infants only excepted who during minority may avoid it) and whether they have a naturall or civill capacity: and privies, *viz.* privies in bloud, as Heirs whether they be lineall or collaterall, or privies in repreſentation, as Executors and adminiſtrators: and all ſtrangers alſo, *viz.* all others beſides parties and privies that have or pretend any preſent right or title (except women covert, and the reſt that have impediment that doe make their entrie or claim, or bring their action within 5 years after Proclamations had, & thoſe perſons excepted alſo if they make not their claim, &c. within five years after the impediment removed) all theſe are concluded. *i.* ſo ſhut & cloſed up together, for their right is ſo extinct hereby, as they can never open their mouthes or lift up a finger againſt it. Saving to all others. *i.* ſuch as have no preſent right at the time of the fine levied, and were excepted before ſuch Right, Title, Claim or intereſt as ſhal accrew to them after the Proclamations upon any truſt, gift in Taile, or other cauſe, before the fine levyed, ſo as they make their claim, &c. within five years after their right firſt accrewed if they have then no impediment, or if they have, within five years after the impediment removed. *Stat.* 18 *Ed.* 1. *de finibus*, *Stat.* 34 *Ed.* 3. 16. *Plow* 373. *Stat.* 4. *H.* 7, *chap.* 24. 1. *R.* 3. *chap.* 7. 32 *H.* 8. *chap.* 36.

For a more full underſtanding of which Statutes and this matter, theſe things in generall muſt firſt be obſerved. 1. That the perſons to be barred by a fine are, 1. Parties. 2. Privies. 3. Eſtrangers. The parties if they be of the age of 21 years, are bound for ever by the fine, and ſhall have no time to claim to preſerve their right, The privies alſo, being heirs and Executors to the parties and void of impediment at the time of the fine levied, or not, if they claim by the ſame title that their Anceſtor had that levied the fine, are barred for ever by the fine, and ſhall have no time to claime to preſerve their right. And therefore if my Father diſſeiſe my Grandfather of Land, and then levie a fine of the Land, and then my Grandfather die, and after my Father die, by this fine I am barred of the Land for ever. *Dyer* 3. *paſche.* 7. *Jac. B. R.* And here note, that he that is a privie within the intent of 4 *H.* 7. is an Heir within the Statute of 32 *H.* 8: *Et ſic é converſo. Trin.* 21 *Jac. Com. B. Curia in Will. Godfreys* Caſe. And that privies or Heirs in eſtate and bloud, as he that is Heir to whom the land doth or ſhould deſcend, are within theſe Statutes, and ſhall be barred by the fine of their Anceſtor of that land. And ſo alſo ſhall privies in eſtate that are not privies in bloud, as where one hath land in burrow Engliſh, and levie a fine of it, hereby the youngeſt ſon is barred. So if one be Tenant in taile to him and the Heirs females of his body, and he levie a fine, having a Son and Daughter, hereby the iſſue female is barred, and yet ſhe is not the Heir of his bloud. But he that is privie in bloud only, and not in eſtate alſo, is not within theſe Statutes, neither ſhall he be barred by the fine: and therefore if Lands be given to a man, and the Heirs females of his body, and he hath a Son and a Daughter, and the ſon levie a fine and die without iſſue, this is no barr to the Daughter, for howſoever ſhe be Heir of his bloud, yet ſhe is not Heir to the eſtate, nor ſhall need to make her conveyance to it by him. The ſtrangers that are to be concluded by the fine, are either, 1. Such as have preſent right and no impediment, and theſe are barred within five years if they make not their claim within five years after the Proclamations. 2. Such as have preſent right, but have impediment of infancy, &c. and theſe are barred if they doe not make their claim within five years after the impediment removed. 3. Such as have no preſent but future right upon cauſe precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrew: or they have impediments, and then they are barred if they claim not within five years after the impediment removed. 4. Such as have neither preſent nor future right at the time of the levying of the fine by reaſon of any matter before the fine, but whoſe right groweth

either

either entirely after, or partly before, and partly after the fine, and theſe are not barred at all by the fine, but they may make their claim, &c. when they will. And parties, privies, and ſtrangers to finesthat are barred thereby, are ſuch as have naturall capacities or civill, for both theſe are barred. And therefore it is held, if ſuch a Corporation as hath an abſolute eſtate and authority of his poſſeſſions ſo as he may maintaine a writ of right thereof, as Major and Communalty, Deane and Chapter, &c. levie a fine of their Lands, they and their ſucceſſors are barred preſently; but if a Biſhop, Deane, or Prebend, without aſſent of the Dean and Chapter, or a Parſon or Vicar without aſſent of the Patron and Ordinary had levied a fine, this would not have barred the ſucceſſor; neither will it bar now with their aſſent, for they are reſtrained by divers Statutes. *Plow.* 337. 375. 378. So alſo ſuch perſons are barred by the fines that are levied by others if they make not their claime in time, as if one diſſeiſe a Corporation aggregate of land belonging to their Corporation, and after levie a fine of it with Proclamations; and they doe not make their claim, &c. within five years, hereby they are barred. 2. Where the Anceſtor is barred by the fine, there for the moſt part the Heir is barred alſo. *Co.* 9. 105. And therefore if Tenant in taile be diſſeiſed, and the diſſeiſor levie a fine with Proclamations, and the Tenant in taile ſuffer five years to paſs without claim, &c. hereby he and his iſſues are barred for ever, ſo that the heir doth ſuffer for the laches of his Anceſtor. 3. The eſtates that ſhall be barred by the fine are eſtates by the common Law, or by Copihold in Fee-ſimple, Fee-taile, or for life, or for years, the eſtates alſo of Tenant by Statute, Elegit, and of Gardeins in Chivalrie, and of Executors that have land untill Debts and Legacies be paid. And therefore if one enter upon, and put out a Copyholder of Land, and levie a fine thereof, and the Copyholder ſuffer five years to paſs and make no claim, &c. the Copyholder and his Lord both are hereby barred for ever. And if a Leaſe be made for years, and the Leſſor or anothere before entrie of the Leſſee levie a fine with Proclamations, and the Leſſee doth not make his claim, &c. within five years, hereby the Leſſee is barred of his intereſt for ever. 4. The Things whereunto theſe Statutes doe extend, are Lands and Tenements, and not a Rent, or other profit apprender out of the Land, and therefore if I have a Rent, Common, or Eſtovers out of Land, or a way over Land, or power to ſell the Land, and a fine is levied of the Land it ſelf, and I doe not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. And for this cauſe it is, that if a Tenant in Ancient demeſne levie a fine of his Land, and five years paſs, the Lord is not hereby barred to avoid it, for herein he claimeth not the Land, but his ancient Seigniorie. *Co.* 9. 104. 5. 124. *Plow.* 378. *Bro. Fines.* 123. *Co.* 5. 124. 5. The time in which they muſt make their claim, or bring their action that have preſent right and no impediment, is within five years after Proclamation had; and the time for them which have impediments, is within five years after the impediments removed. *Plow.* 370. Lord *Zouches* caſe. 6 The time wherin they muſt make their claim or bring action whoſe right happens afterwards, if they have no impediment, is within 5 years after the time that their right accrues, and if there be any impedimentwithin 5 years after impediment removed. *Dyer* 3. *Co.* 3. 86. 91. *Plow.* 373. 7. The perſons whoſe right is ſaved and preſerved, are mentioned in the firſt & ſecond ſaving of the Statute of 4 *H.* 7; and they are ſtrangers, and not parties nor privies. 8. They that have benefit by the firſt Saving of the Statute ſhall have none by the ſecond Saving, for he that will be within the ſecond Saving to have benefit by it, muſt be, 1 Another perſon. 2 The right muſt come and accrew to him firſt. 3. It muſt come to him after the fine and proclamations. 4 His right muſt be upon ſome cauſe or matter before the fine. *Co.* 5, 124. 9. 106. 9. No fine ſhall bar any eſtate in poſſeſſion, reverſion, or remainder which is not deveſted and put to a right at the time of the fine levied. And therefore if one levie a fine of my Land whiles I am in poſſeſſion of it, this fine will not hurt me. So if the Tenant of the Land, out of which I have a Rent or Common, &c. levie a fine of the Land, this ſhall not bar me of my Rent or Common, for I am ſtill in poſſeſſion of this in the Judgement of the Law. So if there be Tenant for life, the remainder for life, or Tenant in Tail, the Remainder in Tail, and the firſt Tenant in Tail or for life do bargain and ſell the Land by Deed indented

indented and inrolled, and after levie a fine to the Bargainee, in this caſe the remainders are not barred, albeit five years paſs without claim, for the Law in theſe caſes doth adjudge them alwaies in poſſeſſion. So if I make a Leaſe for years of Land, rendring a rent, and a ſtranger levie a fine of the Land, and the Leſſee for years payeth his rent to me duly, in this caſe I am ſaid to be alwaies in poſſeſſion, and therefore am not barred by this fine of my reverſion. So if there be a Tenant by Copy or Leaſe for life, the remainder for life, and the firſt Tenant for life accept of a fine of the Land with proclamations and 5 years paſs without claim, &c. hereby he? that is in remainder is not barred. So if one have a Leaſe for years of Land to begin in *futuro* and a fine is levyed of the Land, and five years paſs after the terme begin, it ſeems this is no bar, becauſe this eſtate is not put to a right. *Brownl. Rep.* 1 *part*, 181. 2 *part*, 134. 75, 153.

And for the further illuſtration of all theſe things ſee the examples following. If Tenant in Tail levy a fine of the Land intailed with proclamations according to the ſtatutes, this is a bar to the eſtate taile, wherein theſe things are to be known. *Stat.* 4 *H.* 7. 32 *H:* 8. *Co. ſuper Litt.* 372. 1] *Co* 9. 138. 140. *Dier:* 3. 1. That whereſoever the iſſue doth claim by the ſame title, and muſt make his Conveyance to the Lands by him that levied the fine, there the fine will bar him, and therefore if Lands be given to the husband and wife in ſpeciall taile, *viz.* to them and to the Heirs of their two bodies iſſuing, or the like, or if the gift be to them and the Heirs males or females of their two bodies, or to them and the Heirs of their bodies with the remainder to the right Heirs of the Husband in Fee, and the Husband alone levieth a fine with proclamations, by this the iſſue in taile is barred, And yet ſo as the right of the wife is ſaved ſo as ſhe makes her claim, &c. within five years after her Husbands death. So if Husband and Wife Tenants in ſpeciall taile have iſſue and the Wife die, and the Husband marry another Wife and have iſſue and levy a fine *Sur cogniſance de droit come ceo, &c.* and take back by the ſame fine an eſtate in ſpeciall taile the remainder over, &c. and die, the iſſue by the firſt Wife is barred. *Dier* 354. So if Tenant in Taile be Diſſeiſed, or make a Feoffment in Fee, and after levie a fine with proclamations to the Diſſeiſor or to a ſtranger, the iſſues in taile are hereby barred for ever, the continuance of the poſſeſſion in another notwithſtanding. *Co.* 3. 90. So if a gift be made to the eldeſt ſon and the Heirs of his body, the remainder to the Father and the Heirs of his body, and the Father dyeth, and the eldeſt ſon levy a fine with Proclamations and dyeth without iſſue, this ſhall barr the ſecond ſon for ever for the remainder deſcended to the eldeſt. *Co. ſuper Litt.* 372. So if Lands be given to an eldeſt ſon and the Heirs of the bod yof his Father (the Father being then dead) and he levy a Fine of this Land, this will barr the younger brother. *Curia trin:* 21 *Jac. Co. B.* But if the iſſue in taile doe not make his title by him that did levy the fine, there the fine will not barr, and therefore if my Father be Tenant in Taile, and his brother Diſſeiſe him and levy a fine, and he and my Father dye, this fine ſhall not barr me as iſſue in taile, becauſe I doe not make my title to the Land by him: but if I ſuffer five years to paſs and doe not make my claim, &c. by this means I may be barred by the fine. *Dier* 3. And if the fine be levied of another thing then the thing it ſelf entailed, As if the Tenant in taile grant by fine a Rent, Common, or the like out of the Land intailed, this fine will not barr the iſſue. So if a Rent be entailed and the Tenant in Taile of the Rent Diſſeiſe the Terre-Tenant of the Land out of which the rent doth iſſue, and then levy a fine of the Land, this is no bar to the iſſue of the Rent. *Plow.* 435: 2. Albeit the fine be a double fine with a grant and render, yet it is within theſe Statutes, and will barr the iſſue in taile as well as a ſingle fine, ſo as the grant and render be of the Land it ſelfe and not of any profit apprender out of it. 2] *Co.* 76. 3. 85. *ſuper Litt.* 353. *Bro. fines.* 118. *Dier.* 272. And therefore if Husband and Wife be Tenants in ſpeciall taile, and they levy a fine with proclamations, and the Conuſee grant and Render the Land to them and their Heirs, this fine will barr the iſſue in taile. And if Tenant in taile joyne with *I S* and levy a fine to a ſtranger, and the ſtranger doth grant and render the Land againe to *I S* for years, and to the Tenant in taile in Fee afterwards, the iſſue in taile is barred by this fine.

2. Iſſue in taile barred by the fine of his Anceſtor or ſome other.

fine: So if there be Tenant for life, the Remainder in taile, and he in remainder in taile accept of a fine from a ſtranger, and grant and render to the ſtranger againe for years with a remainder over, hereby the iſſue in taile is bound. If Tenant in taile accept of a fine of the Land entailed from a ſtranger, and then grant and render a Rent out of the Land to the ſtranger by the ſame fine, this will not bind the iſſue in taile to pay the ſame Rent. *Plow* 435. If Tenant in Taile make a Feoffment on Condition, and die having two ſiſters inheritable to the taile, and one of them levy a fine with proclamations *ſur releaſe* to the Feoffee of the whole, in this caſe it is doubted whether the other ſiſter be barred of her half or not. *Dier* 117. 3. Albeit the Tenant in Taile die before all the proclamations be finiſhed, yet when they be finiſhed as they may be after his death, the iſſues in taile are bound by the fine, for howſoever by the death of the Tenant in Taile the right of the eſtate taile doth deſcend to the iſſue, yet when the proclamations are paſſed, this right that doth deſcend is bound by the Statutes, and the iſſue cannot by any claim, &c. ſave the right of the eſtate taile that doth deſcend unto him. 3] *Co.* 3. 86. 87. 1 *in Shelleys* Caſe. 4. Albeit the iſſue in Taile be within age, out of the Realme, under Coverture, *non compos mentis*, or in priſon at the time of the fine levied and the proclamations paſſed, yet the eſtate taile is barred by the fine. And therefore if *A* be Tenant for life of Land the remainder to *B* in taile, the reverſion to *B*, and his Heirs expectant, and *B* levy a fine to *C* and his Heirs, and hath iſſue and die before all the proclamations are paſſed, the iſſue in taile being then out of the realm, the proclamations are made, and after the iſſue in taile cometh into the Realm and claimeth the remainder in taile upon the Land; in this caſe the eſtate taile is barred for ever. 4] *Co.* 3. 84, 91, 5. Theſe Statutes doe extend to fines levied by Tenant in taile by concluſion, and the iſſue ſhall be bound by the fine of their Anceſtor unto whom they are privie in eſtate and bloud, albeit *partes finis nihil habuerunt tempore finis*. And therefore if the iſſue in taile, in the life of his Anceſtor when he hath onely a poſſibility, as if there be Grandfather, Father, and Son, and the Grandfather be Tenant in Taile, and the Father levy a fine of the Land before the Grandfathers death, and then the Grandfather dye before the Father, and after the Father dye, in this caſe the iſſue is barred by this fine. 5] *Co*, 3. 90. *Dier* 279, *Plow.* 435. So alſo if the Grandfather ſurvive the Father. *Curia Trin.* 21. *Jac. Com. B. Godfry & Wades* caſe. *Dyer* 48. But in caſe of a collaterall deſcent, if the collaterall Anceſtor die in the life-time of his Father without iſſue, this fine is no bar, but if he ſurvive his Father; *contrà*. So if Lands be given to the Grandfather and his wife in ſpeciall taile, and the Grandfather dieth, and the Father doth Diſſeiſe the Grandmother, and doth levy a fine with proclamations, the Grandmother dieth, and then the Father dieth, in this caſe the ſon is barred. So if Lands be conveyed in taile to a woman for her Jointure within the Statute of 11 *H.* 7, *cap.* 20. and while ſhe liveth the iſſue in taile doth levy a fine of the Land, by this the iſſues inheritable to the eſtate taile are barred for ever. *Co.* 3. 50. 51. 9. 140. So if Tenant in taile make a Feoffment or be diſſeiſed, and after levy a fine with proclamations for a ſtranger, hereby his iſſues are barred for ever. So if Tenant in Taile die and his iſſue before his entry (having a freehold in law only) doth levy a fine with proclamations, this ſhall be a bar to his iſſues & to his collaterall Heirs & brothers of the half bloud. *Pl.* 434. 435 *Curia.* 21. *Jac. Co. B.* So if Tenant in taile have four Daughters and one of them levy a fine in the life of the Father, this wil be a bar to her iſſue for the fourth part of the Land, *Idem.* But in theſe caſes before and ſuch like where the iſſue in taile doth levy a fine in the life time of the Tenant in Taile, the Tenant in Taile himſelf may after levy a fine of the Land, and thereby barr his iſſue, and the Conuſee alſo to whom his iſſue hath levied a fine, and therefore in all theſe caſes it is ſuppoſed that the Tenant in Taile doth dye and ſuffer the right to deſcend to his iſſue, *Co.* 3, 50. 51. 9. 140. *Co.* 10. 50. 9. 141. 3. 50. 51. If Lands be given by will to one when he ſhall come to his age of twenty four years, to hold to him and the Heirs of his body, and he after his age of twenty one years levy a fine of this Land with proclamations, this is a barr to the iſſue in taile.

If a Diſſeiſor make a gift in taile, and the Donee make a Feoffment to *A* and after levy

levy a Fine with Proclamations to *B.* that hath nothing in the Land, this Fine will barre the iſſues in taile, and they ſhall not avoid it by pleading that *partes finis nihil habuerunt &c.* but it is no barre to the diſſeiſee, for he may avoid it by this plea when he will. And *à fortiori* therefore, if a Fine be levied by the tenant in taile that hath only an eſtate of free-hold in remainder or reverſion is good: as if *A.* be tenant for life, the remainder to *B.* in taile, and *B.* levy a Fine, albeit this be no diſcontinuance, yet it is a barre to the Eſtate taile. But if tenant in taile have iſſue a ſon and a daughter, and the ſon living the tenant in taile levy a Fine and dye without iſſue, and then the Tenant in taile dieth, by this the daughter and the eſtate taile is not barred. *Co.* 3 84. *Trin.* 21. *Jac. Co. B. Will. Godfrey verſus Wades caſe.* So if the younger ſon levy a Fine in the life of the father, and then the tenant in taile dye, this is no barre to the elder ſon. So if Lands be given to a man and the heires females of his body, and he hath a ſon and a daughter, and the ſon doth levy a Fine of the Land, this is no barre to the daughter. So if tenant in taile have a daughter, his wife being with childe of a ſon, and the daughter levy a Fine, and after the ſon is borne, this Fine ſhall not barre the ſon, for theſe howbeit they be privies and heires to the blood, yet are not privies and heires to the eſtate. 6. Albeit the eſtate paſſed by the Fine be afterwards before all the proclamations had avoided, yet the iſſue in taile is barred by it. Diſcontinuance.

And therefore if tenant in taile diſcontinue in fee, and after diſſeiſe the diſcontinuee and levy a Fine with proclamations to a ſtranger, and take an eſtate back by Render in the ſame Fine, and the diſcontinuee before all the proclamations paſſe enter and claime and ſo avoid the Fine, yet hereby the eſtate taile is barred. *Co.* 3 91.

And if tenant in taile infeoffe the iſſue in taile and after diſſeiſe him and levy a Fine, the iſſue enter, and after the proclamations paſſe, and after the iſſue in taile doth infeoffe the tenant in taile which levied the Fine and dyeth, it ſeemes this Fine ſhall barre the iſſues in taile. *Per Popham & Fenner Juſt. M.* 39. 40. *Eliz. B. R.* This is a barre to the eſtate taile and to the iſſues onely and is no bar to him in remainder or reverſion, and therefore when the eſtate taile is ſpent, this barre is at an end. And therefore if an eſtate be limited to *A:* and *B,* his wife and the heires males of the body of *A.* the remainder to *C.* and *A:* and *B.* have iſſue, and *A.* dye and *B.* and her iſſue, or her iſſue alone levy a Fine, this will barre the iſſues of the iſſues whiles there be any, but if they faile it will not barre *C.* in remainder, except he ſuffer five years to paſſe and ſo be barred by his *non claime.* So if tenant for life and he that is next in the remainder in taile joyne in a Fine, this is a good barre to the iſſues in taile for ever as long as that eſtate taile ſhall continue, but not to him that is next in remainder, nor to any other that ſhall come in of any remainder in taile or in fee, nor to him in reverſion. If lands be given to *A.* and the heires males of his body, the remainder to *B.* and the heires males of his body, the remainder to the right heires of *A.* and *A:* doth bargain and ſell this land by deed indented and inrolled to *I. S.* and his heires, and after levy a Fine of it *ſur Conuſance de droit come ceo &c.* to him and his heires, by this the remainder to *B.* is not diſcontinued, but it is a barre to the eſtate taile by the Statutes, and cauſeth the eſtate of the bargainee to laſt ſo long as the tenant in taile hath iſſues of his body, but if the Fine had been before the bargaine and ſale it had been a diſcontinuance of the remainder, but in neither caſe a barre to him in remainder unleſſe he ſuffer himſelfe to be barred by his non-claime within five yeares after his remainder happen to come in poſſeſſion: 8. If there be tenant in taile, the remainder to him in taile, and the tenant in taile levie a Fine of this Land, hereby both his eſtates are barred. *Et ſic de ſimilibus.* But all this notwithſtanding, If Lands be conveyed to a woman in taile for her joynture within the ſtatute of 11 *H.* 7. *chap.* 20. and ſhe levie a Fine of this Land, this will not barre the iſſues in taile. Or if Lands be given in taile to any ſubject by the Kings own gift or proviſion, and the tenant in taile levie a Fine, this Fine ſhall not bind the iſſues in taile nor the King, but others it will barre, for theſe fines are not intended within, but excepted out of the Statute of 32 *H.* 8. but the King himſelfe being tenant in taile of the gift of ſome of his Anceſtors being ſubjects may levy a Diſcontinuance.

Fine of it to barre his iſſues in taile. *Co.* 1. 76. *ſuper Litt.* 372. *Co.* 10. 96. & 9. *Jac. B. R.. Co. ſuper Litt.* 372.

Sect. 7. 2 Wife barred by the fine of her Husband or ſome other.

And in all theſe caſes where a recovery will not bar the iſſues in taile, there a fine will not bar them. *See Brownl.* 1. *part.* 138. 211. *Bro: Fines* 121. *Co.* 6. 55. *Dyer.* 4 *Co. ſuper Lit.* 372. *Co.* 8. 17. 78.

Albeit the fine of the Husband and Wife together of the Wives Land, or of the Land of the Husband and Wife together, be a perpetuall bar to her and her Heirs for ever, yet if the Husband alone levie a fine with Proclamations of ſuch Land, and then he die, in this caſe ſhe is not barred of her right, but if ſhe doe not make her claim &c. within five years after her Husbands death ſhe is barred of her right for ever, notwithſtanding the Statute of 32 *H.* 8. *Dyer* 72. *Plow.* 373. And if one ſeiſed of Land in Fee mary a Wife, and after make a Leaſe of this Land to *A* for life, the remainder to *B* in Fee, and *B* levie a fine with proclamations, and the husband die, and the Wife doe not make her claim &c. within five years after the death of her Husband; hereby ſhe is barred of her Dower for ever notwithſtanding the eſtate for life in *A*, but if the remainder of *B* had been put to a right at the time of the fine levied ſhe might have avoided the fine by Plea. *M.* 18. *Jac. Co. B. in Anne Twiſts* Caſe. *Quod partes finis nihil habuerunt, &c.* And if the Husband levy a fine of his own Land and die, and his Widow having no impediment doth not make her claim within five years after his death; hereby ſhe is barred of her dower for ever. *Dyer* 224. *Co.* 2. 93.

If a jointure be made to a woman after the coverture, and her Husband and ſhe levie a fine of it; hereby without queſtion ſhe is barred of her jointure in this Land; but it is thought that this is no bar of her dower in the reſidue of the Land of the Husband, and eſpecially then when the fine is *Sur conuſance de droit come ceo, &c. Dyer* 358. If Lands be given to a Man and his Wife in taile, the remainder to the right Heirs of the Husband, and the Husband alone levie a fine of this, this will not bar the wife except ſhe ſuffer five years to paſs after his death without making claim, &c. and therefore if the fine be to the uſe of the Husband and his Heirs in Fee, he may diſpoſe it as a Fee-ſimple and his iſſue hath no remedy, *Brownl.* 1 *part.* 139. *Dyer* 351.

3: Diſſeiſee and the like barred by the Fine of the Diſſeiſor, &c.

If a man diſſeiſe me of the Land I have in Fee-ſimple, or Fee-taile, and after levie a fine of this Land with Proclamations, and I doe not make my claim, &c. within five years after the Proclamations had, hereby I and my Heirs are barred for ever of this Land, *Co.* 3: 105. 3: 87. *ſuper Lit:* 298. And if I being ſuch a Tenant in Fee make a Leaſe for years, or be the Lord of any Copyhold eſtate, and my Leſſee for years, or Copyholder in Fee, or for life be ouſted, and I thereby diſſeiſed, and the Diſſeiſor levie a fine, and neither I nor my Leſſee for years, or Copyholder doe make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever.

And if one diſſeiſe me of Land, and after make a Leaſe for life of it, and then levie a fine with Proclamations, and I ſuffer five years to paſs, hereby I am barred both of the reverſion and of the eſtate for life alſo.

If Tenant for life make a Feoffment in Fee, and the Feoffee levie a fine with Proclamations, and he in reverſion or remainder doe not make his claim, &c. within five years, hereby he is barred for ever. *Plow. in Stowels* Caſe.

If I pretend Right or Title to Land, and enter upon it, and put him out that is in poſſeſſion, and then I levie a fine with Proclamations, with an intent to bar him, and he doth not make his claim, &c. within five years, hereby he is barred for ever, albeit he had the true Right, and I no right at all. *Co.* 3. 79.

If I purchaſe Land of *H.* and after perceiving my title defeaſible, and that a ſtranger hath the right of the Land, I doe levie a fine to, or take a fine from another with Proclamations with intent and of purpoſe to bar him that hath right, and he ſuffer five years to paſs, and doth not make his claim, &c. hereby he is barred of his right for ever. *Co.* 3. 79. *Doct. & St.* 83, 155.

Equitie.

And in theſe and ſuch like caſes, there is no reliefe to be had in equity. See more in Numb. 11, *infrà.*

If

If there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail bargain and ſell the Land by Deed indented and inrolled, and after levie a fine with Proclamations to the bargainee *Sur Conuſance de droit come ceo, &c.* in this caſe as to the Tenant in Tail and his iſſue this is a bar, but as to all others it is no bar, albeit they never make any claim, &c. *Co.* 10. 95. 9. 106. So if Tenant in Tail levie a fine of his intailed Land, this is a bar as to him and his iſſues, but as to all others it is no bar at all, and therefore he in remainder or reverſion in their times may enter notwithſtanding. So if Land be entailed to the Husband and Wife, & the Heirs of their two bodies, and the Husband alone levie a fine of this Land, this as to the Husband Tenant in Tail and his iſſues is a bar, but not as to the Wife, for ſhe ſhall be Tenant in Tail ſtill, and yet it ſeems ſhe may not ſuffer a recovery of this Land afterward, *Co.* 9. 140. 132. So if a man attainted of Felony or Treaſon levie a fine of his Land, this as to the King and Lord of whom the Land is held is void, and is no bar to their advantage and title of forfeiture, but as to all others it is a good bar. So if one levie a fine of Lands in Ancient Demeſne, and of other Lands together; this as to the Lands in Ancient demeſne is not good, nor any bar at all, but as to the other Lands it is a good bar. 7 *H.* 4. 44. *F, N. B.* 98. *Plow.*

9. Where a Fine ſhall be a bar, as to one perſon, and not to another, or as to one part of the Land, and not to another.

Recovery.

By the ancient common Law, he that had right, was bound to make claim &c. within a year and a day after the fine levied and execution thereupon, or elſe he was barred for ever; but this bar by *non claime* is now gone, and if ſuch a fine without Proclamations be levied at this day, he that hath right may make his claim at any time to prevent the bar, and avoid the force of the fine. *Co. ſuper Litt.* 254. 262.

10 The time of claim, and within what time he that hath right to Land muſt make his claim, &c. to prevent the bar of the fine.

Parties to fines void of impediment at the time of the fine levied are barred of the Land preſently, and ſhall have no time to avoid the ſame fine by entrie, claim, &c. And privies in bloud, and privies in repreſentation claiming by the ſame Title which their Anceſtor that levied the ſame fine had, ſhall be barred by the ſame fine preſently, and that whether they have any impediment or not. *Stat.* 1 *R.* 3. *chap.* 7. 4 *H.* 7. *chap.* 24.

Parties.

Privies.

Eſtrangers to fines, (being all ſuch as are neither parties nor privies) who have right to the Land whereof the fine is levied, and have no impediment naturall or legall, ſhall have time to make their claim, &c. within five years after the fine levied and Proclamations had, and no longer. *See the Sta. Plow.* 374. *Co.* 9. 105. And therefore if Leſſee for years, Tenant by Elegit, Statute, or a Copiholder in Fee, or for life, be ouſted, and he in reverſion Diſſeiſed, they ſhall have but one 5 years between them to make their claim, &c. and if they claim not within that time they are all barred for ever, for they have all preſent right and may bring their action preſently: but otherwiſe it is where the Tenant for life, & he in reverſion be diſſeiſed, for in this caſe he in reverſion is not barred by the firſt 5 years after the fine levied, for in that time he can have no action, therefore he ſhall have time to make his claim 5 years after the death of the Tenant for life.

Eſtrangers.

1. That have preſent right and no impediment.

If a Diſſeiſor levie a fine with Proclamations of the Land whereof the Diſſeiſin was, the Diſſeiſee muſt make his claim within the firſt 5 years, after the Proclamations had, and if he happen to die within the five years, his Heir ſhall not have five years more, but ſo much time more as to make up the time incurred in his fathers or other Anceſtors time 5 years, and albeit he be an Infant at the time of his Anceſtors death, yet he ſhall have no longer time. *Plow.* 356. 375. If a Tenant in Tail be diſſeiſed and the Diſſeiſor levie a fine, the Tenant in Tail or his iſſues muſt make their claim within the next five years after the Proclamations paſſed, otherwiſe they be barred for ever. The like it is in the lacheſs of him in remainder or reverſion. 19 *H.* 8. 7, *Plow.* 374. *Dyer* 3. And if, in theſe and ſuch like caſes, he that hath preſent right and is without impediment, bring upon himſelf any impediment, as if being within the Realme at the time when the fine is levied, he doe afterwards goe beyond the Sea, or the like, in theſe caſes he ſhall have no longer time then the firſt five years after the proclamations had. *Co.* 100.

Eſtrangers to fines peſtred with impediments of Infancy, Coverture, Madneſs, Idiocy, Lunacy, Impriſonment, or abſence out of the Realme, at the time of

2. That have preſent right and impediment.

the levying of the Fine, and having then any preſent intereſt or right ſhall have five years time after the infirmity removed to make their claime &c. And therefore an Infant regularly ſhall have time for five years after he come to his full age to make his claime &c. although he be in his mothers wombe at the time of the Fine levied. And yet if my fathers brother diſſeiſe him, and levy a Fine with proclamations, and a year after the proclamations my father dyeth, and after and within five years my uncle dyeth, in this Caſe I by reaſon of my infancy ſhall have only ſo much time to avoid the ſame as at the death of my father remained to come of the five years next after the proclamations, and not a new five years, becauſe I claime by the ſame title that my father had. So if my father, or other anceſtor be diſſeiſed and the diſſeiſor levy a Fine with proclamations, and my father or anceſtor dye within five years after the proclamations, in this caſe I ſhall not have a new five years, but only ſo much as remaineth of the old five years to make my claime &c. Madmen and Lunatickes (being ſtrangers to the fine) ſhall have the like time to make their claim &c. as Infants have, and yet if this infirmity happen after the Fine levied, and before the laſt proclamations be made, theſe perſons are not bound to the firſt years, but ſhall have five years time after they be cured of their maladies. Women Covert (eſtrangers to the Fine) ſhall have five years time after they be diſcovert, to purſue the right. But if a *feme ſole* (eſtranger to a Fine) have preſent right, and after the Fine levied ſhe take a husband, and ſo five years paſs after the proclamations had, in this caſe ſhe is barred and ſhall have no further time to claime. Eſtrangers to Fines impriſoned at the time of the Fine levied ſhall have the ſame time and liberty Infants have; but if ſuch impriſonment happen after the time of the Fine levied and before the laſt proclamation made, it ſeemeth they ſhall have five years after the inlargement. And eſtrangers to Fines being out of the Realme at the time of the levying thereof ſhall have five years time after their returne to enter or claime &c. But if they be in *England* at the time of levying of the Fine, and after goe beyond the Seas and ſuffer the five years after the proclamations to paſs, in this caſe they ſhall have no longer time, except they be ſent in the Kings ſervice and by his commandement. And if the party be beyond the Sea at the time of the Fine levyed, and never return but dye there, it ſeems in this caſe the Fine will not bar his heire at all. *See the ſtatutes. Plow.* 359. *Dier* 3. *Plow.* 367. 377. *Plow.* 366. 375. *Plow.* 375. 376, *Plow.* 360. 366. 375: *Plow.* 366. *Sr. Tho. Cottons Caſe.* 27. *Eliz:*

Infant.

Non ſane memorie.

Women Covert.

Impriſonment

Out of England.

3. That have divers defects

Eſtrangers to fines that have divers defects or infirmities, as Infancy, Coverture, non-ſanity of minde, impriſonment, abſence out of the Realme, to avoid Fines ſhall have time for five years after the laſt of the infirmities removed. But if they have divers impediments, and they be all at once after the proclamations made wholly removed, and after they fall into the like againe and dye, in this caſe their heires ſhall not have a new five years, but the firſt five years begun in their Anceſtors time immediately after the firſt impediments ſo removed ſhall proceed, and *non-claime* of their heires during all the reſidue of the ſaid five years bindeth them as their ſaid Anceſtors ſhould have been bound thereby if they had remained void of ſuch impediments during all the ſaid five years. *Plow.* 375, *Dier*, 133.

4. That are without impediment having future right upon cauſe precedent.

Eſtrangers to Fines that have no preſent but a future right, and that ſuch as groweth wholly before the proclamations, if they be void of impediment, ſhall have five years time after their right, title, claime or intereſt firſt groweth, remaineth, deſcendeth or cometh to them after the proclamations. And therefore if a Mortgagee be diſſeiſed and the diſſeiſor doth levy a Fine with proclamations, and the five years paſſe, and after the Mortgagor payeth or tendreth the money, in this caſe he ſhall have time for five years after the tender or payment of the money to make his claime &c.

So if a man levy a fine of his Land whereof his wife is dowable, ſhe ſhall have five years after her husbands death to make her claime &c. and not be bound by the five years after the Fine. *Plow.* 373. *Dier.* 224. *Plow.* 374. So if tenant in taile levy a Fine with proclamations, and after the Five years dyeth without iſſue, the donor ſhall have five years after his death without iſſue to bring his *Formedon. Co.* 78. *Plow.* 373. 374. So if Leſſee for life levy a Fine, or make a feoffment in fee and the Feoffee

Feoffee doth levy a fine; in this caſe he in reverſion or remainder ſhall not be bound by the next five years after the fine levied, but he ſhall five years next after the death of the Tenant for life, and if he die within the five years, his Heir ſhall have only ſo much time as to make up the time before his death five years. *Co.* 78. *Plow.* 373. 374. So alſo is the Law if Leſſee for life be Diſſeiſed, and the Diſſeiſor or a ſtranger levy a fine, in this caſe he in reverſion or his Heirs ſhall have five years after the death of the Tenant for life and ſhall not be bound to the next five years after the time of the fine levied. *Plow.* 374. *Co.* 9. 105. So if Tenant in Tail in poſſeſſion levy a fine and dye without iſſue, in this caſe he in the remainder ſhall have time for five years after the death of the Tenant in Tail without iſſue, and if he make not his claim, &c. in that time, he and his iſſues are barred for ever. The ſame law is for him in reverſion or the Donor if there be no remainder. *Plow.* 374. 19 *H.* 8. 7. *Co.* 3. 87. 84. *Dier* 3. And if Tenant in Tail diſcontinue in Fee, and the diſcontinue levieth a fine with proclamations, and five years doe paſs and the Tenant in Tail dieth, in this caſe his iſſue ſhall have five years after the Deſcender to bring his *Formedon*, *Co.* 3. 87. But if Tenant in Tail diſcontinue rendring rent and dye, and the iſſue accept the Rent (which doth bar him for his time) and then the diſcontinuee levieth a fine and dyeth, in this caſe the iſſue of the iſſue ſhall not be barred by the five years after the fine, but ſhall have five years after the death of the iſſue, 30. *El.* And if one *de non ſane memorie*, make a Feoffment, and the Feoffee levie a fine and then the Feoffor die; in this caſe the Heir ſhall have 5 years after the death of his Anceſtor, and not be bound by the 5 years next after the fine levied. *Plow.* 374.

5. That have future right & impediment.

Eſtrangers to fines that have future right upon any cauſe precedent being affected with ſuch impediments when the right firſt accreweth, ſhall have five years after the impediment removed to make their claim, &c. And therefore Infants that are born, or in their mothers womb when ſuch right doth happen to them, women Covert, mad men, Lunaticks, priſoners beyond the Seas ſhall have this time. As if a man have iſſue a Son and a Daughter, and the Son doth purchaſe Lands and die, and the Daughter entreth as his Heir, and is Diſſeiſed by *A* who levieth a fine, and five years claim without claim, and ten years after the Father hath another Son who is Heir to his brother; he ſhall have in this caſe a new full 5 years after he come to his full age, for he is the firſt unto whom the right deſcended after the Proclamations.

But if a ſtranger to a fine to whom a remainder or other title firſt accreweth after the fine doe not purſue his right within 5 years, hereby he and his iſſues are barred for ever. And in like manner if the firſt iſſue in Tail to whom the Title of the Tail firſt accreweth neglect to make his claim &c. within the firſt 5 years after his Title accrewed, hereby he is bound for ever, and the whole eſtate Tail alſo. And if one abate after the death of a Tenant in Fee-ſimple, and make a Feoffment upon condition, and the Feoffee levie a fine, and 5 years paſs without any claim made by his Heir, hereby the Heir is barred for the preſent, but if afterwards the condition be broken, and the Abator enter, then the Heir may have an aſſiſe of Mortdanceſter againſt the Abator or enter when he will. *See the Statutes Plow.* 366. 367. *Dyer* 3. *Plow.* 358.

6. That have no right for any cauſe before the *Fine.*

Eſtrangers to fines that have neither preſent nor future right at the time of the levying of the ſame fines by reaſon of any matter before the fines levied, whoſe right groweth entirely before the Proclamations or partly before and partly after, may make their claim, &c. when they pleaſe. As if a Father die ſeiſed of Land his elder Son being poſſeſſed, and the younger ſon entreth and is diſſeiſed, and a fine with Proclamations is levied, and then the elder Son is dearraigned, in this caſe it ſeems he is bound to no time. So if a Tenant ceaſe one year, and then a fine with Proclamations is levied, and after the Tenant ceaſeth another year, the Lord may have his *Ceſſavit* 20 years after the Proclamations. *Plow in Stowels* Caſe.

7. That have future rights by divers titles.

And Eſtrangers to fines that have ſeverall future rights by divers Titles growing at ſeverall times it ſeemeth ſhall have ſeverall five years to make their claim, &c. com-

commencing from the ſeveral times that their Titles do firſt accrue unto them. As if Tenant for life, the Remainder in Fee make a Feoffment in Fee, and the Feoffee levy a Fine with Proclamations, and he in the Remainder ſuffer the five years to paſs, in this caſe he is barred of his Entry upon the Alienation for the Forfeiture; but it hath been held, that if the Tenant for life die, that he ſhall have another five years time to bring his Formedon in the Remainder, *Plow.* 357. 367. 372. So if the Husband make a Feoffment of his Wives Land, to another upon Condition, which is broken, and he levieth a Fine of this Land, and the Husband hath iſſue by his wife, and dieth; and the firſt five years paſs, and then his wife dieth, hereby he is barred of the Title by the Condition, but he ſhall have five years more to make his Claim as Heir to his Mother. But if Lands be given to *H.* for the life of *A.* the Remainder to *B.* for life, the Remainder to *H.* in Fee, and *H.* is diſſeiſed, and after the Diſſeiſor levy a fine, and five years paſs; in this caſe *H.* is barred both of his preſent and future eſtate, and ſhall have no further time to make his Claim, *&c.* and yet if *Ceſtuy que vie* and he in the mean Remainder die, *H.* ſhall have another five years to make his Claim to preſerve his Remainder. In like manner it is if Land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C*, and he is diſſeiſed, and the Diſſeiſor levieth a Fine with Proclamations; in this caſe, ſome ſay *H.* for his preſent right ſhall have five years by the firſt ſaving of the Statute, and five years after the death of *A.* by the ſecond ſaving of the Statute. If one diſſeiſe a Feme-ſole, and after marry her, and have iſſue by her, and the Husband is diſſeiſed before marriage or after, and then a Fine is levied with Proclamations, and the Husband dieth firſt, and afterwards the Wife dieth within the five years, the iſſue being of full age, the five years paſs, hereby he is bound as heir to his Father, but he ſhall have five years more after the death of his Mother to make his Claim, *&c.* *Quando duo jura in una perſonâ concurrunt, æquum eſt ac ſi eſſent in diverſis.* *Plow.* 357. 368. 372.

CHAP. LXXXVI.

Of Fine and Amercement.

1. *Fine*, what.

THis word Fine hath divers ſignifications: For ſometimes it doth ſignifie *Pretium*, as when it is the cauſe of obtaining ſome benefit, as leave to Alien, a Writ, or the like. Sometimes it doth ſignifie *Pacem*, as *Finis, quia finem litibus imponit*; and in this ſenſe it is taken when it ſpeaks of a Fine of Lands. But ſometimes it doth ſignifie *Pœnam*; and ſo it is a pecuniary puniſhment impoſed upon ſome offender by a Court or Officer of Juſtice, for an offence done in ſatisfaction of the offence. It hath ſometimes other ſenſes, *Co.* 8. 59. *Terms Ley. Crompt. Jur.* 55.

2. *Amercement*, what.

An Amercement is a penalty or ſum of money, put by a Court upon a man for ſome offence done by Omiſſion or Commiſſion: And this doth differ from a Fine onely in this.

1. A Fine is commonly for ſome great miſdemeanor, and therefore the ſum impoſed is commonly greater: But an Amercement is commonly for ſome petty fault, and therefore the ſum impoſed is ſmall, and leſſer then the offence doth deſerve, and therefore it is called *Miſericordia.*

2. No Court but a Court of Record can Fine; but any Court that is no Court of Record, as County Court, Hundred Court, or Court Baron, may Amerce.

Afferrors.

3. A Fine is never to be afferred by Afferrors, that is, mitigated by men ſworn to that purpoſe: But moſt Amercements muſt be afferred.

4. To

4. To moſt Fines, eſpecially in Courts of Record, Impriſonment is incident, but not ſo to an Amercement. But Impriſonment doth follow a Fine in a Court of Record, that hath power to impriſon. And in that caſe there lieth a Writ called a *Capias pro Fine* to apprehend the party fined, that he may be impriſoned till he pay his Fine. *F.N.B.* 76. *Co.* 11. 42. 8. 60. upon *Littl.* 127. *Crompt: Jur.* 43. 93. 98. 100. 3. *Capias pro Fine*, what.

For this, take theſe things.

1. All perſons, Male or Female, Clergy or Lay, great or ſmall, may be fined or amerced. 4. Who may be fined or amerced, or not, and where.

2. Cities, Townſhips, Burroughs, and Villages, may be fined or amerced.

3. The King or Queen might not have been fined or amerced.

4. Officers of Courts for any offence done, in or out of their Court, in relation to their Offices; the proper place to fine them, is in the Court whereto they belong, if the Courts have power to fine; or elſe there to amerce them.

5. And if any man, Officer or other, offend in the face of any Court, he is there by that Court to be fined or amerced for it: But he may be puniſhed for this in another Court.

6. Infants may not be fined. *Co.* 8. 61. *May.* 9 *H.* 3. 14. *Co.* of *Copiholds* 40. *Infants.*

For Anſwer to this, take theſe caſes.

1. If any perſon do miſdemean himſelf by contemptuous words or deeds, to a Court of Record, eſpecially in the face of the Court, he may be fined for this, if the Court have power, or elſe amerced, *Co.* 8. 61. 2 *Ed.* 4. 1. 5. For what cauſes ſuch perſons may be fined or amerced, or not.

2. If any Officer of a Court behave himſelf corruptly, or negligently, or contemptuouſly in his Office; for this he is to be fined or amerced according to the power of the Court. And therefore if a Sheriff refuſe to execute, or retorn, or miſretorn the Writs of the Court ſent to him, or a Juror to be ſworn, or the like, they may be fined or amerced, *Co.* 8. 59. 61. 26 *Ed.* 3. 75.

3. In all Actions *Quare vi & Armis*, as Reſcous, Treſpaſs, and the like, if Judgment be given againſt the Defendant in a Court of Record, he is to be fined. So in an Aſſiſe, if the Diſſeiſin be found to be with force; but if it be found without force, he is to be amerced onely, *Co.* 8. 59. 32 *H.* 6. 21. *March.* 135: *pl.* 210.

4. If a Plaintiff get a Judgment in a Real Action by Diſceit, where the Defendant had not Summons, according to Law, he ſhall be fined. But in an Action Perſonal for Diſceit between man and man, if Judgment be given againſt the party Defendant, he is to be onely amerced, *Co.* 8. 59.

5. If a Defendant plead a falſe Deed, or deny his own Deed, and it be found againſt him, or he do after relinguiſh his Plea, and confeſs the Deed, he is to be fined. But if it were about a Deed of his Anceſtor, or he deny a Recovery or Record, to which he is a party, he ſhall neither be fined nor amerced, 34 *H.* 6. 20. 10 *Aſſ. pl.* 10. *Co* 8. 60. 11 *H.* 4. 4. *Dyer* 63.

6. If a Defendant in a Replevin, claim Property falſly, and in a *Proprietate probanda*, it be found againſt him, he ſhall be fined, *Co.* 8. 60.

7. If a Plaintiff in an Appeal of death, Robbery, Felony, or Maim, be barred, nonſute, or the Writ abate by his default, he is to be fined, *Co.* 8. 60. 8 *H.* 4. 17.

8. If in an Attaint the Plaintiff be barred, or nonſute, or it paſs againſt the Defendant, and he were party to the firſt Record, he ſhall be fined, *Co.* 8. 60. 15 *H.* 6. 5. But if he were no party to the firſt Record, as here where he is Tenant by Reſceipt, or the like, there it is otherwiſe, 9 *H.* 4. 33.

9. If there be two or more Plaintiffs, and one of them die, and the Writ abate; or if the one appear, and the other be nonſute, which in Law is the nonſute of them both in Perſonal Actions: In theſe caſes, he that doth ſurvive, or appear, ſhall not be fined nor amerced. So where the one Plaintiff in ſuch an Action where Summons and Severance lieth, be nonſute, and the other ſue on, he that is nonſute ſhall not be amerced. And ſo it is in all Judicial Proces where the Plaintiff is barred or nonſute, or the Writ abate: And ſo it is, if the Sute be diſcontinued; or the Court be ouſted of Juriſdiction, the Plaintiff ſhall not be amerced, *Co.* 8. 61. 5. 49. 21 *H.* 6. 41.

10. If

10. If a Treſpaſs be for Battery againſt the Husband and, Wife ſuppoſing it to be the Battery of both, and it be found to be the Wives onely; yet the Plaintiff ſhall not be amerced, for no other Writ can he had, *Co.* 8. 61.

11. In all Actions which do not contain ſome force, or ſome Diſceipt to the Court; if the Defendant come the firſt day, and render the thing demanded the firſt day to the Plaintiff; he ſhall neither be fined nor amerced, *Co.* 5. 49. 8. 61.

12. But in all Writs of *Præcipe quod reddat*, *quod permittat*, *& quod faciat*, if the Plaintiff be barred, or nonſute, or the Writ abate by his default, he ſhall be amerced; and ſo it is in all Actions Perſonal, where it doth ſo paſs againſt the Plaintiff. *Co* 8. 61.

13. If in Actions that are without force or fraud, the Sute go againſt the Defendant, he will be amerced. And ſo it is where part of the thing in queſtion is found againſt the Defendant; or where are more Defendants, and it is found onely againſt one of them, it is ſo alſo, *Co.* 8. 61. 7 *H.* 6. 36. 21 *H.* 6. 41. 9 *H.* 6. 2.

14. If one ſue twice for the ſame cauſe, as in a Recaption, or the like, he is to be fined, *Co.* 8. 60.

15. If one do, or not do any thing againſt an Act of Parliament, in which there is no certain penalty for the offence, the offender (this is a contempt) may be ſued for it. *Co.* 80. 6. *March. f* 135. *pl.* 208.

16. If a Townſhip ſuffer a murderer to eſcape, the murder being done in the day time, it may be amerced. 3 *H.* 7. 1. See more to this, *Mag. Chart.* 26. *Weſtm.* 1. 9. *Crompt. Jur.* 93, 94, 97, *&c.* *Doct. & Stud.* 178. *Mag. Chart.* 14. *Weſtm.* 2. 6. *Marlb. cap.* 18.

For Anſwer hereunto take theſe things.

6. How ſuch perſons may be fined or amerced.

1. Where there is but one Defendant, he cannot be two times amerced, but where there is but one Plaintiff, and divers Defendants, the Plaintiff may be divers times amerced.

2. Where divers are to be fined or amerced, they muſt be fined and amerced ſeverally, and not joyntly, unleſs it be in ſpecial caſes; and yet an Amercement ſet entirely upon a City or Townſhip, is good.

3. No man or place may be twice fined or amerced, for one and the ſame offence.

4. All Amercements ſet, muſt be reaſonably ſet and according to the offence, and not exceſſive.

7. *Moderata Miſericordia.*

5. If any man be unreaſonably amerced, he may be relieved by a Writ of *Moderata miſericordia*, if it be in a Court Baron or County Court; and from other Courts, he alſo may appeal in this caſe. And this matter of Reaſonableneſs, or not Reaſonableneſs, ſhall be tried by Judges, and not by a Jury. See for theſe things, *Mag. Chart. ch.* 14. 34, 35 *H.* 8. 36. *Merton, ch.* 3. *Marlb. ch.* 23. 24. *Co.* 8. 61. 11. 42, 43 *Weſtm.* 1. *ch.* 18. 7 *H.* 4. 3. ſee *Courts.*

8. *Eſtreats* or *Extracts.*

Extracts are Copies, or true Notes of Original writings, as of Fines, Amercements, or Penalties ſet down in the Records of a Court, to be levied by the Bailiff, or other Officer of every man for his offence. And herein muſt be expreſſed the names of the offender, the ſum impoſed, and the cauſe or offence it ſelf, *F. N. B.* 75. *Weſtm.* 2. 8.

Sheriffs may not levy money out of the *Exchequer*, but by Green Wax, and muſt *tot* what they receive, or forfeit treble damage; and the cauſe or offence muſt be expreſt in the Extract, 43 *Ed.* 3. 9. 7 *H.* 4. 5.

CHAP.

CHAP. LXXXVII.

Of Forfeiture.

IT is the effect of the tranſgreſſion of ſome Penal Law, or of the doing of ſome other wrong or miſdemeanor; by the doing whereof ſomething, either Inheritances, Chattels, Goods, or a Sum of money is forfeit. *Forfeiture, what.*

And this differs from Confiſcation; becauſe that is confiſcate which is diſavowed by the Offender as none of his, and not claimed by another. But ſuch as are forfeit, have a known Owner; and for ſomething he hath done, he hath forfeited what was his. So that Forfeiture is general, and Confiſcation is more particular for ſuch things as have no Owner, and ſhall go to the Kings Exchequer; for confiſcate goods are ſuch as no body doth claim. As if one indict a man for ſtealing his own goods, and he doth openly in Court diſclaim them, then the King ſhall have them as confiſcate goods. *Quod non capit Chriſtus, capit Fiſcus, Plow.*483. *Stamf.* 186. *Co.*5.110. upon *Lit.f.*59. *Fitz. Corone* 371. 355. So if a woman kill her husband and flie, all her husbands goods are confiſcate. So if one indict another for ſtealing the goods he delivered him, in this caſe the goods are confiſcate: *Sect. 1. Confiſcation.*

All the Lands and Tenements, Goods and Chattels, Debts and Duties that a man hath in his own right, and to his own uſe, are ſubject in ſome caſes to Forfeiture: But Offices of Skill and Diligence, the Lands and Tenements that one hath in truſt, and the Goods and Chattels one hath in anothers right and to anothers uſe, as the Goods and Chattels of Executors, are not ſubject to Forfeiture; nor the Goods Churchwardens have in right of the Church. The Lands a man hath in the right of his wife are ſubject to Forfeiture during his and his wives life together; and the Chattels real and perſonal a man hath by his wife, are ſubject to be forfeited altogether. Alſo Rights and Titles to Land, and Actions in divers caſes are ſubject to Forfeiture, *Stamf.l.*3.*c.*26. 4 *H.*7.11. *Plow.*487.379. 4 *Ed.*3.47. 6 *H.*7.9. *Co.*3. 2. 11.35. Alſo Actions of Debt and Treſpaſs *de bonis aſportatis*, Account, and ſuch like Actions. But perſonal Actions, as for Battery, and the like, are not liable to Forfeiture. Future Intereſts alſo may be forfeited, *Dyer* 58. Alſo the Lands or Goods a man hath in Jointenancie, or in Common, are ſubject to Forfeiture, as well as thoſe he hath ſole, 28 *Ed.*3.92. *Stamf.l.*3.*c.*26. *2. What things are ſubject to Forfeiture, or not.*

All Eſtates of Inheritances that one hath alone in Fee-ſimple or Fee-tail, are forfeited by Treaſon. So alſo are all Eſtates that he hath in Jointenancie or in Common with any other. For which ſee *Corone*, and *Stamf. Pleas of the Crown*, at large. *St.* 5 *Ed* 6. *c.*11.

All Eſtates in Fee-ſimple are forfeited by many kinds of Felony; for which ſee *Corone*. But in all ſuch caſes the parties muſt be attainted. Eſtates in tail may be forfeited by Alienation of the woman, or the woman or her husband that hath them by the Statute of 11 *H.*7. *cap.*20. See *Diſcontinuance.*

If an Eſtate be made by the Husband to himſelf for life, and after to his Wife and the Heirs males of her body by him begotten, and he and his Wife levy a Fine and ſuffer a Recovery, yet the Iſſue may enter for a Forfeiture, *Co.* upon *Lit.*365.

One may forfeit his Land by alienating it to a Religious Houſe, or in Mortmain. See *Stat. Mag. Chart. c.*36. *& de Religioſis, c.*1.

If a Maid above twelve years, and under ſixteen years, agree to be taken away and contracted againſt or without Friends, ſhe loſeth her Inheritance for her life. See *Stat.* 4 *&* 5 *P. & M. ch.*8.

A Religious Houſe founded by the King, may forfeit their Land that the King gave them, if they do alienate it, *Weſt.*2. *c.*41.

If a Woman after Rape conſent; as well ſhe as the Raviſher be diſabled to have any Heritage, Dower, or Joint-Feoffment after the death of their Husbands and Anceſtors; and the next of blood ſhall have title to enter incontinently, *St. 6. R. 2. ch. 6.*

For Treaſon or Felony, a man ſhall loſe to the King or Lord all his Lands, Rents, &c. whereof he hath any Eſtate of Inheritance in poſſeſſion or in right; as Lands of which he is diſſeiſed, and all his Hereditaments from the time of the offence done. For in the caſe of Felony and Treaſon, the Offender doth forfeit not only the Land he hath at the time of the Attainder, but the Land he had at the time of the offence committed, although it be after ſold away; and this whether the Attainder be by Verdict, Outlawry, or otherwiſe, 30 *H.* 6. 5. And in this caſe the King or Lord that hath the Eſcheat, ſhall avoid all Acts made, done or ſuffered by the Offender after the offence done. But for divers kinds of Felony a man ſhall not forfeit any Inheritance, or any thing but his Goods, or his Goods and Chattels; as for killing *ſe defendendo*, or by miſchance, &c. For which ſee *Corone.*

If a Woman being Tenant in tail of the gift of her Husband or any of his Anceſtors, within the Statute of 11 *H.* 7. accept a Fine *ſur conuſance de Droit, &c.* and grant and render back for years; it ſeems this is no Forfeiture within that Statute, *Dyers Abridg.* 38.

For Petty-Treaſon or Felony, a man ſhall not forfeit any of his Lands entailed, longer then for his own life, *Stamf. l.* 3. *c.* 26;

If a Son be attainted of Felony in the life of his Father, and be executed, and after the Father die; theſe Lands are not forfeit, but the next Heir ſhall have them. But if the Son ſurvive the Father, though he have a Charter of Pardon, *contra.* 31 *Ed.* 1. *Diſcent* 17. 26 *Aſſ.* 2.

If a Freeholder ceaſe for ſuch a time to pay his Rent and do his Services, and there is nothing for the Lord to diſtrain, he may forfeit his Land. See for this *Ceſſavit.* But *Gavelkind*-Land in *Kent* is not forfeited by the committing of Felony. *The Father to the Bough* (there,) *the Son to the Plough.* For Forfeiture and Confiſcation for Felony, &c. See *Co.* 3 *par. Inſt. c.* 102.

Sect. 2. 3. Of particular eſtates, and of Chattels real; and what ſhall be ſaid a cauſe of Forfeiture thereof, or not.

For Anſwer hereunto, take theſe things.

In caſe of Treaſon or Felony.

1. A Forfeiture may be made by a particular Tenant two ways: Either by doing ſomething to the hurt of the Commonwealth, as by doing Treaſon or Felony; or by doing ſomething to the hurt of the Lord, or him in Reverſion. And the hurt to him in Reverſion may be two ways: 1. By matter of Fact. 2. By matter of Record: Alſo it may be by matter of Record three ways: 1. By Alienation. 2. By claiming a greater Eſtate then he hath, or ought to have. 3. By affirming the Reverſion or Remainder to be in a ſtranger. Alſo by Alienation it may be, 1. Either when it doth diveſt the Eſtate, as by levying a Fine, or ſuffering a Recovery of Lands. 2. Or by not diveſting, when there is a Fine levied of an Advowſon in fee, which doth not diveſt the Remainder or Reverſion. By Claim it may be alſo in two ſorts: 1. Expreſs, which is when the Tenant ſhall in a Court of Record claim the Fee; or if being Leſſee for years and ouſted, he bring an Aſſiſe *ut de libero tenemento.* 2. Implied; as if in a Writ of Right brought againſt him, he ſhall take upon him to join the *Miſe* upon the meer right; or if Leſſee for years loſe in a *Præcipe*, and bring a Writ of Error for Error in Proceſs.

In other caſes:

By affirming the Reverſion to be in a ſtranger, he may forfeit his Eſtate two ways. Either actively; and then, 1. By praying in aid of a ſtranger. 2. By attorning to a ſtranger by matter of Record, upon a Grant of the Reverſion to him. 3. When a ſtranger ſhall bring a Writ of Entry *in caſu proviſo*, and ſuppoſeth the Reverſion in him, and the Tenant doth confeſs the Action. 4. If he plead covinouſly to the diſheriſon of him in Reverſion. 5. If a ſtranger ſhall bring an Action of Waſte, and the Tenant ſhall plead no Waſte done. Or ſecondly, It may be paſſively, as when the Tenant ſhall accept of a Fine *ſur coguiſance de Droit, &c.* from a ſtranger. By all theſe means the Tenant may forfeit his Eſtate, *Co.* upon *Lit.* 251. 367. *Dyer* 209. 324. 1 *H.* 7. 22. 9 *H.* 7. 20. *Co.* 2. 15. 3. 3. 1. 66. 10. 44. *Plow.* 35.

2. The

2. The particular Eſtates that may be forfeited hereby, are Eſtates for life, for ones own or anothers life, that one hath alone in ones own right. So Eſtates for life by Dower, by the Courteſie, or after poſſibility of Iſſue extinct. Alſo Eſtates a man hath jointly with his Wife, may be forfeit during their joint lives. So the Eſtates one hath for life in Jointenancie or in Common with another, may be forfeit: Alſo Eſtates for years by *Elegit*, Statute-Merchant or Staple, *Co.* 2. 15. 3. 3. 1.66. *Dyer* 324.362.377.

3. All Eſtates that a man hath for his own or anothers life in his own right, are forfeited by Treaſon or Felony. So are all Eſtates he hath for life in the right of his Wife, during the life of the Husband and Wife together, but no longer. So alſo all the Eſtates a man hath in Jointenancie, or in common with another for life, are forfeit hereby. Alſo all Eſtates that the Offender hath for years by Statute or *Elegit*, and all Chattels real beſides, as Wardſhips *in capite*, and the like, that the Offendor hath in his own or in his Wives right, are forfeit by Treaſon or Felony, *Stamf.*3.26. 6 *H.*7.12. *Co.* upon *Lit.* 42.351.

4. In caſe of Felony and Treaſon, the Offender doth forfeit not only the particular Eſtates for life which he hath at the time of the Attainder, but alſo them he had at the time of the offence committed, albeit they be after ſold away, 30 *H.* 6. 5.

5. Leaſes for years are forfeit by Outlawry or Attainder for Treaſon or Felony, or *Præmunire*, or for killing ones ſelf, or for flying when he is in queſtion for Felony, albeit he be not guilty; or for ſtanding out and refuſing to be tried by the Country; or where a man is convicted of Felony only, and no Judgment is given. So alſo they are forfeit by Petit-Larceny. Alſo all Intereſts that any man hath by Wardſhips, of Tenants by Knights ſervice: And thoſe that have Eſtates in Lands by Extents, Statutes, or *Elegits*, are forfeit by the cauſes aforeſaid. But Eſtates for lives are not forfeited by Outlawries, except it be in the caſes of Treaſon or Felony. *Addition to the Treatiſe of Juſt. Dodridg, f.*27. *Sect.* 3.

6. Now for the further opening and illuſtrating of the Forfeitures by Tenants of their particulars and Eſtates, take theſe Caſes following.

If Tenant for life, in Dower, by the Courteſie, or after poſſibility of Iſſue extinct, or any Leſſee for years, Tenant by Statute-Merchant, Staple, or *Elegit* of Lands or Tenements which lie in Livery, make any good, abſolute or conditional Feoffment in Fee, Gift in tail, or Leaſe for any other life then the Tenant for life for the life by which he holds the Eſtate, or levy any Fine *ſur conuſance de ceo, &c.* or ſuffer any Common-Recovery; or being impleaded pray in aid of a ſtranger; or in a Writ of Right brought againſt him join the *Miſe* upon the meer Right, or admit the Reverſion to be in another; or in a *Quid juris clamat* brought againſt him, claim the Fee-ſimple: By either of theſe things he doth forfeit his Eſtate, *Co.* 2. 15. 3. 3. 1. *66.* 8. 144. upon *Lit.* 251. *Dyer* 324. 55. 362. 209. 377. *Plow.* 15.

And if there be Tenant for life of Land, the Remainder for life, the Remainder in Fee, and both the Tenants for life make a Feoffment in Fee to a ſtranger; this is a Forfeiture of both their Eſtates.

So if there be Tenant for life, the Remainder in Tail, the Remainder in Tail or in Fee, and the Tenant for life doth make a Feoffment in Fee to him in the ſecond Remainder in Tail or in Fee; this is a Forfeiture for which he in the firſt Remainder may enter.

So if there be Tenant for life, the Remainder in Tail, the Remainder in Fee to the Tenant for life, and the Tenant for life make a Feoffment in Fee to a ſtranger; this is a Forfeiture, for which he in the next Remainder may enter. And if there be two Tenants for life, and one of them diſſeiſe the other, and he make a Feoffment in Fee; this is a Forfeiture of his Eſtate; *Dyer* 339. *Co.* 1. 141. *Co.* on *Lit.* 251. 302. *Co.* 3. 86.

If Leſſee for life make a Feoffment to a ſtranger, and make a Letter of Attorney to his Leſſor to give Livery of Seiſin, and he give Livery of Seiſin accordingly; yet it ſeems this is a Forfeiture. But otherwiſe it were, if the particular Tenant were a Leſſee for years, *Perk ſect.* 200. *Co.* upon *Lit f.*52.

If there be Leſſee for life or years, the Remainder in tail to the Lord Protector, the Remainder to another in fee, and the Leſſee for life or years make a Feoffment; this is a Forfeiture, and yet neither of the Remainders are diſplaced, *Co.* 1.77.

If Tenant for life be diſſeiſed, or Leſſee for years ouſted, and after levy a Fine to the Diſſeiſor, or to a ſtranger; this is a Forfeiture. So if in this caſe the Leſſee for years bring an Aſſiſe, or any other Real Action againſt him that did put him out, or the Leſſee for life bring a Writ of Right for the Land; all theſe, or any of them are Forfeitures: For the Right of a particular Eſtate may be forfeited, as well as the Right and Poſſeſſion, *Co.* 2.55. upon *Lit.* 252.

If Leſſee for life or years make a Feoffment to him in Remainder in tail, and to a ſtranger; it ſeems this is a Forfeiture to him in Reverſion or Remainder in fee, whereof he may take advantage when the Eſtate of the Tenant in tail is ended, 41 *Aſſ. pl.* 8. 39 *Ed.* 3.29.

If Leſſee for life make a Feoffment in fee, Gift in tail, or Leaſe for another life on Condition, and after before the Lord enter the Condition is broken, and the Leſſee re-enter; in this caſe albeit he by his entry get but his firſt eſtate, yet it ſeems this is a Forfeiture, and not done away, but he in Reverſion may enter, *Co.* 8.44. *Perk. ſect.* 841. 15 *Ed* 4.4.

Sect. 4. So if Leſſee for life leaſe to another for another life, and this life die before he in Remainder or Reverſion enter for the Forfeiture; yet this is a Forfeiture ſtill, for which he in Remainder or Reverſion may enter, *Co.* upon *Lit.* 252. *Bro. Forfeiture*, 39.

If Leſſee for life make a Leaſe for years on Condition to have Fee; this is a Forfeiture, and yet the Fee doth not paſs until the Condition be performed, 27 *E.* 3 *Book of Aſſiſes.*

If a Husband that hath a Term in the right of his Wife make a Feoffment on Condition, and after re-enter for the Condition broken; in this caſe there is a Forfeiture, and it is not purged by the Re-entry, *Bro. Extinguiſh.* 59.

If a Leſſee for life give the Land to one and his Heirs, to the uſe of himſelf and his Heirs for the life of the Leſſee; this is a Forfeiture, *Paſch.* 21 *Eliz.*

If *A.* be Tenant for life, and he leaſe to *B.* for his life, if *A.* live ſo long; this is a Forfeiture, *B. R.* 20 *Jac.* by the Court.

If one make a Feoffment to another of two Acres, To have and to hold the one for life, and the other in fee, and the Feoffee before his election doth make a Feoffment of both; this is a Forfeiture of one, and he that hath the Title of Entry may enter into which of them he pleaſe, *Co.* 2.37. But if Leſſee for the life of *J. S.* make a Leaſe to another and his heirs during the life of *J. S.* this is no Forfeiture, 27 *H.* 8.39. So if Tenant for life, and he in the next Remainder in tail join in a Fine, Feoffment, or Recovery to paſs an Eſtate in Fee or Fee-tail, this is no forfeiture. And therefore if the Tenant in tail die without iſſue, the Feoffee or Conuſee ſhall hold the Land during the life of the Leſſee for life. So if Tenant for life do make a Feoffment in fee, or Gift in tail to him in the next Remainder in tail; this is no Forfeiture. So if Tenant for life being impleaded, vouch him in the next Remainder in tail. So if Leſſee for life or years make a Leaſe to him in Reverſion for years, the Remainder over to a ſtranger in Fee, and give Livery and Seiſin to him in Reverſion, and he accept it; this is no Forfeiture. So if Tenant for life make a Feoffment to the Wife of him in Reverſion, and a Letter of Attorney to him to give Livery of Seiſin, and he do ſo to his Wife; this is no Forfeiture, *Co.* 1. 76. 66. 10. 96. 6. 5. 30 *Aſſ.* 47. 29 *Aſſ.* 64. *Co.* 10.38. *Perk. ſect.* 203.

And if the thing granted by the Tenant for life be not well conveyed, or it be ſuch a thing granted that doth not lie in Livery, as a Rent, Common, or the like; this will be no Forfeiture. And therefore if the Feoffment, Gift in tail, or Leaſe for other life made by the Tenant for life be not good for want of words in the making, or good execution by Livery of Seiſin or Attornment, or the like; this is no Forfeiture, *Co.* 2.55. And if a Tenant for life or years of an Advowſon, Reverſion, Remainder, Rent, Common, or the like, make a Feoffment or Grant in Fee of it by Deed; this is no Forfeiture, for in this caſe nothing paſſeth but what may lawfully paſs.

paſs. But if the Grant be by Fine, or the Reverſion be in the King, there haply it may be a Forfeiture. But if Tenant for life or years grant a Rent out of the Land to another in Fee, this is no Forfeiture, 2 *H.* 5. 7. *Co.* upon *Lit.* 251. 15 *Ed.* 4. 3. *Finches ley*, 113. 44 *Ed.* 3. 36.

So if Tenant for life levy a Fine *ſur Grant & Releaſe* only to the Cogniſee for the life that the Conuſor hath; this is no Forfeiture. So if Tenant for life or years accept of a Fine *ſur Cogniſance de Droit come ceo* from a ſtranger, this is no Forfeiture. So if he accept of a Fine ſo, and grant and render back to him for years only; this is no Forfeiture, 44 *Ed.* 3. 36. 1 *H.* 7. 22. *Dyer* 148. So if Tenant for anothers life or years of Land, by his Will deviſe the Land to another in Fee; this is no Forfeiture, *Fitz. Deviſe* 21. So if a Leaſe be made to two and the Heirs of one of them, and they two make a Feoffment to a ſtranger; this is no Forfeiture by the Tenant for life, but his Eſtate doth paſs well enough, *Bro. Forf.* 96.

If one make a Leaſe for life to one, and after grant to him a Rent alſo for life, and he grant both in Fee; by this the Rent is not forfeit, but the Land only. So if Tenant for life enfeoff him in Remainder for life; this is no Forfeiture, but a Surrender. So if he make a Leaſe to him in Reverſion or Remainder, for the life of him in Remainder or Reverſion; this is no Forfeiture. So if Tenant for life take a Huſband, and they two make a Leaſe to him in Reverſion for the life of the Husband; this is no Forfeiture, *Fitz. Dower* 95. *Co.* upon *Lit.* 42. See more in *Diſcontinuance.*

If an Annuity be granted to one for life or otherwiſe *pro conſilio impendendo*, and he refuſe to give Counſel to the Grantor upon requeſt; this is cauſe of Forfeiture of the Annuity. But not giving Counſel, unleſs it be in the Kings caſe, is no cauſe of Forfeiture as Refuſer is, *Plow.* 455, 456. See *Forfeiture.*

Sect 5. 4. Of Goods and Chattels, and what ſhall be ſaid a cauſe of Forfeiture thereof, or not; and of what Goods.

All the Goods and Chattels a man hath alone, or in Jointure, or in Common with another, to his own uſe and in his own right, are forfeited by his committing of Treaſon or Felony; and ſo are all his Statutes and Bonds, and Debts due thereby, and upon Contracts and Accounts. But cauſes of Action for Treſpaſs, or the like, are not forfeit, *Stamf.* 188.

In caſe of Treaſon or Felony.

And in this caſe of Treaſon and Felony, in ſome caſes a man may forfeit Goods wherein he hath no property. As for example: If I deliver to another Money or Corn open, and not in bags, to keep, and redeliver when he ſhall be required, and he be attainted of Treaſon or Felony; this Money or Corn is forfeit. So if one ſteal Goods from divers perſons, and is arraigned for one of theſe Felonies and found guilty; by this he doth forfeit all the reſt. So if one ſteal Goods, and before he be attainted he kill himſelf; by this he doth forfeit not only his own Goods, but the Goods he ſtole, *Fitz. Corone* 317. *Stamf. Pleas of the Crown*, 188. 44 *Ed.* 3. 44.

If a man ſuffer himſelf to be outlawed for Felony, or upon an Indictment for Treaſon or Felony he confeſs the Indictment or be attainted, or upon a Traverſe be found guilty, or upon his Arraignment refuſe to be tried by the Country, or flie for a Felony before or after Arreſt, and whether he did the Felony or not, and although he be acquitted of the Felony, or ſuffer Exigent againſt him for a Felony; or being arreſted for Treaſon or Felony eſcape, and will not be conveyed to Priſon, but is killed in the purſuit; or will not be taken, but is killed: Then in all theſe caſes he doth forfeit his Goods and Chattels. And though a man after a Felony done get a Pardon for it, yet his Goods are forfeit. And if a man ſtand mute upon his Trial, or challenge more then Four and twenty upon his Trial, or have his Clergie, and be a Clerk convict or attaint, *Stamf. lib.* 3. *ch.* 29. 22, 23, 24. *Plow.* 122. *Kelw.* 68.

So that now in caſe of Treaſon and Felony, a man doth forfeit not only all his Chattels that he hath in poſſeſſion, but ſuch alſo as he hath but a bare right unto only, as Debts and Goods to be accounted for, or wrongfully taken; but not ſuch as for which Damage only is to be recovered, as in Battery, and the like; ſuch things in Action are not forfeited.

But

But in the caſes of Goods and Chattels there is no relation to the time of the offence, as there is in the caſe of Lands. For in that caſe the Lord that is to have the Land by Eſcheat, may avoid all Leaſes, Acts, Statutes and Conveyances made after the offence committed, until the time of the Attainder. But for Goods and Chattels, and Debts, the Kings Title doth look no further back then to the Goods the party hath at the time of the Verdict given, or Confeſſion made; and in caſe of Outlawry, to the time of the Exigent awarded: And therefore till then the property of the Goods is not altered. And therefore it is held, that till then any ſale of Chattels real or perſonal by the Offender is good, and he is to levy upon them. But in this caſe the Kings Officers do uſe, as ſoon as the Offender is apprehended, to ſeiſe and ſecure all his Goods and Chattels, and give him allowance out of them. *Co.* upon *Lit.* 380, 381. 29 *Aſſ. pl.* 63. 50 *Aſſ.* 5. 8 *Ed.* 4. 4. 7 *H.* 4 47.

But by a Statute-Law, no Sheriff, Coroner, or other Officer is to ſeiſe any mans Goods for Treaſon or Felony, before he be attainted according to Law, under pain to forfeit the double value of the Goods, *Stat.* 1 *R.* 3. *ch.* 3. But for killing a man that would rob him, he doth forfeit nothing. And in any caſe a man ſhall not forfeit the Goods that are another mans, and not the Offenders; nor Goods pawned or diſtrained, nor that one hath as Executor, nor the intereſt a man hath as Guardian in Soccage, *Plow.* 487. *Bro. Pledg. M.* 7 *Jac. Co. B.*

Sect. 6. 5. Who ſhall take advantage of a Forfeiture by Entry upon the Land, or Seiſure of the Goods, or not. In caſe of Treaſon or Felony.

In caſe of Forfeiture for Treaſon, the Lord Protector only is to have all the benefit by Lands and Goods. But in caſes of Felony, the Lord Protector is to have the Lands of the Offender for a year and day to make ſpoil upon them, unleſs the Lord redeem it. (For this ſee *Anjour* and *Waſte.*) And after this year the Lord of whom the Land is held, is to have it. And all the Goods and Chattels forfeit in the caſe of Felony, the Lord Protector is to have them, unleſs any man have had a Grant from the King of them, or can preſcribe for them; and his Preſcription ſo antient, that it hath been allowed in the Kings Bench, or before the Juſtices in Eyre, *Stamf. Prer.* 190. *F. N. B.* 144. *Mag. Char. c.* 22. And if a man have an Eſtate for life, and forfeit by either of theſe offences; this will not (as ſome ſay) eſcheat to the King; but it ſeems otherwiſe. Nor will this go to him that hath *Bona Felonum*, by thoſe words, ſhall take advantage of it: And if it be a Copihold, the Lord of the Manor, not the Protector will have it. And by the Grant of *Bona Felonum*, this will not paſs. *Addition to the Treatiſe of Juſt. Doddridg, f.* 27, 28. *Co.* 2 *par. Inſt.* 47. *Brownl.* 2 *par.* 219.

In other caſes.

In caſe of Alienation by a Leſſee for life or years, for the moſt part he in the next Remainder, though he have but a Remainder for life or years, muſt enter; and if there be divers Remainders, every one in Remainder and in Reverſion in his time may take advantage of it. As if there be Tenant for life, the Remainder in tail to one, and the Remainder in tail to another, and Tenant for life make a Feoffment in fee, and he in the firſt Remainder die without iſſue and do not enter, then he in the next Remainder may enter for the Forfeiture. *Mears* Caſe, *Paſch.* 8 *Jac. Co. B Co.* 1. 76. 2. 51. upon *Lit.* 367.

But if a Diſſeiſor make a Leaſe for life, who makes a Feoffment, and the Diſſeiſſee releaſe to the Feoffee of the Tenant for life, the Diſſeiſor can never after enter for the Forfeiture by the Tenant for life.

If an Eſtate be limited to *J. S.* for life, the Remainder to his Heir-male and the Heir-male of ſuch Heir-male, and *J. S.* make a Feoffment in fee; his Heir apparent cannot enter for this Forfeiture, for he is no Heir whiles the Father lives. So if a Tenant for life make a Feoffment to Husband and Wife, the Reverſion being in the Wife, and ſhe die without Heir, and the Land eſcheat; the Lord to whom it comes by the Eſcheat, cannot take advantage of this and avoid the Feoffment, *Dyer* 339. *Co.* 1. 66.

6. Of Offices, and what ſhall be ſaid the cauſe of Forfeiture of an Office, or not.

Offices may be forfeit divers ways. Some of them may be forfeit by not uſing them; ſome by miſuſing them, or the Officer by miſcarrying himſelf in them may forfeit them: As if any man hath an Office that is appointed for Adminiſtration of Juſtice or publike good, and he is bound to attend it, and do not; this is a Forfeiture.

feiture. And therefore it is, that if a Clerk of the Market, Sheriff, Felizer, Exigenter, or any ſuch like Officer of any of the Courts at *Weſtminſter* do abſent themſelves any long time, and not attend their Offices, and do the things that belong to their charges: As if the Sheriff do not keep his Turn, the Clerk of the Market his Circuit, this is a Forfeiture.

The Officer may alſo forfeit his Office by his miſcarriage in his Office, two ways: 1. By doing that he ſhould not. 2. By refuſing to do what he ought to do. By doing amiſs, called a Miſuſer or Abuſer. So if any one ſell an Office he hath, if it be for the Adminiſtration of Juſtice, or concerning the Kings Treaſure, Revenue, Account, Cuſtoms, Aulnage, or the like, or Clerkſhip in any Court of Record, as a Felizer, Exigenter, or the like; this is a Forfeiture of his Office. As if a Keeper kill his Deer, or ſuffer them to die by his negligence, or deſtroy the Trees or Covert for Deer: Or a Gaoler keep not his Priſoners in ſafe and ſtreight cuſtody, or keep them in Priſon when they ſhould go out, or the like; theſe are Forfeitures of their Offices. So if a Marſhal ſuffer a voluntary or negligent Eſcape in one of his Priſoners.

By refuſing to do that *ex officio* which a man is bound to do upon requeſt, is in ſome Offices cauſe of Forfeiture. And therefore if a Steward be deſired by his Maſter to keep Court, and he refuſeth to do it, or doth it not according to the duty of his place for the good of his Maſter; this is a Forfeiture of the Stewardſhip. But if it be an Office not relating to the adminiſtration of Juſtice or publike good, but for the private good of ſome man, and where the Officers perſonal attendance is not abſolutely neceſſary; there his not attendance for a time, eſpecially in caſe where the Maſter hath no great loſs by it, is no Forfeiture. And therefore if a Keeper be two or three days abſent, and his Game be not killed the while, this is no Forfeiture. And if one be to keep a Court, and he is never requeſted to keep it, and he never keep it; this is no Forfeiture. And if an Officer do only threaten, or endeavor a Miſdemeanor, but doth not act or effect it; this is no Forfeiture. And if one be bound to give Counſel for a Fee, and be never asked advice, and he never give any, he doth not forfeit his Fee.

And it ſeems that that which will be a cauſe of Forfeiture in the Maſter, will be a cauſe of Forfeiture if it be done by a Deputy. But if an Officer in Fee do grant his Office for life, and the Grantee for life doth forfeit; he ſhall (as it ſeems) forfeit his own Eſtate for life only, and not the Fee. See for all theſe things, *Co.* 9. 47, 50 99. 119. 11. 98. upon *Lit.* 233. *Stat.* 3 *H.* 7. 12. *Dyer* 151. 214. 211. 369. *Plow.* 379,380. 2 *H.* 7. 11. 15 *Ed.* 4. 3. 5 *Ed.* 4. 26. 39 *H.* 6. 32. 3 *H.* 7. 12. *Plow.* 454,456. See in *Offices*, *Corone*.

For Forfeiture by a Copiholder, ſee *Copihold*.

Forfeiture by Outlawry, ſee in *Outlawry*.

Forfeiture of an Eſtate by not paiment of Rent or Debt, ſee *Rent*, *Condition*. And for Forfeiture by Statutes, ſee in other Titles. *Co.* 3 *par. Inſt. c.* 102.

CHAP.

CHAP. LXXXVIII.

Of Forein and Forreſt, and Forcible Entry, and Forging of Deeds.

Forein or *Forain.*

THis word is uſed Adjectively in our Law, and is joined with divers Subſtantives. As, Forein matter doth mean matter triable in another County. Forein Plea, is a Refuſal of the Judge as incompetent, becauſe the matter to be tried is out of his Precinct. Forein Anſwer, is ſuch an Anſwer as is not triable in the County where it is made. Forein Service, is ſuch a Service whereby a mean Lord holdeth over of another without the compaſs of his own Fee; or elſe that which a Tenant performeth either to his own Lord, or to the Lord paramount out of the Fee, or elſe Knights ſervice, or Eſcuage uncertain. Forein Attachment, is an Attachment of Foreiners goods found within a Liberty or City, for the ſatisfaction of ſome Citizen to whom the Foreiner oweth money, *Kitch.* 126. 75. *Stat;* 4 *H.* 8. *c.* 2. 22 *H.* 8. 2. 14. 15 *H.* 6. 5. *Kitch.* 209. *Bro. Tenure* 28. *Perk. Reſer.* 650. *Co.* 3 *par. Inſt. c.* 75.

Of Force, and of Forcible Entry.

Force, what.

IT is an offence by which unlawful violence is uſed to perſons or things. And this is either implied; as in every Treſpaſs, Reſcous and Diſſeiſin, there is a Force implied in Law; or it is actual with weapons, number of perſons, &c. which always carrieth ſome fearful ſhew or matter of terror with it. The actual Force alſo is either ſimple, when it is joined with no other crime, as Entry into Lands only: Or compound, when it is mixed with ſome other fact which of it ſelf is criminal; as if any by force enter into anothers Poſſeſſion, and kill a man, or raviſh a woman there, &c.

Forcible Entry, what.

A Forcible Entry is a violent and actual Entry into any Lands, Houſes, &c. or taking of any Diſtreſs by any perſon weaponed, whether he offer violence, or fear of hurt to any there, or furiouſly drive any out of the poſſeſſion thereof. And ſometimes it is taken for a Writ grounded upon the Statute.

Forcible Detainer, what.

A Forcible Detainer is a violent act of reſiſtance by a ſtrong hand, of men weaponed with harneſs, or other action of fear, in the ſame place or elſwhere, by which the lawful Entry of Juſtices or others is barred or hindered.

1. What ſhall be ſaid to be a forcible Entry into, or Detainer of lands or not.

The Statutes of 5 *R.* 2. 7. 15 *R.* 2. 2. 8 *H.* 6. 9. give charge, that none ſhall enter into any Lands, but where Entry is given them by Law; and then in a mild and a peaceable manner: And that none ſhall enter into, or hold a poſſeſſion of Lands with a ſtrong hand, and with force. For the opening whereof, we muſt know,

1. That one or more may commit this offence.

Infant.
Women-covert.

2. An Infant or a Feme-covert by their own act may commit a forcible Entry or Detainer; but they cannot do it by Commandment, as another man may do.

3. Where divers do come in a company to do this act, and one of them only doth uſe the violence, they are all guilty. But herein we muſt take this difference: Where divers come together in one place to do an unlawful thing, and one only doth it, and the reſt ſtand by and do nothing; in this caſe they are all guilty as principal doers; and the act of one ſhall be ſaid to be the act of all. So that if divers come to enter into Lands where their Entry is not lawful, and all of them but one do enter and demean themſelves peaceably, and he only doth enter with force, and after Entry doth hold with violence: This, albeit it be againſt their wills, is a forcible Entry. And ſo it ſeemeth to be, where ſome of them do come without an evil intent, if they come together, or if they come after, and be aiding and countenancing to the offendors. But when divers come together to do a lawful act, as to diſtrain for Rent due,

due, or the like; and in this caſe ſome of them, without any intent before, or allowance or countenance then by the reſt, eſpecially if they diſcountenance it, fall to outrage, and commit this or the like offence; in this caſe it ſeems the reſt are not guilty.

4. A man ſhall not be guilty of this offence by any counſel or command before or agreement after, unleſs he be preſent at the act done. But for further opening hereof, take theſe things. 1. If a maſter come with his ſervants, his ſervants knowing nothing of it, and he enter with force; his ſervants ſhall not be ſaid to be guilty. 2. If a man enter with force to the uſe of another perſon that is not preſent, or by commandment of another not preſent who agreeth to it, yet he is not puniſhable for this force. 3. If many come together, and ſome of them do only enter by force, and the reſt keep it by force; they are all alike guilty both of the forcible Entry and Detainer. *Command.*

5. Though the King or his Tenant could not be outed of their poſſeſsion, yet this offence may be committed in this Land of the Kings, and then is puniſhable as in other caſes.

6. Though he get no poſſeſsion hereby, yet it may be this offence, and puniſhable.

7. This offence may be committed about a Rent, when one doth diſtrain with force, (be the Rent due, or not;) or when one is coming to diſtrain, and the Tenant doth threaten to kill or forcibly reſiſt him, foreſtall the way, or reſcue the Diſtreſs, or the like. So about a Common, as when one doth forcibly keep his Cattel where he hath no Common, or forcibly reſiſt another man that hath Common.

8. The expreſs Force is that which is forbidden, when it is either with multitude, *(i.)* a greater Company then ſuch perſons have uſually attending on them; yet one or two, if they be armed, &c. may commit this offence. Or it is with ſtrong hand, (that is) with apparent violence: In word, by threatening ſpeeches, as to ſay, They will keep the poſſeſſion, if it coſt them their lives, or in ſpight of the other being in with him; or if he threaten to kill or hurt the body of him that is in, if he will not go out; or out, if he offer to come in; eſpecially if this make them to go out, or keep off. Or deed, by turbulent behavior or actual violence offered to the perſon of another; or elſe that they be furniſhed with ſome weapons by them not uſually borne, as Swords, Bucklers, Pikes, Javelins, Bills, Clubs, Pitchforks, Staves, Halberts, Bows and Arrows, Croſs-bows, Guns, Harneſs, Armor, or the like; or by caſting of Stones, Blocks, pouring of hot Coals, ſcalding Water or Lead, or with any other thing wherewith one may hurt the perſon of another. And therefore if any enter thus, though no man oppoſe them, this is a forcible Entry: much more if being entred, they there offer any violence, or fear of hurt to the perſon of another that is in poſſeſſion with him; and moſt of all, if they ſhall furiouſly and forcibly expel and drive another out of the poſſeſſion. For if one enter in at the door being open, peaceably, but then he forcibly puts out them that he finds in poſſeſſion, this is a forcible Entry.

If a man have a Force laid in another houſe by the place, this may make him guilty of this offence of forcible Detainer. So if a man after his peaceable Entry get more weapons into the houſe then were there, or uſually he doth bear; or if he make uſe of the weapons in the houſe to defend his poſſeſſion. But the having of them there, if they were there before, is not a Force puniſhable.

9. If any Juſtice of Peace come to view the Force in a houſe, and they refuſe to let him in; this of it ſelf is a forcible Detainer in all caſes, though it be but by one perſon, and no weapon ſhewed. But if a Juſtice of Peace come not there upon complaint and of purpoſe, but by accident or to other ends, and the parties refuſe to let him in; this is no forcible Detainer. So neither if he refuſe to open the door to his Adverſary, or to any other beſides the Juſtice of Peace.

So if he finde any multitude of perſons, Arms, or the like. So if the Diſſeiſor foreſtalleth the way of the diſſeiſed with Force, that he dare not come near, but do refuſe to open the doors to the other party; this is no forcible Detainer.

And if I be in poſſeſſion of a houſe, and another that hath more right would enter; I may keep him out with my ordinary company and weapons, but not otherwiſe, for fear of the guilt of a forcible Detainer. But if my eſtate and poſſeſſion be lawful, and I and my Anceſtors have peaceably enjoyed it for three years together before the Indictment brought, if ſo my Entry were peaceable, not forcible, and I have continued three years poſſeſſion peaceably and without force, I am in poſſeſſion by right, and of a lawful eſtate, and not by wrong: And I have continued this poſſeſſion all theſe three years without interruption, and not diſcontinued, and my eſtate is not ended; in theſe caſes it ſeems I may keep my poſſeſſion with force, and this is no forcible Detainer; which by Plea to the Indictment will avoid Fine, Impriſonment, and Reſtitution.

But to threaten a man, That if he come to enter, he will burn his houſe, or ſpoil his goods therein: To cut trees upon the land, or carry goods out of the houſe after a man hath entred; the door being open, or only latched, to enter without multitude or offenſive weapons. So by fair means to perſwade or entice any body out of the houſe, or by that means to keep them out; to take a man being out of the place and impriſon him, and in the mean while to ſend one to enter into the land or houſe; or to deny to go out, and by impriſonment keep him out; theſe things will not make a forcible Entry or Detainer. And therefore if in theſe caſes the other ſide make a forcible Entry upon them, they may be put out again.

10. Though the party ouſted be dead, that no reſtitution can be made; yet the forcible Entry ſhall be puniſhed.

11. If one enter into an houſe or land, with an intent to cut or carry away his goods or corn, &c. or the like treſpaſs, though he do not put him hereby out of poſſeſſion; this will be a forcible Entry puniſhable by theſe Statutes, if it be with ſtrong hand, or with multitude.

12. So if any enter peaceably, and after Entry, by force do any ſuch act.

13. To detain a houſe mortgaged by force from the Mortgager, is a forcible Detainer.

14. To go over the land with force or multitude to another place or end, is not a forcible Entry: Nor is the Force that is uſed with the warrant, and in the maintenance of the Law, any offence within theſe Statutes, but lawful. So is the Force uſed in the apprehending of Felons by Sheriffs and other Officers, in executing Writs, and in doing their office, in keeping the Peace, in defence of my perſon and houſe, and the like.

But for the further opening hereof, theſe Caſes muſt be heeded. If two or more men be in harneſs, having alſo in their hands divers weapons, and they enter into the houſe of another to have the poſſeſſion thereof without more doing, and hereupon the other party that was in poſſeſſion departeth and goeth far off; this is a forcible Entry. But if two men in that manner break in the houſe, the door being open, and it is not known to what intent, the Tenants being in quiet, and no violence is uſed to them, but they that keep the poſſeſſion run away; this is a forcible Entry.

If a man have two houſes near adjoining, the one by a defeaſible title, the other by a good title, and he keepeth a Force in the houſe he hath by a good title, to keep out of the other houſe; this is a forcible Detainer.

If a man putteth another out of his houſe by Force, leaveth it, and putteth in one of his Servants in a peaceable manner, and keepeth the party put out in Priſon; this is not a forcible detaining, though it be a forcible Entry.

If one ſole perſon alone break the houſe of another, and enter in by the windows againſt the will of the Owner, and then threateneth the party, and he for fear doth forſake the houſe; this is a forcible Entry.

If

If a forcible Entry be made into the houſe of another, with intent to fight with the party there dwelling, and thereupon the party in poſſeſſion and they that enter upon him do all depart out of the houſe; this is no forcible Entry. So if one enter a houſe to ſeiſe a Ward, and is kept out by force; this is no Forcible Detainer. So if a Leſſor enter with force to ſee if any Waſte be done by the Leſſee, this is no Entry by force, although he remain there a whole day and night after. So to enter a houſe in time of War to fortifie it againſt Enemies, is no forcible Entry. So if the Lord diſtrain for Rent where no Rent is due, and he do it with force; this is no forcible Entry. So if one break and enter the houſe to part an Affray there, or to apprehend a Felon, or one that hath dangerouſly hurt another, and is eſcaped and fled into the houſe: But if the man that is hurt be in no danger, it is otherwiſe. So if a Gaoler bring his Priſoners into the houſe, being his own houſe, for ſafe keeping, and keep a Guard about them; this is neither forcible Entry, nor forcible Detainer.

If I hear that certain Fellows will come to my houſe to beat, rob or kill me, and I take in Force to defend my ſelf; this is no forcible Detainer. But if I hear they are coming to take poſſeſſion, and I gather Force to keep my poſſeſſion, this is a forcible Detainer.

If one enter forcibly in a houſe upon another, and impriſon in the ſame houſe him that was in firſt, and himſelf remaineth there with force; this is a forcible Detaining.

If a man claimeth Common to Land, or a Rent out of it, and the Land is detained with force, that he cannot uſe his Common, or have his Rent by Diſtreſs; this is a Detainer with force. But if one have a Warren in anothers Land, and the Land is detained with force when he would uſe his Warren; or one doth enter into the Park of another to diſtrain his Game, and the Owner of the Park do keep him out by force, this is no Detainer by force.

If a man make a Leaſe for life, and after grant the Reverſion to the ſame Leſſee upon Condition on the part of the Leſſee, which Condition is broken, and the Leſſor doth enter with force to get the poſſeſſion of the land; this is a forcible Entry. So if the Leſſee doth alien in Fee, and thereby forfeit the land, and the Leſſor die before his Entry, and then his ſon and heir enter upon the Leſſee with force; this ſhall be a forcible Entry. (All theſe Caſes are in Mr. *Riſdens* Reading.)

The party grieved by a forcible Entry or Detainer may be relieved, and the offender puniſhed divers ways, (amongſt others) by the help of the Juſtices of the Peace, who may do it upon the Statute of *Northampton*, which is in the nature of a Commiſſion, wherein they proceed as Miniſters only; or by Indictment upon *Stat.* 8 *H.* 6. at the Quarter-Seſſions, which being found there, the party ſhall be reſtored to his poſſeſſion by a Writ of Reſtitution from the Court to the Sheriff, *Dyer* 187. *Cromp. J. P.* 165. 3. The Remedy; and how they are to be puniſhed that commit this offence.

But the moſt ſpeedy and common remedy is by complaint to one or more Juſtices of Peace, who may thereupon go to the place where the Force is; and if it be in an houſe, he may enter and ſearch; and if any Force of armor or weapon be worne or borne againſt this Statute, and if any ſuch offenders be found, he may commit them to Priſon, and may ſeiſe and preſs the Armor ſo found with them: And he ought to record all that which he ſhall do in this behalf, and thereout to ſend ſome Eſtreat into the *Exchequer*, that the Commonwealth may be anſwered of the Armor, or the value thereof. *Commitment.* *Record.*

But here again the Juſtice muſt not make any reſtitution to the party outed, but muſt only remove the Force. And concerning the offenders ſo found and committed by the ſaid Juſtice of Peace, it ſeemeth the Juſtice (at his diſcretion) may fine them; and upon paiment thereof, or Sureties found for the ſame, the ſaid Juſtice may deliver the offenders, even as in the former Statutes of 15 *R.* 2. & 8 *H.* 6. Or elſe the ſaid Juſtice may record ſuch Force, and commit the offenders, and after certifie the Record in the Upper-Bench, or to the Juſtices of the Gaol-delivery, or to the General Seſſions of the Peace. *Reſtitution.* *Fine.* *Certificate.*

Or elſe the ſame Juſtice or Juſtices of the Peace may proceed otherwiſe: For every Juſtice of Peace upon complaint to him made, or upon other notice to him given of any forcible Entry into, or holding, or Detainer of poſſeſſion of any Lands, Tenements, or other Poſſeſſions, (or of any Benefices or Offices of the Church) contrary to theſe Statutes, by the party grieved; without any examining, queſtioning, or ſtanding upon the Right or Title of either party, may and ought in convenient time (at the coſt of the party grieved) to do execution of the Statutes aforeſaid. And as to the Juſtices duty and power in relation to the Aid he may require, removing the Force, Impriſonment of the Parties, and making Record of the Force; theſe things are to be known.

1. He ought to go to the place where ſuch Force ſhall be to view.

2. He may command and take with him ſufficient Power of the County or Town by diſcretion, and the Sheriff alſo, if need be, to aid him for the better execution of his buſineſs, as well for the arreſting of ſuch Offenders, as alſo for the removing of the Force, and for the conveying of them to the next Gaol. And as to this, theſe things muſt be known.

1. If he require any Men-kind, be they Dukes, Earls, Barons, Lords, or men of lower degree, Apprentices, Servants and others, that are not about the apprehending of Felons, or ſome other publike ſervice: But Women, and Children under fourteen years old, Aliens that are not Denizens, Men that are not *compotes mentis*, and Priſoners are not bound. 2. Theſe he may require by word of mouth, without a Warrant in writing; but ſo can no other Officer. 3. He may arreſt or impriſon, and fine ſuch as refuſe to aid him.

3. He ought to arreſt and remove all ſuch Offenders as at his coming he ſhall ſee or find continuing the Force, and may take away their weapons, harneſs and armor, and preſently cauſe them to be preſſed, and after to be anſwered to the Commonwealth as forfeited, or the value thereof. And if the doors be ſhut, and they within the houſe ſhall deny the Juſtice to enter, it ſeemeth he may break open the houſe to remove the Force. But if ſuch Offenders being in the houſe at the coming of the Juſtice, ſhall make no reſiſtance, nor make ſhew of any Force, then the Juſtice cannot arreſt or remove them, except upon the enquiry a Force be found. And if the Houſe or Land which is holden with Force, ſhall extend into two Counties, and the Offenders move their Force into that part of the Houſe or Land which is in the other County, when the Juſtice doth come; it is ſaid by ſome, he cannot then remove the Force; but others hold the contrary.

4. He ought to make a Record of ſuch Force by him viewed. Wherein are theſe things to be known. 1. If the Juſtice come to remove the Force, and the Offenders eſcape before they can be arreſted, yet the Juſtice muſt record the forcible Detainer. 2. If the Juſtice be put out of Commiſſion, or made a Sheriff before he come to the place, he cannot then record it. 3. If the Juſtice record a Force, and ſend to Priſon where no Force is, the party is remedileſs. 4. If a Reſcue be made of the Priſoners committed by him, he may record this alſo: But if he record a Murther or Manſlaughter, this is void. 5. This Record ſhall be a ſufficient conviction of the offenders, and the parties ſhall not be allowed to traverſe it. 6. And this Record (made out of Seſſions by a particular Juſtice) the ſame Juſtice may keep by him; or he may make it indented, and certifie the one part into the Upper-Bench, or he may leave it with the Clerk of the Peace, and the other part he may keep himſelf.

Commitment. 5. He ought to commit immediately to the next Gaol all ſuch perſons as he ſhall find and ſee continuing the Force at his coming to the place; the ſaid Offenders there to remain convict by his own eye, teſtimony and Record, until they have paid a Fine to the *Lord Protector*: For this ſight and view of the Force by the Juſtice (being a Judg of Record) maketh his Record thereof (in the judgment of the Law) as ſtrong and effectual, as if the Offenders had confeſſed the Force before him; and *Traverſe.* (touching the reſtraining of the Traverſe) more effectual then if the Force had been found by a Jury upon the evidence of others. But the Force muſt be in the preſence or view of the Juſtice of Peace, or elſe he can never record it, nor yet commit the

the offenders: For upon Force found by Enquiry only, (although this Preſentment of the Jury be a Conviction of the offenders) it is thought the Juſtice of Peace can neither fine, nor ſend to Gaol. But however he is to remove the offenders that be preſent, that ſo he may reſtore the other, and may bind the offenders to the Good-behaviour. And if they be gone, yet he may make his Warrant to take them and ſend them to Gaol, until they have found Sureties for their Good-behaviour. But for the further opening of this, theſe things muſt be known. *Enquiry.*

1. The Juſtice of Peace may not view a Force, or fine or impriſon in his own caſe: And yet if he come there, and they make an aſſault upon his perſon, he may ſend them to Gaol for this offence.

2. If one enter into a Houſe upon another with Force, and when the Juſtice comes both ſides are fighting for the poſſeſſion; the Juſtice may remove the Force, but cannot give poſſeſſion to the Owner of the Houſe.

3. If he that hath entred forcibly, hath driven the Owner to one end or part only; the Juſtice may remove, and commit them that have ſo entred.

4. If there be Men in Arms in another Houſe near, though in another County, to beat them that take poſſeſſion of the Houſe in this County; in this caſe it is ſaid, the Juſtices may remove them.

5. If the Juſtices come there by accident where the Force is newly done, they cannot arreſt or impriſon, unleſs there be a forcible Detainer in the view.

6. If the offenders before Arreſt eſcape for that time, and after the ſame day the Juſtices meet them in another place; in this caſe they cannot commit them to Priſon.

7. If the Juſtices coming to the place, meet ſome of the offenders by the way in harneſs, or ſee ſome going thither in harneſs, to keep the place; they cannot upon this commit them to Priſon.

8. If when the Juſtices of Peace come, the offenders eſcape into another County, the Juſtices of Peace cannot arreſt them there, albeit it be upon freſh ſuit. And yet it is ſaid by ſome, that if in this caſe before arreſt of the parties they flie, the Juſtices may arreſt them, but not commit them to Priſon. But I doubt it. And yet if both Houſes be in one County, it is out of queſtion. So if they get into a Caſtle in the ſame County, the Juſtices may upon freſh Suit arreſt them and commit them.

9. All this is to be done there only where the party grieved (in the ſenſe of the Statute) which is the party that is to have reſtitution, doth complain, tender the coſts, &c. Not where any man doth complain. And for the opening hereof, take theſe Caſes.

If a man have a Rent iſſuing out of the Land of another, which Land is detained with force when he would diſtrain; he that is ſo diſturbed is not a party grieved, to be relieved by the Statute. And if a man be ſeiſed of Land to which Common is appendant, is diſſeiſed of the Common, and then aliens the Land to his Son and dieth, after which the Land out of which this Common is iſſuing is detained with force; in this caſe the Son is not a party grieved by this Statute. So if after the Fathers death a ſtranger doth enter by abatement into the Land, and holdeth by force; the Son is not a party grieved within the Statute. So if a man be ſeiſed of Land of which ſuch a forcible Entry is made, and dieth before he complain; in this caſe his Son and Heir cannot complain for this Entry. So if a man deviſe his Land by Will and dieth, and before any Entry made by the Deviſee, a Force is made; the Deviſee is not a party grieved. But if a man make a Leaſe for five years on Condition, that if within the firſt two years the Leſſee pay to him Ten pounds, he ſhall have the Fee, and Livery is made accordingly; in this caſe if any ſuch Entry be within the five years, the Leſſee is a party grieved, albeit the Condition be not performed. So if a man be poſſeſſed of a Term, and make the Heirs of *J. S.* his Executors and dieth *J. S.* being alſo dead, leaving iſſue a Daughter, his Wife with child of another Daughter; the firſt enters, and then the other is born; then ſuch Force is committed: In this caſe both the Daughters are parties grieved. So if one enter by Diſſeiſin to the uſe of another, who doth after agree to it, and then a forcible Entry is made; in this caſe neither the

the one nor the other is a party grieved. So if one enter by Diſſeiſin to the uſe of an Infant, who doth agree to it, and then ſuch a forcible Entry is made; in this caſe the Infant is not a party grieved. And generally the party to whom Reſtitution ſhall be made, he ſhall be accounted a party grieved within the meaning of this Statute, *(And for this ſee afterwards.)*

Fine. The ſame Juſtices of Peace, or ſome of them that ſhall ſee the Force, (as having beſt knowledg of the matter, and of the quantity of the offence, and having the cuſtody of this Record) are the proper Judges over this offence, and therefore may aſſeſs the Fine upon every ſuch offender. But the Fine muſt be impoſed upon every offender ſeverally, and not upon them jointly. And the Juſtice ought to eſtreat the ſame Fine, and to ſend the Eſtreat into the Exchequer; and that from thence the Sheriff may be commanded to levy the ſaid Fine to the Commonwealths uſe. But upon the ſame Fine ſo aſſeſſed and eſtreated, it ſeemeth the Juſtice is to deliver the offender: Alſo upon paiment of the ſaid Fine to the Juſtice, or upon Sureties bound by Recogniſance for the paiment thereof, the Juſtice may deliver the offenders again out of Priſon at his pleaſure, by ſome opinions: But *quære*, for that the Sheriff is accomptant for all Fines. Or the Juſtice of Peace (by ſome opinions) may record ſuch Force, and commit the offenders, and after certifie the Record to the Juſtices of Aſſiſe and Gaol-delivery, or elſe to the General Seſſions of the Peace, and there the offenders may be fined: For the Statute doth not ſay, that the Fine ſhall be aſſeſſed by them that record the Force; but rather the Juſtices of Peace may certifie or deliver the Record by them made, and refer the Fine and further proceeding therein to the Upper-Bench; which is thought to be the ſafeſt courſe. Alſo the Juſtice of Peace, notwithſtanding his own view of the Force, may and ought in ſome good Town or place near where the Force was, to enquire by a ſufficient Jury of the ſame County to be returned by the Sheriff, as well of thoſe which made ſuch forcible Entry, as of thoſe which made ſuch forcible Detainer. Wherein theſe things muſt be obſerved.

Eſtreat.

Accomptant.

Enquiry.

1. That one Juſtice of Peace alone out of Seſſions may make an Enquiry; whereas otherwiſe to hold a Seſſions, there muſt be two at the leaſt, and one of them muſt be of the *Quorum*.

2. This Enquiry may be made within a moneth after the time.

3. It may be made, whether the offenders be preſent or gone, at the coming of the Juſtice of Peace.

4. This Enquiry may be made, albeit the Juſtice go out to ſee the place where the Force is, and upon his view make a Record: But he muſt take care the Records do not differ; for if the Enqueſt find contrary to the Juſtices Record, the laſt Record is void.

5. One Juſtice may make the View, and another Juſtice may make the Enquiry.

6. If ſeveral Enquiries be made by ſeveral Juſtices upon the Force, every one of them is a good Enquiry.

7. If the Record of Inquiſition ſay the Jury was ſworn, and indeed it was not ſworn, yet it is a good Enquiry.

8. If the Jury be under twelve, or any of them have been attaint of a falſe Oath upon a *Decies tantum*, or are Ambodexters, the Jury is not good, unleſs there be twelve of the Jury beſides thoſe men.

Warrant to the Sheriff.

9. This Enquiry muſt be made by men of good Eſtates. And therefore the Juſtice of Peace is to ſend his Warrant to the Sheriff, to command him in the behalf of the Lord Protector, to cauſe to come before him four and twenty ſufficient and indifferent perſons, near about the place where the Force is ſuppoſed to be; and every of them ſo returned muſt have Forty ſhillings by the year at leaſt in Lands and Tenements. And the Sheriff is to return Iſſues upon every man ſo ſummoned, the firſt day Twenty ſhillings, the ſecond day Forty ſhillings, and the third day Fifty ſhillings, and at every day after double. And upon default of appearance of the Jurors, the Juſtice may grant an *Alias*, and after that *Pluries* infinite, till they come. And if any Sheriff or Bailiff of Franchiſe that hath the Retorn of ſuch Writ, ſhall be

be negligent, he ſhall forfeit Forty pounds. But if ſuch Jurors have not Forty ſhillings Land *per annum*, yet their Preſentment of ſuch Force is good for the Commonwealth, ſo as the offenders ſhall fine therefore. And if the Sheriff return ſmaller Iſſues upon the Enquiries than the Statute doth appoint; yet the party indicted ſhall not impeach the Enquiry thereof. But theſe defaults in the Sheriff for not returning ſufficient men, may be puniſhed by the Juſtice of Peace, who may hear and determine theſe offences by Bill or Indictment, wherein ſhall go the like Proceſs as againſt men indicted for Treſpaſs.

10. It is convenient upon ſuch Enquiry, that the Evidence be given openly to the Jury, to the intent it may appear to the Iuſtice of Peace or Court, whether there be reaſonable cauſe to ſtay Reſtitution, or not, after the Indictment found.

11. If upon ſuch Enquiry, ſuch forcible Entry, or ſuch forcible holding or Detainer ſhall be found by the oaths of the Enquirers, then the ſaid Juſtice of Peace ſhall reſeiſe the Lands or Tenements ſo entred upon or holden, and thereof put the party in poſſeſſion again, which in ſuch ſort was put or holden out. As touching which point, theſe things are to be known.

Reſtitution.

1. Any one or more Juſtices of Peace before whom the Force is found, and not any other Juſtice of Peace in or out of Seſſions, Juſtices of Oyer and Terminer, or Gaol-delivery, may in perſon put the party put out or kept out, in poſſeſſion again, or may award his or their Precept under his or their own Teſt to the Sheriff to do it. And if the Juſtice before whom it be taken be dead, or otherwiſe the Record being before the Juſtices at their Seſſions, they may award Execution by Writ, but not without a Writ, as the Juſtice of Peace himſelf that took the Inquiſition may do. Alſo the Juſtices of the Upper-Bench, upon a Certificate by the Juſtices of Peace of the Force found before them, or upon removal of the Indictment by *Certiorari*, may by Warrant to the Sheriff, (not in perſon) award Reſtitution. And to do this, the Juſtice or Sheriff may break open any houſe, and take *Poſſe Comitatus*; and if the Sheriff return, He cannot do it for reſiſtance, he will be amerced.

2. The Reſtitution muſt be made to him that is put out, not to his Heirs, Executor, or any other after his death; but the parties in this caſe may be fined and impriſoned. *Co.* 3 *par. Inſt. f.* 142, 143.

Indictment.

3. No Reſtitution ſhall be made, but where the forcible Entry or Detainer is firſt found by Inquiſition, and that upon ſufficient Indictment alſo: For if the Indictment or Inquiſition be quaſhed for inſufficiencie, no Reſtitution can be had upon it. For this cauſe the Indictment muſt expreſs, 1. A putting out, *Expulerunt*. 2. The quality of the thing entred into, as Meſſuage, Cottage, &c. Therefore they entred the Tenement; is void for incertainty. 3. A keeping out; it muſt ſay, Yet they keep out. 4. It muſt be with ſtrong hand, or with multitude; except it be implied by reciting *Stat.* 8 *H.* 6. and conclude, Againſt the form of the Statute aforeſaid, or by ſome other ſuch words. And if one be reſtored upon an inſufficient Indictment, and it be removed into the Upper-Bench, the Court will cauſe the party to be reſtored. And if upon an inſufficient Indictment the Juſtices grant Reſtitution before it be done, the ſame Juſtices, not others, may grant a *Superſedeas* to ſtay it.

4. Reſtitution is only where a man is put or held out of Land, or the like; not of Rent, or the like.

5. The Juſtice may make Reſtitution, notwithſtanding any offer of Traverſe: Yet in this caſe the ſafeſt way is to ſend the Indictment into the Upper-Bench. But as touching Reſtitution, Inquiſition, and the three years Poſſeſſion, and for the clearing of the Law touching them, theſe things are to be known.

1. To whom Reſtitution ſhall be made, and upon what Inquiſition.

2. If it be found that *J. S.* was ſeiſed, until he was diſſeiſed by *J. D.* by force, or until *J. D.* entred upon him by force; in this caſe Reſtitution ſhall be made to *J. S.* So if it be found that *J. S.* was ſeiſed until diſſeiſed by *J. D.* peaceably, which *J. D.* holdeth with force; in this caſe Reſtitution ſhall be made to *J. S.* And if it be found that the Father die, and a ſtranger enter by abatement, and detaineth with force; in this caſe Reſtitution may not be made to the Sons. If it be found that the Father made

made a Leaſe for years and die, the years expired, and before ſuch an Entry made by the Son, ſuch a Force is committed; in this caſe the Son ſhall not have Reſtitution.

If it be found that a man is ſeiſed of Land, and hath iſſue a Daughter and dieth, his Wife with child of a Son; the Daughter is ouſted with Force, and then a Son is born; in this caſe the Daughter, and not the Son ſhall have Reſtitution.

If it be found that *J. S.* was ſeiſed until he was diſſeiſed by *J. D.* and that *J. S.* ouſted *J. D.* with force; in this caſe the Reſtitution ſhall be made to *J. D.* and not to *J. S.* If it be found that *J. S.* was ſeiſed until *J. D.* ouſted him with force, and alſo that *J. D.* was ſo ſeiſed until by *J. N.* diſſeiſed by force; by this Inquiſition *J. D.* the firſt Diſſeiſor will have Reſtitution againſt *J. N.* and thereupon *J. S.* ſhall have Reſtitution againſt *J. D.* and all upon the ſame Verdict.

If it be found by ſeveral Enquiries, that a man is ouſted by force by ſeveral perſons at ſundry times of one and the ſame thing; each Inqueſt is good, and he may have Reſtitution upon any of them, but he ſhall have but one Reſtitution.

If it be found by ſeveral Enquiries, *(i.)* by one Inqueſt, that *J. S.* is ouſted by force; and by another Inqueſt, that *J. D.* is ouſted by force, and both of the ſame Land; in this caſe each of them may have Reſtitution.

If it be found that *J. S.* was ſeiſed for the life of *A.* and he is ouſted with force by *B.* and that *A.* is now dead; in this caſe *J. S.* ſhall have Reſtitution upon this Inquiſition.

If it be found that two Jointenants be ouſted by force; in this caſe one of them may have Reſtitution, without the other. So if it be found that the Father was ſeiſed until he was ouſted with force, and he die before Entry or Reſtitution, the Son ſhall not be reſtored. So of the Executors of a Leſſee for years ouſted before his death. If it be found there is Leſſee for life, the Remainder in fee, and the Leſſee for life is ouſted by force; in this caſe he in Remainder ſhall not be reſtored.

If it be found that *J. S.* was ſeiſed, until by *J. D.* he was ouſted by force, and the Enquiry doth not ſay, At the requeſt of *J. S.* yet he ſhall have Reſtitution.

If it be found that one is ouſted by force, and thereupon he is reſtored, and after he is ouſted by force again by the ſame party; in this caſe he ſhall not have Reſtitution the ſecond time upon the ſame Inquiſition.

If Leſſee for life upon Condition be ouſted by force, and the Leſſor enter for the Condition broken, and this be found; in this caſe the Leſſee ſhall be reſtored.

If Husband and Wife before iſſue had are ouſted with force, and then they have iſſue between them, and the Wife dieth, and this be found; the Husband ſhall have Reſtitution.

If it be found that the Land out of which one hath Rent or Common is detained with force, ſo that he cannot have his Rent or Common; in this caſe he cannot have Reſtitution. And finally it is ſo for the moſt part, that he that is the party grieved, that muſt complain; he is the party to whom Reſtitution ſhall be made. And as touching the three years poſſeſſion, theſe things are to be known.

That if a Diſſeiſor continue the poſſeſſion quietly for one year, and then maketh a Feoffment, and taketh back an eſtate again, and then he continueth for two years more; this is not a good poſſeſſion for three years within the Statute. So if Leſſee for years continue in poſſeſſion for two years, and then his Term expireth, and after this he holdeth for another year; this is not a good continuance in poſſeſſion for three years. But if a man make a Leaſe at will and dieth, after whoſe death the Leſſee doth continue in poſſeſſion three years; this is a good continuance of poſſeſſion within the Statute.

If a Diſſeiſor do continue in poſſeſſion two years, and then is diſſeiſed by his eldeſt Son; the Father dieth, and the Son continueth in poſſeſſion for one year more; this is not a continuance of poſſeſſion for three years, within the Proviſo of the Statute. The ſame Law is, if the Father diſſeiſeth his eldeſt Son and continueth in poſſeſſion three years, and the Son after his death for one year more; this is not a continuance of poſſeſſion by three years within the Statute. But if the Diſſeiſor con-

continue the poſſeſsion for two years in his own life-time, and dieth ſeiſed, and his Son and Heir entreth and continueth the poſſeſsion for one whole year; this is a Continuance of poſſeſſion within the Proviſo. The ſame Law is, if the Diſſeiſor continue poſſeſſion for two years in the life-time of the Diſſeiſee, and one year after his death; this is a Continuance of poſſeſſion for three years within the Statute.

If the Diſſeiſee make a continual Claim within three years, but make no Entry, this is not a Continuance in poſſeſſion for three years within the Statute. The ſame Law is, if the Diſſeiſor continue poſſeſſion by two years, and his Feoffee by one year, this is a Continuance of poſſeſſion for three years. If one recovereth againſt another in a *Præcipe quod reddat* by Covin, and he againſt whom he recovereth hath quiet poſſeſſion thereof for three years; this is a poſſeſſion within the Statute.

If one make a Leaſe to another for the life of *J. S.* and the Leſſee doth continue the poſſeſſion for two years, and then *J. S.* die, and the Leſſee doth continue the poſſeſſion one year after his death; this is no Continuance of poſſeſſion within the Statute. But if he continue the poſſeſſion for three years after the death of *J. S.* this is a good Continuance of poſſeſſion. If the Diſſeiſor make a Leaſe for life, the Remainder over in fee, and the Leſſee holdeth for a year and dieth, after whoſe death he in Remainder entreth and continueth the poſſeſſion for two years more, this is not a Continuance of poſſeſſion within the Proviſo of the Statute.

In theſe caſes a man may alleadge to ſtay Reſtitution any of theſe things. Cauſes of ſtay of Reſtitution.

1. His quiet poſſeſſion for three years: For there ſhall be no Reſtitution awarded, in caſe where the party indicted hath been in quiet poſſeſſion by the ſpace of three whole years together, next before the day of Indictment found, if his eſtate be not ended. And this the party may alleage; and upon this Reſtitution ſhall be ſtaid by the Juſtice of Peace until it be tried, if the other will deny or traverſe the ſame.

2. He may deliver to the Juſtice of Peace or Court a *Certiorari*, and this is a *Superſedeas* to them. And therefore if a man have committed ſuch a Force, and be in doubt that he ſhall be indicted therefore before the Juſtices of Peace, upon the Statute of 8 *H.* 6. and that thereupon Reſtitution will be awarded againſt him, he may have a *Certiorari* out of the Upper-Bench ready; and when the Bill of Indictment is found, he may preſently deliver it to the Juſtice of Peace, or Court; and this is a *Superſedeas* to them; for hereupon the Indictment ſhall be removed unto the Upper-Bench. And although the Indictment be found after the Teſt of the *Certiorari*, it is not material. But if a *Certiorari* come to remove an Indictment taken before a Juſtice of Peace in the Country, and the party will not ſue to remove it, but doth ſuffer it to lie ſtill; ſome think the Juſtice may proceed to grant Reſtitution. But it ſeems the Juſtices *ex officio* are to ſend the Indictment away, becauſe they are commanded ſo by the Writ, and this Writ is a *Superſedeas* of it ſelf. And after Reſtitution made by the Juſtice of Peace, if the other party do remove the Indictment by a *Certiorari* of a more eign date then is the Indictment, the Juſtices of the Upper-Bench may award Reſtitution back again; for upon the matter, the Juſtice of Peace had no power to make Reſtitution, for that the *Certiorari* had relation from the date after Reſtitution granted from the Seſſions, and delivered to the Sheriff; the other party having a *Certiorari*, delivereth it alſo to the Sheriff; after the Seſſions, the Sheriff ſhall not ſurceaſe thereupon, for he hath no authority to allow thereof. But if the *Certiorari* were delivered to any Juſtice of Peace, he may thereupon grant a *Superſedeas* to the Sheriff; and if Reſtitution were made by the Sheriff before the ſaid *Superſedeas* came to his hand, then the other party ſhall have Reſtitution back again in the Upper-Bench, upon Indictment removed thither. *Certiorari. Superſedeas.*

3. He may tender a Traverſe; but ſome doubt whether he may be admitted to a Traverſe before the ſame Juſtice of Peace. But this tender of Traverſe (to an Indictment of a forcible Entry) upon *St.* 8. *H.* 6. is no *Superſedeas* but in diſcretion, ſo as the Juſtice of Peace or Court may grant or ſtay the Reſtitution at their diſcretion, according as the truth of the right or title ſhall appear to them. And ſo is the uſe of the Upper-Bench. Or elſe the Juſtices of Peace before whom the Indictment was found, may after Traverſe tendred certifie or deliver the Indictment into the Upper-Bench, and ſo refer the further proceeding thereof to the Juſtices of that Court. *Traverſe.*

But if the party indicted ſhall tender a Traverſe preſently, whereupon Reſtitution is ſtayed, and after he ſhall not purſue his Traverſe with effect, (but diſcontinueth it) and after doth tender another Traverſe, upon Reſtitution prayed, at another time, the Juſtice of Peace or Court ſhall do well to proceed to grant Reſtitution, notwithſtanding ſuch Traverſe tendred. And it is the courſe in the Upper-Bench, that he that tendred the Traverſe there (upon ſuch an Indictment) ſhall bear all the charges of the Trial, and not the Lord Protector, nor he at whoſe ſuit the Indictment was found. And the ſame reaſon ſeemeth upon an Indictment traverſed before the Juſtices of Peace.

4. He may ſhew Inſufficiencie of the Indictment, for the cauſes before alleadged.

5. And ſome have thought he may plead the Inſufficiencie of any of the Jurors, for not having Forty ſhillings *per annum*. And ſome think that the Juſtices of Peace ought to ſtay Reſtitution, ſave only in caſe where three years quiet poſſeſſion is alleadged, or by removing the Record. The Mayors and Officers of Cities having Franchiſe, have like authority therein as Juſtices of Peace have within their County, 8 *H.* 9. *c.* 9. And if the Juſtices of Peace be negligent in their offices upon theſe Statutes, they may be puniſhed.

Forging a Deed.

Forging of a Deed, what.

FOrging of a Deed is, where a man doth make and publiſh any falſe Deed, Writing or Will, to the prejudice of another mans right, *Kelw.* 112. *Plow.* 186.

What is ſuch a Forgery, or not.

To forge a Will in writing, is ſuch a Forgery, *March* 26. *pl.* 245.

If a Copiholder make and publiſh a Cuſtomary for a Uſage, and put Seals to it to the Lords prejudice, this is a Forgery. *Dyer* 302. 322.

If one forge a Teſtament by which a Leaſe for years is given; this is ſuch a Forgery.

But the making, and not publiſhing and uſing of any ſuch Writing or Deed, is no Forgery, nor puniſhable at all. See what ſhall be ſuch a Forgery, more in *Kelw.* 112. *Plow.* 88. *Co.* 4. 17. *Dyer* 302. 322. 288. *Plow.* 88.

If any one alone or with others forge any ſuch Deed, Charter, Court-Roll, or Will in writing, with intent to trouble, defeat, or charge the Freehold or Inheritance, the Right or Title of Land of another, or publiſh or give in evidence any ſuch Writing, knowing it to be falſe; he ſhall pay to the party grieved double coſts and damages, be ſet upon the Pillory in ſome Market-Town or open place, and have both his ears cut off, his noſtrils ſlit, and ſeared with an hot iron, forfeit the profits of his land, and be impriſoned all the days of his life.

If it be the forging of a Leaſe for years, of Land only (not Copihold) or of an Annuity, Obligation, Bill, Acquittance, Releaſe, or other Diſcharge of any perſonal thing; he ſhall pay the party grieved double coſts and damages, be ſet on the Pillory, loſe one of his ears, and ſuffer a years impriſonment without Bail. The ſecond offence is Felony without Clergy; alſo the party grieved may for this Forgery have an Action of the Caſe at the Common-Law, *St.* 5 *Eliz.* 14.

of

of a Forreſt.

A Forreſt is a great vaſt Wood or piece of ground, where wild Beaſts did uſe to live. But more largely it is thus deſcribed: It is a certain Territory of woody ground and fruitful Paſtures, priviledged for wild Beaſts and Fowls of the Forreſt, Chaſe, and Warren to reſt and abide in, in the ſafe protection of the King, for his Princely delight and pleaſure. Which Territory of ground ſo priviledged, is meered and bounded with unremoveable Marks, Meers and Boundaries, either known by matter of Record, or elſe by Preſcription. And theſe Forreſts now are, or have been repleniſhed with wild Beaſts of Veneries or Chaſe, and with great Coverts of Vert for the ſuccor of the wild Beaſts to have their abode in. For the preſervation and continuance whereof and the Vert, and Veniſon therein, there are certain particular Laws, Courts, Priviledges and Officers belonging to the ſame, meet for that purpoſe, that are only proper to a Forreſt, and not to any other place. Of theſe there have been many in *England*, but moſt of them are gone and deſtroyed. See for this, and how they began, in *Manwood* of *Forreſt-Laws*.

Forgery, what.

Sect. 1. The properties of it.

The properties of a Forreſt are theſe.

1. None can have it but the King;

2. The Courts muſt be there, the Juſtice-ſeat, Eyre, or General-Seſſions of the Forreſt, which muſt be held every three years, the Swanimote thrice a year, and the Attachment-Court once every forty days.

Court of { *Juſtice-ſeat*, *Swanimote*, *Attachment*.

3. The Officers muſt belong to it for preſervation of Vert and Veniſon: As firſt, the Juſtices of the Forreſt, ſometimes called Juſtices in Eyre of the Forreſt, who have the hearing and determining of all offences committed therein againſt Vert and Veniſon, who did judg by the Laws of the Forreſt, 9 *H.* 3. For which ſee *Juſtices*, *Manwood Forreſt-Laws*.

Juſtices of the Forreſt, what.

The Warden or Keeper of the Forreſt; for which ſee *Officers*.

Warden of the Forreſt, what.

The next Officer is the Conſtable of the Forreſt, (*Manwood.*)

Verderer or *Verdour*, what.

The Verderers or Verdours, who are Judicial Officers of the Forreſt choſen by the Kings Writ to the Sheriff, and ſworn in the County-Court of the Shire, by the Freeholders there within the Forreſt where they dwell, to maintain and keep the Aſſiſes of the Forreſt, and alſo to view, receive, and inroll the Attachments and Preſentments of all manner of Treſpaſſes of the Forreſt of Vert and Veniſon, and to overſee, correct and puniſh other Officers beneath them, *Cromp. Jur.* 164. *Manwood.*

Forreſtors or *Walkers*, what.

The Forreſter is a ſworn Officer appointed by the Kings Letters-Patents to walk the Forreſt early and late, to look to the Vert and Veniſon there, attaching and preſenting all Treſpaſſors againſt them within their own Bailiwick or Walk. They were called Walkers, *Cromp. Jur. f.* 201. *Manwood.*

Agiſtors, what.

Agiſtors are ſuch as tack in and receive the money for the tack of the Cattel going in the Forreſt. *Manwood.*

Regardors, what.

Regardors are ſuch Officers as are to view and enquire of all offences of the Forreſt as well of Vert as of Veniſon, and of all concealments of any offences or defaults of the Forreſters, and of all other Officers of the Forreſt, concerning the execution of their Office. *Cromp. Iur.* 153. *Manwood.*

Bailiffs, what. *Beadle*, what.

Bailiffs of the Forreſt and Beadles are Officers that do make all manner of garniſhments of the Courts, and all manner of Proclamations as well within the Courts of the Forreſt as without, and alſo do execute all the Proceſs of the Forreſt, and are like to the Bailiffs errant of the Sheriff within the County.

Sect. 2. *Woodmen*, *Woodwards*, what.

Woodmen are ſuch as look to the Woods there, *Manwood.*

Woodwards are not only to ſee to the Woods, but to all other matters; and if any do any offence there in Vert and Veniſon, they are to preſent it to the Verderors at the next Swanimote or Attachment-Court. *Manwood*, and *Cromp. Jur.* 201.

Ranger, what.

Rangers are ſuch as have the care of the Purliews annexed to the Forreſt, to drive back the game. *Idem.*

Chaſe, what. A Chace ſeemeth to be nothing but the ground which was a Forreſt in the Kings hands, and hath loſt the properties of a Forreſt, or is in the hands of a Subject.

Free-chaſe. And this muſt always be open, and not incloſed: But a Park muſt be always incloſed, and not lie open. And if this be incloſed, it is forfeit to, and may be ſeiſed by the King. And to recover this Chaſe being denied, there lieth a Writ called *Libera Chaſea habenda.* See more in *Franchiſe.*

Libera chaſea habenda, what. *Warren*, what. A Warren is a Franchiſe or privileged place of pleaſure, only for thoſe Beaſts and Fowls that are Beaſts and Fowls of Warren, as Hares and Conies, and Feſants and Partridges. And ſome of theſe lie open, and ſome are incloſed. Theſe were made at firſt by the Kings grant, and ſo may be now within a mans own ground, no where elſe; and then no man may hunt or fowl there without my licence; and if any man hunt or hawk there, he may be puniſhed, *Cromp. Jur*, 148. *Stat. de Malefactoribus in Parcis*, 21 *Ed.* 3.

Park, what. A Park is a piece of ground incloſed and ſtored with wild Beaſts of Chaſe; or a priviledged place for wild Beaſts of Venery, and for other wild Beaſts that are Beaſts of the Forreſt and of the Chaſe, the which are to be in peace there, ſo that no man in that place may hurt or chaſe them without leave of the Owner. And this muſt be incloſed and may not lie open; for if it do, it is cauſe of Forfeiture to, and ſeiſure by the King as a thing forfeit. Nor can the Owner have an Action againſt ſuch as hunt in his Park, if it lie open. *Cromp. Jur.* 148. *Manwood* of his *Forreſt-Laws.*

Sect. 3. There are divers Terms uſed in the Forreſt-Laws, now to be opened.

Woodgeld, what. *Woodgeld* ſeemeth to be the gathering or cutting of Wood in the Forreſt, or the money paid for the ſame to the uſe of the Forreſters; or an Immunity from this by the Kings grant, *Cromp. Jur.* 146.

Regard, what. *Regard* hath two ſignifications: The one for the Regarders office; 2. The other for the compaſs of ground belonging to his Office. For the firſt, they are before the Courts of the Forreſt to make their Regard, (that is) go through all the Bailiwicks of the Forreſt to ſee what offences be done in Vert and Veniſon, and take Notes thereof, and certifie it to the next Court. And for the other, the Compaſs of his Office is all the ground which is parcel of the Forreſt; for there may be Woods within the limits of the Forreſt that be no parcel thereof, and thoſe are without the Regard, *Cromp. Jur.* 175. *Manwood.*

Range, what. A *Range* ſeemeth to be the Office of the Ranger, and the Circuit thereof. For in ſome Forreſts there are twelve Rangers, who are only to look to the Purlieuſes of the ſame upon the Borders of the Forreſts, which were certain Circuits of ground

Purlieu or *Purlue.* near unto the Forreſts, which were made Forreſt by *Hen.* 2. *Rich.* 1. or King *John*, and were after by Perambulations granted by *Hen.* 3. ſevered again from the ſame. And theſe were to hunt back the Deer into the Forreſt, and to preſent all offenders within or without his Purlieu. He was made by the Kings Letters-Patents, and had a Fee out of the Exchequer, and certain Fee-Deer, *Manwood.*

Purly or *Purlieu-man*, what. *Purlieu-man* is he that hath ground within the Purlieu, and hath Forty ſhillings a year Freehold; and ſuch a one with ſome cautions may hunt within his own Purlieu. *Manwood. Cromp. Jur.* 153.

Sect. 4. *Franchaſe* is a Liberty of Free-chaſe in a Circuit annexed to a Forreſt, whereby

Frank chaſe, what. all men that have ground within that Circuit are prohibited to cut down Wood, or diſcover, &c. within the view of the Forreſter, though it be his own Demeſne, *Cromp. Jur.* 187.

Backberond, *Dog-draw*, *Stable-ſtand*, what. *Bloody hand.* Theſe are Terms to note a man that is an offender againſt Vert or Veniſon, and taken in the manner, in theſe caſes. When he hath taken up his ſtand with a Croſs-bow ready to ſhoot, as he were ſtabled, which is called *Stable-ſtand*: Or when he doth draw after ſome hurt Deer with his Dog, which is called *Dog-draw*: Or when he beareth the Deer on his back, which is called *Back-bear*: Or when his hand is bloody with the blood of the Deer. In all theſe caſes the Forreſter may arreſt the body of the offender. *Manwood.*

Tritis or *Triſtis* what. This *Tritis* is a Freedom that one hath from holding a Greyhound in his hand, when the Lord of the Forreſt is hunting there, or elſe to be amerced for his default, *Manwood.*

Vert

Vert is every thing that doth grow and bear green leaf within the Forreſt, that may cover and hide a Deer. And this is Overt-vert, which is High-wood; and Nether-vert, which is Under-wood: Or general, which is all the High-wood; and ſpecial, which is every Tree and Buſh within the Forreſt to feed the Deer withall, as Pear-trees, Crab-trees, Hawthorns, Blackbuſh, and ſuch like; and Bruſhwood is called Cabliſh. *Manwood. Cromp. Jur.* 163. *Vert*, what. *Cabliſh*, what.

Fence-moneth is a moneth wherein it is unlawful to hunt in the Forreſt, which beginneth fifteen days before Midſomer, and endeth fifteen days after Midſomer: So that in this moneth are one and thirty days, wherein they are not to hunt, becauſe in this time the Female-Deer doth fawn. *Manwood.* *Fence-moneth*, what.

Fontgeld is an Amerciament upon men living in the Forreſt, for not cutting out the balls of their great Dogs feet. It doth alſo ſignifie a Privilege to keep Dogs there unlawed, without puniſhment or controlment. *Manwood. Cromp. Jur.* 197. *Sect.* 5. *Fontgeld*, what.

Horngeld ſignifieth a Taxe within the Forreſt, to be paid for horned Beaſts, *Cromp. Iur.* *Horngeld*, what.

Minovery doth ſignifie ſome Treſpaſs or offence committed by ſome Engine ſet up in the Forreſt to catch Deer, or the like. *St.* 7 *R.* 2. *c.* 4. *Minovery*, what

This was an antient great Officer of *Windſor*-Forreſt, that had power of life and death. *Protoforreſtarius*, what.

Walkers, theſe are thoſe that are called Forreſters. *See before.*

An *Aſſart* is an offence committed in the Forreſt by grubbing up the Woods, Coverts or Thickets, and making them plain as arable Land, or the like. And this is a very great offence. *Manwood.* *Walkers*, what? *Aſſart* or *Aſſert*, what.

Agiſtment is the tacking in of Cattel in the Forreſt, and receipt of the Tack-money to the Kings uſe. *Agiſtment* or *Pawnage*, what?

See more for theſe things, in the Statutes of 9 *H.* 3. 10. 56. 8. 16. 9. 1 *H.* 7. 7. 1 *Ed.* 3. 8. 7 *R.* 2. 4. 3 *Ed.* 1. 20. 21 *Ed.* 1. 8 *H.* 3. 3. 32 *H.* 8. 35. 3 *Iac.* 13. 7 *Iac.* 3. 22 *Ed.* 4. 7. 19 *H.* 7. 11. 27 *H.* 8. 6. 13 *Ed.* 1. 5.

CHAP. LXXXIX.

Of Fowling and Fowl; Foreſtalling, Regrating and Ingroſſing.

FOr Fowling and Fowl, ſee *Warren* and other Titles, *St.* 1 *Iac.* 27. The penalty for killing or taking of old Hierons, ſaving by Hawking or Long-bow, See in *Stat.* 19 *H.* 7. *c.* 11. And for taking of young Hierons out of their neſts without leave of the Owner, *St.* 19 *H.* 7. *c.* 11. 1 *Iac.* 27. *Fowling.* *Hieron.*

Who may have and keep, or take a game of Swans from another, See *St.* 22 *Ed.* 4. *c.* 6. *Swans.*

The danger of taking Swans eggs, See *St.* 11 *H.* 7. *c.* 17.

There is no Law againſt the taking of Wild-fowl, as Ducks, &c. Swans, or the like with Nets or Engines. But for ſhooting in a Gun at them, the penalty is the ſame as for ſhooting at other things. But if any man take away from another, or kill his tame Swans or Hierons, he may have an Action of Treſpaſs for this, 14 *H.* 8. 3. 18 *H.* 8. 2.

of

Of Foreſtalling, Regrating and Ingroſsing.

Foreſtalling, Regrating and *Ingroſſing*, what.

TO buy or agree for any thing coming towards a Market or great Town, or to move the Seller to raiſe the price, or to diſſwade him from bringing in his Commodities in thoſe places, is Foreſtalling.

To buy up Commodities, as Corn, Wine, Butter, Cheeſe, Fiſh, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geeſe, Capons, Hens, Chickens, Pigeons, Conies, or other dead victuals whatſoever in any Fair or Market, and ſell them again there, or in any other place within four miles thereof, is Regrating.

To get by buying or promiſe-taking, otherwiſe then by Deviſe of Land or Tythe, any Corn or Grain, or dead victuals into a mans hands, with intent to ſell the ſame again, this is Ingroſſing. And ſo it is, if one by himſelf or another directly or indirectly buy any Wheat or other Grain, with intent to ſell the ſame in Meal, Flower, or otherwiſe, but by Licence of five Juſtices had in Seſſions. But the buying of Barley and Oats without foreſtalling, to make Malt and Oatmeal; and ſuch Victuallers of all ſorts, as Butchers, Fiſhers, and the like, as buy Victuals without Foreſtalling, and ſell it again by Retail according to their Trades; the buying of Victuals by Inholders and Victuallers, and ſpending it in their houſes; the reſerving of Rent-Corn on a Leaſe for Land; the buying of Victuals to victual a Ship or Fort; the buying of Seed-Corn, when one doth ſell or offer to ſale as much again; the tranſportation of Corn from one Port to another by water; the buying of Corn, Fiſh, Butter or Cheeſe by a Badger, ſo he ſell it again within a moneth; nor the buying and ſelling of Cattel by Drovers licenſed, and not abuſing their Licence, ſo they ſell them forty miles off, are not againſt the Laws, nor puniſhable.

The puniſhment of it.

He that is within two years after any ſuch offence done, convict of it, ſhall ſuffer for the firſt offence Impriſonment two moneths without Bail, and the value of the things bought or had: For the ſecond offence after he hath been once convict, Impriſonment half a year, and the double value of the things: And for the third offence, be ſet on the Pillory in the place where he dwels, forfeit all his goods, and be impriſoned during the Kings pleaſure. See for this *St.* 5 *&* 6 *E.* 6. *c.*6.14. 1 *Jac.* 25. 21 *Jac.* 28. *Act of Parl.* 23 *Oct.* 1650.

If any within two years of the offence be convict for buying any Oxen, Runts, Kine, Steer, Heifers, Lambs, Sheep, Goats or Kids living, and ſelling them again within five weeks, he ſhall ſuffer the loſs of the double value thereof, *Stat.* 5 *Ed.*6. *ch.* 14.

If any buy any Hide of Beaſts out of a Market or Fair, unleſs it be of ſuch as killed the Beaſt for their own proviſion, he forfeits Six ſhillings and eight pence, *St.* 1 *Jac. ch.* 22.

If any out of *London*, *Weſtminſter*, or *Southwark* buy to ſell again Butter or Cheeſe, unleſs he ſell it again by Retail, and then not above a Weigh of Cheeſe, or Barrel of Butter, he loſeth the double value of the goods, 21 *Jac.* 22.

The getting of Oak-bark into ones hand with intent to ſell the ſame again, is puniſhable alſo. But for this, ſee the Statute of 1 *Jac.* 22. 13 *Eliz.* 25. *Co.* 3 *par. Inſt. cap.* 90. and *Brownl.* 2 *par.* 108.

CHAP. XC.

Of Frank-law, Frank-pledg, Freehold, Frank-tenement, Free-chappel, Freſh-ſuit, Friars, and Fuſtians.

Frank-law.

HE that loſeth his Frank-law, as for Conſpiracie and ſome offences a man ſhall do, doth fall into theſe miſchiefs.

1. He ſhall never be empanelled upon any Jury or Aſſiſe, or otherwiſe uſed as a Witneſs to teſtifie Truth.

2. If he have any thing to do in the Kings Courts, he may not come there in perſon, but muſt appear by Attorney.

3. His lands, goods and chattels muſt be ſeiſed into the Kings hands, ſpoiled, and his body impriſoned, 24 *Ed.* 3. 34.

Frank-pledges, what.

Frankpledges are Sureties for Freemen: For heretofore every freeborn Subject at fourteen years old was to be ſworne, and to fall into one Tything or other, and be bound one for another, as they all were: If any offended, he was to be brought in by the reſt to anſwer his offence, or they were to make amends for his offence: And they did commonly engage by Ten houſholds. See *Tything-man.*

Frank-tenement or Freehold, what, The kinds.

A Franktenement or Freehold is an Eſtate for life at leaſt; and it is either in deed, or in Law. In deed, when one is actually ſeiſed of it: Or in Law before his Entry, when it is caſt upon a man by a courſe of Law; as when it comes to an Heir by the death of an Anceſtor, or to him in Remainder by the death of the particular Tenant. Or where one doth levy a Fine *ſur conuſſance de droit come ceo, &c.* or *ſur conuſſance de droit tantum,* (the which are Feoffments of Record;) in theſe caſes the Conuſee hath a Freehold in him before his Entry.

So if Tenant for life, by agreement with him in Reverſion, ſurrender to him; by this he hath a Freehold in Law before his Entry. So where a man doth bargain and ſell Land by Deed indented and inrolled, or when Uſes are raiſed by Covenant upon good conſiderations; in theſe caſes the Freehold in Law doth paſs preſently. But upon an Exchange or Partition, or Livery within the view, no Freehold is veſted or removed until the parties enter, *Finches ley* 114, 115. *Co.* upon *Lit.* 266. But ſee more to this purpoſe in *Eſtates.* For this there is one ſpecial Rule here to be remembred; That a Franktenement by way of Intereſt-paſſing cannot commence *in futuro:* And therefore if one make a Feoffment in fee, a Leaſe for life of Land, or grant a Rent or Common in fee or for life, to begin at a day to come, the Eſtate is void. As if a man by Deed in conſideration of Marriage give and grant his Land to his Son and his Heirs after his Fathers death, and Livery is not made; there paſſeth no Eſtate by this. But by way of Surrender of a Copihold, Bargain and Sale, Deviſe or Covenant to ſtand ſeiſed to Uſes, ſuch a Conveyance and Eſtate may be good, *March* 50. *pl.* 78. *Plow.* 301. *Co.* 8. 94. 7. 40. *Dyer* 96. 202. But this is ſometimes holpen by a Livery of Seiſin, as in 36 *Eliz. Callards* Caſe: He being on the Land with his Son, ſaid to him, Stand forth *J. S.* reſerving an Eſtate to me and my wife, I do give thee this Land. By the better opinion, this was good. See *March* 177. 236.

Free-Chappel, what.

A Free-Chappel is a Chappel founded in ſome Pariſh for the ſervice of God, by the devotion and liberality of ſome good man, over and above the Mother-Church; unto which it was free for the Pariſhioners to come, or not to come; and endowed it with a maintenance from the Founder, and thereupon called free. Or (as ſome ſay) thoſe only are Free-Chappels that are of the Kings founding, and by him exempted from the juriſdiction of the Ordinary. And the Lord Protector at this day may licenſe a Subject to found ſuch a Chappel, and by his Charter exempt it from the Ordinaries juriſdiction alſo, *Regiſt. f.* 40, 41.

Freſh-ſuit, what.

Freſh-ſuit is ſuch a preſent and earneſt following of an offender, as never ceaſeth from the time of the offence committed or eſpied, until he be apprehended. And this may be within, or without the view. And the effect of it is this in purſuit of a Felon, that

that the party purſuing ſhall have his goods reſtored to him again, whereas otherwiſe they would be forfeit to the King. *Co.* 3. *Highways* Caſe. *Stamf. Pl. Cor.* 3. 10.

Friars. There were of theſe Friars, when they were here, four principal Orders: *Minors*, *Auguſtines*, *Preachers*, and *Carmelites*; of which all the reſt came. The Friars obſervant were not of any Cloiſter, Covent or Corporation combined together as the reſt, but tied themſelves to obſerve the Rites of their Order, and more ſtrictly then the Conventuals did, and out of ſingularity of zeal did ſeparate themſelves from them, living in places and companies of their own chooſing. *Stat.* 4 *H.* 4. 17. 25 *H.* 8. 12.

Fuſtians. For the true making of Fuſtians, ſee *Stat.* 11 *H.* 7. *c.* 27.
What Fuſtians ſhall be made in *Norwich*, ſee 1 & 2 *P. & M.* 14.
Who may ſearch their houſes, and overſee their Fuſtians, 39 *Eliz.* 23.

CHAP. XCI.

Of Franchiſes and Liberties.

Franchiſe, what it is. A Franchiſe is a Royal Privilege in the hand of a Subject; or ſome Benefit, Power or Freedom, that ſome perſons and places have above others, which originally was derived from the Crown, but now at laſt by continuance of time is claimed and taken in ſome caſes by Preſcription. And of theſe Franchiſes there are many ſorts.

The kinds. Some whereof do ſtand in having; as the goods of Felons, of Fugitives, and of outlawed perſons, Waifs, Strays, Deodaons, Treaſure-trove, Wreck, Markets, Fairs, Warrens, Leets, Courts, and the Cuſtoms of divers Villages, Burroughs and Corporations, Conuſance of Pleas, Hundreds, and the like, *Dyer* 44. *Plow.* 169. And for Fairs and Markets, ſee the Statutes of 2 *Ed.* 3. 15. 5 *Ed.* 3. 5. 27 *H.* 6. 5. 17 *Ed.* 4. 2. 2 & 3 *P. & M.* 7. 31 *Eliz.* 12.

Fairs and *Markets.*

Sect. 1. Some of them do ſtand in doing; as to make Juſtices of the Peace to pardon Felonies, and the power of Corporations, and divers other places, and the like.

Some of them do conſiſt in diſcharge; as to be exempt from ſerving in Juries, from paiment of Subſidies, from the juriſdiction of other Courts, from paiment of Toll, and the like.

And amongſt all theſe ſome are more Royal, as the Franchiſes of the Principality of *Wales*, and Counties Palatine; alſo goods of Felons, of Fugitives, and of outlawed perſons; power to pardon Treaſon or Felonies, or to make Juſtices pardon Felony or Treaſon, and the like. And theſe it ſeems are ſo appropriate to the places and perſons, as that they are not grantable over to any other place or perſon. But others are leſs Royal, as Markets, Fairs, and ſuch like; and theſe it ſeems are grantable over, unleſs they be real and annexed inſeparably unto ſome place, *St.* 27 *H.* 8. *ch.* 25.

Amongſt theſe alſo ſome are real, *i.* inſeparably annexed to ſome place, as divers Cuſtoms of divers places, Burroughs and Corporations, the Juriſdiction and Priviledges of the Principality of *Wales* and Counties Palatine, Warrens, and the like; and theſe be not grantable to any other place by them that do enjoy them. 2. Some are perſonal; and theſe are ſometimes inſeparable from the perſon, and not grantable to another by him; as exemption of Juries, exemption of Toll, and the like. But the moſt of theſe, as Waifs, Strays, Courts, and the like, are grantable from one to another, as other things are: For which ſee *Grants*. Some of theſe may be claimed by Preſcription, and ſome not: For which ſee *Preſcription*.

Goods

Goods of Felons, Fugitives, or of Outlawed perſons, are the goods of one that is attainted or outlawed for Felony, or outlawed otherwiſe, or doth flie for Felony, which by Law are forfeited for Waifs, Strays, Deodands, Treaſure-trove, Wreck. (*See their ſeveral Titles.*) *Goods of Felons, what.*

Markets and Fairs are publick meetings for Trading and Traffick. For which ſee *Stat.* 2 *Ed.* 3. 15. 5 *Ed.* 3. 5.

Warren is a Franchiſe or priviledged place of pleaſures by grant of the King, or Preſcription, for the preſervation of thoſe Beaſts and Fowls which are Beaſts and Fowls of Warrens; as Hares, Conies, Pheaſants and Partridges. And this a man may have by grant of the King, or Preſcription; and it may be in a mans own ground, or another mans. And if another do chaſe or kill any Beaſts or Fowl of a Warren, the Owner may have an Action of Treſpaſs againſt him. And this may lie open, and need not be incloſed, as a Park muſt. See more in Parks and Forreſts, which it ſeems is in a manner all one with this, *Co.* upon *Lit.* 233. *Plow.* 130. See more in *Forreſt.* *Warren, what.* *Preſcription.* *Treſpaſs.*

It is a privilege that ſome Town or place have by the Kings grant, by which they have ability to hear and determine matters and cauſes amongſt themſelves, and to call their cauſes out of other Courts, if they be there queſtioned or impleaded, by motion to the Court, and a requeſt of Conuſance, that the matter may be heard and determined by them in their own Court. Which muſt be at the beginning of the Suit; for if once the Court be poſſeſſed of the Suit, it is too late to demand Conuſance for that Suit. And therefore ſuch as have this Franchiſe, are uſed to have Attornies or Bailiffs at *Weſtminſter* to demand Conuſance (if any Suit come into the Court there) at the very beginning: And this a man muſt have the Kings grant for, for he cannot preſcribe for it; but yet it ſeems one may preſcribe *tenere placita* in his own Court before his Bailiff in ſuch a place. But Conuſance of Plea lieth always in demand, and is of Record. See *Stat.* 6 *H.* 6: *ch.* 26. *Dyer* 202. 9 *H.* 7. 11. For Leets, view of Frankpledg, and Court-Baron, ſee *Courts.* *Conuſance of Pleas, what.* *Preſcription.*

This is a Franchiſe that ſome Hundreds and places have, that the Sheriff cannot come there to do any Execution, or execute any Writ without wrong to the Lord of the Franchiſe: And therefore they uſe to ſend their Warrants to the Bailiffs of thoſe Franchiſes to do it. See *Stat.* of *Lincoln*, 9 *Ed.* 2. But if the Bailiffs of thoſe Franchiſes do not their office, then the Sheriff may do it by a *Non omittas.* 13 *Ed.* 1. 39. *Lit. ch. Burgage.* 40 *Aſſ. pl.* 27. *Retorna Brevium*, or *Return of Writs*, what. *Non omittas.*

Burroughs are antient Villages incorporate, from whence do come Burgeſſes of Parliament: And theſe have divers Franchiſes, Freedoms and Exemptions that other places have not; as to hold Pleas, and to do divers other things: Amongſt which Burroughs, *London*, *Cheſter*, *Canterbury*, and divers others have divers and ſundry Franchiſes annexed to their Corporations. *Places of Priviledg. Burroughs.*

The Principality in *Wales*, are certain Shires in *Wales* which did belong unto the Kings eldeſt ſon, that have certain Franchiſes; of which read *Stat.* 38 *H.* 8. *ch.* 2. 27 *H.* 8. 26. *Cromp. Jur. f.* 137, 138. *Plow.* 123. 20 *Jac.* 10. 27 *Eliz.* 9. 5 *Eliz.* 25. 34 & 35 *H.* 8. 36. *Sect.* 2. *Principality of Wales*, what.

The Counties-Palatine are four ſpecial Counties, (*i.*) *Lancaſter*, *Cheſter*, *Durham*, and *Ely*, which have ſpecial exemption and juriſdiction: For they have juriſdiction of all cauſes that do ariſe within their own limits and Counties, and the Kings Writ doth not come there; and they have the ſame authority in a manner that the Palace of the Kings Royal Court hath. For which ſee the Statute of 37 *H.* 8. *c.* 5. whereby their power is ſomwhat abridged. 27 *H.* 8. 24. 33 *H.* 8. 39. *Counties Palatine*, what.

The Cinque-Ports are five Haven-Towns, *Romney*, *Hithe*, *Dover*, *Haſting*, *Sandwich*; which becauſe they lie (being Eaſtward towards *France*) upon the Narrow-Seas, and are dangerous for an Invaſion, therefore they have had antiently, and ſo ſtill have allowed to them divers Franchiſes and Priviledges which are upon Record and well known: As to be quit of Subſidies, to be freed and exempted from the juriſdiction of any other Courts, and to have their cauſes heard and determined among themſelves; to have a ſpecial Governor, who is called Lord Warden *de* Cinque-Ports, and divers other things. *St.* 2 *H.* 5. 6. *Mag. char. c.* 9. *Cinque-Ports*, what.

Tribute or *Cuſtom, Impoſt*, what.

Tribute, Impoſt, Toll and Cuſtom, ſeem to be one thing; a paiment from private men to publike uſe. But Cuſtom properly is the profit which the King maketh of Wares tranſported; and Impoſt is the Tax received by the King for the Wares that are imported from other Nations in to us at any Haven here, *Stat.* 31 *Eliz.* 5.

Toll or *Tonage*, what. *Turn-Toll*, what

It ſeems there are three kinds of Toll, Tributes or Cuſtoms paid for paſſage, &c. There is Turn-Toll, which is a ſum of money that is to be paid by every one that doth buy any Beaſts or Cattel in any Fair or Market; which the Buyer, and not the Seller (unleſs it be the cuſtom of the place) muſt pay: And if the cuſtom be, that one muſt pay for it, though he do not ſell it, then it muſt be paid accordingly; and if he refuſe to pay it, they may diſtrain the Beaſts or Cattel, unleſs the party be exempted from the paiment of Toll, as one may be, (Of which ſee after *Exemption from Toll.*) And this one may claim and have by the Kings grant, or by Cuſtom or Preſcription. See *Toll, Chap.*

Toll-travers, what.

Toll-travers is, where one doth claim to have ſomething for all the Beaſts that are driven over his ground.

Toll-through, what.

Toll-through is, where any Town doth preſcribe to have ſomwhat for every Beaſt that doth go through the Town: which it ſeems hath been given moſt commonly for the repairing of ſome Bridg, or ſome High-way, *Stat.* 2 *&* 3 *Ph. & M. ch.* 7.

Stallage, Pickage, what.

Stallage is money paid for pitching of Stalls in Markets or Fairs; and Pickage is money paid for breaking the ground to do it. This is a kind of Toll. See *Toll* in *Chap.*

Exemption of Toll, what. *Breve eſſendi quietum de tollonio*, what.

Exemption of Toll is, where the King hath granted to any man to be free from paying Toll. In this caſe if any body ſhall diſtrain him, he may have an Action of the Caſe; or if any one require it, he may have a Writ to the Sheriff, *De eſſendi quietum de Tollonio.* And this one may have by the Kings grant, or Preſcription.

Tonage, what.

Tonage is a Cuſtom or Impoſt for Merchandiſe brought or carried in Tons and ſuch like Veſſels from or to other Nations, after a certain Rate in every Ton, *Stat.* 14 *Ed.* 4. *ch.* 3.

Some alſo ſay, it is taken ſometimes for a Duty due to the Mariners for unlading their Ship arrived in any Haven, after the Rate of every Ton, *St.* 1 *Jac.* 33. 3 *Car.* 1. *Act March* 11. 1650. This is always ſet by Parliament.

Poundage, what.

Poundage is a Subſidy granted to the King of all manner of Merchandiſes of every Merchant-Denizen and Alien carried out of this Realm, or brought into the ſame by way of Merchandiſe, to the value of Twelve pence in every pound, 12 *Ed.* 6. *ch.* 13. Or (as others have it) a Duty due from Mariners for unlading their Ship arrived in any Haven after the Rate of every Ton, *Stat.* 1 *Jac.* 33. *Act March* 11. 1650.

2. What Franchiſes may be claimed by Preſcription, and what not:

Any man may make title to, claim, and have Treaſure-trove, Waifs, Strays, Wreck, Conuſans de Pleas, Courts of Leets, Hundreds, &c. Infangtheef, Outfangtheef, to have a Park, Warren, Royal Fiſhes, Fairs, Markets, Frankfoldage, the keeping of a Gaol, and the like, by uſage and preſcription; and theſe may be gained and kept without matter of Record. But ſo he cannot for ſuch Franchiſes as cannot be ſeiſed before the cauſe be of Record; as the Goods and Chattels of Traitors and Felons, Outlawed perſons, Fugitives, of thoſe that be put in Exigents, Deodands, to make a Corporation, Conſervators of the Peace, or a Coroner; and theſe cannot be claimed by Uſage in the Country without matter of Record, as without Charter, or the like; unleſs it be by a mean as incident to a County-Palatine, which one may have and claim by Preſcription, *Co.* upon *Lit. f.* 114.

Sect. 3. 3. When, and what Franchiſes ſhal be forfeit, and how: BY *Non-uſer, Abuſer, Refuſer.*

Some Franchiſes may be forfeited by a Non-uſer, ſome by Refuſer, and moſt by Abuſer. Of which ſee ſomwhat in *Forfeiture de Offices*: As if a Clerk of the Market do not uſe his Office, he doth forfeit it, *Co.* 9. 99.

If one have a Fair or a Market one day, and he keep it another; as if his Grant or Preſcription be for Wedneſday, and he keep it Thurſday, by this he doth forfeit it, *Co.* 9. 50. So if a Fair or Market be granted a man for one day in the week, and

and he keep it two days, 22 *Aſſ.* 34. But in this laſt caſe he forfeits only that which he hath uſurped.

If one keep a Fair or Market two days, and being queſtioned by the King, he claimeth both days by the Kings grant, and afterwards it is found he hath but one day; by this he doth forfeit both days, *St.* 2 *Ed.*3.*c.*15. 2 *H.*7.11.

If one have Aſſiſe of Bread and Beer, and Pillory-Tumbrel, and he do not uſe it, he forfeits his Franchiſe.

A Lord of a Franchiſe may loſe it for default in purſuit or arreſting of Felons, *St.*3 *Ed.* 1. *c.*9. See *Cromp. Jur.* in all. Where Franchiſes are incident of common right, there the Forfeiture of the one is the Forfeiture of the other; as the abuſe of the Court of *Pipowders*, is the Forfeiture of the *Fair*. So where they are ſubordinate one to the other. But where they are contradiſtinct *Species*, or by ſeveral Titles or Patents, it is otherwiſe. *Hil.* 17 *Jac. B. R. Court.*

In ſome caſes for the Abuſer of a Franchiſe a man ſhall be fined, but ſhall not forfeit his Franchiſe. So for uſurping a Franchiſe a man ſhall be fined, or for uſurping more then one ought to have: But if one take leſs Franchiſes then he hath right to, this is no Forfeiture, *Bro. Franch.*37.

If one have a Fair or Market-day by Grant or Preſcription granted to him *Wedneſday*, and he keep it on that day, and another alſo, his Market or Fair on *Wedneſday* is not forfeit, 22 *Aſſ.*3.4.

If one claim one day by Patent, and another by Preſcription, and the laſt be found againſt him, this is no Forfeiture of that he hath by Grant. So that not uſing of a Fair or Market, it ſeems, is no Forfeiture, *Co.*9.50. 2 *H.*7.1.*c.*30.

A Market or Fair is not forfeit by taking of Toll where none is due, or taking more then is due, *Hil.* 17 *Jac. B. R.* by the Court: Or by keeping it longer then the time, *Stat.* 1 *Ed.*3.15.

An Abbot had a Franchiſe of Gaol-delivery, and he kept the Priſoners too long, and would not be at charge to make deliverance, it was adjudged a cauſe of Forfeiture, 8 *H.*4.18.

A man had a Priſon, and he kept Priſoners for Felony after they were acquitted and had paid their Fees; it was adjudged a Forfeiture of the Franchiſe for ever, 20 *Ed.* 4. 6.

If a Franchiſe of taking Toll be abuſed, as if exceſſive Toll be taken, it is a Forfeiture, *Weſtm.* 1. 30. So if they take for Murage more then they ought to take by their Grant, (*Idem.*) If the Town be the Kings, he may ſeiſe the Franchiſe. So if it be another Lords, and be done by his conſent. If it be a Bailiff or other Officer, he ſhall reſtore as much more as was taken, and ſuffer forty days Impriſonment, (*Idem.*)

4. What Franchiſes a Subject may have, or not, and how.

No Subject ſhall have power to pardon Felonies or the Acceſſaries, or any Outlawry for ſuch offences; nor to make any Juſtices of Eyre, Aſſiſe, Peace, Gaol-delivery. But other Franchiſes a Subject may have, ſuch as the goods of Felons, of Fugitives, of outlawed perſons, Waifs, Eſtrays, Deodands, Treaſure-trove, Wreck, Markets, Fairs, Leets, and the like. But ſome of theſe may be had by Preſcription, ſome muſt be had by Patent from the Lord Protector. See *Brownlow*, 2 *par.*219.

Ad quod damnum, what.

Ad quod damnum, is a Writ which ought to be ſued before the King grant certain Liberties, as a Market Fair, or the like, that may be prejudicial to others; and by this it may be enquired of. *Terms of the Law.*

Non omittas, what.

It is a Writ lying, where a Sheriff doth return upon a Writ to him directed againſt a perſon dwelling in a Franchiſe; That he hath ſent unto the Bailiff of the Franchiſe that hath the Return of Writs, and he hath made him no anſwer, or hath not ſerved the Writ: Then the party may have this Writ to command the Sheriff to enter upon the Liberty, and to execute the Writ himſelf, which otherwiſe he could not do without ſubjecting himſelf to an Action of the Caſe. And withall the Bailiff of the Franchiſe is to be warned; and if he come not at the Return of the Writ, then all the Writs that go forth afterwards in that Suit, ſhall be with a *Non omittas*. 13 *Ed.*1. 39. *St. Lincoln*, 9 *Ed.*2. 2 *Ed.*3.5.

Sect. 4. *Quo Warranto*, what.

It is a Writ for the King, lying where one hath no title to a Franchiſe, as having never any, or having forfeited what he had, to recover it into his hands. For by this Writ the party that doth take the Franchiſe, is required to ſhew by what title he doth hold it; and if he do not appear, then the King may ſeiſe the Franchiſe *more diſtrictionis*, by the Sheriff; and then the party hath a time by a *Replevin* to avoid that Seiſure; and if he doth it not within the time, then he doth loſe the Franchiſe for ever. And if it be found that he do uſe the Franchiſe without the Title, then the Judgment is, he ſhall be ouſted of it. If it be found he hath abuſed it, then the Judgment ſhall be, that he hath forfeited it. And this is to be brought before the Juſtices of Eyre or of Aſſiſe; and therefore the allowance of a Franchiſe before them bindeth the King: Otherwiſe upon a Suit in the Common-Pleas. See *Cromp. Jur.* 144, 145. *Bro. Q. Warranto*, 5. 7.

When Franchiſes ſhall be ſaid to be extinct, and how.

If the King grant any Privilege, Liberty or Franchiſe, which be in his own hands as parcel of the Flowers of his Crown; as the Goods and Chattels of Felons, Fugitives, or outlawed perſons, Waifs, Eſtrays, Deodands, Wrecks, and the like: If theſe come again to the King, they are extinct, and the King hath them in right of his Crown; and if they were appendant before, the appendancie is now gone. *Contra* of Fairs, Markets, Hundreds, Leets, Parks, Warrens, and the like, be they appendant to Manors or otherwiſe in groſs, they are not extinct by unity in the Kings hand, *Co.* 9. 25, 26. *Dyer* 44. *Plow.* 219: 15 *Ed.* 4. 7.

For the duty, office, and charge of Bailiffs of Franchiſes in making Returns, &c. and how they are to be puniſhed for their miſdemeanor herein, See *Stat.* 5 *H.* 6. *c.* 2. 42 *Ed.* 3. *ch.* 11. 2 *H.* 5: 3. 13 *Ed.* 1: 39. 12 *Ed.* 1. 5. 1 *Ed.* 3. 5. 27 *H.* 3: 24, 25:

For the Power of the Sheriff and others within Franchiſes and priviledged places, See *Stat.* 27 *H.* 3. *c.* 24.

What things Lords of Franchiſes may do, and have within their Franchiſes, See *Stat.* 1 *Jac.* 22. 27 *H.* 6. 5.

See more of theſe things in *Preſcription*, *Extinguiſhment*, *Grant*, *Toll*, *Forfeiture*, *Priviledges*.

For Liberties and Franchiſes in general, theſe things are further to be known out of the old Statutes of *Mag. charta*, 1. 9. 37. *St. de quo Warranto*, 18 *Ed.* 1. and 30 *Ed.* 1. *De tallagio non concedendo.* Time of *Ed.* 1. *c.* 4. 1 *Ed.* 3. 2. 9. 14 *Ed.* 3. 1. 1. 25 *Ed.* 3. 3. 1. 6 *R.* 2. 1. 1. 2 *H.* 4. 1. 27 *H.* 8. 24. 32 *H.* 8. 20.

1. That the people of the Nation are to have and enjoy their antient Liberties without impeachment.

2. The Citie of *London*, and other antient Cities and places are to have and enjoy their antient Liberties and Privileges.

3. The Clergie, and all others of every rank and order, are to enjoy their Liberties, and the King was not to impeach them in any ſort by *Quo Warranto*, or otherwiſe.

4. Men that claimed Franchiſes, were to have ſhewed them, and had allowance of them before the Juſtices of Aſſiſe, or they were to be ſeiſed.

CHAP.

CHAP. XCII.

Of Games and Playes.

AS to Playes and Games, theſe things are to be known. *Playes and Games.*

1. None may keep or maintain a houſe or place of unlawful Games, under pain of Forty ſhillings; and none may haunt or uſe ſuch places, in pain of Six ſhillings eight pence.

2. Juſtices of Peace without, and Head-Officers within Corporations, may ſearch for them that keep, or ſuch as haunt ſuch houſes ſuſpect; and finding any, put them in Priſon until they put in good Security never to keep or uſe ſuch Games again.

3. No Artificer or his Journyman, Husbandman, Apprentice, Labourer, Servant at Husbandry, Mariner, Fiſherman, Waterman, or Servingman ſhall play at Tables, Tennis, Dice, Cards, Bowls, Cloſh, (*i.*) caſting of a Bowl at nine Pins of wood, or nine Shank-bones of an Oxe or a Horſe, Coiting, Logating, or any other unlawful Game out of Chriſtmaſs, or then out of their Maſters houſe or preſence. in pain of Twenty ſhillings. And none may play at Bowls in open place out of his Garden or Orchard, in pain of Six ſhillings eight pence. *Cloſh*, what.

4. The Servant by his Maſters leave and with him, or other Gentleman reſorting to his Maſters houſe, may play at Cards, Dice or Tables.

5. The Maſter that hath an Hundred pounds, may licenſe his Servant to play at Bowls or Tennis.

6. All Licences of the King to keep ſuch houſes and places are void, *St.* 33 *H.* 8. *c.* 9. 2 & 3 *P.* & *M. c.* 9. *Archery.*

7. Parents and Maſters muſt provide for their Sons and Servants, betwixt ſeven and ſeventeen years old, a Bow and two Shafts, and cauſe them to exerciſe ſhooting in pain of Six ſhillings eight pence.

8. Sons and Men-ſervants betwixt ſeventeen and ſixty years old, ſhall be furniſhed with a Bow and two Arrows, and uſe to ſhoot therewith, under pain of Six ſhillings eight pence. *Buts.*

9. The Inhabitants of every Town ſhall continue their Buts in good repair, in pain of Twenty ſhillings for every three moneths default.

See other things of Bows, Bow-ſtaves, Arrow-heads, and Fletchers, *St.* 33 *H.* 8. *c.* 9. 8 *Eliz.* 10. 13 *Eliz.* 14. 1 *R.* 3. 11. 12 *Ed.* 4. 2. See *Arrow-heads.*

May-poles.

10. No May-Poles may be ſet up or continued, *Ord.* 6 *April* 1644.

Cock-matches.

11. No Cock-matches, nor meetings for Cock-fighting may be; but it may be puniſhed for an unlawful Aſſembly, *Ord. March* 17. 1653. See more in *Guns*, *Hawking*, *Hunting*, and my *Juſtice of Peace* Book, 2 *par.* in the *Charge.*

12. Bear-baitings, Bull-baitings, Enterludes, Common-Playes, are declared to be unlawful Games by the Statute of 1 *Car.* 1. and therefore to be puniſhed by 33 *H.* 8. 9. Cock-matches are forbidden by *Ord.* 31 *March*, 1654. *Stage-Playes.*

13. All Stage-Players are to be whipped as Rogues, and enter into Recogniſances with Sureties not to do ſo again: And he that is preſent at ſuch a Play, forfeits five ſhillings. *Ord. Feb.* 11. 1647. *St.* 3 *Jac.* 21.

14. How all ſports are forbidden on the Lords day, See *Lords day.* And for Playes and Games, *Stat.* 2 & 3 *Ed.* 6. *ch.* 14. *St.* 12 *R.* 2. *ch.* 6. 2 & 3 *Ph.* & *M.* 9.

CHAP.

CHAP. XCIII.

Of Gard or Ward, Gift and Grant.

Sect. 1. *Gard or Ward.*

THis word *Gard* in French ſignifieth a Cuſtody. And ſometimes it is applied to them that attend upon the ſafety of the Lord Protector. Sometimes it is applied to them that have the Education of Children under age, or of an Ideot. And ſometimes alſo it is taken for a Writ of Ward, of which there are three ſorts; A Writ of *Rights of Ward*, *Ejectment of Ward*, and *Raviſhment of Ward*. In the ſecond ſignification alſo it is moſt commonly applied to the Wardſhip of ſuch an Infant, whoſe Anceſtor held his Land by the Tenure of *Capite* or Knights ſervice; and by reaſon of that Tenure, his Child, be it male or female, muſt be in the cuſtody of his Lord during its minority.

Gardein, what.

The kinds. *Gardein in Chivalry*, what.

And hence it is, that he that hath the protection and education of ſuch an Infant, is called a Gardein. For a Gardein is one that hath the wardſhipor keeping of any perſon, or that which is his, or both. And of Gardeins there have been divers kinds; as Gardein in Chivalry, which was one that had the wardſhip and cuſtody of an Heir, an Infant, whoſe Anceſtor died ſeiſed of Land held of the King *in capite*, or of a common perſon by Knights ſervice. Both which kind of Wardſhips are taken away by an Order of the Lords and Commons in Parliament, 24 *Febr.* 1645. in theſe words:

It is this day Ordered by the Lords and Commons aſſembled in Parliament, That the Court of Wards and Liveries, and all Wardſhips, Liveries, Primer-Seiſins, and Ouſterlemains, and all other charges incident or ariſing for or by reaſon of Wardſhips, Livery, Primer-Seiſin, or Ouſterlemain, be from this day taken away: And that all Tenures by Homage, and all Fines, Licences, Seiſures, and Pardons for Alienation, and all other charges incident thereunto be taken away: And that all Tenures by Knights ſervice either of the King or others, or by Knights ſervice or Socage in Capite *of the King, be turned into free and common Socage.*

And therefore we ſhall not need to ſay any thing to them. There are other Gardeins that do yet continue; as Gardeins in Socage, Gardeins in Nurture, Gardeins in Nature. Some make more, and diſtinguiſh Gardeins into Gardeins by Common-Law; ſo were Gardeins in Chivalry: By Nature, as the Father to his eldeſt Son: By Socage and becauſe of Nurture, as Father or Mother, without aſſignation: Or appointed by Will or by Cuſtom, as Orphans in Cities. So that ſome Gardeins are made by the Law, and ſome by the Will of the Anceſtor. See for theſe Diviſions, *Co.* upon *Lit.* 76. 88. *D. & S.* 149. *Co.* 5. 126. 6. 71.

Grantee of a Ward, what. *Committee of a Ward*, what.

He that had a Wardſhip by a Tenure *in capite* committed to him by the King, was called the Grantee of a Ward: And if it had been committed by the King, he was called a Committee of the Ward.

Sect. 2.

The Wardſhip by Tenures *in capite* and by Knights ſervice being gone, we ſhall not ſtay upon them to ſhew the office and duty of the Gardeins; nor where ſuch Heirs of Anceſtors that do hold Lands by theſe Tenures ſhall be in Ward, or not; nor where there ſhall be a Wardſhip for a third part, upon the Statutes of 32. and 34 *H.* 8. Nor where the Heir ſhall be out of Ward, or not; or of Marriage, Forfeiture, or value of Marriage: But we ſhall paſs it over, and ſay no more but this, That theſe Tenures had many Incidents annexed to them; as Wardſhip of Body, Marriage, Aid, Homage, Eſcuage, Primer-Seiſin, and drew to them the body, lands, and diſpoſal and profit of the marriage of the Infant, which was ſo much as the Lord tendred in marriage: And this the Heir at his full age was to pay the Lord, or the Lord was to keep the Land for it; or he might have had a Writ called *à valore maritagii*. And if the Heir had married himſelf during his Minority, being of years of conſent, without the conſent of his Guardian, he had forfeited to his Gardein the double value of his Marriage. See for all this, *Co* 6. 70. *Merton, ch.* 7. *Dyer* 255. 2 *H.* 7. 9 *Co.* 5. 127. *Weſtm* 1. 22. *Co.* upon *Lit.* 76, 81, 82, 83. *Co.* 2. 93. 10. 83. 11. 24. 8. 371. and many other Books.

Aid. Marriage. Eſcuage. Valore maritagii, what.

Forfeiture of Marriage, what.

A Gardein in Socage, is he that hath the Wardſhip or Cuſtody of an Heir an Infant, whoſe Anceſtor died ſeiſed of Land held of the King, or any common perſon by Socage-tenure, or in that nature, as by Petit-Serjeanty, Copy of Court-Roll, or the like. And as to this, theſe things are to be known. *Gardein in Socage, what.*

1. This Wardſhip is by reaſon of Tenure alſo, and ſhall go to the next of kin unto whom the heritage by his death may not deſcend: As if Land deſcend on the part of the Father, then the next of kin on the part of the Mother ſhall have the Wardſhip, and ſo on the other ſide; and not ſuch a Kinſman as may have or hope for any benefit by his death. *The nature of this Wardſhip, and the power and duty of this Gardein.*

2. This Wardſhip doth differ from the Wardſhip of Heirs of *Capite* and Knights-ſervice land. For, 1. The Gardein in Chivalry and by Knights-ſervice had all to his own uſe, and was to hold it till the Heir, if he were a Son, were one and twenty years old. But this Gardein is to hold and take all the profits of the Land till the Heir be fourteen years old only, and then he muſt account for and pay all the profits to the Heir: And after fourteen years of age, the Ward or his Executors or Adminiſtrators may call the Guardian to an Account, by a ſpecial Action of Account given in the Caſe; for which ſee *Account*. 2. If the Gardein in Chivalry or by Knights ſervice had died during the minority of the Heir, the Executors or Adminiſtrators of the Gardein muſt have had it as a Chattel. But in this caſe, not the Executor or Adminiſtrator, but the next of kin to the Heir: And if it were a Woman Covert that had it, not her Husband, as in the former caſe, but the next of kin to whom the heritage may not deſcend, ſhall have it. 3. A Gardein in Chivalry or Knights-ſervice might have ſold or granted away his Wardſhip; but this Gardein in Socage cannot grant away this Wardſhip to another. And if the Wife be this Gardein, and ſhe and her Husband let the Land, and the Husband die; the Wife may enter and avoid the Leaſe. 4. If the Gardein *in capite* or Knights-ſervice had married the Heir within age, the Gardein ſhould have had the benefit of it. But if Gardein in Socage marry his Ward within fourteen years of age, he muſt account to the Heir for the Marriage alſo, and pay ſo much as any man *bona fide* had offered, or would have given in Marriage. *Accompt.* *Chattel.*

3. But in this they both agree; that the Gardeins duty and office is to give the Heir education, and to preſerve his Inheritance and the Writings of his Land, and not to make any waſte or deſtruction upon the Land.

4. If an Anceſtor be ſeiſed of Rent-charge, Rent-ſervice, or Common, or ſuch things which lie not in Tenure, and die, his Heir within fourteen years old; in this caſe the Heir may chooſe his Guardian: But if he be ſo tender of years as not able to chooſe, it were fit the next of kin to whom the heritage may not deſcend did diſpoſe him and it, unleſs the Father by will otherwiſe appoint it. But if there be a Gardein in Socage for other Land, it were fit he were Gardein for all. But whoſoever ſhall receive theſe Rents, muſt be accountable to the Heir in an Action of Account for them. See for all theſe things, 28 *Ed.* 1. *Stat.* 1. *Marlb. c.* 17. *Co.* upon *Lit.* 87. *Lit. l.* 2. *c.* 4. *Plow.* 296. *Co.* upon *Lit.* 87. 89. And the danger of ſuch a Guardians betraying of his Truſt in the marrying of his Ward, See *Infant* and *Marriage*.

Guardian in Nurture, is he that is made ſo by Will; which is where a man holdeth goods or lands not held *in capite*, Knights-ſervice, or in Socage, and giveth them to his Child, and doth by his Will appoint a Guardian to the body of his Child till ſuch a time: And this being confirmed by the Ordinary, was wont to be admitted by our Law. And if the Father did not appoint one till his age of fourteen years, then the Ordinary did appoint one. *Sect. 3. Tutor or Gardein in Nurture, what.*

But now the Law will do the ſame without the Ordinary, that then it did with the Ordinary. At fourteen years old and after, the Infant may chooſe his own Guardian: Alſo the Father by his Will may appoint what Guardian he pleaſe for his goods or lands held in Socage; but for Copihold-lands, the Cuſtom of the place muſt be obſerved. See for theſe things, *Co.* of *Copihold, ſect.* 22. *Noy* 122, 123.

The

Gardein in Nature, what.

The Gardein in nature is the Father, who is to have the Wardſhip of his Son and Heir apparent ſo long as he liveth; for during the Fathers life, the body of ſuch Son was not to be in Ward to any other body, but in ſpecial caſes. See *Plow.* 295. 304. *F.N.B.* 90. 143. 33 *H.* 6. 55. See *Infant.*

Gard by cauſe of Gard, what.

This is where one hath the Wardſhip of a Minor, becauſe he is Gardein to his Lord, being likewiſe in his Minority. *Old N.B.* 94.

Droit de Gard, what.

Right of Gard is a perſonal Action, or a Writ to recover the Body or Land of an Heir that ſhould be in Ward to him, by reaſon of a Tenure *in capite* or Knights ſervice. It is called alſo (as it ſeems) *Droit de cuſtodia terræ & hæredis*, or *de communi cuſtodia. F.N.B.* 139. *Old N.B.* 89. And if it be for the Body, this Writ lieth for a Gardian in Socage, *Merton c.* 6. *Co.* 9. 129.

Droit de cuſtodia terræ & hæredis; or, *de communi cuſtodia.*

Ejectment of a Gard, or *Ejectione cuſtodiæ* what.

This is a perſonal Action or a Writ lying for a Gardein in Chivalry or Socage, where he is put out of the Land, and not out of the Body, for his relief herein. *F.N.B.* 141.

Raviſhment del Gard, what.

This is a Writ lying where the Body is taken away, and not the Land; and by this the Gardein will recover the Body, if he be not married; and if he be, he ſhall recover damages. *Co.* upon *Lit.* 89. *F.N.B.* 139.

Intruſion del Gard, what.

This is where the Heir before his age, and before he hath ſatisfied, the Lord doth enter upon him and put him out, being Guardian in Chivalry or by Knights ſervice, *F.N.B.* 197.

Ætate probanda, what.

Ætate probanda, was a Writ of Office to enquire again of the full age of an Heir, being found to be within age by one Office, when he is able to prove he is of full age, *F.N.B.* 157.

Diſparagement, what.

This was taken for a wrong done by the Guardian in Chivalry to his Ward, by marrying him or her within age of conſent to any unworthy perſon, and unfit for him or her: For by this means the Guardian might have loſt his Ward and all the profits of his Wardſhip, *Merton c.* 6, 7. *Co.* on *Lit.* 80.

Sect. 4. *Livery*, what.

Livery was, where the Kings Tenant *in capite* is dead, and his Heir is of full age at the time of his death, or he hath been in Ward, and is now become of full age; in this caſe he had the poſſeſſion delivered unto him by a Writ out of the Kings hands, which was called a Writ of Livery. And Primer-Seiſin was the right the King had to the firſt poſſeſſion of Lands and Tenements held of him in chief, whereof his Tenant died ſeiſed, until the Heir had performed the Service due for it. Theſe Liveries and Primer-Seiſins, and all charges incident and ariſing thereby being taken away by the ſame Parliament-Order, we paſs them by.

Primer Seiſin, what.

Ouſter le main, or *Amoveas manum*, what.

Ouſter le-main did ſignifie a Judgment given to him that tendered a Traverſe, or ſued a *Monſtrans de droit*, or a Petition. For when it did appear upon the matter diſcuſſed, that the King had no right to the Wardſhip he ſeiſed, then Judgment was given in Chancery, that the Kings hands ſhould be amoved; and thereupon an *Amoveas manum* was awarded to the Exchequer, that the Heir ſhould have his Land again. For after the death of the Kings Tenant, the courſe was to enquire by office, and by Inqueſt of Office the death and Tenure was found, and ſo the King was entitled to the Wardſhip. And this Office found, if it had been falſe, might have been avoided by a Traverſe, *Monſtrans de Droit*, Petition or Pleading. Of which you may read, *Stamf. prer.* 73. 42. *Finches ley* 324. *Plow.* 488. and in many other places. This alſo by the general Order aforeſaid is taken away, and therefore we paſs it over. So alſo Licence for Alienation, Eſcuage, Aid, Homage, Fealty, and the reſt of the things incident to this Tenure is gone.

Aid.
Homage.

Meſne-profits or *Rates*, or *Iſſues.*

Meſne-Rates, Profits or Iſſues of Lands, was nothing elſe but the Profits of Land which the King was to have for a time, until he were ſatisfied ſome duties: As when the Heir of his Tenant *in capite* being of full age did die before tender of his Livery, until the time of his death. And ſo in ſome caſes he was to be anſwered from the time of the Title found; as upon an Alienation in Mortmain, from the time of the Alienation as it is found by Office; and upon Letters-Patents annulled for inſufficiencie, from the time of the Grant, as it is found by Office. See for this, 41 *Ed.* 3. 11. 11 *H.* 4. 5. 33 *Ed.* 1. *de Eſceatoribus.* 28 *Ed.* 3. *c.* 4. *Dyer* 308.

Diem

Diem clauſit extremum is a Writ that did lie where the Kings Tenant, that held of the Crown in *Capite*, or by Knights Service, or in Soccage died, then this Writ was directed to the Eſcheator to enquire of what Eſtate he died ſeiſed, who was his next Heir, and his Age, and the certainty of the Land, the value, and of whom it was held, and who took the profits. And this Writ was to be ſued out within a year after the death of the party, and could not be had after that time, but then there muſt be had the Writ called a *Mandamus*, which is of the ſame nature. And in caſe where the Anceſtor had died the Kings Ward, there muſt have been ſued out the Writ called a *Devenerunt*, which is of the ſame nature, and differeth in circumſtance onely. But all theſe Writs are now uſeleſs, the Tenure *in Capite* being taken away. *Sect. 5.* *Diem clauſit extremum*, what. *Mandamus*, what. *Devenerunt*, what.

Quæ plura was a Writ uſed onely where an Office was fonnd by a former Writ, and ſome of the Land was left out of the Office, then this was given to ſupply it. So alſo was the *Melius Inquirendum* to ſupply a Defect in a former Office, found by virtue of another Writ. And the *Datum eſt nobis intelligi*, was a Writ that did lie where upon a former Office the Land was found to be held of another Lord, and not of the King. And there were Records to ſhew they were held of the King, that it might be again enquired of. But all theſe Writs are laid aſide at this day. *Quæ plura*, what. *Melius Inquirendum*, what. *Datum eſt nobis intelligi*, what.

Of a Gift.

THis word importing no more, then the transferring of the property of a thing from one to another, is of larger extent then a Feoffment, which is always applied to an immovable thing; for this is often applied to movable things alſo, as Trees, Cattle, Houſhold-ſtuff, *&c.* The property whereof is, and may be altered as well by Gift, as by Sale or Grant. And in this ſenſe, a Gift is ſometimes by the Act of the Party, as when one man doth give a thing to another. And this is, or may be either by word or by writing: And ſometimes it is by Act of Law, as when a Woman is married to a Husband, or one is made Executor to another; in theſe caſes by the marriage onely, and taking of the Executorſhip, the Law gives all the Goods of the Woman to the Husband, and of the Teſtator to his Executor. So where one doth take my Goods as a Treſpaſſer, and I recover damages for them upon a Sute in Law; in this caſe the Law doth give him the property of the Goods, becauſe he hath paid for them. But this word Gift is ſometimes taken more ſtrictly, and applied to a conveyance or paſſing of an Eſtate of Lands or Tenements to another in Tail, wherein this word *Dedi* is moſt commonly uſed. And then he which doth ſo give the Land, is called the Donor, and he to whom it is given, the Donee. And this for the moſt part is by Deed, though it may be otherwiſe. And for theſe Deeds of Gift of immovable or movable things, ſee *Deed* and *Grant in toto*, wherein all the Learning touching this matter is involved. And ſo we paſs to a Grant. *Gift*, what. *Donor*, *Donee*.

Of a Grant.

THis word taken largely, is where any thing is granted or paſſed from one to another. And in this ſenſe it doth comprehend Feoffments, Bargains, and Sales, Gifts, Leaſes, Charges, and the like; for he that doth give, or ſell, doth grant alſo. And thus it is ſometimes in writing, or by Deed, and ſometimes it is by word without writing. But the word being taken more ſtrictly and properly, it is the Grant, Conveyance, or Gift by writing of ſuch an Incorporeal thing as lieth in Grant, and not in Livery, and cannot be given or granted by word onely without Deed: Or it is the Grant of ſuch perſons as cannot paſs any thing from them but by Deed, as the King, Bodies Corporate, *&c.* And this albeit it may be made by other words, yet it is moſt commonly made by this word [*Grant*] as being moſt proper to this purpoſe. *Co. ſuper Littl.* 172. 9. *Finches Ley* 79. *Grant*, what.

Know therefore that amongſt Hereditaments, ſome are ſuch as are ſaid to lie in Livery, *i.* ſuch as whereof Livery of Seiſin may be made, as Manors, Houſes, Lands, *&c.* And ſome are ſuch as do not lie in Livery, *i.* whereof no Livery of Seiſin can, nor need to be made, but they paſs by the Delivery of the Deed, without

any more, and of this ſort are Rents, Reverſions, Services, Advowſons in groſs, and the like; which things cannot paſs from man to man without Deed or matter of record, which is of a higher nature then a deed.

Grantor, Grantee. The Kinds.

And he that makes this grant is called the Grantor, and he to whom it is made is called the Grantee, *Co. ſuper Lit.* 49.

It is taken here in the largeſt ſenſe, as that which doth comprehend both. And ſo ſome grants are of the land or ſoile it ſelf, and ſome are of ſome profit to be taken out of or from the ſoile, as Rent, Common, &c. And ſome are of goods and Chattels, and ſome are of other things, as Authorities, elections, &c. And they are made ſomtimes by matter of Record, and ſometimes by Deed or writing in the country, and ſometimes by word without either. Some grants alſo tend to charge the grantor with ſomething he was not charged with before, and ſome to paſs ſomething out of him to the Grantee, and ſome tend to diſcharge the Grantee, of ſomething wherewith he was charged or chargeable before, and whereof he is now hereby diſcharged.

3. Things neceſſarily requiſite to every good grant.

Regularly theſe things are requiſite in every good grant or gift. 1. That there be a Grantor, Donor, &c. and that he be a perſon able to grant, and not diſabled by any legall or naturall impediment. 2. That there be a Grantee, Donee, &c. and that he be a perſon capable of the thing granted, and not diſabled to receive it. 3. That there be a thing granted, and that the thing be ſuch a thing as is grantable. 4. That it be granted in that order and manner that Law requireth; as where the thing is not grantable without Deed, that it be done by Deed. And if it be by Deed, that the Deed have apt words to deſcribe and ſet forth the perſon of the Grantor, and Grantee, and thing granted, &c. and that all neceſſary circumſtances, as ſealing, and delivery, and livery of ſeiſin, and atturnement where it is needfull, bee obſerved. 5 That there be an agreement to, and acceptance of the grant or thing granted by him to whom it is made, and for default in either of theſe particulars a grant may be void: *In acquirendo rerum dominio, ſcilicet quòd donationes non valent, licèt ſint inceptæ, niſi ſint perfectæ.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever ſince the making of it; in this caſe the grant may be good, notwithſtanding ſome legall defect in ſome of theſe particulars. *Co.* 11. 73: *Plow.* 555. *Perk. ſect.* 1. *Bro. Grant.* 89.

4. What ſhall be ſaid a good and ſufficient grant, gift, or ſale. Or not. 1. For the manner of it. And what may be granted without Deed Or not. And how. Rents, Services &c.

Corporations, as Dean and Chapter, Major and Communalty, and ſuch like, regularly can neither grant Lands, Goods, or chattels, but it muſt be by Deed. But the Grantees of ſuch perſons, and all other common perſons may grant or give any thing which doth lie in livery, as Manors, Houſes, Lands, and ſuch like things in Fee-ſimple, Fee-tail, for life, for years, or at will, by word without Deed. And if a Leaſe be made of any ſuch thing for life or years, with a remainder over in Fee-ſimple, Fee-tail, or for life; it is good, albeit the ſame be done by word without any Deed in writing. *Perk. ſect.* 64. 4 *H.* 7. 17. *Plow.* 150. 16 *H.* 7. 3. *Litt. ſect.* 60.

Such things as are ſaid to lie in Grant & not in Livery, generally cannot be granted or given, had or taken without Deed unleſs it be in ſome ſpeciall caſes. And therefore Rents and ſervices, and ſuch like things which are in groſs, and not incident to ſome other thing, may not be granted without a Deed. And therefore if a Rent-Charge be granted unto me for years, I may not grant this Rent over without Deed. And if there be Lord and Tenant of errable Land by fealty, and the ſervice of yeelding the tenth ſheaf of Corn before it be ſowed; the Lord cannot grant this ſervice for years without Deed. But if a Rent, or any ſervice be parcell of, or incident to a manor or any other thing which is Grantable without Deed; in this caſe by the grant of the principall by word, this thing may paſs as belonging thereunto without any Deed. Alſo Rents or ſervices may be granted upon a partition by one coparcenor to another without Deed. *Brownl.* 1 *part* 40. *Co. ſuper Lit.* 49. *Dyer.* 139. *Perk. ſect.* 61. 60. 63. *Brown. Grant* 59.

Reverſion or Remainder.

A reverſion cannot be granted in Fee-ſimple, Fee-tail, for life, or years without Deed, unleſs it be in caſe where it is parcell of a Manor. But a reverſion may be granted upon a partition by one coparcenor to another without any Deed. And the ſame Law is of a remainder. And therefore if one make a Leaſe for life or years

to

to one, the Remainder in fee-ſimple, fee-taile, or for life, to another without deed, howſoever this be a good remainder in the firſt creation without deed, yet this remainder cannot be granted over without deed. *Perk. Sect.* 61. *Dier.* 174. *Plow.* 433. *Bro. Grant.* 104.

Advowſon, Tithes &c.

A Parſonage or Rectory, albeit it conſiſt of nothing but Tithes, and the like, beſides the Church and Church-yard, and it hath no houſe nor glebe belonging to it, yet may be granted without deed in fee-ſimple, for life, or years: and then the Tithes and offerings will paſſe as incident. But the Tithes alone, or a portion of Tithes, oblations, mortuaries, or obventions are not grantable by themſelves without deed. And therefore a leaſe paroll of Tithes, albeit it be but for years, is not good. And if the Parſon agree with one of his Pariſhioners, that he ſhall have his own Tithes; this is not a good grant of the Tithes, neither may it be pleaded or uſed ſo; but perhaps by way of agreement a Pariſhioner may retain his Tithes. And if a Leſſee for years of Tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron *Denham*, 2 *Car.* at *Sarum* Aſſiſes. And yet it is held that a Parſon may grant his Tithes from year to year to him that is to pay them without any Deed, but this is by way of retainer. But this grant or agreement muſt be made to and with the party himſelf that is to pay the Tithe, and not with another: neither can this intereſt bee aſſigned or a ſtranger take advantage of it, as hath been agreed in the caſe of *Hawkes* and *Braſield*, *Paſch.* 3. *Jac. B. R. See Brownl.* 1 *part.* 98: 2 *part.* 11. 15 *H.* 7. 8. 16 *H.* 7. 3. 19 *H.* 8. 12. 21 *H.* 6. 43. All this was agreed 36 *El. B. R.* 21. *Jac. B. Mich.* 8. *Jac. Dr. Longworths caſe.*

By way of Agreement Tithes may paſs for years without deed, but not by way ofleaſe without a deed; but a leaſe for one year may be of Tithes without a deed.

An Advowſon in groſſe cannot be granted without deed; yea the grantee of the grantee of an Advowſon is to ſhew both the deeds. But an Advowſon is grantable upon a partition between coparcenors without deed. And an Advowſon incident to a manor, or peece of Land is grantable with the manor or land without any deed. The next avoidance to a Church is not grantable without deed. *Plow.* 150. 9 *Ed.* 4. 47. 21. *Ed.* 3. 38. 11 *H.* 4. 3. *Dier.* 29. 10. *Co.* 11.

Common of Paſture &c.

Common of Paſture, of Eſtovers, turbary, Fiſhing, &c. cannot be granted in fee-ſimple, fee-tail, for life, or years, unleſſe it be in caſe of partition, or of appendancy as incident to ſome corporall thing without deed. And therefore if a man grant by word of mouth to me Common for twenty beaſts in his manor; this is not good. Neither if it be granted to me by deed, may I grant this over to another without deed.

But if a man have Common of Paſture appendant or appurtenant to his Land; in this caſe he may grant his Land with the Common appendant by word only without any deed. Franchiſes, as Fairs, Markets, Courts, Warrens, and the like, or the profits thereof are not grantable without deed. But it ſeems a Hundred is grantable without deed, for that is *liberum tenementum*. The profits of a Mill, County, Ferry, Corody, or the like, are not grantable without deed. *Perk. Sect.* 61. 15 *H.* 7. 8.

Franchiſes, and ſuchlikethings.

Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entrie to any reall or perſonall thing are not grantable at all, but by way of releaſe to the tenant of the land &c. by which means it may be extinguiſhed: but this may not be neither without deed. And therefore if a man take my goods as a treſpaſſor, or I deliver him my goods to keep, and after I will give theſe goods to him; I cannot do this without deed. *Brownl.* 1 *part.* 40 6 *H.* 7. 9. *Dier.* 91. 126. *Doct. & St.* 16.

Things in action, &ſuch like things.

An election, Condition, covenant, aſſent, Licence, or liberty cannot be created and annexed to an eſtate of inheritance or freehold without deed. *Dier.* 281.

Offices.

A priviledge to hold Land for life without impeachment of waſt, is not grantable without deed. Offices for the moſt part are not grantable without deed. And yet ſome inferiour offices, as Stewardſhips, Bailiwicks, and the like are, for ſuch officers a Lord of a Manor may retain by word without deed. *Co.* 9. 9.

Chattels. Moſt Chattels reall and perſonall, may be given and granted without deed. And therefore if a man by word of mouth grant, give, or ſell me his Leaſe for years, the Wardſhip of body and Land, or the Wardſhip of Land that he hath by reaſon of a Tenure by Knights ſervice, or by grant from the King, or grant or ſell me the trees ſtanding upon his ground, the Corn growing upon his Land, his horſe, ſword, plate, or other houſhold-ſtuffe; this is a good grant or gift. But the Wardſhip of the body of an heir onely, cannot be granted without deed. So a next preſentation cannot be granted without deed. *Perk. Sect.* 57. 60. *Bro. Done i. Dier.* 370. 5 *H.* 7. 35. 36. *Plow.* 150,

What by the ſame deed. If one grant his reverſion of land to one, and by the ſame deed granteth a rent out of the ſame land to another, and delivereth the deed to both of them at one time; this is good, and ſhall enure firſt as a grant of the rent to one, and then as a grant of the reverſion to the other. *Plow.* 540.

If one convey Land to another, and the grantee by the ſame deed doth grant a rent or common to the grantor out of the ſame land conveyed; this is as good as if it were by another deed. *Dier*, 6.

By what words of grant. *Dedi & Conceſſi* be the moſt apt words for all kind of grants, yet it may be by other words, and the grant is good as by thoſe words. *Co. ſuper Litt.*

The beſt way in Grants is to grant by words of preſent time in the preſent tenſe as well as in the preterperfect tenſe. But a grant by words of the preterperfect tenſe only, as by *Dedi & Conceſſi* only without words of the preſent tenſe is good. 35 *H.* 6. 11.

2. In reſpect of the perſon of the grantor &c. and the naming of him. And who may be a grantor. And how. Touching this part two things are requiſite.

1. That the grantor be a perſon able.

2. That if the Grant be by Deed, that he be ſufficiently deſcribed and ſet forth eithe by his proper names, or elſe by ſome other matter of diſtinction. Note therefore that whoſoever may be a feoffor, may be a grantor. And any natural, politique, or corporate body (not prohibited by Law, as Monke, Frier, Woman covert, infant, and ſuch like) may be a grantor, donor &c. And the grants of ſuch perſons will be good. *See Feoffment Numb.* 4. *Perk. Sect.* 3.

Alien. An Alien may, and is able to grant or give any thing that he is capable of, to have or take by grant or gift.

Perſon attaint or outlawed. A perſon attainted of treaſon or felony may give or grant his land; and this is good againſt all others beſides the King, and the Lord of whom his Land is held. And he may grant or give his goods to relieve himſelf in priſon, and this will be good againſt all others, and the King and Lord alſo. A perſon outlawed in a perſonall Action may give or grant his goods or chattels, and the gift or grant will be good againſt all others but the King. *Perk. Sect.* 26.

Woman covert. The Queen may without the agreement of the King make grants, gifts &c. of her Lands or goods, but another woman that hath a husband cannot give, or grant her Lands or goods without her husbands conſent, unleſſe it be in ſome ſpeciall caſes:

And albeit ſhee doe recite by the deed that ſhe is ſole and not covert, yet this will not help. And if the caſe be ſo that by agreement between her and her husband there be a certain portion of her husbands Lands or goods allotted unto her to diſpoſe of, and manage at her pleaſure, yet ſhe alone without her husband can make no good grant or gift of any part of theſe Lands or goods. But if ſhe grant any thing by Fine, and the husband doe not avoid it during the coverture; this grant will binde her after his death. And if ſhe make a gift or grant of her husbands goods, it is thought this is not good untill her husband agree to it. *Co. ſuper Litt.* 3. *Perk. Sect.* 8. 20. 41.

An infant cannot make any gift or grant &c. that is good, but in ſpeciall caſes, for if he maketh any grant or gift that taketh effect by the delivery of the deed onely, as if he grant a rent-charge out of his land, or make a feoffment with a letter of Attorney to give livery of ſeiſin, or give or ſell his horſe, and the buyer or donee take him himſelfe; theſe are void *ab initio.* And if the grant, or gift take effect by the delivery of his own hand, as if hee make a feoffment and give livery of ſeiſin himſelfe,

himſelfe, or ſell a horſe and deliver him with his owne hands; this is voidable by the Infant himſelfe, or others that ſhall have his right &c. But if an Infant grant any thing by Fine; this muſt be avoided during his minority, or elſe it cannot be avoided at all. 9 *H.*7. 24. 26 *H.*8. 2. *Perk. Sect.* 12, 13, 14. 19. 7 *H.* 4. 5: *See cha.* 2. *Numb.* 6.

All Grants that are made by Dureſſe, are voidable by the parties themſelves that make it, or others that have their eſtates &c. But if it be done by Fine, it is good and unavoidable. *Perk. Sect.* 16. Dureſſe.

All Gifts, Grants, &c. made by deed in the Country by thoſe that are *de non ſane memorie* are good againſt themſelves, but voidable by thoſe that are their heires, executors, or have their eſtate. But if it be by Fine, it is good and unavoidable. *Co.* 123. 124. *See cap.* 2. *Number* 6. *Non ſane memorie.*

A man that is borne dumbe, or dumbe and deafe, if he have underſtanding, may by delivery of the Deed and making of ſignes make a good Grant, Gift, &c. But a man that is borne deafe, dumbe and blind cannot. *Perk. Sect.* 25.

A Baſtard may give or grant as well as any other man, after he hath gotten a name by reputation. *Perk. Sect.* 26. Baſtard.

A Parſon may grant any thing belonging to his Parſonage for no longer time then for his owne life, and therein likewiſe but during his reſidency, albeit he have the conſent of the Patron and ordinary. *See Leaſe.* Parſon.

Neither the head without the members of a Corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the Lands belonging to their Corporation. *Perk. Sect.* 31, 32. 33. Corporation.

One executor or Adminiſtrator may give or ſell any of the goods of the deceaſed, and this is good to bind all the reſt. *See Executors.* Executors.

What Grants Eccleſiaſticall perſons may make of their Eccleſiaſticall Lands, huſbands of the Lands of their wives, and tenants in taile of their Lands intailed, See in *Leaſe.*

The name of the perſons in Grants is ſet downe, only to diſtinguiſh perſons and to make the perſon intended certaine: and therefore howſoever it be beſt and moſt ſafe to deſcribe the perſon by his true and proper name of Baptiſme, and alſo by his Sirname, and if it be a Corporation, by the true name whereby the Corporation is made; yet miſtakes in this caſe unleſſe they be very groſſe, will not make void the grant. Miſnaming.

Nihil facit error nominis, cùm de corpore conſtat. And therefore if one that is a Baſtard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common eſteeme then his own right name, or is uſually called by another name then his true name in the place where he lives, in theſe caſes they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; ſome have ſaid he may grant by either of theſe names. *Sed Quære.* And if *John* at *Stile* grant by the name of *W:* at *Stile*; this grant is good. *Et ſic de ſimilibus. Co* 6. 36. *on Lit.* 3 *Perk. Sect.* 41. *Co. ſuper Litt.* 3. *Perk. Sect.* 39. *Co. ſuper Litt.* 3. And theſe grants are good, eſpecially when there is ſome other addition to make it more certain, as when a Duke, Marqueſs, Earle, or Biſhop, grant by their names of honour or dignity, and grant without any name, or with a falſe name of baptiſme, as when the Duke of *Suffolke* by the name of the Duke of *Suffolke*, without any more words, or by the name of *William* Duke of *Suffolke*, when his name is *John*, or the Biſhop of *Norwich* grant ſo; theſe are good grants, becauſe there is but one ſuch Duke, and one ſuch Biſhop within the kingdome. *Fitz grant.* 67. *Perk. Sect.* 42. So if a Deane and Chapter, Mayor and Communalty grant by the name of their Corporation without any addition of Chriſtian or Sirname; it is good. And eſpecially then alſo are theſe grants good, when the true name doth appear in ſome other part of the deed. *Perk. Sect.* 40. As when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the ſame deed doth grant by the name of *Thomas* at *Stile*, Or *Alice* at *Stile* reciting by her deed that ſhe is a feme covert when in truth ſhe is ſole.

But if an ordinary man grant by his Sirname only without any name of baptiſme,

or

or by his name of baptiſme without any ſirname at all; in theſe and ſuch like caſes for the moſt part the grant will be void for incertainty, unleſſe there be ſome other matter in the deed to help it, or ſome matter done *ex poſt-Facto* to ſupply it; for in ſome caſes where the thing granted doth lie in livery, ſuch a miſtake or incertainty in the grant may be holpen by the livery of ſeiſin upon the deed afterwards. And ſo alſo it is in the names of Corporations: for if the variance and miſtake by omiſſion or alteration be only in ſome ſmall matter ſo as it is literall and verball only, the grant will not be hurt by it. But if the miſtake or omiſſion be in the ſubſtance of the name; the grant may be void by it. And therefore if *Decanus & Capitulum eccleſiæ cathed' Sanctæ & individ. Trin. Caerlil.* grant by the name of *Decanus eccleſiæ cathed. Sanctæ Trin. in Caerlil. & totum capitulum eccleſiæ prædict.* this is good: *Et ſic de ſimilibus*: for if the ſenſe doth ſtill remaine either expreſly or by neceſſary implication, and the deſcription be ſuch as doth import a ſufficient and certaine demonſtration of the true name of the Corporation according to the foundation thereof, it ſufficeth. But if any of the ſubſtance or eſſence of the name be omitted, *contrà*. And therefore if a Corporation incorporate by the name of *Præpoſiti & collegii regalis coll. beate Mariæ de Eaton juxta Windſor*, grant by the name of *Præp' & ſociorum Colleg. regalis de Eaton &c.* leaving out *Collegium beatæ Mariæ*; this grant is void. 3 *H.6.* 26. *Perk. Sect.* 38, 42. *Co.* 6. 65, 10. 122, 11, 19. *Dier.* 150. *Co.* 10. 124.

3. In reſpect of the grantee & the naming of him. And who may be a grantee &c. And how.

Touching this part, three things are requiſite. 1. That the grantee be a perſon capable. *i.* that he be a perſon in being at the time of the grant made, and not diſabled by any legall impediment to take by the grant. *Co. ſuper Litt.* 2, 3. *Perk. Sect.* 43. *See infeoffment. cap* 9. *Numb.* 4.

2. That if the grant be by deed, he grantee be ſufficiently named, or at the leaſt ſet forth and diſtinguiſhed by ſome circumſtantiall matter, and that he be ſo named or deſcribed, as that he may be capable by that name whereby he is ſet forth.

3. That he himſelf and not a ſtranger doe take by the ſame grant. Note therefore that all naturall and politique or corporate bodies that are not diſabled by law may be grantees. And all perſons that may be grantors may be grantees: And ſome others that cannot grant or give, yet may take or receive. And a grant made to one, two, three, or twenty ſuch perſons is good. A Grant of land or rent in poſſeſſion to the right heires of *I. S*, *I. S.* being then living is void, for there is nor can be any ſuch perſon *in rerum natura*, for no man can be an heire to another that is living. But ſuch a grant to one in remainder is good, if ſo be that *I. S.* die before the particular eſtate end and before the remainder happen. So if a grant be to him or her that ſhall be the firſt child of *I. S.* and he have no child at the time of the grant, this is void.

So if a grant be made to the wife or child of *I. S.* when there is none ſuch, it is void.

As if a grant be to *I S*, and to his firſt borne ſon, or to *I. S.* and her that ſhall be his wife, and he hath at the time of the grant neither wife nor ſon; in theſe caſes the grant is void as to the wife and ſon, and *I. S.* ſhall have all by the grant. *Co* 1. 101. *Perk. Sect.* 52, 54. *Co.* 2. 31.

Alien.

An Alien may be a grantee; but if any thing be granted unto him whereof he is uncapable, as any eſtate of lands in fee-ſimple, for life, or years, he cannot hold it, but the King will have it from him. *Co. ſuper Litt.* 2.

Pre rogative. Perſons attaint

A perſon attainted of treaſon or felony before or after attainder may be a grantee, but he cannot hold the thing granted; for if the King or Lord will he may have it from him. So alſo perſons outlawed in perſonall actions may be grantees of lands, or goods, but the King will have the profits of the Lands and property of the goods. *Co. ſuper Litt.* 2. *Perk. Sect.* 48.

Woman covert.

A woman covert may be a grantee; but her husband may by his diſagreement avoid the grant. And yet if he doe not avoid it in his life time, the grant will be good: and he that will have the grant to be void, muſt ſhew that the husband did diſagree to it. *Perk. Sect.* 43. *Co. ſuper Litt.* 2.

Infant.

An infant may be a grantee, for this is preſumed to be for his advantage.

And

And yet at his full age he may agree to it and perfect it, or diſagree to it and avoid it without any cauſe ſhewed, *Perk. ſect.* 4. *Co. ſuper Lit.* 2.

A man *de non ſane memorie* may be a Grantee as well as any other man, and it ſeems theſe grants cannot be afterwards avoided. But ſuch men may not be Grantees of Offices of truſt and ſuch like things. *Co. Idem.* Men *de non ſane memorie.*

A Baſtard, perſons deformed having humane ſhape, leapers, and ſuch like may be Grantees of Lands or Goods, &c. as other men may be. *Co. Idem.* Baſtard.

An Hermaphrodite may be a Grantee according to the moſt prevailing Sex. *Co. Idem.* Hermaphrodite.

A Clerk convict, and a man impriſoned may be a Grantee as well as any other. And ſo alſo may a villaine of the King or of a common perſon, but he cannot retain the thing granted, for the King or Lord may have it from him if he will. Clerk convict. Villaine.

But Monkes, Friers, and ſuch like perſons cannot be Grantees, for they are utterly diſabled. *Co. ſuper Lit.* 3. *Perk. ſect.* 48. 51.

Regularly it is requiſite that the Grantee be named by his names of Baptiſme and Sirname, and ſo it is moſt ſafe; and ſpeciall heed muſt be taken to the name of Baptiſme, for that a man cannot have two or more names of Baptiſme as he may of Sirnames. *Co. ſuper Lit.* 3. And yet in ſome caſes though the name be miſtaken, the grant is good. As if a grant be to *I. S.* and *Em* his wife and her name is *Emelin, Bro. Noſme.* 9. Or a grant is made to *Afred Fitzjames* by the name of *Etheldred Fitzjames Bro. Confirmation.* 30. Or a grant be to *Robert* Earle of *Penbrooke* where his name is *Henry*; or to *George* Biſhop of *Norwich* where his name is *John*; *Co.* 6. 65. 27 *E.* 3. 85. Or a grant be to a Mayor and Communalty, or a Deane and Chapter, and Mayor or Deane is not named by his proper name, *Co. ſuper Lit.* 3. Or a grant be to *I. S.* wife of *W. S.* where ſhe is ſole; all theſe and ſuch like grants are good, for in this caſe the rule doth hold, *utile per inutile non vitiatur. Dyer* 119. And if one be baptized by one name, and after confirmed by another; yet a grant to him by his firſt is good, *Co. ſuper Lit.* 3. And ſo alſo ſome think of a grant to him by his ſecond name. *Sed Quære* of this. Alſo when a Baſtard hath gotten a name by reputation, a grant may be made to him by that name, and it is good. Miſnaming or not naming.

If a grant be made to *W.* at Stile by the name of *W.* at Gappe; this is a good grant notwithſtanding this miſtake. 9 *E.* 4. 43. *Fitz. Grant* 23.

But where a grant doth intend to deſcribe the perſon of the Grantee by his proper name and doth omit or miſtake his Chriſtian name or ſirname; in this caſe for the moſt part the grant is void unleſs there be ſome ſpeciall matter to help it, as in the caſes before. And yet if the grant doe not intend to deſcribe the Grantee by his known name, but by ſome other matter, there it may be good by a certain deſcription of the perſon without either ſirname or name of Baptiſm. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the ſecond ſon, or to the youngeſt ſon, or *Seniori puero*, or *omnibus filiis*, or *filiabus* I. S. or *omnibus liberis* I. S. or *omnibus exitibus I S.* or to the right Heirs of *I. S.* or to the next of bloud of *I. S.* in theſe caſes grants made to theſe perſons in theſe words are good, for the perſon is certainly enough deſcribed. And if a Leaſe be made to *I. S.* for life, the remainder to him that ſhall come firſt to Pauls ſuch a day, or to him that *I. S.* ſhall name in three daies; if in theſe caſes any one doe come to Pauls that day, or be named by *I. S.* within three daies, and the particular eſtate doth ſo long continue; this is a good grant of the remainder, *Id certum eſt quod certum reddi poteſt.* But if a grant be made in theſe words, *viz.* Incertainty.

To foure of the pariſhoners of Dale; or *Deo & eccleſiæ de D.* or to two of the ſons of *I. S.* and he hath many ſons; or to *I. S.* or *W. S.* in the disjunctive; theſe and ſuch like Grants as theſe are utterly void for incertainty.

And if a gift or grant of goods be to the pariſhioners of Dale in theſe words; it ſeems this is good; but if a grant or gift of Land be made to them by theſe words, it ſeems this is void. And ſo alſo it is of a grant of goods to the Churchwardens of a pariſh, this is held to be good: but otherwiſe it is of a grant of Land to them. A baſtard is capable by that name whereby he is uſually called, and therefore a grant to him by that name is good. And a right heire,

or

or one that ſhall be the firſt iſſue of *I. S.* that hath no child, is capable of a remainder by that name, but of Land in poſſeſſion he is not capable by that name. And a baſtard as the reputed Son of *I. S.* may take by a grant to *I. S.* and his iſſue. A Biſhop may take by the name of a Biſhop without any other name. But if a grant be made to the pariſhioners or inhabitants of Dale, or *probis hominibus de* Dale, or to the commoners of ſuch a waſt, or to the Lord and his Tenants bond and free; theſe are not good grants; for albeit theſe perſons are capable, yet are they not capable by theſe names.

If a Grant be to Chriſts Church in *Oxford*, this is good to the Corporation albeit the name of the Corporation be *Eccleſia Chriſti in Univerſitate* Oxford. *Co. ſuper Lit.* 3. *Perk. ſect.* 54. *Bro. Grant* 65. *Done* 17. *Dyer* 337. *Perk. ſect.* 55. 56. *Bro. Don.* 31. *Grant.* 172. *Done* 50. *Fitz. Done. Perk. Sect.* 55. 52.

If there be two Grantees and one of them doe take by the Deed it is ſufficient, but if the grant be to one that is no party to the Deed and not to the Grantee himſelf; in this caſe albeit the Grantee and he to whom the grant is made be capable and never ſo well deſcribed by their names yet is the grant void, for no grant can be made but to him that is party to the Deed, except it be by way of remainder.

And therefore if a man make a leaſe for term of life, and after the Leſſor grant to a ſtranger that the Tenant for life ſhall have the Land to him and his Heirs; this Grant is void. *Et ſic de ſimilibus.* And yet it ſeems in ſome caſes if one of the grantees be party to the Deed that another Grantee that is no party to the Deed may take with him. And therefore the caſe was: *Robert* gave the reverſion of Lands which *Agnes* his Wife did hold for her life to *Stephan de la More*, *Habendum poſt mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejuſdem Roberti*; in this caſe it was adjudged that albeit *Joane* were not named before the *Habendum*, yet that ſhe ſhould take in Tail with her Husband: *Doct. & Stud.* 94. *Co.* 1. 15, *ſuper Lit.* 231. *New Terms of the Law.* 251. 252: 5 *E.* 3. 17. *Co. ſuper Lit.* 21.

4. In reſpect of matter touching the thing granted, charged, &c.

Touching this point theſe things are requiſite.

1. That the thing whereof the grant is made be grantable, and that both in reſpect of the nature of the thing it ſelf, and alſo of his eſtate that doth grant it, for in ſome caſes albeit the thing for the quality of it be grantable, yet in reſpect of the eſtate and property that the owner hath in it, it is not grantable.

2: That if it be by Deed, it be ſufficiently diſtinguiſhed and named.

1. In reſpect of the nature of the thing granted. And what things are grantable over or chargeable. Or not.

Amongſt things that are grantable ſome are grantable *de novo* and in their firſt creation, but not tranſmiſſible nor aſſignable afterwards. And ſome are grantable at firſt in their originall creation, and aſſignable over afterwards from man to man *in infinitum.*

All things that may be granted by Fine and whereof a fine may be levied, may be granted over from man to man. *See Fine Numb. 6. part.* 3. *See in expoſition of the Termes of Grants ſupra, cap.* 5 *Numb.* 15. *Bro. Done* 10.

1. In reſpect of the nature of the thing it ſelfe.

All the things that are before obſerved to be grantable by or without Deed, are grantable over from man to man. And therefore all corporal and immoveable things that lie in livery, as Manors, Meſſuages, Cottages, Lands, Meadowes, Paſtures, Woods and the like are grantable in Fee-ſimple, for life, or years at firſt and aſſignable over again at the pleaſure of the Grantee. Alſo trees, and Emblements are grantable. And a man may grant the veſture or herbage, *i.* the graſs of his ground and not the ground it ſelf. And a man that is ſeiſed in Fee of a houſe may give or ſell the timber, ſtone, &c. of the houſe, and the Donee or Grantee may take it after the death of the Donor. Alſo all incorporeall things that lie in Grant, as Rents, ſervices and the like, are grantable over in Fee-ſimple, for life, or years, and therefore Rents or ſervices reſerved upon any eſtate and Rents granted out of Lands are grantable over *in infinitum.* And if a man have a Rent reſerved on a particular eſtate, he may grant over parcell of it. But a Rent or Service ſuſpended cannot be granted. Neither can a man grant a Rent iſſuing out of a Rent. If a Rent be granted to me, I may grant it over to a ſtranger before I be ſeiſed of it; and this grant is void.

Rents, Services,

But

But an Annuity it ſeemes is not grantable over after the firſt creation of it. And yet if an Annuity be granted to *I. S.* and his aſſignes *pro conſilio*; it ſeemes this Annuity is grantable over. Advowſons are grantable in fee-ſimple, for life, or years, from man to man *in infinitum*. Alſo the preſentation to a Church before the Church is void is grantable; but when the Church is void, that Turne is not grantable, for it is then in the nature of a thing in Action. Alſo Rectories, and tithes, and portions of tithes, and penſions are grantable from man to man *in infinitum*. *Stat.* 32 *H.* 8. *cap.* 7. *Perk. ſect.* 90.

Reverſions and Remainders are grantable from man to man in fee-ſimple, fee-tail, for life or years. And if I have a tenant for life of three houſes; I may grant the reverſion of two of them. And if I have the reverſion of three houſes and four acres of land; I may grant the reverſion of two houſes and of two acres of land. And if tenant in taile be of an acre of land the remainder to his right heires, he may grant over this remainder by it ſelf; and yet it is ſuch a thing as the tenant in taile himſelf may bar by a common recovery. But if a grant be of land to *I. S.* for years the remainder to the right heires *I. D.* and *I. D* is living; this remainder is not grantable ſo long as *I D*, doth live. *Perk. ſect.* 73. 88. 87. Reverſions & Remainders.

Commons, of paſture, of turbary of fiſhing, of eſtovers, are grantable in fee, for life or years, from man to man *in infinitum*. And yet if a common in groſs and without number be granted to a man and his heires; it ſeemes this is not grantable over to another man. But if common for a certain number of beaſts be ſo granted, it ſeemes the law is otherwiſe, and that this is grantable over in caſe where the firſt grant is to the grantee only, and not the grantee and his aſſignes. *See Brownl:* 1 *part* 32. 42. 43. 2 *part.* 226 227. *Perk. ſect.* 103. *Per* 2 *Judges againſt one Hil.* 16. *Jac. B. R.*

Offices are grantable at firſt; but the great Judiciall Offices of the Kingdome, as the Offices of the Lord Keeper, Chiefe Juſtices, or chiefe Baron, or of other of the Juſtices or Barons, and ſuch like, are not grantable over to others, neither may they be Executed by deputies. But the Sheriffes office albeit it be not grantable over, yet may it be executed by deputy. *Perk ſect.* 101. The reverſion of an office is not grantable by a Subject as it is by the King, yet a Subject may grant an office *Habendum* after the death of the preſent officer; and this is good. *Per Lord Keeper & 2 Chief Juſt. M.* 5, *Car. in cancellaria. Co. ſuper Litt.* 233. *Perk ſect.* 101. The inferior offices alſo that are offices of truſt, eſpecially if they concern the perſon of the grantor, howſoever they are grantable at firſt, yet are they not grantable over by the officer to any other, unleſſe they be granted to them and their aſſignes: and of this ſort are the offices of Steward, Bailife, Receiver, Sewer, Chamberlaine, Carver, and the like: neither may theſe be executed by deputy, but where the grant is ſo. Offices. Prerogative.

Licences, and authorities are grantable at firſt for the lives of the parties, or for years. But the grantees of them cannot aſſigne them over. And therefore if power be given to me to make an award or livery of ſeiſin; I may not grant over this power to another. And if licence be granted me to walke in another mans garden, or to goe through another mans ground; I may not give or grant this to another: 12 *E.* 7. 25. 13 *H.* 7. 13. Licences, Authorities, &c.

A bare poſſibility of an intereſt which is incertaine, is not grantable. And therefore if one have a terme of years in land, and by his will deviſe it to *I. S.* for his life; and afterwards to me for the reſidue of the yeares; or deviſe it to *I. S.* if he live ſo long as the terme ſhall laſt, and if he die before the Terme end the remainder to me; in theſe caſes ſo long as *I. S.* doth live, I cannot grant over this poſſibility. So if a leaſe be made to me and my wife for life, the remainder to the ſurvivor of us; I may not grant this remainder over to another man. But ſuch a poſſibility being coupled with ſome preſent intereſt is grantable over. And therefore if *A.* have foure houſes in execution upon a ſtatute, and by courſe of time it will endure thirteen years, and after two of the houſes are evicted by Elegit for fifteen years; in this caſe he that hath this execution upon the ſtatute may aſſigne over his intereſt in theſe two houſes, for after the execution by the Elegit is ſatisfied, *A.* ſhall Poſſibilities.

have the two houſes againe untill he be ſatisfied. *Co.* 4. 66. 5. 24. *Dier.* 244. *Co.* 10. 51.

Incidents.

The Lord cannot grant the wardſhip of the heire of his tenant whiles the tenant is living. *Perk. Sect.* 50, Thoſe things that are inſeparably incident to others are not grantable without the thing to which they are ſo incident and belonging. And therefore a Court Baron which is evermore incident to a Manor is not grantable without the manor it ſelf: common appendant to land is not grantable without the land it ſelf to which it doth belong: and common of eſtovers appendant to a houſe is not grantable without the houſe it ſelf to which it doth belong. 1 *E.* 4. 10. *Perk. Sect.* 104. 5 *H.* 7. 7.

Suſpended things.

A rent, ſervice, or other thing whiles it is wholly in ſuſpenſe, is not grantable. And therefore if the Lord diſſeiſe the tenant, or the tenant enfeoffe the Lord upon condition; the Lord cannot grant over the Seigniory during this ſuſpenſion. But if one have a rent in fee out of my land, and he purchaſe the ſame land for life or years; in this caſe it ſeemes the rent is grantable, even whiles the eſtate of the land doth continue. So if the tenant make a leaſe for years or life of the tenancy to the Lord; in this caſe the Lord may grant the Seigniory notwithſtanding. And yet if the tenant make a leaſe to another man for life, and the Lord grant the Seigniory to this tenant for life in fee; in this caſe it ſeemes the grantee of the Seigniory cannot grant it over, becauſe it was never in *eſſe*, 16 *H.* 7. 4. *Co. ſuper Litt.* 314. *Bro. Grant.* 173. *Perk. Sect.* 88, 89.

Franchiſes.

Franchiſes, as views of Frank pledge, Perquiſites of Courts, Leets, Conuſance of Pleas, Faires, Markets, goods of felons, waiſes, eſtrayes, Hundreds, Ferries, or Paſſages, Warrens, and the like, are grantable over from man to man in fee, for life or years, *in infinitum*.

Things in action.

Things in action, and things of that nature, as cauſes of ſuit, rights and titles of entry are not grantabl over to ſtrangers but in ſpecial caſes, nor is a Judgment aſſignable. *Brownl.* 1. *part.* 33. And therefore if a man have diſſeiſed me of my land or taken away my goods; I may not grant over this land or theſe goods untill I have ſeiſin of them againe. Neither can I grant the Suit which the law doth give to me for my reliefe in the caſes to another man. So if I make a feoffment to another man on condition that if I doe ſuch a thing I ſhall have the land againe; in this caſe I may not before or after the time of performance of the condition, grant over the condition to another. But all theſe things I may releaſe to the parties themſelves, for it is a maxime in law, that every right title, or intereſt in *præſenti* or in *futuro* by the joint act of all them that may claime any ſuch right, title or intereſt, may be barred or extinguiſhed: *Co.* 5. 24. 10. 48. *Co. ſuper Lit.* 214. *Dier.* 244. *Perk. Sect.* 86, 87. 85. *Bro. Done.* 27 24, 48. *Co.* 6. 50. And in ſome caſes a grantee of a reverſion may take advantage of a condition annexed to an eſtate for life or years. If a man owe me money on an obligation, or the like; I cannot grant this debt to another: but I may grant a letter of atturney to another man to ſue for it and receive it, or I may grant the writing it ſelf to another, and he may cancell it or give it to the obligor. *See Condition Co. ſuper* 232. *Perk. Sect.* 86. A preſentation to a Church after the Church is become void is not grantable, for it is in the nature of a thing in action. *Dier.* 283. And if a man take my goods from me, or from another man in whoſe hands they are, or I buy goods of another man and ſuffer them in his poſſeſſion and a ſtranger taketh them from him; it ſeemes in theſe caſes I may give the goods to the treſpaſſor, becauſe the property of them is ſtill in me. *Perk. Sect.* 92 *Fitz. Done.* 3. 7.

Perſonall things.

Truſts and confidences which are perſonall things for the moſt part, are not grantable over to others. And hence it is alſo that offices of truſt and confidence are not grantabl over but in ſome ſpecial caſes where they are granted to a man and his aſſigns or where they are granted to a man and his heirs, *Perk.* 99. *Pl.* 379. And hence it is alſo that a Wardſhip by reaſon of a terme in ſocage, which by the law is given to the next of kin, is not grantabl over to any other perſon by the Gardian in Socage. *Plow.* 293.

Entire things.

Some things are ſo entire, that they cannot be ſevered by grant. And therefore if a man hold three acres of land of me by twelve pence rent, and I grant the ſervices of the third Acre; this is void, and he ſhall have all or none, for I cannot ſever the tenure: But if a man hold land of me by homage, fealty, eſcuage, and

a certain rent; in this caſe I may grant the rent & keep the ſeigniory. *Fitz. Grant.* 19. 76

A villaine is grantable for life, or years; and if the villaine during the eſtate of the grantee purchaſe land in fee, the grantee ſhall have it for ever as a Perquiſite, albeit he have but an eſtate for life in the villaine it ſelfe. *Perk. Sect.* 94. Villaines.

All chattels reall and perſonall regularly are grantable from man to man *in infinitum*, as leaſes for years be they preſent or future, wardſhips of tenants in Capite, or by Knights ſervice, trees, Oxen, horſes, plate, houſholdſtuffe, and the like. Alſo trees, graſſe and corne growing and ſtanding upon the ground, fruit upon the trees, wooll upon the ſheeps back is grantable. *Dier* 58. *Plow.* 142. 147. *Perk. Sect.* 91. *Dier.* 305. *Perk. Sect.* 90. Chattells reall and perſonall.

If a man ſell me ten load of wood in his wood to be taken by his aſſignment; or ſell me three acres of wood towards the north-ſide of the wood; by this grant in theſe words, I have ſuch an intereſt as is grantable over. If I make a leaſe by deed of a houſe to another, and therein it is agreed between us, that if the rent be not paid me by ſuch a time I ſhall enter into the houſe and take and ſell the goods there as mine own to pay the rent; it ſeemes this is a good grant of the goods and that I may doe according to the agreement. And if one that doth hold land of me, grant to me by deed indented that I ſhal diſtrain for my ſervice in all his land, this is a good grant. *Co.* 5. 24. *Fitz. Bar.* 280. Diſtreſſe.

A man may give or grant money, As if *I*, deliver one mony on condition that if he aſſure me of ſuch land he ſhall have it, otherwiſe that he ſhall redeliver it to me again, in this caſe if he make the aſſurance he ſhall have the mony, If not, I may have an accompt for it. *Fitz. Grant.* 6: *Fitz. Done.* 11. Money.

Such things as are *feræ naturæ*, as Conies, Hares, Deere, and ſuch like, are not grantable at all. *Bro. Done.* 34. *Ferænaturæ.*

A Parſon of a church may grant his tithes for years, and yet they are not in him. *Perk. ſect.* 90 Tithes.

A man may give or grant his Deeds, *i.* the parchment, paper and wax to another at his pleaſure, and the Grantee may keep or cancel them. And therefore if a man have an obligation, he may give or grant it away and ſo ſever the Debt and it. So Tenant in Fee-ſimple may give or grant away the Deeds of his Land, and the Executor in the firſt caſe, and the heir in the laſt caſe hath no remedy. But a Tenant in Tail of Land cannot give or grant any of the Deeds belonging to the Land intailed no more then the land it ſelfe. One may give or grant Apparell, and it is ſaid if one make apparell for another, and put it upon him to uſe and weare; this is a gift or grant of the apparell it ſelf. *Co. ſuper Litt* 232. *Trin* 38. *El. B. R.* 25 *H.* 8. 5. 1 *H.* 7. *Doves caſe.* 1 *H.* 4. 31. *Fitz. Bar.* 179. Deeds. Apparell.

If one grant to another all the wooll of his ſheep for ſeven years; this is a good grant. *Perk. Sect.* 90. Wooll.

If one being a Parſon give to another all the wooll he ſhall have for tithe the next year; this is a good grant. *Fitz Grant.* 40.

If one grant to another his horſe or his cow in the disjunctive; this is a good grant notwithſtanding this incertainty, and the donee ſhall have election, and by that make the grant good. *See Certainty. Bro. Done.* 19. Incertainty.

Any eſtate that a man hath in fee-ſimple, fee-taile, for life, or years in any Lands &c. or any rent, or profit apprender out of the ſame is grantable from man to man *in infinitum*. And he that hath any ſuch eſtate of any lands may charge it with any rent or profit to be taken out of it as long as the eſtate of the land doth laſt. But an eſtate at will is not grantable over. And if an eſtate be made to a man and his heires without the word Aſſignes, yet he may aſſigne it at his pleaſure, for Aſſignes is included within Heires. 2. In reſpect of the eſtate, property and poſſeſſion of the grantor.

An *Intereſſe termini*, i. a leaſe for years to commence in *futuro* is grantable before the terme doth begin, whether it be a leaſe of the land it ſelf, or any rent or other profit out of it. 22 *E.* 4. 37. *Perk. Sect.* 91.

The intereſt or eſtate that a man hath by extent, is aſſignable from man to man at pleaſure. *Co.* 4. 64.

The reverſion upon an eſtate taile is grantable. And yet the tenant in taile in poſ-

ſeſſion by the ſuffering of a common recovery may bar him in reverſion of any fruit of it. *Co. 6 S. Geo. Curſons caſe Co. 1. Altonwoods caſe.*

If an eſtate be made of land upon condition, as if *A.* make a feoffment to *B.* on condition that if *A.* pay twenty pound he ſhall have the land againe: in this caſe *A.* and *B.* together may at any time before the performance of the condition joine together and grant this land, or charge it with any rent &c. and this will be good, for it is a maxime in law, Fee-ſimple land may be charged one way or other. And in this caſe *B.* may grant over his eſtate alone, but it will be ſubject to the condition. And if *B.* grant a rent out of the land to a ſtranger, and after the condition is performed and the feoffor enter; in this caſe he ſhall avoid the rent. But in this caſe *A.* cannot grant, for he hath nothing but a poſſibility. If one enfeoffe divers to the uſe of his ſon and heire upon condition and before the time of performance of the condition the father and ſon joine to grant or charge the land, this is a good grant or charge. *Co. 1. 147. 10. 48, 49. Lit. chap. Confirmation. Co. 1. 147.*

If the tenant in taile and he that is next in remainder in fee joine in the grant of a rent charge in fee, and after the tenant in taile doth die without iſſue; in this caſe this is a good grant and charge againſt him in remainder. And if *A.* doth bargaine and ſell land to *B.* by indenture and before inrolment they doe joine to grant a rent charge to *C.* by deed; in this caſe this is a good charge and grant whether there be any inrolment or not. And ſo if donor and donee in taile grant a rent charge out of the land, and then the donee die without iſſue; in this caſe the grant is good to bind the donor. *Co, ſuper Litt. 45. Co. 10. 48. 49.*

If Land be granted to two men & to the Heirs of their two bodies begotten; in this caſe albeit they have ſeverall inheritances after their death, yet neither of them can grant away his eſtate after his life, for they are divided only in ſuppoſition of law. *Co. ſuper Litt:* 182.

A leaſe is made to the Father during his life and the lives of 2. of his ſones, in this caſe, this leaſe ſhall continue after the death of the father, and the father may aſſigne away all the eſtate. *Goldsb.* 387.

If one grant me a hundred Coards of wood to be taken by his Aſſignement; it ſeems before Aſſignement I may not grant away this wood over to another. *Goldsb.* 184. And if the grantee dye before Aſſignement, the grant is void, and his executors ſhall not have it.

One Coparcener of a ſeigniory may grant his part to a ſtranger.

If two Jointenants be of a plow land, and one of them doth grant to a ſtranger common of paſture for beaſts without number to be taken in the ſame land; this is void. *Perk. Sect. 73. Perk. Sect. 103.*

Iointenants. If two Jointenants be of a reverſion, and one of them grant the whol, this is void for a moity. If a man grant, or charge that which is none of his, and that wherein he hath no property, it being in the grantee or a ſtranger; the grant is void. And therefore if a man grant a rent charge out of the Manor of Dale, or grant a reverſion of land, and in truth the grantor hath nothing in the manor of Dale, or in the land, in this caſe the grant is void. And albeit the grantor doe afterward purchaſe the Manor, or the land, yet this will not make the grant good. But if the grant be by Fine, or by indenture, there in ſome caſes it ſhall be good by way of Eſtoppell. And Eſtoppell. in this caſe albeit the party recite that it is his owne, yet this will not mend the caſes.

And therefore if a man recite that he hath a rent of ten pound a year, and then grant five pound a yeare parcell of it; in this caſe if he have no ſuch rent, the grant is void: *Perk. Sect. 80. Perk. Sect. 65. Dier. 12. 33.*

Servant. A Shepherd, Bailif, or Parker cannot give or grant away the goods of his maſter without authority. And yet it ſeemes the ſervant of a Taverner or Mercer may give or grant his Maſters Wine or Wares. And if a wife give or grant the goods of her husband; this is a good gift or grant untill the husband diſagree to it, and by his Husband and Wife. agreement it is made good for ever: *Bro. Done. 56. 4.*

If a man have a leaſe for years of land, and make a leaſe for life of it or charge it for longer time then the leaſe for years doth laſt; in this the grant is good

good for ſo long as the Leaſe for years doth laſt, and no longer. But if he make a Leaſe for life and give livery of ſeiſin, he doth forfeit his eſtate. *Plow.* 525.

Regularly a man cannot grant, or charge that which is not in his own poſſeſſion albeit he have a right to it. And therefore if a man be diſſeiſed of his Land, and before he hath entred into or recovered the land he doth grant or give the land or his right to the Land to a ſtranger, or grant a rent charge out of the Land to a ſtranger; in theſe caſes the grants are not good. And yet ſuch grants by fine may be good by way of Eſtoppell. And by a releaſe alſo the right may be extinct. But if one that hath a reverſion upon an eſtate for life, and he grant a rent iſſuing out of this Land; in this caſe the grant is good, and the charge ſhall faſten upon the Land after the eſtate of the Tenant for life is ended. And if a man grant Common, or Rent, notwithſtanding that a ſtranger take the Rent or uſe the Common at the time of the Grant, yet this grant is good, for a man cannot be out of poſſeſſion of theſe things but at his pleaſure. And if a Leaſe for years be made to me: I may grant away my eſtate before my entry: And if the Leaſe be to begin at a day to come; I may aſſign over my intereſt before the day come, for in this caſe the intereſt is in me from the time of making of the leaſe. Alſo I may give or ſell my goods that I have not in poſſeſſion, and therefore if a man take my goods out of mine or another mans poſſeſſion; I may afterward give or grant theſe goods to him or another man, and this grant or gift is good. *Perk. Sect.* 92. 98. *Co. ſuper Litt.* 46. *Hil.* 18. *Jac. B. R. per.* 2 *Juſtices. Perk. ſect.* 92. 93. *Fitz. Done* 3. *Bro. Done* 13. *Dyer* 90. 30. *Co.* 4. 62. 63. *Dyer* 305 20 *H.* 6, 22. *Perk. ſect.* 59. *Co.* 11. 50.

Eſtoppell.

A Leſſor cannot give or grant the trees growing on the ground of his Leſſee for life or years without the licence of the Leſſee, except they be firſt cut down by the Leſſee or ſome other, for then he may. And if there be leſſee for life, and the Leſſor give the trees growing on the ground, and after the Leſſee for life dieth; in this caſe the Donee cannot take them, for that at the time of the gift a property of them was in the Leſſee. But if a Tenant in Fee-ſimple give or grant the houſes ſtanding, or trees growing on the ground he hath in his poſſeſſion; in this caſe the Grantee or Donee may take them after the death of the grantor, and that albeit they be not cut or taken down before his death. And yet if the Tenant in Tail give or grant the trees grown upon his intailed Land, and the Donor die before the trees be cut; in this caſe the Donee or Grantee cannot cut them afterwards. Howbeit if ſuch a Tenant in Tail give or grant his emblements of Corn growing on the ground, the Donee may cut and take them after the death of the Tenant in Tail. And if the Tenant in Tail give or grant his trees, and die before they be cut, and afterwards before the iſſue in Tail enter into the Land the Donee or Grantee cut them and take them away, in this caſe the iſſue in Tail can bring no action of treſpaſs againſt the Donee or Grantee for the trees. But perhaps if the trees be not removed off the ground, he may take them.

Tenant for life. Trees.

Tenant in Tail.

Emblements.

If two Coparceners be of an advowſon, and the one doth preſent, and then he doth grant the next preſentation: this is a good grant: but by this grant doth not paſs the next he hath to grant, for his companion muſt have the next. So if one be ſeiſed in Fee of an advowſon, and he hath a wife, and he grant the third preſentation; this is a good grant: but it ſhall be taken for the third: he may grant what is the fourth, for the wife is to have the third for her dower, *Dyer* 35. 15 *H.* 7.

Preſentation.

If a man have granted a thing once, he cannot afterwards grant it again. And therefore if a man give or grant me a horſe firſt by word of mouth, & after grant him to me by Deed; this ſecond grant is void, and therefore if there be any fault in this grant in writing, it is not material. And if a man grant to me common of paſture without number in his ground, and after make the like grant to another; this ſecond grant is void as to me, albeit it be good againſt the Grantor. And if one grant the next preſentation to a Church after the death of the preſent Incumbent, and after grant the ſame to another; or make a Leaſe of Land to one for ten years, and after make a Leaſe of the ſame Land to another for the ſame ten years; or give a horſe to one, and after give the ſame horſe to another; in all theſe caſes the ſecond grant is void. But if the firſt grant or gift be only of part of the thing granted afterwards,

3. In reſpect of a former grant of the ſame thing.

or

or of part of the time onely, the ſecond grant will be good for the overplus: And therefore if one be ſeiſed of a manor and demiſe ten acres of the demeſne to ten years, and after demiſe the whole Manor to another for twenty years; this is a good grant for the overplus of the Manor beſides the ten acres, preſently, and for the whole Manor for the laſt ten years.

So if the ſecond grant be to begin after the firſt is determined; it is good. And if the ſecond be ſuch as may be ſatisfied and not impeach the former, both ſhall ſtand good. And therefore if one that hath an Advowſon grant the next preſentation to one, and after he doth grant the next Preſentation to another, and doth not ſay [after the death of the Incumbent;] in this caſe the ſecond grant is good, and the Grantee thereby ſhall have the ſecond avoidance after the death of the preſent Incumbent. *Perk. ſect. Dyer* 35. 350. *Litt. Bro. ſect.* 298. *Perk. ſect.* 102.

4. In reſpect of naming or deſcription of the thing granted. Miſnaming or Miſrecitall.

By the grant of an acre of Land or of any other thing by the name whereby it is called the reverſion of that thing, if the grantor have no more but a reverſion, will paſs, and this miſtake will not hurt. But it is not ſo *è converſo*. And yet ſome have ſaid, if one grant a thing in poſſeſſion, by the name of the reverſion of the thing, this is good to paſs the poſſeſſion. *Quod non eſt lex*. For if one make a leaſe for years, and before the Leſſee enter, the Leſſor grant the Land by the name of the reverſion or the Land; this grant is void. If one make a Leaſe for life of the Demeſnes of a Manor rendring Rent, and after he doth grant the Manor by the name of the Manor; this is a good grant for the reverſion of the Demeſns as wel as for the reſidue of the Manor. But if one grant common by the name of the reverſion of the common, it ſeems this is not good. And yet if one have common and grant it for life, and during that eſtate he doth grant the Common by the name of *totam illam Communiam ſuam, &c.* ſome doe hold this grant to be good, *See Brownl.* 1 *part* 30. 42, 84. 184 *Co.* 4. 122. *Perk Sect*, 114. 116 *Co.* 10. 106. 107. 11. 47. *Plow.* 190 *Co. ſuper Litt.* 46. *See alſo Co.* 2 *in Lanes* Caſe, *which doth ſeem to warrant this opinion alſo. Dyer. the grant is good in a common perſons caſe. Bro. Grant.*

Any thing may be granted by the name whereby it is and hath been uſually called of latter times within nine or ten years or thereabouts, albeit it be an improper name, and not the ancient name of the thing, but a name newly gotten. And ſo a Manor may paſs by the name of a meſſuage or Farm, or a Farme or Manor by the name of a meſſuage if it be ſo uſually called & reputed. So the great houſes in *London* called *Exceter* and *Dorſet* houſes may be granted by thoſe names, And if a man grant that which in deed is a paſture ground, by the name of a wood; Or grant that which in deed is a wood by the name of a paſture ground, & the things are called by thoſe names; theſe are good grants of thoſe things. And if one grant by the name of a great field that which in Deed is but a little cloſe, but it is uſually called by the name of a great field, this is a good grant of this thing. So if one grant by the name of a plow land that which in truth is but an acre of Land or grant by the name of a Manor that which is but a plow Land; theſe grants are good. And ſo as it ſeems, it is *è converſo*. But if a man grant a houſe, or a meſſuage; by this grant, an acre of of Land will not paſs. *Co* 6. 65. 45 *E.* 3. 6. *Bro. grant.* 7. *Perk. ſect.* 116. 14 *H.* 8. 1. 27 *H.* 6. 2.

By the Grant of ſervices, a Rent reſerved upon an eſtate tail will paſs. *Co. ſuper Litt.* 153. *Mic.* 7. *Jac. Curia. B. R.*

If a man make a Leaſe of one houſe to another for years, and the Leſſee divide it and make two houſes of it, and after the Leſſor doth grant the reverſion of it by the name of one houſe; this is a good grant to paſs it. And if one Leaſe three houſes to three ſeverall men at ſeverall times, and they divide them into twenty nine Tenements and houſholds in them all; and the firſt Leſſor doth grant them by the name of three meſſuages: this is a good grant to paſs them all. But if he grant by the name of fifteen meſſuages or Tenements only: it ſeems this is good for no more but for fifteen of the ſubdivided Tenements.

If one recite that he hath a Rent charge iſſuing out of black acre and white acre, and then grant the ſame Rent, and in truth it doth iſſue out of black acre only: or if he do recite that it doth iſſue out of one acre when in truth it doth iſſue

out

out of both : in both, in theſe caſes the grant is good notwithſtanding theſe miſtakes, *Perk. ſect.* 72.

If one be Patron of the Church of *S. Peter* and *Paul* in *D.* and he grant the next Preſentation of the Church of *S. Peter*, or of the Church of *S. Paul* : theſe are void grants to paſs the Preſentation, *Bro. Grant* 12.

If one grant a Rent out of white acre by the name of a Rent out of black acre, this grant is void as to charge white acre. *Perk. ſect* 79. *Per Ch. Juſtice Hutton & Yelverton, Co. B. Mic.* 3. *Car. in the caſe of Edward Crew.*

If one have a Manor called *Steeple Lavington*, and he grant it by the name of weſt *Lavington* alias *Steeple Lavington* by the [*alias*] eſpecially if the grant ſay [lying in *Lavington*] and the Manor of *Steeple Lavington* doth lie in that pariſh, and the grantor hath no other Land there.

If one grant all his Lands which he hath in *D* in this mannor, [All my Lands in *D* which I had of the grant of *I. S* ;] this is a good grant of all his Lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. But if the words be [all my Lands which I had by the grant of *I, S.* in *D.*] in this caſe the grant is not good to cary any other Lands in *D.* but ſuch as he had of the grant of *I. S.* So if one grant in this manner [all my Manor of Sale in Dale which I had by deſcent] and in truth he had it not by deſcent but by purchaſe ; this is a good grant of the manor. So if one grant all his Lands in Dale, and ſay no more ; this is a good grant to paſs all his Lands there.

But if one grant in this manner, [all my Lands in Dale which I had by deſcent from my father,] and in truth I had them not by deſcent but by purchaſe, this grant is void and will not paſs thoſe Lands. So if I grant in this manner [all my Lands that I had by the attainder of *I. S.*] and in truth I had no Land by that means, this grant is void. And if I grant after this manner [all my Lands in *B* in the tenure of *D* which I had of the gift of *I. S.*] and in truth it doth lie in *B* and is in the Tenure of *D* but it was not purchaſed of *I. S* ; this is a good grant to paſs the Land, *Mic.* 2 *Jac. in Brownes* caſe *agreed. Plow*, 169. 395. *And ſo was the opinion of Ch. Juſtice Popham* 2 *Jac. B. R. Dyer.* 87. *Mic.* 2 *Jac. Adjudge Brownes* caſe.

If a pariſh lie in two Counties, *viz. Berk* and *Wilts*, and one grant in this manner [all his cloſe called Callis in the pariſh of Hurſt in the county of *Berk.*] and in truth the cloſe doth lie in the county of *Wilts* ; this is a good grant to paſs the cloſe.

But if one grant in this manner [All his houſes in the pariſh of *S. Butolphs extra Algate* late in the tenure of *R*] where in truth he hath no houſes there, but he hath ſome houſes in *S. Butolphs extra Alderſgate* ; this is a void grant. And yet if the grant be in this manner [All that my houſe in the occupation of *I. S.* in *S. Andrews* pariſh] whereas in truth it is in the pariſh of *K.* but in the occupation of *I. S*, it ſeemes this grant is good to paſs the houſe. But if it be thus [All that my houſe in *S. Andrews* pariſh in *Holborne* in the occupation of *I. S.*] and in truth it is in another pariſh but in his occupation : this grant is not good to paſs the houſe. *Dyer* 299. *Co.* 3. 10.

If I grant all and ſingular my Lands in the Tenure of *I. D.* which I purchaſed of *I. N.* ſpecified in an Indenture of demiſe made to *I N*, and I have land wherein ſome of theſe references are true and the reſt falſe, and no land wherein they are all true ; in this caſe nothing paſſeth, as if I have land in the Tenure of *I. S.* and purchaſed of *I. N.* but not ſpecified in the Indenture to *I. B.* or if I have Land which I purchaſed of *I. N.* and ſpecified in the Indenture to *I. B.* but not in the Tenure of *I. D.* But if I have ſome Land wherein this is true, and ſome wherein part of them are true, and part falſe, then doe they paſs thoſe wherein all the circumſtances are true.

If one grant in this manner [my manor of Dale which appeareth by Office found to be of the value of Ten pound *per Annum*] and in truth in the Office it is found at twenty pound *per Annum* ; this grant is good notwithſtanding this miſpriſion. *Hil.* 2. *Jac. B. R. per Tanfield.*

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If one grant in this manner [all my manor of *W* late parcell of the poſſeſſion of the Abbot of *S.* and late in the poſſeſſion of *K*,] and in truth it was never in the poſſeſſion of *K*, this grant is good notwithſtanding. But if the grant be thus [*omnia illa, terras &c. in tenura* I.S. *jacen. in* W. *nuper prioratui de* S, *ſpectan.*] and in truth the Land doth lie in *S.* and not in *VV*; this is no good grant to paſs the Lands in *S.* And if the Lands doe lie in *VV.* but are in the Tenure of *I D.* and not in the Tenure of *I S*, the grant is void to paſs the Lands in the occupation of *I S*, *Paſc.* 7 *Jac. B. R. Co.* 2.32.

If one purchaſe Land of *I S* in *T* and have no other Land there, and he grant his Land in *T* late the Land of *R S* or late the Land of *S* and miſtake or omit the chriſtian name; this grant is good notwithſtanding this miſtake. And ſo alſo it is where there is a blanck left for the chriſtian name. And if in this caſe he grant all his Land in *T* and ſay no more, this is a good grant to paſs the Land. And if one grant [all his Lands in *D* called *N* which were the Lands of *I S*] this is a good grant to paſs the Lands called *N* though they were never the Lands of *I S*. But if the grant be [of all his Lands in *D* which were the Lands of *I S*] by this none but thoſe Lands that were the Lands of *I S* will paſs. *Dyer* 376. *Bro. Grant* 92.

If one grant in this manner [all my meadow in *D* containing ten acres] whereas in truth his meadow there doth contain twenty acres, it ſeems this is a good grant for the whole twenty acres. So if one grant thus [All thoſe forty ſeven acres of Land by the Sleight whereof fifteen lie in *D*, twenty in *E*, and twenty five in *F*] and in truth all of them doe lie in *F* and none of them in *D* or *E*: this is a good grant to cary the whole forty ſeven acres. *Dyer* 80.

If one grant twenty load of Wood and ſay in his grant [of which twenty load of wood he had ſixteen load by the grant of his father *I S*] and in truth *I S* did not grant any wood to him at all, or did not grant unto him ſixteen load only: this is a good grant of the twenty load of wood notwithſtanding this falſe recitall, *Bro. Grant.* 69.

If one grant his Manor of *D* and doth not ſay in what Town or Towns it doth lie, this is a good grant. But it is beſt to ſay in what Towns the Manor doth lie, for if it lie in divers places (as it may) and any of the places into which it goeth be omitted and the reſt are ſet down; no part of the Manor lying in the Town that is not expreſſed will paſs. *Br. Grant* 53. 7 *H.* 4.41.

If one grant a Manor and that which in truth is but one Manor by the name of the Manor of *A* and *B*; this is a good grant of the Manor. And ſo alſo it is if it be two Manors, as if a man be ſeiſed of the Manors of *Ryton* and *Condor* in the county of *Salop.* and he grant in this manner [*totum illud Manerium de Ryton & Condor cum pertinen. in Com. Salopiæ*;] this is a good grant of both the Manors. Otherwiſe it is in caſe of the King. *Co.* 1.46.

Prerogative. If one have a farme of Land, Meadow, &c. by leaſe called *Hodges* lying within the pariſhes of *S. Stephen* and *S. Peter* in S. *Albons*, and he reciting the ſaid leaſe grant to *C* his terme and intereſt in the houſe, lands, &c. called *Hodges* in the pariſh of S. *Peter* and *S. Albons*; this grant is good only for ſo much as doth lie in the pariſh of *S. Peter*, and not for that which doth lie in *S. Stephens.* But if he grant the farme, and doth not ſay in what pariſh it doth lie; this is a good grant of the whole farme. As in the caſe before of a Manor that doth lie in divers pariſhes. And if in the caſe here the farme lie within the pariſh of *S. Peter* only; the grant is good for the whole farme. If one recite that whereas he hath ſuch lands by forfeiture, or whereas ſuch a one hath an eſtate of his Land, or whereas the grantee hath paid him ten pound or done him ſuch ſervice, or the like, and theſe things are not true, and afterwards he doth grant the Land by apt words; this miſtake in theſe caſes will not hurt the grant. But otherwiſe it is in caſe of the King in ſome of theſe caſes. *Curia. Co. B. Paſc.* 9 *Jac. Inter Plat. & Sleepe. Bro. Grant* 53.

Prerogative. If one have a Manor in which he hath Parkes and Fiſhponds, and he grant the Manor for life except the game and fiſh, and after grant the reverſion of the Manor; this is a good grant of the game and fiſh alſo. *Co.* 11.50.

If a grant be of [*Centum libratas terra*, or 50 *libratas terra*, or of *Centum ſolidat' terra*,

terre] it ſeems theſe are good Grants, and that hereby doth paſs Land of that value, and ſo of more or leſs. *Co. ſuper Littl.* 5.

If a Grant be of an Acre of Land covered with water, this is a good Grant; *Co. ſuper Littl.* 4.

If a Grant be of a certain portion of Land or Tithes, or of the fourth part of Land or Tithes, and there be a ſufficient certainty in the deſcription of it, this Grant is good. And therefore if the Grant be of the fourth part of the Tithes, and of the offerings of the Church of St. *Peter*, this is a good Grant. *Dyer* 84. 34 *Ed* 3.

If one ſeiſed of an Advowſon in Fee, grant to *J. S.* that as oft as the Church is void, he ſhall name the Clerk to the Grantor, and he ſhall preſent him to the Ordinary; this is a good Grant of the Advowſon. *Bro. Grant* 101. 121.

A Reverſion may be granted by the name of a Remainder, or a Remainder by the name of a Reverſion, and ſuch a Grant is good. As if one grant Land to *J. S.* the Reverſion to *J. D.* this is a good Grant of the Remainder. *Dyer* 46. *Plow.* in *Hills* and *Granges* caſe.

If one make a Leaſe of Land to Husband and Wife for their lives, and after grant the Reverſion of this by the name of the Reverſion of the Land, which the Wife doth hold for life; this Grant is void. So if one grant to two for life, and after grant the Reverſion of one of them, this is void. *Fitz. Grant* 63.

A Fulling or Griſt Mill may be granted by the name of a Mill onely. 21 *Aſſ.* *Incertainty.* *pl.* 23.

If one grant in this manner [*All that his Meſſuage, &c. And all the Lands, Meadows and Paſtures thereunto belonging*;] this is a good Grant, and certain enough to paſs all the Lands, Meadows, and Paſtures uſually occupied therewith. 27 *H.* 6. 2. *Plow.* 164. *Bro. Leaſe* 55.

If the Lord grant his Manor by the name of [*His Manor, with the Reverſion of all his Tenants,*] or by the name of [*the Reverſion of all his Tenants, bond and free which hold for life or years*] and do not name them by their particular names; theſe Grants are good in theſe caſes, and certain enough. *Fitz. Grant* 68. *Perk. ſect.* 68.

If one grant Land, and ſay not in what Pariſh, or County, or Village it doth lie, yet if there be any other matter to deſcribe it; it ſeems the grant is good enough, and it may be averred where it lieth. But if there be no circumſtantial matter in the grant to denote and decipher out where it doth lie; it ſeems the Grant is void for Incertainty. And therefore if one grant his Manor of *Dale*, or his Lands in the occupation of *J. S.* or his Lands that deſcended to *J. S.* or his Lands that did belong to the Priory of *S.* or the like; theſe are good Grants and certain enough. *Id certum eſt quod certum reddi poteſt. Bro. Grant* 53. *Co.* 9. 47.

If there be Tenant for life of three Houſes and four Acres of Land, and he in Reverſion, grant the Reverſion of two houſes and of two Acres of this Land; this is a good Grant, and hath ſufficient Certainty in it. *Perk. ſect.* 73.

If a Grant be Incertain altogether, and have not ſufficient Certainty in it, and cannot be made certain by ſome matter *Ex poſt facto*, it is void. And therefore if there be Lord and Tenant of three Acres of Land by Fealty, and twelve pence Rent, and the Lord grant [*the Services of the third Acre*] to a ſtranger; this Grant is meerly void. So if Husband and Wife hold an Acre of Land joyntly of *J. S.* for their lives, and *I. S.* grant the Reverſion of the Acre of Land which the Husband alone doth hold for his life; this Grant is void. So if there be Lord and three Joyntenants, and the Lord grant the Services of one of them to a ſtranger, this Grant is void. So if one have twenty Tenants that do pay him twelve pence a peece Rent, and he grant five ſhillings yearly out of theſe Rents, and doth not ſay of which Tenants, this Grant is void for Incertainty. So if Conuſance of Pleas be granted, and it is not ſaid before whom, this is utterly void. So if one have two Tenants, and doth grant the Reverſion of one of them, and doth not ſay which, this is void for Incertainty. So if one grant Eſtovers to another, and ſay not what, nor how; this is void. So if one grant me ſo many of his trees, or of his horſes as may be reaſonably ſpared, this grant is void. And yet if one grant me ſo many of his trees as *I. S.* ſhall think fit, it ſeems this grant is good. And if one grant me one hundred load of Wood to be taken by the

Aſſignment of the Grantor, or to be taken by the Aſſignment of *J. S.* theſe are good Grants. So if one grant me three Acres of Wood toward the North-ſide of the Wood; this is a good Grant, and certain enough. *Perk. ſect. 67. & 68, 69. 9 H. 6. 12. 44 Ed. 3. 17. Bro. Grant 52. Dyer 91. Co. 5. 24.*

If one Grant to one of the Children of *J. S.* and *J. S.* hath more then one, and he doth not deſcribe which he doth intend; this Grant is void for incertainty. *Bro. Donee 31.*

If one Grant to me a Rent or a Robe, twenty ſhillings or forty ſhillings, or Common of Paſture or Rent, in the Disjunctive which is at firſt very incertain; yet this Grant may become good; for if I make my Election, or he pay the Rent, or perform the Grant in either part, the Grant is now become good. *9 Ed. 4. 36. Perk. ſect. 74.* So if one be ſeiſed of two Acres of Land, and he doth Leaſe them for life, the Remainder of one of them, and doth not ſay of which to *J. S.* in this caſe, if *J. S.* make his Election which Acre he will have, the Grant of the Remainder to him will be good. *Perk. ſect. 76.* So it is when a man hath ſix horſes in his Stable, and he doth grant me one of his horſes, but doth not ſay which of them; in this caſe I may chuſe which I will have, and in theſe caſes, when I have made my election, and not before the Grant, is good. And if in theſe caſes the Grantee do not make his election, during his life, it ſeems the Grant will never be good. If one be ſeiſed of Land, and Leaſe it for years, rendring ten ſhillings rent, and after he doth grant a rent of ten ſhillings out of this Land to a ſtranger; in this caſe, albeit, there be ſome incertainty in the Grant, yet this is a good Grant of a Rent of ten ſhillings, but it ſhall be taken a Grant of a new, and not of the old Rent, and therefore ſhall not take effect, until the particular eſtate be ended. *Bro. Grant 77.*

See more to this point in *Deeds*, and their *Expoſition*, *chap. 5. Numb. 15.* and *Fine chap. 2. Numb. 7.*

5. In reſpect of matter in ſome other parts of the *Grant.*

In ſome caſes albeit there be in a Grant, a good Grantor, and a good Grantee, and a thing granted, and all theſe are duly and certainly deſcribed, yet the Grant may be void for ſome fault, in ſome other thing, touching the Grant: As,

1. In the *Commencement* of the Eſtate.

1. In the Commencement of the Eſtate: For if a man be poſſeſſed of a Term of years, albeit it be one hundred years or upwards, and grant to another all the Reſidue of this term of years that ſhall be to come at the time of his death; this Grant is void for incertainty: And yet if a man poſſeſſed of ſuch a term in Land, grant the Land to another, To have and to hold to him after the death of the Grantor for fifty years, or for two hundred years; theſe are good Grants, and in the firſt caſe the Grantee ſhall have fifty years, if there be ſo many to come of the term of one hundred years, at the death of the Grantor; and in the laſt caſe the Grantee ſhall have the Land for the whole one hundred years, or ſo many of them as are to come at the death of the Grantor. *Bro. Grant 154. Co. 1. 155. Plow. 520.* So if one Grant any thing that doth lie in Livery or in Grant, and that is in *eſſe* at the time of the Grant in Fee-ſimple, Fee-tail, or for life, and the eſtate is to begin at a day to come; this for the moſt, is void; howbeit in ſome caſes the Livery of Seiſin will help it: But a Leaſe for years to begin *in futuro*, is good enough. And if a Leaſe be made to one for years, or for years determinable upon lives, and after a Leaſe is made to another of the ſame thing, To have and to hold from the end of the former Leaſe; this is a good Leaſe, and the Commencement certain enough. So if a Leaſe be made of Land to one for life, and after the Reverſion thereof, is granted to another for life, *Cum poſt mortem vel alio modo vacare contigerit*, this is good. *Dyer 58. Co. 5. 1. Paſche, 7 Jac. Dennis* caſe. So if a Leaſe be made to one for twenty years, if he live ſo long, and after a Leaſe is made to another *Habendum*, after the end of the Term granted to the Leſſee for twenty years to be accompted from the date of the Deed laſt made; this is a good Grant for twenty years after the firſt Leaſe ended, and the words [*to be accompted, &c.*] ſhall be rejected. *Craddocks* caſe. *Paſche, 7 Jac. Co. B.* And if one grant a Rent to me *Habendum*, from the time of my full age for my life, and I am of full age at the time of the Grant, this Grant is good for my life. *Co. 9.* If a Woman-ſole have a Leaſe for years, and take a Husband, and then he in Reverſion Grant the Land to another

Incertainty.

another *Habendum* after the terme granted to the husband &c. where in truth it was never granted to the husband but by an Act of law, *viz.* the mariage, yet this is a good Leaſe. *Plow.* 192. *Co.* 5. 36.

2. In the limitation of the eſtate. For if a grant be to two *& hæredibus*, without *Suis*, this is void for incertainty, and cannot be made good by Averment. And yet a grant to one *& hæredibus*, is good. And if a man grant two Acres to have and to hold the one in fee-ſimple and the other in fee-taile, or the one in fee-ſimple and the other for life, and doth not ſet downe which in fee-ſimple &c. in certaine, yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men, *Habendum* the one to the one, and the other to the other, and ſay not which either of them ſhall have, this is void for incertainty. And if one have a reverſion of land after a leaſe for yeares, and grant the land *Habendum* the reverſion, or grant the reverſion *Habendum* the land, this is good. 22 *H.* 6. 15. *Plow.* 28. *Perk. Sect.* 75. 77. *Plow.* 152. *Co.* 10. 107. *Plow.* 147.

2. In the limitation of the eſtate. Or in the *Habendum* of the Grant.

Incertainty.

In ſome caſes a grant or gift may be void at leaſt to ſome perſons and purpoſes when there are none of the defects aforeſaid in it, as when it is made upon a corrupt contract, or to the end to defraud creditors of their debts, or purchaſors of their lands bought, or the like, whereof ſee before in *Deed chap.* 4. *Numb.* 5.

6. In reſpect of the end or ground of the Grant.

And in ſome caſes albeit there be no other fault in the grant, yet it may become void for want of ſome other matter that ought to be done, as inrolment, livery of ſeiſin, atturnment, &c. for where theſe things are requiſite the grant is not good untill it be had, neither for that thing which will not paſſe without that ceremony, nor yet for that which otherwiſe would paſs by the deed. And therefore if a feoffment be made of a Manor to which an Advowſon is appendant, and no livery is made ſo that the Manor doth not paſſe; the Advowſon will not paſſe neither. Where a grant may be void by the refuſall or waiver of the grantee, See before in *Deed Numb.* 6. *chap:* 4. 21 *H.* 7. 5. *Co ſuper Litt.*

7 In reſpect o omiſſion of ſome ceremony &c.

If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor that neither he nor his heires ſhall vouch the warrantor or his heires upon the warranty; this is a good diſcharge of the benefit of voucher, and doth bar the feoffee of it. And yet he may bring a *Warrantia Chartæ* ſtill. So if one grant to mee a rent-charge, and afterwards I grant to him that he ſhall not bee ſued for this rent; this is a good grant to bar me of bringing an annuity for the rent. And yet I may diſtrain for the rent ſtill. And ſo *è converſo* if I grant to the grantor he ſhall not be diſtrained for the rent, by this I am barred of a diſtreſſe, but not of bringing an annuity for the rent: So if the Lord doth grant to his tenant holding by Knights ſervice, that his heires ſhall not be in ward &c. or a man doth grant to his debtor that he will not ſue him for the Debt at all, or untill ſuch a time; or one grant to his Leſſee for life or years, that he ſhall not be impeached for waſt; all theſe are good diſcharges, and may be pleaded by way of bar to avoid circuity of Action. 7 *H.* 6. 43. 21 *H.* 7. 23. *Perk. Sect.* 69. *Bro. Grant.* 175. *Kelw.* 88.

5. What ſhall be ſaid a good grant in the nature of a releaſe or diſcharge. Or not.

How a grant ſhall be uſed and taken *Brownlows Rep.* 1 *part.* 32. 2 *part*, 57. 192. 193.

CHAP. XCIV.

Of Gig-Mills, Goldſmiths, Guns, Hereſie, Hemp, Honor, Horns, Horners, Hops, Horſes, Apoſtate.

Gig-Mills, what.

GIg-Mills were Mills uſed in the making of Cloath, which with Iron-Cards, are forbidden by the Statutes of 3 *Edw.6.* 2. 5 *Ed.6.* 22.

Goldſmiths, Gold and *Silver.*

For Goldſmiths, Gold, and Silver. See the Statutes of 4 *H.* 7. 2. 2 *H.* 6. 14. 18 *Eliz.* 15. 2 *H.*5.4. 8 *H.*5. 3. 5 *H.*4. 13. 37 *Ed.*3. 7. 28 *Ed.*2. 20. 25 *Ed.*3.12. 5 *Ed.*6. 16. 4 *H.* 7. 28. 2 *H.*4.5. 9 *Ed.*3.1. 5 *R.*2. 2. 2 *H.*6.6. 27 *Ed.*3. 14.

Guns and *Croſs-bows.* *Dag.*

The Hand-Gun is an Engine prohibited to be uſed and carried about; and within this word is included a Dag, though it were invented ſince the Statute: As within the word Croſs-bow is included a Stone-bow; and a Hag-but, Haque, or Haque-but, is a Hand-gun of about three Quarters of a yard long: And there is alſo the half Haque or Demy-haque. But for all theſe, and for ſhooting, See 33 *H.*8.6. 2, 3 *Ed.*6. 24. *Co.*5.71,72. 1 *Jac.*25. 27. 5 *Eliz.*2. 5.

Haque and *Demi-Haque.*

Gun-powder and Salt-Peter may be brought in from beyond Sea; and it may be made freely in this Realm, 16, 17 *Car.* 22.

Hereſie and *Heretick,* what. *Apoſtate.*

An Heretick (by our Law) it was one that did wilfully oppoſe ſome principal Head or Article of Chriſtian Faith, evidently againſt the Scripture and Doctrine of the Church, he was to be dealt with by the Biſhop, if obſtinate to be excommunicate; and if he did not ſubmit, to be burned. So alſo, if he did conform, and then fall away, and become Apoſtate. Theſe things are gone, and changed with the times. But of them read, *F.N.B.* 209. *Bro.* 458. *Doct. & Stud.*29. 2 *H.*4.15: 31 *H.*8. 14. 1 *Eliz.* 1. 8 *H.*8.14. 2 *H.*5.7. *Co.*upon *Littl.*281. 3 *part. Inſt.*c.4. See *Services of God.*

Hemp and *Flax.*

For this ſee Statutes, 33 *H* 8.17. 22 *H.* 8. 12.

Honor and *Honor-Court,* what.

Honor doth ſignifie ſometimes the moſt noble ſort of Lordſhips, whereof the Inferior Lordſhips or Manors do depend by performance of ſome Cuſtoms or Services to thoſe that are Lords of them. And it ſeems there are none of theſe, but ſuch as did originally belong to the King, and have ſince been given in Fee to Noblemen. And in theſe places are the Courts called Honor Courts, 37 *H.* 8. 18. 31 *H.* 8. 5. 33 *H.*8. 37,38.

Horns and *Horners.*

For Horns and Horners. See 4 *Ed.*4.8. 7 *Jac.* 14.

Hops.

For Hops, and the puniſhment of them that bring into us, or uſe bad Hops. See 1 *Jac.* 18.

Horſes.

For Stone-horſes, Mares, and other Horſes. See 27 *H.*8.6. 32 *H.*8.13. 8 *Eliz.* 8. 1 *Ed.*6.5. 5 *Eliz* 19. 11 *H.*7. 13. 2, 3 *Phil. & Ma.*7. 31 *Eliz.*12. 21 *Jac.* 28. 20 *R.*2. 5.

CHAP. XCV.

Of Houſe-boot, Fire-boot, Plough-boot, Hedg-boot, and Hay-boot.

HOuſe-boot is ſufficient Timber and Wood for reparation of the houſing: Fire-boot is ſufficient and neceſſary fuel to burn: Plough-boot is ſufficient and neceſſary Timber and Wood to make and amend Sullows and Wains, and the reſt of the Plough geer: Hay-boot is ſufficient and neceſſary ſtuff to make Rakes, Forks, and ſuch like Inſtruments; and Hedg-boot is neceſſary ſtuff to make and amend the Hedges. *Houſ boot, Fire-boot, &c.* what. *Plough-boot.* *Hay-boot.* *Hedg-boot.*

All theſe a Leſſee for life or years (be his Leaſe in writing, or by word) may (by the Law) cut down and take without any leave of the Leſſor, in any part of the ground demiſed to him; wherein theſe things are to be known.

1. Where the Law gives him leave to take any one of theſe, he may take all of them. *Leſſees* that have Eſtates for life or years.

2. He may take them, although there were no ſpecial Agreement, nor words in his Leaſe to give him liberty to take it.

3. He may (as it ſeems) cut it before he uſe it, that it may be fit for uſe, but not before ſome occaſion begin to appear for the uſe of it.

4. If he be reſtrained by any ſpecial Agreement contained in his Leaſe, then he may not take it; for, *Modus & conventio vincunt legem.*

5. He may cut not more then enough, and not ſuperfluity.

6. The ſtuff he doth cut and take, muſt be to amend and make the Hedges belonging to the things demiſed, to make the Corn and Hay growing upon, and coming of the ſame Land; the Wood for Fire to be burnt in ſome part of the houſing, let by the ſame Leaſe; the Wood for Timber to amend part of the houſing demiſed: For if it be beſtowed in any other place, or to any other purpoſe, or more be cut then is reaſonable, or otherwiſe then, as is before ſet down, it will be a Waſte. *Waſte.* See for this *Co.* upon *Littl.* 41. *Broo. Common* 32. *F.N.B.* 59. *Dyer* 19. *Fitz Common* 28.

CHAP. XCVI.

Of Hunting and Hawking, and of Hawks.

AS to theſe things, this is to be known.

1. None may Hawk or Hunt with Spaniels in ſtanding Grain, or before it is ſtocked, under pain of forty ſhillings to the owner of the Ground, if he do it without his leave, 23 *Eliz.* 10. *Hunting, Hawking, &c.*

2. The penalty of taking Hares, Pheſants, and Partridges by Nets and other Engines, 23 *Eliz.* 10. 1 *Jac.* 27. 7 *Jac.* 11. 11 *H.* 7. 17. *Hares, Pheſants, Partridges.*

3. The penalty of keeping Gray-hounds, Dogs, or Nets, to kill or take Deer, Hares, Pheſants, or Partridges, 1 *Jac.* 27. 7 *Jac.* 11. 11 *H.* 7. 17. 14, 15 *H.* 8. 10.

4. The

4. The penalty of buying or ſelling Deer, Hares, Pheſants, Partridges, 1 *Jac.*27.

5. The penalty for Hawking at, or deſtroying Pheſants, or Partridges, between the firſt of *July*, and the laſt of *Auguſt*, 7 *Jac.*11.

Hawks and *Hawks-Eggs.* 6. The penalty for breaking down Fiſh-pond Heads, or entring into Parks, Woods, or other Grounds, and there to kill or chaſe the Deer, or take away Hawks or Hawks Eggs, 5 *Eliz.*21.

7. The penalty for ſtealing, concealing, or taking away Hawks, 34 *Ed.* 3. 22. 37 *Ed.*3.19. 11 *H.*7.19. 5 *Eliz.*21.

8. Every man may take Airies of Hawks, Sparrow-Hawks, Faulkons, Eagles, and Herons, in their own Woods, 9 *H.*3. 13. But you may ſee more of this in my *Juſtice of Peace*, 2 *part in the Seſſions charge.* 13 *R.*2.13. 14, 15 *H.*8. 10.

Hunting in a Park. 9. None may kill or hunt Deer or Conies in any Park, in pain of three moneths Impriſonment, and treble damages to party grieved, 3 *Jac.* 13. 7 *Jac.*3. See there more for this.

CHAP. XCVII.

Of an Idiot, Idolatry, and Implication.

Sect. 1. 1. *Idiot*, what. AN Idiot or Man *Non compos mentis*, is one that is void of Reaſon and very fooliſh, and wanteth natural and common Underſtanding, as in the Caſes, *infra*. Sometimes the word is taken for a Plea, to avoid a Deed made by ſuch a man as is ſo, *Terms Ley Idiot. Cromp. Jur.* 114.

The kinde. There are four ſorts of Men *Non compotes mentis.*

1. An Idiot or Natural fool ſo born, and he is called an *Idiot à Nativitate.*

2. One that is ſo by the Viſitation of God, and he is called an Idiot Accidental.

3. One that is Lunatick by certain fits and ſeaſons, that hath his *Lucida intervalla.*

4. One that hath made himſelf ſo by his own act, as a Drunkard; one that is born dumb, deaf, and blinde, is accounted as an Idiot to ſome purpoſes.

Who ſhall be accounted ſuch a one. He is then reputed, and to be taken a Natural or Accidental Idiot or Lunatick, when he may be made to believe any thing: As that an Aſs can flie, Trees walk, and Beaſts and Birds ſpeak, and the like; or that cannot number twenty pence, name his Father and Mother, nor his own age, or the like. But if he have ſo much knowledge, as to be able to read or learn to read by the inſtruction of others, or meaſure an Ell of Cloth, or name the days of the week, or write Letters, or make acquittances, or beget children, or the like, whereby it doth appear he hath ſome light of Reaſon; in this caſe, he is not to be counted an Ideot, *Co* 4. 124. *Co. ſuper Littl.* 247. *Perk.* 5. *Terms Ley Ideot. Swinb. fol.*43. *Broo.*443. *Co.*4.12. 128. *Cromp. Jur. f.*38.

How he is to be tried. This Idiot is to be tried and diſcovered by the Writ which is called *De Idiota inquirendo*, which is a Writ directed to the Eſcheator or Sheriff of any County, where the King when he underſtood there was an Ideot, ſo weak of underſtanding, that he could not govern his own Eſtate: That the Sheriff or Coroner therefore do call before him the Idiot, and examine him before a Jury, whether he be ſufficiently able to manage and order his own eſtate with diſcretion, and accordingly to certifie, *Co.* 9. 31. *F.N.B.* 231.

Idiota Inquirendo, what.

He that is an Idiot *à Nativitate*, the King ſhould have the cuſtody, and Wardſhip of all his Land (except Copihold Lands) of whatſoever Lord the ſame be held, and by what means ſoever, as by purchaſe or diſcent, the Ideot did come by them. Alſo he was to have the cuſtody and Wardſhip of his Body, Goods, and Chattels, and all that is his, during the life of the Idiot: And the King was to have the profits of all this to his own uſe, ſave onely that with the ſame, he muſt fine and provide for the Idiot and his family, ſufficient Meat, Drink, Apparel, and other neceſſaries.

But

But the King was to have no intereſt in the Eſtate and Subſtance of the Idiot, but onely a Cuſtody, and therefore he could not ſell any of the Lands, or Goods, or Chattels (unleſs perhaps make a Leaſe of the Land at a yearly rent.) And if the Idiot happen to come to be of his right minde again, then the King was to deliver all that was his to him again, if not, he was to leave it to the Heirs and Executors, or Adminiſtrators of the Idiot after his death: But Rights or Titles of Entry or Action, that the Idiot had, thoſe (it ſeems) the King ſhould have no benefit by neither, could he make any uſe of; but for all that was in poſſeſſion, he was to have as before. And if any man ſhould have kept the Body, Lands, Goods, or Chattels, from the King, the King ſhould have remedy to recover it. 27 *Ed.* 2. 9, 10. *Co.* 8. 170. *Stamf. pr. c.* 9. *Co.* 4. 126, 127. *F. N. B.* 232. 32 *H.* 8. 46. *Dyer* 25. 164. *Fitz. ſa Def.* 37. *Scire fac.* 10. 1 *H.* 7. 24.

And for the Lands, Goods, and Chattels of Lunaticks, the King was to hold them during the time of their Lunacy: But as for this Idiot, and he that is an Idiot *per Accidens*, or one that hath his *Lucida intervalla*, the King was to have their Eſtate and Subſtance, not as he had the eſtate of the Natural Idiot to his own uſe without rendring an account; but in this caſe he had them onely to keep for the Lunatick, and was to find him and his family with it; and when he came to be of ſome memory again, muſt render to him an account for the profits, and deliver him all the overplus of that hath been laid out for the maintenance of him, and his family, *Co.* 8. 170. *Dyer* 25. *Stamf. pr. c.* 9. *F. N. B.* 232.

If a Copiholder be an Idiot, his Copihold-eſtate ſhall be ordered by the Lord; and not by the King. *Dyer* 302.

It ſeems ſuch an Idiot may conſent to marriage, and his Iſſues are Legitimate. *Trin.* 3 *Jac. B R. Stiles* caſe.

Sect. 2. What Acts ſuch an Idiot may do, or not.

If ſuch a one were made a Judg, all Acts that ſhould be done by, or before him, as Judg, were good, and would binde all men. *Broo.* 446.

If ſuch an Idiot do any thing by Fine or Recovery, or the like, it will binde him, and all others, as if he were another man. But the Judges, before whom ſuch a Fine or Recovery is taken, ought not to admit it; ſo if he acknowledge a Recognizance, it is unavoidable. *Co.* 4. 127. *Perk. ſect.* 24.

If ſuch a perſon, during the time of his Idiocy or Lunacy, had committed Treaſon againſt the King, he ſhould be puniſhed as a Traitor. *Co.* 4. 124.

All Acts that the Lunatick man doth, during the time of his *Lucida intervalla*, though it be by Deed in the Countrey, as a Feoffment, Obligation, or the like, ſhall binde him and all others, that it ſhall concern, as any other man. So if in thoſe times he commit any Felony, or other offence, he ſhall be puniſhed as another man. *Co.* 4. 127.

All Acts that are done by a Drunkard that makes himſelf *De non ſane memorie*, ſhall binde and prejudice him, as if he were not ſo, as Deeds, Obligations, and the like, or Bargains and Contracts, he doth make then: Alſo if he do then in that caſe, commit any Treaſon or Felony, his Drunkenneſs will not mitigate, but aggravate his offence. *Co.* 4. 124. *Plow.* 19. See *Terms Law Diſability* 148, 149.

If he make a Bond, and muſt be ſued upon it, and Recovery be had, and his Execution done or money paid, before the Office is found; this is unavoidable. *Co.* 4. 126.

If ſuch a one as is a Natural or Accidental Idiot or a Lunatick, by the Act of God, do whiles he is ſo, do or commit any act of Felony; this is no Felony in him, neither ſhall he loſe or forfeit life or goods, or any thing elſe, though the act be Felony by a Statute, that doth ſay that every one that doth ſo, ſhall be judged a Felon. *Stamf.* 1. 7. 3 *H.* 7. 1. *Co.* 4. 127. 21 *H.* 7. 31.

If ſuch a one in that caſe make a Teſtament, it ſeems, it is not good. See *Teſtament. Co* 6. 13. *Dyer* 203. 75.

The Acts and Deeds of ſuch perſons done, during the time they are out of their minde, are void or voidable as Acts done by Infants are. See *Infant. F. N. B.* 202. 7 *H.* 4. 5. 52. See more for both of them, *Teſtament Numb.* 4. *Grant Numb.* 2, 3. *Fine Numb.* 6, 8. *Capacity, Diſability* throughout.

Privies

Who may take advantage by their Acts, or not.

Privies in blood, as Heirs, may take advantage, and ſhew the Diſability of their Anceſtors that were *Non compotes mentis*, and ſo avoid their Acts and Deeds for this cauſe: And for this cauſe they may have a Writ appointed for that end called *Dum non fuit compos mentis*. Alſo Privies in Repreſentation, as Executors or Adminiſtrators; and therefore if he ſhould make any Obligation, Covenant, or the like; and they be ſued upon it, they may avoid it by ſhewing his Diſability. *Co.* 4. 127.

Dum non fuit compos mentis, what.

If the Idiot make a Gift, Grant, a Releaſe of his Land before the Kings Office had been found for him, the King might avoid it at any time, during the Idiots life. So alſo he might avoid Obligations, Bills, or the like. *Co.* 4. 126.

If he grant a Rent-charge out of his Land, and die, his Heir may avoid it, and he ſhall hold it diſcharged. *Littl.* 405, 406.

A man himſelf that is *Non compos mentis*, ſhall never for that cauſe avoid his own act, either by Law or in a Court of Equity; for a man ſhall never be received and allowed to ſtultifie himſelf. Adjudged, *Trin.* 37 *Eliz. Stroud verſus Marſhal, B. R: Mich.* 2 *Jac. Linch verſus Hinde.* Adjudg. *Littl.* 405, 406.

Privies in Eſtate, cannot take advantage at any ſuch Diſability; as if a Donee in Tail *Non compos mentis* make a Feoffment in Fee, and die without iſſue, he in Reverſion or Remainder cannot avoid this Deed by this Plea. So if Tenant do *Non ſane memorie* make a Feoffment in Fee, and die without Heir, ſo that the Land ſhould Eſcheat, the Lord cannot avoid this Feoffment for this cauſe. *Co.* 4. 127.

The old Statutes about Idiots are *Prerog. Regis* 9, 10.

Idolatry and *Superſtition.*

For the taking away of the Monuments of Superſtition and Idolatry. See *Act*, 8 *Aug.* 1643. 9 *May.* 1644. See *Pope.*

Implication, what.

Implication is where the Law doth imply ſomething that is not expreſſed between parties, upon their Deeds or Agreements, as ſometimes, if there want words to expreſs their mindes, the Law will help it by Implication; and ſo one word, or thing ſhall be implied by another, ſometimes one ſentence ſhall be implied by another, ſometimes one Eſtate by another: As if one Deviſe, that after his wife *J. S.* ſhall have his houſe; here the wife ſhall have an Eſtate for life by Implication. It is alſo in divers other caſes, as if one grant an Office, it is a Condition *tacite* implied by Law, That he muſt execute the Office, elſe the Grant to ceaſe. So in every Exchange a Condition and a Warranty are *tacitè* implied. *Quod neceſſariò ſubintelligitur non deeſt.* See in other Titles.

Deviſe.

CHAP. XCVIII.

Of Impriſonment.

1. *Impriſonment.*

IMpriſonment is where a Man is reſtrained of his uſual and lawful liberty; ſo that he cannot go abroad at all times, and in all places with that freedom, as at other times without Bail or Mainpriſe: And this, whether it be in the open Field, or in the Street, or in a Houſe, or in a Gaol, or in a Stocks, all comes to one, if it be any Reſtraint of Liberty, it is an Impriſonment. *Terms Ley Impriſonment.*

Arreſt.

An Arreſt ſeems to be nothing elſe, but the firſt Act of this Impriſonment, when a man is firſt taken and reſtrained from his Liberty. *Terms Ley Arreſt.* Note that this Impriſonment will excuſe a man in many Caſes from prejudice, for which ſee *Co. ſuper Littl.* 159. 260, *&c.*

Sect. 1, 2. What Act ſhall be ſaid an *Arreſt* or *Impriſonment*, or not.

If one lay hands upon a man, and hold him; keep him in a houſe, lock him in a room, tye him to a Tree or Poſt; put him in priſon or Stocks, or the like; all theſe be Impriſonments. So if one ſay to another, *I Arreſt you in the Lord Protectors name*, and lay no hands on him, it ſeems this is an Arreſt, eſpecially if he be a known, ſworn Officer that doth ſo, for in that caſe were the Arreſt good, the Party is bound to obey, and to ſubmit to the Arreſt. And ſo was the opinion of the Lord-Keeper, and the two Chief Juſtices, *Mich.* 5 *Car. Co.* 9. 66, 69.

But

But if one do only require another to ſtand or ſtay, or ſay he doth intend, or will arreſt him, but doth not lay hands upon him, nor ſay he doth arreſt him; this, it ſeems, without more, is no arreſt nor impriſonment, *Br. F. Impriſ.* 37.

3. Where an Arreſt or Impriſonment ſhall be ſaid to be lawful.

1. In reſpect of the cauſe of the Arreſt.

In all caſes where the Common-Law, or where any Statute doth give power to arreſt and impriſon, there it is lawful and juſtifiable ſo to do. But in that caſe he that doth ſo, muſt take heed that he do purſue the Statute in the manner and order of doing of it: As if a Bailiff be found in arrearages before Auditors, the Auditors may commit him to Priſon; but then it muſt be to the next Priſon, and it muſt be ſpeedily, 13 *Ed.* 1. 11. *Dyer* 204.

One convicted of Witchcraft may be impriſoned, *St.* 1 *Jac.*

A Forger of Deeds, or one that doth agree to any ſuch thing, to the intent any Freehold may be recovered or charged, may be impriſoned. So if one had refuſed to pay his Tythes after ſentence given in the Spiritual Court for them, he might be impriſoned, 27 *H.* 8. 1. And ſo in divers other caſes, and for divers other cauſes; for which ſee the Statutes at large, 5 *Eliz.* 14.

Fine.

In all caſes regularly, where a man is fined by any Court that hath power to fine and impriſon, there he may be impriſoned alſo; for Impriſonment is incident to every Fine: As if Jurors will take more then their Fees for their labors, after they have given their Verdict, of him for whom they gave it: If men will conſpire to put a man in danger of his life by Indictment: If one will willingly plead a falſe Plea, to delay the Suit: If a Sheriff or Bailiff of a Franchiſe will not, or will falſly return his Writ directed to him: If a Guardian in Chivalry will take a Feoffment of his Heir within age, of his Land: If in a *Quid juris clamat*, or *Per quæ ſervitia* the Tenant do appear, and refuſe to attorn: If a Sheriff neglect or refuſe to take his oath when he doth enter to his office: If a Leſſee doth commit waſte after a Prohibition by *Eſtrepement*: If one plead a falſe Deed, or deny his own Deed, and upon Trial it be found againſt him: If a Juror give a falſe Verdict: If one bring an Attaint, and it paſs againſt the Plaintiff: If one bring an Appeal, and by his default the Will abate, or upon Trial it paſs againſt the Plaintiff: If one that is upon Mainpriſe, fail to come in at his day: If one do a Treſpaſs, Diſſeiſon, Forcible Entry, or the like; for theſe and many other cauſes a man may be impriſoned. *Br. Impr.* 9. 77. 101, 102. *Br. Fan. Impr.* 107. 10. 13. 98. *Fitz. per quæ ſervitia*, 23. *Dyer* 168. *Co.* 5. 105. 32 *H.* 8. 54. *Br. Impr.* 5. 9. 14. 11. 113.

A man may be impriſoned for, or upon ſuſpition of Treaſon, Felony, or any other great offence, for the preventing of any ſuch offence, the breach of the Peace, or the like; ſo for Night-walking, and the like. *Vide infra*, 9 *Ed.* 4. 26. 20 *Ed.* 4. 6. 11 *Ed.* 4. 4.

If a man be mad and furious, and like in his madneſs to harm; he may be bound or ſhut up by any man whiles he is ſo, to prevent miſchief, *Br. F. Impr.* 35.

If men ride armed, or there be any Rebellion, the Sheriff, Officer, or any other as aſſiſtant to them, may arreſt and diſarm them, and no falſe Impriſonment lieth, 1 *H.* 7. 7.

If the Impriſonment be on a falſe and fained Suit, as in ſuing Execution on a Statute when the money is paid, no falſe Impriſonment lieth for this, *Stat.* 43 *Ed.* 3. *c.* 35.

If a Conſtable make a Deputy, and the Deputy do execute Warrants and make Arreſts, it ſeems this is good. *Phelps* and *Winſcombs* Caſe, *Mich.* 13 *Jac. B. R.*

If a Hue and Cry be levied, and no cauſe; he that doth arreſt on ſuch a Hue and Cry is to be juſtified, and he that raiſed it ſhall be puniſhed, 21 *H.* 7. 27.

Ordinaries might impriſon Prieſts for Incontinencie, 3 *H.* 7. 1.

By and upon a Writ of *Vi laica removenda*, the Sheriff may arreſt a Clerk reſiſting, &c. albeit the Writ ſpeak of many, and thoſe Lay-men, Adjudg. *Trin.* 18 *Jac. B. R.*

For Treaſon, Felony, or Breach of the Peace, any man may arreſt without Warrant or Precept, *New Terms ley Arreſt.* But he that doth arreſt, muſt ſee a Felony be done. Secondly, that he be ſuſpect, *Idem.* And that there be ſome cauſe to ſuſpect

Suſpition. Common voice. him above another; as that Hue and Cry is gone forth, and doth denote ſuch a man as he is; or that it is the common voice that he is the man, or it is ſuch a man as he is, or that he is a Companion of Thieves, or that he hideth himſelf, flieth, or the like. For in theſe caſes any man may by warrant of the Common-Law, without any Writ or Warrant from any other, and that before Preſentment, Indictment, &c. arreſt the party ſuſpect; and whether the cauſe of ſuſpition be good, ſhall be tryed by the Judges in the Action of Falſe Impriſonment, or upon a *Habeas Corpus*. But it is ſaid, that an Arreſt upon a Hue and Cry is not good, unleſs ſome Felony have been committed, *Co. 2 par. Inſt.* 2 *H.*7.15. 5 *H.*7.5. And any man ſo taken is to be brought to Gaol, to abide till Seſſions, to be acquitted or indicted, *Idem.* See more, *Cromp. Jur.f.*16.6.80.*a.*93.*b.*97.*b.*110. See more in *Co.*10.76.

A Juſtice of Peace may himſelf in his own diſcretion arreſt a man, and compel him to find Sureties for the Peace: And if he will, he may then let him go without giving Surety, and no falſe Impriſonment will lie againſt him, *Br. Treſp.* 177.

In reſpect of the party arreſting, and his Authority. Any man as well as a Conſtable or Officer, after a Felony is done, that doth ſuſpect another, may arreſt him and bring him to an Officer, or to a Juſtice of Peace, or to Gaol, which he will. But in this caſe the party muſt take heed of two things. 1. That there be a Felony done. 2. That he have ſome cauſe and reaſon to ſuſpect that party that he doth arreſt. See Cauſes *infra*. So any one that doth know ſuch a man hath committed the Felony, may of his own head without any Warrant from a Juſtice or Officer, apprehend the Felon, and carry him to the Officer, Juſtice of Peace, or Priſon. *Plow.*49. 29 *Ed.*3.9. 13 *H.*7.10. 20 *H.*7.26. 5 *H.*7.6. 10 *Ed.*4. 17. 14 *H* 8.16.

A Watchman may arreſt Night-walkers in the night, 4 *H.*7.15: *Co.*9 68. or any ſuſpitious perſons, 5 *Ed.*3.14. 13 *Ed.*1.

If there be any Breach of the Peace by fighting, or any apparent likelihood thereof, the Conſtables or Officers may take the parties and ſet them by the heels, or put them in Ward. So if they offer to aſſault the Officer himſelf. So if there be a lewd ſuſpected Fellow in a lewd Houſe, it ſeems the Officer may ſet him by the heels, *Finches ley* 336: *Fitz. Bar* 202. 3 *H.*4.9. 5 *H.*7 6. 13 *H.*7, 10. 10 *Ed.*4.17. 12 *H.*7.18. 22 *Ed.*4.35. And if there be an Affray, any man may reſtrain the Affrayers to keep Peace: But the Affray being paſt, they cannot meddle further without authority from Officers, *Co.*2 *par. Inſt.*52.

If any Sheriff, Bailiff, Conſtable, Officer, or other Miniſter of Juſtice in doing their Offices, as executing Writs, the Juſtice of Peace Warrants, keeping the Peace, or apprehending Felons, require others to aid them in that work; the parties ſo required muſt aid them, and then their Arreſt or Impriſonment is as lawful as the Officers, *Stat.* 2 *H.*7. *c.*15. *Weſtm.* 1. *c.*9. *Winton* 3 *H.*7.1. *Co.*9. *Co.*8: 66. 5 *H.*7.15.

If one man wound another, ſo that it is uncertain whether he will die or live; the Officer may apprehend the party, and keep him in hold till he ſee whether the party be like to live or die, 10 *H.*7.26. And any other man may arreſt ſuch a man, and hold him for a reaſonable time upon this account, *Co.*2 *Inſt.*52.

Sect. 3. If a man be outlawed for Felony, it ſeems any other man as well as the Sheriff or his Officers, may arreſt the party without any Warrant: But if he be outlawed in an Action perſonal only, *contra. Dyer* 120.

By a Warrant from the Lord Protector, his Council, or from any the Courts at *Weſtminſter*, or from a Juſtice of Peace, or from the Sheriff, one may lawfully arreſt or impriſon another. As if a Sheriff have a Writ to arreſt a man, and he make a Warrant to any Bailiff of Franchiſe, or other ſworn, known, or ſpecial Bailiff to arreſt the party; this is a good authority. But therein they muſt take heed they do purſue their Warrant, or elſe the Arreſt or Impriſonment may be wrongful. And this Warrant, it ſeems, muſt be in writing, unleſs the party to be arreſted be preſent; or elſe it ſeems no good authority. But if the party be preſent, it ſeems ſuch verbal authority is good enough, *Co.*8.67. 26 *H.*7.5. *Co.*6.64. *Bro. Treſp.* 339. 10 *H.*7.16.

If a Sheriff or his Bailiff arreſt a man on a *Capias* directed to them, and there be

no Original on which the *Capias* was grounded; yet the Arreſt is lawful in them. So if a *Capias* come to them to take the body of a Duke, Countee, Baron, Dutcheſs, a Counteſs or Baroneſs, againſt whom by Law no *Capias* doth lie for Debt, or the like, and the Sheriff do execute it; the Arreſt and Impriſonment is lawful. So if the Suit upon which the Proceſs do come to him be never ſo unjuſt, and he arreſt by vertue of the Proceſs, his Act is lawful. *Co.* 8. 67. 16 *H.* 7. 3. *Kelw.* 98. 43 *Ed.* 3. 33.

After an Action is entred in *London*, a Serjeant at Mace may arreſt the party with his Mace *ex officio*, without any Precept at all. *Co.* 8. 67.

Officers may arreſt ſuſpitious perſons that walk by night, and carry them to a Juſtice, or ſet them in the Stocks till the morning, 5 *Ed.* 3. 14.

If a Commiſſion *contra legem* be to *J.S.* to arreſt *J.N.* and *J.S.* do it, the Arreſt is lawful in him, and no falſe Impriſonment lieth, *Br. Treſp.* 372.

If a Sheriff arreſt a Duke or ſuch like on a *Capias*, the Arreſt is lawful. *See before.*

If there be two or more of one name, and the Sheriff hath Proceſs againſt one of them, and there is no diſtinguiſhing addition whereby the Sheriff may know which is intended; in this caſe if he do miſtake, yet the party arreſted hath no remedy but by *Indemnitate nominis*. But the Sheriff or other Officer is to ſee at his peril, that he miſtake not the party in caſes of Arreſt; for he is bound to take notice of him; for if he miſtake him by information of another, or the like; he ſhall have this Action. And ſo was the opinion of the whole Court, *Trin.* 38 *Eliz.* *Coots* Caſe, *B. R.* *Sect.* 4. In reſp. of the party arreſted.

If a *Capias* come to a Sheriff to arreſt a man by a wrong name, and he do it; this Action lieth, *Brownl.* 2 *par.* 48. So if a Proceſs come to the Sheriff to arreſt *J.S.* and he do arreſt *J.N.* and although the party Plaintiff do ſhew him a wrong man; this will not help him. And yet if there be practice between him and the party arreſted, he may aver this, and that will help him, *Brownl.* 1 *par.* 211. See *Br. F. Impr.* 19.

If one be arreſted on a *Latitat* or *Quapias* in the morning of the day that the Writ is retornable, it ſeems the Arreſt is lawful, *Trin.* 3 *Jac.* *per* three Juſtices. Of the time.

If one arreſt a Miniſter or another on a Sabbath-day, either at the ſuit of the party or the Protector, it is a good Arreſt. But if the Miniſter be arreſted at his Church, *eundo* or *redeundo* to or from the ſame, the Bailiffs for this may be bound to their good behaviour, or might have been cenſured in the *Star-chamber*, eſpecially if it be whiles they are about Divine ſervice, 1 *R.* 2. 15. 50 *Ed.* 3. 5. *Co.* 9. 66. *Brags* Caſe, *Hil.* 7 *Jac.* *C.B.*

If one arreſt another in the night upon a Proceſs for the Lord Protector, or a common perſon, the Arreſt is lawful, *Co.* 9. 66.

If two men be fighting, and one of purpoſe to prevent harm put one of them up in a houſe, or lock him in a chamber till the heat be paſt; it ſeems this is lawful: But if they had been quarrelling only, and not fighting, *contra.* *Br. F. Impr.* 28. Of the manner and order, and end.

If a man take another on ſuſpition of Felony, or the like, and after put him in the Stocks for a while till ſome other courſe can be taken with him, it ſeems this is lawful and juſtifiable. So if he be ſick, and he keep him a while for that, 5 *H.* 7. 4. 29 *Ed.* 3. 9. 9 *Ed.* 4. 9. 22 *Ed.* 4. 25. *Br. F. Impr.* 28.

If one arreſt another on a Juſtice Warrant, and let him go, or he eſcape, and after he taketh him again upon the ſame Warrant, this is good enough, *Br. Impr.* 18. *Br. Impr.* 13.

If one ſeiſe the Wardſhip of the body of a Ward happened to him, this is juſtifiable, *Plow.* 294.

If a man be in danger to be killed by others, and one put or lock him in a houſe or chamber to keep him from their violence, it ſeems this is good and lawful; but he muſt not keep him there longer then is needful, *Br. F. Imp.* 3.

If one do keep or carry a man or woman by their own agreement, as upon a horſe, in a Boat, or the like, this is juſtifiable alſo, *Br. F. Imp.* 18.

In reſpect of the Place.

If one arreſt a man upon a Writ in a Franchiſe, the Arreſt is good, and this Action of Falſe impriſonment will not lie, but an Action of the Caſe will. *Ch. Juſt. B. R. 14 Jac.*

If a man be arreſted in a Church, the Arreſt is good, and no Falſe impriſonment lieth: But if Divine Service be let, the Bailiff may be puniſhed. See before. See *Co. 9. 66.*

If a Priſoner eſcape, and the Sheriff take him in another County and arreſt him there, the Arreſt is lawful. See *Eſcape, infra.*

Sect. 5. In reſpect of the purſuit of Authority.

If a Conſtable or any other take a man for Felony or Treaſon, or ſuſpition of Felony, and carry him to the Gaol preſently without any further Warrant, this is juſtifiable, and the Gaoler muſt at his peril receive him. But if another man that is no Officer do ſo, however it be juſtifiable in him, yet it ſeems the Gaoler may chooſe whether he will receive him or no, without a Juſtice of Peace's Warrant. And yet if another man take the Felon in the manner doing his Felony, in this caſe it ſeems the Gaoler muſt receive him. And if the Gaoler in theſe caſes refuſe to receive him, the Officer or other may take home the Priſoner and keep him at his own houſe till courſe be taken; and all this is juſtifiable, *Br. F. Impr.* 24. 27.

If a Sheriff make a Warrant to three *conjunctim & diviſim* to arreſt one, and one or three of them do it, this is good, *Ludlows* Caſe, *B. R.* But if two of them do it, it ſeems it is not good.

If another man that is no Officer arreſt a man on ſuſpition of Felony, and then deliver him over to an Officer, and the Officer let him go, or do not bring him to the Juſtice or to Gaol, yet the Arreſt of the firſt man is lawful, *Br. Impr.*

If a Priſoner be by a Writ of *Habeas Corpus*, or the like, to be brought to *Weſtminſter* into any of the Courts there, and by the way the Sheriff bring him through another County, and there he detain him; yet there his detaining of him in this caſe is lawful. *Contra*, if he did go there with a Keeper without Writ. *Vide infra. Dyer 66.*

If a Juſtice of Peace ſend a Warrant to an Officer to bring *J. S.* before him, or one of the Juſtices of the County, to give Sureties for the Peace; and if he refuſe, then to carry him to Gaol: And the Priſoner would go to one Juſtice, yet the Officer may bring him to another; and if he refuſe there to give Surety, the Officer may take him to Gaol upon his firſt Warrant without any other. And in all theſe caſes, no Action of Falſe impriſonment will lie againſt the parties that do arreſt or impriſon, *Co. 5. 59.*

If one threaten to kill another, or break the Peace, and the Officer bring him to the Juſtice; and if he refuſe to be bound for the Peace, and the Officer carry him to Gaol, this is lawful, 22 *Aſſ. p.* 56. 54. 7. 6. 38 *Ed.* 3. 6.

If after a man is lawfully arreſted, he be committed to a private Priſon, where he ſhould be ſent to the common Priſon, it ſeems this Action lieth. By *Cook* Ch. Juſtice. *Brownl.* 2 *par.* 41.

4. Where the Arreſt or Impriſonment ſhall be ſaid to be unlawful, upon which Falſe impriſonment lieth. *Falſe impriſonment*, what. In reſpect of the cauſe.

The Law doth much favour the Liberty of men: And therefore if any man ſhall be reſtrained therein without good cauſe, the party ſo wronged may have an Action of Falſe impriſonment, in the nature of an Action of Treſpaſs, which lieth where a man is wrongfully impriſoned, or detained in priſon contrary to order of Law. And a man is then wrongfully impriſoned, when either there is no good cauſe for his impriſonment, or the party that doth it hath no good authority by any Common or Statute-Law, or by any power or Warrant derived from others: Or elſe when being lawfully impriſoned at firſt, he is unlawfully detained afterwards: Or elſe when the authority ſo given is not purſued, but the party that doth arreſt doth miſdemean himſelf therein, as in the caſes following, *F. N. B. tit. Treſpaſs. Co.* 8. 66, 67. *Br. F. Imp.* 1, 2. But in all ſuch caſes the party grieved may have remedy; and this may be puniſhed divers ways beſides this by Falſe impriſonment. For, 1. He may cauſe the party to be indicted at the Kings ſuit. 2. He may have a *Habeas corpus* out of either Bench, Chancery or Exchequer, for Officers priviledged in their own Courts, and in the Upper-Bench and Chancery for any other. And upon this the Gaoler muſt return, By whom and for what cauſe he was committed: And if it appear juſt, he ſhall be

be ſent back; if not, he will be delivered; if it be doubtful, he will be bailed. 3. He may have a Writ *De homine replegiando*, or *De odio & At.* See *Co.* 2 *par. Inſt.* 55.

For ſuch petty offences for which a man is not fineable, he ſhall not be impriſoned: As if in pleading one do deny the Deed of his Anceſtor, and it be found upon Trial to be his Deed: Or if one ſue on an Obligation for a Debt, and yet know the Defendant hath a Releaſe of the Debt; or if one plead a falſe Deed, and do after before Trial relinquiſh his Plea, *Br. Impr.* 1. 2. 7.

None may be arreſted for Debt, Treaſons, Detinue, or other cauſe of Action, but by vertue of a Precept or Commandment out of ſome Court. *New Terms ley Arreſt.*

If one impriſon me upon an illegal Warrant, as a binding Proceſs from the Council of the Marches of *Wales*, &c. *Glouc. Aſſ.* 17 *Car.*

If one owe me money, or have treſpaſſed me, and the like, and I will impriſon him for it without order of Law, he may have a Falſe impriſonment againſt me. So if I impriſon him till he have given me a Bond, made me a Releaſe, and the like. *Terms ley F. Impr. Br. Treſp. F. N. B.* 88. *c.*

If I ſuſpect a man for Felony, and complain to a Conſtable, he cannot arreſt him on my ſuſpition; but after I have arreſted him and committed him to him, there the Conſtable may keep him and is bound to look to him, *per* Ch. Juſt. *Bridgman & Cur.* See more in *Marlb. c.* 23.

If one arreſt another for having ſuſpitious goods, and know of no Felony done before; or there be a Felony done, but no cauſe to ſuſpect the party arreſted; in theſe caſes the party may have an Action of Falſe impriſonment. For as a Suſpition without a Felony, ſo a Felony without a Suſpition, is no good cauſe to authorize a man to arreſt, 7 *H.* 4. 3. 14 *H.* 8. 16. 27 *H.* 8. 23.

If there be an Order by Law made by a Corporation or Village, That every one that ſhall, or ſhall not do ſuch a thing ſhall be impriſoned, and hereupon a man that breaketh this Order is impriſoned; now hereupon he may have an Action of Falſe impriſonment: For without ſome ſpecial Law or Cuſtom to enable them, they cannot make Laws of impriſonment, *Co.* 4. 64. 9 *H.* 5. 29.

If a man bind himſelf to pay money, and that if he pay it not, it ſhall be lawful for the other to impriſon him, and he fail paiment, and the other do impriſon him; a Falſe impriſonment lieth, 23 *Ed.* 3. 3.

If the Sheriff impriſon upon a *Juſtities* or *Nativo habendo*, this Action lieth againſt him, 2 *H.* 4. 24. See *Dyer* 244. *Cromp. Jur.* 93. 6.

If a Warrant be to a Conſtable to arreſt a man and bring him before him at the next Seſſions, and he arreſt him after the Seſſions and bring him to the Juſtice, this Writ lieth, *Tr.* 9 *Car. B. R.*

If two men be quarrelling only, and one that is no Officer will go and ſet them by the heels, the party may have Falſe impriſonment againſt him, *Br. F. Impr.* 28. *In reſpect of the parties arreſting and their authority.*

If a Sheriff have a Priſoner in Execution, and do ſet him at liberty, or do voluntarily ſuffer him to eſcape, and afterwards without Writ do take him again in Execution; the party may have an Action of Falſe impriſonment againſt the Sheriff; and though in this caſe the party had promiſed to come to Priſon again by a day, and do not, and thereupon he arreſt him, yet the Arreſt is unlawful, *Co.* 3. 44. *Vide infra.*

If the Sheriff or any of his Bailiffs by warrant from him ſhall arreſt any man after the Sheriff is diſcharged of his office; or a Juſtice of Peace and one that hath Warrant from him arreſt any man after his Commiſſion is determined, and notice thereof given; ſuch Arreſts will be unlawful, and the parties may have this Action, *Dyer* 41. *Sect. 7.*

If any Bailiff arreſt without a Warrant in writing from his Maſter or Officer, without a Warrant in writing from the Juſtice, (unleſs it be one that is preſent) it ſeems this is unlawful; and though he get a Warrant after in writing, yet this will not help the matter, but the party may have this Action, *Dyer* 244. 14 *H.* 8. 16; *Co.* 9. 66. 344. 10 *H.* 7. 17.

If

If the Sheriff arreſt a man without Writ, or without a Writ ſealed, or in any other manner then in his Writ, this Action lieth againſt the Sheriff; and the having a Writ, or having it ſealed after, before the Action brought, will not help, *Dyer* 242. 43 *Eliz.* 6.

If a Conſtable arreſt on a ſuſpition, and he flie, and another that is no Officer, without commands of the Conſtable, purſue and arreſt him; this is unlawful, *Br. Treſp.* 297.

In reſpect of the party arreſted. If one have a Warrant to arreſt *J. S.* and he come to another and ask him whether his name be *J. S.* and he ſay, yes; and thereupon he ſay, If your name be *J. S.* I arreſt you at the ſuit of *W.* Now this is an unlawful Arreſt, for which Falſe Impriſonment lieth, *Trin.* 7 *Jac. B. R.*

If the Sheriff either of his own head, or by the direction of the Plaintiff arreſt a contrary man, the party arreſted may have this Action, unleſs it be a man of the ſame name: For which ſee above. *Kelw.* 229. *M.* 5 *Jac. Goldſmiths* Caſe.

If a Warrant be to arreſt *J.* the ſon of *W.* and he arreſt the ſon of *S.* which indeed is the right perſon intended, but not the perſon within his Warrant; here the party arreſted may have this Action, 10 *Ed.* 4. 12. *Br. F. Impr.* 38.

Of the time. If a Sheriff or his Bailiff will arreſt a man on a Writ after the day of the Retorn, or a Bailiff before the Teſt of his Warrant; the party arreſted may ave this Action, *Dyer* 242. *Co.* 8. 66, 67. *James verſ. Bone, Paſc.* 17 *Jac. B. R.*

If the Conſtable or Juſtice of Peace, after an affray is paſt and all is quiet, if there be no body wounded, will impriſon the affrayers in the Stocks or elſwhere, it ſeems they may have an Action of falſe Impriſonment, 5 *H.* 7. 6. 32 *H.* 8.

If a Warrant be to an Officer to cauſe *A.* to find Sureties for the Peace or Good-behaviour, and *A.* hearing of it do voluntary go to another Juſtice and bind himſelf, and get a *Superſedeas*: Now if after this the Officer arreſt him, the party may have a falſe Impriſonment, *Poulton de Pace* 20.

Of the manner and end. If one hold another in his arms in the ſtreet or elſwhere, and hinder him of his liberty and reſtrain him; he may bring his Action of falſe Impriſonment, if it be againſt the parties will, though he were never put in Priſon, 43 *Ed.* 3. 20. 22 *Aſſ. pl.* 25.

If the Maſter lock a man up in a chamber, and give his Servant the key to keep, and the Servant knowing his impriſonment there to be unjuſt, doth notwithſtanding keep the key: Now this is unjuſt both in Maſter and Servant, and an Action will lie againſt both: But if the Servant had not known the cauſe, no Action would have lien againſt him. 22 *Ed.* 4. 54.

Sect. 8. Of the place. If the Sheriff will arreſt a man on a Writ out of the compaſs of his County, the party arreſted may have this Action; for he may detain his Priſoner in no other County, when he is to bring him on a Writ into a Court. Whereof ſee before, *Br. F. Imp.* 27, *Weſtm.* 7. *c.* 34.

Of the purſuit of the Authority, or by matter *ex poſt facto.* If an Officer put a man in Priſon that hath wounded another, to ſee whether the party will live or die, and there do detain him after he doth perceive that the fear and danger of death is paſt; in this caſe the party for this Detainer after a reaſonable time, may have an Action of Falſe Impriſonment, *Br. F. Impr.* 6.

If a Juſtice of Peace do ſend a general Warrant to an Officer to carry a perſon to Gaol, and ſet down no cauſe why therein, and the Officer thereupon do ſo; it ſeems this Action will lie againſt the Juſtice, if not againſt the Officer alſo. But upon a general Warrant without cauſe to bring a perſon before him, if the Officer do ſo, it is a good Arreſt enough (as it ſeems:) however it ſeems the ſafeſt way to ſet down the cauſe.

If a Juſtice of Peace ſend for a man, and then preſently ſend him to Gaol without any examination, the party may have this Action againſt the Juſtice, *Mich.* 8 *Jac. B. R.*

If the Sheriff after he hath arreſted a man lawfully, when a legal Diſcharge is offered him, as a *Superſedeas* or other Writ; or the party, if it be at another mans ſuit, offer him a Releaſe, and bid him let him go, detain him; this Detainer is a *Caption en ley*, for which this Action lieth, 2 *R.* 2. 12. *Fitz. tit. Bar*, 253. *Withers verſ. Henly, B. R. M.* 13 *Jac.*

If

If the Sheriff upon a *Capſat* make a Warrant to a Bailiff to take the party, and he pay the money to the Sheriff, and hath a *Superſedeas*, and doth ſhew it to the Bailiff, and yet he doth arreſt him, or being arreſted detain him under colour of illiterature; it ſeems for this Falſe Impriſonment doth lie. *Stringer verſ. Stanlake. Trin.* 37 *Eliz. Co. B.* 13 *H.* 7. 16. 1 *H.* 7. 28. 33 *H.* 6. 48. *Et iſſue fuit rule en la cas D. Trotman & Hues*, at *Glouceſter* Summer-Aſſiſe 6 *Car. dent Whitlock* Juſtice. So alſo in the ſame caſe, if one after he hath lawfully arreſted a man, do after detain him for Fees that are not due, or unlawfully arreſt him again for them. See *Br. F. Imp.* 12. *Kelw.* 36. 89. So where a Keeper doth detain for undue Fees. Where a man may be impriſoned, See *Merton c.* 3. 6. 7. 11.

If one that is no known common ſworn Bailiff arreſt a man by Warrant from the Sheriff, and the party ſubmit to the Arreſt and deſire ſight of the Warrant, and the Bailiff will not ſhew it him; then may the party arreſted have this Action againſt him; for after the time of the refuſal, the Arreſt is unlawful. And if the Arreſt be by a Bailiff-errant and ſworn, he is bound to declare the Contents only, and not to ſhew the Warrant it ſelf: And if he do not ſo upon demand of the party arreſted, *i. e.* ſhew the cauſe at whoſe ſuit, and for what, and in what Court; then the party arreſted may have this Action againſt him, as againſt another Bailiff in the firſt caſe. But if the party arreſted do not deſire to ſee the Warrant, or know the Contents, or do not ſubmit to the Arreſt, but ſtrive to eſcape; in this caſe the Bailiff is not bound to ſhew it, *Co.* 9. 69. 21 *H.* 7. 23. 14 *H.* 7. 9. *Co.* 6. 55.

If one after he have arreſted a man, when he ſhould carry him to Priſon, or to a Juſtice, carry him to his own houſe, or to the Priſon of another County, (unleſs it be in ſome ſpecial caſes) or keep him longer at his houſe then is meet; in theſe caſes the party may have this Action as for an unlawful impriſonment. So if a Juſtice of Peace, in ſtead of ſending a Priſoner to Gaol where he ſhould have his Trial, will ſend him to another place, or keep him at his houſe; the party may have this Action againſt the Juſtices, *per Cook & Foſter* Juſtices. *Kelw.* 45. *Plow.* 38. *Br. F. Imp.* 25. 5 *Ed.* 4. 6. 14 *H.* 7. 5. *Hil.* 8 *Jac. Bro Treſp.* 247.

If one be arreſted by the Sheriffs or his Bailiffs, that by Law is bailable, and he tender them ſuch Bail as the Law requires, and they refuſe it, or detain him longer; the party may have this Action. 23 *H.* 6. *FNB.* 152. *Plow: Co. Dyer* 25. *Sect.* 9.

If a Sheriff or Bailiff of a Franchiſe arreſt a man upon a *Capias ad reſpondend.* and after they do not return the Writ, or return him with a *Non eſt inventus*: Now in this caſe the party may have againſt the Sheriff or Bailiff that arreſted him, an Action of Falſe Impriſonment, *Co.* 5. 90. *Kelw.* 81. 89. *Plow.* 16. 3 *H.* 7. 11. 21 *H.* 7: 12.

If a Warrant be to bring one before a Juſtice of Peace, if he do not put in Surety of the Peace, and he do ſo, and the party notwithſtanding apprehend him; the party arreſted may have this Action, *Br. F. Impr.* 17.

If a Warrant be to an Officer, to cauſe a man to find Sureties of the Peace or Good abearing, and the Officer arreſt him before the other is required to do it, and doth refuſe, he may have Falſe Impriſonment; for the Officer ought to do this firſt, 5 *Ed.* 4 12.

If a Court meddle with a thing wherewith they have nothing to do; as the Court of Common-Pleas, with Pleas of the Crown; the Leet, with Actions between party and party: There in that caſe, if any ſuch Court ſhall ſend out Precepts or Proceſs to arreſt men; in this caſe all the Officers or Miniſters that ſhall execute ſuch Proceſs or Precepts, ſhall be puniſhed in an Action of Falſe Impriſonment. But if the Court have juriſdiction of the Cauſe, and have erred only in their Proceeding, *contra*: As where a *Capias* in the Common-Pleas is awarded without an Original, or a *Capias* againſt a Duke, Earl, or the like; here no Action lieth againſt the Sheriff or other Officers for executing this Writ. And ſo in like manner in the Warrants of Juſtices of the Peace, if they do command any thing in or about ſuch matters as whereof they are Judges, or wherewith they have to do; although they miſtake or miſ-behave themſelves in the manner of their Proceeding, yet the Officer in that caſe is not to be puniſhed by Falſe Impriſonment. As if a Juſtice of Peace will ſend a Warrant to carry

5. Againſt whom the Action of Falſe Impriſonment will lie, or not.

carry a man to Gaol for Felony, before any Indictment be againſt the Felon (which it ſeems he cannot do) and the Officer do ſo, no Action of Falſe Impriſonment will lie againſt the Officer. But if a Juſtice ſhall ſend a Warrant to an Officer to arreſt one for a Debt he doth owe him, and expreſs ſuch a cauſe in the Warrant, and he do ſo; in this caſe the Action may be brought againſt the Juſtice and the Officer alſo. And for this cauſe it ſhould ſeem reaſon that the Juſtice ſhould ſet down his cauſe in his Warrant, that the Officer may judg whether it be fit to be obeyed or no, and not by a kind of neceſſity be brought into danger, and cannot ſee to prevent it. But the experience is otherwiſe in many places, *Wolſies* Caſe *M.* 8 *Jac. Co.* 10. *le caſe de Marſhalſey. Keſw.* 192. 14 *H.* 8. 16. 24 *Ed.* 3. 9. 7 *Ed.* 3. 24. *Bro. Treſp.* 372. 22 *Aſſ. p.* 64. *Plow.* 394. *Brownl.* 2 *par.* 16. See *Clergie.*

Sect. 10. If one procure another to impriſon me wrongfully, I may have an Action of Falſe Impriſonment againſt them both, 12 *H.* 7. 15. *Dyer* 244.

If a Sheriff make a Warrant on a *Cap. ad reſpondend.* to arreſt a man, and after the Sheriff do not return the *Capias*; here howſoever this Action lieth againſt the Sheriff, yet it lieth not againſt the Bailiff. *Contra*, if he be a Bailiff of a Franchiſe, 20 *H.* 7. 1. 21 *H.* 7. 22.

The Heir, Executor or Adminiſtrator cannot be charged for the Falſe Impriſonment of the Anceſtor or Teſtator. See *Action perſonal.*

If a Plaintiff will bring an unlawful Warrant, and ſhew the Sheriff the party, and require him to arreſt him; or bring a good Warrant, and ſhew the Sheriff the wrong perſon, and require him to do it, the Action will be againſt them both, *Br. Treſp.* 307. 99.

6. Gaoler, what. It is one that hath the cuſtody of the place and Priſon wherein Priſoners are kept; and of theſe there be as many as Gaols and Priſons. Their duty and charge is, to look to their Priſoners that they eſcape not, at their peril; for they muſt anſwer for them. Alſo they muſt ſee that they have neceſſary proviſion: And for that the Law doth give them an Action of Debt to recover it againſt their Priſoner, in which Action the Priſoner ſhall not be ſuffered to wage his Law, becauſe the Gaoler is bound to give it him. Alſo they are to ſee that ſuch Priſoners as are in for Debt upon Executions, be kept *in arcta cuſtodia*, and have not too much liberty; for by this means they will be forced the ſooner to pay their Debts. The Gaoler it ſeems may put irons or bolts on any Priſoners legs that is committed to him, and juſtifie it, *per* Juſt. *Bridgman, Trin.* 8 *Car. Mich.* 9 *Jac. Pinchens* Caſe. *Co.* 9. 87. *Dyer* 249. *Stat.* 14 *Ed.* 3. 10. 1 *R.* 2. 12. 3 *H.* 7. 3. 29 *H.* 7. 10. 1 *Ed.* 3. See more, *Co.* 3 *par. Inſt. cap.* 100.

7. Priſon, what. Priſoner, what. A Priſon is a ſtrong place or houſe for the ſafe keeping of Debters and Malefactors. And a Priſoner is he that is reſtrained of his Liberty in any Action Civil or Criminal, or upon any Commandment which may be upon matter of Record, as a Commitment in a Court; or upon matter of Fact, when it is upon an Arreſt by a Sheriff, Conſtable, or other.

Tower, what. It is the principal Priſon of the Nation, and therefore uſed for the principal Court, the High Court of Parliament, from whence they do commonly commit men to the *Tower*: And for the principal perſons, the Peers of the Land, which are always impriſoned there when they are impriſoned.

Marſhalſey and Marſhal, what. It is the proper, ordinary, and immediate Priſon for the Upper-Bench, for Priſoners that are committed out of, or condemned in that Court in Debts and other Civil Pleas. And the Sheriff, Gaoler, or Keeper, he is the Marſhal, who is an Officer attendant on the Upper-Bench, *Dyer* 297. 21 *Ed.* 4. 71.

Fleet, what. The *Fleet* is the proper, ordinary, and immediate Priſon for the Common-Pleas, for the Priſoners committed thence and condemned there in any Civil Plea; the Keeper and Guardian whereof is an Officer attendant on this Court. Alſo this Priſon doth belong to the *Palace*, *Chancery*, and *Exchequer*; and from thence they do uſually commit to this Priſon, *Dyer* 297. 21 *Ed.* 4. 71. *Dyer* 275.

Newgate, what. It is the uſual and proper Priſon unto which Criminal offenders are ſent from the *Upper-Bench*; and this Priſon is alſo uſed for ſuch kind of priſoners as are within the City of *London*, as the two *Counters* are uſed for ſuch as are in priſon for Debt there.

See

See for priſon, 13 *R.*2.15. 5 *H.*4. 10. 7 *H.*4.4. 23 *H.*8. 2. 19 *H.*7.10.

How a priſoner ſhall be conveyed to priſon. See 3 *Jac.* 10.

An Eſcape is, where one that is Arreſted, cometh to his liberty before he be delivered by Order of Law; and this is ſometimes in Deed, and ſometimes in Law only: Sometimes alſo it is voluntary, and this as it is a greater fault, ſo it is more ſeverely puniſhed: Sometimes it is negligent, which is not ſo great a fault, nor ſo ſeverely puniſhed, *Terms Ley. Co.*5.52. 3 *Ed.* 38. 8. *Eſcape*, what. The kindes of it.

The Voluntary is, when the party that hath the priſoner, doth turn him looſe, or ſuffer him willingly to eſcape. *Old Book of Entries, fol.*8.

The Negligent is, when the priſoner gets away by ſome neglect, but yet againſt the will of the Keeper that hath him.

The Eſcape in Deed is, when the priſoner is actually gone. The Eſcape in Law when the priſoner is ſtill in priſon notwithſtanding.

The Fruit and Conſequence of this is, That the party who doth ſuffer this Eſcape, ſhall be puniſhed according to the cauſe, for which the party was impriſoned: As if the priſoner were taken for Treaſon, then a voluntary Eſcape ſuffered of ſuch a priſoner, is Treaſon; and ſo for every offence, as the offence is. And if one do negligently againſt his will, ſuffer any ſuch priſoner to Eſcape, the party that ſo doth, is onely to be fined and impriſoned, and that more or leſs, as the cauſe of the impriſonment of the priſoner was at firſt. *Old Book of Entries, fol.*8. *Stamf.* 9 *H.*4. 1. See *Cromp. Jur.* 74,79,80, 105. 1 *R.*2.12. *Sect.* 11. 9. The fruit of it.

If the Arreſt and Impriſonment were for Debt or Damages upon an Execution, and the Sheriff, Gaoler, or Bailiffs that have the party in Execution, ſuffer him to eſcape voluntarily, and turn him at liberty, or willingly diſcharge him out of Execution; in this caſe the Sheriff or his Gaoler ſhall anſwer the Debt or Damages, for which the party was in Execution unto the Plaintiff, at whoſe Suit he was in Execution, which he may recover by Action of Debt againſt the Sheriff; and he hath no remedy againſt the priſoner, neither can he take him again upon that Execution: And though the Judgment, on which the Execution was, be erroneous, yet ſo long as it doth ſtand in force, it will not help the Sheriff. But if the Eſcape were negligent, and the priſoner get away againſt the will of the Sheriff, or the Gaoler; in that caſe, if he take the priſoner again in freſh purſuit, and before any Action of Debt brought by the Plaintiff upon the Eſcape, then the priſoner ſhall be ſaid to be in Execution as he was before, and the Sheriff or Gaoler ſhall not anſwer the Debt: But if they be ſued, they may plead in Bar, they took the priſoner upon a freſh purſuit; or if he cannot take him upon a freſh purſuit, howſoever in this caſe he muſt anſwer the Debt or Damages to the Plaintiff. Yet for his Counter-remedy againſt he priſoner, he may take him again at any time, or in any place within that County, or elſwhere, where he can finde him, and then may impriſon him, until he hath ſatisfied him as much as he hath paid to the Plaintiff; or elſe he may have an Action of the Caſe againſt the priſoner, and ſo relieve himſelf that way againſt him; or if the firſt *Capias ad Sat'* on which he was firſt arreſted, be not filed, he may take out a new Execution againſt him at the Suit of the Plaintiff, and take him by that. And after the Eſcape and Repriſal before the party hath his recompence of the Sheriff, he may take him to be in Execution for him again, if he will. But when once the Sheriff doth willingly diſcharge the priſoner, the Plaintiff can never after take out any new Execution againſt the priſoner, but muſt take his Remedy againſt the Sheriff. *Co.* 5.52. 6 *H.*7.12. 13 *H.*7.1. *Co.*3.52. 14 *H.*7.1. *Co.*9.69. *Co.*8.142. *Plowd.* 35.37.

Note here, that by freſh purſuit (before) is not meant onely when the purſuer hath the priſoner in ſight; but when he doth make a preſent purſuit after him, and in that purſuit he is taken, though he were out of view, and in another County; for thither alſo in that caſe, may the Sheriff purſue him, and there take him alſo, if he can finde him, *Plow.*35.37. *Freſh purſuit*, what.

If a Townſhip or Village ſuffer a Murderer to eſcape in the day, though he did his murder in the Fields, or Lanes, it ſhall be puniſhed by Amercement, and that whether they have notice of the murder, or not, *Dyer* 210.

No Warden of the Fleet ſhall ſuffer any priſoner in Execution, to go out of priſon by Mainpriſe, Bail, Baſton, without making gree to the party, unleſs by Writ or other Commandment of the Lord Protector, upon pain to loſe his office, and the party to have a Writ of Debt againſt him, 1 *R.* 2. 12.

Sect. 12. 10. What ſhall be ſaid an *Eſcape* of one in *Execution*, or not.

If a Sheriff or Gaoler ſuffer his priſoner in Execution to go abroad with his Keeper, or without his Keeper, unleſs it be by the Licenſe of the Lord Chief Juſtice, and of the party Plaintiff, or ſuffer him to go into another County out of his Cuſtody, though it be with his Keeper, and with Licenſe alſo; this is an Eſcape in Law, though he come to priſon again: But in *London*, by a ſpecial Cuſtom, in ſome caſe, the priſoner may go abroad with his Keeper, and it is no Eſcape. *Plow.* 36, 37.

If a man be in priſon on an Execution, and the Sheriff at the end of his year do not make him over by Indenture to his Succeſſor, though he tell him of it, and he knoweth there is ſuch a priſoner, yet the new Sheriff is not chargable with him; and therefore this is an Eſcape in the old Sheriff.

So if one man be in Execution for two Debts, and the Sheriff mention but one upon the Indenture; this is an Eſcape for the other. But if the old Sheriff die, then the new Sheriff is chargable for the priſoners he doth finde in priſon, without any Indenture or other notice. *Co.* 3. 72: 44.

If upon a *Capias ad Satisfact'* the Sheriff retorn that he hath taken the Body, but hath him not in Court the day of the Retorn of the Writ, although he be in Gaol, yet it ſeems this is an Eſcape in Law: But the practice of this day is otherwiſe. *Ideo quere.* 7 *H.* 4. 11. *Bro. Eſcape* 107.

If a Sheriff or Gaoler will let go his priſoner, and take a promiſe of him, that he will come again by ſuch a day; this is an Eſcape, though the party be come again at the day. *Co.* 3. 44.

If the King had commanded, or if a great man ſhould require the Sheriff or Gaoler, to diſcharge the priſoner, and he do ſo; this is an Eſcape. So if at any ſuch command, he let him go at liberty for a little while; this is an Eſcape. *Dyer* 278. 297. 13 *H.* 4. 13.

If a Woman-ſole be a Keeper of a priſon, and ſhe marry with one of her priſoners; this is an Eſcape in Law. So if a man have a priſon in Fee, and his Son and Heir be his priſoner, and he die, and the priſon deſcend to his Son; this is an Eſcape in Law, *Plow.* 37.

If one be Arreſted, and the party reſcue himſelf by violence, or another do reſcue him out of the Sheriffs hands, this is an Eſcape; for the Sheriff might have had *Poſſe Comitatus* to aid him; but if the Reſcue had been by the Kings enemies, *contrà. Dyer* 241. *Co.* 6. 54.

If the Baron and Feme be in Execution for the Debt of the Wife, and the Gaoler ſuffer the Wife to eſcape, this is an Eſcape which will make the Goaler chargable for the Debt. Dr. *Suteliff verſus* Sir *George Reynel. Trin.* 13 *Jac. B. R.* See *Co.* 3. 43.

If the priſoner do involuntarily eſcape, and the Sheriff do make a hot purſuit after him, and take him, though it be in another County; this is no Eſcape, *Broo. Eſcape* 4.

Where there is no Impriſonment at the time of the Eſcape, there is no Eſcape, as if a priſoner Eſcape; and after the Sheriff take him for himſelf, not upon a freſh purſuit, and after in the time of another Sheriff he doth eſcape; this is no Eſcape as to the Plaintiff, for he was not now in Execution for him.

So if a man be impriſoned by a Court that hath not power ſo to do: As if a Court Baron will grant a *Capias* to take a mans body in Execution, or the Court hath power, but doth not proceed legally. As if the *Chancery* will grant a *Capias* to take a mans body upon a Recognizance where no *Capias* doth lie, and the Sheriff do ſo, and after let him eſcape; or a Court will ſend a man to priſon on a Judgment for the Plaintiff, without any requeſt or deſire by him; or the party that doth Arreſt hath no Authority, as the Sheriff Arreſt without Proces, and after let the priſoner go: In all theſe caſes there is no Eſcape, 14 *Hen.* 7. 1. *Dyer* 66. 206. 197. 306. *Bro. Eſcape* 3.

If

If a Sheriff die, and a priſoner eſcape before another be made Sheriff; this is no Eſcape to charge the precedent or ſubſequent Sheriff, but the party may be taken in Execution again, upon the ſame Execution, *Co.* 3. 72.

If a priſoner in Execution eſcape, and the Gaoler make freſh Sute, and before his retaking, the party doth bring his Action againſt the Gaoler; in this caſe the Gaoler cannot retake, as for the Plaintiff to have him in Execution again, but for his own Indempnity. But if he do not bring his Action, then he may take him for the Plaintiff, *Goldsb.* 180. *pl.* 114.

If the Sheriff, Juſtice of the Court, and the Plaintiff in the Sute, Licenſe a priſoner to go for a time abroad, and he do ſo and return at his time, this is no Eſcape; but it ſeems the Gaoler or Sheriffs conſent muſt be in this caſe alſo, *Dyer* 275.

If a Sheriff or Gaoler be to bring a priſoner by *Habeas Corpus*, or the like, into a Court by a day, and the priſoner get away by the way, or the Keeper go out of the right way, or into another County; yet if he come by the day of the Retorn of the Writ in Court: theſe be no Eſcapes. *Co* 3. 42. *Dyer* 249.

If a Plaintiff by word Licenſe a Sheriff to deliver a priſoner, and he do ſo; this is no Eſcape. 27 *H.* 8. 24.

If a Priſon be burnt with fire, or broken by enemies of the Commonwealth, and hereby the priſoners get out; this is no Eſcape. *Contrà*, if it be broken by Rebels or Traytors. *Dyer* 66. *Bro. Eſcape* 10.

If a man be in Execution, and a Writ of Privilege is ſent to the Sheriff from Parliament, to deliver him, and he do ſo, this is no Eſcape; but after Parliament, he may take him again, *Dyer* 60.

If a priſoner be took from a Gaoler, by the Lord Protectors Writ, and then by a Court committed to another, this is no Eſcape in the firſt Gaoler. *Dyer* 249. 152.

If one arreſted on a Meſn Proces be reſcued, the Sheriff ſhall not be puniſhed for this; and if the party bring any Action, he may plead his Reſcous, but ſo he cannot upon an Execution. *May verſus Proby, & Lumley vic' Middleſex*, Adjudg. *Hil.* 14 *Jac. B.R.*

If a priſoner eſcape out of the *Kings Bench*, or *Marſhalſey*, or the *Fleet*, the Keepers of thoſe Priſons ſhall be charged, and the Action ſhall be brought againſt them. *Sect.* 13. 11. Who ſhall be charged for an *Eſcape*.

If a priſoner eſcape out of either of the *Counters* in *London*, the Action ſhall be brought againſt the Sheriffs of *London*.

If a priſoner eſcape out of any other Gaol in the Countrey, the Action muſt be brought againſt the Sheriff of the County, *Dyer* 278. 296. *Co.* 3. 52.

If a priſoner be removed out of the *Fleet*, that was there upon an Execution out of the Common Pleas, and he be removed by a *Corpus cum cauſa*, and then ſent to the *Marſhalſey* for another Debt; if he eſcape thence, the Gardein of the *Marſhalſey* ſhall be charged for the firſt and ſecond Debt, and not the Gardein of the *Fleet*, *Dyer* 152.

If an eſcape were in the time of a Predeceſſor Sheriff, the Succeſſor ſhall not be charged for it, but the Action ſhall be brought againſt the firſt Sheriff by the name of *Nuper vic'*, *Co.* 3. 52.

If a Gaoler that hath the Fee of a Priſon, make a Leaſe of it for life or years, and the Leſſee ſuffer an Eſcape, the party grieved may ſue him; and if he be not ſufficient to anſwer it, he may ſue the Leſſor, *Co.* 4. 98. *Dyer* 278.

It is where one is kept in Priſon, or reſtrained from his liberty, contrary to Law, or threatned to be killed, maimed, or impriſoned; if he will not do ſome Act, or make ſome Deed, which he thereupon doth; now for this cauſe the Deed is void. And if the party to whom it is made, make any uſe of it, the party that made it may plead it was done by *Dureſſe*, and ſo avoid it: And yet the party ſo impriſoned may have his Action of falſe Impriſonment alſo, for the Impriſonment, *Co.* 1, 119. 2. 9. 2 *Ed.* 4. 19. *Perk* 16. 9 *H.* 7. 24. *Terms Ley. Cromp. Jur. fol.* 296. 12. *Dureſſe*, what.

As all kinde of Eſpecialties; as Bills, Bonds, Feoffments, Leaſes, Releaſes, Wills, and the like, may be avoided by this means; ſo alſo it ſeems, Recognizances made upon the Statute, 23 *H.* 8. 6. and Marriages may be avoided for this cauſe. What Acts may be avoided by *Dureſſe*, or not.

So alſo Diſcents hapning whiles a man is in priſon, ſhall not hurt him, *Dyer* 143. But Records Regularly ſhall not be ſaid to be ſo made, and therefore not avoided by ſuch a Plea or Pretence, 16 *H.*7.5. 31 *H.*6.9.

13. What ſhall be ſaid to be done by *Dureſſe*, and thereby void or voidable.

To make the Caſe to be ſo, theſe things muſt be in the caſe.

1. There muſt be a Threatning, or Beating, or Impriſonment.

2. The Threatning muſt be of Life, Member, or Impriſonment.

3. It muſt be of the Life, Member, or Body of the party himſelf, that makes the Deed, or his Wife, or Childe.

4. Upon this the Deed muſt be made; and if either of theſe be wanting, it is no *Dureſſe*, *Bro. Dureſſe* 76. 18. 9 *H.*7. 24. 39 *H.*6. 50. *Brownl.* 2 *part.* 276. As in the Examples following.

If one threaten me, unleſs I will make him a Bond of forty pound, and I tell him I will not, but I will make him a Bond of twenty pound, and I do ſo, this is by *Dureſſe*. But if I ſay I will not do it, unleſs you give me five pound, and he do ſo; it ſeems this takes away the force, and yet if it move firſt from him, as I will give you five pound, and you ſhall give me a Bond of forty pound; here it ſhall be judged by *Dureſſe*, and ſo void.

If four do threaten one to impriſon him, if he will not ſeal a Deed to one of them four, and he do ſo for fear of this; this is void. So if one threaten, unleſs he will ſeal to four, and he do ſo, it is void to all four of them, *Broo. Dureſſe* 1.

If one threaten or impriſon a man till he ſwear, or promiſe he will ſeal ſuch a Deed, and afterwards he doth it accordingly at another time, and in another place out of priſon, and without threatning; yet this ſhall be ſaid to be done by *Dureſſe*, and therefore void, *Broo. Dureſſe* 7. 11. 20. 21 *Ed.*4.6.

If one threaten to kill a man, unleſs he will make a Deed to *J. S.* a ſtranger, and he do ſo; this is void, as if it were to the party himſelf, *Broo. Dureſſe* 9. 20.

If one that is in priſon for another, upon a lawful cauſe, and I ſhall procure them to be uſed more ſeverely in priſon; by this means to compel him to make ſome Deed, and thereupon he do ſo; this ſhall be ſaid *per Dureſſe* and void, *Broo. Dureſſe* 2. 10. *Brownl. Reg.* 1 *part.* 64.

If a man be impriſoned at my Sute, be the cauſe unjuſt, or not, and he will then make an Obligation to another; this is good, and cannot be ſaid to be *per Dureſſe*. *Terms Ley.*

If one threaten me to take away my Goods, burn or break my Houſe, enter upon my Land, or to kill or wound my Father or Mother, Brother, or Siſter, or Friend, or do impriſon any of them; and hereupon I ſeal a Deed, this is good, and ſhall not be ſaid *per Dureſſe*, 7 *Ed.*4.21. 20 *Aſſ. pl.*14. 18 *H.*6.21. 21 *Ed.*4.13. 15 *H.*6.17. 11 *Ed.*4.13. 8 *H.*6.8. *Co.*2.9. Some affirm the contrary upon threats to Father or Childe, 15 *Ed.*4.1.

If one diſtrain my Beaſts, to compel me to ſeal a Deed, and will not deliver them, unleſs I do ſo, and threaten me, that unleſs I will ſeal the Deed, if I take my Cattle again, he will beat and kill me; this is no *Dureſſe*, and therefore if I do ſeal upon this any Deed, the Deed is good enough, *Broo. Dureſſe* 16.

If a man be arreſted and impriſoned upon good cauſe, and being in priſon make an Obligation, or other Deed to him, at whoſe Sute he was arreſted, or to any other for his enlargement; it is good enough: As if Auditors do commit an Accomptant to priſon, and then he make an Obligation to his Maſter for the Arrearages; or if one in priſon for Felony, will grant a Reverſion to one to help him out of his trouble, it is good enough, *Dyer* 143. *Broo. Dureſſe* 17. 11. 4. 6. *Mansfields* caſe in *C. B.*

If *A.* and *B.* by *Dureſſe* to *B.* ſeal a Deed, the Deed is good to *A.* that was never threatned, *M.* 7 *Jac.*

If one make an Obligation by *Dureſſe*, and after being at large, take a Defeaſance upon it; this makes the Obligation good, and doth eſtop him to ſay it was by *Dureſſe*, 3 *H.*6.16. *Broo. Defeaſance* 17.

If a ſtranger be impriſoned by another ſtranger, and kept in priſon until another, as Surety for the ſtranger, make a Bond; this is not avoidable by this Plea, *Brownl.* 1 *part.* 64. But if a Court that had no power to impriſon a man (as the High Com-

Commiſſion formerly) in things out of their power, had impriſoned a man, and took Bond of him for a Fine; this had been, and ſtill will be void upon this account, *Brownl.* 2 *part.* 14.

Sect. 14. 14. *Bail*, what.

It is where a man is taken and arreſted for any cauſe whatſoever, for that he is reſtrained of his liberty, and for being under Arreſt, doth give Bond to appear at the Aſſizes, Seſſions, or other Court; then upon this he is bailed (*i. e.*) ſet at liberty till his day of Appearance come. And if he be not bailable, the parties that bailed him, may be puniſhed, *Terms Ley Bail.* 4 *Ed.* 3. 2.

Mainpriſe, what.

It is where a man is arreſted in ſome ſpecial caſe, then the Judge may deliver his body to certain men to keep, to bring him at his day; and theſe be called *Main pervors*, who if the party appear not at the day, are to be amerced: And where a man arreſted, is bailable, and cannot be bailed, he may have a Writ of Mainpriſe to bail him, *Terms Ley Main Pervors*, *F.N.B.* 249. 9.

15. Who may be bailed, or not.

Such as are arreſted on mean Proces, Writ, Bill, or Warrant, in Actions Perſonal, or Indictment for Treſpaſs, are Bailable. Such as are accuſed of Receipt of Felons, of Commandment, or Force, or Aid, in Felony done, and a man appealed by an Approver after the death of the Approver (if he be no common Thief, or defamed) ſhall be let out of priſon by a Surety, 33 *H.* 6. 10. *Plow.* 67. *Weſtm.* 1. 15. *Daltons* J. P. *fol.* 271.

Such as are brought before Juſtices upon a light ſuſpition, or upon malice, if he perceive it ſo, though it be an accuſation of Felony, 1 *R.* 3. 3. 3 *H.* 7. 3. *Weſtm.* 1. *cap.* 15. 27 *Ed.* 1. 3. 1 *Ed.* 3. 8.

Such perſons as are in priſon or Executions, *Cap. ut legat'* Excommunications, Sureties of the Peace, Vagabonds, or by ſome ſpecial Commandment from ſome Juſtice for ſome ſpecial cauſe, Feloneous burners of Houſes, and the like, are not bailable, 5 *Ed.* 3. 8. 2 *H.* 5. 2. 33 *H.* 6. 10. See the Proces againſt the Bail, *Brownl. Rep.* 1 *part. in toto*, 2 *part.* 76.

The Defendant in an Appeal of Maim, if the Maim be hainous, nor the Principal in an Indictment, or Appeal of Felony, nor the Acceſſory after the Attainder of the Principal, nor any in High Treaſon, 6 *H.* 7. 11. *Weſtm.* 1. 75. *Stamf.* 71. *Attorneys Acad.* 167. *F.N.B.* 249. Where Bail ought to be taken of an offender, 1 *H.* 7. 3. 2 *Phil. & Mar.* 13.

Odio & Atia, what.

It is a Writ lying where a man is impriſoned upon a falſe Conſpiracy, and there is no Appeal or Indictment againſt him, then he may have this Writ; and the Conſpiracy being found, he ſhall be delivered upon the Bail of twelve ſufficient men of the County, whether he be guilty or impriſoned of Malice, or not, *Co.* 9. 56. *Regiſter* ſee for this, 2 *part.* of *Co. Inſt.* 42.

See more for *Priſon*, *Priſoners*, *Gaol*, *Gaolers*, and *Arreſt.* 1 *Ed.* 3. *ſtat.* 1. 7. 5 *Edw.* 3. 8. 14 *Ed.* 3. *ſtat.* 1. 10. 13 *Rich.* 2. 15. 5 *H.* 4. 10. 19 *H.* 7. 10. 6 *H.* 8. 6. 23 *H.* 8. 3. 14 *Eliz.* 10. *Weſtm.* 1. 34. 50 *Ed.* 3. 5. 1 *R.* 2. 15. And in my Book of *Juſtice of Peace*, *cap.* 26.

For Diſcharge of Priſoners unable to ſatisfie their Debts, ſee *Act*, 4 *September* 1649. *Act*, 21 *December* 1649. *Act*, 6 *April* 1650. *Ordinance*, 6 *October* 1653. *Ordinance*, 9 *June* 1654.

For *Mainpriſe* and *Bail.* The old Statutes are *Marlb. cap.* 27. *Weſtm.* 1. 3 *H.* 7. 3. 1, 2 *Ph. & Ma.* 13. 2, 3 *Ph. & Ma.* 10.

CHAP.

CHAP. XCIX.

Incident, Appendant, Parcel or Adjacent, Intent and Incontinency.

1. *Incident*, what. The kindes.

INcidents are ſuch things as depend on other things more principal, to which they are in a manner acceſſary; and theſe are ſometimes called Appendant, and ſometimes Appurtenant; and theſe are of a different nature and conſideration: For ſome of them are, as it were, Parcel of the things themſelves that are the principals, as the Glaſs-windows, Doors, Wainſcots, and other Appendix of a Houſe to the houſe it ſelf, Trees, Hedges, Ways, and Waters to the ground, in which they are. Some of them are ſo Incident to their principal, that they cannot be divided from it, and yet continue to be: As a Court Baron to a Manor, Court of Pipowders to a Fair, and Eſtovers to a Houſe: Charters of Land to the Land, and Common Appendant unto the Land, to which it is Appendant.

And theſe Incidents howſoever they are not needful to the *eſſe*, yet to the *bene eſſe* of the things themſelves they are needful; and therefore the Law hath ſuch a care to preſerve them: And for this cauſe it is, That if a Common of Eſtovers do belong to a Houſe, and after the Houſe fall, or be gone, it ſhall continue to the place, where the Houſe ſtood.

And theſe two kindes of Incidents are ſo inherent to the Principals, that by the Grant of the one, the other is granted, and they cannot be extinct by Releaſe, nor ſaved by Exception from the other; but in ſpecial caſes, though it be not named, as the Glaſs, and the reſt, by the Grant of the Houſe, Trees by the Grant of the Ground, and the Court Baron by the Grant of a Manor, and ſo the reſt.

And the third ſort of theſe Incidents, are ſuch as may or may not have Dependance on their Principals, and will ſtand well enough without them: As an Advowſon, Villain, Leet, Warren, and the like; all which may be Appendant to a Manor by Preſcription of Continuance of Uſage, time out of minde; or may be, or be made in Groſs, being ſevered from their principal; of this nature alſo is a Rent Incident to a Reverſion, *Co. ſuper Littl. f.93.*

And theſe alſo paſs by the Grant of the principal, without any other words of *Cum pertinentiis*: See *Broo. Incidents in toto. Perk. ſect.* 112. *Dyer* 288. 14 *H.8.* 25. *Co.* 11. 50. 8 *Hen.* 7. 54. *Plow.* 3. 81. *Co.* 4. 38. *Co. ſuper Littl. fol.* 121, 122. 143. 151, 152. See much of this in the *New Book of Executors, fol.* 5.

2. What things ſhall be ſaid to be *Parcel* of, or *Incident* to other things, and go with them, or not.

All things that are annexed and faſtned to the Houſe by Nails, Skrews, or Pins, or by Morter or Stones, though it be ſet there by the charge of a Leſſee, as Glaſs, Wainſcot, Tables, Shelves, *Vates turneis*, and the like: Alſo Doors, Locks, Keys, and the like, are ſo Incident to the Houſe, that being once there ſet on by whomſoever, they cannot be ever after divided from the Houſe, unleſs it be by him that hath the Inheritance, that may pull it down if he will: And therefore if any Leſſee for life or years, ſhall ſet on to any Houſe any ſuch thing, he cannot after take it away, neither before nor after the end of his Term; much leſs then when they are fixed by the charge of another; and therefore theſe do go with the Houſe, and the Heir hath them that hath the Houſe, and the Executor as Chattels. See *Chattels. Co.* 4. 63. 21 *H.*7:26. 20 *H.*7.13.

Land, Meadow, Paſture, Wood, and divers other things are Parcel of a Manor, and Incident to it; for this word is a Compound and Collective word. So Lands, Meadows, or Paſture, may be Parcel of a Monaſtery, Rectory, Caſtle, or Honor:

So

So alſo Tithes, Offerings, and Glebe Land, are Parcel of Parſonage or Vicaridge, *Plow.* 170. 168. 15 *H.*7. 8.

Fealty is Incident to Homage, and Homage and Knights Service to Eſcuage, and by Grant of Service, Eſcuage doth paſs, *Co. lib. Inſt.* 1 *part, fol.*69.

Fealty is an Incident inſeparable to a Tenure or Reverſion, *Co. ſuper Littl.* 93. 143.

So is a Diſtreſs to Homage, Fealty, and Eſcuage, *Co. ſuper Littl.* 150 *b. Cromp. Jur.* 113. 116 *a.*

If one grant me to put Pipes in his Ground to bring water to my houſe; now as Incident to this Grant, I may come upon the Ground to amend my Pipes when there is need. So if I have Trees growing in another mans Ground, I muſt have as Incident to it, ſo much of the Soil as to nouriſh the life Vegetative of the Trees, 9 *Ed.*4.35. *Co.* 11. 49. 5. 11. 21 *H.*6. 47.

Fire-boot, Houſ-boot, Plough-boot, and Hay-boot, is Incident to every Leaſe for life or years. See *Houſ-boot*, 9 *H* 7. 21.

A Diſtreſs is Incident to every Fine or Amercement in a Law-day. See *Leet* and *Fine.*

The Qualities of Dower, Courteſie, Diſpuniſhment of Waſte, and power to ſuffer a Common Recovery, are Incident to an Eſtate-tail: See *Tail*, *Co.* 10. 30.

Rent and Services reſerved upon any particular Eſtate, are Incident to the Reverſion thereof: Alſo Fealty is Incident to Homage, and to every Tenure. Diſtreſs and Fealty is Incident to Rent-ſervice: A Rent ſeparably, Fealty inſeparably is Incident to the Reverſion, *Co. ſuper Littl.* 150. And by the Grant of the Reverſion, all the Services will paſs, *Co. ſuper Littl.* 237. *Kelw.* 136. *Co.* 4. 127. *Co. ſuper Littl.* 151.

Incorporeal things, as Advowſons, Allains, Ways, Courts, Fiſhings, Commons, or the like, may properly be Parcel of, or at leaſt Appendant to Corporeal things, as Houſes, Lands, Manors, and the like. *Et ſic contra*, *Plow.* 170. *Co* 4. 38. *Co. ſuper Littl.* 122. *Co. lib. Inſt.* 1 *part, fol.* 49.

A Forreſt may be Appendant to an Honor, Land to an Office, or an Office to Land; an Advowſon, Market, Fair, or Warren, Leet, Hundred, and ſuch like, may be Appendant to a Manor. Ways, Commons, Fiſhings, and the like, may be Appurtenant to Lands, Meadows, Paſtures or Rents. A Leet may be Appendant to a Hundred. A Waiff or Eſtray may be Appendant to a Leet, or to a Manor. A Villain Regardant, an Advowſon Appendant, are Incident to a Manor, and paſs without *Cum pertinentiis*, 11 *H*7. 16. 33 *H.*6. 45. *Plow.* 170. 8 *H.*7. 5. 4 *Ed.*4. 29. 6 *H.*7. 1. *Co. ſuper Littl.* 367. *March.* 76. *pl.* 115.

A Reverſion Expectant on a Franck-tenement, may be Parcel or Appendant to a Franck-tenement or Inheritance in Poſſeſſion. And all theſe Appendancies may be made by Preſcription of Uſage time out of minde, *Co.* 11. 47. & 6. 64. *Plow.* 70.

If one Leaſe a Manor, except an Acre; now this Acre as to the Leſſor, is no part of the Manor, but as to him that hath right by a Title, it is Parcel; and therefore he need not make any Farſpriſe in his Writ, *Plow.* 104.

If one ſell a Manor, excepting the Woods and Underwoods, and Hierons, and Hawks breed in the Wood, the Leſſor ſhall have them, not the Leſſee. See *Attorns*, *Co. ſuper Littl.* 324. *ut Littl.* 591. 14 *H.*8. 11.

A Waiff or Eſtray, is not as Parcel, nor inſeparably Incident to a Leet, nor one liberty to another, as a Leet to a Hundred, or the like, but by Common Uſage, time out of minde, they may become Appurtenant or Appendant; nor a Rent to Homage or Fealty. 8 *H.*7. 5. 12 *H.*7. 18. *Plow.* 332. *Co. ſuper Littl. fol.* 150.

Toll, Pickage, and Stallage, is not of Common Right, Incident to a Fair or Market, as the Court of Pipowder is to a Fair, *F. Curia*, *Hil.* 17 *Jac. B. R.* But by Preſcription perhaps may become Incident.

No Corporeal things are, or can be incident to, or parcel of other things of the ſame nature and ſubſtance, as one houſe to another, or Land, Meadow, Paſture, Rent, or the like, to a Houſe or to Rent, unleſs it be in caſe where that to which it is

incident,

incident, be a compounded thing, as a Manor, Farm, Caſtle, Honor, or the like; for to ſuch, Land, Meadow, and Paſture, may be incident. See before. *Plow.* 170. 85. *Bro, Incident* 29.

A Leet cannot be Appendant to a Church or Chappel, nor Common of *Turbary* to Land, nor Common Appendant to Meadow, or Paſture, *Co.* 4. 38. *Bonâ fellomi*, and ſuch like Royal Franchiſes cannot be Appendant to any Manor or Houſe, or the like, *Co.* 10. 68.

A Franck-tenement or Inheritance in Poſſeſſion, cannot be Parcel and Appendant to a Reverſion, *Expectantona, Co.* 11. 47.

Franck-tenement, for which ſee *Grant.*

Fealty or Reverſion is not inſeparable to the Rent, neither will it paſs by the Grant of it, *Co. ſuper Littl.* 150. 324, 325.

One Office cannot be Appendant to another properly; but there be ſome great Offices that have other Offices, as incident to theirs, by common uſe of time out of minde, as the Chief Juſtices; and ſo now they are become Appendant, *Plow.* 138.

If one make a Leaſe of an Incorporeal thing, rendring Rent; this Rent is not incident to, neither will it paſs by the Grant of the Reverſion, *Co. lib. Inſt. 1 part: fol.* 47.

3. Where things *Incident* may be ſevered, and how, or not.

The Wainſcot doors, or any other part of a Houſe, may be ſevered from a Houſe, by him that hath the Feoffment of the Houſe. A man may bar himſelf of his liberty, to amend his Pipe that hath it (as in the caſe above.) A man may ſever his Tithes and Offerings, from his Gleab. A Leſſee may bar himſelf of his Fire-boot, Hay-boot, and Plough-boot, by Agreement; for *Modus & conventio vincunt legem.* And a man of his power to diſtrain in ſome caſes where his Diſtreſs is incident; And a man of his power to diſtrain in ſome caſes, where his Diſtreſs is Incident. And the Tenant in Tail in ſome caſes, may be barred of the Privileges and Qualities that are Incident to his Eſtate, *Broo. Incid. in toto.* 7 *Ed.* 4. 11. *Brownl. Rep.* 2 *part.* 192, 193.

But a Court Baron cannot be ſevered from a Manor, nor a Manor from the Court, for theſe live and die together: So neither can a Court of Pipowders be ſevered from a Fair, Common of Eſtovers from the Houſe, to which it doth belong, nor Common from the Land, to which it doth append; but theſe Commons may by a means be extinct. See *Common. Plow.* 381. *Co.* 11. 77. 914. *Doct. & Stud.* 75. 26 *Aſſ. pl.* 66.

Homage and Fealty cannot be parted, nor Fealty from a Tenure; nor Wardſhip and Marriage from Eſcuage: But Rent may be ſevered from a Reverſion, and ſo it may from Fealty; for it is but incident ſeparable, yet it paſſeth by Grant of the Rent, unleſs it be ſaved. *Co. ſuper Littl.* 151. *Co.* 9. 127. 8 *H.* 6. 5. 5 *H.* 7. 7.

Fees or Annuities for Offices, cannot be ſevered from the Offices, whiles the Offices continue. See for this, *Plow.* 381.

If one grant Wood to be burnt in ſuch a Houſe; this may not be granted from the Houſe, but he that hath the Houſe, ſhall have the Wood.

4. Where things once *Appendant*, become *Diſappendant* or *Extinct.*

If the King had a Manor to which an Advowſon is Appendant, and he grant the Manor, and not name the Advowſon in ſpecial; now hereby the Advowſon is ſevered, and become in Groſs: So if one Leaſe a Manor for life, excepting one Acre Parcel of it; hereby this Acre is ſevered. So if one Diſſeiſe a man of an Acre Parcel of a Manor, hereby this Acre is divided till by his Entry it be united. And if in all theſe Caſes, the owner of the Manor do after grant the Manor or the Reverſion of it, the Advowſon or Acre of Land doth not paſs. *Co.* 10. 64. 11. 47. *Dyer* 48.

If one Diſſeiſe me of Common Appendant belonging to my Manor, and during the Diſſeiſon, I ſell the Manor; now hereby the Common is extinct for ever. *Co.* 11. 47. 40 *Ed.* 3. 21.

If a Lord will releaſe his Services to his Tenant, hereby they are extinct.

CHAP.

Of Intent.

INtent is the true meaning of men, and their minde in their words, ſayings, and doings: And this in ſome caſes, the Law hath much regard unto, and in ſome not. As in *Acts* of Parliament, the intent and minde of the Law-makers is much regarded. In Arbitrements, the Intent and Minde of the Arbitrators; in Wills and Teſtaments, the Intent and Minde of the Teſtator; alſo in Deeds and Publick Inſtruments, in Bargains and Contracts, the Law hath much reſpect to the Intent of the Parties: And therefore in divers caſes, if the Intent be ſatisfied, though the words be not, the Law is ſatisfied with this: As if a Feoffment be made on Condition, that the Feoffee ſhall make a Gift in Special Tail to the Feoffor, and his Wife by ſuch a day, and they both, or one of them die before the day, leaving iſſue behinde them, and then the Feoffee make back an Eſtate in the firſt caſe, to the Iſſue, and the Heirs of the Body of the Father and Mother, and in laſt to the Survivor of them, without impeachment of Waſte, the Remainder to the Iſſue in Tail; howſoever this be no performance of the words; yet becauſe it is as near the Intent as may be, the Law doth accept of this as a good performance of the Condition. So *è contra* when the words are fully performed, and not the Intent, the Law will not be ſatisfied with it: And therefore in the caſe above, if the Feoffee had made a Feoffment to another before, or granted a Rent-charge out of the Land, or the like; and after, before the day, make back an Eſtate according to the Condition; yet the Law will not allow this for a performance of the Condition, and yet he doth as much as is in the words, *Littl. Condit.* 82. *Plow.* 29. 28. See 23 *H.*7. 4. *Intent*, what. *Regard.*

In ſome caſes the Law doth not regard mens Intent, as when men ſhall do evil, when they ſay they intended none; or do more evil when they intend leſs: Here they ſhall be puniſhed according to their Deed, and not according to their intent; as if one intend onely to beat a man, and therein happen to kill him. So if Mens Wills and Teſtaments have any thing in them contrary, and repugnant to any rule of Law, the Law will not regard it, nor labor to fulfil it.

Of Incontinency and Baſtardy.

AS to the point of Incontinency, we are to know there are divers degrees thereof. Firſt, There is Bigamy, the having of more Wives then one, wherein theſe things are to be known. It is Felony for any one having a Husband or Wife, and knowing him or her to be alive, to marry another Husband or Wife: Secondly, But if the Husband or Wife have been ſeven years together beyond Sea; or they have been ſeven years together one from another in any part of the Kings Dominions; the one of them then not knowing the other to be alive within this time; or they were duly divorced from the firſt Husband or Wife, or the firſt marriage be duly declared to be void, or the firſt marriage were made within age of conſent; In all theſe caſes it is no Felony, 1 *Jac.* 11. *Bigamy*, or *Double Marriage:*

And as to Adultery, theſe things are to be known. *Adultery.*

1. It is Felony for a Woman, knowing her firſt Husband to be alive, or not having been three years abſent, continually beyond Sea, or elſwhere continually from her, ſo long ſhe not knowing him alive within that time, or by common report reputed to be dead; to be known by a man, it is Felony in both of them.

2. It is Felony for any man to lie with a married Woman, if he know her to be ſo, *Act*, 10 *May*, 1650. *Fornication.*

3. If any others lie together, or if any one be a Baud, or keep a Baudy-houſe, the ſecond offence in both theſe caſes, is Felony, *Act*, 10 *May*, 1650. *Baud.*

4. As to Inceſt, it is to be known, That it is Felony for any one to lie with his, or her Grand-father or Grand-mother, Father or Mother, Brother or Siſter, Son or Daughter, or Grand-childe, Father, Brother or Siſter, Fathers Wife, Mothers *Inceſt.*

Husband, Sons Wife, Daughters Husband, Wives Mother or Daughter, Husbands Father or Son, *Act*, 10 *May*, 1650.

Buggery. Sodomy. 5. It is Felony to commit Buggery with a Beaſt, or to commit Buggery, or Sodomy with a man, 25 *Hen.* 8. 6. 5 *Eliz.* 17. *Co.* 3 *part of Inſt. cap.* 10.

Rape. 6. It is Felony to raviſh or force any Wife, Widow, or Maid, againſt her will, albeit ſhe do after agree, and conſent to it, 13 *Ed.* 1. 34. 6 *Rich.* 2. 6. *Co.* 2 *part. Inſt. cap.* 11.

7. It is Felony carnally to know any Maid that is at that time under age of ten years, albeit ſhe be conſenting to it at the time, 18 *Eliz.* 6.

8. For Fornication, the firſt offence the offender is to be ſent to Gaol three moneths without Bail, and until ſecurity given for the Good-behavior, for one whole year; or the Juſtice of Peace may binde to the Good-behavior for a leſs time, at his diſcretion, *Act*, 10 *May*, 1650.

9. A Baud, or one that keeps a Baudy-houſe, is for the firſt offence to be whipped, ſet on the Pillory, burned on the Forehead with the Letter *B.* put in *Bridewel* for three years, and bound to the Good-behavior for her life, *Act*, 10 *May*, 1645. *Co.* 3 *part Inſt. cap* 98.

10. If there be a Baſtard in the Caſe, the Reputed Father thereof, at the requeſt of any Pariſh, (in danger to be charged therewith) is to be bound to the Good-behavior, and to be at the next Seſſions, that he may be forth-coming.

11. The Woman that hath the Baſtard, when ſhe is delivered, and recovered, is for the firſt offence to be ſent to *Bridewel* a year; and for the ſecond offence ſhe is to be ſent thither, till ſhe put in Sureties for her Good-behavior, and not ſo to offend again.

12. If the Juſtices out of, or in the Seſſions, make any order for the keeping of and ſecuring the Pariſh in danger to be charged, the party charged to be the Father, and the Mother muſt obey it, or be committed to Gaol till they do it, 18 *Eliz.* 3. 7 *Jac.* 4.

13. The Laws of Bigamy in other caſes, then as before, are now void, and the marriage of all orders of men, and ſecond marriages lawful to all, and not prejudicial to any. See 1 *Ed.* 6. 12. 10 *Eliz.* 7. And ſee more for Baſtards, in *Baſtard*, and my Book of *Juſtice of Peace.*

CHAP. C.

Of Joyntenants, Parceners, and Tenants in Common.

Sect. 1. *1. Joyntenants, what.*

JOyntenants are ſuch as have, and come by Lands or Tenements, Goods, or Chattels, by one and the ſame joynt Means and Title, as in the caſes hereafter following. As if Lands be given or granted by Fine, Recovery, *&c.* Deed, or without Deed, or Deviſed by Will to two or more, and their Heirs, or to two or more for their lives, or for other lives, or to two or more for years. (But between Baron and Feme after marriage, there is no Moyety, but each of them hath all, *Co. ſuper Littl.* 187, 188.)

So if Goods, or any other Chattels, be given or granted to two or more, and they have it in Poſſeſſion, or in Right; in all theſe caſes the Donees or Grantees are Joyntenants.

So if a Contract be made to two or more, or a Recognizance or Obligation be made to two or more, the parties to whom the Contract is made, the Conuſees and Obligees

Obligees are Joyntenants of this Debt or Duty: And between theſe Joyntenants there is a twofold Privity in Eſtate, and in Poſſeſſion, *Co. ſuper Littl.* 169. Alſo Joyntenants may be of an Eſtate by wrong; but this *Jus accreſcendi inter mercatores pro beneficio commercii locum non habet:* As of two Merchants for the Wares, Merchandiſes, Debts, or Duties, that they have as joynt Partners or Merchants. See *Terms Ley, Littl. fol* 62. *Broo. Joyntenants* 17. *Plow.* 10. 72. *Dyer* 250. 305. *Co.* 3. 26, 29. 1. 85. *Noy, chap.* 6. *Co. ſuper Littl.* 182.

2. Where a man ſhall be ſaid to be a *Joyntenant*, or not.

If an Advowſon be granted to A. & B. *Habendum eis & uni eorum conjunctim & diviſim*; it ſeems by this they are Joyntenants, *Dyer* 304.

If Lands be given to two *& uni eorum diutius viventi*; hereby they are Joyntenants for life, *Co.* 1 1. 4.

If Lands be given or granted to two, without limitation of any Eſtate; hereby they are Joyntenants for life, *Co.* 8. 95.

If Lands be given or granted to two or more *Habendum* to them ſucceſſive, they are hereby Joyntenants. So if Lands be granted to two or more, and to him that ſhall ſurvive, they are by this Limitation, Joyntenants. *Broo. Joyntenants* 33. And this is ſo, whether the Grant be for life or years. See *Broo. Joyntenants* 140. *Whitlocks* caſe, *M.* 3 *Jac. B.R. Broo. Treſpaſs* 54.

If a Leaſe be made to two, or more for years, with a *Proviſo*, That if they die within the Term, that the Term ſhall ceaſe, hereby they are Joyntenants, *Dyer* 67.

If Joyntenants be ouſted or diſſeiſed, and ſue for and recover again, they ſhall be Joyntenants as they were at firſt, *Co. ſuper Littl.* 188.

If Chattels Real or Perſonal be granted to a Biſhop, or the like, and another, or to two Corporations, or the like; here they are Joyntenants: And it is not as in the caſe of Lands ſo granted, *Co. ſuper Littl. fol.* 190.

If Leſſee for years grant his Term to another, and a Woman, they are Joyntenants.

But if Goods be given to a Woman, and another, the Husband of the Woman, and the other, are Tenants in Common.

If a Leaſe be made to two or more, *Habendum eis ad terminum vitæ eorum conjunctim & alterius diutius viventis, ac aſſignatis ſuis qui primus eorum diſcedere contingat durante vita ejus qui ſuperſtes*; hereby they are Joyntenants, *Dyer* 46. *Co.* of *Copihold* 142.

If an Eſtate be made to a Husband and Wife, and a third perſon, hereby they are Joyntenants, the Husband & Wife, hath a Moyety, and the other perſon, the other Moyety, *Litt.*

If Leſſee for life grant to him in Reverſion, and two others, for two parts in three parts, the other men are Joyntenants, *Broo. Joyntenants* 14.

If Lands be given to two Men or Women, or more, and the Heirs, or Heirs Males, or Heirs Females of their Bodies, or in any ſuch like manner; hereby they are Joyntenants for their lives, and they have ſeveral Inheritances, and their Iſſues after ſhall be Tenants in Common, *Co. ſuper Littl. fol.* 182, 183. *Dyer* 350. *Littl. fol.* 62, 63, 64.

If Lands be given to two or more, and the Heirs, or Heirs Males of the Body of one of them; hereby they are Joyntenants for their lives, and one hath the Inheritance, *Dyer* 350. *Co.* 3. 60.

If one make a Feoffment in Fee to the uſe of himſelf, and his wife that ſhall be, and after he take a wife, ſhe ſhall be Joyntenant with him, *Co.* 1. 101.

If Joyntenants Exchange their Lands, they have in Joyntenancy for other Lands, they ſhall be Joyntenants of their other Land, as they were of this, unleſs they agree to have it in Common, *Perk.* 55, 56.

If two Men or more do Diſſeiſe another, now hereby they are Joyntenants of this Eſtate, which they have got by the Diſſeiſion, unleſs they made the Diſſeiſon to the uſe of another, or to the uſe of one of them, *Littl. cap. Joyntenants, ſect.* 62.

If one Diſſeiſe to the uſe of two, and one agree at one time, the other at another, they are Joyntenants, *Co. ſuper Littl.* 188.

If a Rent-charge of ten pound be granted to *A.* and *B. habendum* to them two, *viz.* to *A.* until he be married, and to *B.* until he be advanced unto a Benefice; theſe be Joyntenants in the mean time; and if *A.* die before marriage, the Rent ſhall ſurvive, but if *A.* had married, the Rent ſhould have ceaſed for a Moyety, *Et ſic è converſo.* See more there. *Co. ſuper Littl. fol.* 180, 299, 300.

If a Leaſe be made to three joyntly in the Premiſſes of the Deed, *habendum* to one for life, the Remainder to another for life, the Remainder to the third for life; hereby they are not Joyntenants, but have one in Remainder after another, *Dyer* 260.

If one Demiſe to two *habendum* to one for years, and to the other for life, they are no Joyntenants, *Co. ſuper Littl.* 188.

If Lands be given to a Husband and Wife, and the Heirs of their Bodies, here is no Joyntenancy between them, *Co.* 10. 50.

If two or more Diſſeiſe another to the uſe of one of them, they are not Joyntenants, *Littl. ſect.* 62.

If a Leaſe be made to two or more *Habendum eis pro termino vitæ eorum eſſe alteri, eorum diutius viventi ſucceſſive uni eorum poſt alterum ſicut nominantur in Indentura, & non conjunctim,* and Livery of Seiſin be made accordingly, hereby the Leſſees are not Joyntenants, but ſhall take one after another, *vide pur ceo* Tenants in Common: For where there is a Tenancy in Common, there is no Joyntenancy: But if an Indent be between *A.* of the one part, and *B.* of the other part; and thereby *A.* demiſe to *B. C.* and *D. habendum* to them *ſucceſſive,* there *C.* and *D.* muſt take by way of Remainder, and not joyntly, *Dyer* 361.

If a man make a Leaſe for life, and after grant the Reverſion to the Tenant for life, and another and their Heirs, they are not Joyntenants of the Reverſion, but the one hath all for life, and the Reverſion between them.

So if two be Tenants for life, and the Reverſion is granted to one of them, *Co. ſuper Littl. fol.* 182.

So if Leſſee for life, grant his eſtate to him in Reverſion, and a ſtranger.

So if a man make a Leaſe for life, and grant the Reverſion to two in Fee, and the Leſſee grant his Eſtate to one of them.

If Lands be given to two *& heredibus,* it is void, and doth limit no Eſtate.

If Lands be given to a man, and ſuch a woman as ſhall be his wife, here is no Joyntenancy, but the man ſhall have the whole. But if one make a Feoffment in Fee to the uſe of himſelf, and of ſuch wife as he ſhall after marry for their lives, when he takes a wife, they are Joyntenants, *Co.* 1. 101. *Co. ſuper Littl. fol.* 188.

If Lands be demiſed for life, the Remainder to the right Heirs of *J. S.* and of *J. H. J. S.* hath iſſue and dieth, and after *J. H.* hath iſſue and dieth, the iſſue are not Joyntenants, becauſe the Moyeties veſted at ſeveral times, *Co. ſuper Littl. Idem.*

Sect. 2. 3. Where the *Survivor* ſhall have all by right of *Survivorſhip.*

The nature of this Tenure is, that every Joyntenant is ſeiſed of the whole thing, whether Lands or Goods, of which he is a Joyntenant, and they have it *pro indiviſo,* and if one of them die naturally or civilly, ſo long as the Joyntenancy doth continue, the ſurviving Joyntenant ſhall have his part, and ſo he that doth live laſt and longeſt, ſhall have the whole, and neither of their parts ſhall go to their Heirs, Executors, or Adminiſtrators, as long as there be any other Joyntenant left to take it, and this is called *Jus accreſcendi, Co. ſuper Littl.* 181. *Plow.* 203. *Co.* 6. 76. *Littl fol.* 280, 281. *Broo. Joyntenancy* 38.

In all the caſes above, if one of the Joyntenants die, his part ſhall go to the ſurvivor; as if three Joyntenants be of Land in Fee, and one have iſſue, and die, the Land ſhall go to the other two ſurvivors; and if one of them die, the laſt liver ſhall have the whole, and his Heirs for ever, *Littl. fol.* 62. *Dyer* 187. *Co.* 1. 76.

So if two or more have a Leaſe for years, or a Wardſhip, and one of them die, the ſurvivor ſhall have the whole, and not the Executor or Adminiſtrator of the deceaſed Joyntenant, *Littl. f.* 62.

So

So if a Recognizance, Bill, or Contract, be made to two, or more, and one die, the Survivors, not his Executors, or Administrators, ſhall take the benefit of it, *Littl. f.* 62. *Broo. Joyntenants* 7. 17.

So if the Obligation were to Baron and Feme, and he die, ſhe may ſue, and ſhall have it.

And in all theſe caſes the Survivor may ſue in his own name alone, *Broo. Joyntenants* 44. 6 *Ed.* 4. 8. 22 *H.* 8. 1.

If the Baron and Feme, and a third perſon are Joyntenants into, and the Husband ſell away the whole, and die, and after his Wife die; now by Survivorſhip the right of Action, to recover the whole, is come to him, and it ſeems he ſhall recover the whole.

If two Joyntenants be in a Fee, and one make a Leaſe for years of his own part, rendring Rent, and die, the Survivor ſhall have the Reverſion, but not the Rent, *Co. ſuper Littl. fol.* 185. *Dyer* 187. For he comes in Paramount.

If a Feme-ſole and another be Joyntenants of a Leaſe for years, and after ſhe take a Husband, and die, the ſurviving Joyntenant ſhall have the whole; for the Joynture was not ſettled by marriage, but the Husband might have ſevered it, if he would in his Wives life. *Plow.* 4. 18. *Co. ſuper Littl. fol.* 185.

If three or more Joyntenants be, and one Releaſe to them all, it ſeems, that yet the Joyntenancy doth continue, and that the Survivor amongſt them, ſhall have the whole, *Broo. Joyntenants* 2.

If a Feme-Covert and a ſtranger be Joyntenants of a Term, and the Huſband have the Fee-ſimple, and after the wife die, the ſtranger ſhall have the whole by Survivorſhip, for here the Joynture was not ſevered. *Plow.* 4. 19, 20.

If two Joyntenants be, and one become in debt to the Lord Protector, and die, it ſeems the Survivor ſhall have the whole, yet ſee the Statute of the 13 *Eliz. cap.* 4.

If the Limitation be to *A.* and *B.* and the Heirs or Heirs Male of *B.* here if *B.* die *A.* ſhall have the whole by Survivorſhip, and if *A.* die, *B.* hath the Fee-ſimple, *Littl.*

If two Joyntenants be of a Rent, and it be behinde for many years, and one of them die, the Survivor ſhall have all the Arrearages, and may bring an Action and recover them, *Broo. Joyntenants* 3.

So if two Joyntenants be of a Manor, and a Bailiff receive the profits for many years, and then one of them die, the Survivor alone ſhall have all the Arrearages, and may by Action recover them. See the Statute of *Broo. Joyntenants, fol.* 22.

So if a Husband and Wife loſe an Advowſon in a *Quare impedit*, by a falſe Oath, and the Husband die, ſhe alone ſhall bring the Attaint, and not the Executors, Heir, or Adminiſtrator of the Husband, though the damages recovered againſt them were paid out of the Goods of the Husband. *Broo. Joyntenants, fol.* 7.

If Baron and Feme before marriage, be Joyntenants in Fee, and after the Husband, during Coverture alien and die; now his Wife ſhall have the whole by Survivorſhip: And if the Baron be attainted for Felony or Treaſon, yet the Wife ſhall have a Moyety at leaſt, *Terms Ley, Dyer* 122.

If Lands be let to *A.* and *B.* during the life of *A.* If *B.* die, *A.* ſhall have all: But if *A.* dieth *B.* hath nothing, *Co. ſuper Littl. fol.* 181. See the *Woman Lawyer, fol.* 131.

But otherwiſe it is amongſt all ſorts of Merchants, and of joynt Shopkeepers that joyn in Trade; in this caſe if the increaſe thereof, if one die the other ſhall not have the benefit by the Survivor, ſee *Brownlows ſecond part fol.* 99.

If

Sect. 3. 4. Where not, but the *Joynture* is ſevered, and ſo this Quality of the *Tenure* gone.

If once the Joyntenancy be ſevered, unleſs it be revived again (as in ſome caſes it may) the quality of Survivorſhip is gone. And therefore if once the Joyntenants make Partition amongſt them; this is a Severance, and if after one of them die, his part ſhall go to his Heir, Executor, or Adminiſtrator, as the caſe is, and not to his Companions, *Littl. f.*68, 69. *Broo. Joyntenants* 2. 8.

So if one of them give, grant, or convey away his part for all his time; this is a Severance, and will prevent Survivorſhip; ſo if he Surrender it, *Daniels* caſe, *Hil.* 13 *Jac. B.R.*

If two Infants be Joyntenants in Fee, and one of them make a Feoffment of his Moyety; this is a Severance of the Joynter, *Broo. Joyntenants* 13.

If two be Joyntenants for life or years, and one of them purchaſe the Fee, or it diſcend upon him; this is a perpetual Severance of the Joyntenancy, *Dyer* 12. *Co.* 2. 61. 3. 60.

If *A.* be Tenant for life, the Remainder to *B. C.* and *D.* for life, the Remainder to *E.* in Fee, and *E.* levy a Fine to *A.* for life, and the Remainder to *B.* in Fee; this is a Severance of the Joynter between *B.* and the reſt, *Co.* 3. 60.

If an Eſtate be to three, and the Heirs of one of them, and he that hath the Fee die, and one of the Survivors purchaſe the Reverſion, hereby the Joyntenancy is ſevered.

If a Leaſe be made to two for their lives, and after the Leſſor grant the Reverſion to them two, and to the Heirs of their two Bodies; the Joynter is ſevered, and they are Tenants in Common, *Co. ſuper Littl.* 182.

If two Joyntenants be of a Leaſe for one and twenty years, and the one of them letteth his part for certain years, part of the Term; the Joynture is ſevered, *Co. ſuper Littl.* 192.

If two Joyntenants be in Fee, and one letteth his part to another for the life of the Leſſor, and the other Joyntenant dieth firſt, here ſhall be no Survivorſhip, but it may be if the Leſſor had died firſt, *contrà*, *Co. ſuper Littl.* 19.

If a Feme-Covert and another be joyntly poſſeſſed of any Chattels Perſonal, the Law doth preſently ſever the Joynter of it, and give her part to the Husband. *Contrà* of Chattels Real *ut ſupra*, 21 *H.*7. 29. *Co. ſuper Littl.* 185. 25 *H.*7. 29. *Plow.* 4. 19.

Survivorſhip holdeth not for Goods amongſt Merchants, *Brownl. Rep.* 2 *part*, 99.

If three Joyntenants be, and one Releaſe to one of his Companions his part; it ſeems by this the Joynture is ſevered for that part, and the Releaſee, and the other ſhall hold that part in Common, *Broo. Joyntenants* 2.

If two Joyntenants be, and one is attainted for Felony; in this caſe the Lord, not the Survivor, ſhall have this Moyety, *Broo. Adjudg.* 12 *Car.*

If two Joyntenants be of a Term, and one commit Felony by killing himſelf, or otherwiſe, or be outlawed, the Joynture is ſevered, for the Lord Protector ſhall have the Moyety by Forfeiture.

And if it be a Joyntenancy of Perſonal things, as Bond, Oxen, or the like; the Lord Protector will have the whole by Prerogative: So alſo of Chattels Real, if they be between Husband and Wife, *Plow.* 419. 19 *Hen.* 7. 47. *Broo. Joyntenants* 34.

If one Joyntenant loſe his part, and it be recovered from him in an Action; hereby the Joyntenancy is ſevered, *Broo. Joyntenants* 9.

If a Baron, and Feme, and a third perſon be Joyntenants, and the Baron ſell the whole; this is a Severance of the Joynture, and if he die, the Wife may ſue for her Moyety, *F.N.B.* 193.

If one Joyntenant being ouſted by his Companion, bring an Aſſiſe againſt him, and recover his Moyety; this is a Severance of the Joynture. *Broo. Joyntenants* 41.

If two Women-Coverts be Joyntenants, and their Husbands alien the whole, and each of them recover his part by a *cui in vita*; this is a Severance of the Joynture, *Broo. Idem* 43.

If

If a man be ſeiſed or poſſeſſed of a joynt Eſtate, and a Judgment is had againſt one, and Execution, it ſeems this is a Severance for ſo much, and ſo long at leaſt as Execution is, *Co.6.* 79.

If two Joyntenants be in Fee, and one make a Leaſe for life, and die; it ſeems this is a Severance of the Joynture, at leaſt, if the other Joyntenant die; that the Leſſor ſhall not have his part, *Co. ſuper Littl. fol.* 191. But if the Tenant for life die before either of the Joyntenants, then it is in *Statu quo prius, fol.*193. See *Littl. fol.* 68.

If a Leaſe be made to two for their lives, and the longer liver of them, or either of them longeſt living, and they make Partition and one die; the Leſſor, not the Survivor, nor the Heir or Executor of the Leſſee ſhall have his Moyety that is dead, *Co. ſuper Littl. f.*191. *Broo. Joyntenants, f.*28. 30 *Aſſ. pl.*8.

If one have a Rent iſſuing out of Land, and grant it to the Tenant of the Land, and another; here the Survivor ſhall have nothing, for the one half was extinct, *Plow.*419.

If two Joyntenants be in Fee, and they both joyn in a Leaſe to an Abbot, and a ſecular Man for their lives; here the Reverſion depending upon either of the Freeholds, is ſevered.

So if a Leaſe be made to two ſecular Men *habendum* the one Moyety to one, and the other to the other. *Co. ſuper Littl. fol.*131.

If two Joyntenants be in Fee for life, and one make a Leaſe for years of the Land, or grant *Veſtura terræ*, or *Herbagium terræ*, to begin preſently or after his death, or at any other day to come; this is a good Leaſe, which the Survivor cannot avoid, though the Leſſee die before Entry, or do not enter till after the death of the Leſſor, *Co. ſuper Littl.* 184. *Plow.* 203. *Littl.* 286. *Alienatio rei profectus juri accreſcendi: Co. ſuper Littl.*186. So if two Joyntenants be of a Water, and one grant the ſeveral Piſchary.

Sect. 4. 5. Where the Leaſe, or Charge of one *Joyntenant* is good, and ſhall charge or bind the Land, or not.

If two be Joyntenants for life, and one make a Leaſe for years, of his part, to begin after his death, during his Companions life; this is a good Leaſe, Adjudged, *Harbin* and *Baſſets* caſe, *Mich.* 3 *Jac. B. R. Cite arere* in *Daniels* caſe, *Hil.* 13 *Jac. B. R. per Juſtices*; and therefore a *fortiori*, when the Leaſe is to begin preſently.

If two Joyntenants be for life, and one of them Leaſe for years, rendring Rent, and die; this is a good Leaſe, and the Succeſſor ſhall have it ſubject to the ſame, and yet the Rent reſerved thereupon, is determined, *Dyer* 187.

If two Joyntenants be in Fee, and one grant a Rent-charge in Fee, and after Releaſe to the other; now in this caſe the Grant of the Rent is good, and the other Joyntenant ſhall hold the Land charged.

If a Feme-ſole and *J. S.* be Joyntenants for life, and ſhe marry *B.* and *B.* and his Wife Leaſe to *C.* for ſixty years, rendring Rent, if the Wife and *J. S.* live ſo long, and the Wife dies: Now this Leaſe is good againſt the Survivor, but it ſeems the Rent is determined, *Smalman verſus Agtorrow, B. R.*

If one Joyntenant grant a Rent-charge, Common of Paſture, Turbary, or a Corrady, or a Way out of the Land and die, the Grant is void as to charge the Land, and the Survivor ſhall hold it diſcharged; but if he ſurvive, it is good. So if after the Charge, the Grantor releaſe to his Companion, then he ſhall hold it charged, 23 *H.*6. 5. *Co. ſuper Littl. f.*185. eſpecially if he hath another Companion or Survivor living. See *Littl.*289. *Co. ſuper Littl.*184.

If two Joyntenants be for life, and a Judgment is had againſt one of them, and he after releaſeth to his Companion, and dies before Execution; now the Survivor ſhall hold this Land diſcharged of the Judgment. *Contrà*, if he had ſued Execution in the life time of the Joyntenant, for then his Moyety, notwithſtanding the Releaſe, was ſubject to Execution.

So it is in the caſe of a Statute or Recognizance, but if he ſurvive his Companion, the Charge is good for ever. *Co. ſuper Littl fol.*184. See *Co.* 9.79. *Plow.* 418.

If a Feme-Covert and another be Joyntenants of a Leaſe for years, and the Husband

Husband will grant a Rent out of the Land, and die, and the Wife die; this Grant is void, and the Survivor ſhall hold it diſcharged, *Plow.* 418.

If a Leaſe be on Condition, That if the Leſſee pay to the Joyntenants ten pound at ſuch a day, then he ſhall have a Term, and the Joyntenants die before the day, here it ſeems the Leaſe is not good, and the Survivor ſhall hold it diſcharged, *Plow.* 263. For this was no Leaſe, but a Communication onely, *Co. ſuper Littl.* 184.

If two Joyntenants be of Land, and one of them grant Common of Paſture for Cattle in the ground, and die, this is not good; but the Survivors ſhall hold, if diſcharged, *Perk. ſect.* 103.

If one Joyntenant in Fee-ſimple had been in Debt to the King, and died; after his death, no Extent ſhould have been made upon the Lands in the hands of the Survivor, *Co. ſuper Littl.* 185.

But if a Recovery be had againſt one Joyntenant, and he die before Execution, the Survivor cannot avoid this.

6. What Act one Joyntenant may do, or not. By himſelf.

A Joyntenant may by Act executed diſpoſe his own Eſtate, and give, grant, or ſell it to whom he will, or make any Leaſe of it for part of his time, to begin preſently, or at a day to come after his death, or otherwiſe at his pleaſure; but he cannot diſpoſe his Companions part, and yet if he grant the whole, it will be good for his own part, but it will not paſs his Companions, though he happen to have it before the Survivorſhip; neither can he deviſe his own part by Will, *Littl.* 286. *Plow.* 203.

And if two Joyntenants be for life, and one of them doth make a Leaſe for eighty years, to begin after his death, and after dieth; this was adjudged by all the Judges of *England* a good Leaſe againſt his Companion, *Goldsb.* 187. *pl.* 130.

One of the reſt may ſue Partition, and compel his Companions to make Partition. See *Partition & le Statutes*, 32 *H.* 8. 32. 31 *H.* 8. 1. *Co.* 6. 12. *Co. ſuper Littl. fol.* 187.

If a Joyntenant make a Leaſe for years, though the Leſſee never have poſſeſſion, or it begin at a day to come, and the Joyntenant which made it, die before the day; it bindeth the Survivor: But if he had granted one, that he ſhould have a Leaſe, if he pay ten pound before *Midſummer* next, and the Joyntenant which made it, die before the day; this will not binde the Survivor, for here no preſent intereſt did paſs, and a Rent thereupon reſerved ſhall not go to the Survivor. *Co. ſuper Littl.* 318. *Plow.* 203. *Brown.*

One alone cannot preſent to an Advowſon; but if one had done it, and the Biſhop inſtituted, *&c.* it had been good, and it ſhould not hurt his Companion for any after Preſentment, *Co. ſuper Littl. f.* 186.

If Lands be given to two, and the Survivor of them, neither of them alone whiles they both live, can charge or give this Remainder, *Whitlocks* caſe, *Mich.* 3 *Jac. B. R.*

If a Joyntenant in Fee, Covenant to ſtand ſeiſed for good conſiderations of his Companions part after his death, and after he die before the Covenantor, ſo that he hath his part by Survivorſhip, yet the Covenant is void, and doth not raiſe any uſe. *Burtons* caſe, *Mich.* 3 *Jac. B.R.*

With his Companion.

All the Joyntenants together may grant or charge the Land, how and in what manner they will.

They may all together by conſent and agreement make Partition by Deed, and if they be Joyntenants for years, they may do it without Deed, *Co. ſuper Littl.* 186, 187. *Littl. f.* 65.

To his Companion.

They may give their parts one to another by Releaſe, and ſuch a Releaſe is good without any words of Heirs, *Co. ſuper Littl. fol.* 194. and without Attornment, or other Ceremony, *Co. ſuper Littl.* 318. And therefore if a Baron and Feme, and a third perſon be Joyntenants, and the third perſon releaſe to the Baron and Feme; this is good, and gives all the Eſtate of the third perſon to the Husband, or he may releaſe to the Wife alone, and then that would give all the Eſtate to the Wife alone: Alſo one of them may make the other his Bailif of his Moyety, and have an Action of Account againſt him, and he may let his part to his Companion for years, or

at

at will, *Co. ſuper Littl. fol.* 185. *Littl. ſol.* 69. *Co.* 6. 79. 8. 63. But they cannot make a Feoffment, or give Livery of Seiſin one to another, as Tenants in Common and Parceners may; but a Tenant in Common cannot releaſe to his Companion, but a Parcener may both Releaſe and Inſeoff, *Perk, ſect.* 193. *Co. ſuper Littl.* 200.

Sect. 5.

7. Where one *Joyntenant* may prejudice his *Companion*, or not.

One Joyntenant may prejudice his Companion, as to the profits of the thing, of which they are Joyntenants; for there is a Privity in Truſt between them; and therefore if one take all the profits of the Land, or all the Rent of the thing, or one get the Body of the Ward, or get the Perſonal thing, whatever it be, and uſe it, the other hath no remedy, but to do the like if he can: And in caſe of Executors, one of them may ſell any Chattel, Real or Perſonal, without the reſt. See *Executors. Dyer* 23. *vide infra, Co.* 2 68. *Kelw.* 22.

If two have a Seigniory of a Knights-Service, and the Tenant is dead, his Heir within age, ſo that the Lord may now ſeiſe the Ward or Wave, and Diſtrain for the Rent: If one of the joynt Lords do Diſtrain for the Services, the other is barred and bound by this, 1 *Ed.* 3. *Co.* 2. 68.

Alſo in Perſonal Actions, the oue may releaſe all: As if an Obligation be made to two, one of them may releaſe the whole, *Co.* 6. 25. *Plow.* 263. *Co.* 2. 68.

Alſo if a Recogniſance be made to many, and one purchaſe Parcel of the Land, the Statute is extinct for all. See *Statutes, Aſſ.* 106.

So if two Joyntenants bring an Action of Waſte, and one Releaſe; this is a Bar to his Companion, *Co.* 2. 68.

And if one Joyntenant do waſte the Land of both of them, as it ſeems, it ſhall be recovered, *Kelw.* 23. yet ſee 14 *Edw.* 1. *Retorn del Vicount.* 9 *Hen.* 5. *cap.* 15.

If two Joyntenants be of a Term, and one have the Leaſe, and he give or grant it away, it ſeems he hath no remedy for the Deed; but this doth not hurt the Eſtate. By three Juſtices, *Trin.* 38 *Eliz. B.R.*

But one Joyntenant cannot prejudice another, as to any matter of Freehold or Inheritance; and therefore a Joyntenant in Fee, for life or years (unleſs it be in the Caſe of Executors before) cannot ſell his Companions part, or evict him out of it, or charge or impeach it: So neither can he releaſe any real or mixt Action, brought by them againſt another; As if they bring an Aſſiſe, or Writ of Right of Ward, for the Body of a Ward, or the like, and one Joyntenant releaſe to the Defendant; this will not prejudice the reſt, but it may give them the whole, *Co.* 2. 68. 30 *H.* 6. 45 *Ed.* 3. 10. *Kelw.* 60. *Dyer* 167. 179.

8. Where an Act done by one *Joyntenant*, ſhall binde his *Companion*, or not.

All ſuch Acts as Joyntenants, are compellable to do; there, if one Joyntenant do it, and do it ſo as the Law will compel him; this is good, and will binde his Companions: As if a Woman have Title of Dower to the Land, and one Joyntenant will endow her, and that of a third part onely of the Land; this is good, and will binde his Companion: Or if one Joyntenant Attorn to the Grantee of the Reverſion, or Services in the Countrey, this is good. As if a Leſſor diſſeiſe his Leſſees, and make a Feoffment, and one of them re-enter, this is an Attornment in Law, good, and ſhall ſerve for both. So if a Reverſion be granted to one Joyntenant for life, and he accept the Deed, this is a good Attornment for the other in Law. So if one Leſſee give Seiſin of a Rent to a Lord, it is good, and will binde the reſt. *Co.* 2. 69. 30 *H.* 6. 2. *Littl. f.* 129. 12 *Aſſ pl.* 20.

So all things that are for their benefit, and as well for the benefit of his Companion as of himſelf, the Act of one ſhall binde the reſt: As if they be to pay a Rent to the Lord, or the like. Payment by one ſhall ſerve for all; ſo a Claim or Entry after a Diſſeiſin, or the like, *Co.* 2. 68.

If one Joyntenant will endow a Woman of a Rent, in ſtead of Land, or endow her of more then a third part; this will not binde his Companions. So if the Reverſion of two Tenants for life, or the Rent or Seigniory of two Joyntenants be granted by Fine there, if a Writ be brought, to require the Joyntenants to Attorn, one muſt not Attorn without the other, *Co.* 20. 67.

9. What Acts done by, or to one *Joyntenant*, ſhall benefit his Companion, or nor.

If one Joyntenant enter or claim the Land, that he and his Companions have right to, this ſhall avail the reſt generally, *Co. ſuper Littl. f.* 252.

If two Joyntenants make a Leaſe for life, and the Leſſee ſurrender to one of them; it ſeems this ſhall enure to both, in reſpect of their joynt Reverſion, but if the Leſſee grant his Eſtate to one of them, *contrà. Co. ſuper Littl. f.* 192. *Perk.* 615.

If one of them obtain a Seiſin of Rent, this ſhall avail his Companion. *Broo. Tender* 16.

If two Joyntenants make a Leaſe by Poll, or Deed Poll, rendring Rent to one of them; this ſhall enure to both. *Contrà*, if it be by Deed indented. See *Reſervation.* But perhaps if one enter or claim, ſpecially to his own uſe or for another, it may not avail his Companion.

10. How Acts done by, or to them, ſhall enure.

If two Joyntenants be of Land with Warranty, and they make Partition by Deed, the Warranty is deſtroyed; but if it be upon a Writ, *contrà. Co. ſuper Littl. fol.* 186, 187.

If a Warranty be made to them, this ſhall enure to them as ſeveral Warranties, *Co.* 5. 819.

Co. Litt. 6. If there be three Joyntenants, and one releaſe to one of the other; this ſhall not avail the other. *Co. ſuper Littl. f.* 193.

If Donee in Tail be diſſeiſed by two, and he releaſe to one of them, this ſhall enure to both: But if the Kings Tenant for life had been diſſeiſed by two, and he releaſe to one of them, he ſhall hold out his Companion. So if two Joyntenants make an Eſtate for life, and then diſſeiſe their Leſſee, and he releaſe to one of them, he ſhall hold out his Companion.

If Tenant for life be diſſeiſed by two, and he in Reverſion, and Tenant for life joyn in a Releaſe to one of the Diſſeiſors, he ſhall hold his Companion out: But if they ſeverally releaſe their ſeveral Rights, it ſhall enure to both the Diſſeiſors.

If two men do gain an Advowſon by Uſurpation, and the right Patron doth releaſe to one of them, it ſhall enure to both.

If two Joyntenants be diſſeiſed by two, and one of them releaſe to one, this ſhall enure to both for a Moyety.

If one be diſſeiſed by two Women, and one take a Husband, and the Diſſeiſee releaſe to the Husband; this ſhall enure to both Diſſeiſors. See more in *Releaſe. Co. ſuper Littl.* 276.

11 What Actions one *Joyntenant* may have againſt a ſtranger.

It ſeems a Joyntenant can have no Real or Perſonal Action, concerning the Joyntenancy, but he muſt joyn with his Companion; and therefore if they be diſſeiſed of the Freehold, they muſt have an Aſſiſe againſt the Diſſeiſor; if they be ouſted of a Term on *Ejectione firme*: And if they be wronged in the Profits, as by Waſte, Treſpaſs, or Arrearages of their Bailiff that hath received their Rents or Profits, they muſt joyn in the Action always, unleſs it be in ſome ſpecial caſes, as that *Plow.* 419. *Co. ſuper Littl. f.* 195, 196. *Littl.* 311. 22 *H.* 6. 12. *Broo. Joyntenants* 36.

Againſt his Companion. Yet if three Joyntenants be, and one releaſe to one of his Companions, and after they be diſſeiſed; now for the two parts of which they be Tenants in Common, they muſt bring one Action, and for the third part of which, he is Tenant in Common with the other, he muſt bring an Action alone, *Cromp. Jur. f.* 49. *b. Littl. f.* 70.

One Joyntenant hath no Action nor Remedy againſt another for the taking of the Profits, or for Waſte making, or the like: And therefore if it were Wood, and one cut it down, and ſell it all, and keep all the money; or if it be an Advowſon, and one alone preſent, and in the caſes before, he hath no Action at Common Law to relieve himſelf. See before *Doct. & Stud.*

So if one will not help Incloſe the Grounds, or Repair the Walls or Bridges, or the like. But if one ouſt the other altogether, he may have an Aſſiſe, or chaſe the others Cattle, for the chaſing he may have Treſpaſs: And if there be Houſes or Mills upon the thing, and they be in decay, the other Joyntenant may compel him by a Writ of *Reparatione facienda*, to joyn to repair it, or of *Contributione facienda*, to contribute towards it. See of *Tenants in Common. F. N. B.* 34. 162. 6 *Hen.* 7. 8. *F. N. B.* 127. *Broo. Joyntenants* 41. *Dyer* 923. *Co.* 6. 12, 13. *Lib. Inſt.* 1 *part. fol.* 54.

If

If there be two Joyntenants for life, and the Fee to one, and he that is Joyntenant for life onely doth Waſte, the other that hath the Fee hath no remedy againſt him, *Dyer* 913.

If two Joyntenants be of a Manor, and a Copihold Eſcheat, one of them may grant the Copihold, and his Companion ſhall not avoid it, *Co.* of *Copihold*, *fol.* 91.

Joyntenancy is a Plea where an Action is brought againſt one for Treſpaſs, or other matter about that Land that another hath in Joyntenancy with him; then this being ſhewed, will abate the Writ, for they muſt joyn as is before, *Dyer* 31. *F.N.B.* 229. *Dyer* 32. *Joyntenancy, what.*

Tenants in Common, are ſuch as have and come by Lands, Tenements, Goods, or Chattels, by ſeveral Titles and Means; as in the caſes hereafter following, *Co. ſuper Littl.* 189. 12. *Tenants in Common, what.*

If any Joyntenant in the caſes above, give, grant, or convey over his part of the thing which they ſo hold in Joyntenancy to a ſtranger; in this caſe the Joyntenancy will be gone, and the ſtranger and the reſt of the Joyntenants, will then be Tenants in Common: Or Tenants in Common may be by Preſcription, as, where one and his Anceſtors, and thoſe whoſe Eſtate he hath in one Moyety, have held in Common the ſame Moyety with another Tenant that hath another Moyety, and with his Anceſtors, and thoſe whoſe Eſtate he hath *pro indiviſo*, time out of minde. And between theſe, there is onely a Privity of Poſſeſſion, and not of Eſtate of Land, *Littl. fol.*70. *Co.*4.628. 63. *Co. ſuper Littl. fol.*169, 198, 199.

If a Feoffment be of Land to *A.* and *B. habendum* the one half to *A.* the other half to *B.* here *A.* and *B.* are Tenants in Common; but if it be to one and his Heirs, and to the other and his Heirs, *Contrà. Co. ſuper Littl. fol.* 65. *Littl.* 65. 13. Where a man ſhall be ſaid to be a Tenant in Common, or not.

If one Deviſe by Will to his Sons or Daughters, or to others to be enjoyed equally, or by equal Portions, or to be equally divided, any ſuch like words in a Will, will make a Tenancy in Common, *Co. ſuper Littl. fol.*183. *Co.* 3. 37. *Dyer* 25.

If Lands or Goods be given or granted to a Corporation, and another man, they are Tenants in Common at the firſt, for they cannot be Joyntenants, *Co.* 5. 8. And there muſt be ſeveral Liveries, if it be a Feoffment. So of Lands given to any body Corporate or Politick, as to two Biſhops. *Co. ſuper Littl. fol.*189, 190: *Littl. ſect.* 66. 16 *H.*7. 16.

If one ſeiſed of a peece of Land, infeoff another of a Moyety thereof, and ſay not which Moyety, the Feoffor and Feoffee of the two Moyeties ſhall be Tenants in Common, *Littl. fol.*67.

If two Joyntenants be in Fee; and one Leaſe his part for life to another, the Tenant for life, and other Joyntenant, are Tenants in Common, at leaſt during the Leaſe for life, *Littl. f.*4. 67.

Parceners are in the nature of Tenants in Common, and if one of them alien her part, the Alienee and the reſt ſhall hold in Common, *Littl. f.*70. *Sect.* 7.

If there be three Joyntenants in Fee, and one of them make a Feoffment to a ſtranger; now this Feoffee, and the other two Joyntenants, are Tenants in Common, but the other two remain Joyntenants ſtill, *Littl. f.*46.

If two Joyntenants be in Fee, and one give his part to a ſtranger in Tail, and the other his part to another ſtranger in Tail; the two Donees and their Iſſues, are Tenants in Common, *Littl. f.*66.

If three Joyntenants be, and one Releaſe to one of his Companions; now for this third part releaſed, he is Tenant in Common with the other two, *Littl. fol.*68.

If Lands be conveyed to two Men or Women, and the Heires of their Bodies after their death, their Iſſues are Tenants in Common, *Littl.* 285. *Co.*1. 84. 85.

If upon a Partition, one Parcener grant a Rent to the reſt, they ſhall be Tenants in Common of this, *Co.*5. 8. 15 *H.*7. 14. *Dyer* 153.

If a man and a Feme-ſole have a Villain, and after intermarry, and the Villain purchaſe Land, they ſhall be Tenants in Common of the Villain, as they were of the Land, and ſo of other like things; for the Law hath reſpect to the cauſe, 3 *Ed.*3. 84.

If *J. S.* be Parſon of *D.* and Lands be given to *J. S.* Parſon, and his Succeſſors, and *J. S.* Clerk, and his Heirs, he is a Tenant in Common with himſelf in reſpect of his ſeveral capacity. So in all ſuch like caſes, *Co. ſuper Littl. fol.* 189, 190. *Broo. Dean* 2. 14 *H.*8. 30.

If a Tenant for life grant to him in Reverſion, and others, they two are Tenants in Common with him, *Broo: Joyntenancy* 14.

If a gift be to two *Habendum*, to one for his life, and the other for his life, it ſeems they are Tenants in Common, *Dyer* 10.

If a Leaſe be made to two for the life of one, the Remainder to the other without more, it ſeems by this Limitation they are Tenants in Common, *Dyer* 60.

If a Remainder be limited to the right Heirs of *J. S.* and *J. N.* they ſhall take ſeverally, and be Tenants in Common, though the words be joynt. *Co.* 5. 8. 34 *Ed.*3. 29.

If Land be given to a man, and two women, and the Heirs of their Bodies, here are ſeveral Inheritances, of which, the Iſſues are Tenants in Common, *Co.* 10. 59.

If Lands be given to two men, and their wives, they are Joyntenants for life, but after the husband and wife hath one moyety in Tail, in Common with the other Baron and wife, *Ibidem.*

If two Parceners make a Leaſe, rendring Rent, they have this Rent in Common; but if they grant the Reverſion, excepting the Rent, *contrà.* for there they are Joyntenants of the Rent.

If two Joyntenants be of a Chattel Perſonal, and one commit Felony, the Lord Protector, and the other Joyntenants are not Tenants in Common, but the Lord Protector will have all, *Plow.* 322.

So if two had ſuch a thing in Common, and one did commit a Forfeiture, the Lord Protector will have all. *Ibidem.*

14. The nature and quality of this *Tenure.*

The nature of this holding is, That howſoever they occupy in Common, and they hold *pro indiviſo*, and neither of them doth know his own part, as in the caſe of Joyntenants, yet the Survivor in this caſe ſhall not have the part of him that dieth (as in the caſes of Joyntenants) but it ſhall go to his Heir, Executor, or Adminiſtrator as the caſe is; and therefore ſuch a Tenant may Grant or Charge his Land, as he may any other Land, whereof he is Sole ſeized; and if he will paſs it to his Companion, he may make a Feoffment, and give Livery of Seiſin to him as Parceners may; for it will not paſs by Releaſe, as between Joyntenants: But Actions Perſonal, as it ſeems, do ſurvive, and the Survivor ſhall have the whole of them, as in the caſes of Joyntenants, *vide infra.* And it ſeems in this caſe one of them cannot do any act to binde, or prejudice his Companion, becauſe they have ſeveral Titles; and in this caſe they may alſo make Partition, if they will, by Agreement, *Littl. f.* 72. *Plow.* 140. 10 *Ed* 4. 3.

Sect. 8.

15. What actions one *Tenant* in *Common* may have, or not. Againſt a ſtranger.

All Actions that are Real, and in reſpect of the Reality, the one may and muſt ſue alone; as if they be diſſeiſed, every Tenant in Common muſt have a ſeveral Aſſiſe againſt the Diſſeiſor. And ſo ſhould it ſeem for mixt Actions that are moſt in the Realty, for the *Magis dignum trahit adſe minus dignum.* But in all Perſonal Actions, as for Treſpaſs in breaking the Hedges, ſpoiling the Houſes, Graſs, Corn, cutting the Wood, taking Fiſh, or the like, there they muſt ſue joyntly, and cannot ſever in the Action.

So alſo for Rent in a Leaſe, in Account againſt the Bailiff, and Actions mixt that are more Perſonal then Real, as Waſte, and the like: And if one of them die, before theſe Actions brought, the right of the Action doth ſurvive to the reſt onely, and they alone ſhall have it as in the caſe of Joyntenants before: And if one of them ſue alone for theſe Cauſes, the Defendant may plead, That he is Tenant in Common, and ſo avoid the Action, *Littl. fol.* 70, 71. 22 *Hen.* 6. 12. *Broo. Tenants in Common*

Common 18. 24. 2. *Broo Joyntenants* 51. 38 *Edw.* 3. 7. *Co. ſuper Littl. fol.* 195. 198.

If one avow upon a Diſtreſs taken Damage-feaſant, he muſt do it as Bailiff to all the Tenants in Common, not to one onely, Adjudg. *Hil.* 7 *Car.*

If Tenant for life, the Reverſion to two Siſters commit Waſte, and one Siſter die having iſſue, and the Tenant commit Waſte again, the iſſue and her Aunt ſhall joyn in the Action of Waſte; and the Aunt-ſole recover treble damages for the Waſte done in her Siſters time, 45 *Ed.* 3. 3.

If his Companion diſſeiſe him of his Freehold, he may have an Aſſiſe, if he Evict him of his Term, he may have an *Ejectione firme*, as it ſeems. But for any wrong in taking the whole profits from his Companion, the Law is all one in this caſe, as in the caſe of Joyntenants, which ſee before; for one of them cannot ſue another, *Co. ſuper Littl.* 199. Againſt his Companion.

And yet if one Tenant in Common will break the Dove-houſe of another, and kill his Pigeons, and ſpoil his flight, or carry away all his Corn after it is ſowed, it ſeems the other ſhall have Treſpaſs againſt him; or break the Pales of his Companions Fold, which they have in Common, Treſpaſs lieth; but this ſeems to be for the wrong done to that wherein he hath a ſole property. *Co. ſuper Littl. f.* 200. *Weſtm. cap.* 22. 14 *Ed.* 4. 8. *Somerſets* caſe, *B. R. Paſche*, 3 *Jac. F. N. B.* 91. 5 *H.* 7. 8. 21 *H.* 8. 1. in the Preamble.

And if two Merchants occupy their Goods in Common, and to their Common profits, the one may have an Account againſt the other. So may another Tenant in Common, if he make his Companion his Bailiff. *Co. ſuper Littl. fol.* 200. 10 *H.* 7. 16.

If two be Tenants in Common of Chattels Perſonal, or of Chattels Real entire, and one get all, the other hath no remedy, but to get the Poſſeſſion again, if he can. But if two be Tenants of a Houſe or Mill, one may force the other to contribute towards Reparation; and if they have a River in Common, and one corrupt the River, the other may have an Action on the Caſe. *Et ſic in ſimilibus*, ſee in the Margent, *Co. ſuper Littl. f.* 199, 200.

In the Perſonality, one Tenant in Common may prejudice his Companion, as well as a Joyntenant, as in taking the profits; for which ſee before. As alſo in any Perſonal Action brought by them all, one may Releaſe; but if the ſame be for a thing entire, and in the reality, as a Preſentation to a Church, Wardſhip of a Body, or the like, there the Releaſe of one doth not prejudice the reſt, but doth give the reſt the whole, *Co.* 5. 98. 45 *Ed.* 3. 10. *Co. ſuper Littl.* 197. 16. Where one *Tenant in Common* may prejudice his Companion, or not.

If two Tenants in Common joyn in the Grant of a Rent-charge of twenty ſhillings, this ſhall be and enure as ſeveral Grants. *Co.* 5. 8. 17. How acts made by, or to one ſhall enure.

An Attornment by one, is good for all the reſt, except the Lord Protector be one, for then it is void for all. *Brooks* caſe, 6 *Car. Cur. Ward.* 18. What act done by one, will binde the reſt.

Of Paceners.

PArceners, otherwiſe called Coparceners, are ſuch as have equal portion in the Inheritance of the Anceſtors, and this is in the nature of a Tenancy in Common, the difference ſee in the *Engliſh Lawyer, fol.* 24, 25. And of theſe there are two ſorts. *Sect.* 9. 1. *Parceners*, what. The kindes.

One is of Parceners by Law, which is when a man dieth, ſeiſed of Land in Fee-ſimple, or Fee-tail, and hath no Sons, or other Heirs Male; but Daughters, Siſters, Aunts, or the like (for if he have but one Daughter, ſhe is no Parcener) then theſe Daughters, or other Collateral Heirs, ſhall have the Lands in equality amongſt them, and theſe are called Parceners at Common Law.

The other is, where Sons or Daughters by the Cuſtom of the Country do challenge an equal part of their Anceſtors Lands he died ſeiſed of, as the Cuſtom of

of Gavel-kinde in *Kent* is, and theſe are called Parceners by Cuſtom; and in theſe caſes, all theſe Parceners are in Judgment of Law, but as one Heir. And they may if they will, hold the Land joyntly without Diviſion, and then they ſhall be ſaid to hold in Parcenary, or they may divide it, and every one hold his part to himſelf, and that is called a Partition, and is defined to be the dividing of Lands or Tenements, diſcended by Common Law or Cuſtom, amongſt Co-heirs or Parceners, whether they be Sons or Daughters, Siſters, Aunts, or otherwiſe of kin to the Anceſtor, from whom the Land diſcended to them: And this may be made, and done voluntarily, or by Agreement of the parties, and without Writ, which is called a Diviſion by the Common, or elſe it may be Compulſory, and by Writ, if either or any of the parties refuſe, and thereby the reſt or any of them, or their Heirs (if any of them be dead) that are willing, may compel the others that refuſe; and this Writ is called a *Partitione facienda*, which is defined to be a Writ that lieth for thoſe that hold Lands or Tenements *pro indiviſo*, as Coparceners, and would ſever to every one his part, againſt him or them that refuſe to joyn in Partition, to compel them to it.

Parcenary.

2. *Partition*, what.

3. *Partitione facienda*, what.

And ſuch a Diviſion as is ſo made by Writ, is ſaid to be a Diviſion by Statute Law; and this Writ alſo Joyntenants or Tenants in Common, may have to make a Diviſion amongſt them, if they will. See beneath, *Parceners ſtat' Hibernie. 9 H. 3. 1. Dyer* 29. *Co.* upon *Littl. fol.* 164. *Co.* 6. 12. *Dyer* 265. *F. N. B.* 61.

Joyntenants. Tenants in Common.

The fruit of it.

And this Diviſion after it is made, doth change the holding by Coparcenary, ſo that after every one ſhall hold his part in ſeveralty: And yet ſo, as if the part of one be afterwards recovered from him by a lawful Title; in this caſe he may compel the reſt to make a new Partition, and he ſhall have another part from them, and till then he may occupy in Common with them: But if he had aliened that part wholly away, whereof the Eviction was, then it ſeems he cannot enter upon his Companions, unleſs he had reſerved ſome Reverſion. See for this, *Co.* upon *Littl. fol.* 164. 170.

4. What perſons ſhall be accounted *Parceners*, or not.

None ſhall be accounted Parceners, but ſuch as are Females and in equal diſtance, as Daughters, Siſters, Aunts, or the like, or the Heirs of ſuch Females that come to Land by diſcent. For if any ſuch perſons purchaſe Lands or Tenements; in this caſe they are not Parceners, but Joyntenants. See more for this *Co.* upon *Littl.* 164. where it appeareth, that men may be Parceners in ſpecial caſes; the Son of ones Daughters, with the Daughters of another.

The nature of this Tenure.

The having of Land in Coparcenery, is in the nature of holding of Land in Common, for no Survivorſhip hath place amongſt them; and either of them may by Act executed, or by his will grant, give, or charge, his own part, whether the thing be in Poſſeſſion, or Reverſion: And they may make a Feoffment one to another, and give Livery one to another, *Co.* upon *Littl.* 164. *Littl. fol.* 64. *Dyer* 29. *Littl. ſect.* 280.

And if an Advowſon diſcend amongſt them, they ſhall preſent by turn, the eldeſt firſt, and the reſt after, *ordine quiſque ſuo*: And if either of them diſturb the other, in this caſe, he that is diſturbed, may have a *quare impedit* againſt his Companion; but ſo cannot one Joyntenant or Tenant in Common againſt another, *Littl. fol.* 64. *Dyer* 29. *Littl. ſect.* 280. *Kelw.* 1. *F. N. B.* 34.

So long as the Land is undivided, they have one intire Freehold in it, in reſpect of a ſtranger, but amongſt themſelves to many purpoſes, ſeveral Freeholds. And this Unity is not ſevered by the death of any of them, but her iſſue, and the reſt ſhall be ſued joyntly, and ſue ſo, but the iſſues of ſeveral Coparceners ſhall not joyn; and yet when they have recovered, a Writ of Partition lieth between them, and there is between them a Privity in Perſon, in Eſtate, and Poſſeſſion, *Co.* upon *Littl. fol.* 164. 169. *F. N. B.* 62.

5. Where *Parceners* are compellable to make Partition, and how.

Parceners are compellable by the Common-Law to make Partition, and for that purpoſe they may ſue out a Writ of *Partitione facienda* (ſee above.) And though one of them have made a Leaſe of his part to his Companions, yet he may have this Writ againſt the reſt. *Fitz. N. B.* 62.

Fitz.

Alſo Joyntenants and Tenants in Common, whether they be ſo, of an Eſtate of Inheritance in Fee-ſimple, or Fee-tail in their own Rights, or in the Rights of their Wives; or which hold joyntly or in Common, for Term of life, year, or years onely. *Joyntenants. Tenants in Common.*

And Joyntenants, or Tenants in Common, where one or ſome of them have Eſtate or Eſtates for term of life or years, with the other that have Eſtate or Eſtates of Inheritance, or Freehold, are compellable by the Writ of *Partitione facienda* to make Partition of the Lands, they do ſo hold as Coparceners are.

And in all theſe caſes, let him that brings the Writ ſee that he comprehend all the Land, whereof Diviſion is to be made in his Writ. *Stat.* 31 *Hen.* 8. *chap.* 1. 32 *Hen.* 8. *chap.* 23: *Bro. Partition, fol.* 33. *Co.* 6. 12. *Dyer* 265.

If three Parceners be of a Reverſion after an Eſtate for life, and one of them alien his part by Fine, and after the Tenant for life die, and one of the other two enter into the whole: Now the Alienee, and the other cannot joyn, and have one Writ of *Partitione facienda* upon theſe Statutes, but they muſt bring ſeveral Writs. *Sect.* 10.

So if in this caſe the two Coparceners had joyned, and brought the Writ againſt the Alienee upon theſe Statutes, the Writ would abate; yet if the Husband of one of the Siſters, or one of the Parceners her ſelf purchaſe one of her fellows parts, there is a ſpecial Writ by the Common Law in this caſe to compel Partition, *Dyer* 128. 243. *F.N.B.* 62.

If there be two Parceners, and one of them take a Husband, and hath iſſue by her, and ſhe die, and he hold himſelf in as Tenant by the Courteſie, they may make Partition by agreement; or if the Tenant by the Courteſie will not, the other may compel him by this Writ: But if the Parcener refuſe, the Tenant by the Courteſie cannot have this Writ againſt the other, that doth refuſe, *Littl. ſect.* 264.

If one of the Parceners alien his part in Fee, the other Parcener may bring this Writ againſt the Alienee, but the Alienee cannot bring it againſt the Parcener, unleſs it be upon the Statute, as a Tenant in Common, *Co.* upon *Littl. fol.* 175.

Coparceners may make Diviſion of their Lands they hold in Coparcenery, either during their whole, or a part of their Eſtate, and that they may do (as hath been ſhewed) either by Agreement with, or without writing, and that divers ways. *6. What ſhall be ſaid a good Partition of their Land. Without Writ by Agreement.*

1. As if they agree to divide it, and do divide it to every one his part.

2. If they chuſe certain Friends to divide it, and ſet it out into parts; and in this caſe the eldeſt muſt chuſe firſt, and ſo every one in his age, unleſs they otherwiſe agree.

3. If after the parts be divided, and ſet out, there be Lots caſt, and ſo a choice is made by that means.

4. By caſting in Land in *Hotchpot*. See beneath, and in *Littleton*, and all theſe are good Diviſions. *Hotchpot.*

And in all theſe caſes the parties dividing, if they be of full age, at the time of the Partition made, be bound for them and their Heirs, though it be never ſo unequally made. *Infant.*

But if the parties that divide, were ſeiſed of an Eſtate-tail, there the Diviſion (if it be unequal) will onely binde them for their lives, and the iſſue of him that hath the leſſer part, may either avoid it, or affirm it. *Tail.*

So if the Diviſion were made by the Husbands of the Parceners; the Wives after their deaths, if their parts be not equal, may either avoid it, or affirm it.

So if the Parcener be within age, at the time of the Diviſion made after ſhe comes of full age, ſhe may either affirm or avoid it; & if in theſe caſes, that party that may avoid, do verbally agree to the Diviſion, or take the profits of the part alloted t ,or her,

o him or

or make a Leaſe of it, after his time, he may avoid it; this hath affirmed the Diviſion: But it ſeems in all theſe caſes, where the Diviſion is equal, that it is not to be avoided by any of the Parceners, or their Heirs, *Co. ſuper Littl.* 171.

A Partition by Agreement, without Writing, that one ſhall have one part of the Land, and another another part; and that he that hath the better part, ſhall pay to the other Parcener a yearly Rent, iſſuing out of his Land; this is a good Diviſion; and the party to whom this Rent is given by the Agreement, may diſtrain in the Land of Common Right for this Rent, though there be no Deed; ſo a Reverſion, nay Advowſon, or the like, in this caſe may paſs without Deed, *Littl. ſect.* 251. 29 *Aſſ. pl.* 23. *Plow.* 134. *Dyer* 29.

If they agree that one of them ſhall have all the Lands in Severalty one year, another all another year, or in any ſuch manner, this is a good Partition, *F.N.B.* 62. 11 *H.* 4. 3. 21 *Ed.* 3. 7.

If there be ſome Land in Fee-ſimple, and ſome Land in Fee-tail diſcended, and they agree one ſhall have the one ſort of Lands, and the other the other; this is good, but this may become void by matter *Ex poſt facto*, *F.N.B.* 62. *M. Littl. ſect.* 26.

If Joyntenants, or Tenants in Common of a Term of years of Land, do make Diviſion thereof by word, without Deed, it ſeems it is good enough, *Dyer* 350.

If Joyntenants, or Tenants in Common of any Eſtate of Inheritance, in Fee-ſimple, Fee-tail, for life or for years, by mutual agreement, by writing, make Partition, it is good, *Dyer* 350. *Bro. Partition* 38.

But if Joyntenants, or Tenants in Common of any Eſtate of Inheritance or Freehold, make Partition by word onely; this is not good to ſever the Joynture, *Co.* upon *Littl.* 165.

But Tenants in Common may by word and Livery of Seiſin, make Partition well enough the ſame, *Co.* 6. 12. *Dyer* 350.

Sect. 11. *Prochein Amy.* If Partition be made by *Prochein Amy* of an Infant that is a Parcener, it is not good.

If the Anceſtor died ſeiſed of Land intailed, and ſo much in Fee-ſimple, and the eldeſt take the intailed, and the other the Fee-ſimple, this is good for their time; but if the yongeſt Alien all or part, in Fee or in Tail, that he leave not a ſufficient Recompence to the Iſſue, the Iſſue may avoid the Exchange, and take to half the exchanged Lands, and the other hath no remedy for his part of the Fee-ſimple Lands, *Co.* upon *Littl. fol.* 172.

But *contrà* of a Leaſe for life or years, but if part of the Fee-Land diſcend, the Iſſue muſt wave the profits of that, if he will have the benefit of the other.

By *Writ.* The Partition that is made upon a Writ directed to the Sheriff, to make Partition between the parties, muſt be by the Oath of a Jury of twelve lawful men of the Neighborhood.

For ſo is the Judgment upon this Sute, That the Sheriff in perſon ſhall go to the Lands, and that he by the Oaths of twelve men of his Bailiwick, ſhall make Partition between the parties, and that one part ſhall be aſſigned to one, and another part to another. And how the Sheriff doth do this, he muſt return under his Seal, and the Seal of the twelve men to the Juſtices, before whom the Writ is retornable. *Co.* upon *Littl. fol.* 167.

If *A.* and *B.* be Tenants in Common of a Manor, and *A.* purchaſe Land, ſo intermixt with the Lands of the Manor, as the Jury cannot tell how to make Diviſion of the Manor, and to diſtinguiſh it from the Land purchaſed: In this caſe *A.* muſt ſhew the Jury the bounds of the purchaſed Lands, and *B.* is not bound to do it, or elſe if the Jury have no evidence of either ſide, and they make Partition of the Manor, as it is commonly preſumed and known to extend, it is good enough, *Dyer* 164.

If there be a Capital Meſſuage upon the Lands to be divided, the Sheriff muſt allot that wholly to the eldeſt of the Parceners, an not divide it. *Contra tenetur. Co.* upon *Littl.* 165.

For

For ſuch Inheritances as are entire, as a Villain, Reaſonable Eſtovers, and the like, either the eldeſt muſt have all, and the reſt contribution, or elſe one ſhall have it one while, and the other another; but a Rent-charge is dividable, and the Diſtreſs alſo. See *Co.* upon *Littl. fol.* 164, 165. See all the *Tract* in the *Engliſh Lawyer, fol.* 24, 25.

7. Where the Entry of one of them ſhall benefit the other, or not.

The Entry of the one Parcener into the Land diſcended, may avail, and ſhall be the Entry of the other, if they agree, ſo *Littl.* 160.

But if one that doth enter, do enter into all to his own uſe, or after his Entry make a Feoffment in Fee; this ſpecial Entry ſhall not benefit the other: As if a Tenant in Tail die having two Daughters, and the eldeſt enter into the whole, and thereof maketh a Feoffment, with Warranty; this is a Collateral Warranty, which ſheweth that the Entry did not avail both, for there the Warranty muſt begin by Diſſeiſin. But this Entry is onely available when the other will; and therefore if one enter, both cannot be vouched as Heirs, for that is a diſadvantage; but both may have an Aſſiſe, *Littl.* 160. 4 *H.* 7. 9.

8. Where they muſt joyn in Action, or not.

If Land diſcend to Parceners, and they die having Iſſues, and the Iſſues be diſſeiſed, or if the Parceners themſelves were diſſeiſed; their Iſſues, or themſelves muſt joyn in an Aſſiſe, againſt the Diſſeiſor.

So if they be diſturbed in a Preſentment to an Advowſon, they muſt all joyn in a *quare impedit.*

So if they have cauſe to bring Waſte or a Ceſſavit, they muſt joyn. See *Joyntenants*, and *Tenants in Common.*

So for Perſonal wrongs, they muſt joyn in Action; and if ſome of them die, the Action ſurvives to the reſt, and they ſhall recover all, as in *Account, Treſpaſs, &c. Kelw.* 1. *Littleton, fol.* 71. *Broo. Joyntenancy* 51. 48. *Co.* upon *Littl. fol.* 198.

Hotchpot, what.

It is a mixing together of Lands in Frank-marriage, with other Lands in Fee-ſimple diſcended: As if a man be ſeiſed of thirty Acres of Land in Fee, and giveth ten of them in Frank-marriage with his Daughter, having but one Daughter more, and die ſeiſed of the other twenty Acres; now if ſhe that is married, will have any part of the twenty Acres, ſhe muſt relinquiſh her twenty Acres, and caſt them into the other twenty Acres in Hotchpot, and thereupon an equal Diviſion muſt be made of all, elſe her ſiſter ſhall have the whole twenty Acres.

But if the Land given in Frank-marriage were by another Anceſtor, or given in another nature, and not in the nature of Frank-marriage, then ſhe need not put it into Hotchpot, *Littl. ſect.* 267, 268.

Ile of *Wight.*

For the Ile of *Wight*, ſee 4 *H.* 7. 16.

CHAP. CI.

Of Judgment, Judges, and Ireland, *King and Queen.*

Judgment, what.

JUdgment is the Sentence and Decree that a Judge doth make at the end of a Sute, which is no more but the pronouncing of what the Law doth ſet down, and determine in that caſe according to that which is alleaged and proved. And this ſo long as it ſtands in force, and till it be reverſed by Attaint or Writ of Error, is final and makes an end of the Sute. *Finches Ley* 453. *Co. ſuper Littl.* 39:

As to this take theſe things.

1. In every Judgment there is to be a Proſecutor, a guilty perſon, and a Judg.

2. Some Judgments are Final, and ſome are not.

3. Judgments when they are ready to be given, may be ſtaid, if there be any Error in the proceeding: For albeit a cauſe be ſo forward, that it is ready for Judgment, yet if there be any Error in the proceeding, or it ſtandeth ſo in Law that Judgment ought not to be given in it, as the Judges are about to do, upon the opening of the Matter, and Motion of the other party, the Judgment may be ſtaid. And this is called an Arreſt of Judgment; and upon this is entred by the Judges, *Curia aviſare vult*, the Court will adviſe.

Arreſt of Judgment, what.

Curia aviſare vult, what.

4. Judgments duly given muſt continue, and the parties for whom they are given, be in peace until they be reverſed by Attaint or Error.

5. The Judges that give the Judgment, and in ſome caſes other Judges that are above them, may if there be cauſe, after they are given, avoid them; and this is called a *Vacat*.

Vacat of a Judgment, what.

6. A Prelate, two Earls, and two Barons, (upon complaint by Commiſſion from the King) might have called for any Record where delay in any Court had been of entring Judgment, and they with the Lord Chancellor, Treaſurer, and Juſtices of either Bench, and ſuch of the Kings Council as they had thought fit to call to them, might have given Judgment in the Cauſe, and that muſt have ſtood, or they might have referred it to the next Parliament.

7. The Parliament may call in queſtion, and reverſe if they ſee cauſe, the Judgments given in all other Courts. But ſee for theſe, and other things of this Subject: 4 *H.* 4. 23. 14 *Ed.* 3. *Stat.* 1. 5: *Co.* 3. 13. *Dyer* 268. *Cromp. Jur.* 18. *Brownl.* 98, 99, 188, *&c. Dyer* 249.

Judges or what *Juſtices.*

A Judge is one that is deputed by the Supreme Magiſtrate to do right by way of Judgment, and he is called alſo a Juſtice: Of Judges and Juſtices there are many kindes. But ſee for them in *Officers* and *Courts*.

Aſſociation, what.

Aſſociation is where ſome others are joyned with the Judges to be aſſiſtant with them.

Coram non Judice, what.

Coram non Judice is where any man doth take upon him as a Judge to do any thing in a Cauſe, wherein he hath no Juriſdiction; in this caſe all that he doth, is void, and ſaid to be done *Coram non Judice*.

So it is for the Judges of the Court of Common Pleas to meddle with the Pleas of the Crown, a Steward in a Leet to meddle with Civil Actions between man and man.

For Judges and Juſtices, this onely is to be known.

1. The Supreme Magiſtrate hath by his Prerogative, the making and appointing of the Judges and Juſtices.

2. He may increaſe or diminiſh them as he ſhall ſee cauſe.

3. When they do enter into their Offices they muſt be ſworn, duly to ſerve the Supreme Magiſtrate in their Offices, 14 *Ed.* 3: *Stat.* 1. 5. 18 *Ed.* 3: 3:

4. The

4. The Judges and Juſtices are to do right according to their Oaths, and Offices, to all men, without delay and reſpect, and not to regard any Letters or Commands, from the King himſelf to the contrary, 2 *Ed.*3 8. 20 *Ed.*3. 1,2,3.

For *Ireland*, and that which concerneth the ſame, ſee the Statutes, 17 *Ed.*1. 1. 34 *Ed.*3. 17,18. 1 *H.*6. 3. 2 *H.*6. 8. 16,17 *Car.* 30,33,34,35. And *Wingates* Abridgment. *Ireland.*

For the Adventurers in *Ireland*, ſee the *Ordinance*, 1 *June.* 1653. *Adventurers.*

For Iron, ſee 28 *Ed.*3.5. *Iron.*

For the Sale of the Kings and Queens Lands, and Goods, ſee *Acts*, 23 *Novemb.* 1649. 17 *July.* 1649. 26 *June.* 1649.

CHAP. CII.

Of Latin and Law.

FOr Latin, this onely is to be known.

1. That all Law-Books that are Printed, muſt be in the Engliſh Tongue, and not in Latin. *Latin.*

2. All the Pleadings and Proces in Sutes muſt be in Engliſh under pain of twenty pound. *Acts*, 22 *Novemb.* 1650. and 9 *April*, 1651.

Law is a Rule for the governing of a Civil Society, to give to every man that which doth belong to him. 1. *Law*, what.

1. Our Laws are divided into three ſorts. Common Law, which is nothing elſe but Common Cuſtom, and that which is commonly uſed through the whole Nation; and this is founded eſpecially upon certain Principles or Maxims made out of the Law of God, and the Law of Reaſon. The kindes of the Law. Maxims of Law.

2. Statute Laws which are certain Acts and Conſtitutions of Parliament, that have been made in all ſucceeding Generations, to correct, abridg, and explain the Common Law: And all theſe to give right to every man, and to preſerve every man from wrong.

3. The Cuſtoms of particular places, which are the Laws of the places. *Doct. & Stud. l.*9 75. *Dyer* 54. *Co.*11. 74. *Brownl. Rep.* 2 *part. f.*198.

4. There is alſo the Civil Law, Martial Law, Eccleſiaſtical Law, Canon Law, Law of Nations, Law-Merchant, a part of the Law of Nations, and the Law of Chivalry, or Title of Honor. And of all theſe Laws, our Law taketh ſome notice, *Doct. & Stud* 6. *Fitz. Gard.* 118. *Dyer* 150. 21 *H.*7. 33. *F.N.B.* 117. *Co.* 2 *part. Inſt.* 58.

An involuntary Ignorance, as that of an Infant, or a Lunatick, will excuſe them in many caſes, *Plow.* 19. 2. Where the *Ignorance of Law*, will excuſe a man, or not.

As if ſuch an one do ſuch an act as would be Felony, or ſome other leſſer offence in another; this ſhall be excuſed in them.

So if ſuch a one neglect to claim, or enter to his Land in time, this laches or neglect ſhall not prejudice him.

But if any other man tranſgreſs any Law, it will not excuſe him to ſay, That he was ignorant of the Law; this is a voluntary Ignorance, as is that alſo of a Drunkard; and therefore his drunkenneſs will not excuſe him of any offence he ſhall commit, *Co.*1. 45. *Plow.*19.

If a man know that two men have pretended Title to one peece of Land, and he will ſay that the one hath the right, and the other hath no Title; if in truth it be otherwiſe, and the other hath the right, that he ſaith hath none; an Action of the Caſe for Slander of the Title will lie, and this ignorance of the Law will not excuſe him, *Co.*1. 177.

So in the caſe of Bankrupts, if one come not in to demand his debt, he may loſe it, and the ignorance of Law will not help him; *Vigilantibus & non dormientibus ſubveniunt jura, Co.* 2. 26.

3. Where the Ignorance of the Fact will excuſe, or not.

If a Man have made a Leaſe on Condition, that the Leſſee ſhall not do ſome Collateral Act, as Alien without Licence, or the like, which the Leſſee may do, and the Leſſor never know of it, and the Leſſee break the Condition, and after the Leſſor accept the Rent; this ſhall not bar him of Entry for breach of the Condition, unleſs the Leſſor had notice; for this ignorance of the fact here, ſhall help him. *Co.* 3. 65.

But if one be bound in an Obligation with Condition, that he or another ſhall do any act, as Counſel ſhall adviſe, and he tender him a Deed, that the Obligor cannot read nor underſtand; he muſt ſeal it preſently, and may not forbear till ſome body read it to him, elſe his ignorance will not excuſe him. *Co.* 2. 3.

If a Deviſe be made to one of Land, till he ſhall levy one hundred pound, and the Deviſee do not know of the Deviſe, and the time doth run on; yet he ſhall hold it no longer then the time he might have levied ſo much out of it, and his ignorance of the fact here will not help him. *Co.* 4. 82.

If one be bound to repair Houſes, and he know not of the decay, this will not excuſe; but if it were to repair ſuch Houſes as another ſhall after aſſign, and he aſſign unknown unto him; here his ignorance will excuſe, *Doct. & Stud.* 149. But no Ignorance of Law in theſe points will help.

Wager of Law, what.

It is an Oath taken by ſome certain perſons in ſome Courts, where one is charged with a Debt, or Detinue of Goods without Specialty, or upon ſome ſecret Agreement, where the Plaintiff cannot prove the Surmiſe of his Sute by any Deed, or open act (in which act the Defendant might privily diſcharge it) then the Defendant may if he will, wage his Law; and that is, ſwear that he doth not ow the money, or detain the Goods as the Plaintiff doth pretend, *&c.* And he is to have ſix, or eight, or twelve (as the Court will appoint him) more, that muſt ſwear they think that he ſweareth truth, which is like the Oath made by Compurgators in the Civil Law; and this offer to wage Law, is called Wager of Law, and the doing of it, doing of Law; and this muſt not be without witneſſes. They were uſed to be eleven, and himſelf twelve, which did countervail a Jury. He is to be ſworn directly and abſolutely, and the Compurgators, that they believe he doth ſay true.

Where it lieth, or not.

This liberty of Wager of Law, is allowed onely in caſes of Secreſie, where the County cannot have notice of the thing: As in Action of Detinue, of Goods lent, or left with the Defendant, for which the Plaintiff hath no Eſpecialty; and in Actions of Debt, upon private Contracts and Agreements, and the like; as for Money lent, Rent upon a Leaſe for years, of a ſtock of Sheep, or the like, Detinue of a Horſe, or other perſonal thing.

But it lieth not in an Action of Debt for Rent upon a Leaſe for years in writing; nor in an Action of Debt for Arrearages of Account, nor in an Action of Debt upon any Bill, Bond, or other Eſpecialty, nor in any Action of the Caſe, nor in Account upon Receipt by another Mans hand, not upon Contract when the party hath a Deed of the Contract, nor upon a Leaſe of Land, though it be ſtored with Beaſts, *Finches Ley* 425. Nor in an Action of Debt brought for Wages by a Laborer, bound by Statute to ſerve, nor upon a Leaſe for years, though it were made without Deed. See for this, *Co.* 2 *part. Inſt. cap.* 28. See more in the Statutes of 38 *Ed.* 3. 5. 5 *H.* 4. 8.

4. *Nient* Lettered, or not able to read.

It is a Plea given for a Lay and unlearned Man, to avoid a Deed he hath made, when ſuch a man is to ſeal a Deed, and he deſire to hear him read, or to hear the Contents of the Deed; and the other party, to whom the Deed is to be ſealed, do not read him, or cauſe him to be read, or the Contents to be ſhewed; or the party himſelf, to whom the Deed is to be ſealed, or another at his requeſt, or of his own minde, do read or declare the Contents thereof, falſly and untruly, concealing part, or reading otherwiſe then it is, or adding more, and thereupon the party ſeal it: Now if he be after ſued upon this Deed, or the party make any uſe of it, the party that made the Deed may avoid it, by ſhewing the whole matter; but if it be a matter

of

of Record, it cannot be avoided for any ſuch cauſe. So if the party do not deſire to hear the Deed read, or the Contents thereof, there the not reading of it, will not make the Deed void; but in that caſe the miſreading of it, though it be done without the parties requeſt, will make the Deed void. But no Ignorance of the Law upon the Deed will help in this caſe.

Then a thing is ſaid to be in Abeyance, when it is in no perſon, for that no perſon is capable of it for the preſent; but it is onely in conſideration of Law, and kept by Law, for one that may be capable of it: As when a Leaſe is made for life, the Remainder to the right Heirs of *J. S.* which *J. S.* is then living; this Remainder is kept by the Law, for it is out of the Grantor, and yet cannot be in the Heirs of *J. S.* for he can have no Heirs whiles he liveth; but if he die before the Leſſee for life, it will reſt well enough, otherwiſe not; and till the death of the Tenant for life, the Remainder is ſaid to be in Abeyance. *Terms Ley. Co. ſuper Littl.* 342. 5. *Abeyance* or *Cuſtody of Law.*

The Books of Law muſt be turned into, and all Proces in the Courts muſt be in Engliſh. See for this *Act*, 7 *Nov.* 1650.

CHAP. CIII.

Of a Leaſe.

A Leaſe doth properly ſignifie a Demiſe or Letting of Lands, Rent-Common, or any Hereditament unto another for a leſſer time then he that doth let it, hath in it. (For when a Leſſee for life or years, doth grant over all his Eſtate or time unto another, this is more properly called an Aſſignment then a Leaſe.) And this albeit, it may be made and done by other words, yet it is moſt commonly and aptly made by the words, Demiſe, Grant, and Let; and in this caſe he that letteth, is called the Leſſor, and he to whom it is let, the Leſſee. 1. *Leaſe*, what: *Aſſignment.* *Leſſor, Leſſee.*

This word alſo is ſometimes, although improperly, applied to the Eſtate, *i.* The Title, time or intereſt the Leſſee hath to the thing demiſed, and then it is rather referred to the thing taken or had, and the intereſt of the Taker therein; but in this place it is applied rather to the manner or means of attaining, or coming to the thing Letten.

And in this ſenſe it is ſometimes made and done by Record, as Fine, Recovery, *&c.* and ſometimes, and moſt frequently, by writing, called a Leaſe by Indenture, albeit it may be made alſo by Deed Poll. And ſometimes alſo it is (as it may be of Land, or any ſuch like thing grantable without Deed for life, or never ſo many years) by word of mouth without any writing, and then it is called a Leaſe-Parol: And hence comes the Diviſion of a Leaſe-Parol, and a Leaſe in writing. And all theſe ways it may be made either for life, *i.* for the life of the Leſſee, or another, or both; or for years, *i.* for a certain number of years, as ten, an hundred, a thouſand, or ten thouſand years, moneths, weeks, or days, as the Leſſor and Leſſee do agree; and then the Eſtate is properly called a Term of years: For this word Term doth not onely ſignifie the Limits and Limitation of time, but alſo the Eſtate and Intereſt that doth paſs for that time: Theſe Leaſes alſo for years do ſome of them commence *in præſenti*, and ſome *in futuro*, at a day to come; and the Leaſe that is to begin *in futuro*, is called an *Intereſſe termini* or Future intereſt; or at will, *i.* when a Leaſe is made of Land to be held at the will and pleaſure of the Leſſor, or at the will and pleaſure of the Leſſor and Leſſee together: And ſuch a Leaſe may be made by word of mouth as well as the former. *Terms Ley. Co. ſuper Littl.* 43. 45. Juſtice *Dodridge* Treatiſe, called *The Uſe of the Law. Broo. Leaſes*, 60. 437. *Plow.* 421. 432. *Dyer* 125. 2. The kindes. *Term of years.* *Intereſſe termini*, or *Future Intereſt*, what.

Regularly

3 Things neceſſarily required in every good leaſe.

Regularly theſe things muſt concurr to the making of every good leaſe. *See Grant Numb.* 4. *Co.* 6. 36. 34. 35. 1. 154. 155. *Co. ſuper Litt.* 45. 46. *Plow.* 273. 523.

1 As in other grants, ſo in this there muſt be a Leſſor, and he muſt be a perſon able, and not reſtrained to make that Leaſe.

2 There muſt be a Leſſee, and he muſt be capable of the thing demiſed, and not diſabled to receive it.

3 There muſt be a thing demiſed, and ſuch a thing as is demiſable.

4 If the thing demiſed be not grantable without a Deed, or the party demiſing not able to grant without Deed, the leaſe muſt be made by Deed. And if ſo, then there muſt be a ſufficient deſcription and ſetting forth of the perſon of the Leſſor, Leſſee, and the thing leaſed, and all neceſſary circumſtances, as ſealing, delivery, &c. required in other grants, muſt be obſerved:

5 If it be a Leaſe for years it muſt have a certain commencement, at leaſt then when it comes to take effect in intereſt or poſſeſſion, and a certain determination either by an expreſs enumeration of years, or by reference to a certainty that is expreſt, or by reducing it to a certainty upon ſome contingent precedent by matter *ex poſt-facto*, and then the contingent muſt happen before the death of the Leſſor or Leſſee.

6 There muſt be all needfull ceremonies, as livery of ſeiſin, atturnment, and the like, in caſes where they are requiſite.

7 There muſt be an acceptance of the thing demiſed, and the eſtate by the Leſſee.

But whether any rent be reſerved upon a Leaſe for life, years, or at will, or not, is not materiall, except only in the caſes of Leaſes made by Tenant in Tail, husband and wife, and Eccleſiaſticall perſons. Of which ſee *infra*.

4 What ſhall be ſaid a good and a ſufficient leaſe for life or years. Or not.

For the ability and capacity of the Leſſors and Leſſees, and what ſhall be ſaid a good leaſe or not, in reſpect of the ability of the Leſſor, and the capacity of the Leſſee, and the deſcription of their perſons, the nature and deſcription of the thing demiſed, and what miſ-recitall, or miſnoſmer will hurt, or not, See *Grant Num.* 4. and *infra Numb.* 5. 6. 7.

1 In reſpect of the perſons of the Leſſor, and the Leſſee, the thing leaſed, & the eſtate, property, or poſſeſſion of the Leſſor thereir.

Leaſes for life, or years, or at will, may be made of any thing corporall or incorporall, that lieth in livery or grant. Alſo leaſes for years may be made of any goods or chattels. See for this *Grant Numb.* 4. *Bro. Leaſes* 23.

A man ſeiſed of an eſtate in Fee-ſimple in his own right of any Lands or Tenements, may by Deed or writing in the country, or without writing, by word of mouth make a leaſe of it for what lives or years he will. And he that is ſeiſed of an eſtate in Tail of any Lands or Tenements, may make any leaſe out of it for his own life, but not longer unleſs it be by fine or recovery, or it be ſuch a leaſe as is warranted by the Statute of 32 *H.* 8. (whereof ſee more *infra.*) And he that is ſeiſed of Lands or Tenements of any eſtate for his own or anothers life may make what leaſe for years he will of it, and it will be good as long as the leaſe for life doth laſt. And he that is poſſeſſed of lands or Tenements for years, may make a leaſe of it for all or part of the years, and theſe are good Leaſes. The Tenant for life or years may alſo aſſigne over all their eſtates if they pleaſe. And if ſuch Tenants make leaſes for longer time, as if Leſſee for years make a leaſe for life ; it ſeems by this the Land will paſs for life, if the Term of years laſt ſo long. But if he give livery of ſeiſin upon it (as he muſt to make the leaſe for life good) this is a forfeiture of the eſtate for years. *Co.* 7. 12. 1. 44. *Plow.* 524.

A Licenſe to a man to enjoy land for 7 years, is a leaſe for 7 years; and a Licenſe to ſow Corne, is upon the matter a leaſe of the Land till the Corne be taken away : by Baron *Thorpe*, at *Glouc. Aſſiſes.* 1654.

Foafeiture. Infant.

If an Infant be ſeiſed of Land in Fee-ſimple, and he make a Leaſe for years of it rendring no rent; this leaſe is void. But if there be a rent reſerved upon the leaſe, then the leaſe is but voidable, and may by the acceptance of the rent by the Infant after his full age be made good. 9. *H.* 7. 24. 18. *Ed.* 4. 2. *Plow.* 545.

Acceptance.

Jointenants, Tenants in Common.

Iointenants, Tenants in Common, and parcenours may make leaſes for life or years of their own parts, and purparties at their pleaſures, and theſe leaſes will binde their companions.

And

And one Coparcenour, or Tenant in Common may make a leaſe of his part to his companion if he will. *Litt. cap. Tenant in common, F. N. B. 62. G.*

If a Feoffment be made upon condition, and before the time of performance of the condition, the Feoffor and Feoffee doe joyne to make a leaſe for life or years of the Land; this is a good leaſe.

A man that hath an eſtate in land to him and his wife and his Heirs, may make what leaſe he will of the Land, and this will be good againſt all men but his wife onely, and that for her time. *Bro. Leaſes* 58.

If there be Leſſor in Fee, and Leſſee for ten years; in this caſe they two may joyn together and make a Leaſe for lives, or for any terme of years; and this is good. *Co.* 10. 49.

A Diſſeiſee cannot make a leaſe of that Land whereof he is diſſeiſed untill he make his entry or recover the poſſeſſion of the Land again. So neither can a woman that hath recovered the third part of her husbands Land in a writ of dower, make any Leaſe of it before ſhe be in poſſeſſion by execution: And yet if a Leaſe be made to me for years, I may make a Leaſe of part, or an aſſignement of all the term before I have made my entry into the Land demiſed. So if the Father die, and the Son make a leaſe to a ſtranger of the Land deſcended to him before his entry; this is a good leaſe: but if a ſtranger had entred and abated into the Land, and then the ſon had made the leaſe, *contrà. Plow*, 133. *Bro. Scire facias* 36. *Co. ſuper Lit.* 46: *Plow.* 137. 142.

By ſpeciall power or proviſo to make leaſes.

In ſome caſes alſo ſuch perſons as are not ſeiſed in Fee-ſimple, &c. nor able to derive ſuch eſtates for life or years out of their own eſtates, may lawfully notwithſtanding make ſuch leaſes for life, &c. And this is ſometimes by ſome ſpeciall Act of Parliament enabling them ſo to doe. And hence it is alſo that a Tenant in Tail may make leaſes for three lives or twenty one years. And ſometimes it is by ſome ſpeciall power or authority that is given or reſerved by and to the party himſelf that had the Fee-ſimple in him, or given to ſome other to doe it in his name, and leaſes thus made may be good. And therefore if any Act of Parliament enable a Tenant in Tail or a Tenant for life to make leaſes for three lives, or twenty one years, leaſes that are ſo made in purſuit of that authority, are good. And if a man be ſeiſed of Land in Fee, and convey it to the uſe of himſelf for life, or in Tail, with divers remainders over, with a proviſo that it ſhall be lawfull for him or any ſuch Tenant in Tail, to make leaſes for twenty one years; in this caſe he or they may make ſuch leaſes and they will be good. But in both theſe caſes care muſt be had to purſue the authority ſtrictly *i.* that the leaſes made be according to the power and direction given by the ſtatute or proviſo: for if it differ and vary ever ſo little from the ſenſe and meaning of the ſame; the leaſe will not be good. And therefore in the caſe before of a power to make leaſes for twenty one years, if the party make more leaſes for twenty one years at one time then one, they are all void but the firſt, becauſe it is againſt the intent of the parties, though it be not againſt the words. And ſo if the power be to make leaſes for three lives; he cannot by this make a leaſe for ninety nine years if three lives ſo long live. But if the power be thus provided, &c. that he may make any leaſe in poſſeſſion or reverſion; ſo as it doe not exceed the number of three lives or twenty one years; in this caſe a leaſe may be made for ninety nine years if three lives live ſo long. But where uſes are raiſed by way of covenant, and in the deed there is a proviſo that the covenantor for divers good conſiderations may make leaſes for years; in this caſe this power is void, and therefore no leaſe can be made hereupon: neither will any averment help in this caſe. And if a man have a letter of Atturney, or other authority to make leaſes for another, and doe make them accordingly; ſuch leaſes are good. *Co.* 5. 5. *Dier* 357. *Co.* 6. 2. 8. 70. 1. 175. *See in leaſes made by Tenant in tail infrà.* But herein alſo caution muſt be had of three things. 1 That the authority be good. 2 That he that is the Deputy or Atturney doe purſue the authority ſtrictly. 3 That he doe it in the name of his maſter, and not in his own name. *Co.* 9. 76.

Averment.

But if a power to make leaſes be raiſed upon a Covenant to ſtand ſeiſed without any tranſmutation of the poſſeſſion, this is void in law, and not to be holpen in equity. *Caries Rep.* 30.

2 In reſpect of the manner of the agreement and the words whereby the ſame is ſet down. And what words will make an eſtate for life or years.

A Leaſe made for a Thouſand days, Months, or weeks, is as good for ſo long as it endureth as a leaſe for an hundred or a thouſand years, So a leaſe for half a year, or a whole year is good: So if a leaſe be made from day to day, or from week to week for four years; this is a good leaſe for four years, *Et ſic de ſimilibus.* So if one make a leaſe for ten years, and ſo from ten years to ten years, during an hundred years, or untill an hundred years are incurred; this is a good leaſe for an hundred years. So if one make a leaſe from three years to three years, during the life of *I S.* in this caſe if livery of ſeiſin be not given, this is a good leaſe for ſix years; but if livery be given, it is a good leaſe for the life of *I S.* And if a leaſe be made from my death untill *Anno Domini* 1650; this is a good leaſe. *Brownl.* 1 *part* 30. *Co.* 6. 72. 14 *H.* 8. 13. *Plow.* 422. *Plow.* 272. *Bro. Leaſes* 49. *Dier* 24.

Livery of Seiſin.

If I ſay to *I S*, being in my houſe [Here *I S*, I demiſe to you my houſe and Land ſo long as I live;] this is a good leaſe for life to him if livery of ſeiſin be made. *Et ſic de ſimilibus. Co.* 6. 26.

Livery of Seiſin.

If one make me a leaſe of Land untill an hundred pound be paid me, and make livery of ſeiſin upon it; this is a good leaſe for life determinable upon the payment of the hundred pound. But if no livery be made, it is no good leaſe. 21. *Aſſ. pl.*

Executors.

If one make a Leaſe to me for my life, and for four, ten, or twenty years after: this is a good leaſe for life firſt if livery of ſeiſin be made, and then a good leaſe for years for ſo many years as are agreed upon afterwards, which my executors ſhall have. And if no livery of ſeiſin be made; yet it ſeems it is a good leaſe for ſo many years after my death. *Bro. Leaſes* 27. 51.

If an Indenture of Leaſe be made between *A* of the one part, and *B C* and *D* of the other part, and therein *A* doth demiſe land to *B* To have and to hold to him for eighty years, if *B* ſhall live ſo long, and if he die, or alien the premiſſes within the term, then that his eſtate ſhall ceaſe, and then the Leſſor doth grant the Land to *C* for ſo many years of the ſaid term as ſhall be then to come after the death or alienation of *B*, if he live ſo long; in this caſe this is a good leaſe to *B* for ſo many years as he ſhall live of the eighty years, but the leaſe to *C* after is not good, for the terme is ended by the death of *B*, but if the words of the ſecond demiſe be To have and to hold during the reſidue of the eighty years, and not during the reſidue of the terme; in this caſe the ſecond demiſe is good to *C* alſo. *Co.* 1. 153. *Dyer* 253.

If one make me a Leaſe for ſixty years if I live ſo long, provided that if I die within the term, that my Executors ſhall have it during the reſidue of the ſixty years; in this caſe this is a good leaſe for the ſixty years determinable upon my death, but not a good leaſe for the reſidue of the ſixty years after my death. And yet it may amount to a good covenant for that time. *Co.* 1. 155. *Dyer.* 150. 2. 53.

Covenant.

If *A* covenant to levy a fine to *B* and his Heirs, provided that if he pay *B* and his Heirs ten pound at the end of thirteen years, that then the fine ſhall be to the uſe of *A* and his Heirs, and *A* doth covenant with *B* by the ſame Deed, that *B* his Heirs, Executors, and aſſignes, ſhall quietly hold the premiſſes from *Michaelmas* next for thirteen years and yearly from thenceforth for ever if the ten pound be not paid according to the intent; in this caſe this covenant doth not make a good leaſe for the thirteen years, and it is but a covenant. *Evans caſe. Trin* 5. *Jac. B. R.*

Covenant.

If one make a leaſe for a certain number of years, and it is further agreed that upon ſome contingent the Leſſee ſhall have the Fee-ſimple, and livery of ſeiſin is given hereupon; in this caſe the leaſe for years doth continue good for the time agreed upon. *Plow.* 272. *Lit. Sect.*

Executors.

A leaſe for years cannot by the agreement of the parties be made to the Heirs of the Leſſee, nor intailed to the Heirs of his body. And therefore if a Leaſe be made to I *S* and his Heirs, or to *I S* and the Heirs male of his body, yet the executors of *I S* and not his Heirs ſhall have it, and the Executors may ſell the term. *Co*, 2. 24. 10. 87. If two agree by word that one of them ſhall have ſuch a peece of Land for twenty years; this is a good and perfect leaſe that is made by this agreement, albeit they doe agree to have a writing made of it afterwards, for in this caſe the writing is but the confirmation of it. But if the agreement be that ſuch a writing ſhall be made, or that a leaſe ſhall be made of ſuch a thing between them and put in writing, ſo that the agreement hath reference to the writing, and implieth an intent not to

perfect

perfect the agreement till the writing be made; in this caſe the leaſe is not a perfect leaſe untill the writing be made. *Per Juſtice Jones at the Aſſiſes at Glouc.*

Albeit the moſt uſuall and proper making of a leaſe is by the words, Demiſe, grant, and to ferm let, and with an *Habendum* for life or years, yet a Leaſe may be made by other words, for whatſoever word will amount to a Grant will amount to a leaſe. And therefore a Leaſe may be made by the word, Give, Betake, or the like. The word *Locavit* alſo is a good word. And the uſe in the Exchequer is to make Leaſes by the word *Committimus*, which is a good word to make a Leaſe, *Co. ſuper Litt.* 5. *F. N. B.* 270. *e. Br. Leaſes.* 71. And if *A.* doe but grant and covenant with *B*, that *B.* ſhall enjoy ſuch a peece of land for 20. years; this is a good leaſe for twenty years. *Bro. Leaſes.* 60. So if *A*, promiſe to *B*, to ſuffer him to enjoy ſuch a peece of land for twenty years; this leaſe is a good leaſe for twenty years. *Mic. 9. Jac. B. R Curia.*

So if *A.* licenſe *B.* to enjoy ſuch a peece of land for twenty years; this is a good leaſe for twenty years. 5 *H.* 7. 1. And therefore it is the common courſe, if a man make a feoffment in fee, or other eſtate upon condition that if ſuch a thing be, or be not done at ſuch a time, that the feoffor, &c. ſhall reenter, to the end that in this caſe the feoffor, &c. may have the land and continue in poſſeſſion untill that time, to make a Covenant that he ſhall hold and take the profits of the land untill that time; and this Covenant in this caſe will make a good leaſe for that time, if the incertainty of the time (whereunto care muſt be had) doe not make it void. And therefore if *A.* bargaine and ſell his land to *B.* on condition to reenter if he pay him an hundred pound, and *B.* doth covenant with *A.* that he will not take the profits untill default of payment, or that *A.* ſhall take the profits untill default of payment; in this caſe howbeit this may be a good Covenant yet it is no good Leaſe. And if the Morgagee covenant with the Morgagor that he will not take the profits of the land untill the day of payment of the mony; in this caſe albeit the time be certaine, yet this is no good Leaſe but a Covenant onely. If one give a Bond for the quiet holding of a Cloſe for three years; it ſeemes this is no leaſe in Law. See the opinion of the Parliament for *Bonds* and *Covenants* both *Stat.* 14 *Eliz. cap.* 11. *Agreed by all the Judges Mic.* 20. *Jac. et per. Juſt. Bridgman. And* 8. *Car. B. R.* Covenant.

A Leaſe for years may begin at a day to come, as at Michaelmas next, or three or ten years after, or after the death of the Leſſor, or of *I. S.* and it is as good as where it doth begin preſently. But a leaſe for life of any thing whatſoever whether it lye in Livery, or in Grant, if it be *in eſſe* before, cannot begin at a day to come. And therefore if a leaſe be made *Habendum*, from Michaelmas next, or from the day of the making of it, or after the death of the leſſor, or after the death of *I. S.* to the leſſee for life, this leaſe is not good: but in caſe of a leaſe of land made thus, it is ſometimes holpen by the livery of ſeiſin. For which See *Livery of Seiſin chap.* 9. *Numb.* 11. *Co.* 5. 1. *ſuper. Litt.* 48. *Plow.* 156. 197. *March.* 50. *Plow.* 78. 177. 236. *See Frank Tenement Brownl.* 1. *part.* 79. 80. 88. 3. In reſpect of the Commencement, & continuance & end of the term or eſtate. Incertaintie. Freehold to commence in futuro.

But all leaſes for years whether they begin *in preſenti*, or *in futuro*, muſt be certaine, that is, they muſt have a certain beginning, and certain ending, and ſo the continuance of the term muſt be certain, otherwiſe they are not good. And yet if the years be certain when the leaſe is to take effect in intereſt or poſſeſſion, it is ſufficient, for untill that time it may depend upon an incertainty, *viz.* upon a poſſible contingent precedent before it begin in poſſeſſion or intereſt, or upon a limitation or condition ſubſequent: but in caſe when it is to be reduced to a certainty upon a contingent precedent, the contingent muſt happen in the lives of the parties. And albeit there appear no certainty of years in the leaſe, yet if by reference to a certainty it may bee made certaine it is ſufficient. *Id certum eſt quod certum reddi poteſt.* As for examples, if *A.* ſeiſed of lands in fee, grant to *B.* that when *B.* ſhall pay to *A.* twenty ſhillings, that from thenceforth he ſhall hold the land for twenty one years, and after *B.* doth pay the twenty ſhillings; in this caſe *B.* ſhall have a good leaſe for twenty one years from thenceforth. and if *A.* grant to *B.* that if his tenant for life ſhall die, that *B.* ſhall have the land for ten years; this is a good Leaſe. And if one make a leaſe for years after the death of *C.* if *C.* die

within ten years; this is a good leaſe if *C.* die within the ten years, otherwiſe not. But if *A.* be ſeiſed of land in fee, and leaſe it to *B.* for ten years, and it is agreed between them that *B.* ſhall pay to *A.* an hundred pound at the end of the ſaid ten years, and that if he doe ſo, and ſhall pay the ſaid hundred pound, and an hundred pound at the end of every ten years, that then the ſaid *B.* ſhall have a perpetuall demiſe and grant of the premiſſes from ten years to ten years continually following *extra memoriam hominum &c.* in this caſe this, albeit it be a good leaſe for the firſt ten years, yet it is void for all the reſt for incertainty. And if a leaſe be made to begin from the Nativity of Chriſt, and he doth not ſay which Nativity, as next &c. it is void for incertainty. And yet if a leaſe for years be made of land in leaſe for life to have and to hold from the death of the tenant for life; this is a good leaſe: So if it be to have and to hold from *Michaelmas* next after the death of the tenant for life, or from *Michaelmas* next after the determination of the eſtate of the tenant for life; theſe are good leaſes. So if there be a former leaſe in being for life or years, and another leaſe for years is made of the land to have and to hold from the end of the former eſtate by ſurrender, forfeiture, or otherwiſe for twenty years; or to have and to hold from the ſurrender, forfeiture, or other determination of the former leaſe if there be any, and if there be none for twenty years; theſe and ſuch like leaſes are good, and this commencement is certain enough. And if one make a leaſe to begin after the death of *I.S.* & to continue untill *Michaelmas*, which ſhall be in *Anno Domini* 1650. this is a good leaſe. *Co. ſup.* 5. *Lit.* 45. *Co.* 1. 1. 155. *Co. ſuper Lit.* 45. *Plow.* 83. 524. *Co.* 6. 35. 1. 155. *Plow.* 270. *Hil.* 16. *Jac. in the Exchequer. Plow.* 192. 523. *Co.* 6. 36. *Plow.* 523. *and* 17 *Jac. B. R. Agree.*

If a man have a leaſe of land for an hundred years, and he make a leaſe of this land to another to have and to hold to him for 40 years to begin after his death; this is a good leaſe for the whole forty years, if there ſhall be ſo many of the hundred years to come at the time of the death of the leſſor. But if the leſſor grant the land to another to have and to hold to him for and during all the reſidue of the term of an hundred years that ſhall be to come at the time of the death of the grantor; this is void for incertainty. And yet if in this caſe he grant withall all his eſtate, or all his term, or all his intereſt in the premiſſes of the deed, and then ſay to have and to hold the land &c. to the grantee for all the reſidue of the term of an hundred years that ſhall be to come at the time of his death; by this the whole eſtate and intereſt of the grantor into the land doth paſſe preſently by theſe words in the premiſes of the deed. And if in this caſe the leſſee for an hundred years make a leaſe of the land to have and to hold after his death for an hundred years; this will be a good leaſe for as many of the firſt hundred years as ſhall be to come at the time of his death. If a leaſe be made to two for their lives, the remainder which ſhall firſt happen to dye for forty years; in this caſe this is but a poſſibility. And therefore neither the one nor the other, nor both together can grant away this terme of forty years, *Goldsb.* 168. *Lit. Bro: Sect.* 437. *Bro. Grant.* 154. *Co.* 1 155. *Plow.* 520. 521. *See Expoſition of Deeds.*

If *A.* make a leaſe to *B.* for ninty years to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others, and afterwards makes another leaſe of the land *Habendum* after the determination or redemption of the former leaſe, it ſeems this is a good leaſe and certain enough. But if a leaſe be made to *A.* for eighty years if he live ſo long, and if he dye within the ſaid term or alien the premiſſes, that then his eſtate ſhall ceaſe, and then he doth further by the ſame deed grant and let the premiſſes for ſo many years as ſhall then remain unexpired after the death of *A.* or alienation to *B.* for the reſidue of the ſaid term of eighty years, if he ſhall live ſo long; in this caſe the leaſe to *B.* is void, for after the death of *A.* the term is at end. but if he ſay for the reſidue of the eighty years, it is otherwiſe. *Per Juſtice Bridgeman. Co.* 4. 153. *Dier.* 253.

If *A* doth make a leaſe of land to *B.* for ſo many years as *B.* hath in the Manor of Dale, and *B.* hath then a leaſe for ten years of the Manor of Dale; in this caſe this is a good leaſe for ten years. But if *A.* make a leaſe of land to *B:* for ſo many years as the land *B.* hath in execution ſhall be in execution; this leaſe is void for incertainty. And if a leaſe be made during the minority of *I. S:* or untill *I. S.* ſhall come to the age

age of twenty one years, theſe are good leaſes; and if *I. S.* dye before he come to his full age, the leaſe is ended. But if a leaſe be made to another until a child that is now in its mothers belly ſhal come to the age of twenty one years; this leaſe is not good. And if a leaſe be made for ſo many years as *I. S.* ſhall name; in this caſe if *I. S.* doe name a certain number of years in the life time of the party leſſor; this is a good leaſe. But if a leaſe be made for ſo many years, as the executor of the leſſor, or of the leſſee ſhall name, this leaſe is void. *Plow.* 273. 523. 522. *F. N. B.* 6. *N.* 14 *H.* 8. 11. *Co.* 6. 35.

If a man make a leaſe for twenty one years, if *I. S.* live ſo long, or if the coverture between *I. S* and *D. S.* ſhall ſo long continue, or if *I. S.* ſhall continue to be Parſon of Dale ſo long, theſe and ſuch like leaſes are good. But if *A.* make a leaſe to *B.* for ſo many yeares as *A.* and *B.* or either of them ſhall live, not naming any certain number of years; this cannot be a good leaſe for years. So if the Parſon of Dale make a leaſe of his glebe for ſo many years as he ſhall be Parſon there, this is not certain neither can it be made ſo by any means. And yet if a Parſon ſhall make a leaſe from three years to three years ſo long as he ſhal be Parſon; this is a good leaſe for ſix years if he continue Parſon ſo long, and for the reſidue void for incertainty. So if I make another a leaſe of land untill he be promoted to a Benefice; this is no good leaſe for years, but void for incertainty. *Co. ſuper Lit.* 45. *Plow.* 27.

If I have a rent-charge of twenty pound *per annum*, and let it to another untill he have levied an hundred pound, this is a good leaſe for five years. But if I have a peece of land of the value of twenty pound *per annum*, and I make a leaſe of it to another untill he ſhall levy out of the profits thereof an hundred pound; this is no good leaſe for years, but void for incertainty. *Co.* 6. 35. 14 *H.* 8. 10. *Plow.* 274.

But her note in all theſe caſes of incertain leaſes made with ſuch limitations as aforeſaid, as untill ſuch a thing be done, or ſo long as ſuch a thing continue &c. that if livery of ſeiſin be made upon them, they may be good leaſes for life determinable on theſe contingents, albeit they be no good leaſes for years. *Plow.* 27. *Co.* 6. 35. Note.

And in ſome ſpeciall caſes a leaſe may be good notwithſtanding ſome incertainty in the continuance of it, for a leaſe may ceaſe for a time and revive again, as if tenant in tail make a leaſe for years reſerving twenty ſhillings, and after take a wife and die without iſſue; in this caſe as to him in reverſion the leaſe is meerly void: but if he indow the wife of the tenant in tail of the land, as to the wife, it is revived again. So if tenant in taile make a leaſe for years rendring rent, and die without iſſue, his wife enceint with a ſon, and he in reverſion enter, in this caſe as againſt him the leaſe is void, but after the ſon is born the leaſe is good again if it be within the Statute. So if tenant in fee-ſimple take a wife, and then make a leaſe for years and dieth, the wife is indowed; in this caſe ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force again. *Co. ſuper Lit.* 46 10 *Ed* 3. 26.

If a leaſe be made for life or years to *A.* and after the leſſor doth make a leaſe for years by word or in writing to *B.* regularly this concurrent leaſe to *B.* is a good leaſe at leaſt for ſo many years of the ſecond leaſe as ſhall be to come after the firſt leaſe is determined according to the agreement, as if the firſt leaſe to *A.* be for twenty years, and the ſecond leaſe to *B.* be for thirty years, and both begin at one time; in this caſe the ſecond leaſe is good for the laſt ten years. And yet the reverſion will not paſſe without the atturnment of the tenant, and therefore if any rent be reſerved on the firſt leaſe, the ſecond leſſee ſhall not have it untill the firſt leſſee doth atturn. But if the ſecond leaſe be for the ſame or for a leſſe time, as if the firſt leaſe be for twenty years, and the ſecond leaſe be for twenty or for ten years to begin at the ſame time; theſe ſecond leaſes are for the moſt part void. *Plow.* 433. 421. 273. *Co.* 1. 155. *Bro. Leaſes.* 73. 1 . *Plow.* 521. *Co.* 4. 58. And yet herein a difference is taken between leaſes made by matter of record and by writing, and leaſes that are made by word of mouth; for if the ſecond leaſe be made by fine, deed indented, or poll, albeit it be but for the ſame or for a leſſer time, and albeit it be a leaſe of the land it ſelf, and not of the reverſion, yet it will paſſe the rent reſerved upon the firſt leaſe if the firſt leſſee atturn, and ſo alſo it will do without atturnment where atturnment is not needfull. But if the ſecond leaſe be made by word of mouth it is otherwiſe, for a reverſion and a 4. In reſpect of another leaſe then in being of the ſame thing.

rent in this caſe will not paſſe without deed, and therefore a grant by word doth not paſſe them.

Eſtoppel. And if the ſecond leaſe be by fine or deed indented, then alſo it will work by way of Eſtoppel both againſt the leſſor and againſt the leſſee, ſo that if the firſt leaſe happen by any means, as by ſurrender or otherwiſe, to determine before it be run out, then the ſecond leſſee ſhall have it; and if there bee any rent reſerved upon the ſecond leaſe, the leſſee muſt pay it from the time of the making of the leaſe. *Dier.* 58. 356. *Plow.* 421, 422. *Co.* 1. 155. And therefore if one make a leaſe of land to *A.* for ten years, and after make a leaſe to *B.* of the ſame land from *Michaelmas* next for ten years, and before *Michaelmas* the firſt leſſee doth purchaſe the fee-ſimple ſo that now by this means his term is drowned; in this caſe the ſecond leaſe ſhall begin at *Michaelmas*. *Dier.* 112. *Plow.* 432. So if one make a leaſe to *A.* for twenty years, and *A.* make a leaſe of the land to *B.* for two years rendring rent, and after *A.* makes a leaſe for the reſt of his time to *C.* by deed; this leaſe if the leſſee for two years doe atturn, is a good leaſe of the rent and reverſion; and ſo it is alſo without Atturnment, if there be any conſideration given for it, for then it is alſo a good leaſe for all the reſt of the term after the two years. *Co.* 4. 53. So if one make a leaſe to *A*, for twenty years, if he live ſo long rendring rent, and after he doth make a leaſe to *B.* by Indenture for eighty years to begin preſently, or grant the reverſion to begin at a day paſt, or the like, in all theſe caſes if the firſt leſſee atturne, the rent will paſſe, but if not, it will be a good leaſe for the land for ſo many of the years as ſhall bee to come after the Firſt leaſe ended. But if the ſecond leaſe bee by paroll without a deed, the reverſion as a reverſion will not paſſe, and the grant will bee void if there be nothing elſe to help it. *Co.* 1. 155. *Plow.* 432. 434. *Hil.* 6. *Jac. Adjudge Finch verſus Vaughan.* And in caſes where the ſecond leaſe is void, albeit the firſt leſſee ſurrender his eſtate, or his eſtate end by a condition, yet the ſecond leaſe is not hereby made good. *Dier.* 112. But if the ſecond leaſe for years after another leaſe for life or years be made for mony, ſo as it may be ſaid to paſſe by way of bargain and ſale; this may help the matter, for in this caſe albeit it be by word only, it may paſs the reverſion and the rent alſo: but in moſt caſes it is good for the remainder of the term after the firſt leaſe ended. And if the ſecond leaſe be to begin after the end of the former leaſe; in this caſe the former leaſe is no impediment at all to the validity of the latter leaſe, but the latter leaſe is good notwithſtanding. *Co.* 2. 35. 36.

5. What leaſes or other acts may be made or done by a tenant in tail. And what leaſes made by ſuch a tenant ſhall be good to binde the iſſue, or him in remainder, or others after the death of the tenant in tail. And how they ſhal bind.

Any perſon whatſoever of full age that hath any eſtate of inheritance in Fee-taile in his own right of any lands, tenements, or hereditaments, may at this day without fine or recovery make leaſes of ſuch lands for lives or years, and ſuch leaſes ſhall be good ſo as theſe conditions and incidents following be therein obſerved and kept. *Stat.* 32 *H.* 8. *cap.* 28. *Co. ſuper Litt.* 44.

1. Such leaſes muſt be by deed indented, and not by deed poll or by paroll.

2. They muſt be made to begin from the day of the making thereof, or from the making thereof.

And therefore a leaſe made to begin from *Michaelmas* which ſhall be three years after for twenty one years, or a leaſe made to begin after the death of the tenant in tail for twenty one years is not good. *Co.* 5. 6. *Dier.* 246.

But if a leaſe be made for twenty years to begin at *Michaelmas* next; it ſeemes this is a good leaſe.

3. If there be an old leaſe in being of the land, the ſame muſt be ſurrendred, or expired and ended within a year of the time of the making of the new leaſe, and this ſurrender muſt be abſolute, and not conditionall; alſo it muſt be reall, and not illuſory or in ſhew only. For *factum non dicitur quod non perſeverat. Co.* 5. 2.

4. There muſt not bee a double or concurrent leaſe in being at one time, as if a leaſe for years bee made according to the ſtatute, he in the reverſion cannot afterwards expulſe the leſſee and make a leaſe for life or lives, or another leaſe for years according to the ſtatute, nor *è converſo*. But if a leaſe for years be made to one, and afterwards a leaſe for life is made to another, and a letter of atturney is made to give livery of ſeiſin upon the leaſe for life, & before the livery made the firſt leaſe

is

is ſurrendred; in this caſe the ſecond leaſe is good. *Sparks* Caſe. *Trin* 4. *Jac. B. R.*

5 Theſe leaſes muſt not exceed three lives, or twenty one years from the time of the making of them. And therefore if Tenant in Tail make a leaſe for twenty two or for forty years, or for four lives; this leaſe is void, and that not only for the overplus of time more then three lives or twenty one years, but for that time of three lives or twenty one years alſo. And it hath been reſolved, that if Tenant in Tail make a leaſe for ninety nine years determinable upon three lives, that this is not a good leaſe. But if a leaſe be made by a Tenant in Tail for a leſſer time, as for two lives, or for twenty years, this is a good leaſe. And if a Leaſe be made for four lives, and it happen that one of the lives die before the Tenant in Tail die; yet this accident will not make the leaſe good, but it remains voidable notwithſtanding. *Co.* 5. 6. *Dyer* 246. *Co.* 1.

6. Theſe leaſes muſt be of Lands, Tenements, or hereditaments manurable or corporall, which are neceſſary to be letten, and whereout a rent by law may be iſſuing and reſerved. And therefore if a Tenant in Tail make a leaſe of ſuch a thing as doth lie in grant, as an Advowſon, Fair, Market, Franchiſe, or the like, out of which a rent cannot be reſerved, eſpecially if it be a Leaſe for life; this leaſe is void, and that albeit the thing hath been anciently and accuſtomably letten. And a grant of a rent-charge therefore out of ſuch lands is void. *Tallentines* caſe, *Paſch.* 3 *Jac. B. R*, *Co.* 11. 60. *Trin.* 2 *Ja. B. R. Adjudg. Doddingtons* Caſe. And if Tenant in Tail make a leaſe for three lives of a portion of Tithes rendring rent, this leaſe is unqueſtionably void. And ſo alſo it ſeems it is if it be a leaſe for twenty one years.

7 They muſt be of ſuch Lands, or Tenements, which have been moſt commonly letten to farm, or occupied by the Farmors thereof by the ſpace of twenty years next before the leaſe made, ſo as if it have been letten for eleven years at one or ſeverall times within twenty years before the new leaſe made, it is ſufficient. And albeit the letting have been by Copy of Court Roll only, yet ſuch a letting in Fee, for life, or years, is a ſufficient letting, and ſo alſo is a letting at will by the Common Law. But theſe lettings to farm muſt be made by ſuch as are ſeiſed of an eſtate of inheritance: for if it have been only by Guardian in Chivalry, Tenant by the courteſie, in dower, or the like; this will not ſerve to be a letting within the intent of the ſtatute. *Co.* 6. 37. *Dyer.* 271.

8 There muſt be reſerved upon ſuch leaſes yearely during the ſame leaſes due and payable to the Leſſor and his heirs to whom the reverſion ſhall appertain, ſo much yearly farm or rent, or more as hath been moſt accuſtomably yeelded or paid for the lands &c. within twenty years next before ſuch leaſe made. And therefore if the rent be reſerved but for part of the time of the new leaſe, this leaſe is void. And if the Tenant in Tail have twenty acres of Land that have been accuſtomably letten, and he make a leaſe of theſe twenty acres, and of one acre more which hath not been accuſtomably letten, reſerving the uſuall yearly rent, and ſo much more as to exceed the value of the other acre; this is not a good leaſe by the Statute. So if the Tenant in Tail of two farms, the one at twenty pound rent, the other at ten pound rent, and he make a leaſe of both theſe farms together, at thirty pound rent; this is not a good leaſe within the Statute. *Co.* 5. 8. 6. 6. 37. But if beſides the annuall rent there have been formerly reſerved things not annuall, as Hariots, Fines, or other profit upon the death of the Farmors, or profit out of anothers ſoil, as paſturage for a colt &c. if upon the new leaſe the yearly rent be reſerved, albeit theſe collaterall reſervations be omitted, yet theſe leaſes are good. *Co.* 6. 37. 38. *Trin.* 3 *Jac. B. R. Adjudg. Adjudg. Tr.* 18. *Jac. B. R.* And ſo alſo if there be more rent reſerved upon the new leaſe then the rent that hath been anciently paid, the leaſe is good notwithſtanding. And yet if Tenant in Tail of Land let a part of it that hath been accuſtomably letten, and reſerve the rent *prorata* or more then after the rate; this is not a good leaſe. *Co.* 5. 6. And yet if two coparcenours have twenty acres of Land of equall value between them in Tail, and the e have been uſually letten, and they make partition of theſe Lands, ſo as each of them hath ten acres; in this caſe they may make leaſes of their ſeverall parts reſerving the half of the accuſtomable rent. *Co.* 5. 5. *And yet Co. ſuper Lit.* 44. *B. is contra.*

And

And if upon the old leaſe the Rent were payable at four days in the year, and by the new leaſe it is reſerved to be paid at one day; this is not a good leaſe. But if the rent upon the old leaſe be payable in gold, and the new rent be payable in ſilver; it ſeems the leaſe is not good. And if a Tenant in Tail be of a Manor that hath been uſually demiſed for ten pound rent, and after a Tenancy eſcheat, and then he doth make a leaſe of the Manor rendring ten pound rent by the year; in this caſe this is a good leaſe, but if the Leſſor purchaſe a Tenancy, then it ſeems otherwiſe. *Trin.* 3. *Jac. B. R. Cornwals* caſe. *Co* 5. 5. *Co.* 5. 6.

9 Such leaſes muſt not be without impeachment of waſt. And therefore if Tenant in tail make a leaſe of his Land intailed without impeachment of waſt; this leaſe is void. And if a leaſe be made for life, the remainder for life, &c. this is not a good leaſe: for in this caſe during the remainders, the Tenant for life cannot be puniſhed for waſt done. But if ſuch a Tenant of Land make a leaſe of it to *I S* for the lives of three others; this is a good leaſe, albeit it may afterwards become an occupancy. *Co.* 6. 37. *& Meers* caſe *Adjudge.*

Waſt.

10 Such leaſes muſt not be againſt any ſpeciall Act of Parliament. And therefore if a woman that is Tenant in Tail of the gift of her deceaſed husband, or any of his Auncеſtors whiles ſhe is ſole, or after with another husband make any ſuch leaſe warranted by this Statute; yet this leaſe is not good. *Stat.* 11 *H.* 7. 20. *Co.* 3. 51.

11 They muſt have all due ceremonies and circumſtances for the perfection of them, as other ſuch like leaſes have, as livery of ſeiſin, and the like, where they are needfull. And then only when leaſes have theſe conditions, and are made according to theſe proviſions, are they ſaid to be within this ſtatute of 32 *H.* 8. and ſuch only as doe bind the Tenant in Tail himſelf, and the iſſue in Tail, for otherwiſe if it be not warranted by this ſtatute, albeit it will bind the Tenant in Tail himſelf that made it, yet it will not binde his iſſue, but as to him it will be void, or voidable at the leaſt: for if Tenant in Tail of land make a leaſe of it for an hundred years without any rent reſerved thereupon; this leaſe as to the iſſue in Tail is void: but if he make a leaſe of his Land for an hundred years rendring rent, and have iſſue and die; in this caſe the leaſe is onely voidable by the iſſue at his pleaſure, and therefore if the iſſue accept the rent after the death of the Tenant in Tail; by this means the leaſe is affirmed and become good. But howſoever the leaſe bee made, it will not binde him that comes in of a remainder over, nor him that is the donor. And therefore if a Tenant in Tail make a leaſe warranted by the Statute, and after die without iſſue, ſo that the land doth remain over to another, or revert to the donor; in theſe caſes neither he in remainder, nor the donor ſhall be bound by this leaſe, for as to them the leaſe is void. And yet by a common recovery the Tenant in Tail may make leaſes of, or lay charges upon the land to bind the donor and him in remainder alſo. But otherwiſe it is of a fine, for if Tenant in Tail make a Leaſe for years by fine, this will not bar the donor, nor the remainder in any caſe where it is in a ſtranger. And yet if the remainder be in the Tenant in Tail himſelf, and he make a leaſe for years by deed according to the Statute or by fine; this leaſe is good and ſhall bind his own remainder. *See more Brownl.* 1 *part.* 139. 173. *Co.* 7. 7. 8. 34. *Dyer* 7. 8. *The womans Lawyer.* 73. *Plow.* 435. 436.

Acceptance.

6. What leaſes or other acts may be made or done by the husband with the lands he hath in Fee-ſimple, or Fee-tail in the right of his wife, or joyntly with her. And what leaſes made by him of ſuch lands are good. Or not. And how.

The *Husband* may at this day without fine or recovery make leaſes of the lands, tenements or hereditaments, whereof he hath any eſtate of inheritance in Fee ſimple, or Fee-tail in the right of his Wife, or joyntly with his wife made before or after the coverture, ſo as there be in ſuch leaſes obſerved the eleven conditions or limitations before required in the leaſes made by Tenant in Tail, and ſo that the wife doe joyn in the ſame deed, and be made party thereunto, and doe ſeal and deliver the ſame deed her ſelf in perſon. For if a man and his wife make a letter of Atturney to another to deliver the leaſe upon the Land; this leaſe is not a good leaſe from the wife warranted by the Statute.

And yet then as in other like caſes of leaſes not warranted by this ſtatute, it is a good leaſe againſt the husband.

And when the leaſe is ſuch a leaſe as is warranted by the ſtatute, it doth bind the husband and wife both, and the Heirs of the wife; but if it be an eſtate

Tail

Tail, it doth not bind the Donor nor him in remainder. *Stat.* 32 *H.* 8. *cap.* 28. *Co. ſuper Litt.* 44. *Paſch.* 7 *Jac. B.R.*

If the Husband and wife at the Common Law had joyned in a leaſe of her land without rendring of Rent; this leaſe had been void as againſt the wife, and ſo is the law ſtill. 26 *H* 8. 2.

If the husband at the Common Law had been ſeiſed of Land in the right of his wife, and he had made a leaſe for years rendring rent and died; this leaſe had been void, and ſo is the Law ſtill. 26 *H.* 8. 2. *Co.* 2, 77.

If the husband and wife at the Common Law had made a leaſe by word rendring rent; this leaſe had been void as againſt the wife; and ſo is the law ſtill. *Dyer* 91.

The husband and wife together may by fine, or recovery, make what leaſes they will of her Land, or charge it for what time they will; and ſuch leaſes and charges will be good againſt the husband and wife both and their heirs alſo: *Stat.* 32 *H.* 8, *ch.* 28. *See the womans Lawyer* 163:

But if the husband alone doe levie any fine of his wives land, and thereby make any eſtate whatſoever; this will not bind the wife after her Husbands death, but ſhe may avoid it.

And if the Husband and wife make a leaſe of her land rendring rent to them and the heirs of the wife (as in ſuch leaſes it ought to be;) in this caſe the husband cannot by fine or otherwiſe grant or diſcharge this rent longer then during coverture unleſs the wife joyn in the fine, but the rent ſhall deſcend, remaine or revert in ſuch ſort and manner as the land ſhould have done.

7. What leaſes or other acts Biſhops or other ſpirituall or eccleſiaſticall perſons may make or doe with the lands they have in the right of their churches or houſes. And what leaſes made by ſuch perſons will bind their ſucceſſors and others. Or not.

Biſhops with the confirmation of the Deane and Chapter, Parſons or Vicars with the conſent of their Patrons and Ordinaries, Archdeacons, Prebends, and ſuch as are in the nature of Prebends, as Precentors, Chaunters, Treaſurers, Chancellors and ſuch like, alſo Maſters and Governours and Fellowes of any Colledges or houſes, (by what name ſoever called) Deans and Chapters, Maſters or Gardians of any Hoſpitall and their brethren, or any other body politique, ſpirituall and eccleſiaſticall (*Concurrentibus hiis quæ in jure requiruntur*) might by the ancient common law have made leaſes for lives or years, or any other eſtate of their ſpirituall or eccleſiaſticall living for any time without ſtint or limitation.

And at this day the Biſhops, and the reſt of the ſaid Spirituall perſons, except Parſons and Vicars, may make leaſes of their ſpirituall livings for three lives, or twenty one years, and ſuch leaſes will be good both againſt themſelves and their ſucceſſors.

But ſuch perſons may not make leaſes or eſtates for any longer time then for three lives or twenty one years; and if they doe, albeit it be by fine or recovery, or it be confirmed by the Dean and Chapter, &c. yet it is void as againſt the ſucceſſor.

Neither will the leaſes made by ſuch perſons for three lives or twenty one years be good, unleſs they have certain conditions and properties required in them.

Theſe things therefore are neceſſarily required to be obſerved in the making of ſuch leaſes, *Co. ſuper Lit.* 44. *Co.* 5, 14. 11. 66. *Stat.* 32 *H.* 8. *chap.* 28. 13. *El.* 10. 1 *Jac. chap.* 3. 1. *El. chap* 19. 14 *El. chap.* 11. 18 *El. chap.* 10. 20.

1 That they have the effect of all the qualities or properties before mentioned and required by the Statute of 32 *H.* 8. *Co. ſuper Litt.* 44. *Co.* 11. 66. 5. 3. 15. in the leaſe made by the Tenant in Tail, and be made after that pattern, *viz.* That they be by deed indented.

2 That they doe begin from the time of the making of them.

3 and 4 That the old leaſe be ſurrendred, and there be not a concurrent leaſe (ſave in caſe of a Biſhop.) And therefore if any ſuch perſon make a leaſe for 21 years to one, and then make a leaſe for three lives to another; this ſecond leaſe is void.

And yet if a Biſhop make a leaſe for 21 years to one man, and then within a year after make another leaſe to another for 21 years to begin from the making of it, this, ſo as it be confirmed by Dean and Chapter, is reſolved to be a good leaſe.

5 That

5. That they doe not exceed three lives or twenty one years, but they may be for a leſſe time.

6. That they be of lands or tenements manurable or corporall.

7. That they be made of lands that have been commonly let to farm by the ſpace of 20 years before.

8. That there be reſerved upon them the ancient and accuſtomed rent payable to the leſſor and his ſucceſſors during the time.

9. That they be not made without impeachment of waſt.

10. That there be livery of ſeiſin upon them &c. where it is requiſite.

11. If the leaſe be made according to the exception of the Statute of 1 *Eliz.* and 13 *Eliz.* and not warranted by the Statute of 32. *H.* 8. as in the caſe of a concurrent leaſe, and it be made by a Biſhop or any ſole Corporation, it muſt be confirmed by the Deans and Chapters, or others that have intereſt. And if a Parſon or Vicar make a leaſe, it is not good but during the Parſon or Vicars reſidence, according to the Statute of 13 *Eliz. chap.* 20. and in this caſe there needs no confirmation at all. *Co.* 11. 66. 5. 3.

12. Some of the leaſes that are made by the Colledges and houſes of the Univerſity &c. muſt have ſome rent corne reſerved upon them. But Biſhops, Deans, Parſons and ſuch like ſpirituall perſons cannot grant the next advowſons of Churches, neither can they grant rents out of their ſpirituall livings but the ſame charges will be void after their death. And if a Biſhop ſuffer an annuity to be recovered againſt him by a pretence of title of preſcription on a Judgment after a verdict or confeſſion, or a parſon in ſuch a caſe pray in aide of the Patron; and ſo ſuffer an annuity to be recovered; this will not bind the ſucceſſor. And yet a Biſhop, or any ſuch ſpirituall perſon may grant ancient offices of truſt of neceſſity or conveniency, as the offices of Chancelor, Regiſter, Steward, Bailiffe, or the like, with the ancient fees incident thereunto for the life or lives of the grantees, and ſuch grants are good, albeit they be made by the Biſhops of the new erected Biſhopricks, and that there be not in them the conditions and properties required in the leaſes before mentioned, ſo as they be confirmed by the Deane and Chapter. But they may not grant any new office nor yet adde any new Fee to the old offices. And therefore if a Biſhop grant an annuity, *pro conſilio impenſo & impendendo* where none was before; this will not bind the ſucceſſor. And yet if there be an old fee, and there is a new fee added to it; in this caſe it ſeemes it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwiſe then they have been granted. And therefore where the ancient grants of the office have been to one; it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of theſe offices be longer then for the life or lives of the grantees. And in caſe where the grant is void, the confirmation of the Deane and Chapter will not make it good. *See Brownl.* 2. *part.* 134. 135. 158. *Stat.* 18 *Eliz. chap.* 20. *Co.* 5. 15. 11. 66. 10. 58. *Dier.* 370. *And moſt of theſe points were agreed by Juſtice Jones & Juſtice Whitlock at Lent Aſſiſes at Gloc. 6. Car.*

Note. But here Note that albeit in all theſe caſes of leaſes and grants not warranted by the Statutes aforeſaid, the Statutes ſay the leaſes ſhall be void, yet this is to be underſtood as againſt the ſucceſſors and not againſt the leſſors themſelves, for the leaſes are good ſo long as the leſſors live, or at leaſt ſo long as they continue in the place. And therefore if ſuch a leaſe be made by a Deane and Chapter or other corporation aggregate; it is good as againſt the Deane or other head of the Corporation, ſo long as he doth continue in his place. And if a Biſhop make any leaſe or other grant not warranted by the Statute of 1 *Eliz.* or a Dean and Chapter, Maſter and Fellowes of a Colledge or the like make leaſes not warranted by the Statute of 13 *Eliz. chap.* 10. theſe leaſes are good againſt themſelves, albeit they are void againſt their ſucceſſors. So as if a private Act of Parliament doth entaile land upon a man, and appoint him what eſtates he ſhall make, and that if he make any other eſtates they ſhall be void; in this caſe they ſhall not be void as to the tenant in taile himſelf that doth make them. *Co. ſuper. Litt.* 45. 329. 3. 59. 10. 59. 11. 73. 78. 5. 5.

Leaſes of Benefices with cure, are no longer good then the Parſon is reſident. 13. *El.* 20.

Leaſes

Leaſes made by Colledges muſt have reſerved upon them the third part of the Rent in Corn. See 18 *Eliz.* 20.

If one make a Leaſe to another, during the will and pleaſure of him that letteth, or him that taketh, or both (for ſo in effect is every Leaſe at will;) this is a good Leaſe at will. So if one make a Feoffment in Fee, or Leaſe for life. *&c.* and do not make Livery of Seiſin, and ſo perfect the Eſtate; the Feoffee or Leſſee hath onely an Eſtate at will. But if a bargain and ſale be made of Land, and the ſame is void; or a Corporation grant Land, and the grant is void; by this there is no Leaſe at Will made. *Co. ſuper Littl.* 55. 56. 270. 14 *H.* 8. 12. 8. What ſhall be ſaid a good Leaſe at Will, or not.

Leaſes for lives or years are of three natures, ſome be good in Law, ſome be voidable by Entry, and ſome void without Entry. And of ſuch as be good in Law, ſome be good at the Common Law, as Leaſes made by Tenant in Fee-ſimple, notwithſtanding they be for longer time then three lives or twenty one years; ſome by act of Parliament, as Leaſes made by Tenant in Tail, Leaſes made by a Biſhop ſeiſed in Fee in the right of his Church alone without the Chapter, Leaſes made by a man ſeiſed in Fee-ſimple, or Fee-tail of Land, in the right of his wife, together with his wife, for twenty one years, or three lives according to the Statutes. And of ſuch Leaſes as be void alſo, ſome are void at the Common Law, and that ſometimes *in præſenti*, as in the caſes before of Leaſes for years that have no certainty in them, or Leaſes for lives made without Livery of Seiſin, and the like. And ſome are void *in futuro*, as if a Tenant in Tail make a Leaſe for years warranted, or not warranted by the Statute, and after die without iſſue; this Leaſe is void as to him in Reverſion or Remainder, *Ceſſante ſtatu primitivo ceſſat derivativus.* So if a Prebend, Parſon, or Vicar make a Leaſe for years not warranted by the Statutes; this is void by the death of the Leſſor, and the Succeſſor need not make any Entry or Claim to avoid it. So if a Tenant for life make a Leaſe for years, and after die; in this caſe the Leaſe for years is void. And therefore in all theſe, and ſuch like caſes, no Acceptance of Rent after will affirm ſuch Leaſes. But otherwiſe it is in caſes of Leaſes for years, made by Biſhops, albeit they be confirmed by Dean and Chapter; and of Leaſes made by Deans and Chapters, or Tenants in Tail, as to their Succeſſors, and Iſſues, when the Leaſes are not warranted by the Statutes: And otherwiſe it is alſo in the caſe of Leaſes for life, made by theſe or any of the former Leſſors; for in all caſes of Leaſes for life, it muſt be avoided by Entry, *&c.* and therefore ſuch Leaſes are not void, but voidable, *viz.* The Leaſes of Biſhops and Deans after their death by their Succeſſors, and that by the Statute Law, and the Leaſes of Tenants in Tail by their Iſſues after their death, and that by the Common Law. And in theſe, and ſuch like caſes, the Acceptance of the Rent, by the Iſſue or Succeſſor, will make good the Leaſe, at leaſt for their time, *Co. ſuper Littl.* 45. 3. 59. 65. 7, 8. 9. Where a Leaſe for life or years ſhall be void *ipſo facto*, by the death of the Leſſor, or by other means, or not, but voidable by Entry, *&c.* and how. *Acceptance.* *Acceptance.*

If a Leaſe be made for years on Condition, that upon ſuch a Contingent, it ſhall be void; in this caſe, ſo ſoon as the thing doth happen the Leaſe is void *ipſo facto*, without any re-entry, *&c.* But if a Leaſe for life be made on ſuch a Condition; in this caſe the Leſſor muſt enter, *&c.* before the Leaſe will be void. *Co.* 3. 65.

See the old Statutes about Leaſes, 32 *H.* 8. 28. 13 *Eliz.* 10. 1 *Eliz.* not Printed, 13 *Eliz.* 20. 14 *Eliz.* 11. 18 *Eliz* 6. 43 *Eliz* 9. *Wingates* Abridgment.

CHAP. CIV.

Of a Libel.

Libel, what.

THe word Libel is taken two ways: Sometimes this word is uſed for the Declaration in a Matter in the Spiritual Court, which muſt be delivered unto the Defendant when he demands it. Sometimes, and ſo here this word Libel is taken for a Scandalous writing or doing of ſomewhat that tendeth to the defamation of another, it is called *Famoſus libellus ſeu infamatoria Scriptura*: Sometimes it is againſt a private perſon, ſometimes againſt a publick perſon, ſometimes againſt the living, ſometimes againſt the dead.

The kindes of it.

A Libel in writing, is when any Epigram, Rime, or other writing, is compoſed or publiſhed to the note, or contumely of another, by which his fame or dignity may be prejudiced; and this may be either *verbis aut cantilenis*, as where it is maliciouſly repeated or ſung in the preſence of others; ſecondly, *Traditione*, when the Libel or any Copy of it, is delivered over to another to ſcandalize the party, or it may be by other means. As firſt, by Pictures, when the party is painted in any ignominious and reproachful manner. Secondly, By Signs, when one doth make or fix a Gallows, or any other reproachful or ignominious ſign at the door of the party, or elſewhere. *Co.* 5. 126. *Crompt. Jur.* 335. See *Co.* 3 *part. Inſt. cap.* 76. *Brownl.* 2 *part.* 152.

The puniſhment of it.

Whoſoever contrive, or procure to be contrived, or maliciouſly publiſh any of theſe Libels, knowing them to be ſo (which way ſoever it be done) againſt a private man, living, or dead, is a great offender; and againſt a Magiſtrate, or publick perſon, is a greater, and ſhall be puniſhed by Indictment; and in this caſe it will not help the Libeller, though the things be true, whereof the Libel is; for it is puniſhable notwithſtanding.

And if one finde any ſuch Libel againſt a private man, he may burn it, or deliver it to a Magiſtrate; if it be againſt a publick perſon, he muſt deliver it to a Magiſtrate, or elſe may be puniſhed: But if one onely read a Libel, or hear it read, or laugh at it, or write a Copy of it onely; this is no ſuch Publication as is puniſhable: And yet if after he hath read, or heard it, he repeat it, or read it, or part of it to others, this is puniſhable. *Co.* 5. 126. 9. 59.

Of the Lords day.

FOr the better underſtanding of the Law, herein theſe things are to be known.

1. This day is by every one to be ſanctified and kept holy: And men muſt be careful herein, to exerciſe themſelves in the duties of Piety and true Religion publickly; and every one on this day (not having a reaſonable excuſe) muſt diligently reſort to ſome publick place, where the Service of God is exerciſed, or muſt be preſent at ſome other place, in the practice of ſome religious duty, either of Prayer, Preaching, Reading, or Expounding the Scriptures, or Conference upon the ſame.

Sports.

2. None may on this day meet out of their own Pariſh at any ſports whatſoever, nor may they meet within their own Pariſh for Bear-baiting, Bull-baiting, Enterludes, or other unlawful Exerciſes, under pain to forfeit three ſhillings and four pence for every offence, to be levied by Diſtreſs and Sale of Goods, and for lack of Diſtreſs,

Diſtreſs, to ſit three hours in the Stocks: Nor may any on this day keep, or be preſent at any Wreſtlings, Shooting, Bowlings, Ringing of Bells for pleaſure, Mask, Wake, Church-Ale, Dancing, Games, Sports, or Paſtimes whatſoever, under pain to forfeit five ſhillings, if he be above fourteen years old, and twelve pence by him that hath the Government of him, if he be under fourteen years old to be levied by Diſtreſs, and ſale of Goods; or if no Diſtreſs be to be had, to ſit in the Stocks three hours.

3. No Carrier may go with his Horſes, Waggoner, Carter, or Wainman; may go with his Cart, Waggon, or Wain, or Drover with his Cattle, on this day, under pain to forfeit twenty ſhillings for every offence, to be levied by Diſtreſs and ſale of his Goods, if he be queſtioned within ſix weeks after the offence done. But there ſhall be but one twenty ſhillings forfeited for one Journey, although he paſs through twenty Pariſhes, and the twenty ſhillings that Pariſh ſhall have where the Diſtreſs is firſt taken. *Carriers.*

4. No Butcher may kill or ſell any Victuals on this day, under pain to forfeit ſix ſhillings eight pence, if it be queſtioned within ſix weeks after the offence done, to be levied by Diſtreſs and ſale of Goods. *Butcher.*

5. None may cry, ſhew forth, or put to ſale any Wares, Merchandiſes, Fruits, Herbs, Goods, or Cattle, on this day; unleſs it be in an Inn or Victualling-houſe, and for ſuch as cannot otherwiſe be provided for, and unleſs it be the crying and ſelling of Milk before nine in the morning, and after four in the afternoon, from the tenth of *September*, to the tenth of *March*; and for the reſt of the year before, eight in the morning, and after five in the afternoon, under pain to forfeit the thing ſo cried, or offered to ſale. *Tradeſmen.*

6. None may on this day, without good cauſe, travel, under pain to forfeit ten ſhillings, nor carry any burden, or do any worldly labor, under pain to forfeit five ſhillings; both theſe Forfeitures to be levied by Diſtreſs and ſale of Goods; and if no Diſtreſs be to be had, to ſit in the Stocks three hours. *Traveller.*

7. None may on this day, or the days of Humiliation or Thankſgiving, uſe Dancing profanely, Singing, Drinking, or Tipling in any Tavern, Inn, Ale-houſe, or Tobacco-houſe, nor be there, or grinde any Corn at a Mill, but upon cauſe to be allowed by one Juſtice of Peace, under pain to forfeit ten ſhillings a peece; he that is in the Inn, and he that keeps the Inn, the Millard, and he that ows the Corn, to be levied by Diſtreſs, and ſale of Goods, and for lack of Diſtreſs, to be ſet ſix hours in the Cage or Stocks. *Drinking, Tipling.* *Millard.*

8. No Traveller, Waggoner, Butcher, Higler, Drover, or their Servants ſhall come into their Inn or Lodging on Saturday night, after twelve of the clock, nor go from thence on Monday morning before one a clock, without neceſſary cauſe to be allowed by one Juſtice of Peace, under pain of Forfeiture of ten ſhillings by the Inn-keeper, and ten ſhillings by the Traveller, to be levied by Diſtreſs and ſale of Goods, and for lack of Diſtreſs, to be ſet ſix hours in the Stocks or Cage. *Carrier.*

9. None may execute any Writ, Order, or Warrant on this day, days of Humiliation or Thankſgiving (but in caſe of Treaſon, Felony, breach of the Peace, and profaning of the day) under pain to forfeit five pound to be levied by Diſtreſs and ſale of Goods, and for want of Diſtreſs to ſit ſix hours in the Cage or Stocks, and the ſerving of the Proces, is void. *Void.*

10. None (but in caſe to be allowed by one Juſtice, or for Gods ſervice) may travel with any Boat, Wherry, Lighter, Barge, Horſe, Coach, or Sedan on this day, under pain of forfeiture of ten ſhillings by him that doth carry, to be levied by Diſtreſs and ſale of Goods, and for lack of Diſtreſs, to ſit ſix hours in the Stocks or Cage. *Coaches, Boats.*

11. All Conſtables, Church-wardens, Overſeers of the Poor, Governors of Companies of Water-men, and other Officers, muſt upon ſight and knowledge, or information of any of theſe offences before-named, committed, ſeiſe and ſecure the Goods or Wares cried, ſhewed forth, or put to ſale; and make diligent ſearch, for the diſcovering, finding out, apprehending, and puniſhing of them, under pain *Officers.* *Seiſe Goods.* *Search.*

of twenty ſhillings, to be levied by Diſtreſs and ſale of Goods. And this puniſhment they muſt (as it ſeems) endeavor, by informing againſt the offender to a Juſtice of Peace.

12. If the Juſtice doth not his duty, he forfeits five pound, to be levied by Diſtreſs and ſale of Goods, by Warrant from the Lord Chief Juſtice, Lord Chief Baron, or Judge of Aſſize, upon view, confeſſion, or proof of one witneſs.

Forfeitures. 13. All theſe Forfeitures (ſave onely ſomething in ſome few caſes) muſt go to the poor of the Pariſh, and the overplus in all caſes is to be returned to the owner.

14. Theſe Laws are to be openly read at the Quarter Seſſions, and there and at the Aſſiſes, to be given in charge to the Grand-Jury, and to be read the firſt Lords-day in *March* every year.

15. If any Book be found againſt the Morality of the Sabbath, or Fourth Commandment, or to countenance the profanation thereof, they are to be burnt. 1 *Car.* 1. 3 *Car.* 1. *Ordinance*, 6 *April*, 1644. *Act*, 19 *April*, 1650. 17 *September*, 1650. 27 *Sept.* 1650. See more in my *Juſtice of Peace.*

CHAP. CV.

Of Lieu or Place, Linen-Cloth, Lent, and League.

Lieu or Place. AS to Place, theſe things muſt be known.

1. When one thing doth come in the place of another, it ſhall be ſaid to be of the ſame nature, as that it comes in the place of; as in caſe of Recovery of Recompence in Value, Eſchange, and Rent to make Equality of Partition, and the like: For which ſee the *Titles*.

2. Place is conſiderable in pleading; for ſome things are ſaid to be Local, and can be tried no where but in the County where they were done; and therefore the Action about them, muſt be laid there, as all real Actions about Land. And if one charge an Inn-keeper for the loſs of his Goods, he muſt not ſay the Inn is in another County, then that wherein it is: But for Tranſient Acts, and ſo Actions about them, they may be ſaid to be in any County; and therefore in theſe caſes, though the wrong be done in one place, the Plaintiff may ſuppoſe it to be done in another, and in another County alſo. And the Jury are bound to finde it.

3. When the Law doth require a thing to be ſet down in a place certain, as in caſe of demand of Rent to have a Re-entry, he muſt in pleading, ſay it was done at that place.

4. When a thing is to be done upon Requeſt, ſome place of the Requeſt in pleading muſt be ſuppoſed to be. *Co.* upon *Littl.* 282, 283.

Lent.

FOr the time called *Lent*. See 1 *Jac.* 29. 5 *Eliz.* 5. 35 *Eliz.* 7.

Linen-Cloth.

FOr Linnen-Cloth, how it muſt be made. See 28 *H.* 8. 4. 1 *Eliz.* 12.

League.

League.

FOr Leagues and Truces, the breakers thereof, and the Office of the Conſervator of the Truce. See 2 *H.*5.6. 14 *Ed.*4. 4.

CHAP. CVI.

Of Lord and Tenant, Tenure, Services, Manor and Meſn, &c.

THis word Lord or Seignior, is a word of Honor with us, and uſed diverſly. Sometimes it is attributed to a man that is noble by Birth, or Creation, who were ſometimes called Lords of the Parliament. So alſo the Sons of a Duke, and the Sons of an Earl were called Lords. *Sect.* 1. *Lord*, what. *Seignior. Nobility.*

This word is alſo attributed to Men Honorable by Office, as the Lord Chief Juſtices, and others, and ſometimes it is applied to meaner men that have Fee, and are Lords of Manors, and conſequently have the Homage of Tenants that hold of them within their Manors; and the Lord and Tenant in this ſenſe, are Relatives. And by his Tenants, and to them onely, he is called Lord, or Land-lord; and in this ſignification this word Lord is commonly taken. And hence it is that a Manor is called a Seigniory or Lordſhip; and ſo he is divided into Lord above, and Lord Meſn. The Lord Meſn is he that is owner of a Manor, and by vertue thereof, hath Tenants holding of him in Fee, and by Copy of Court-Roll, and yet holdeth himſelf over of a Superior Lord, who is called Lord above, or Lord Paramount. *Old N. B. 79.* The kindes. *Lord Meſn.* *Lord Paramount.*

Tenant is he that holdeth any Lands or Tenements in Fee for life or years, by any kinde of Right or Tenure of another man. And very Lord, and very Tenant, be they that be immediate Lord and Tenant, the one to the other: And Tenure doth ſignifie the manner whereby Tenements are holden of their Lords. *Tenant*, what. *Very Lord, and very Tenant*, what.

And of Tenures were divers kindes, ſometimes Spiritual, as Frank-almoign, which is now gone; and others Temporal, as Eſcuage, Cornage, Grand-Serjeanty, Knights-ſervice *in capite*, or in chief; Knights-ſervice or Chivalry, Caſtle-Gard, Soccage, Petit-Serjeanty, and others. And all theſe (upon the matter) are either in Chivalry or in Soccage. *Tenure*, what. The kindes.

For Eſcuage, and Cornage, which were Services the Kings Tenants were to do to his perſon, in the Wars againſt the *Scots*. Grand-Serjeanty, which was likewiſe a Service to be done by the Kings Tenant to the King by attendance upon his perſon. *Eſcuage*, what. *Cornage*, what. *Grand Serjeanty*, what.

Knights-Service *in capite*, or in chief, which was likewiſe a Service by which the Tenant was bound to ſerve the King in his Wars. And Knights-ſervice or Chivalry, which was a Service whereby another Tenant that held of a common perſon, and not of the King, was bound to go with his Lord in the Wars. And the Tenure by Caſtle-Gard ſeems to be of the ſame nature. But all theſe Tenures and Services, the Incidents to them, of Wardſhip, Marriage, Primer Seiſins, are taken away by Order of Parliament, and turned into Tenures in Soccage: For which ſee Title *Gard*. *Knights-ſervice in capite or in chief*, what. *Knights-ſervice or Chivalry*, what. *Caſtle-Gard*, what.

So that now there is no Tenure, but of the nature of Tenure in Soccage; and this is where a Tenant doth hold of his Lord, to pay him ſome Rent onely, or to do him ſome Husbandry-work for all manner of Services. So that to hold by Fealty onely, or by Fealty and Rent, or by Homage, Fealty, and Rent, for all manner of Services, or by Petit-Serjeanty, and Soccage *in capite*; and ſo Fee-farm, Burgage, and all other Tenures whatſoever, at this day, are but Soccage-tenure, *Co.* 2 *part. Inſt.*44. Which is of that nature, that it draweth to it Aid, (for which ſee *Aid*) and a Relief. *Sect.* 2. *Soccage*, what. *Petit-Serjeanty*, what. *Soccage* in capite, what. *Burgage Fee farm.*

For

The nature of *Soccage Tenure.*

For theſe two are inſeparably Incident to every Tenure; and not Liveries, Primer Seiſins, Wardſhips, *Ouſter le Maine*, Homage, Fines, Seiſures, and Pardons for Alienation, as ſome of the other Tenures did, but now taken away alſo.

And for theſe things, ſee *Co.* upon *Littl.* 74, 77, 107, 108. 93. and of *Copiholds*, with many other places, which we ſhall now paſs over.

And for Soccage-tenure, ſee *Littleton* on *Soccage*, 40 *Edw.* 3. 22. *Weſtm.* 1. 35. 25 *Edw.* 3. 11. 13 *Ed.* 1. 1. *Co.* 7. 33. *Co.* upon *Littl.* 21. 29 *H.* 7. 15. See more in *Gard.*

Where and how a Tenant may be created, altered, or extinct; and how it ſhall be taken.

As concerning Tenures, theſe things are to be known.

1. A Tenure may be of Houſes, Lands, or Tenements, and ſuch like things, but not of Rents, Seigniories, Commons, or ſuch like things.

2. Any man may alter his Tenure, or extinguiſh it by Releaſe, or the like, but hardly can a common perſon create a Tenure at this day, *Crompt. Jur* 21. *Dyer* 84 27 *H.* 8. 9. *Broo. chap.* 113.

Priority and *Poſteriority.*

3. If in caſe of Priority of Tenure and Poſteriority, where one holdeth Land of one Lord more anciently then he doth hold his other Land of another Lord, the Tenant die, the Lord of whom the Land was held by Priority, ſhould have had the Wardſhip of the Body of the Heir, becauſe that could not be divided as the Land of either Lord might. And in caſe where the Priority were Incertain, that it could not be diſcerned, or one Tenure was as old as the other; then he that could firſt have ſeiſed the Body of the Heir, ſhould have had it. And if the King had been one of the Parties, whether the holding of him were by Priority or Poſteriority, he would have the Wardſhip of the Body from all the other Lords: But every Lord ſhall have the Wardſhip of his own Land held of him. *Dyer* 12. 24. *F. N. B.* 142. *Finches Ley*, 152.

Non-tenure, what.

For Non-tenure, ſee 25 *Ed* 3. 16. 4 *H.* 7. 24.

Sect. 3. *Services*, what. The kindes.

Service is the duty or performance, which the Tenant by reaſon of his Fee, oweth unto his Lord; and this is the Fruit of Tenure.

And of Services there are twelve parts, Homage, Fealty, Eſcuage, Knights-ſervice, Soccage, Frank-almoign, Homage, Anceſtrel, Grand-Serjeanty, Petit-Serjeanty, Tenure in Burgage, in Villainage, and Rents. And there is no Tenure but hath ſome ſervice incident to it: As for Aid, Relief, and ſuch like things, they reckon theſe the Fruit or Improvement of, or Incidents to Services; but they are much of one nature, and may be put together, *Co.* upon *Littl.* 94. 6.

And of Services there have been theſe Diviſions. Some were Military and Noble, as Knights-ſervice, and the like; and ſome were more clowniſh and baſe, as Soccage, and the like. Some alſo were ſaid to be real, as Wards, Marriages, and the like; and ſome again were called Perſonal, which were ſuch as were to be done by mens perſons, as Homage, Fealty, and the like. Some Services alſo were ſaid to be for the benefit of the Lord onely, as payment of Rent, and the like; and ſome again were ſaid to be *pro bono publico*, as the Services of War.

Thoſe for the Lords benefit, ſome of them are Annual, and certain as Rent, Sute of Court, to be Butler or Baker to the Lord; or elſe they are once onely, and upon an Accident, as Herriot, Relief, Fealty, Amercements, Forfeitures, or the like.

Thoſe that are *pro bono publico* are, Firſt, For defence of the Realm, as Eſcuage, and the like, now taken away. Secondly, To make or repair a Common-Bridge, or Common High-way. Thirdly, For advancement of Religion, and Works of Piety, as to maintain a Preacher, or Ornaments of a Church. Fourthly, To do Works of Charity, as to marry a poor Virgin, or the like. Fifthly, For the advancement of Juſtice, as to aid a Sheriff, to keep a Record, or the like.

Services alſo are ſaid to be entire, or dividable.

There are four ſorts of entire Services. 1. Chattels valuable, as an Ox, Aſs, or the like, or things of pleaſure, as a Falcon, or the like.

2. Such as are perſonal, to be done by the Tenant in perſon to the perſon of the Lord, as Fealty, and the like; to be Butler, Sewer, to the Lord, and the like.

3. Such as conſiſt of ſome Manual work, as to cover the Lords Houſe, Stable, or the like.

4. To

4. To exerciſe ſome Office, as to be Steward, Bailiff, or the like, to the Lord.

Services are alſo yet further diſtinguiſhed into Services of profit, and no fidelity; and ſervices of fidelity, and no profit.

Some ſay Services are free, and they conſiſt, firſt, in Render, as to pay Rent; ſecondly, in uſing, as to have Common; thirdly, in Prender, as to take Eſtovers in the Lords Woods; or Villain, as to ſcoure the Lords Ditches, or the like. And again into Corporal, either of Submiſſion, as Homage, Fealty, *&c.* or of profit, and that either publick, to amend High-ways, and the like, or the private profit of the Lord. For all which ſee *Co.* of *Copihold*, 22. *Co.* 105. 6. 1. *Littl.* 222. *Co.* 10. 106, 108. or *Littl.* 64. 92. 22 *Ed.* 4. 3.

Homage is taken two ways. 1. For a Corporal ſervice or ſolemnity uſed by the Tenant to his Lord, and to this Fealty is always incident; and the Receipt of this Service by the Lord from his Tenant, is called the Receipt of Homage. This hath not been uſed at all for many years, and is now gone, we ſhall paſs it over alſo. You may read of it in *Littl. ſect.* 85, 86, *&c.* *Homage*, what. *Receipt of Homage*, what.

Reſpite of Homage, was nothing but the forbearance or delay of the taking of it: For which, men were wont to pay a ſmall ſum of money in the Exchequer every fifth Term. This alſo is gone, and out of uſe, but you may read of it in *Co.* of *Copihold*, and *Finches Law*. *Reſpite of Homage*, what.

Fealty is an Oath taken at the admittance of every Tenant, to be true to the Lord, of whom he holdeth his Land. And as to this, theſe things are to be known. *Fealty*, what.

1. Although Homage were more honorable then this, yet this is more ſacred then that; for this is always done with, but that was done without an Oath.

2. This is a Service that is incident to all Tenures.

3. This may be done often, and muſt be done by the Tenant to every Lord ſucceſſively, and for every peece of Land.

4. This is to be performed by every Freeholder, except Tenants in Frank-almoign, and by all Tenants for years, and by Copiholders.

5. This may be made as well to the Lords Steward or Bailiff, as to the Lord himſelf; otherwiſe it was of Homage, in all theſe particulars when it was in uſe, it was done by none but Tenants in Fee-ſimple or Fee-tail, and but once, and then to the Lord himſelf, *&c.* But ſee for Fealty, and how it is made, *Co.* of *Copihold*, 19. *Rep.* 11. 17, 81. upon *Littl.* 71. 67. 92. *F.N.B.* 250.

This word Herriot is taken for the beſt Chattel perſonal, as Ox, Horſe, peece of Plate, or Houſhold-ſtuff that a Tenant hath at the time of his death, or time of his Alienation, which the Lord is to have. And this is either by Cuſtom, as where by the Cuſtom of the place, time out of minde it hath been ſo uſed at the death and Alienation of every Tenant, as it is in divers Copiholds, and other Manors by the Copiholders or other Tenants; or it is by Service, when there is no ſuch Cuſtom, but it is reſerved by Grant, That the Tenant ſhall hold by the Service to pay a Herriot at the time of his death or Alienation of his Land. And this alſo is certain, as the beſt Beaſt, *&c.* or incertain, as yeilding a Herriot, *&c.* and ſay not what. *Co.* upon *Littl.* 185. *Sect.* 4. *Harriot or Herriot*, what. The kindes of it.

As to this, theſe things are to be known:

1. Albeit the Lord cannot ſhew the original of a Herriot-cuſtom, yet if he can prove the payment of them, after the death or Alienation of his Tenants (as the Caſe is) from time to time; this is ſufficient to maintain the Service.

2. If the Lord have power to chuſe the beſt Beaſt, and he chuſe the worſt, he is concluded hereby and cannot chuſe again, 16 *H.* 7. 5.

3. If a Woman be to pay Herriot at her death, the Lord may not ſeiſe the Husbands Goods for this, without a ſpecial Cuſtom to warrant his ſo doing, *M.* 8 *Car. B. R.*

4. This muſt be paid before the Mortuary, and the Lord may not by any ſhifting Deviſe of the Tenant, be defeated of it, *Co.* upon *Littl.* 185.

5. In

5. In caſe of Herriot Cuſtom, the Lord hath property in the Goods aſſoon as his Tenant dieth, and may take and ſeize it within or without his Lordſhip, where-
Detinue. ever he finde it, and may have a Detinue againſt him that keepeth it from him, and
Action of the Caſe. an Action of the Caſe againſt him that doth eſſoyn it, *Broo.* 348. 8 *H.*7. 10.

6. The Copiholder for life by this Service is, The Lord grants the Seigniory for ninety and nine years, if the Tenant live ſo long, and after makes a Leaſe for four hundred years, the Tenant is ouſted, and dieth; yet a Herriot ſhall be paid, and the Leſſee for ninety and nine years, and not for four hundred years ſhall have it, *March.* 23. *pl.* 52.

7. Some hold the Lord alſo may ſeiſe Herriot Service, *Goldsb.* 191. *pl.* 128.

Sect. 5. Relief is a certain ſum of money, or other thing which the Heir of a Freeholder
Relief, what. that is at full age, at the time of his Anceſtors death, is to pay to the Lord, of whom the Land ſo to him comes, as Heir is held at his entrance into the Land.

The kindes. And it is either Relief-ſervice, which is a Service due from moſt Freehold-Tenants, to their Lords in all places; or Relief-cuſtom, which is a Relief to be paid by the ſpecial Cuſtoms of ſome places, and Manors, upon the Death, or Alienation of the Tenant. And in ſome places it is upon the death of the Tenant onely, *Mag. Chart.* 2, 3, 12. *Co.*7. 33.

What is to be paid for a *Relief*, and when. That which is to be paid, in this caſe, for Relief, is not certain nor alike in all places, and for all Tenures; for ſometimes, and in ſome caſes it is more, and in ſome caſes leſs; neither is it paid in all places at the ſame time: For the common courſe is for the Tenure *in capite*, or by Knights-ſervice, for an Earldom one hundred pound, for a Barony one hundred marks, for a whole Knights Fee one hundred ſhillings, and ſo *pro rata*. And the Reaſon hereof, ſee after in Knights Fee.

If the Tenure be by grand Serjeanty, the Relief is the value of the whole Land for one year; and if the Tenure be by Soccage or Petit-Serjeanty, the Relief is to be double the Rent: As if the Tenant hold by ten ſhillings Rent yearly, payable at certain times, he ſhall double this Rent, he muſt pay ten ſhillings beſides his Rent preſently. In ſome places by Cuſtom it is half a years profit of the Land, and in ſome places it is a years profit of the Land. And this the Heir is to pay when his Anceſtor dieth, as all the benefit the Lord then hath: And for this if it be Relief-ſervice the Lord may diſtrain, but cannot have an Action of Debt: But if the Lord die, his Executors may have an Action of Debt, but may not diſtrain. And ſome have ſaid alſo the Lord himſelf may have an Action of Debt: And for Relief-cuſtom, according to the Cuſtom of the place. *Co. ſuper Littl.* 83, 84. 91. 162. *Co.* of *Copihold*, 32, 53. *Co.*7. 33. *Kelw.*136. *Littl.* 157.

Where it ſhall be paid, or not, and how. For Anſwer to this Queſtion, theſe things are to be known.

1. Where the Heir was within age at the death of his Anceſtor, the King was to have no Relief at his full age, *Mag. Chart.* 3.

2. If one hold ſome Land of the King *in capite*, and ſome of other men by Knights-ſervice, and the King had had the Wardſhip of all (as he muſt have had) the Heir, when he had come of age, muſt have paid a Relief to all the other Lords, for all the Land he held of them, *Co ſuper Littl.*77. *Broo Relief* 13.

3. In caſe the King when the Heir is of full age, at the death of the Anceſtor, or not to ſue Livery, a Relief is to be paid to the King. *Co. ſuper Littl.*77.

4. The Rule generally is this, That where the Heir ſhall be in Ward, if he be within age, he ſhall pay a Relief if he be of full age, and whiles the Gardein hath the cuſtody of the Land, the Heir is not to pay a Relief. *Broo. Relief*, 12, 13.

5. If the Meſnalty diſcend to the Tenant of the Land, though the Meſnalty be at the ſame time extinct, yet the Tenant for that time muſt pay a Relief, 11 *H.*7. 12.

6. If one hold of ſeveral common perſons by Knights-ſervice, the Lords by Poſteriority ſhall have no Relief, becauſe they have the Wardſhip of the Land held of them, unleſs it be in caſe where there was Land held of the King, for there the King had all the Land, and then the Heir at full age did pay Relief to the other Lords, 24 *Ed.* 3. 24.

7. If

7. If the Tenant hold his Land by to do certain days work at Harveſt, or to attend at Chriſtmas, or the like; in theſe caſes the Tenant is not to pay Relief; for theſe Rents are not to be doubled, nor are any corporal ſervices whatſoever to be doubled, *Co.* upon *Lit.* 91.

8. If the Tenant be to pay yearly a pair of Gilt-Spurs, or Five ſhillings in money at *Eaſter*; in this caſe the Tenant may pay which of them he pleaſeth for his Relief, ſo he pay it forthwith. But if he pay not one of them at the time appointed by Law, then the Lord may diſtrain for which he pleaſe, *Co.* upon *Lit.* 91. *Election.*

9. If the Rent to be paid be Ten ſhillings every ſecond or third year, the Relief ſhall be Ten ſhillings, and muſt be paid forthwith, *Co.* upon *Lit.* 91.

Sect. 6. *Knights-Fee, what.*

Knights-Fee was taken heretofore for ſo much as was held a ſufficient livelihood for a Knight; and is not to be reckoned according to the quantity and content of eight Hides, which is (as ſome would have it) eight hundred Acres of Land, nor ſix hundred and eighty Acres of Land (as others would have it to be) but according to the quality and value; and it was eſteemed twelve times the Ploughman or Yeomans living, which in old times was five Nobles. So that the ſtate of a Knight was eſteemed Twenty pounds by the year, be the Acres more or leſs: And then they eſteemed Four hundred Marks by the year ſufficient to maintain the ſtate of a Baron; and Four hundred pounds, twenty Knights Fees by the year, ſufficient to maintain an Earl; and now of late for the two later Dignities of Marquiſs and Duke thus, Eight hundred Marks for a Marquiſs, and Eight hundred pounds for a Duke: which were eſteemed antiently to be a competent yearly Revenue for ſuch perſons. So that according to theſe Rates, the Reliefs of theſe perſons is paid ſtill for the Knights relief, and all thoſe above him, which are the Noblemen: For the Knight payeth the fourth part of his Revenue, being five Pounds; the Baron one hundred Marks, the Earl one hundred Pounds, the Marquiſs two hundred Marks, and the Duke two hundred Pounds. But theſe Paiments being a Charge incident to the Tenure *in capite*, we do conceive they are now gone by the general Order of Parliament. See *Co.* 2 *par. Inſt.* 7, 8, 9. *Mag. char.* 2. *Relief*, how much.

By what ſervices one ſhall hold, and how.

Before the Statute of 18 *Ed.* 1. *Quia Emptores*, the Grantee of Land muſt always have held the Land of the Grantor by ſuch Services as he held over, if other Services had not been reſerved; or otherwiſe the Grantor might have appointed him to hold of the next Lord. But at this day in all Feoffments to one and his Heirs, the Feoffee is to hold the Land of the chief Lord of the Fee, by the ſame Services that the Feoffor held before. And if the Feoffment be made of parcel of the Land, the Feoffee ſhall hold of the chief Lord *pro particula* according to the quantity of Land, and the Feoffor ſhall be ſet free for that part. And if one make a Leaſe for life or years, and reſerve no Rent; in this caſe the Leſſor ſhall have Fealty only, and no Rent, although he hold over by Rent. And Donees in tail and their Iſſues are to do ſuch Services to the Lord Paramount as the Donor, if they do not make ſome ſpecial Reſervation upon the Deed, *Co.* upon *Lit.* 23. See more after. *Fealty.*

What ſhall be ſaid a Seiſin of Services, or not.

Seiſin of any part of a Service, is a Seiſin of all. Seiſin of a ſuperior Service, is a Seiſin of all inferior Services incident thereunto. And therefore if a Tenure be by Homage, Fealty and Eſcuage, (which is Knights-Service, and Suit of Court) and he get Seiſin of the Fealty or Homage, this is a Seiſin of all the reſt. So if he had gotten Seiſin of the Eſcuage. So Seiſin of a Rent, is a Seiſin of all the reſt of the Services; and paiment of a Penny in the name of Attornment, is a ſufficient Seiſin of all the Services; and Seiſin of an annual Service, is a good Seiſin for all caſual and accidental Services, *Co.* 4. 8. Upon *Lit.* 69. 153. 159. 165. 102. 314. 315.

Where Services ſhall be multiplied by the Alienation of parcel of the Tenancie, or not, but ſhall be divided and apportioned.

For anſwer to this queſtion, theſe things are to be known.

1. All ſuch Services as are not entire by the Statute of *Weſtm.* 3. *De quia Emptores terrarum*, ſhall be apportioned and divided *ſecundum valorem*, upon every Feoffment by the Tenant upon any part of the Land in ſeveralty. But not ſo upon Alienation of a Moyetie, or a third part of it. As if one hold two Acres in Fee at Two ſhillings Rent, and the Tenant make a Feoffment in Fee of one Acre by name; in this caſe the Rent ſhall be divided, and the Feoffee muſt pay Twelve pence of this Rent.

Rent. But if the Feoffment were of a Moyetie of the two Acres, it were otherwiſe.

2. But if in theſe caſes the Services reſerved be entire, whether annual or accidental, and for a time only; in this caſe they ſhall not be divided, but they ſhall be multiplied, and the Feoffor ſhall perform the ſame Service he did before, and the Feoffee ſhall do as much more. *Quæ in partes dividi nequeunt, ſolida à ſingulis præſtantur.* As if a Tenant hold his two Acres by the Service of an Oxe or a Falcon, or Fealty, or the like, and make a Feoffment of one Acre; now in this caſe each of them, the Feoffor and Feoffee both, ſhall pay a Horſe or a Falcon. For the Rule is in this, *Res inter alios acta nemini nocere debent, ſed prodeſſe poſſunt.*

3. And yet if Land out of which Suit of Court is due, do come to divers perſons by diſcent as Coparceners, or by purchaſe of the Land by Parcels, one of them alone ſhall do the Suit, and all the reſt ſhall be contributory. And if one hold by the Service to be Butler, Baker, or to ride with the Lord, or to cover his houſe, or to be his Steward, Bailiff, or the like; in all theſe caſes the Services ſhall not be multiplied, but one alone ſhall do them, and the reſt ſhall be contributory, and the Lord may diſtrain which he will of them for it. And yet if a Hariot be to be paid, this ſhall be multiplied, and every one that hath any part of the Land muſt pay a Hariot, by what means ſoever he come by the Land.

4. Where Land is divided by act of Law; as if a Feoffment be of two Acres rendring an Oxe, and one is Burrough-Engliſh land, and the other Acre is other land, and this land is divided at the Feoffees death and goeth to his two ſons; in this caſe it ſeems there ſhall be but one Oxe paid. So if a Leaſe were made of ſuch Land
Rent. rendring that Rent to the Leſſor and his Heirs, and he die, the two Heirs in this caſe ſhall have but one Oxe. So of a Leaſe made by two Tenants in Common rendring ſuch an entire Rent.

5. But in all caſes where the entire Services are not valuable, as Homage, Fealty, or the like, or they be *pro bono publico*; there let the Land be divided by the act of the Law, or the act of the party, the Services ſhall be multiplied. See for all this, *Co.*6.1.8.105. upon *Lit.* 149. *Co.* 10. 106. 108. *Lit.* 222. 22 *Ed.*4.36. *Weſtm.*3. *chap.* 2.

Sect. 7. Where and how Services may be altered and extinguiſhed. The Remedy for theſe Services where they are not performed. For *Harriot.*

The Lord by Releaſe or Purchaſe of the Tenancie, and by other means, may alter or extinguiſh his Services: Alſo by other means this may be done. But for this ſee *Extinguiſhment, ſect.* and *Apportionment* throughout.

For moſt of theſe Services, if they be denied, or not paid to the Lord, his moſt apt and proper remedy for them is to diſtrain. And for this ſee *Diſtreſs, chap. ſect.* 3. and *Rent, chap. ſect.* And if the Lands and Tenements lie freſh for two years together, that he can have no Diſtreſs for thoſe two years, then he may have a *Ceſſavit*, and recover the Land it ſelf. And in ſome caſes the Lord may have an Action of Debt; and for this ſee *Debt.*

But for accidental Services, as Harriot, Wardſhip, and the like, the remedy is by Seiſure. See *Gard, chap.* And for Harriot-Cuſtom, the property of the Goods being in the Lord preſently by the death of his Tenant, he may ſeiſe it where-ever he find it: And if it be detained, or eloined and conveyed away, he may have an Action againſt him that doth it; (*a*) or he may diſtrain for it at his choice, (as is held of late.) But if it be in a Copihold or Cuſtomary Manor, we do not think it ſafe to diſtrain, unleſs the Lords have been uſed to reſtrain. And for Harriot-ſervice, if it be certain, (*i.*) the beſt Beaſt, or any goods in certain, (*b*) it is held that the Lord may ſeiſe and take it alſo: But if it be incertain, he cannot ſeiſe it, but muſt diſtrain for it; and ſo he may alſo do for Harriot-ſervice certain, if he will, for in this caſe he hath election which to do. (*a*) So ruled by Juſt. *Jones* at *Sarum*-Aſſizes, 9 *Car.* (*b*) *M.* 39. 40 *Eliz. B. R. Goldsb.* 191. *pl.* 128. See for all this, 21 *H.* 7. 13. 8 *H.* 7. 10. *Bro. Diſtr.* 43. *Kelw.* 184. *D. & St.* 76. *Plow.* 96, *Co.* of *Copihold* 51.

Sect. 8. For *Relief.* For *Aid.*

For a Relief the Lord may diſtrain, but cannot bring an Action of Debt; but his Executors may bring an Action of Debt, and cannot diſtrain, *Co.* upon *Lit.* 83, 84.

For Aid to make the Lords eldeſt ſon Knight, or marry the Lords daughter, it is ſaid the Lord may diſtrain, or have a Writ to recover it, *F. N. B.* 82. *Co.* upon *Lit.* 91.

See *ch.* 9. *ſect.* 1. For

For Suit to the Lords Court, if it be denied, the Lord may compel him to it by Diſtreſs, or a Writ called *Secta ad Curiam.* See *F.N.B* 158. 12 *H.*7.17. See *Suit, chap.* But for ſome kind of Rents the Lord may have a Writ of Debt; for which ſee *Debt*, in my Firſt Part of *The Marrow of the Law.* For other Rents, and for Corporal Services, as Homage, Fealty, amending High-ways, Bridges, diſcharging offices to the Lord, and in other caſes the proper remedy is by Diſtreſs. See *chap. ſect.* 3. *For Suit.*

Ceſſavit is a Writ that lieth where my very Tenant that holdeth of me by a Rent, and the Rent is behind two years, and no ſufficient Diſtreſs is to be found upon the Land, then I may by this Writ recover the very Land it ſelf. But this Writ lieth for annual Services only, and not for Homage, Fealty, or the like accidental Services; nor will it lie for a Rent-ſeck. And the Heir cannot have this Writ for a Ceſſer in the Anceſtors time, nor one Lord for a Ceſſer in another Lords time. And therefore if the Tenant ceaſe one year in one Lords time, and after another year in the time of another Lord to whom the Seigniory is granted by the firſt Lord; this is diſpuniſhable. And if in this caſe when the Action is brought, the Tenant will come into Court and pay the Arrearages, and give Bond with Sureties duly to pay the Rent afterwards, the Lord muſt accept it. Alſo it is ſaid, the Lord upon ſuch a Ceſſer may enter, or have a Writ of Eſcheat. See for theſe things, *Glouc. ch.* 4. *Weſtm.*2.21. *Co.*2.93. *Kelw.*74. *Plow.*132. *Co.* upon *Lit.* 154. *Ceſſavit*, what.

Writ of Eſcheat, what.

There is a Writ called *Ceſſavit de cantaria* of no uſe at this day. *Weſtm.*2 41. *Ceſſavit de Cantaria.*

Secta ad Molendinum, is a Writ lying where one doth hold Land of me by the Service to grind at my Mill, and he doth not ſo, but grinds at another Mill; in this caſe I may have remedy by this Writ, *F.N.B.*122. *Secta ad Molendinum*, what.

Secta ad Curiam, is a Writ that lieth againſt him that refuſeth to perform his Suit either to the County or Court-Baron, *F.N.B.*158. *Secta ad Curiam*, what.

Encroachment of Services is, where a Lord hath gotten more Rent or other Services of his Tenant then are due. And if the Lord diſtrain for this incroached Rent, the Tenant may be relieved by the Writ called, *Ne injuſtè vexes. Terms of the Law. Co.*8.64. 10.108. 9.33. *Plow.*94. *F.N.B.*10.11. *Sect. 9. Encroachment*, what. *Ne injuſtè vexes* what.

A Meſne is he that is Lord of a Manor, and thereby hath Tenants holding of him, and yet holdeth himſelf of a ſuperior Lord. And a Meſnalty ſignifieth nothing but the Right of the Meſne. *Meſne*, what. *Meſnalty*, what.

Forejudger is a Judgment given in a Writ of Meſne brought by a Tenant againſt the Meſne Lord, which ſhould and ought to acquit the Tenant of Services demanded by the Lord above of whom the Tenement is holden, and the Meſne will not appear; then Judgment is given, that the Meſne Lord ſhall loſe his Seigniory, and the Tenant ſhall ever after hold of the Lord Paramount by ſuch Services as the Meſne held before, and ſhall he diſcharged of the Services he yielded to the Meſne. The word *Forejudger* is alſo uſed for the putting of an Attorney out of the Roll, and forbidding him to practiſe, *F.N.B.*135. *Co.*11.17,18. *Forejudger* of a *Meſne*, what.

The Writ of Meſne, is a Writ given to the Tenant that is diſtrained for the Services which the Meſne ought to do to the Lord Paramount, *F.N.B.*135. This is alſo called *Medio Acquietando.* Writ of *Meſne* or *Medio Acquietando*, what.

Acquital is, where the Tenant holdeth of the Meſne certain Lands, and the Meſne holde h over of the Lord above; in this caſe the Meſne muſt acquit the Tenant paying his own Services due to him, of all other Services due to the Lord, *Co.* upon *Lit* 100. *Acquital*, what.

Owelty of Services, is where the Tenant holdeth of the Meſne by the ſame Services that the Meſne doth hold of the Lord Paramount, *Co.* upon *Lit.* 100. *Owelty of Services*, what.

A Manor by ſome is defined to be a thing compounded of divers parts, as of a Houſe, Land arable, Meadow, Paſture, Woods, Rents, an Advowſon, Court-Baron, and the like. It is called alſo a Seigniory or Lordſhip; and he that hath it, the Seignior or Lord. And of a Manor there are two principal parts; the Demeſne, and the Services. By Demeſne is ſometimes underſtood all the parts of the Manor which are not in the hands of the Freeholders, whether they are in the hands of Leſſees for life, years, or at will. *Manor* or *Seigniory*, what. *Seignior.* *Demeſne*, what.

But moſt properly and uſually by Demeſns is underſtood the Lords chief Manor-place, which he and his Anceſtors have time out of mind kept in their own hands and occupied, with all the Houſes, Lands, Meadows and Paſtures thereunto belonging, which were never in Leaſe; and this place or houſe was antiently called the Lords Manſion-houſe. And by Services are to be underſtood the Rents and Duties that Tenants are to pay and do to the Lord of the Manor for the Tenements they hold of him: And theſe are either certain, as Rents and the like; or caſual, as Perquiſites are.

Sect. 10. *Manſion-houſe, Services,* what.

Some ſay a Manor is, where Lands are holden by divers of one man by certain Services. Some define it to be, Lands in the hands of a Lord, of whom many Tenants, two at the leaſt, do hold to do ſuit of Court there: And they hold, that the Land conſidered apart from the Service, is termed Demeſns. And others define a Manor to be a Rule or Government which a man hath over ſuch as hold Land within his Fee; and they ſeem to intend rather the Court-Baron which is incident to every Manor, and doth ſtand and fall with it. And for the ſupport and continuance of this Court, there muſt be two Freeholders at the leaſt left which do hold of the Manor: And therefore it is held, that if all the Freeholds but one do eſcheat, or be bought in by the Lord, the Manor, and conſequently the Court-Baron is diſſolved: For a Manor cannot continue without a Court-Baron, which cannot continue without Freeholders to be Judges of the Court. Yet here we do diſtinguiſh, and we muſt know, that in all Manors where there are Freeholders and Copiholders (as there are in many Manors) there are two Courts; the one called the Court-Baron or Court of Freeholders, wherein they are Judges, and this is to try Actions between party and party; and the other for Copiholders, called the Copiholders Court, which is for the ſurrendring and granting of Eſtates, and making of Admittances, and the like, and in this Court the Lord or his Steward is the Judg. And one of theſe may ſubſiſt without the other: As if the Lord ſell all his Copiholds in Fee to one man; in this caſe the Purchaſor may keep the Copiholders Court, and do all that doth belong thereunto; and the Seller may keep the Freeholders Court, and do all that doth belong thereunto: And therefore the Manor may continue, where either of theſe Courts do continue. *Bro. Manor* 5. *Suit* 17. *Co.*4.26.6.64.

Court-Baron.

Freeholders.

The kinds.

A Lord, and a Lordſhip or Manor is either in groſs, when it is held of the perſon of another, as ſometimes it was of the King; or elſe it was becauſe of a Manor, when it was held of the King, as of his Manor, or of his Honor of *Dale*. *Finches ley* 145. 34 *H.*6.49. *Bro. chap.*210.

How Manors did begin at the firſt.

It is ſuppoſed that Manors at the firſt did begin thus. The King at firſt granted a certain Circuit of ground to a certain great man, a Baron, or the like, for him and his Heirs to dwell upon, and to exerciſe ſome Juriſdiction within it, paying ſuch Rent and doing ſuch ſervices for the ſame as the King thought good: And then this great man, by example and in imitation of the Kings policie, parcelled out a great part of this Land to others, ſome to one, and ſome to another, and reſerved ſuch like ſervices for war and peace from his Tenants, as he was bound to do to the King. As for example, the King granted two thouſand Acres of land together to one great man to hold of his perſon, to do ſuch ſervice to him in the time of War or Peace, as to provide a Horſe or Ammunition, or to go with him in the War, or to be his Carver, or the like. This great man then doth grant a thouſand Acres of the uttermoſt parts of this land, ſome to one to hold by one ſervice, and ſome to another by another ſervice; and ſome ſervice was for the time of War, and ſome for the time of Peace; ſome to go with the Lord, ſome to provide horſe, ſome to pay money, and ſome to plow and dreſs his land, ſome to repair his houſe, ſome to be his Butler, ſome to be his Bailiff, or to be his Steward, and the like; and a thouſand Acres of this land he kept to himſelf, which the Lord did uſe to manure by his Tenants or Bondmen, ſuch as they had then: And then did the Lord appoint at his Courts of his Manor, which were ſet up with the Manor, how his Tenants ſhould hold their land, making an Entry thereof in the Rolls of the Court; much of which was ſtill in the Lords power, and therefore thoſe Tenants were called Tenants at will; and ſuch were thoſe who are now Copiholders, who hold to this day at the will of the Lord,

Lord, according to the Cuſtom of the Manor. And at the Lords Courts did the Lord uſe to aſſemble his Tenants before his Steward at a time appointed; and there he was by the Oath of his Tenants, Copiholders and Freeholders, to be informed by their Preſentment, of all ſuch Duties, Rents, Reliefs, Wardſhips, Forfeitures, and Profits that did happen to him; and then the Bailiff did uſe by Seiſure, by Diſtreſs, Amerciament, and the like, to do execution amongſt the Tenants, and help the Lord to his dues. And in theſe Courts they had power alſo, the Tenants to ſue one another under Forty ſhillings, and the Freeholders were (as they ſtill are) the Judges in this Court, called the Court-Baron, or Freeholders Court. But the Copiholders of theſe Manors have now gotten Freedom for their Perſons, and Aſſurance for their Eſtates by the Cuſtom of the place; they are not now under the bondage they formerly were. (*See in my Book of Copiholds.*)

But at this day no Subject can make ſuch a Manor: For ſince the Statute of *Quia Emptores terrarum*, it is held that no man can well create a Tenure; and therefore it is held, the King himſelf cannot create a Manor at this day: For a Manor was made by continuance of time, when there was a Meſſuage, and the Inhabitants of it have time out of mind occupied Land, Meadow and Paſture as belonging to it, and have had ſuch Rents and Services belonging to it; and have been uſed to preſent to the Advowſon, and the like. And therefore if a man ſhall now give Land to divers men in Tail by the Service of Suit-Court, albeit this Service may be well raiſed, yet is not this a Manor. Nor can a Lord purchaſe other Land and lay to his Manor, though the Tenant be never ſo willing to it.

Sect. 11.

But the changeableneſs of mans eſtate, and mutability of time hath brought it ſo to paſs, that theſe great men or their poſterity have alienated theſe Lands and Manſions, and others that had none, have by their wealth purchaſed many of them; and ſome of them are ſold to meaner men, who by their skill in Phyſick, Law or Merchandiſe, or otherwiſe, have gathered wealth and enabled themſelves to purchaſe the ſame. And many of them for Capital offences have forfeited them into the Kings hands; and ſome of theſe remain in the Crown, others are gone to others from the Crown, *Perk. tit. Reſerv. Plow.* 169. *Co.* of *Copiholds* 52. 55. *Bro. Tenure* 102.

Steward of a Manor. His power.

And to this Manor do belong two principal Officers: A Steward, which the Lord may make or diſcharge by word or writing; and being made, his office is not to make a benefit by it to himſelf, but to keep the Courts, and therein to enter the Plaints, Pledges, Surrenders, Admittances, Fealties, and the like: For which ſee *Officer, chap. ſect. Co.* 1. 61. of *Copihold* 123. *Co.* 4. 30. 9. 48.

Bailiff of a Manor. His power.

And a Bailiff, who may alſo be made and diſcharged by word without writing; and being made, he is to diſpoſe the affairs of the Lord, to pay and receive his Rents, and give him an account for them, order the Husbandry, diſtrain Beaſts damage-feſant, repair the Lords houſes, pales or hays, and for this purpoſe he may cut down timber: He is alſo (if need be) to tack in Cattel, fell and ſell ſaleable Underwoods, and do other things for the bettering and improvement of the Manor: But he may not ſet up any new houſe, nor old houſe fallen, nor make any additions or alterations, as tile a houſe before thatched, pale it where it was before hedged, or the like, without ſpecial commandment of his Maſter, but he will be a Treſpaſſor, *Co.* 4. 30. *Dyer* 148. 12 *H.* 7. 23. 8 *Ed.* 4. 13. *Bro. Bailiff*, 31.

Where and how a Manor may be deſtroyed or ſuſpended, and afterward again revived.

If the Demeſns of a Manor be once by the act of the party ſevered from the Services in Fee-ſimple, or the Copiholds from the Manor in Fee-ſimple, although it be but for an inſtant, and that there be no Tranſmutation of poſſeſſion, by this means the Manor is diſmembred, and is but a maimed Manor. So that if one of the Courts continue, it is a Manor (as we have ſhewed before) but an imperfect Manor. As if one be ſeiſed of a Manor for life, the Remainder to *B.* and his heirs, and *B.* levy a Fine to *D.* of the Demeſns, and he doth render it back to *J. S.* for forty years, and after to *B.* and his heirs for ever; by this the Manor is deſtroyed. So if the Lord of the Manor ſell away the Inheritance of all the Copiholds to ſeveral perſons, hereby the Manor and Court of Copiholders is deſtroyed: And ſo it is if he ſell away all the Freeholds, or all but one, hereby the Manor and Court of Freeholders is gone: And ſo it is, if they do all eſcheat into the Lords hands: And ſo it is if the Lord do

purchaſe

purchaſe into his own hands all the Freeholds, or all but one; hereby the Manor and Court of Freeholders is diſſolved. But when the Alteration is by act of Law, it is otherwiſe: And therefore if a Manor be divided between Parceners, and one of them hath one part of the Demeſns and Services, and another another part of the Demeſns and Services; in this caſe each of them ſhall have a Manor and a Court. And if upon the Diviſion of the Manor between them, one of the Parceners have all the Demeſns allotted to him, and the other all the Services allotted to him, and after one of them die without iſſue, ſo that his part come to his companion; in this caſe it ſhall be ſaid that the Manor and Courts were only ſuſpended while they were divided; and when they come again together, the Manor is revived again.

If one that hath a Manor grant away the Moyetie of it, hereby the Manor is deſtroyed. By *Juſt. Jones.*

If one Manor that is held of another eſcheat, ſo that they come into one hand; in this caſe both of them are united and do continue, and are neither of them deſtroyed. But if once a Manor be deſtroyed by the act of the party, he can never after be revived. *Fortior eſt diſpoſitio legis quàm hominis.*

Sect. 12. Where Land that is part of a Manor, ſhall be ſaid to be divided from the Manor, and where it ſhall be united again, or not.

For anſwer to this, take theſe things.

1. If the Lord make a Feoffment of a Copihold by Deed, or without Deed; by this the Copihold land is abſolutely ſevered from the Manor, and ſhall never be reunited again, *Co.* 11.47. *Dyer* 281.

2. If one convey a Manor, excepting one Acre; by this, this one Acre is perpetually ſevered from the Manor, *Co.* 11.47.

3. If a man be ſeiſed of a Manor in right of his wife, and he grant four Acres of it for life, and after the husband grant the Reverſion of them to *J.S.* in Fee, and after the husband and wife levy a Fine to *J.S.* in Fee; by this the four Acres are united to the Manor, and are parcel thereof, *Plow.* 104. 18 *Aſſ. pl.* 3.

4. If the Lord of a Manor make a Leaſe for years of part of his Manor by particulars; in this caſe during the Term this is no part of the Manor, neither will it paſs by the grant of the Manor: And albeit the Leſſee do leaſe it back again to the wife of the Leſſor, yet during this time it is not reunited. And yet the Reverſion of theſe Lands in theſe caſes is ſtill parcel of the Manor, *Plow.* 431. *Co.* on *Lit.* 324, 325.

Perquiſites, what.

Perquiſites are advantages and profits that come to a Manor by Caſualty, and not yearly; as Eſcheats, Hariots, Reliefs, Waifs, Eſtrays, Forfeitures, Amerciaments in Courts, Wards, Marriages, Goods and Lands forfeit, or purchaſed by Villains, Fines by Copiholders, and the like. *Co.* upon *Lit.* 119. *Perk. ſect.* 94. *Cromp. Jur.* 109.

For the old Statutes concerning Tenures and Services, ſee *Mag. char.* 10. 31, 32. *Quia Emptores, &c. Stat.* 1 *Ed.* 3. 2.12,13. 34 *Ed.* 3.15. 7 *Ed.* 4.5. 35 *H.* 8.14. 37 *H.* 8. 20. 1 *Ed.* 6.4. *Marlb.* 9.

Lords and Tenants, ſee *Marlb. cap.* 22. 15 *R.* 2.12. 16 *R.* 2.2.

CHAP.

CHAP. CVII.

Of Maintenance.

IT is a taking in hand, bearing up or upholding of Quarrels and ſides, to the diſturbance or hinderance of Common right, *Co. ſuper Lit.* 368. 1. *Maintenance,* what.

It is where a man doth give to another that is Plaintiff or Defendant in any Suit, or to any other in his behalf or to his uſe, any ſum of money or other reward for to maintain his Plea or Suit, or otherwiſe uſeth perſwaſion or maketh labour for him, or uſeth means to countenance, aid or aſſiſt him, when he himſelf that ſo doth hath nothing therewith to do. And this may be either by Champerty, Conſpiracy, Embracery, Jurors in giving their Verdict, Buying of Titles, or the like: And he that ſo doth is a Maintainer, called alſo a Bearer, 26 *Ed.* 3. 5. Of all which ſee beneath the particulars. *Conſpirators. Maintainers. Bearers.*

And this if a man do, the party that is grieved hereby may have a Writ called *A Writ of Maintenance,* which is given againſt the Maintainer in this caſe; or he may follow him upon the Statutes that are made againſt this offence: Which ſee after. See for this, *Cromp. Juriſd. f.* 38. *a. b.* 39. *a.* 50, 51. 77, 78. *Weſtm.* 1. 28. 32. 33 *Ed.* 1. *chap.* of Conſpirators and of Champertors. 20 *Ed.* 3. *c.* 4. 7 *R.* 2. *c.* 15. *Terms ley,* 1 *Ed.* 1. 14. *Writ of Maintenance.*

If any the Kings Counſellors or Officers, or other great men, ſhall by ſending of Letters, Meſſengers, giving of Liveries, or the like means, ſollicite matters, maintain or meddle with quarrels or queſtions that concern not them, or take parts to the hinderance and let of the Common Law and Juſtice, (whether it be in the Country or elſwhere:) If he be a Privy-Counſellor or other great perſon, he ſhall be puniſhed by advice of the King and his Council: If he be an Officer or Servant of the King in the Exchequer or other Court, or any Menial Servant of his, he ſhall loſe his Office and be impriſoned during the Kings pleaſure, *St.* 1 *Ed.* 3. 44. 22 *Ed.* 3. 3. 1 *R.* 2. 4. 19. 10 *Ed.* 3. 4.

If any bind themſelves by Oath, Covenant, or other alliance, That every one ſhall help and ſuſtain the other falſly and malitiouſly to indict, or falſly to move or maintain Pleas: And alſo ſuch as cauſe Children within age to appeal men of Felony, whereby they are impriſoned and ſore grieved: And ſuch as retain men in the Country with Livery or Fees to maintain their malitious enterpriſes, (and this doth extend as well to the giver as the taker;) and Stewards and Bailiffs of great Lords, which by their ſeigniory, office or power undertake to uphold or maintain quarrels, pleas or debates that concern not them, nor their Lords and Maſters, 33 *Ed.* 1. 1 *R.* 2. 7.

Giving of Liveries, Badges, Signs and Tokens, and retaining unneceſſary Servants by Great men, to maintain quarrels and ſuits, forbidden by divers Statutes, as 1 *R.* 2. 7. 7 *H.* 4. 14. 8 *H.* 8. 4. 1 *H.* 4. 7. 8 *Ed.* 4. 2. See Statutes of *Weſtm.* 1 *Ed.* 3. 14.

A Feoffment made for Maintenance ſhall be void, *Stat. R.* 2. *ch.* 9. 8 *H.* 6. *ch.* 4.

Maintenance is twofold in Court, called *curialis.* When one is to have part of the thing, called Champerty. 2. Without having any thing; and this is general, or ſpecial. 3. When one laboureth a Juror. All this is *pendente lite* in the Courts of Juſtice; or it is *ruralis* in the Country, by taking or keeping poſſeſſions. *Vide infra:* This laſt kind is puniſhable only at the ſuit of the King, *Co.* upon *Lit.* 369. 368. The kinds of it.

If

2. What ſhall be ſaid to be Maintenance, and puniſhable.

By a great man.

If any man of great authority in the County, will in the preſence of a Jury and the ſtanders by at the Trial of an Iſſue, ſay openly, That he will ſpend money in the Cauſe in queſtion in the behalf of the Plaintiff or Defendant, or that he will give money to labour the Jury, or will ſpeak other great and high words in favor of one of the parties; this is an unlawful maintenance, though he do ſpend no money, or do not labour the Jury, 22 *H.*6.5. 13 *H.*4.19.

So if any ſuch great perſon, when any Iſſue is to be tryed, having nothing to do in the cauſe, ſhall come to the Bar with the Plaintiff or Defendant, and ſtandeth by only; this is an unlawful Maintenance, though the Jury reſpect him not, but give their Verdict the right way, 22 *H.*6.6.

If *A.* do owe to *B.* Twenty pounds, and *B.* promiſe to *C.* part of this Debt to proſecute and maintain the Suit; this is unlawful Maintenance; but this is more properly to be called and accounted Champerty, 15 *H.*7.2.

By a Juror.

If one of the Jurors in an Inqueſt will give or promiſe money to another of his Fellows, to give or ſay his Verdict for Plaintiff or Defendant; this is Maintenance, though it be according to the truth of the cauſe: But if one of them do perſwade his Companion to paſs for one ſide or other, as he conceiveth the truth of the cauſe to be, and as the Evidence doth induce; this is no Maintenance, 17 *Ed.*4.5. 18 *Ed* 4.4.

If a Juror take money to ſay his Verdict for the one ſide, See for this 34 *Ed.*3.8. 38 *Ed.*3.12.

If two be in ſuit and do join iſſue, and the Maſter of one of the parties to the ſuit, or any other deliver money of his own head to a ſtranger to labour the Jury to try the iſſue to give Verdict for his ſervant or friend; this is Maintenance in the Maſter or friend, though he never do or ſay any thing to the Jury; or though he do, and the Jury paſs againſt him, *Dyer* 95. 28 *H.*6.7. 21 *H.*6.15.

If one give a Juror money to appear and ſay his Verdict of one ſide, this is Maintenance, though he do never appear, or do appear and not ſerve, 22 *H.* 6.6. *Dyer* 95.

By a Witneſs.

If one do threaten to beat or kill a Juror, if he do not give his Verdict on the one ſide; this is Maintenance, though he give his Verdict on the other ſide, *Stat.* 22 *H.* 6.6.

If one come to a Juror of his own head, and offer to inſtruct him of the matter in queſtion, this is Maintenance: But if the Juror come to the party and deſire him to inſtruct him, *contra.* 22 *H.*6.6.

By another perſon.

If one will come when a Cauſe is in hearing, and offer himſelf of his own head to give Evidence for the one part or the other; this is Maintenance. But if he be ſent for and required by the Court, *contra.* *Quære* of this: For I have heard Chief Juſtice *Bridgman* of *Marches* ſay, It was no fault to offer ones Evidence, *Stat.* 28 *H.*6.6.

If any perſon after a Suit is begun, ſhall encourage either of the parties, or yield either of them aid or help, as give them money, retain Councel, or the like, unleſs it be in the caſes hereafter following: All theſe, and ſuch like Acts as theſe, are unlawful Maintenance and puniſhable. *Vide plus infra.* 22 *H.*6.6.

It may be Maintenance in a man to take parties, though he be to have no part of the thing in queſtion, *Co. ſup. Lit.* 365.

If any man that is not a Lawyer, and have no intereſt in the cauſe in queſtion, will take upon him to do the part of a Counſellor, as to open the Cauſe, or inſtruct the Jury, or the like; this is Maintenance. So if a man have Land in queſtion, and he will ſhew his Writing to a Nobleman or other that is no Lawyer, and he tell him his cauſe and title to the Land is good; this is Maintenance, 22 *H.*6.6. *Fitz. Maint.* 21.

If a Sollicitor retain an Attorney for his Maſter, and promiſe him paiment of his Fees; this is no Maintenance, *per* two Juſtices in *Hil.* 16 *Jac.* Upper-Bench. For in doubtful things, the beſt ſhall be taken. See *Cromp. Juriſd.* 97.*a.*

3. What not, but is a Maintenance juſtifiable.

By a Lawyer or Attorney.

If any Sergeant or other Counſellor being retained for his Fee, do give his Client the beſt Counſel he can for defence or recovery of his right according to the courſe of Law, or doth enforce the Evidence of his Client at the Bar; this is no Maintenance, but that which is lawful. But if he ſhall pay or promiſe money or reward to any of the

the Jury to give his Verdict for his Client, or threaten any of them to be killed, beaten, or otherwiſe evil intreated if they do give their Verdict againſt his Client, or if he do ſpend or offer to ſpend his own money in his Clients cauſe, this is unlawful Maintenance, 6 *Ed* 4.5. 22 *H.*6.6. 11 *H.*6.13.

If one that is retained an Attorney in any Cauſe, do any lawful Act touching the Suit for the benefit of his Client, as retain Counſel, bring forth Proceſs of *Capias*, of Execution, or *Superſedeas*, or the like, procure a Jury to be impanelled and returned by the Sheriff, give in Evidence to a Jury, or requeſt any of the Jurors to appear; this is a maintenance lawful. But if an Attorney ſhall give or promiſe money or reward of his own or of his Clients, to give his Verdict for his Client, or threaten him if he do otherwiſe, or defend or offer to defend his Clients cauſe at his own charge, or procure the Sheriff to return a Jury of his naming; every of theſe acts is an unlawful maintenance, *Kelw.f.*15. 13 *H.*4. 19. 36 *H.*6.37. 11 *H.*6.10.

If a Sheriff or Bailiff ſhall impanel and ſummon a Jury, this is no maintenance in him, but that which is juſtifiable: But if he ſhall give money or reward to a Jury, or do any ſuch unlawful act as before, this is maintenance in him, 22 *H.* 6. 24. 13 *H.* 4. 19. By a *Sheriff.*

If one be like to be arreſted upon a Writ, come to his Neighbour and pray him to adviſe him what to do, and he adviſe him to yield his body to the Juſtices, and to have a *Superſedeas*; this is a lawful maintenance, *St.* 22 *H.* 6. 35. 12 *Ed.* 4. 14. 19 *Ed.* 4.3. By a *Neighbor.*

So if one tell his Neighbour, another doth owe him money, and ask him what he ſhall do, and he adviſe him to ſue him. So if one tell his Neighbour, he muſt have a Suit in ſuch a matter, and ask him what Counſellor or Attorney he were beſt to have, and he tell him, or go with him, or ſpeak for him to his Counſellor or Attorney, or ſtand by at the hearing of his Cauſe, if he be not a great man; all theſe things one Neighbour may do for another: But if he give money or other reward to the Counſellor or Attorney, or to the Sheriff or Bailiff to arreſt a man, this is maintenance, 19 *Ed.* 4.37.

It is no maintenance for Jurors that are compelled to come, to give a Verdict for one ſide or the other: But if ſuch a Juror ſhall labour the Judg after Verdict to give Judgment, this is maintenance, 18 *Ed.*4. 2. 28 *H.*6.6. By a *Juror.*

Every one that hath Intereſt into any thing whereof, or concerning which any Suit is, may take part or maintain in the ſame Suit: As if a Tenant for life, years, or Entail of Land be impleaded for the ſame, he in Reverſion or Remainder may maintain the Suit at his own charge: But if one that is Grantee of a Reverſion or Remainder will maintain before he hath Attornment of the Tenant, this may be maintenance, *Br.maint.*58. 6 *H.*5.4. 2 *Plow.*52. 9 *H.*6.64. 39 *H.*6.26. By one that hath intereſt.

If a man have one only Daughter, and he is ſeiſed of Land, and is impleaded for it; ſhe, or her husband (if ſhe be married) may maintain the ſuit, and juſtifie it: But if ſhe be dead without iſſue begotten by her husband before the Suit begun, or the Action brought for ſome other thing, as upon a Covenant, Account, or the like, and they maintain, this is unlawful, 14 *H.*7.2. 6 *Ed.*4.4. 19 *Ed* 4.3.

If one ſeiſed of Land in Fee, make a Leaſe thereof to another for life, and after grant to a ſtranger, That if the ſaid Leſſee for life do die during the Leſſors life, that then the ſtranger ſhall enjoy the Land for twenty years; if the Leſſee for life be impleaded, the Grantee may maintain him, 9 *H.*6.64.

If one that hath the Fee-ſimple of Rents grant it with Warranty, and after the Grantee be impleaded for it, the Grantor in this caſe may maintain it, 11 *H.* 6. 49.

If a man hath a Rent-charge in Fee out of Lands, and another man hath in cuſtody a Box of Writings concerning the ſame Rents, and after he that hath the Rent doth grant it to a ſtranger and his heirs, and doth grant alſo, that if he can recover the Writings, the other ſhall have them; an Attornment is made to this Grant, and the Grantor doth bring a Detinue for the Box; the Grantee in this caſe may lawfully maintain, 9 *H.*6.64.

If the Tenant be impleaded, the Lord may maintain in reſpect of his Services.

If *A.* owe to *B.* Twenty pounds, and *C.* owe to *A.* Twenty pounds by Obli-

gation, and *A.* deliver to *B.* the Obligation from *C.* in ſatisfaction of the Twenty pounds; in this caſe *B.* may ſue *C.* in the name of *A.* on this Obligation, and retain Attornies and Councel, and ſo may *A.* alſo; for both of them have intereſt in this Debt. So if one be bound to pay *J.S.* Twenty pounds to the uſe of *W.S.* *J.S.* and *W.S.* may both meddle in the Suit, 10 *H.*6.47. 15 *H.*7.2. 34 *H.*6.30.

If one deliver a Writing to one to be kept, and a ſtranger bring a Detinue for it, he that delivered it may maintain, 39 *H.*6.20.

If one of a Pariſh be queſtioned for Burial in the Church-yard, the reſt of the Pariſhioners may maintain the Suit, 18 *Ed.* 4.2.

If one be bound for anothers appearance, he may go into the Court and ſee if the ſame be recorded; this is juſtifiable: But if he do more, as retain Councel or the like, this is unlawful maintenance, 18 *Ed* 4.12. See more, 24 *H.*6.25. 14 *H.*6.6. See more, *Bro. Choſe Exact.* 13. *Fitz. Maint.* 14. *Bro. Maint. in toto.*

By a *Maſter.* If a mans ſervant be ſued, and his maſter requeſt a Lawyer to be of Councel with his ſervant in the ſuit, or go with his ſervant to Councel, or pay the Councellors Fee with part of the wages of his ſervant, or go with his ſervant to the Bar when his cauſe is to be tryed; or if the ſervant be arreſted in a priviledged place, and he at his own charges deliver him, this is a lawful maintenance in reſpect of his ſervice. But if the ſervant be impleaded in any real Action, or otherwiſe where he may appear by Attorney, and his preſence is not requiſite; there if the maſter do any ſuch act, it is a maintenance puniſhable. So if the maſter give him money to go to Law out of his own purſe, *per* Juſt. *Haughton, Hil.* 16 *Jac. B.R.* Or lay out any money for him, unleſs it be out of his wages due to him. And this was the opinion of Juſtice *Bridgman* and of the whole Court, 8 *Car. Trin.* in the Marches of *Wales.* 22 *H.*6.35. 9 *H.*6.64. 28 *H.*6.12. 19 *Ed.*4.3. 21 *H.*7.40.

By a *Servant.* The Servant in any Suit commenced by or againſt his Maſter, may at the commandment of his Maſter travel in the furtherance thereof, retain Councel with his Maſters money, inſtruct the Councel or the Jury when the cauſe is tryed, or the like. But this muſt be ſuch a Servant as is hired for a year or more, and retained to do all his Maſters ſervices; and not one that is hired for a day or two, or hired to go a journey, or do ſome ſpecial ſervice: For if ſuch a Servant ſhall ſo maintain his Maſter, or his Maſter him, this will be an unlawful maintenance.

So if either of them ſhall give or promiſe money or other reward to any of the Jurors to give his Verdict, or do threaten any of them to be killed, maimed, beaten, diſpoſſeſſed of their Farms or Goods, or give his own money to the Sheriff to get the party arreſted, this is an unlawful maintenance, 19 *H.*6.31. 19 *Ed.* 4.30. 39 *H.*6.5. 2 *Ed.* 4.14. 19 *Ed.*4.31.

By a *Kinſman:* The Father may maintain his Son and Heir; the Son, the Father or Mother; one Brother, or one Ally or neer Kinſman another, by going to the Bar with them and ſtanding there to comfort them, or go with them to Councel, or ſpeak to one to be of Councel with them in their cauſe: But ſuch a one may not retain a Councellor of himſelf, or give him money of his own, or give or promiſe money or other reward to a Juror to give his Verdict for him; for this is an unlawful maintenance. And he that will juſtifie by reaſon of any ſuch affinity through marriage, muſt ſhew that the party by whom the affinity was, is yet living, or ſome iſſue of the body of that party; for otherwiſe the maintenance of ſuch a perſon is unlawful: But it ſeems one Kinſman may not aid another in any caſe but in a real Action, and there where he that doth maintain hath ſome poſſibility to have the Land it ſelf, *Stat.* 9 *Ed.* 4.32. 14 *H.*7.2. 20 *H.*6.1. 34 *H.*6.26. 6 *Ed.* 4.5. 49 *Ed.* 4.2. *St.* 6 *Ed.* 3. *ch.* 33.

By a *Goſſip.* If one that is a Goſſip to another do maintain him, this is lawful; for this makes a kind of affinity, 6 *Ed.*4.5.

Any one may go with an outlandiſh man that cannot ſpeak Engliſh, to help to make his mind known, and to inſtruct his Councel; this is a maintenance juſtifiable, 15 *H.*7.2. 34 *H.*6.26.

By any other. Any one may give a poor man that is not able to defend his Suit, money of charity to help him; and this is juſtifiable, 9 H.6.64.

If

If any give to another money to begin and profecute a Suit, this is not maintenance; for no maintenance can be unlawful till the Suit begun, unleſs it be in the caſes following of Champerty. But if I give any man money to follow a Suit, and I do promiſe him what he layeth out more I will pay him; unleſs this be an Attorny, it ſeems this is unlawful, 3 *H.* 6. 55. 8 *H.* 5. 8. 10 *Ed.* 4. 19.

No maintenance in any Spiritual Court is ſuch, for which the party grieved may have the Writ of *Maintenance*; but it muſt be in the Common-Law Courts. *Teſdale* againſt *Bevington*, *Mich.* 39 & 40 *Eliz.* *Co. B. & P.* 37 *Eliz.* *Conſtanly & Barns* Caſe.

Champerty is, and Champertors be they that move Pleas and Suits, or cauſe to be moved either by their own procurement, or by others, and ſue them at their proper coſts, for to have part of the Land, or part of thing in queſtion and variance. And this is a *ſpecies* of Maintenance, for every Champerty is Maintenance, *Co. ſup. Lit. f.* 368. *Weſtm.* 1. *ch.* 25. *Weſtm.* 2. 48. 28 *Ed.* 1. 71. 33 *Ed.* 1. 3 *Ed.* 1. 25. 13 *Ed.* 1. 48. 4. *Champerty*, what. *Champertors.*

And in this caſe, and for this offence, the party grieved may have either a Writ called a Writ of *Champerty*, or the Writ of *Maintenance* to relieve himſelf, or he may proſecute the offence upon the Statute mentioned *infra*. And this Writ may be brought againſt the Buyer alone, or againſt the Seller alone; and the party grieved may have this Action againſt the Champertors, though he do recover, and ſo loſe nothing by the Champerty, 30 *Aſſ.* 5. 9 *H.* 6. 64. 7 *Ed.* 4. 15.

No Officers of the King by themſelves or others ſhall maintain Pleas, Suits or matters hanging in the Kings Court, for Lands, Tenements, or other things, for to have part or profit thereof by Covenant made between them; and he that doth ſhall be puniſhed at the Kings pleaſure, 3 *Ed.* 1. 25.

No perſon whatſoever ſhall receive any Lands or Tenements, or any thing by Gift, Purchaſe, or otherwiſe in Fee, or to Farm, ſo long as the thing is in queſtion, (nor for to obtain part of the thing in Plea) or for other reward ſhall maintain any matter that is in ſuit, nor upon any ſuch covenant or agreement ſhall give up his right to another: And he that doth ſo, the taker ſhall loſe as much lands and goods of his, as doth amount to the value of the part that he hath purchaſed for ſuch maintenance; and he ſhall be three years impriſoned, and further puniſhed at the Kings pleaſure. See the Expoſition of this *infra*. *Weſtm.* 2. *ch.* 48. *Stat.* 21 *Ed.* 1. *ch.* 11. 33 *Ed.* 1. 28.

By this Statute, as well he that ſelleth or demiſeth his Land for life or years, or any part thereof during the time it is in ſuit, ſhall be puniſhed, as he that purchaſeth the ſame, *Fitz. Champert.* 5.

If any perſon ſhall unlawfully maintain or procure any unlawful maintenance in any Action in any of the Kings Courts where Title of Land may be tryed, or ſhall unlawfully retain, for maintenance of any Suit or Plea, any perſons to embrace any Jurors or Freeholders, to ſuborn any Witneſſes by letters, rewards, promiſes, or by any other ſiniſter labour or means, to the end to maintain any matter or cauſe, or to diſturb or let Juſtice, or to procure or occaſion any manner of perjury by falſe Verdict or otherwiſe in any ſuch Court, ſhall forfeit Ten pounds. *Stat.* 32 H. 8. 9. *Weſtm.* 2. 28.

Juſtices of Aſſiſes or of either Bench may hear and determine matters of Maintenance, Conſpiracie, and Champertie; and that which they cannot end, they may adjourn to the Court where they are Juſtices, 4 *Ed.* 3. 11.

If any one by Covenant or Agreement, or Writing, doth bargain to have parcel of the Land, Debt, or other thing which is in Suit, if it be recovered, to aid and maintain the party to that Suit; this is Champerty, and puniſhable by the Statute before-mentioned. As if I have title to land or goods, and I agree with another that if he will maintain me in the Suit for the recovery thereof, that then he ſhall have a moyetie or a part thereof to himſelf. So if one owe me Twenty pounds, and I offer to a ſtranger part of it to recover it for me, *F.N.B.* 171. 15 H. 7. 2. 8 *Ed.* 4. 13. 5. What ſhall be ſaid to be *Champerty*, or not.

It ſeems that the Aſſignment of Statutes or Bonds for money, is Maintenance or Champerty. See *Co.* 10. 102. in marg.

If a bargain or agreement be by word, to have part of the thing in ſuit, to this end to maintain the ſuit; this is Champerty, as well as if it were by writing, 7 *E* 3.9. *Fitz. Champ.* 6.

If one give his Land freely without conſideration, if it be hanging the Suit, as well as where he ſelleth it for money or other conſideration, 8 *Ed.* 4. 13. See *Cromp. Juriſd.* 66. *a.* 76. *Fitz. Champ.* 5. 30 *Aſſ. p.* 5.

If one bargain for Land before any Suit begun for it, and after a Suit begun the party make a Conveyance of the Land according to the bargain, *pendente lite*, yet this is no Champerty, *Fitz. Champ.* 15. *Plow.* 465.

If one make a Feoffment of Land to his own uſe, during the time that a Suit is depending againſt him for this Land; this is no Champerty, 8 *Ed.* 4. 13.

If one give Land to his Son in Frank-marriage, or for his life, during the time that a Suit is depending againſt him for the ſame Land; this is no Champerty within the Statute of 28 *Ed.* 1. For next Friends may maintain one another by that Statute, 6 *Ed.* 3. 33. *Plow.* 305. *Fitz. Champ.* 10.

If one make a Leaſe for life of Lands, and after the Tenant for life is impleaded, and hanging that Plea he doth ſurrender to him in Reverſion, this is no Champerty, *Fitz. Champ.* 14.

If a Judgment be had for Land, and after the Recovery, the party that hath recovered ſell the Land; this is no Champerty.

So if one that hath given him Counſel in the caſe, do take part of the Land recovered for his Fees. But if there were any Contract or Bargain made before the Recovery depending the Suit, then it may be Champerty, *Stat.* 13 *H.* 4. *ch.* 19. 47 *Ed.* 3. 9.

6. *Embracers*, what.

Embracers are ſuch, as when a matter is in Trial between party and party, come with the party to the Bar (having received ſome reward ſo to do) and ſpeak in the caſe, or privily labour the Jury, or ſtand there to ſurvey and overlook them, thereby to put them in fear or dread of the matter, or the like. And if in this caſe he take money, it ſeems a *Decies tantum* may be brought againſt him, *St.* 38 *Ed.* 3. 12. See more, *Cromp. Jur. f.* 32. 38. 6. 39. 28 *Ed.* 1. 11. 10. 19 *H.* 7. 13. *Terms ley. Co. on Lit.* 369.

7. Who ſhall be ſaid to be an Embracer, and what Embracery, or not.

He is accounted an Embracer, who will threaten the Jury, or any of them, if they do not give their Verdict by his direction: Or if one will inſtruct the Jury beforehand, *Co. ſuper Lit.* 369.

Alſo he that is Procurer of a Jury to appear, who is commonly called a Leader of Inqueſts. And whether the Jury paſs for him, or no, or give any Verdict, or no, it is not material, for he ſhall be puniſhed notwithſtanding, *F.N.B.* 171: *Co.* on *Lit.* 369.

If one take money to embrace, and do not embrace, this is no Embracery.

If the Counſellor for his Fee ſpeak to the Jury, and inform his Clients Evidence unto them ſo much as he can openly upon the Trial of the Cauſe, this is no Embracery: But if he otherwiſe labour to the Jury to give their Verdict, and receive money to that end, this is Embracery, 41 *Ed.* 3. 9. 6 *Ed.* 4. 5.

8. The puniſhment of it.

The party that is attainted of this offence, ſhall pay ten times as much as he hath received; as a Juror ſhall do that hath taken money to give his Verdict: which by a *Decies tantum* in this caſe, as well as in the former, may be recovered againſt the party. See *Decies tantum, & Stat.* 34 *Ed.* 3. *ch.* 8. 38 *Ed.* 3. 12.

If a Juror take money to give his Verdict on one ſide or the other, he is to be puniſhed as a Maintainer by a *Decies tantum*.

So if a Juror will take money on both ſides, who is called an *Ambodexter*; ſuch a one ſhall never be put in Juries or Inqueſts, but be ſent to Priſon, and puniſhed further at the Kings pleaſure; and he may be puniſhed by a *Decies tantum*, 39 *Aſſ. p.* 19. But if a Juror take money after Verdict given for the party, where there was no Covenant before, this is out of all the Statute, but he may be fined for this, 5 *Ed.* 3. 10. 44 *Ed.* 3. 39; *Fitz. Decies tant.* 12.

If

If any perſon ſhall bargain, buy or ſell, or by any means get any pretenſed Rights or Titles; or takes Promiſe, Grant, or Covenant to have any Right or Title of any perſon or perſons in or to any Lands or Tenements, but where ſuch perſons which ſhall ſo bargain, &c. their Anceſtors, or they by whom he or they claim the ſame, have been in the poſſeſſion of the ſame, or of the Reverſion or Remainder thereof, or taken the Rents or profits thereof by the ſpace of a year before the ſame Bargain or Covenant, he ſhall loſe the value of the Land ſo held or covenanted for; and the Buyer knowing thereof, ſhall loſe as much alſo. See *Cromp. Jur. f.* 38. *a. Co.* on *Lit. f.* 214. 369. 9. Buying of pretenſed Titles.

But any man that is in lawful poſſeſſion may get any pretenſed right or title, notwithſtanding this Statute, 32 *H.* 8. 9.

For which note: Title or Right is either meerly in pretence or ſuppoſition, and nothing in truth: Or when it is good Right and Title in truth, and made pretenſed by the act of the party; and both theſe are within the Statute. Alſo a Right is naked without poſſeſſion, when the abſolute Right cometh by Releaſe, or to wrongful poſſeſſion, and no third perſon hath either *Jus proprietatis*, or *Jus poſſeſſionis*. When he hath a good Right, and a wrongful Poſſeſſion, *vide infra*. *Co. ſuper Lit.* 369.

If one make a Leaſe for years for a Term of years to another of Land, contrary to this Statute; this is as well within the Statute, as if he had made an Eſtate in Fee-ſimple, Fee-tail, or for Term of life: And for making ſuch a Leaſe of a pretended Title or Right, the Leſſor and Leſſee ſhall forfeit the value of the Inheritance of the Land. See a Caſe more in *Co. ſuper Littleton, fol.* 369. *Dyer* 374. 74. *Plow.* 87. 10. What ſhall be ſaid a buying of a pretenſed Title, or not.

So if one have a pretended Title or Right to Copihold-land, and ſell it, this is without the danger of this Statute. But if one make a Leaſe for years to another only to try a Title, this ſhall not be within this Statute, *Co.* 4. 26.

If *A.* be lawful owner of Land and in poſſeſſion, and *B.* that hath no right thereunto, granteth to, or contracteth with another for the Land; though the Grant be void, yet the Grantor and Grantee be within the danger of the Statute. if *A.* in this caſe be diſſeiſed, *A.* hath a good right: yet if *A.* being out of poſſeſſion granteth to or contracteth with another for the Land, they are both within the danger of the Statute. *A fortiori* of a Right in Action, unleſs it be to a great man, &c. *Co.* on *Lit.* 369.

He that hath a good Title at the time of his Bargain or Leaſe, is not within this Statute, though neither he nor his Anceſtors have been in poſſeſſion thereof, &c. according to the Statute, by the ſpace of a year before. And therefore if a man do enter into Lands that be holden of him for an Alienation in Mortmain, or if he recover Lands by a Real Action, he may ſell the ſame Land, or make a Leaſe of it within a year after the Entry or Recovery, without any danger of this Statute, *Plow.* 47. *Dyer* 74. *Co.* on *Lit.* 369.

So if one mortgage his Land for a long time on Condition, and after he redeem it, he may ſell it, though he he have not been in poſſeſſion a year. For by pretenſed Rights is not meant good and clear Rights. But where one man is in poſſeſſion, and another that is out of poſſeſſion doth claim them or ſue for them, doth bargain, ſell, or make any agreement to part from the Land, or to make any aſſurance thereof after he ſhall recover the ſame; this is within the danger of the Statute, whether he hath a good Title, or not. As if a Diſſeiſor die ſeiſed, and the Diſſeiſee enter and diſſeiſe his Heir; though he hath an antient Right, yet becauſe he hath unlawful poſſeſſion, if he ſell or contract the Land before he hath been in poſſeſſion a year, he is within the danger of the Statute. But if one be diſſeiſed, and the Diſſeiſee releaſe to him; now he may ſell it preſently, and need not ſtay the year.

But where he that hath a pretenſed Right, and none in truth, gets the poſſeſſion wrongfully, and then ſels; this is within the Statute. But if there be Tenant for life, the Remainder in Fee by a good Title, he in Remainder may get the pretenſed Right.

See for theſe things, Statutes of *Weſtm.* 1. 28. 1 *Ed.* 3. *Parl.* 2. 14. 20 *Ed.* 3. 4. 1 *R.* 2. 4. 9. 7 *R.* 2. 15. 32 *H.* 8. 9. 1 *Ed.* 3. *Parl.* 2. 14. 4 *Ed.* 3. 11. *Co.* 3 *par. Inſt.* 76 & 77.

CHAP. CVIII.

Of Merchant and Merchandiſes, Trading and Traffique.

Trading and *Traffique.*

NOne that ſell out of a Market-Town or Corporation in the Country, may ſell by Retail (but in Groſs) any Cloth, Haberdaſhers wares, Grocery wares, in any ſuch Corporation or Market-Town, or the Suburbs or Liberties thereof, but in an open Fair there, under pain to forfeit the Wares ſold or offered to be ſold, and Six ſhillings eight pence, *Stat.* 1. 2 *Ph. & M.* 2.

There are many other Laws concerning Trading and Traffique, to this effect.

1. None may uſe Trades that they have not been trained up in.

2. They in their Trades, eſpecially if they ſell any thing that is to be eaten or drunk by men, muſt ſell true, not falſe and ſophiſticated Commodities, nor uſe deceit.

3. They muſt ſell (eſpecially Proviſion) at reaſonable prices, and for moderate gain.

4. Bakers, Brewers, and ſuch like Tradeſmen muſt keep the Aſſiſe.

5. They muſt buy and ſell by juſt Weights and Meaſures.

6. Trading with ſome Countries is forbidden: See for theſe things my *Juſtice of Peace* Book. *Co.* 2 *par. Inſt. ch.* 30. *Acts, Aug.* 2. 1650. and 3 *Octob.* 1650. and 6 *Novemb.* 1650.

Merchants and *Merchandiſes.*

There are four ſorts of Merchants, Merchant-Adventurers, Merchants-Dormants, Merchants-Travailing, and Merchants-Reſidents.

What Merchant-Strangers may ſell and buy in this Country, and how, and what Cuſtom they ſhall pay, See *Stat.* 9 *H.* 3. 30. 9 *Ed.* 3. 1. 25 *Ed.* 3. 2. 2 *R.* 2. 1. 1 *R.* 2. 7. 19 *R.* 2. 1. 19 *H.* 7. 8. 5 *Eliz.* 7. 1 *Jac.* 25. 4 *H.* 4. 15. 17 *Ed.* 4. 1. 3 *H.* 7. 8. 1 *Eliz.* 11. *Co.* 2 *par. Inſt.* 58.

What Merchandiſes may be brought into this Country, bought and ſold here, and how, *Stat.* 1 *Eliz.* 11. 5 *Eliz.* 7. 1 *Jac.* 25. 4 H. 4. 15. 17 *Ed.* 4. 1. 3 H. 7. 8. 4 *Jac.* 9. 1 & 2 *P. & M.* 2. 3 *Jac.* 9. 12 *Ed.* 4. 3. *Act of Parliament, Aug.* 28. 1649.

What Merchandiſes may be tranſported, and how, *Stat.* 5 *Eliz.* 22. 2 H. 6. 6. 3 *Jac.* 7. And with whom we may trade, or not, *Act of Parl.* 3 *Octob.* 1650. Where and when they muſt be laden, *Stat.* 1 *Eliz.* 11. 4 *H.* 4. 20.

Policy of Aſſurance, what.

Policie of Aſſurance, is a courſe taken by thoſe which do adventure Ware or Merchandiſe by Sea; whereby they being loth to hazard their whole Adventure, do give to ſome other a certain rate or proportion, as Ten in the Hundred, or ſuch like, to ſecure the ſafe arrival of the Ship, and ſo much Wares at the place agreed upon. So that if the Ship and Wares do miſcarry, the Aſſurer maketh good to the Venturer ſo much as he promiſeth to ſecure, as Twenty, Forty, a Hundred, more or leſs. And if the Ship do ſafely arrive, he gaineth that clearly which the Venturer doth compound to pay him. And for the more even dealing between the Venturer and the Securer in this caſe, there is a certain Clerk or Officer ordained to ſet down in writing the ſum of their Agreement, that they may not differ thereupon afterwards; and this Writing is called a Charter-party. If any difference be about it, the King hath been uſed to grant a Commiſſion to certain men to hear and end it.

Charter-party, what.

See

See Statutes, 43 *Eliz.* 11, 12. *Co.* 5. 23. For Merchant-ſtrangers, and how they are to buy and ſell, and imploy the Wares and Money, See 14 *R.* 2. 1, 2. 2 *H.* 4. 5. 4 *H.* 4. 15. 5 *H.* 4. 9. 6 H. 4. 4. 11 H. 4. 8. 9 H. 5. 9. 8 H. 6. 24. 27 H. 6. 3. 17 *Ed* 4. 1. *Co.* 2 *par. Inſt.* 7. 41. *Imploiment.*

The Weigh of Cheeſe is thirty two Cloves, every Clove eight pound of Averdepois weight; ſome make ſeven pound to a Clove. The Weigh of *Suffolk*-Cheeſe is two hundred fifty ſix pound of Averdepois weight; and their Barrel of Butter is of like weight with the Foiſt. But the Weigh of *Eſſex*-Butter and Cheeſe is three hundred pound, after the rate of an hundred and twelve pound to the Hundred, which is three hundred thirty ſix pound of Averdepois weight. *Dalton's Juſtice of Peace*, 185. What accoune ſhal be of merchandiſes and Commodities for weigh: and meaſure, in buying and ſelling.

Beef and other Fleſh is ſixteen ounces of Averdepois, and eight of them pounds make a Stone, *Dalton*. *Butter and Cheeſe.* *Fleſh.*

Herrings are ſold by the Barrel, Half-Barrel, and Firkin; and theſe according to the meaſure of Ale and Beer: The Firkin, eight gallons; the Kilderkin, ſixteen gallons; and the Barrel, thirty two gallons. Alſo Herrings are ſold by the Hundred, a hundred and twenty to the Hundred, ten hundred to the Thouſand, and ten thouſand to the Laſt, *Stat.* 11 H. 7. 23. 13 *Eliz.* 11. 31 *Ed* 3. 2. *Herring.*

Hemp, twenty pound weight maketh the Stone, 2 H 8. 12. *Hemp.*

Of Sugar, Spices, and Wax, eight pound maketh the Stone, and thirteen Stone and half, or a hundred and eight pound maketh the Hundred. *Raſtals Abridgment, Weights*, 8. *Sugar, Spices.*

Tile is a hundred and twenty to the Hundred, 17 *Ed.* 4. 17. *Tile.*

Of Hops, a hundred and twelve pound maketh the Hundred. *Hops.*

For Salmon, Eeles, Lead, Leather, Iron, Glaſs, ſee *Raſtal* of *Weights*: So for Coal, Talwood, Billet and Faggot, *St.* 7 *Ed.* 6. 7. 43 *Eliz.* 14.

All other Commodities of Tale or Number, are ſold by the Hundred: whereof Cattel and Fiſh are ſold a hundred and twenty to the Hundred; and yet the hundred of Hard-fiſh muſt be a hundred and ſixty, *Raſt.* 8. *Cattel.* *Fiſh.*

All other headed things, as Nails, Pins, &c. are a hundred and twenty to the Hundred. And all other things are but five-ſcore to the Hundred. *Pins, Nails.*

Of Timber well hewn and ſquared, fifty foot maketh a Load; a Lath is in length five foot, in breadth two inches, and in thickneſs half an inch. The Aſſiſe of Wood, ſee 7 *Ed.* 6. 7. *Timber and Wood.* *Lath.*

A Bale of Paper is ten Reams, a Ream twenty Quires, a Quire twenty five ſheets. *Paper.*

A Roll of Parchment is five dozen or ſixty skins. But all theſe things come beſt to be known by the uſage of the Country; and according to this generally it is to go in Trading and Traffique. *Parchment.*

See *Ships* and *Shipping*, *Weights* and *Meaſures*.

CHAP.

CHAP. CIX.

Of Marriage.

Marriage.

Arriage is the copulation of a man and a woman together, by agreement to be man and wife, by an inſeparable conjunction to live together all the days of their life. And the inception of this firſt is, when wedlock is promiſed and vowed by words in the Future-tenſe, which is called *Affiance* or *Sponſality*; which therefore is defined to be, *Futurarum nuptiarum conventio & repromiſſio:* For, the full contract of Matrimony is, when it is made by words *de præſenti*, in a lawful conſent. And ſo two be made man and wife before God, without lying together, and that without conſent of Parents or Tutors; which is not of neceſſity, though it be meet and convenient to be had. But Matrimony is not accounted conſummate by our Law, until it be celebrated and ſolemnized *in facie Eccleſiæ. Co. ſuper Lit. 76. a. Bract. l. 4. f. 298. Glanv. lib. 1. cap. 1. Wo. Lawyer*, 117.

Affiance or *Sponſality.*

Contract of Marriage.

Affiance Quotuplex, *and the validity and fruits thereof.*

This Sponſion or firſt promiſing is alſo ſometimes naked, *(i.)* when they do promiſe ſimply and barely by their word only each to other, to contract Matrimony hereafter: And ſometimes confirmed, *(i.)* when there is an Oath made, or ſomewhat taken as an earneſt or pledg between them on both parts, or on the one part, to be married hereafter. And it alſo is either publique, and that is either by the parties by themſelves preſent together, or by Meſſage and Letters when they be apart, and of and to which there be ſome privy and witneſſes: Or elſe it is ſecret, *Solus cum ſola*, to which none are privy but themſelves; which being proved well, is of the ſame force with the former; ſave only that a Promiſe made after to another in publique, ſhall be preferred and prevail againſt it.

Sponſion, { *Simple:* / *Conditional.*

This is alſo ſometimes ſimple, and ſometimes it is conditional. If it be conditional, it ſuſpendeth the Promiſe till the Condition be performed, unleſs by a new agreement the Condition were diſcharged. But if the Condition be againſt the right of Matrimony, it maketh the Promiſe void, as, To poiſon the child ſhe firſt conceiveth, *&c.* But though otherwiſe unhoneſt or impoſſible, yet if it be not againſt the Law of Wedlock, it is good enough. But this Affiance, be it naked or confirmed, publique or private, is not of that force as to compel the parties to marry, but is an obligation only, or being bound in a ſort to marry hereafter: For after ſuch a Promiſe only, the parties may marry themſelves to others; and yet it ſeems the party that doth break his or her Promiſe in this caſe, is ſubject to ſuit and ſome puniſhment in the Spiritual Court. But a legal Contract containeth more in it, and is compulſory: And yet neither Affiance nor Contract is of the force of Marriage; for by this only without Marriage, neither husband nor wife ſhall have any benefit by the others death, and till then they are ſeveral perſons in Law, and may enfeoff one another, *Perkins.*

Contract legal.

Sect. 1. Note, that in all theſe Promiſes the Law requireth not a curious form of words; for any words whereby their Agreement may appear, will be ſufficient. *Womans Lawyer, f.* 52.

All perſons may lawfully marry, that be not prohibited by Gods Law to marry, that is, that be not prohibited by the Levitical degrees. All Clergy-men may marry as well as others, and their children ſhall be legitimate, and they themſelves ſhall have all the priviledges of Marriage that other men have. *Stat. ſect. 6 Ed. 6. c.* 12. 32 H. 8. 38. *&* 2 *&* 3 *Ed. 6, c.* 21. See *Co.* 2 *par. Inſt.* 683.

The ſix Clerks of the *Chancery*, and other Clerks there, may marry, notwithſtanding the old cuſtom to the contrary. Alſo all ſuch as exerciſe any Eccleſiaſtical juriſdiction may be married, notwithſtanding their office and imployment, *Stat.* 14. *&* 15 H. 8. *c.* 8. 37 H. 8. *c.* 17.

In this conjunction many things are prohibited, and divers things required, 1. In the parties themſelves. 2. In the making of their agreement, *Cap.* 434.

In

In the parties themſelves, 1. That there be no Impediments natural, or accidental; that they be not either of them within age of conſent, (*i.*) the man under fourteen, and the woman under twelve, for then may they after when they come to this age, avoid the marriage by their diſagreement, without any divorce at all, and marry others. But by the Civil Law, it ſeems they are deemed able to conſent when they are *Puberes* ripe, and fit for marriage, though they are not of this age.

2. What perſons may marry, who not. Impediment of Marriage is lawful, what not.

2. That they be of a ſound and whole minde to conſent, and not *Inopes mentis*, for he that is mad, without intermiſſion of fury, cannot marry, but he that is deaf and dumb may Contract Matrimony.

3. The perſons muſt not be in relation one to another, *Infra gradus prohibitos* (that is) in reſpect of Conſanguinity, for marriage is forbidden betwixt thoſe that are of Kinred Lineally, (*i.*) Parents and Children in *infant'*. Alſo betwixt thoſe that are Kinred in the *tranſverſe* or Collateral line, until the fourth degree be paſt, or in reſpect of Affinity or Alliance, and this riſeth between them that are married, and the kinred of one of them, as betwixt the Husband and the kinred of his Wife; but this prohibiteth marriage onely to the perſons contracted, *&c.* for the Couſins or Conſanguinity to my Wife, are Affinity onely to me, and not to my Brothers or Children by a former Wife, and ſo *è converſo* my Blood, to my Wife. Hence it is, that Father and Son may marry the Mother and Daughter, and that two Brethren may marry two Siſters. And after the fourth degree be paſt, a man may marry any of his Affinity: And thoſe that are not within the Levitical degrees, are not forbidden, (*a*) therefore a man may marry the Daughter of the Siſter of his firſt Wife.

4. The perſons ſhould be of the ſame Religion, for by the Laws of the Church, Marriages are not good betwixt Jews and Chriſtians.

5. The perſons muſt be fit for generation, and therefore thoſe that by coldneſs of nature or inchantment, are impotent, are forbidden to marry.

6. The perſons muſt be alſo free, and not be engaged to any other, either of them by Precontract; ſecondly, in the making of the Contract.

1. It muſt be free; and therefore if both, or either of the parties be compelled by threatnings, impriſonment, or the like, or drawn by inchantment, *&c.* Fraud or flattery, or other ſuch means againſt their wills to agree; this will make the marriage void.

2. It muſt be lawful; and therefore if it be corruptly made, as when one hath adulterouſly polluted a Woman, If he promiſe her to have her when his Wife dieth, *&c.* See more in the *Womans Lawyer*.

They were then by the Laws formerly to be married by a Miniſter before Witneſſes, according to the Subſtance of the *Common Prayer. Sect.*

If any Marriage had been made where any ſuch impediment is as aforeſaid, either in the perſons that make it, or the manner of making it, it was to be avoided again afterwards by Divorce at the Suit of the party grieved, by ſentence in the Eccleſiaſtical Court; for to that Court, theſe matters did then belong, and the Ordinary was the onely Judg to judg, diſcuſs, and determine this queſtion and matter of Marriage. But it was not void, until by ſentence of the Spiritual Judg, it was avoided; and therefore if that had not been in the life time of the parties, the iſſue was inheritable, and it could never be avoided after; for a Divorce cannot be after the death of either of the parties. But now the lawfulneſs and unlawfulneſs of Contracts and Marriages, and all Exceptions againſt them ſhall be heard, and ended by the Juſtices of the Peace, at their General Quarter Seſſions by the new Statute, *Act*, 24 *Aug.* 1653. Alſo in caſe of a Marriage by Force or Fraud, the Lords Commiſſioners of the Great Seal, may give Commiſſion to men to hear and end it. See *Women, Act*, 10 *Jan.* 1650. 14, 15 *H.* 8. 8. 37 *H.* 8. 17. *&* 437. *Co. ſuper Lit.* 79. *a, b. Broo. tit. Gard.* 124: *Womans Lawyer* 57, 58. 32 *H.* 8. 38. *Levit.* 18. (a) *Trin:* 2 *Jac. Rich. Parſons* caſe. *Co. B. Womans Lawyer* 59. *Kelw.* 53: 12 *H.* 8. 6: *Dyer* 305. 12 *H.* 7. 22. *Broo. Baſtardy* 23, 37, 44, 47. But now by the new *Act*, the Law is altered herein, and Marriages are to be made up by the Juſtices of Peace, and not by the Miniſters.

3. Things required to make a good *Marriage.*

For the knowledge of which Law, take theſe things.

1. The Man married muſt be ſixteen years old, or more, and the Woman muſt be fourteen years old, or more.

2. The parties muſt freely conſent, and neither party be brought to it, by Force or Fraud; and their Parents, Gardians, and Overſeers alſo, if they have any, and they be under one and twenty years of age, either of them muſt conſent to it.

3. They that are to marry, muſt one and twenty days before the marriage, deliver to the Regiſter of each Pariſh, where the parties do dwell, the Chriſtian names and ſirnames of the perſons to be married, with the additions of the places where they dwell, and the names of their Parents, Gardians, or Overſeers, if they have any.

4. This Marriage muſt be publiſhed by the Regiſter in the Churches of both places, or by ſome other, by his appointment and procurement, three Lords days before, at the cloſe of the Morning Exerciſes, or in the next Market Town, on three Market days together, in three weeks, one after another in the Market place, between eleven and two of the clock, and then certifie to a Juſtice of Peace of the County where one of the parties dwelt: And if any Exception be againſt the Marriage, this muſt be certified alſo to the Juſtice.

5. This Publication being thus certified by the Regiſter of the places to a Juſtice of Peace; and he being ſatisfied of this Publication, and Conſent of Parties, and their Parents, and Gardians, as before; This Juſtice muſt marry them after the Form herein ſet down afterwards.

The Man taking the Woman by the Hand, muſt ſay theſe words.

Sect. 2.

J. A B. *Do here in the preſence of God, the Searcher of all Hearts, take thee* C. D. *for my wedded Wife; and do alſo in the preſence of God, and before theſe Witneſſes, promiſe to be unto thee a Faithful and Loving Husband.*

Then the Woman taking him by the Hand, muſt ſay thus.

J. C. D. *Do here in the preſence of God, the Searcher of all Hearts, take thee* A. B. *for my wedded Husband; and do alſo in the preſence of God, and before theſe Witneſſes, promiſe to be unto thee a Loving, Faithful, and Obedient Wife.*

And this being done, the Juſtice is to declare them Man and Wife; and the Subſtance hereof is to be obſerved, or otherwiſe the Marriage is not good.

If either of the Parties be dumb, the words may be ſpared; if they have no Hands; the taking of hands may be ſpared.

This done, he muſt, if the Parties deſire it, give a Certificate hereof in Parchment, under his Hand and Seal, of the Marriage, Witneſſes, and all the Circumſtances thereof to the Parties.

He is to ſee the Regiſter to make an Entry in his Regiſters Book of the Publication, Conſent of Parties, Parents, or Gardians, and Exceptions if any be in the caſe. *Act*, 24 *Aug.* 1653.

The Marriage being thus conſummate, they are then reputed Man and Wife.

Husband and Wife. Feme-Covert.

Husband and Wife, are a Man and a Woman coupled together by Marriage, and then is this Woman ſo married, ſaid to be a Feme-Covert, which is defined to be a Woman legally married to a Husband, and married ſhe muſt be; for until ſhe be married, although ſhe be Eſpouſed or Contracted, yet ſhe is not reputed a Feme-Covert. But when ſhe is married in *Facie Eccleſiæ*, then is ſhe reputed a Feme-Covert, though her Husband never have any Carnal knowledg of her; and hence is the word Coverture for ſo long, as theſe perſons do ſo continue married, ſo long there is a Coverture between them, and the Coverture is ſaid to continue: And whatſoever is done during the continuance of this Marriage, is ſaid to be done during the Coverture. See the *Womans Lawyer.*

Coverture.

4. To what purpoſes they ſhall be reputed, but as one perſon in Law, and to what purpoſes they ſhall be reputed divers perſons in Law.

This Marriage of two ſuch perſons doth knit them ſo faſt, and make ſuch a ſtrait fellowſhip between them, as that they are ſaid to be but *Una perſona, una caro & ſanguis unus:* And hence it is, That howſoever in the obliquity of Fines, Recoveries, and Uſes, there is a way, yet a man cannot by down-right Livery or Bargain, Feoffment, Gift, or Leaſe, paſs Lands to his Wife, during the Coverture, not

nor make any Covenant or Obligation to her: And if one enter into a Covenant to make his Wife a Feoffment, it is impoſſible, and therefore void, yet one may binde himſelf in an Obligation or Covenant before or after Marriage to a ſtranger, to let his Wife have neceſſaries, or ſo much clothes, or to pay her ſo much money by the year to do it, and this is good.

2. The one of them cannot ſue the other, neither can the Wife ſue any ſtranger, unleſs her Husband be joyned with her.

3. The Wife as ſhe doth participate of the name of her Husband (for ſhe changeth her name into his.) So alſo ſhe doth partake of the Nature and Condition of her Husband. Hence it is, That if he be an Earl, ſhe is a Counteſs; he a Knight, ſhe a Lady: If he were an Alien, and be made Denizen, the Wife ſhall be ſo alſo: If a Freeman marry a Bond-woman, ſhe ſhall be free, during the Coverture: And if a Lord marry his Wife, ſhe ſhall be free, during the Coverture, and *è converſo*: If a Dutcheſs or Counteſs that is not ſo by birth, marry with a Gentleman or Eſquire, ſhe loſeth her name and dignity, and muſt follow the Condition of her ſecond Husband, *Uxor cenſetur dignitate mariti.*

4. Hence it is alſo, that the wife cannot be produced as a witneſs for, or againſt her Husband (*b*) a Writ of Conſpiracy will not lie againſt Husband and Wife. (*c*) If ſhe deliver her Husbands Goods to a ſtranger, Treſpaſs doth not lie againſt the ſtranger, but ſome other action. (*d*) If *T.* enfeoff *W.* and *A.* his Wife, and after it is by Parliament enacted, that all eſtates made by *T.* to *W.* ſhall be void, the Feoffment ſhall be void, as well to the Wife as to the Husband. (*e*) If one purchaſe Lands held *in capite*, to him and his wife, and his Heirs without Licence, and after have a pardon of all offences, *Pro quacunque alienatione ſibi facta*, and do not ſpeak of his wife, yet it is a good pardon (*e*) if a Feoffment.

5. If a Feoffment be made of Land to them two, and a third perſon, they two ſhall have but a moyety: If to them two, and two others, they ſhall have but a third part; and if it be made to them two after their marriage together, there ſhall be no moyeties between them, therefore the Husband can neither grant nor forfeit any part of it. And if the Husband alien it, ſhe may after his death recover the whole by a *Cui in vita*. If a Villain and his wife purchaſe Land, the Lord enter, and the Villain die, ſhe or her Heirs ſhall have it. So if the wife take and convey away her Husbands Goods, this is no Felony in him. So if the Husband joynt purchaſer be an Alien born, or attaint in a premunire, or for Felony: *Co.* on *Lit.* 112. 187. *Plow.* 294. *F.N.B.* 78. 27 *H.* 8. 27. 4 *H* 7. 4. *Perk ſect.* 763, 764. 39 *H.* 6. 45. *Exod.* 21 3. 4 *H.* 7. 31. *D. & St.* 139. *Broo. ſect.* 499. *Co.* 4. 119. 6. 53. *Co.* on *Littl.* 6. *b.* (*b*) *F.N.B.* 116. *Stamf. pl. Corona* 174. (*c*) 11 *H.* 4. 24. *Hawk.* (*d*) 5 *H.* 7. 31. (*e*) *Dyer* 196. *Littl. ſect.* 292. 39 *H.* 6. 45. *Plow.* 483. *Co.* on *Littl.* 187. 40 *Aſſ. pl* 7. *Broo Parl.* 43.

But in other caſes they are conſidered as divers perſons in Law, and ſo one of them may do an act to another: As firſt, when they do it in *auter droit*, or as in the perſon of another. As if a Feoffment be made to one of them, and a Letter of Attorny to the other to give Livery, this the one of them may do to the other. So if the wife be an Executrix, ſhe may pay or deliver a Legacy to her husband: So if ſhe have power to ſell Land by Will, ſhe may ſell it to her husband. *Perk. ſect.* 169. 11 *H.* 7. *Co. ſuper Littl.* 187. If an eſtate be made to the husband and wife before marriage, and after they marry, they ſhall have moyeties between them, and one hath not all as in the caſes before (ſee more Caſes for this *Infra*) *Co. ſuper Littl. f.* 187. 355. *b.*

Sect. 3. 5. What acts the Husband may make to his Wife, during the Coverture, where not.

Though by no Conveyance at the Common Law, by plain Livery or Bargain, a man could during the Coverture, either in Poſſeſſion, Reverſion, or Remainder, limit an Eſtate to his Wife; yet by ones Teſtament one might, and ſtill may, either by Cuſtom or Statute deviſe his Land to his wife in Fee-ſimple, Fee-tail, or for term of life or years; and one may now upon the Statute of the ſeven and twentieth of *Henry* the Eight, limit a uſe upon a Feoffment to, or a Covenant with others to ſtand ſeiſed to uſes, to the uſe of his wife: So that now in the obliquity of Fines, Recoveries, and Uſes, there is an expedite way of tranſporting of Inheritance between them: As a Feoffment, Fine, or Recovery may be had and ſuffered to the uſe of the Wife of the Feoffor or Conuſor, and her Heirs. Alſo a man may make a Feoffment

to a ſtranger on condition to reinfeoff the Wife of the Feoffer, and this is good by the Common-Law, 4 *H.* 7: *Co. ſuper Litt. fol.* 112. *Perk. ſect.* 763.

Alſo he may give her any of his Goods or Chattels by his Will, for that is not to take effect untill after his death. If an other man make a Feoffment to my Wife, and a letter of Attorney to me give her ſeiſin, I may do it, and it will be good enough. *Perk. fol.* 41.

6. What acts the Wife may do to her husband, where not.

If *Cey q. uſe* had deviſed that his wife ſhould ſell his Land, and made her Executrix and died, and ſhe took another Husband, in this caſe ſhe might ſell the Land to her Husband. 10 *H.* 7. 20. *Co. ſuper Litt. f.* 112.

But if a *Feme Covert* be ſeiſed of Land in Fee-ſimple, ſhe can not deviſe it to her Husband, for ſhe is *ſub poteſtate viri*, and can do nothing in her own right without him, for the Law will preſume it done by Coertion of her Husband. *Co. ſuper Litt.* 112.

7. How acts done to the Feme-covert alone ſhal enure

A *Feme Covert* cannot take by grant from the Husband: but ſhe may, and that without any precedent aſſent or agreement of the Husband, be capable of, and take Lands or goods by the gift or grant of others; and therefore all Feoffments, Leaſes, Obligations, &c. made to her are good, and this is good, untill the Husband diſagree to it by word or deed, or both. And if he do neither agree nor diſagree in his life time, then is it unavoydable by any from or under him. But if he diſagree to it, he makes it all voyd; but after he hath once agreed, hee cannot by diſagreement avoid it. And if an eſtate be made to the Wife, and the Husband do agree to it, yet the Wife or her Heirs after his death, may diſagree to it, and avoid it. *Vide agreement.* 21. *H.* 7. 20. *Br. Cont.* 3. 27 *H.* 8. 25. *Perk c.* 43. *Co. ſuper Litt. f.* 3. 1 *H.* 7. 16. 7 *H.* 4. 17. 18 *H.* 6. 8 15. *Ed.* 4. 1.

8. How acts done to the Husband and Wife ſhall enure.

If a reverſion be granted to a man and a woman and their Heires, and before Attornment they two enter-marry, and then attornment is made. Or if a feoffment were made to them, and after they marry, and then livery of ſeiſin is given to them, *ſecundum formam Chartæ*; In both theſe caſes they ſhall take entirely, and not by moyties. But if a Feoffment were made before the Statute to the uſe of a man and a woman and their heires, and they entermarry, and then the Statute is made; in this caſe they have moyties, and the Husband may alien a moytie during the *Coverture*: *Fitz. Diſcent.* 52. *Co.* 4. 68. *Plow.* 483. *Co. ſuper Litt. fol.* 187.

If an Eſtate be made to a Villayn, and his Wife being free and to their Heires, and the Lord of the Villayn enter, yet if ſhe ſurvive her Husband, ſhe ſhall have the whole. 40 *Aſſ. p.* 7. *Co. ſuper Litt.* 187.

If one make a Leaſe to *A.* and to a Husband and Wife, *viz.* to *A*; for life, to the Husband in tayle, and the Wife for years, it ſeemes each of them hath a third part, in reſpect of the ſeveralty of the eſtates. *Co. Idem.*

If a Feoffment be made to a man and a woman ſole, and their Heirs with warranty, and they intermarry, and after are impleaded, and vouch and recover in value; now of this land ſo recovered in value, there ſhall be no moyties between them, becauſe they are not now capable of moyties. *Plow.* 485.

If I let land to a Feme ſole for her life, and ſhe taketh a Husband, and after I confirm the ſtate of the Husband and Wife, to have and to hold for tearm of their two lives, in this caſe the Husband doth not hold joyntly with his Wife, but holdeth in right of his Wife, for the tearm of her life, and after for tearm of his own life by way of remainder, if he ſurvive his Wife. And if it had been made of his Eſtate to him alone, to have and to hold the land to him and his Heirs, this had been good: And hereby he ſhould have had the Fee-ſimple after the death of his wife. But if the Confirmation had been made to the Husband and Wife to have and to hold the Land to them two, and their Heires, they are Joynt-Tenants of the Fee-ſimple, and the Husband is ſeized in the right of his wife for her life, for they cannot take by Moyties during the Coverture, *Co. ſuper Litt.* 299. *Fitz. Releaſe.* 45.

If a Deed be made to the Husband and Wife of land, and after his death ſhe do accept of the ſtate, now ſhe is bound to perform all the inherent Covenants as much as her Husband. *See Covenants* 45 *Ed.* 3. 11. *Dier.* 13.

If a man letteth land to the Husband and Wife, To have and to hold the one moytie

moytie to the Husband for the tearm of his life, and the other moytie to the Wife for the tearm of her life, and the Leſſor confirm the eſtate of them both in the Land *Habendum* to them, and to their Heirs: by this Confirmation, as to the moyty of the *Husband* it enureth only to the *Husband* and his heires, for the wife had nothing in that: But as to the moytie of the Wife, they are Joint-tenants, for the husband hath ſuch an Eſtate of the Wifes moytie as is capable of confirmation. *Co. ſuper Lit.* 299. *Fitz. Confirmation.* 17.

Sect. 4. And if one diſſeiſe me, and after I take a Wife, and then after the Tenant doth make Feoffment of this Land to me and my wife, this ſhall enure to me only, and my wife ſhall have no benefit by it. *Dier.* 10. *a.*

If Lands be given to a man and his wife, *Habendum*, the one moity to the Husband, and the other moity to the Wife, in this caſe they ſhall take ſeverally, and be ſeiſed of Moities as tenants in Common, *per Knightly* (*See more to this, ſupra.*)

What things are given to the Husband by the marriage, and how, what not.

Howſoever it be ſo, That whatſoever the Husband had before coverture either in Goods or Lands, is abſolutly his own, and the wife hath neither ſeiſin nor property therein; yet all that was the Wives, by inter-marriage is now made the Husbands, *& non habet uxor poteſtatem ſui ſed vir, & res licet ſit propria uxoris, vir tamen ejus cuſtos cum ſit caput mulieris.* But it is the Husbands, *diverſo modo.* For as for all the Lands and Tenements whereof ſhe hath any Eſtate in Fee-ſimple, Fee-tail, or for life, theſe he is to have during both their lives together. And ſome of them ſometimes after for his own life, by the courteſie of *Englandt.* And alſo all the right and Titles of Entry that ſhe hath into any Lands, are given to the Husband; ſo that he may enter or claim it as the woman might. Alſo all her Chattels reall ſhe hath in poſſeſſion, and in her own right, as wardſhips of Tenants in *Capite*, and Knights ſervice, eſtates by Statute-merchant, Statute-ſtaple, leaſes for years, and the like, he ſhall have the uſe and occupatio n of and power by act executed, to give, grant, or ſell, ſurrender or forfeit it during his life: And if he ſurvive his wife, he ſhall have them abſolutely and not conditionally only as he hath them before. Alſo all her Chattels perſonall, as Horſes, Sheep, Neat, Corn, Wool, Money, Plate, Jewels, even to her Chamber, Bracelets and Apparell more then needfull, which ſhe hath in her own right, property and poſſeſſion, are given, with the property thereof unto him by act of Law, by the intermarriage, ſo that he may ſell, keep, or bequeath it if he dye; and if he do not bequeath them, they ſhall goe to his Executors, whether he ſurvive his wife or no, and this is to be underſtood not only, of that ſhe hath at the time of the mariage, but that which ſhall fall to her alſo at any time after the marriage during the Coverture. Alſo all her Choſes and cauſes of Action for any matter before, or after the marriage are his to take, ſue for, or releaſe, when they be due at any time, during both their lives together; but if he doe not diſpoſe it, it will come to his wife again after his death: And therefore if a Legacie be given to a woman ſole, and ſhe take a Husband, untill her Husband releaſe or receive this, if ſhe die ſhe may deviſe or diſpoſe it; and if he dye, it will return to her, and ſhall not goe to his Executors, except it be received by his appointment, for then the thing in action is become in poſſeſſion. *Co. ſuper Litt. f.* 112. 300. 351. *Plow.* 191. 419. 21 *H.* 7. 29. 16 *Ed.* 4. 8. 7 *H.* 6. 1. 14 *H.* 4. 24. 39 *H.* 6. 27. *Co.* 10. 51. *Doct. & Stu. f.* 13. *Co.* 6. 36. *Dyer* 177. 251. *Plow.* 204. 260. 10 *H.* 6. 11. 11 *H.* 7. 19. *Perk. fol.* 148. *Huntley & Griffith, p.* 38 *Eliz. B. R. March.* 44. *pl.* 69. *ſee Chattels.*

And if ſhe have made Feoffment or condition that the Feoffee, ſhall pay her 100*l.* at a day, and before the day ſhe marry, how in this caſe the Husband ſhall have this money; or before the day he may releaſe the condition, and this will bind her. All her wardſhips of Socage Tenure, Heirs, and Tuitions, he ſhall have during the Coverture only. *Plow.* 204. *Dyer* 251.

But there is this difference between a property of perſonall goods, and a bare poſſeſſion only: For if perſonall goods be bayled to a Feme ſole, or if ſhe find them, or if they come to her hands, as Executrix to a Bayliff, and taketh a Husband, this bare poſſeſſion is not given to the Husband, although the action of *Detinue* muſt be brought againſt the Husband and the wife, 39 *Ed.* 3. 17. *Co ſuper Litt.* 351.

All the Goods and Chattels alſo the Wife hath in *auter droit*, as Executrix or Admini-

Adminiſtratrix, or as Gardian in Socage, *&c.* the Husband ſhall have the diſpoſing powerof, during the Coverture, ſo that during that time he may ſell or give them, *Plow.* 294. 192. *Dyer* 7. If any Chattels perſonall were given to the Wife, *dum ſola fuit*, and to a Stranger, and after ſhe mary, now the Husband alone, and the Stranger are Tenants in common of this Chattell, and the Husband ſhall have an abſolute property in the one half of them. *Plow. in Bracebridges* Caſe.

But none of her dignities are given to him; for though the Husband may be enriched; yet he cannot be ennobled by his Wife: and though a man may ennoble a Wife, yet a Wife cannot dignifie a Husband: But ſhe may loſe her own dignity by taking a Husband; As in the caſe of the Lady *Anne Powes* 4 *Marie* 1. *Quando mulier nobilis nupſerit ignobili, deſinet eſſe nobilis. Bro.* 5 *Ed.* 499.

What things the Husband ſhall have after the death of his Wife.

After the death of the wife, the Husband ſhall have not only all the Chattels perſonal of his Wife which he ſhall have, whether he ſurvive her or not, but alſo all the Chattels reall of his wife, which then he ſhall have abſolutely to himſelf as his own other Chattels reall: And if they were joyntly poſſeſſed of any Chattels reall, as where a wardſhip or leaſe for years is made to them two, after her death her Husband ſhall have the whole. *Co. ſuper Lit.* 351. 46. *Plow.* 191. 192. *Fitz. joinder in Actions* 20.

Sect. 5.

All Chattels reall being of a mixt nature (*viz*) partly in poſſeſſion, and partly in action, which happen during the Coverture he ſhall have, if he ſurvive his Wife, albeit he doth not reduce them into poſſeſſion during her life-time: As if the Husband be ſeiſed of a Rent Service, Charge, or Seck, in the right of his wife, & the Rent become due during the Coverture, and thewife dieth, he ſhall have the arrerages. So if he have an Advowſon in the right of his wife, and the Church become void during the Coverture, if he ſurvive her, he ſhall have the preſentation. *Co. ſuper Litt*, 551. *F. N. B.* 121. 122. 14 *H*, 4. 12; *Co. ſuper Litt.* 120.

All arrerages of Rent incurred and due to the wife before or after Marriage, the Husband ſhall have, if he ſurvive the wife. As if the Wife be endowed of a Rent, and ſhe take a Husband and dye, he ſhall have the Rent arrear during the Coverture, and may ſue for it by the Statute 32 *H.* 8. *c* 37. If he make a leaſe of his wives Land, rendring Rent, and ſhe dye, he ſhall have the Rent due in her life time. *Co.* 4 51. *& ſuper Litt.* 351. *F. N. B* 121. 9 *H.* 6. 52.

Alſo Caſes in action recorded by him, or him and his wife in her life time by Judgement, the Husband ſhall have alſo, and as Executor or Adminiſtrator to her he may have all that ſhe hath. *F. N. B.* 121. *Co. ſuper Litt.* 351.

If a Legacie be given to a woman ſole, and ſhe take a Husband, and after ſhe makes a Letter of Attorney to one to receive this money given by the Legacy, and then ſhe dyeth, in this caſe the Husband, and if he dye, his Executor or Adminiſtrator ſhall have this money, and may have an action of Accompt for it againſt him that received it: So if the Husband had made the Letter of Attorney: but before the thing in action be turned into poſſeſſion, the wife may deviſe, or give, or diſpoſe it to her Husband or any other, and he cannot have it but by her legacy, or by Adminiſtration from her; but now by the receipt of it, the property doth reſt in the Husband, and he, his Executor or Adminiſtrator ſhall have it. If the woman have a Bond, and ſhe take a Husband who doth make a letter of Attorney to another to receive the money, and ſhe dye, the Husband ſhall have it and accompt for it, *pro Popham. Ch. Juſt.* for the thing in action is become in poſſeſſion. *Huntly & Griffiths* Caſe *p.* 38. *Eliz. B. R.*

What not, but the Executor of the wife, or ſome other ſhall have it.

If a Feme ſole be poſſeſſed of a Chattel reall, and be thereof diſpoſſeſſed, and then taketh a Husband, and the wife dyeth, and the Husband ſurviveth, this right is not given to the Husband, but the Executor or Adminiſtrator of the wife ſhall have it: And ſo as Executor or Adminiſtrator, the Husband may have that that another may have by that meanes. *Co. ſuper Litt.* 351.

So if the Wife have but a poſſibility and no intereſt, and dye, the Executor, and not the Husband ſhall have this. *Idem.*

If ſhe had a wardſhip by reaſon of a tenure in Socage, and dye, her Husband ſhall not have this, but it ſhall go to ſome other; and if he dye before her, this ſhall ſurvive to her, and not go to his Executor, *Plow.* 293.

If

If the goods and Chattels ſhe hath in right of another; as Executrix or Adminiſtratrix after her death, her Executor or Adminiſtrator, not her Husband muſt have it. *Co. ſuper Litt.* 351. *Plow.* 294. 192.

If a woman ſole granteth a tearm to her own uſe, and then taketh a Husband and dyeth, the Executor or Adminiſtrator of the Wife, not the ſurviving Husband ſhall have this truſt. *Paſc.* 32 *Eliz. Withams Caſe, in Camold. Co. ſuper Litt.* 351. See a good Caſe for this. in *March. Rep. f.* 44. *Plow.* 69.

Chattels reall conſiſting meerly in action, as a Writ of right of Guard, *avatore maritagij*, or forfeiture of marriage, Relief whereunto the wife was entitled before the marriage, the Husband ſhall not have unleſſe he recover it, during the Coverture: So alſo Chattels Perſonals that be in action, as debts by obligation or contract, or otherwiſe, before or after marriage; for he that ſues for them after, muſt ſue as Executor or Adminiſtrator to the wife, and that the Husband may be if he will, for he may give her leave to make an Executor, and ſhe may make him her Executor, or if ſhe die inteſtate, he may ſue forth an Adminiſtration, which in right belongs to him. 32 *H.* 8. *chap.* 37.

If one give a Feme ſole a Legacy to be paid preſently or at a day to come, and ſhe marry, and dye before any releaſe or diſpoſall by her Husband, in this caſe, her Executor or Adminiſtrator, not her Husband, ſhall have it. *per Chief Juſtice Mich.* 17. *Jacobi. B. R. Eliz. Trin.* 38. *Eliz. Jacobi Regis, Huntleys caſe Accord.*

If I have the inheritance of Land, whereof there is a leaſe for years; and the Leſſee grant his Leaſe to my wife, and *I. S.* and after ſhe die, now I ſhall not have this terme, but *I. S.* for the terme was not drowned. But by a Feoffment or new Leaſe, I might in her life time have given away her intereſt. *Plow.* 418.

If two Femes ſole be Join-tenants of a terme, and I marry one of them, and ſhe die, now th'other Join-tenant, and not ſhall have the whole. But if it had been a perſonal chattell, *Contra*, for the Join-tenant hath the elder title. *Plow.* 418.

So if a terme be granted to my wife, and a ſtranger, or were granted to my wife, while ſhe was ſole, and a ſtranger, and ſhe die; In this caſe I ſhall not have her moytie, but it doth ſurvive and goe to the ſtranger. *Plow.* 418.

If one be bound to a Feme ſole for money, in an obligation, and the day of payment happen during the Coverture, and the Husband do not releaſe it, or ſue for, and recover it, in his wifes life time, as he ſhould, in his owne and his wifes name, or if the day of payment happen after the death of the wife, he ſhall not have it, but the Executor of his wife, which ſhee may make him by his agreement, or the Adminiſtrator of his wife, which he may be, if he will. *F. N. B.* 121. 7 *H.* 6. 2. 49. *Ed.* 3. 23. *Co.* 451. 39 *H.* 6. 27.

The wife ſhall have again to her ſelfe after the death of her Husband, all the Chattells reall, that her Husband had by her, and did not by act executed during the Coverture, diſpoſe or alter, (And what ſhall be an alteration of ſuch chattel, ſee in the next diviſion) Alſo all ſuch chattels reall, whereof they were joyntly poſſeſſed; As if any wardſhip or leaſe for years were granted to them two, now the wife ſhall have the whole, unleſſe the Husband have by act executed, diſpoſed it. *Co. ſuper Litt.* 46. 351. *Co.* 10. 51. *Plow.* 191. *Fitz Joinder in Action.* 20.

If a man be poſſeſt of a terme of Forty years in the right of his wife, and make a leaſe for twenty years reſerving thereupon a Rent, and then dye, though the Executors of the Husband ſhall have the rent, yet the wife ſhall have the reſidue of the terme after her Husbands death, for a diſpoſition of part is not a diſpoſition of the whole; but if there were a clauſe of Reentry for not payment, ſhe may not Reenter by this. So if a leaſe be made to them Two, for years during the Coverture, and he do not diſpoſe it in his life time by act executed, the wife ſhall have it all. And regularly that which her Executor or Adminiſtrator ſhall have after her death (*For which, ſee the laſt diviſion*) ſhee ſhall have after her Husbands death; as all the goods and Chattels ſhee hath in *Auter Droit*, not diſpoſed by her Husband. All chattels reall conſiſting meerly in action. All Chattels perſonall alſo conſiſting meerly in action, not recovered by him in his life time. *Co. ſuper Litt.* 46. 351. *Plow.* 294.

Alſo ſhe ſhall have all chattels reall, that are of a mixt nature, *viz.* partly in Poſ. *Sect.* 6.

ſeſſion,

ſeſſion, and partly in action which happen during the Coverture: As if the Husband be ſeiſed of a Rent ſervice, Charge, or Seck in the right of his wife, and the Rent became due, during the Coverture: ſhe ſhall have it and not his Executors. So if he be ſeiſed of an Advowſon in right of his Wife, and the Church become void, during the Coverture, and he dye, ſhe ſhall have it. 14. *H.* 4. 12. *Co. ſuper Litt.* 351.

If an eſtray happen within the manor of the Wife, if the Husband dye before ſeiſure, the wife and not the Executors of the Husband, ſhall have it, for the property was not veſted in the wife till ſeiſure 10 *H.* 6. 11. 43. *Ed.* 3. 8.

If one be bound in an Obligation, or promiſe, or Statute, to a Feme ſole, who after takes a Husband, or to the Wife or to the Husband and wife during the Coverture, and the Husband dye before he recover or releaſe it; the Wife, not his Executors ſhall have it. *F. N. B.* 121. 7 *H.* 6. 2. 46. *Ed.* 3. 12.

If a Rent be granted to a man and woman ſole for twenty one years, if the Grantor ſhall live ſo long, and after they inter-mary, and then Arrearages incurr, and then the Husband dyeth, and then more Rent is behind: now the wife and not the Executor of her Husband, ſhall have the Arrearages before and after her Husbands death. *Curia. B. R. Burgens* caſe. *Hill.* 22. *Iac.* 33. *H.* 6. 20, 39. *Ed.* 3. 19. *Hill.* 7. *Eliz. B. R.*

If a Husband be ſeiſed of Rent in the right of his wife, and the Rent incurr, and the Husband dyeth, the wife and not the Executors of the Husband ſhall have the Arrears, *Per* 3. *Inſt. B. R.* 22. *Iac. Hill,* 9. *H.* 6. 43. 29. *Ed.* 3. 40.

If a Leaſe be made to a Husband and Wife, for terme of their lives, the remainder to the Executors of the Survivor of them, and the Husband dye, the wife and her Executors ſhall have it; And this the Husband could not grant away from her, becauſe it is but a poſſibility and no intereſt. *Hill.* 7. *Eliz. B. R. Co. ſuper Litt.* 46.

If they two get a Judgement againſt a man for damages, and he dye, the wife ſhall have all the damages. 48. *Ed.* 3. 12.

If an obligation be made to them two, during the Coverture, and he dye, ſhe ſhall have it, and not his Executors. 3 *H.* 6. 37.

If a Feme ſole ſow her Land, and after marry, and he dye before ſeverance, the Wife, and not the Executor of the Husband ſhall have it. *Bro. Emblements.* 26.

If Husband and wife have a mannor to them, and the Heirs of the Husband, and a Tenant by Knights ſervice dyes, his Heire within age, and after the Husband dyes. the wife and not the Executors of the Husband ſhall have the wardſhip. So of a preſentment to a Church, 1. *Mar.*

Paraphernalia what. This word *Parapherna* is uſed in our Law: but in the civill Law, the thing is ſaid to be *Paraphernalia*, which by the Civilians is ſaid to be ſomething which the wife hath to her ſelfe beſides her Dowry which her Husband gave her, the which ſhe muſt have and not the Executors of the Husband. And of which the Wife may make a Will without the aſſent of her Husband, as being a thing in the free diſpoſition of the wife. And this both by the Civill and the Common Law is all the neceſſary furniture and apparell of a womans body provided her by her Husband which may extend to many Garments of the ſame kinde, and is not to be reſtrained to one garment only, which is, that is ſufficient to cover the body, and yet not to be extended to that which is above her degree, and therefore Jewells and Chains of Gold and Silver ſhall not be eſteemed *Parapherna* for a Husband-mans wife: but theſe may be *Parapherna* for the Wife of a Nobleman. But what ſhall be allowed for *Parapherna* is to be decided by the Judges, and they do uſe to give a greater allowance where are no debts of the Husband to pay then otherwiſe. And *Omnia hæc bona mulieris*, are ſaid to be *Privilegiata & de paraphernis non debet maritus intromittere in vita uxoris*, neither is he to deviſe them at his death. And as touching theſe, it is out of queſtion; that if the Husband dye, the Wife, and not the Executor nor Adminiſtrator of the Husband ſhall have them. And that with the conſent of her Husband ſhe may make a Teſtament of them and deviſe them. But not otherwiſe, as it ſeems by our Law, becauſe the property and poſſeſſion is in him. And yet by the Civil Law ſhe may deviſe them, and make an Executor of them without the Husbands conſent. 18. *Ed.* 4. 11. 12, *H.* 7. 23. 33. *H.* 6. 31. *M.* 27. 28. *Scaccar and the Lord Treaſurer and*

other

other five Executors of Vicount Binden, againſt Vicounteſſe Binden, Fitz. Trec. 24. *F. Executor.* 19. 37. *H.* 8. 28. *Fitz: Adminiſt.* 7, *Br. Adminiſt.* 31. 33. *H.* 6. 31. *Br: Teſtament* 13. 18. *E.* 4. 11: 12, *H.*7 23, 24.

All the chattells perſonall the Wife had in her own right; at the time of the taking her Husband, ſhall not after the death of the husband go to the Wife againe, but ſhall go to the Executor or Adminiſtrator of the Husband, as his other goods and chattels. *Co. ſuper Litt.* 351.

12: What not but the Executor of the Husband ſhal have them.

If the Husband and wife be ejected of a terme, which the Husband hath in the right of his wife, and the Husband bring an *Ejectione firme* in his owne name (as he may) and recover it, now by this the Terme is altered, and is become the Husbands own in his own right, and after his death ſhall go to the Executor of the Husband and not to the wife. *Plow.* 415. 37. *aſſ. Plow.* 11, *Co. ſuper. Litt. fo.* 46. 6.

If the Husband grant the whole terme upon condition that the Grantee ſhall pay a ſumm of money to his Executors and the Husband dye, and the condition is broken and the Executor enter, now this is a diſpoſition of the terme, and the Executor ſhall have it. *Co. ſuper Litt. f.* 46.

Sect. 9.

The Husband during the Coverture is liable and ſubject to all Suits for any cauſes or wrongs by the wife before the marriage or after, during the Coverture, as Debts, Covenants, ſlanders, treſpaſſes, and the like. So as the Husband and the wife be both joyned in the ſuit, and the ſuit be begun, and judgement had in it during the Coverture. For if either the wife be ſued alone, or they be both ſued, and one of them dye, before Judgement obtained, the ſuit faileth. And therefore it is that upon an Indictment againſt the wife alone, for a treſpaſſe, Ryot, or the like, if ſhe be to pay fine, forfeiture, or be impriſoned, the Husband ſhall not be charged with it, unleſſe it be ſo appointed by ſpeciall words in a Statute, but her body muſt ſuffer, and the Fine or forfeiture ſhall be levied of her, if ſhe ſurvive her Husband, for a Husband ſhall never be charged, for the act or default of his wife. but when he is made party to the action and Judgement is given againſt him and his wife; but if the ſuit be by information upon a Penal Law againſt Husband and wife, there he may be charged, *Co.* 11. 61. *F. N. B.* 83. 121. *Kelw.* 81. *Co.* 8. 148. *old Liured' Entries f.* 6. *Co.* 11, 61. 9. 72.

13. Where the Husband ſhall be charged for the debt or duty of the wife intreſpas, or other thing done by his wife, where not.

But regularly he ſhall not be charged with any contract made by his wife during the Coverture, (yet *vide Aſcuns* exceptions, *& plus infra.*)

During the Coverture.

If the Husband have a Leaſe in the right of his wife, Rendring rent, and the Rent behind, during the Coverture, and ſhe dye, in this caſe, he may be ſued for this rent, after her death; alſo as Executor to his wife, if he ſuffer her to make a Will, and make him Executor, and he prove it; here he may be charged, where otherwiſe he would not be. *Kelw.* 61. 10 *H.* 6. 11. *Bro. conſultation* 5.

After the death of the wife.

If ſhe (being ſole) had held land by wrong, and after marry, and the husband continue the occupation, now for this continuance of the wrong, he may be charged, after her death, and both of them together in her life. might have been charged for her occupation before the marriage. *Plow;* 192. *F. N. B.* 120. *Kelw.* 60.

If the wife hold Land for which by cuſtom a Hariot (*i*) the beſt goods of the tenant ought to be paid, and ſhe dye, the beſt goods of the husband ſhall not anſwer it, without there be a ſpeciall cuſtom for it. *Curia M.* 8. *Gar. B. R. Chanon et Kings caſe.*

If the Husband give the wife power to contract for him, and ſhe make a contract and dye, the Husband may be charged for this contract after her death, and without ſuch power, he may be charged for her neceſſary apparrell, or for the goods ſhee bought that came to the uſe of the Husband, and he agreed to it afterwards: *F. N. B.* 120. *G. Fitz.* 41. 160. 163.

14 Where and in what caſes the act or neglect of the husband alone during the coverture ſhall or ſhall not bind the wife and others, & the power of the Husband, If alone.

But the Husband ſhall not be ſued for any debt ſhe did owe before the marriage after her death, unleſſe judgement were had in her life time, and after marriage ſhe could not contract but by his appointment. *Fitz.* 119. *Ritch. fol.* 187.

The Husband alone may make an eſtate of any of the Lands he hath, in the right of his wife, during both their lives without her conſent and agreement. *Experientia.*

If an eſtate in Fee-ſimple, Fee-taile, or for terme of life, be made to a Feme-Covert or to the husband and wife, the husband alone may diſagree to it, and avoid it, for both. *Litt. Sect,* 671. 1 *H.* 7. 10. *Co* 8. 72 *Dier.* 51. 5 *H.* 7. 32.

If lands be given to them two, and the heires of their two bodies, the husband alone may levy a Fine and bar their iſſues, and her alſo, if ſhe do not make her claime or entry, within five years after the death of her husband. 23 *H.*8. 28.

If a woman have an eſtate for her life; as tenant in Dower or otherwiſe, and her husband alone, or he and his wife do by Deed, ſurrender it to him, in reverſion, this is good during the Coverture, but if ſhe ſurvive, or there be a divorce, *Cauſa præcontractus*, the wife may enter and defeat the ſurrender, though he to whom it was made be dead, and his heire be in by deſcent; But if the husband and wife ſurrender by fine, this is good and will binde the wife. *Perk. ſo.* 117.

And generally all things done by the husband voluntarily, and out of Court, which he and his Wife are compellable to do, ſhall be deemed both their acts, and good; As if he being ſeiſed in his wives, or joyntly with his Wife, aſſign dower to another woman, grant a rent for equality of partition, or make an Attornment, this ſhall bind her, though it be done by him alone

If a feme ſole make a Feoffment in fee, or condition to pay ten pound to the Wife at *Eaſter* next, and before the day ſhe take a husband, the husband may releaſe this condition, and bar her for ever. *Perk. ſect.* 764.

A man may make any waſte, or ſpoyl, pull down the houſes, or cut down the timber of all thoſe Lands that are his Wives Inheritance that he holdeth in her right, and her heirs have no remedy, for the husband hath the fee-ſimple of the Land in her right. 32 *Ed.* 3. 26.

If a Feoffment or other eſtate be made to a Feme ſole on condition, and after ſhe take a husband who doth not perform, or break the condition, and ſo forfeit the eſtate, the wife is barred and bound by this: So likewiſe upon a condition in law, as if the husband doth commit waſt in his wives land (See *Infants*) 20. *H.* 6. 28 *Co.* 8. 48.

If a feme ſole have a Right or Title of Entry into lands, and after the ſame accrued, ſhe take a husband, and he ſuffer a dying ſeyſed, this doth bar her of her entry. *Litt. Sect.* 404.

If a man have a right or title of entry into Lands, and after marry a wife, and do not enter during the Spouſals, that the husband may have an entry in fait or in Law; now by this neglect of the husband, the wife is barred of her dower. *Perk. Sect.* 366. 367. 370. *Co.* 246. *ſuper Litt.*

If a leaſe be made of two acres for life, the remainder of one acre to a feme ſole, and ſhe take a husband, and the tenant for life dye, and the husband doth make election of one acre, now this election ſhall bar and bind her, and ſhe ſhall not chooſe again. *Perk. Sect.* 79.

If they two levy a fine of her Land, and the husband alone declare and limit the uſes, this is good, and will bind the wife, if her diſagreement thereunto be not proved. *Co.* 2. 157.

Sect. 8. If a Co-partner be marryed, and for equality of partition the husband and wife grant a Rent to the others out of the part of the feme Covert, this being equall, ſhall bind the feme Covert for ever, and neither ſhe nor her heyrs ſhall avoid it. 29. *Aſſ.* 23. 17 *Ed.* 3 10.

If he be attainted of felony, he doth hereby forfeit the profits of her free-hold land during the Coverture, *Co. ſuper Litt.* 351.

If the husband and wife be Joynt-tenants, and he be in debt to the King, the King will have this Land in execution. (See more in *Dower & Diſcontinuance*) *Plow.* 321.

If he give or grant away any of her Chattels reall, by act executed, this will bind and bar the wife: And therefore if a man be poſſeſt of a term in the right of his wife, if he in the Reverſion confirm the State of the husband and his Wife, to have and to hold the land for term of their two lives, by this confirmation her leaſe for years is gone and drowned. *Co. ut ſupra Plow.* 199. *Litt.* 526. *Co* 9. 129. 10. 47. *D.* 264.

If the wife have any future intereſt, or intereſt *termini*, the husband alone during the coverture may by Releaſe bar her of it. *Co.* 10. 47.

If ſhe have any goods or chattels as Executrix, and the husband ſell and diſpoſe it by act executed; this will bar and bind her: Alſo he may during the coverture releaſe any debt, confeſſe any action, or do any thing as Executor may do, and it ſhal bind her. *Bro. grants* 157. *Kelw.* 122. 21. *H.* 7. 24. *Co.* 5. 27. *Kelw.* 163. If

If an Obligation be made to her during the Coverture, the Husband by his diſagreement may avoid it. 48 *Ed* 3. 12. 7 *H.* 6, 1.

If a Statute or Obligation be made to them two, or to her alone, during the Coverture, and the husband alone make a defeaſance, or releaſe it, this will barr the wife. *Plow.* 260. *b. Co. ſuper Litt.* 351.

If ſhe have cauſe of action for debt, duty, battery, ſlander; treſpaſſe, or the like, the husband alone may releaſe it during the Coverture, and bar his wife. *Kelw.* 92. 20 *H.*7. 5.

If the Husband be outlawed or attainted, hereby the chattells reall of the Wife are forfeyted, for this is a gift in law. *Plow.* 260. *b. Co. ſuper Litt.* 351.

Upon an Execution againſt the Husband for his debt, the Sheriff may take and ſell a tearm the husband hath in right of his Wife during her life. 26.27 *Eliz. Amner & Loddington Adjudge en amtalez Court. Co ſuper Litt. f.* 351.

The husband alone may make an Attorney for him and his Wife, or caſt a protection, and ſhe cannot diſavow or avoid it. 33 *H.* 6. 43. 35. *H.* 6. 3.

If the husband do attorn voluntarily in caſe where by the Law he might have been compelld to it, this will bind the Wife. *Co* 9. 85.

If a Feme ſole, an Executrix take a husband, and he put himſelf in arbitrement for the debt of the Teſtator, and an award is made, and he die, now the wife cannot avoid it. 20 *H.*7. 29.

If the husband forfeit Iſſues and dye, thoſe Iſſues ſhall be levied of the Land of the Wife. *Doct. & Stu.* 38 12. *H.*7. *t.*

If the husband claim fee in a *Quid juris clamat*, or diſclaim an Avowry, ſo that the Lord recover, the Wife is without remedy. *Per Martin.* 9 *H.* 6. 52.

If a leaſe be made to husband and wife for life, and the husband commit waſte, and dye, now if ſhe continue the poſſeſſion, ſhe ſhall be ſubject to an action for this; but *contra*, if ſhe wave the poſſeſſion. 21 *H.* 6. 24.

If the man that is Copy-holder in the right of his Wife do alien without licence, or otherwiſe commit a forfeiture, the eſtate is forfeit. So if the Wife be tenant for life, and her husband make a Feoffment. *Per. Iuſt. Dodd. Trin.* 21 *Jac.*

The husband alone cannot by Fine, Recovery, or otherwiſe diſpoſe his wives land for longer time then for their two lives together, unleſſe it be in ſome ſpeciall caſes, as upon the Statute of 32 *H.*8. (which ſee in Leaſes) or the like. Where, and in what caſe not

And if he doe alien or grant it for longer time, ſhe may be relieved by a *Cui in vita* (which ſee *infra*) or ſhe or her heir may enter by the Stat. 32 *H.* 8. *cap.* 28. And although the money given for the Land that is ſold be paid to her, yet this doth not help the matter at all. 17 *Ed.* 4. 14. See diſcontinuance.

If a Joynt eſtate be made in Fee ſimple, or for life to the husband and wife, the husband alone during his wives life, cannot by Judgment ſurrender, or otherwiſe ſever this joynture, or diſpoſe any part of this Land longer then for their joint lives; but if it had been made before the marriage, *Contra*, 19 *H.* 6. 45. *Dier.* 9.

If the husband doe commit waſte in the freehold of his wife, and die before the writ brought; now neither the wife nor the land ſhall be hurt by it, but after his death they be diſcharged. 2 *H.*4. 3. 29 *Aſſiſ.* 47. *Doct & Stu. f* 29. *Sect* 9.

If the husband and wife in the right of the wife have any right to enter into lands acrued to them during the Coverture, and the husband ſuffer a deſcent, and dying ſeiſed, this ſhall not hurt the wife; but after her husbands death ſhee may enter. *Lit. Sect.* 433.

If the husband levie a Fine, or make a feoffment of the Land he hath in the right of his wife, this will not prejudice her after his death, if ſhe avoid it in time; but if it be by fine, ſhe muſt enter or claim within five years after his death, or ſhe may be barred, 39 *Ed.* 3. 29. 29. *Aſſ: p:* 43. *Jac: Fines, Co:* 8. 72.

If the husband be ſeiſed of a Reverſion in the right of his wife, and he grant it away, and the tenant attorn, yet this will not bar the wife. 19 *H.*6. 4.

If a Leaſe be made to husband and wife of land, which are chargeable with damages, or more Rent then it is worth; if ſhe after his death refuſe the occupation

of the land, it ſeems ſhe ſhall not be charged with damages of Rent. *Doct. & Stu. f.* 120.

If the husband and wife levy a fine of the land of the wife, and he declare uſes alone, and ſhe diſagree to it, and make it appear, by declaring other uſes, or the like: now in this caſe the Declaration of the husband, will not bar nor bind the wife, *Co.* 2. 57.

If the husband diſcontinue his wives land, and goe beyond Sea, and the diſcontinuee letteth it to the wife for life, and giveth her livery, now hereby ſhe is remitted, and the husband by his diſagreement afterward cannot avoid it. *Lit. Sect.* 677.

If he be attainted of felony, this doth not forfeit any freehold eſtate of his wives, but the profits only during the Coverture, and no longer, for the ſtate remaineth ſtill in the wife. *Co. ſuper Litt.* 351.

If a leaſe be made to a husband and wife for life, and the husband alien the land in fee, or in tayle, now the Leſſor may enter for a forfeiture; but if the wife ſurvive, ſhe may recover it by a *Cui in vita.* 11. *Aſſ. p.* 11. 43. *Aſſ. p.* 11. *Bro. Cui in vita.* 9, 10.

If he that is an Accomptant to the King by reaſon of the receipt of the Kings money purchaſe Land after to him and his wife in fee, in tayl, or for their lives, and after the Husband die, in this caſe it ſeems the wife ſhall not anſwer for this debt with this Land. But if he were debtor to the King before the purchaſe, *Contra. F N B.* 150. 217 *Dier.* 225. *Crompt. Jur.* 102 *b.* 110. *b.* 111.

If a woman have Land by deſcent or purchaſe, ſoly, or with another, and her Husband alien it to a ſtranger, this bindeth her and her Husband whiles he lives, and by the Common-Law ſhe might not have entred after his death, but muſt have had her *Cui in vita.* But now by 32 *H.* 8: It was provided that no fine, or other act of the Husband only, of any land that is the Inheritance or free-hold of the wife, ſhall be any diſcontinuance or hurt to the wife or her heires, *&c.* after her Husbands death, but that ſhe or they may enter notwithſtanding, if ſhee will. *Stat.* 32 *H.* 8. 28 *Co.* 8. 72.

If the Husband by his laſt will deviſe a term he hath in the right of his wife, this will not hurt her, for this deviſe is void. *Co. ſuper Litt.* 351 *Plow.* 418.

If the Husband grant a rent out of Land he hath an eſtate of for years in her right, and after dye, this will not hurt her, for this will not bind the wife. *Dier.* 6. *Co. idem* 7 *H.* 6. *f.* 2 *Plow.* 418.

If a leaſe be made to Husband and wife for years, the remainder to the ſurvivor of them for one and twenty years, the husband alone cannot diſpoſe of this remainder to bar his wife. So if a leaſe were made to them for lives, with ſuch a Remainder for years, the husband cannot grant it away. *Co.* 10 51.

If an Uſurpation be ſuffered by the Husband in the Advowſon that the wife hath by deſcent, this ſhall not prejudice the wife but ſhe may after her husbands death have a *Quare Impedit*, or *Aſſiſe*, or *darrein preſentment* for the preſentment: But if ſhe have it by purchaſe, *contrà*, for there plenarty is a bar to her if it be ſix months; the Husband cannot touch by Eſſoyn, if the wife by covin of the Plaintif ſhall appear. *Co.* 6. 50. *a b:*

If a woman Leſſee for life take a Husband, and being impleaded, they pray in ayd of a ſtranger, and the husband die, now this ſhall not hurt the wife, for he in reverſion cannot enter: 15 *Ed.* 4. 29.

If the husband and wife demiſe his wives Land by Indenture according to the ſtatute of 32 *H.* 8. rendring 20*s.* rent, and after the Husband releaſe all his right except 12 *d* *&c.* Or grant that the leſſee ſhall hold it diſpuniſhable of waſte, and then die, now ſhe is not bound by this. And though ſhe accept the 12 *d.* yet ſhe may have the reſt, or bring an action of waſte. See more, Remitter, Acceptance, warranty, Leaſe, Fine. *Dier.* 504.

Sect. 10. 15. Where and in what caſe the act of the wife alone during the coverture, ſhall bind, where not, and the power of a feme Covert.

If a man deviſe that his Executor ſhall ſell his Land and make a feme Covert his Executor, in this caſe ſhe may ſell this land without her Husband, or ſhe and her Husband may ſell it together. So if one deviſe Land to a woman to diſpoſe thereof at her will and pleaſure, and to give it to one of her Children, ſhe alone may make a feoffment to any of her Children during Coverture, for ſhe is but an Inſtrument.

Inſtrument. *See Kelw. fol.* 10. *Trin.* 2 *Carol. Uply & Daniels* caſe, *B. R. curia.*

Cey que uſe had made his Wife his Executrix, and deviſed that ſhe ſhould ſell his Lands, and the woman took a ſecond Husband, and then ſold the Land to him, and this was reſolved to be good: So if a Feoffment be made to a Feme Covert on condition that ſhe ſhall reinfeoff, and ſhe alone reinfeoff, this is good, and neither the Husband in his life, nor the wife after his death may avoid it. *Plow.* 4. 14. 34 *Ed.* 3. *Cui in vita.* 19.

If Lands are given to a woman on condition to ſell it, and diſtribute the money for the Feoffees ſoule, and ſhe take Husband, and they two ſell and do diſtribute, now this is good, and there is no remedy for the woman after his death in Law nor Conſcience. 10 *H.* 7. 20 *Womans Lawyer, fol* 124.

If ſhe alone doth levy a Fine of her own Land, it will be good and bar her ſelf and all others, if her Husband do not avoid it in his life time. *Co.* 10. 43. 32 *H.* 6. 31. *Crompt Jur.* 102.

If ſhe be attainted of Felony before any iſſue had by her Husband, the Lord by Eſcheat may enter preſently, and put out the Husband, but after her Husband hath Iſſue by her, *Contra.* 4 *Aſſ. p.* 4. 4 *Edw.* 3. *Fitz. Aſſiz.* 166 *Co ſuper Litt.* 165.

If ſhe be an Executrix or Adminiſtratrix, ſhe alone may receive Debts due to, or pay Debts or Legacies due from the Teſtator, ſo it be done duly, and not in prejudice of her husband, and the reſidue ſhe may give for Gods ſake, maugre the teeth *ſa barbu*; but if ſhe deliver any goods before Debts payd, her husband may have an action of Treſpaſſe againſt the taker. But *Quære* for Legacies, for *M.* 19 *Jac. Co. B. inter Wats & Goldsborrow*, It was held that a *Feme Covert* cannot deliver or aſſent to a Legacy without her husband. *Co.* 5: 27, 2. *H.* 7. 15. 18. *H.* 6. *Perk f.* 2.

A Feme Covert may by the Licence precedent, or agreement ſubſequent of her husband make a will, and make him Executor alſo. if ſhe will. And by this meanes the debt due to her, and damages for goods taken away, or other wrongs done, *Dum ſola fuit*, may be recovered by him: Alſo ſhe may make either a ſtranger, or her husband, her Executor, as to all ſuch duties as were due to her before marriage, which were due to her in Action and not in poſſeſſion; As if when ſhe were ſole, ſhe had made a Leaſe for her life rendring Rent, and the Rent is in areare, and ſhe marrieth, or ſhe being Executrix and had many debts owing her or otherwiſe. And if ſhe make a will without his leave, and make *I S*, her Executor, and her husband do by word agree to it afterwards, or after *I, S.* have proved the will, do deliver him the goods, ſhe deviſed, this makes it a good will, *Bro. Teſtament* 10. 12. *H.* 7, 22. *Womans Lawyer f.* 124. *Perk, fol.* 97.

A wife alone may contract for her own neceſſary wearing Apparell, and the husband muſt performe it, unleſs it be in caſe where he have before forbidden the ſeller to deale with her, or let her have any: Alſo if the wife buy unneceſſary Apparell, and the husband do after agree to it, this will bind him. 11 *H.* 6 38. *Dyer* 234. *Trin.* 14 *Ja. Banco Sir William Gards* caſe.

If ſhe alone buy any thing that comes to the uſe of the husband, though ſhe had no ſpeciall authority for it before, if the Husband after he do heare of it, do agree to it, this will bind him. And ſo it ſeems of any thing elſe, for ſhe may give, ſell or charge any of her husbands goods or chattells by his conſent; and if ſhe have done it without, yet if he do afterwards agree to it, this makes the contract good, whether it be to his advantage or not, but his conſent will not make a Feoffment made by her of her own Land good. *Old N. B.* 62. *Dyer.* 234. *Fitz. Deb.* 120. 163. 11 *H.* 6. *f.* 38 27 *H.* 8. 24. If the wife doe uſe to ſell the husbands goods, and he doth allow of it, and affirme it her ſale will be good, eſpecially if it be ſuch things as are fit for her to ſell, as Butter, Cheeſe, Eggs or Calfes, & ſhe in ſuch caſe may give licenſe to the buyer to fetch the Calf out of the leaſe, and this licence may be good, *Gloc. Aſſiſes* 1654. A Feme Covert may be a *Diſſeiſereſs* without aſſent of her husband, and he ſhall be charged with damages in an Aſſiſe. Some hold that ſhe alone may ſue in the ſpirituall Court with defamation, and that the husband cannot releaſe it, nor that any prohibition lyeth againſt her. *Sarah Edwards* caſe. 7. *Jac. B. R.* *Contra.*

A Feme Covert may take an *Aſſumption* from any man, for her husband, ſhe may take an Obligation or Feoffment in her own name, and it will be good, until he diſagree to it. If the husband and the wife wage their law, &c. and have day given, and the wife do not appear at the day, he ſhall be condemned.

A Feme Covert alone can do nothing during the Coverture, with any her lands, goods or chattels, ſhe hath in her own right without her husband, for that ſhe is *Sub poteſtate viri et omnia quæ ſunt vxoris, ſunt ipſius viri, & res licet ſit propria uxoris, vir tamen ejus cuſtos cum ſit caput mulieris, & non habet Vxor poteſtatem ſui, ſed vir*; Therefore all Feoffments, Deed, Gifts, and Grants, by her alone, are void, although ſhe ſay in the Deed ſhe is ſole, and not married, and although they be executed by livery of ſeyſin, or attornment, And although the Husband know of it. *Benet lib. 2 cap. 15. Co. ſuper Litt.* 112. 14 *H.* 4 29. *per chap.* 41.

A Deviſe by her of her Land by Will is void. If a Feoffment be made to her, ſhe ſhall take nothing untill he agree to it, and a bare *Verball* agreement of the Husband will avoid it. And if the husband be vagrant, have not been in the Country a great while, and ſhe know not whether he be dead or alive, and ſhe Reckoning that ſhe is ſole, grant a rent charge out of her Land, yet this is void, and if the Grantee enter and diſtraine for the Rent, the Husband may have an action of Treſpaſs againſt him, *Dyer* 554. & 34. *H.* 8. *cap.* 5. 1 *H.* 7. 16. *Perk. ſo.* 2.

She cannot give or ſell his goods or chattells by contract or bargaine without his authority generall or ſpeciall precedent. And if ſhe do, it is void, neither can ſhe give them by Will, without his agreement precedent or ſubſequent. *Dyer* 234.

If ſhe enter into any Bond, Statute, or Recognizance alone without her husband, they are void and will not binde him, ſhe alone cannot releaſe any debt due to her, as Executor or otherwiſe. *Co.* 10. 43. *Kelw.* 10. 16. *H.* 7. 5. 1 *H.* 3. 12. 1 *H.* 7. 15. *Co.* 5. 27. *Kelw.* 12, 21.

If ſhe buy or make any contract for goods, and to pay mony, without his authority, this will not binde him, albeit the things bought do come to the uſe of his houſe, unleſs he doe afterwards agree to it. *Dyer* 234. 21 *H.* 7. 40. 11 *H.* 6, 38. *F. N. B.* 62.

If ſhe contract for apparrel, more then is needfull, and that is ſuperfluous, the husband ſhall not be charged with it, nor bound by it. 11 *H.* 6. 38.

If mony be paid to me upon Bill, or Bond, or Rent on a leaſe, and it be paid to my wife, and ſhe accept it, this will not prejudice me if I after diſagree to it. But if I once agree, the payment is good. And untill I do diſagree, the Law doth conclude, I do agree and allow of it, and although it be a Rent that was hers before the marriage, yet it is all one. *Adjudge Sir Paul Tracy's* caſe *in* 19. *Jaco. B. R.*

She cannot ſue, nor be ſued, without him, nor plead any other Plea then he doth in a ſuit, unleſs it be in ſome ſpeciall caſe where he is dead in Law. 33. *H.* 6. 31. 2 *H.* 7. 15. *cui in vita.* 3. 1. *H.* 4.

She cannot be Executor without her husbands agreement, nor being ſo made, do any Act that might be a *devaſtavit* of the goods without him. *Co.* 5. 27. 33 *H.* 6. 43.

She ſhall never be receaved to diſavow the ſuit of the husband and her ſelf. 39. *Aſſ. See Infant, Abilitie.*

Sect. 12. Where and what acts they both may do during this Coverture, and the power of the husband and wife together, and where not.

The husband and wife may joyn together, and by Fine or common Recovery (where ſhe is excluded) make a good aſſurance of any Land ſhe hath any free-hold Eſtate in, and barr her of her Title and right of Dower or Jointure into her preſent husbands Land, and ſo by a recovery ſuffered by husband and wife, in Lands, ſhe may paſs her Land. But they cannot do it by Deed indented (no though after it be inrolled) Feoffment, nor the like, unleſs it be by ſpeciall cuſtome. And where ſhe doth joyn with him to levie a fine or ſuffer a recovery; ſhe is to be examined by him that taketh the Conuſance of the fine or the Recovery, *Stat.* 18. *Ed* 1. But if they be both within age at the time of the levying of the Fine, they may at their full age avoid it by Writ of Error. *Worſeys* Caſe, *B. R.* 29. *Eliz. Doct. & ſtu. fo.* 175. *Co.* 10. 43. *Kel.* 10. *Br.* 101. *Plow.* 515. *Stat.* 34. *H* 8. *cap.* 22. *Crompt. Jur.* 100. *b.* If a partition or exchange be made by Deed of her Land, between the Husband and wife, and another, and ſhe agree to it after her husbands death, this is good and will bind her. 20. *H.* 7. 8. *Co. ſuper Litt. fo.* 171.

The

The husband and wife together, may make a Leaſe of the wifes Land, rendring a rent and if ſhe after his death accept the Rent, by this the Leaſe is affirmed, and the wife cannot avoid it (*See Acceptance*)

They may by themſelves or by Attorney make a Leaſe of her Land to try a title, and ſuch a Leaſe is good without queſtion. *per Juſt. Jones Summer Aſſizes at Glam. 9 Car.*

If they two be ſeiſed of any eſtate of Inheritance in Fee-ſimpl or Fee-taile, Jointly before the Coverture or after, or if the Husband be ſeiſed of any ſuch eſtate in the right of his wife, they two may make Leaſes for three lives or twenty one yeares to binde their iſſues, or heirs by the 32 *H.* 8 *cap.* 8. and this may be without Fine or recovery by a Deed in the Country (See Leaſes) *Co.* 506. 6. 37. *Coſuper. Litt. f.* 44. If the Husband have a Coppy-hold eſtate in fee, or for life within a mannor in the right of his Wife, they two may make a good ſurrender of it, and ſo ſell it. But it ſeems in the caſe the wife muſt be Excluded in the Court there before her ſurrender be taken. *Co.* 4. 23. 6 *Dier* 344 *Raynolds caſe M.* 7. *Jac. B. R.*

She may with his conſent deviſe her goods, by his authority, make contracts, *vide ſupra Dier.* 334 *Co.* 632. 20 *H.* 6. 23. 21 *H.* 7. 40.

Whatſoever act ſhe being ſole might have avoided by her Infancy, ſhe and her Husband both may avoid by entrie or action after marriage, if they take the time. *Litt. Sect.*

But though her husband joyn with her, they cannot grant that which is not grantable. As if the wife have the wardſhip of an Infant and of his Lands, by reaſon of a Tenure in Socage, and ſhe and her husband grant it, this is void. *Plow.* 293.

And though her husband joyn with her, or give his conſent, yet ſhe cannot deviſe her land by will. *Dyer* 344.

If the husband and wife both joyn in a Statute Recognizance, this will not bind the Wife nor her Land. *Kelw.* 10.

17 Where and what acts make a countermand by the intermarriage, and where and what not.

All acts done by a *Feme ſole*, that be countermandable, done to the diſadvantage of her husband, if they be not executed before the marriage, are countermanded by the marriage, whereof ſee *Countermand See Fine Numb.* 6. 8. *Grant Numb* 2. 3.

But ſuch acts as are done by, or to her, that are or may be for her advantage, are not countermanded by the marriage: So alſo ſuch acts as are not countermandable: As if the Conuſance of a Fine be by her whiles ſhe is ſole, and ſhe marry before the recording and finiſhing of it, yet the Fine may go on: So if a *Feme ſole* deliver a Deed as in Eſcrow to take effect as her Deed, after certain conditions performed, and before they be performed ſhe marry, yet the conditions may be performed, and the Deed take effect according to the intent and agreement. *Dyer* 246.

If a *Feme ſole* and another have a leaſe for years in Joyntenancy, and ſhe take a husband, yet the Joyntenancy doth continue and is not determined.

If a leaſe at will be made to a *Feme ſole*, and ſhe take a husband, this leaſe is not determined. *Plow* 418. *Kelw.* 61. *See Countermand*

Sect. 13.

18 Where and what actions ſhall be ſued and maintained by husband and wife joyntly, and what the husband ſhal have alone or joyntly with his wife at his election, where, and what not.

In ſome caſes, & for ſome cauſes the husband and wife muſt joyn in the Suit: As if any wrong be done to the perſon, name, or lands of the Wife, before, or during the Coverture, or if the Suit be upon any Covenant on a leaſe made by the husband and Wife of the Wives Lands, where the Covenant is made to them both: or if the Suit be for any Inheritance, as Lands, Commons, Advowſons, or the like, that do belong to the Wife. 9. *Ed.* 4. 52. *Dyer* 805. 40 *Ed.* 3. 3. 21 *H.* 6. 30. *Co.* 5. 16. 97. 59.

If an action of Debt upon arrearages of accompt (where one was receiver to her whiles ſhe was ſole) they muſt both joyn, and that though the Auditors were aſſigned during the Coverture in a writ of *Detinue* of Charters of the inheritance of the Wife, they muſt joyne.

If one have a term in the right of his Wife (and be outed of it) it ſeems they both muſt joyn in an *Ejectione Firme*. But *quære*, 47 *Ed.* 3. 12. *Plow.* 418. 16 *Ed.* 4. 18.

If husband and wife make a leaſe for years of the Wives Land, they muſt joyn in an action of Waſt, elſe it is not good. 7 *H.* 4. 15. 3 *H.* 6. 53.

In treſpaſs, if the Plaintiff recover againſt the husband and wife by falſe verdict, they muſt both joyn in the attaint. But in ſome caſes the husband muſt ſue alone, and not

not joyn his wife with him: As if goods be delivered by them both, the husband alone muſt bring the *Detinue*: Or if an *Aſſumpſit* were made to the wife to pay to the husband money, the husband alone muſt ſue for it: If he ſell any of his Wives land for money, he alone muſt ſue for the money, or for any goods or chattels that were hers, he alone muſt bring the *Replevin*. But if the goods were his Wives as Executrix to another, there he may joyn her with him in the Suit: So likewiſe if the goods were taken from her, *dum ſola fuit*. 46 *Ed.* 3. 20. 27 *H.* 8. 24. 8 *Ed* 4. 48 *Ed.* 3. 18. *Fitz. Reception* 37. *Aſſ.* 11.

If he have execution of a Statute made to his Wife, or ſhe had execution before the Marriage, and he is afterwards ouſted, he alone may ſue for it. 37 *Aſſ. p.* 11.

If he ſue for money promiſed him in marriage, he alone may ſue for it: But he muſt be adviſed whether at the Common-law, or in the Spirituall Court: for which, ſee *Action ſur le* Caſe and *Prohibition*, and theſe caſes. 23. *Aſſ. Pl.* 70. 45 *Ed.* 3. 44. 14 *Id.* 4. 22. 17 *Ed.* 4. 5. 19 *Ed.* 4. 10. *Engliſh Lawyer* 197.

If a leaſe for years be made, or wardſhip granted to a husband and wife, and they be diſturb'd, the husband, as it ſeems, may ſue, alone, or he may joyn his wife with him, *Fitz. Joynder in Action* 20. If the wife have a turn to preſent to a Church and the husband is let, he alone may ſue for this, 50 *Ed.* 3. 13.

In treſpaſs upon the Statute, 5 *Rich.* 2. the husband alone may ſue, and ſo likewiſe for taking away Charters that do concern the inheritance: So if he alone deliver ſuch Charters.

And in ſome caſes the husband may ſue alone, or may joyn his wife with him at his election: As where an obligation is made to them two during the Coverture: So if an accompt were made to her as her receiver when ſhe was ſole: So if they two make a leaſe of their Land, and the Leſſee make Waſt: So in all actions of the nature of Treſpaſs for wrong done before or after the Coverture on the wives Land wherein Damages only are to be recovered, and he alone may releaſe it: As where a Reverſion is granted to a husband and wife, and the Leſſee break her Covenant: So if ſhe have a Rent charge arrear before the Marriage: So if he have a Leaſe for life in her right, and he make a leaſe for years, and the Leſſee do Waſt, and the husband have cauſe to bring an action of the Caſe: So if an Aſſize have paſſed againſt him and his wife, yet he alone may have the writ of *Champarty*: So if a man bring a writ of Raviſhment of Goods upon a poſſeſſion *Jure uxoris*, he may bring it in his own name. If the husband be lord in the right of his wife, of a Mannor, and they have cauſe to bring a writ of *Reſcous*, he alone, or both of them may ſue: And alwaies where the action may ſurvive the Wife, ſhe may joyn in the Writ: And generally where the hu bands releaſe is good, and will barr the Wife, or that which is in demand, or to be recovered, cometh meerly and only to the husband, there he may ſue in his own name if he will, as where he ſueth one for chaſing in a free Chaſe, which he holds in the right of his Wife, or for Strays taken of Lands holden in the right of his wife, or for breaking of a houſe, and carrying away the timber of a houſe, or eating the Graſs, *&c.* which is his wives inheritance: So in ſuch like caſes where damages is only to be recovered. *H.* 6. 37. 16 *Ed.* 4. 83. *H.* 6. 53. 43 *Ed.* 3. 3. 8. 26. 21 *H.* 6. 30. 7 *H.* 7. 2. 46 *Ed.* 3. 3. 8 *H.* 4. 21. *March.* 47. *pl.* 75. 212. 249.

Sect. 14. 19 Where and what actions ought to be ſued joyntly againſt the husband and wife, for a thing done by them during, or before the coverture.

In ſome caſes where there is cauſe of action that doth concern a *Feme Covert*, the Suit muſt be brought againſt the husband and the Wife, for in no caſe can the Wife be ſued in any action without the husband, and in ſome caſes the husband cannot be ſued without the Wife; as where the ſuit is for the recovery of any Land whereof the Wife hath any eſtate of freehold: So if one deliver goods to a *Feme ſole* who doth after marry, the husband and Wife muſt be both ſued. If the husband doe commit Waſte in the Land he hath in the right of his Wife, the ſuit muſt be againſt them both: So if a man have cauſe to have an action of the Caſe againſt a man that hath land in the right of his Wife, for not reparations, whereby his Land was drowned it muſt be againſt them both: So if a Leaſe be made to a husband and Wife for years, rendring Rent, *Detinue* for the Rent or *Waſt* muſt be brought againſt them both. 39 *Ed.* 5. 17. *Co.* 5. 11. 62. 5. 52. 1 *H.* 4. 31. 3 *H.* 4. 1.

If

If a Feme-covert finde goods, and convert them to her own uſe, it ſeems the action muſt be brought againſt them, and not againſt the husband onely, if ſhe ſlander another, or beat him, or do any Treſpaſs, or otherwiſe, to him or his, the Action muſt be conceived againſt them both. *Dyer* 355. 9 *Ed.* 4.2,4. *M.*31,32 *Eliz. Co.*11.61.*b.*

20. What not, but againſt the Husband alone, and what the one way or the other at the Election of the party who ſueth them.

But in ſome caſes the husband muſt be ſued alone, as if they two make an Obligation, during the Coverture, he alone muſt be ſued upon it. *Co. ſuper Littl.*

If one be Guarden in Chivalry, in the right of his wife, and a woman have cauſe to demand Dower out of the Land, he muſt ſue the husband onely; ſo if the Wardſhip were granted to the husband and wife; ſo if a Rent be granted out of the Land a man holds in the right of his wife, to another for his life, and it be arrear, and he dies; here the Action of Debt ſhall be brought againſt the husband alone. So if a wife be Guardein in Soccage of the Lands of an Infant, and take a husband, for the time before the Marriage, they muſt be joyned, but for the time after the Marriage, will lie againſt him alone. *Fitz. Debt*, 180. *Briſſ. Aſſ.* 561. *Briſſ.* 847.930.

21. Where one of them ſhall anſwer without the other, *Sur* 44 *Ed.*3 1. 34 *H* 6. 19. 36 *H.* 6. 1. 43 *Ed* 3. 18. 41 *Ed.*3. 24. 16 *Aſſ. pl.*1. 3 *H.* 6. 9. 9 *Ed.*4. 23. 9 *H.*6 8. 8 *H.* 4. 6. 21 *H.*4. 1. *Cauſa Matrimonii prælocuti.*

But an Action of Trover and Converſion of the Trover of the wife, it ſeems may be brought againſt the husband and wife, or the husband alone. *Drapers* caſe, *Mich.* 1 *Jac. B. R.*

If one have a Ward in the right of his wife, and a woman have cauſe to bring her Writ of Dower, ſhe muſt have it againſt the husband onely; but if a Writ of Ward-ſhip be brought to recover a Ward, it ſhall be brought againſt them both becauſe of Voucher. 46 *Ed.*3. 20.

And where the Action is brought againſt the husband and wife, ſhe muſt be named Wife in the Writ: But in no caſe may the wife be ſued alone, whiles the husband is living, and known to be ſo, unleſs it be in ſome rare caſe, whereof the husband for ſome offence is baniſhed, *&c.* 42 *Ed* 3.23.

It is a Writ lying where Lands are given by a woman to a man, on condition he ſhall take the woman to wife by a day, and before that day he doth diſable himſelf, or at the day he doth not take her accordingly, then the Donee may have this Writ to recover the Land again. But this is now out of uſe: 1 *H.*4. 2 *H.*4.7. 18 *Ed.*4.4. *F. N. B.* 205. *Co.*2. 15.

Cui in vita.

It is a Writ that lieth where a man is ſeiſed of Lands in Fee-ſimple, Fee-tail, or for term of his life in the right of his wife, and doth alien the ſame, and dieth: Then the wife ſhall have this Writ to recover the Land ſo aliened. And if ſhe die before it be recovered, her heir may have a *ſur cui in vita*. *Exp. Terms of the Law*, *p.*85.

22. How Criminal Matters done by them joyntly or ſeverally, ſhall be conſtrued, and how they ſhall be puniſhed for them.

A Feme-covert may commit a Felony, and be principal or acceſſory, as another may, as if ſhe kill a man, or ſteal goods, or receive ſtoln goods without her husbands privity; and if ſhe do ſo, ſhe muſt anſwer it her ſelf, for her husband ſhall ſuffer no Corporal puniſhment for her: But if a Feme-covert ſteal any thing by the commandment of her husband, or together with her husband ſhe ſhall be quit, for it is no Felony in her. *Contrà*, if ſhe hold a man whiles her husband kill him, and if ſhe receive Goods of her husbands ſtealing, though ſhe know it, ſhe is not acceſſory, for ſhe is not bound to diſcover her husband. 15 *Ed* 4.1. 29 *Aſſ. pl.*40. *Stamf l.*1. *c.*19.

Any act that is high Treaſon in an other, ſhall be ſo in her, and for this offence ſhe is to be burned: So alſo for Petti-Treaſon for the killing of her husband, *Dyer* 332.

*Sect.*15.

If a woman do commit any miſdemeanor, as Ryot, Battery, *&c.* for which ſhe may be indited, and Judgment thereupon muſt be againſt her alone, therein ſhe muſt anſwer without her husband, and the Fine put upon her, ſhall not be levied upon her husbands goods in thoſe caſes, but her body muſt anſwer it, and the King muſt ſtay for his Fine until ſhe be ſole: But in caſes where for any miſdemeanor made by any Statute, it is otherwiſe provided, *Co.*11. 61. *b.*

23. *Divorces.*

It is the ſeparation of two married perſons before coupled together, by ſentence of a Judg, for it is impoſſible that after perſons are lawfully married, they may by any agreement between themſelves, divide and ſeparate themſelves again, *New Terms of Law, Womans Lawyer*, *f.*64.

And this is ſometimes, *A vinculo Matrimonii*, (*i.*) which doth diſſolve and make a nullity of the marriage from the beginning; and this is when the Divorce is by reaſon of ſome eſſential Impediment, as *Cauſa præcontractus, cauſa metus, cauſa frigiditatis*

vel impotentiæ, cauſa affinitatis vel conſanguinitatis, and this Divorce that is of this kinde, which is perpetual, makes ſuch a nullity of the Marriage *ab initio*, that he may take any other wife, or ſhe another husband, that all the children had between them, during this marriage, are reputed Baſtards, the wife ſhall have no Dower, the husband ſhall not be Tenant by the Courteſie, they may ſue one another. 32 *H.*8. 11. 38. *Co.*7.45. 9. 141. *Dyer* 147. *Rew.*164. *Co. ſuper Littl.*235.

The other kinde of Divorce is *à menſa & toro*; and this is when the Divorce is *Cauſa adulterii*, or *Cauſa profeſſionis*, which is onely till reconcilement be had, and doth not diſſolve the Marriage, nor produce any of the effects aforenamed, ſo in this caſe the wife may be endowed, and the children inherit, notwithſtanding.

Cauſes thereof. The cauſes of Divorce, do ſometimes precede, and ſometimes ſucceed the Marriage; precede, as in all the cauſes before, where there is any ſuch impediment; as if it be ſo that two be married, *Infra annos nubiles*, for this at their full age, they may be divorced: So if either of the ſaid parties be, *inops mentis*, at the time of, and always after the marriage. 47 *Ed.*3. *in ſuis*: 39 *Ed.*3.32. 19 *Aſſ. pl.* 2.

Cauſa conſanguinitatis & affinitatis. If two be married that be within the degrees of Conſanguinity or Affinity forbidden, this is cauſe of Divorce: As if a Woman do marry, her Grand-father, Father, Sons ſon, or Brother of the whole, or of the half Blood, her Father or her Mothers Brother, her Brother or Siſters Son, Brother or Siſters Children, or a Man married the Widow of his Grand-father, Father, Son, Sons Son, the Widow of his Brother or Brothers Son, or his Brothers Sons Son, nor with the Grand-mother, Mother, Daughter, Neece, Great Aunt, or Siſter of his deceaſed Wife. *Engliſh Lawyer*, *f.*71. 25 *H.*8.22. *Womans Lawyer.*

Cauſa profeſſionis. If one be a profeſſed Infidel, and the other a profeſſed Chriſtian, it ſeems this is cauſe of Divorce.

Cauſa frigiditatis. If either of the parties at the time of marriage be *inhabilis*, unable and unfit for procreation, for this cauſe the parties may be divorced, and their after-marriage to others, good; but it ſeems it muſt be ſuch as was at the time of the marriage, for if it happen after marriage, it is no cauſe. *Co.*5.98. *Dyer* 179. *Engliſh Lawyer. Co.* 6.66.

Cauſa præcontractus. If one have Contracted marriage before with another, now this is ſufficient cauſe of Divorce of a latter marriage, with another after this Precontract. See 32 *H.*8.38. 2, 3 *Ed.*6.3.

Cauſa metus. So alſo if a marriage be made through fear, or upon any ſuch corrupt terms as before, this is cauſe of Divorce.

Cauſa adulterii. Some cauſes alſo do ſucceed the marriage, as when it is for Adultery or Fornication, which by the Canon, is Carnal and Spiritual, for they diſſolve Matrimony, when one of the parties is converted to Chriſtian Faith, and the other being an Infidel, will not live with him, out of the 1 *Cor.* 7.

That which a Divorce doth work, and bring forth, may be ſeen by that which was ſaid before, and by theſe caſes following.

24. The effect and fruit thereof. If a man marry with a Woman Precontracted, and hath iſſue by her, this iſſue in Law and Truth beareth the ſirname of his Father: But if after they be divorced for the Precontract, there the iſſue hath loſt his ſirname, and becomes a Baſtard. *Co.* 6.66.

Sect. 16. If a Leaſe be made to a man and his wife, during the Coverture between them; now if a Divorce be made between them, for any cauſe that doth diſſolve the Marriage; in this caſe the Leaſe is determined: But if the Divorce be *cauſa adulterii*, this doth not determine the Leaſe. *Co. ſuper Littl.*235.

25. Where and what things the Wife ſhall have again after Divorce, and what acts of the Husband ſhall bind the Wife after the Divorce, and where and what not. If Land be given to a man and his Wife, and to the heirs of their two bodies, and after they are divorced, *cauſa præcontractus*, hereby their Eſtate of Inheritance is turned into a Joynt Eſtate for life. *Co. ſuper Littl.*28.

If the Husband, during the Coverture, make any Diſcontinuance of his wives Land, or any ways charge it by granting of Rents, Commons, *&c.* out of it, or entring into any Statute, or the like, and after, they be divorced; in this caſe ſhe ſhall avoid all theſe Diſcontinuances and Charges: And to avoid the Alienations, the Writ of *Cui ante Divorcium* is given her, it is to recover the Lands ſhe held in her right

right alone, or joyntly with him, which he alienedduring the Coverture; or ſhe may enter by the Statute of 32 *H.*8. But ſuch things as are executed, as Gifts and Sales of her Goods, Waſte, Seiſage of Wards, Receipts of Rents, and Preſentments to Benefices, and the like, that were done during the Coverture, ſhall ſtand, and cannot be avoided. *Broo. Arraignment* 18. *Co.*8. 75.

If Lands be given to her Husband, and her in Frank-marriage, with her marriage, and after they be divorced, now the wife ſhall have all the Land; and if the Husband keep it from her, ſhe may ſue him. So if Goods were given unto her, with the marriage of her Husband, and after they are divorced, ſhe ſhall have all the Goods that are left, and not (*bona fide*) ſold or ſpent, to her ſelf, and may have a Detinue for to recover them, or ſhe may ſue in the Spiritual Court for them. 19 *Aſſ. pl.*2. *Dyer* 13. *Old N. B.* 139. 6 *H*8.7.

If the Husband during the Coverture, releaſe a Legacy due to his Wife, and after they are divorced, it is ſaid the Releaſe is not good to binde the wife; but *quere* of this caſe, for I think the contrary to be Law. *Totty* and *Stephens*, *B. R.* 44 *Eliz.*

If one that is bound to a Woman by Obligation marry her, and after they be divorced, it ſeems her action that was ſuſpended, is now revived. See 11 *H.*7.4. *Dyer* 140.

If Lands be given to the Husband and Wife, ſo as now they have no Moyeties, yet if they be after divorced, there ſhall be Moyeties again between them: And if they be Donees in Tail, and after divorced; now they have but Frank-tenant. *Bro. Tail* 9. *Perk. ſect.*238. See more in *Women*, *Widows*, *Acceptance*, and *Agreement*.

It is a double marriage, which by the Common Law was an impediment to a man to demand his Clergy in Felony, or to be called to holy Orders, which is now out of uſe, and altered. 1 *Ed.*6. 12. 1 *Eliz.* 7. 18 *Ed.*3. 2. *Expert Terms of the Law*, *pag.*38. *Bigamy.*

CHAP. CX.

Of Marque, Maſons, Malt, Maltſters, and Marſhes.

MArque, and Letters of Marque, are authority given by the Supreme Magiſtrate to ſome perſons, to right themſelves upon ſtrangers without the Limits, and reach of our Laws, by the taking of their Goods, to make amends for ſome wrong done by them to ſome of ours; for which they are deſtitute of Remedy in another Country. And it is ſo called, becauſe the griefs whereupon theſe Letters are ſought and granted, are commonly given about the Bounds and Limits of every Country, or becauſe the Remedie there is moſt likely to be had by ſome ſudden inrode, and hapning of ſuch Recompence of the Injury received, as may moſt conveniently be lighted upon. 15 *H.*6.8. 4 *H.*5.7. *Act*, 25 *June*, 1649. 17 *April*, 1649. *Mark or Repriſal*, what.

For Maſons. 3 *H.* 6. 1.

For Marſhes and Fens. 4 *Jac.*8. 13. 7 *Jac.* 20. *Maſons. Marſhes and Fens.*

Of Malt and Maltſters.

FOr Malt and Malſters, theſe things are to be known.

1. It muſt be made of good Grain, and well, and orderly prepared.
2. It muſt not be ſold till it be well cleanſed.
3. Officers may ſearch for bad Malt, and if they finde any, ſell it away. 2 *Ed.*6.10.
4. Juſtices of the Peace, in Seſſions, may reſtrain the ſuperfluous number of Malſters, and of Buyers of Barley to make Malt.

5. Such as have Barley of their own, may make this into Malt, 39 *Eliz.* 16.

6. The Malt made in the Counties of *Huntington*, *Cambridge*, *Northampton*, and *Bedford*, and brought to *London*, muſt be very well cleanſed from duſt and filth. And Officers of the places where it is ſold, muſt ſearch and ſee to it, and puniſh defaults. 17 *R.* 2. 4.

7. When Malt is at ſixteen ſhillings the Quarter, Beer may be tranſported to our Allies in Casks. See *Tranſportation*, and 3 *Jac.* 11.

The old Statutes for this are, 17 *R.* 2. 4. 2 *Ed.* 6. 10. 39 *Eliz.* 16. 3 *Jac.* 11. See my *Juſtice of Peace*.

CHAP. CXI.

Of Maſter and Servant, Meaſon or Dwelling-houſe.

Sect. 1.

1. *Maſter* and *Servant.*

2. The kindes of Servant.

MAſter and Servant are Relatives; and a Servant in the Intendment of our Law, ſeems to be ſuch a one, as by Agreement and Retainer, oweth duty and ſervice to another; which therefore is called his Maſter. And amongſt Servants ſome are ordinary, menial, and familiar, (*i.*) Such, as always and conſtantly in Houſe, or attending on their Maſters buſineſs: And theſe are called Menial and Familiar Servants; and theſe are either for a leſs time, As ſuch as are hired by the year, or half a quarter of the year, or ſuch as are for a longer time: As Apprentices which are for ſeven or eight, or more years. And others are extraordinary, and upon occaſion onely, as Retainers, who are not dwelling with him, but bear the Maſters name and Livery, Laborers, and the like; alſo ſome Servants are Univerſal and General. (*i.*) Such as are to look to all their Maſters buſineſs, and to ſerve him in all his lawful commands, and others are ſpecial and particular. (*i.*) Such as are to look to ſome things onely, and to ſerve him in ſome ſpecial matters onely, as Bailiffs, Parkers, Stewards, Butlers, Receivers, and the like; and in all theſe caſes the general Rule of Law is: That according as the Agreement and Retainer is, ſo the Servant muſt do his work, and ſo the Maſter muſt pay his wages; and if either of them fail, they may have Reciprocal Remedy one againſt another. See *Statutes of Laborers and Debt.* 3 *Eliz.* 4. 16 *R.* 2. 4.

Retainer.

What Acts of the *Servant* ſhall binde the *Maſter*, or not. In matter of *Contract.*

The Contract of the Servant in buying, will binde the Maſter, and make him chargable to an Action of Debt, for the thing bought, in either of theſe caſes.

1. Where the Servant is a known and common Bailiff to his Maſter, and is uſed to buy for him, and he doth mention his Maſter in the bargain, and doth buy for him, though the Maſter never have the thing bought.

2. Where the Maſter did give him a precedent authority ſo to do, and he do mention his Maſters name in the bargain, and do buy for him, though the Maſter never have the thing bought, nor notice of the bargain; and any friend may be a Servant in theſe caſes.

3. Where the thing bought, doth come to his Maſters uſe, and he doth aſſent to it.

4. When he doth afterwards aſſent to it, though the thing bought do not come to his uſe; for a ſubſequent aſſent is equivalent to a precedent authority. And in theſe caſes the Seller may have an Action of Debt againſt the Maſter: And if the Servant himſelf do make any ſpecial promiſe to pay the money, the Buyer may upon this, have his Action of the Caſe againſt the Servant alſo. And it is held by the better opinion, That theſe Contracts are good, although the Servant in his Contract, do never mention the name of his Maſter. But generally in all other Caſes, the Contract of the Servant as to the Maſter, is void, and will not binde him. *Fitz.* 202. 27 *Aſſ. pl.* 5. 11 *H.* 6. 20. *Plow.* 11. *F.N.B.* 62. *D. & St.* 137. *Dyer* 234. 2 *R.* 2. 65. 21 *H.* 7. 40.

So

So in ſelling the Maſters Goods or Chattels, the Contract of the Servant will binde the Maſter, and alter the property of the thing ſold; in either of theſe caſes.

1. When the Servant hath any precedent authority, general or ſpecial to ſell it; and there it will binde the Maſter, though the money be not paid to the Maſter, or come not to his uſe, and though he have no notice thereof.

2. So if he have no ſuch expreſs charge and authority, if he be a common and known Baily, and uſe to ſell for his Maſter.

Or 3. if the Maſter agree to the ſale and bargain after it is made; and in this caſe the Maſter may have an Action of Debt in his own name againſt the Buyer. *Broo. Debt. Contract* 24.

If the Servant that is ſuch a known Baily, or hath ſuch an Authority, Pledg or Exchange any of his Maſters Cattle for Corn, or the like, and the Corn come to his Maſters uſe, the Maſter is bound by this: As a Contract made to a Wife, is good when the Husband doth agree to it, ſo it is of a Contract to a Servant, and it ſhall be ſaid to be made to the Husband, and Maſter himſelf. In all the caſes of buying by a Servant, if he promiſe to pay the money by a day, the Seller may have an Action upon the caſe, upon that promiſe, as well as an Action of Debt againſt his Maſter upon the Contract. See *Contract.*

If I be a Merchant, and have a Factor that doth uſe to buy one kinde of Stuff for me, as Tinue, or the like, and no other; if he buy Says, or other Commodities for me, and aſſume to pay it, I may be ſued upon this Contract of my Factor. *Goldsb.* 139. *pl.*46.

If one bid another deliver his Servant what he doth call for, and he will pay him, here the Maſter ſhall be chargable for how-much-ſoever the Servant doth fetch, *Co.*8. 146.

If one ſend his Servant to Market or Fair to buy Cattle, or other things for him, and doth not tell him of whom he ſhall buy it; now of whomſoever he ſhall buy it, the Maſter ſhall be chargable: But perhaps, if he had bid him buy of one man, and the Servant buy of another, the Maſter ſhould not have been chargable, *Doct. & St.* 137. *Sect* 2.

If ſuch a Servant as is uſed to buy and ſell, ſell his Maſters Horſe, or exchange his Ox for Wheat that cometh to his Maſters uſe; this is good, and the Maſter may not have an Action of Treſpaſs for it; and he ſhall be charged for the Corn, and the other need not ſhew that he had authority from his Maſter, *Noy* 110.

If one make a man his general Receiver, and he receiveth money of a Debtor of his Maſters, and maketh him an Acquittance, and payeth not the money to his Maſter, yet this payment ſhall binde the Maſter, and diſcharge the Debtor; but if he make an Acquittance to him, and he pay not the money, this will not binde the Maſter. And yet if a man make another his general Receiver by writing, and give him power alſo thereby to make Acquittances, and he make an Acquittance to one of whom he receives not money; this will binde the Maſter, and diſcharge the Debt. *Doct. & St.* 138. *Noy* 111. If one ow me money, and I ſend my Servant for it, and he pay it to him; this will bar me to demand it again, and diſcharge him of it, *D. & St.* 138. *In matter of Receipt, Gift, or Diſcharge.*

If a Lord of whom Land is held, be diſſeiſed of a Seigniory, and the Bailiff pay the Rent to the Heir of the Lord, without any ſpecial Commandment; this doth give the Heir Seiſin of the ſervice. *Doct. & Stud.* 138. *In point of Conſent.*

If my Servant that is no common Bailiff, will buy other mens Goods for me, or ſell my Goods from me, without any authority from me ſo to do; this will not binde nor charge me, ſo as he may bring an Action againſt me for the Goods that are bought, or that I may not take again my Goods that are ſold. *Doct. & Stud.* 137. *What Acts of the Servant will not binde the Maſter.*

If ſuch a Servant buy any thing for me, eſpecially if it be things unneceſſary, and thoſe things come to the uſe of my Houſe, yet I ſhall not be bound by, nor charged for this, unleſs I agree to the bargain after that it is made, and had notice of it, 11 *H.*6. 20. *D. & St.* 137. *In matter of Contract.*

If a Servant that hath authority to ſell his Maſters Goods, do ſell and warrant the Goods ſold; this Warranty will not binde the Maſter, though the ſale will. 11 *Ed.*4. 7.

If a Taverners or Mercers Servant, or a Parker, Bailiff, or Shepherd, that have the cuſtody and power of their Maſters Goods, and perhaps authority for to ſell them, do give *In matter of Receipt or Diſcharge.*

give away any of them, it ſeems this gift is void, and doth not binde the Maſter, but that he may bring an Action of Treſpaſs againſt him, that ſhall meddle with them, under colour of ſuch a gift. *Noy* 110. 21 *Ed.*4. 5. *Broo. Donee* 56.

If one make one his general Receiver, and he by agreement betwixt the Debtor and him, take and accept a Horſe, or other thing, in recompence of the Debt; this will not binde the Maſter, nor diſcharge the Debtor; and yet if in this caſe, the Receiver had authority from his Maſter, to make ſuch a Commutation, or the Maſter do afterwards aſſent to it, by this the Maſter may be bound. *Doct. & Stud.* 138.

If my Servant go to a man that doth ow me money, and tell him, or ſhew him a counterfeit Letter, that I ſent him to receive it, and my Debtor pay him the money; this will not bar me of my money, nor diſcharge him of the debt; but if the money come to my uſe after, and I aſſent unto it, *contrà. Doct. & Stud.* 138.

If there be Lord Meſn, and Tenant, and the Tenant holdeth of the Meſn, as of his Manor, and the Meſn maketh a Bailiff, and after the Tenant maketh a Feoffment, and the Feoffee tendereth notice to the Bailiff, and he accepteth and receiveth the Rent with the arrearages; this notice and acceptance will not binde the Lord, nor compell him to alter his Avowry. *Doct. & Stud.* 138.

In matter of Conſent.

If one make a Bailiff of his Manor and the Lord of another Manor, of whom the Manor is held, grant the Seigniory to another, and the Bailiff doth after pay the Rent to the Grantee; this ſhall not binde the Lord, nor amount to an Attornment for the Grantee, *Doct. & Stud.* 130.

If the Bailiff pay more Rent then he ſhould, and the Lord incroach by this means; this ſhall not binde the Maſter, unleſs the Maſter did give commandment to pay more Rent then was due. *Doct. & Stud* 130.

Sect. 3. Where the *Maſter* ſhall be charged for the Act or Offence of his *Servant* or *Deputy*, or not; and how.

If the Servant keep his Maſters fire ſo negligently, that the Maſters houſe, and his Neighbors alſo is burnt thereby; the Maſter ſhall be charged, and anſwer for this negligence of his Servant: But if this negligence were abroad, out of his Maſters houſe, *Contra. Doct. & St.* 137. 2 *H.*4. 19. *F.N.B.* 94. 22 *H.*6 24.

If a common Hoſtlers ſervant rob a gueſt that lodgeth in the houſe, the Maſter ſhall be chargable, and anſwer for this Felony in an Action of the Caſe. But if another man, no common Inn-keeper or Hoſtler do ſo, it is otherwiſe. See *Action of the Caſe.*

If a Servant of a Gaoler that hath a priſoner in execution for debt, ſuffer him to eſcape; the Maſter ſhall be chargable in an Action of Debt. And if he have a Felon in his cuſtody, and the Servant ſuffer a voluntary eſcape of him, the Maſter ſhall be fined for this, but it ſhall not be Felony in him, as it ſhall be in the Servant. *Doct. & Stud.* 137. *Co.*9. 98.

Officers, Deputies.

If any Officers do make and appoint any Deputies in their Offices, they ſhall anſwer, and be charged for the offence of their Deputies; and their acts will be as penal to them, as if they were done by themſelves: As High-Sheriffs muſt anſwer for their Under-Sheriffs, Under-Sheriffs for their Bailiffs, Gaolors for their Deputies, and ſo all others. *Broo. Forfeiture* 27. *Co.*9 98.48. *Dyer* 238. *Co.*4.33. 5. 89. *Br Off.* 24. But if one have an Office grantable over to an Aſſignee, and he aſſign it; in this caſe the Aſſignor ſhall not be charged, or prejudiced by any thing the Aſſignee doth. *Dyer* 261. 10 *H.*7.23. 18 *H.*8. 5.

If a Servant, or one of a mans Family do lay or caſt any thing into the High-way, that is a Nuſance, it ſeems the Maſter may be puniſhed for it. *Noy* 110. So if a mans Cattle do againſt his will, hurt another, he muſt anſwer for them, for he muſt govern them. *Idem.* But if a Servant borrow or receive money in his Maſters name, and for him, without any authority from his Maſter, the Maſter ſhall not anſwer this, nor be charged for it, though it come to his uſe, unleſs he do after agree unto it. *Doct. & Stud.* 137. *Noy* 109.

If one ſend his Servant with deceitful Wares to a Market or Fair, and command his Servant to ſell them, but doth not ſay to whom; it ſeems no Action of the Caſe will lie againſt the Maſter for this; but if he bid him ſell them to one man in particular, and he do ſo; there for the Goods ſold, the Maſter ſhall be charged in an Action of the Caſe, 11 *Ed.*4. 6.

If

If my Servant drive my Cattle into another mans ground againſt my will, and they do Treſpaſs there; it ſeems I ſhall not anſwer for this Treſpaſs: So if my Servant ſet on my Dog, againſt my will, and kill another mans Cattle; or if he do any other Treſpaſs by beating a man, entry into his Land, taking away his Goods, or otherwiſe, or commit any Felony, I ſhall not be charged, nor anſwer for it, unleſs I be acceſſary thereunto. *Doct & St.* 137. 11 *Ed.* 4. 7. 9 *H.* 6. 53. 6 *H.* 6. 39. 13 *H.* 7. 15.

If the Servant ride his Maſters horſe into a Town where they have power to attach Goods upon a Plaint of Debt; and the Goods are attached as the Goods of the Servant, and forfeit for his default of Appearance, the Maſter ſhall not be prejudiced by this; but he may take his horſe again, or bring an Action of Treſpaſs for him. So if the Maſter ſend his Servant for to diſtrain another mans Cattle, and the Servant after he hath diſtrained doth kill, or otherwiſe abuſe the Diſtreſs, the Maſter ſhall not anſwer, nor be charged for this. 21 *H.* 7. 27. *D. & St.* 138. *Noy* 111.

For the Murder, Felony, Battery, or Treſpaſs of his Servant, the Maſter ſhall not be charged. *Noy* 109. But if I command my Servant to do a Treſpaſs, or agree to it, I am a Treſpaſſer alſo.

No act or default of the Maſter, to which the Servant is no way acceſſary or privy, ſhall binde or be prejudicial to the Servant, unleſs the Servant be acceſſary or aſſenting thereunto; as the Felonies of the Maſter, and the like. So if the Servant diſtrain Cattle, at his Maſters commandment, and after the Maſter do kill, or abuſe the Diſtreſs; or a Bailiff of a Sheriff arreſt a man by the Sheriffs Warrant, and after the Sheriff do not return the Writ. 20 *H.* 7. 13, 22, 23. *Sect.* 4.

For Apprentices, theſe things are to be known. *Apprentice.*

1. That in ſome caſes men may not take Apprentices, or but ſuch a number, and ſuch kinde of Apprentices. 2. A man may not exerciſe ſome Trades, till he have ſerved ſeven years as an Apprentice in the Trade. 3. The differences between Maſters and their Apprentices, are to be ended by the Juſtices of the Peace. 4. A Maſter cannot ſend his Apprentice beyond Sea, unleſs his Calling, to which he is Apprentice require it. 5. In ſome caſes Men and Women may be bound Apprentices againſt their will. 6. Apprentices cannot be turned over from one to another, but by Cuſtom, as in *London*. But for all theſe, and ſome other things concerning them. See 5 *Eliz.* 4. 43 *Eliz.* 2. 1 *Jac.* 25. *Co.* 11. 54. *March. Rep.* f. 1. And the *Firſt part of my Juſtice of Peace*, in the Chapter of *Maſters, &c.*

For Artificers, Laborers, and Servants, theſe things are further to be known. *Laborers, Artificers and Servants.*

1. In ſome caſes, and in ſome works, Laborers, and them that are fit to labor, may be compelled to work. 2. None may be idle that have able bodies, and nothing to live by but their work. 3. In ſome caſes men may not take Journeymen, or not ſo many, or not ſuch men. 4. Servants and Laborers muſt take the wages aſſeſſed by the Juſtices, and may not take more. 5. Maſters muſt give to their Apprentices, Laborers, and Servants, what is meet for Diet, Cloths, and Wages, and may not abuſe them. And Apprentices, Laborers, and Servants, muſt do their duty to their Maſters. 6. If any miſcarriage be of either ſide, the Juſtices of the Peace may puniſh it. But ſee for all this, and other things. 23 *Ed.* 3. 1, 2, 3, 4, 8. 13 *R.* 2. 8. 7 *H.* 4. 14. 3 *H.* 6. 1. 28 *H.* 8. 5. 2, 3 *Ed.* 6. 15. 21 *H.* 8. 7. 5 *Eliz.* 4. 8 *Eliz.* 11. 3 *Jac.* 9. 1 *Jac.* 6, 16, 17. 4, 5 *Phil. & Ma.* 5. *Co.* 11. 54. And in my *Juſtice of Peace firſt part*, the *Chapter of Laborers, Maſters, and Servants.* *Wages.*

This was an old Writ that did lie againſt ſuch, as having not whereon to live, did refuſe to ſerve, or for him that refuſed to ſerve in the Winter where he ſerved in the Summer. *Regiſt. Orig.* 189. *b.* *Laborarii*, what.

A Journeyman is he that covenanteth with another, to ſerve with him in his occupation for a year, or leſs time for money, or other reward. 3 *Jac.* 9. See the Statutes of 5 *Eliz.* 4 and the reſt. *Journeyman*, what.

The Dwelling-houſe hath many privileges granted to it by Law: As firſt, Precedency in a Writ, if it be demanded amongſt other things. Secondly, It cannot be broken to make an Arreſt at the Sute of a common perſon, but at the Sute of the King, as to arreſt the owner, or another man in it, for Felony, or on a *Capias utlagatum* it may be broken open. Thirdly, Protection againſt the Kings Prerogative, for *Meaſon* or *Houſe-dwelling.* *Felony.*

Salt-

Salt-Peter. Salt-Peter-men cannot dig in a mans Dwelling-Houſe, without the owners conſent. 4. If one kill a man that is about his Houſe, to rob or ſpoil him in his own Houſe, he may kill him, and juſtifie it, when he hath done it. 5. If one be threatned to be beaten in his Houſe, he may aſſemble his Friends, and ſtand on his guard there, and it is no Ryot. 6. If two Joyntenants be of a Houſe, one of them may compel his Companion to help to repair the Houſe. *Co.* 11. in *Lewis Bowls* caſe.

Ryot.

CHAP. CXII.

Of Money, Meal, Mills, Millards, Mines, Monopoly, Milderneux and Powldavy.

Meal. IF any ſell Meal any where but in the open Market, or there mixt, and not pure, or do uſe Bolting; he forfeits double the value of it, and muſt be impriſoned two moneths without Bail. *Act*, 23 *Octob.* 1650.

Mills and Millards. For Gig-Mills. See 3 *Ed.6.* 2. 5 *Ed.6.* 22.

For Iron-Mills. 27 *Eliz.* 9.

How Millards are to be puniſhed for changing the Griſt, or taking exceſſive Toll. See *Leet*, and other Titles, and in my *Juſtice of Peace* Book.

Milderneux and Powldavy. For Milderneux and Powldavy, and how, and where it may be uſed, and by whom, See 1 *Jac.* 22.

Mines. For Mines, theſe things are to be known. Firſt, That all Mines in any mans ground of Gold and Silver Oar, or where the Major part is Gold and Silver, are the Lord Protectors, and not the owners of the Soyl, whether they be new Mines or old. Secondly, All the Mines and Quaries of Cole, Stone, Brick, Iron, Gravel, Lime, Clay, and the like, when a Tenant for life or years, comes firſt to the Land are his, and he may dig on. But ſuch a Leſſee for life or years, cannot open and dig new Mines or Quarries, without ſpecial words in his Leaſe to warrant it. See more of theſe things in *Waſte, Treſpaſs, Eſtate for years.*

Monopoly, what. A Monopoly is where the power of ſelling any thing, is in ſome one man alone; or where one doth ingroſs or get into his hands, ſuch a Merchandiſe as none can ſell them, or gain by them, but himſelf. And to this there are three inſeparable Incidents againſt the publick good: Firſt, The price of the Commodity is raiſed. Secondly, The Commodity is made worſe. Thirdly, It tendeth to impoveriſh many poor Artificers and Tradeſmen. And therefore the Law doth utterly diſtaſte it. See for this 21 *Jac.* 3. *Co.* 11. 86, 87. and *Co.* 3 *part. Inſt. chap.* 85.

Monopoliſts, Propounders, and Projectors. All ſuch as get ſuch Allowance from the King, by Grant, or otherwiſe for the ſole buying, working, or making, or uſing of any thing, whereby any perſon or body Corporate or Politick, are ſought to be reſtrained of any Freedom or Liberty they had before, and hindred in their lawful Trade are called Monopoliſts, *&c.*

Money. For the Statutes concerning Money. See them in *Wingates* Abridgment, *Money.*

CHAP. CXIII.

Of a Mortgage, Mortmain, and Mortuary.

Mortgage or Pledge, what. MOrtgage doth ſignifie in our Law, a pawn of Lands or Tenements, Goods, or Cattles, laid, or bound for Money borrowed, peremptorily to be the Creditors for ever, if the money be not paid at the day agreed upon.

The kindes. The nature of Mortgaged Land and Goods. Of Lands thus: As if one make a Feoffment in Fee, Gift in Tail, Leaſe for life, or years to another (for mony borrowed) on Condition, That if he repay him his money by ſuch a day, that then he ſhall have his Land again. And this bindes the Land ſo, till that time, that neither of them can do any thing with the Land:

Land: But both of them together, may ſell or charge it; and after the day paſt, and money not paid, the Mortgagee cannot well ſell it, for the Land (eſpecially if it be of much more value then the money) will be recovered in *Chancery*, upon payment of the money, Intereſt, and Damage: For which ſee my *Firſt part of the Marrow of the Law, f.* 628. But for this ſee *Condition* at large in my Book of *Common Aſſurances, chap.* 6.

A Pledg of Goods is, where one doth deliver Goods to another man in aſſurance of another thing had from him at the ſame time: And this is either in Deed, where one doth actually deliver Jewel, Plate, or other Goods, to one for twenty pounds lent him; and if he do not pay the money at a day agreed upon, That he to whom they are delivered, ſhall have them; and if he do pay the money, that then he ſhall have the things pledged again. In this caſe if the Deliverer do pay his money at the day, he ſhall have his Goods again, or an Action of Detinue for them, if he refuſe to deliver them: And if he do not pay the money at the day, the other may keep the Goods pledged, for ever; and yet the Quality and Condition of the Intereſts of theſe Parties doth ſtand thus. The Party that doth pledg them, till the time they be forfeit to the Party that hath them in pawn, according to their Agreement, hath a general Property in the things pledged: So as if they be caſually loſt, he muſt abide the loſs of them; and they cannot be forfeit by the Party that hath them in pawn, nor can they be taken in Execution, or attached for his Debt: And yet the party that hath the Pledg, hath ſuch a Special Property in it, That if the thing pawned be a Horſe, Ox, or the like, he may work it, if a Cow milk it: And if it be any other thing, as Apparel, or the like, that will not grow much worſe by uſage, he may uſe it as the firſt owner thereof might have done: But if he ſhall abuſe it, the party pawning it, may have an Action againſt him for this Abuſe. And he that hath this Pledg, may aſſign over his Intereſt to another; and this Aſſignee ſhall hold it upon the ſame Terms the party to whom it was pledged, held it. And if the Goods be taken away from him that hath them in pawn, he may have an Action of Treſpaſs againſt the Taker, and ſay, *Quare bona ſua cepit*. And if the party to whom it is pawned, die before the day of payment of the money, the Goods ſhall go to his Executor. And when the day is paſt, and the Pledg is forfeit, yet doubtleſs if it be much more worth then the money, the party pawning it, will have it again by a Sute in *Chancery*, upon payment of the Money, Uſe, and Damage, if he ſue before it be quite ſold: There is alſo a Pledg in Law, where the Law without any Special Agreement made, doth enable a man to keep Goods in the nature of a Diſtreſs. And ſo a Tailor may keep, but muſt not uſe, nor ſell a Garment he hath made, till he be paid for the making of it: And ſo an Inn-keeper may keep, but not uſe his Gueſts Horſe, till he pay him for his Meat; and if he leave him there ſo long, till he have eaten as much as he is worth, he may ſell him, and pay himſelf; and ſo was it agreed, in *Trin.* 3 *Jac. B. R.* This word Pledg is taken alſo for one that is Surety for another. See for all this, 5 *H.*7.1. 22 *Ed.*4.11. *Kelw.*82. *Littl.*332, 333. *Co.* upon *Littl.*205. *Co.*7.14. *Doct. & Stud.*150. *Broo. Attachment* 20.

Property.

Aſſign

Executors

Chancery

Taylor

Innkeeper

Of Mortmain.

IT is where one doth give Lands to, or to the uſe of any Religious Houſe, or other Corporation, then it is ſaid to be in a Mortmain, becauſe the Services are gone, and the Corporation can yield no Services to the Lord; and therefore if any Alien to any ſuch perſons, or in any ſuch manner without the *Kings* Licence, the Lord of whom the Land is held, may enter at any time, within a year after, for a Forfeiture; and if he do not, the next immediate Lord may, and ſo every Meſn-Lord ſhall have half a year; and if none enter, it ſhall come to the *King*; and of ſuch Inheritances, wherein no Tenure can be as Villains, Rents, and the like: For theſe the *King* ſhould have had them preſently; but ſuch Alienations may be good with the *Kings* Licence. *Broo.* 19. *Dyer* 25. 7 *Ed.*1. 25 *H.*8.10. 13 *Ed.*3.3. 16 *R.*2.79. *Broo.* 79.

Mortmain, what.

Forfeiture.

It is a Writ that is uſed to go forth, when the King was about to grant any Liberties, as Market, Fair, or the like, to enquire what prejudice will come thereby: So alſo

Ad quod damnum, what.

it ſeems where one would alien in Mortmain, before the King granted his Licence, he uſed to grant this to the Eſcheator to enquire what harm it may be to him, or to his Country. See 27 *Ed.*1. *Ordinatio de libertatibus*. *F.N.B.* 221.

Quale Jus, what. It was a Writ that did lie where an Abbot, or ſuch like perſon had a Judgment to recover againſt one by Default, then before Judgment given, or Execution awarded, this Writ did go to the Eſcheator, to inquire what right he had to recover; and if it had been found he had no right, then the Lord which ſhould have had the Land, if it had been aliened in Mortmain, ſhall have had it. *Terms Ley*. See the old *Statutes*, *Mag. Chart.* 36. *Weſtm.*2.32. 15 *R.*2.5. 23 *H.*8.10. *Wingates* Abridgment.

Of Mortuary or Corſe preſent.

Mortuary or Corſe preſent, what. *Executor.* MOrtuary is a Gift left by a man at his death to his Pariſh Church, for the Recompence of his Perſonal Tithes and Offerings, not duly paid in his life time: And this by the Executor was uſed to be paid next to the Herriot, and before the Debts: For anciently, if a man had three Beaſts, the Lord had the firſt Beaſt, the Parſon the next, in the right of his Church. But now the rate, and order of this is altered, and ſet down in Certain, by the Statutes of *Circumſpecte agatis*, 13 *Edw.*1. 21 *H.*8.6. *Co.* upon *Littl.*185. *Doct. & Stud.* 175. See *Tithes*.

CHAP. CXIV.

Of Navy and Navigation, Marriners and Shipping, News and Night-walkers.

Sect. 1. *Navy, &c.* FOr the Navy and Navigation, Marriners, Ships and Shipping, and that which doth concern theſe things, ſee 6 *R.*2.8. 1 *El.* 13. 5 *Eliz.*5. 13 *Eliz.*15. 18 *H.*6.19. 1 *Jac.*25. 39 *El.* 17. 1, 2 *Phil. & Ma.*5. 18 *Eliz.* 8. 43 *Eliz.*3. 1, 2 *Phil. & Ma.*16. 8 *Eliz.*13. *Acts*, 9 *Octob.*1651. 16 *June*, 1648. For increaſe of Shipping, ſee *Merchants*, *Tranſportation*.

Of News.

News. THe Penalty of telling falſe News of the great Men of the Realm, ſee 3 *Ed.*1.34. 2 *R.*2.5. 12 *R.*2.11. 1, 2 *Phil. & Ma.*3. See *Scandalum Magnatum* in my *Firſt part of the Marrow of the Law*.

Of Night-walkers.

Night-walkers. NIght-walkers are ſuſpitious perſons, ſuch as ſleep by day, and walk by night; theſe eſpecially, if they haunt leud Houſes, or keep leud Company, or be otherwiſe ſuſpitious, may be arreſted by a Juſtice of Peace Warrant, and bound to the Good-Behavior for this, without any more matter, ſee 13 *H.*7.10.

CHAP.

CHAP. CXV.

Of Nosm or Name.

Sect. 1.

1. *Nosm* or *Name*, what.

NOmen *quasi rei notamen*, Names were invented onely to put a difference between person and person, thing and thing, and these are considerable in Law, with relation to Deeds or Writs. For by mistakes of names, sometimes Deeds may be avoided, sometimes Writs may be abated, or suits may become erroneous. And for this we are to know that our Law doth call Persons or Bodies, Natural, or Politick.

The kindes of Names, of Baptism, Sirname.

There are many kindes of Names, Names of Persons, or Bodies, and places, of Persons, Natural and Politick; the Politick is sole or aggregate of many: There are Names of Baptism, as *John*, *William*, and Sirnames, as *White*, *Dyer*, *&c.* Names of Mystery, or Occupation, as *Baker*, *Mercer*, *Carpenter*; Names of Office, as *Justice of Peace*, *Attorney*, and the like; Names of Honor, Degree, or Dignity, as *Duke*, *Earl*, *Knight*, *Gentleman*; Names of Corporation, as *Major* and *Commonalty*, and the like: And Politick Bodies, as *Bishops*, *Deans*, *&c.* There are names of places, as *Towns*, *Villages*, *Parishes*, *Hamlets*, and the like.

2. *Body Politick*, what. The kindes of it.

A Body Politick, is a Body in Fiction of Law, that endureth in perpetual succession. And these are either sole of one person, such were a *Bishop*, *Dean*, *Prebend*, *Archdeacon*, *Parson*, *Abbot*, *Prior*, and the like. And these had a double capacity, to give, or take, sue, or be sued, or else they are aggregate of many, and then are called a *Corporation*.

3. *Corporation*, what.

A *Corporation* is an Assembly, and joyning together of many into one Fellowship, Brotherhood, and minde, whereof one is as the Head, and the rest is as the Body.

The kindes of it.

And these kindes of *Corporations* were said to be heretofore, either by the Common Law. So the *Parliament* onely was a *Corporation*. And so *Church wardens* also are to some purposes a *Corporation*, or by the *Kings* Authority, or mixt. Some of these again were said to be *Spiritual*, and some *Temporal*. The *Spiritual* were also, either of dead persons in Law, as *Abbots*, *Covents*, and the like, or they are of able persons in Law, as *Dean* and *Chapter*, *Master* and *Fellows* of Colledges, and the like. Some of them also were said to be Regular, and some Secular *Corporations*. *Temporal* are such as is a *Major* and *Commonalty*.

For *Corporations*, these things are to be known.

4. *Corporations. Ordinances.*

1. They may not make or execute any Ordinance in Diminution of the *Prerogative*, or of other, or against common profit, except approved by the *Chancellor*, *Treasurer*, *Chief Justices*, or three of them, or the *Justices of Assise*, under pain of forty pound. 19 *H.* 7. 7. 2. They may make no Ordinance to restrain Sutes in the *Kings Court*, under pain of forty pound, 19 *H.* 7. 7. *Brownl.* 2 *part*, 284. 3. They must take but two shillings and six pence for the first Entry of an Apprentice, and three shillings and four pence for his Entry of Freedom, under pain of forty pound. 22 *H.* 8. 4. 4. They may not by Bond or Oath, restrain any Apprentice or Journeyman from keeping shop, or take more money of them for their Freedom, then the Fee of Entry. 28 *H.* 8. 5. 5. Acts done by the Major part, these shall binde the rest, and no Oath taken to the contrary, shall be binding. 33 *H.* 3. 27.

But for this matter of *Corporations*, see *Co.* on *Littl.* 250. 34. 11. 26. 14 *H.* 8. 3. And in divers other places in my Book of *Common Assurances*, *chap.* 12.

5. *Addition* and *alias Dictus*, what.

Addition is a Title given to a Man over and above his proper and *Christian* name and sirname, shewing his Estate or Degree, Occupation, Mystery, Place, and Dwelling. 1 *H.* 5. 5. *Alias Dictus* is the manner of Description of a *Defendant* in a Writ, when he is sued upon an Especialty, where after a short Description of his *Names* and *Additions*, the Writ goeth farther, *Alias Dictus*; and then doth after describe and set him down again by the very *Names* and *Additions*, whereby he is named and bound in the Writing. *Dyer* 50.

6. Indempnitate nominis, what. This is a Writ that lieth where an Action of Debt, Covenant, or Accompt, is brought againſt one man, or one man hath entred into a Recognizance, or the like, and another man of the ſame ſirname is taken, and vexed in his Body, Goods, or Lands thereby; in this caſe, the party grieved, or his Executors, after his death, if the Goods be taken, ſhall be relieved by this Writ. See for it *F.N.B.*267. *Kelw.*89. *Dyer* 5. *Finches Law* 454. 37 *Ed.*3.2. 9 *H.*6.4. *Brownl. Rep.* 2 *part.*270.

7. *Miſnoſmer*, what. *Miſnoſmer* is the miſtake of the right name of a perſon, or thing: And this is ſometimes in the Chriſtian, ſometimes in the Sirname, and ſometimes it is in ſome other of the Additions; and where this will mar a Deed, or not. See my Book of *Common Aſſurances, chap.*12. *Co.*6.63. on *Littl.*3. *Brownl. Rep.* 2 *part.* 244, 245. 48. 1 *part.* 59. And where a Writ will abate, or not by ſuch miſtake, ſee *Co.* 6. 63. And what ſhall be ſaid a good name to purchaſe by, or not, ſee at large in my Book of *Common Aſſurances, chap.*12. 12 *H.*7.28. 5 *Ed.*4.2.

Sect. 2.

As for names of Dignity, and Titles of Honor, theſe things are to be known.

8. *Dignities and Nobility, and Title of Honor.*

1. There have been, and are, where the Law doth take notice, divers Titles and Degrees of Honor and Dignities, one beneath another, As the *King* as Supreme (in whoſe room the *Lord Protector* now is,) the *Queen, Prince, Dukes, &c. Marqueſſes, Earls, Vicounts, Barons, Vavaſors, Lords, Knights of the Bath, of the Garter, Baronets*, (which are all one with *Knights Bannerets*, the *Templers of the Rhodes*, of the *Order* of St. *John* of *Jeruſalem*, *Eſquires*, *Gentlemen*, who are ſaid to be thoſe, whom their Blood, and Race, doth make Noble, and known; and under this are compriſed all above *Yeomen*; for all *Noblemen* are *Gentlemen*, but all *Gentlemen* are not *Noblemen-Gentlemen*. Alſo perſons were divided thus, as by the Noble, and in reſpect of Nobility of the *Lords-houſe of Parliament*, and of the Barony of *England*, or one of the *Commons*, and in reſpect there of the *Commons-houſe in Parliament*. And there are divers Degrees of Nobility, As *Dukes*, *Marqueſſes*, *Earls*, *Vicounts*, and *Barons*, which laſt word did ſometimes include all the reſt; ſo of the *Commons* there be degrees, As *Knights*, *Eſquires*, *Gentlemen*, *Citizens*, *Yeomen*, and *Burgeſſes* of ſeveral degrees, but Nobility with us is ſaid to be from the *Knight* upward, and is leſſer; that is, all from *Barons* downward, or greater from the *Barons* upward.

2. Some of theſe Degrees, Orders, and Titles, are gone, as *King*, *Queen*, and *Prince*, *Vavaſors*, the Order of *Knights-Marſhal*, *Templers of the Rhodes*, and others. Some of them continue to this day, as *Marqueſſes*, and the reſt. Some of all which remain ſtill amongſt us.

Heraulds. 3. Theſe have either Arms, Enſigns, and Cogniſances allowed them, and for the examination, and ſafe keeping of theſe, there are Officers called *Heraulds*, who are of purpoſe to look to it, and to finde them out, and to give them to ſuch as deſire it.

4. The *Kings* have had in all times, the diſpoſe of moſt of theſe Inferior Honors at their firſt Creation, as the Dignities of *Dukes*, *Earls*, and moſt of the other great Dignities: All which they did ſometimes confer in Fee, ſometimes in Tail, or as they pleaſed. Some of theſe are made by Patent of the King, and ſome by other ways and means, ſome of them are incident to Offices, and ſome not.

6. Some of theſe Creations were done with much Ceremony and Solemnity, and ſome with no Ceremony at all.

Degradation. 7. Theſe Honors had, they that had them, might have loſt and forfeited them, and they might have been degraded of them; the which alſo in ſome caſes was done with much Ceremony. *Cambden*, *Howes* Annals, Sir *Thomas Smith de Republica.*

8. None may aſſume to themſelves, nor give to others any Names, or Titles of Honor, or Dignities conferred on, or given to them by the laſt *King*, ſince 4 *Januar.* 1641. *Act*, 4 *Feb.* 1651.

9. The differences about theſe things were wont to be decided by the *Conſtable* of *England*, and *Earl-Marſhal*, by the Law of *Chivalry*, or Title of *Honor* in the Court of *Chivalry*. But theſe Officers, and this Court is now gone. 21 *H.*7.33. 37 *H.*6. 16. See Title *Lord*, *Co.*2 *part*, *Inſt.*6. For *Biſhops* and *Biſhopricks*, ſee 1 *Ed.*3. *ſtat.* 2. *cap.*2. 14 *Ed.*3. *ſtat.*3. *pro clero cap.*6. 25 *Ed.*3. *ſtat.*3. *pro clero*, *cap.*6. 26 *H.*8. 14. 3 *Ed.*6.2. 3 *Ed.*6.1. 1,2 *Ph. & Ma.*8. 8 *El.*1. 5,6 *Ed.*6.1. 39 *El.*8. 1 *Jac.*3. For *Addition*, ſee 1 *H.*5.5.

CHAP.

CHAP. CXVI.

Of Notice.

Sect. 1. *Notice, what.*

NOtice is the making ſomething known, that a man was or might be ignorant of before; and this in divers caſes produceth divers effects, As firſt, in reſpect of the party that doth give it, that by this means he ſhall have ſome benefit that otherwiſe he ſhould not have had; or hereby he may be freed of ſome charge, that otherwiſe he ſhould have born. Secondly, In reſpect of the party to whom the notice is to be given; in that, by theſe means he is made ſubject to ſome Action or charge, that otherwiſe he ſhould not have been ſubject unto; and his eſtate is ſubject to a Forfeiture, which otherwiſe it had not been in danger of: Thirdly, In reſpect of both, in that hereby an act may be brought, that otherwiſe had been good, or an act may be good, that otherwiſe had been naught. *Co.* upon *Littl.* 309.

Where Notice is requiſit and ought to be given. And what ſhall be ſaid a ſufficient Notice, or not.

If a Parſon had reſigned his Church unto the Ordinary, the Ordinary or his Succeſſor, if he die, muſt give notice thereof to the Patron, elſe he ſhall never take advantage of the Lapſe, if the Patron do not preſent within ſix moneths. *Kelw.* 49:

To the Patron by the Ordinary.

If the Ordinary had refuſed to inſtitute a Clerk preſented, becauſe he was illiterate (as in that caſe he might) there he muſt have given notice thereof to the Patron, eſpecially if the Patron had been a Lay-man, (for if he had been a Clergiman, it ſeems otherwiſe) or if he had refuſed him for any private cauſe confeſſed upon his examination, and not publickly, and notoriouſly known. In theſe caſes he muſt have given notice to the Patron, or elſe he had taken no advantage of the Lapſe. See *Dyer* 293. *Kelw.* 50. 6. *Broo. cap.* 504. 1 *H.* 7. 9. *Doct. & Stud. l.* 2. *Kelw.* 49, 50. *Dyer* 293. 246.

If the Parſon be deprived, the Ordinary muſt have given notice hereof to the Patron, or elſe he had taken no advantage of the Lapſe. *Dyer* 346.

If one that had a Benefice with Cure of eight pound, and is not qualified, had been inſtituted, but not inducted into another, contrary to the Statute of 2. 1 *H.* 8. The Ordinary muſt have given notice hereof to the Patron, elſe he had taken no advantage of the Lapſe. *Co.* 4. 79.

If a Church had been void by Simony, the Patron muſt have had notice. 13 *Eliz.* 6. See more in 31 *Eliz.* 6.

To the Tenant of the Grant of the Reverſion.

If a Manor be conveyed or transferred from one to another, as when an Eſtate that one hath in a Manor, doth ceaſe by limitation of uſe, and it be limitted to another, then he that is the preſent Lord muſt give notice hereof to the Copiholder, or elſe if the Copiholder deny his Rent upon demand to the Lord, this is no Forfeiture. So alſo is it, though the Manor were paſſed by a Deed of Bargain and Sale inrolled. *Co.* 8. 92. 5. 13.

Forfeiture by a Copiholder.

To one upon a Condition to avoid or affirm an Eſtate.

If the Leſſor make a Feoffment of his Land in Leaſe for life or years, that is, upon condition to forfeit for non-payment of Rent, and the Leſſor give Livery and Seiſin to the Grantee of the Reverſion, ſo that the Leſſee hath not notice of it; in this caſe the Grantee muſt give him notice of it, elſe he cannot enter after demand for non-payment of the Rent upon the Condition, as the Leſſor might have done; and ſo is it, though the Grant of the Reverſion had been by Deed and Bargain and Sale inrolled. *Co.* 9. 113. 8. 42.

If one make an Indenture to Uſes, provided, That if one at any time, during his life, pay to *J. S.* twenty pound, or tender it, at ſuch a place, then the Uſes to ceaſe, or the Eſtate of any raiſed by the ſaid Uſes, ſhall ceaſe; in this caſe, if he will pay the money according to the Condition, he muſt give notice thereof to *J. S.* elſe the tender at the place, is not ſufficient. *Co.* 8. 92. *Dyer* 35. *Co.* 5. 113.

If

If a Feoffment be made to divers Uſes on Condition, That if one that hath an Eſtate by the ſame Feoffment ſhall do, or not do ſomething, that then his Eſtate ſhall be void; now he muſt have notice of this Condition, or elſe the doing, or not doing of that act, is no Forfeiture of his Eſtate. *Dyer* 354. *Co.* 9. *Francis* caſe.

If a Leaſe be made on Condition to do ſome collateral thing, as build a Houſe, or the like, and the Leſſor ſell the Reverſion by bargain and ſale or Feoffment; in this caſe the Vendee muſt have notice hereof, for otherwiſe if he after the Condition broken, accept the Rent; this is no Diſpenſation of the Condition, or Affirmance of the Eſtate. *Co.* 3. 64. 8. 92.

Sect. 2. By a Lord to the Feoffee or Purchaſor to change the *Avowry*.

If one grant a Reverſion, notice hereof muſt be given to the Tenant by the Grantee; for otherwiſe, if he Attorn, and have no notice of the Grant, his Attornment is void, (ſee *Attornment.*) But Notice by Law may be without Notice in Fact. *Co.* upon *Littl.* 308.

To a Purchaſor of a Uſe or Truſt.

If one have any Eſtate, or any Lands in truſt for, and in the uſe of another, and one is about to purchaſe this; in this caſe, it behoves him to whoſe uſe, to give notice of the uſe to the Purchaſers, for otherwiſe the uſe may be gone: For if in that caſe, the party truſted, do for a good conſideration ſell the Land to one that hath notice of the uſe, then the Purchaſor ſhall ſtand ſeiſed of that Land to the firſt uſe. *Plow.* 351.

To others in other caſes.

If one bring an Action againſt an Executor or Adminiſtrator, and lay his Action in another County, then that wherein the Executor or Adminiſtrator doth dwell, he muſt give notice hereof unto him; for the Executor or Adminiſtrator, is not bound to take notice of it, unleſs it be in the ſame County, and therefore if he after that do pay away the Aſſets he hath to another, that hath not begun any Sute, the party hath no Remedy. See *Executors. Plow.* 279. *Broo. Notice* 16.

If a mans Dog do kill Cattle, he ſhall not be charged in an Action of the caſe, unleſs he had notice of the quality of the Dog therein. See *Action of the Caſe.*

If the Lord diſtrain the Tenant for ſuch Services as he holdeth of the Meſn; in this caſe, he may have a Writ of Meſn, without giving any notice thereof to the Meſn; but if he diſtrain for other Services then he holdeth, there he cannot have this Writ before he have given notice to the Meſn. *Broo. Notice* 21.

If one make a Leaſe for years to one, and after make a Leaſe to another, to begin after the Surrender, End, or Forfeiture of the firſt Leaſe, with clauſe of Re-entry for not payment of Rent. After the Leſſor took a ſecret Surrender of the firſt Leſſee, and after that Surrender a Rent day incurred, and the Rent not paid by the ſecond Leſſee; it was adjudged, that his Eſtate was not void, for the other ought to have given him notice of the Surrender. *Goldsb.* 140. *pl.* 49.

If a Condition be to pay money at any time, during ones life, he muſt give notice when he will pay it. *Co.* upon *Littl. f.* 211. So if *A.* be bound to *B.* with Condition that *C.* ſhall infeoffee *D.* on ſuch a day; in this caſe *C.* muſt give notice to *D.* thereof, and requeſt him to be on the Land at the day to receive the Feoffment, and he muſt ſeek *D.* and give him notice. *Co* upon *Littl.* 211.

If the Maſter impriſon a man wrongfully, and the ſervant keep the Key of the Room where he is in priſon, he muſt have notice of the cauſe that it is wrongful, or elſe he is no Treſpaſſer. *Broo. Faux Impriſonment.*

If I hire the ſervant of another man, hired in a foreign County, and have not notice thereof; in this caſe, I am no Treſpaſſer; as it ſeems it ſhould be, if he were the ſervant of another man, hired in the ſame County. *Broo. Notice* 20. 4. 8.

Sect. 3. If a man be bound by the Condition of an Obligation, or otherwiſe upon a penalty, upon a contingent precedent; this is to be done by the Obligee, and it lieth wholly and properly in his Conuſans, and not in the knowledge of the Obligor; in this caſe it ſeems, that the Obligee muſt give notice of the thing done to the Obligor, or otherwiſe he is not to be charged to do that thing; as if he be to pay money within a week after the Obligee is married; in this caſe he muſt give him notice when he is married. But if he be bound to do ſuch a thing by a ſingle Obligation, Covenant, or an Aſſumpſit onely; in that caſe he muſt take notice of it at his peril. So alſo where

where the thing doth lie, as much in the knowledge of the Obligor, as of the Obligee, as in the caſes below. *Wheelers* caſe. *Mich.* 7 *Jac. B. R. Hil.* 9 *Jac. B. R.*

If *A.* be bound to *B.* to pay him one hundred pound when he doth come to *London*, he muſt give notice to *A.* when he doth come to *London*, as was reſolved. *Mich.* 3 *Jac. in Co. B.*

If *A.* be bound to *B.* in an Obligation with Condition, that *B.* coming from beyond Sea before the 22 of *April*, then that *A.* ſhall pay *B.* twenty pound before the 27 of *April* after; in this caſe it ſeems *B.* is not bound to give notice of his Retorn, *Goldsb.* 138. *pl.* 49.

When one is bound to do ſuch an act after the death, or marriage of a ſtranger, or to ſtand to the Award of another. *Co.* 7. 29.

Where the promiſe is to the party, to do a thing at the time of the marriage of a ſtranger; there it ſeems notice is requiſite, but when it is to be done at the time of the marriage of the party himſelf, *contrà*. By three Juſtices, in *B. R. Trin.* 14 *Jac.* but *quere*. *Co.* 7. 29. 9 *Ed.* 4.

If I binde my ſelf to ſave another harmleſs from a Bond, he is bound in for me; aſſoon as I am ſued, his Obligation is forfeit, without giving notice of it. *Foxes* caſe, *M.* 4 *Eliz.* upon an *Arbitrement*. See *Arbitrement* and *March, f.* 108: *pl.* 186.

If the Ordinary had refuſed a Clerk preſented, becauſe he was *merè laicus*, or for any other notorious crime, as becauſe he was a Baſtard, perjured perſon, common whore-maſter, drunkard, or the like; or if a Parſonage had become void by Ceſſion, and the Creation of a Parſon, a Biſhop; in theſe caſes the Ordinary was not bound to give notice to the Patron, but he muſt have taken notice of it at his peril, and preſented again, or elſe the Ordinary may preſent by the Lapſe, *Kelw.* 49. *Dyer* 293. *Broo. Notice* 241. 3. In what caſe the party is bound to take notice, without giving notice.

If one that had a Benefice with Cure of eight pound, and being not qualified for another, had been inſtituted and inducted to another againſt the Statute of 21 *H.* 8. In this caſe the Ordinary was not bound to give notice, *Co.* 4. 19.

If there be Lord and Tenant, and the Tenant make a Feoffment in Fee, and die, then the Lord, though no notice be given to him, yet muſt change his Avowry, and take his Service of the Feoffee, *Broo. cap.* 108,

So if a Recovery be had againſt the Tenant, or if the Tenant be diſſeiſed, and the Diſſeiſor die ſeiſed, and ſo the Heir is in by Diſcent, and the Entry of the Diſſeiſee is gone; here the Lord muſt charge his Avowry without notice, *Perk. ſect.* 131.

If one be bound to pay money, or do any other thing at the death, or marriage of a ſtranger that is not party to the Deed, here the Obligee is not bound to give notice of this contingent to the Obligor, but he muſt enquire and take notice of it at his peril. *Wheelers* caſe, *M.* 7 *Jac. B. R.*

So if one be bound to ſtand to the Arbitrement of *J. S.* and *J. S.* do make an Arbitrement, the Obligor muſt take notice, and perform it at his peril.

So if one binde himſelf to account before Auditors, and to pay the Arrearages, he muſt take notice of the Account, and pay the Arrearages at his peril, without any notice given. 1 *H.* 7. 5. *Co.* 8. 92.

If one have Land in truſt, or to anothers uſe, and have the ſame without any conſideration; in this caſe the Donee ſhall ſtand ſeiſed to the firſt uſe, though he had no notice of it. *Plow* 351.

If one diſtrain anothers Cattle, he is not bound to give notice to the owner in what Pound he doth put them, though the owner deſire to know, but he muſt enquire after, and look to them at his peril, *Broo. Notice* 22.

If a Tenant for life, Leaſe for years and die, the Leſſee for years muſt take notice thereof, and avoid at his peril, and he in Reverſion is not bound to give him notice thereof. *Broo. Notice* 15. *Sect.* 4.

If general Acts of Parliament that do concern the whole Nation, the Judges in giving of their Judgments, are bound to take notice; though the ſame be never pleaded before them: And every other man is bound to take notice preſently at his own peril. But of ſpecial Acts of Parliament that concern ſome particular places or perſons

perſons, onely the Law doth allow ſome reaſonable time, and means for notice, *Broo. Notice 9.*

The Sheriff in the ſummoning of men, and taking, and ſeiſing mens Goods, and Lands, is at his peril, to ſee that he do not miſtake, though no notice be given him; and therefore if a Sheriff do make Execution of another mans Goods, or ſeiſe, or diſtrain, or make Replevin of another mans Cattle, or give Seiſin of another mans Land, inſtead of his, that he ought to take and ſeiſe, though notice be given him by the Plaintiff, or ſome other, that they are the proper Goods and Lands of him, whoſe Goods or Lands he intended to take; yet in this caſe the Sheriff is a Treſpaſſor. *Doct. & Stud. lib. ſect. 44. Broo. Notice 43.*

4. How Notice is to be given.

If the Ordinary had been to give notice of the Avoidance of a Church, or Refuſal of a Clerk to a Patron, he ought and muſt have done it by himſelf, or by ſome other by his appointment, by a writing or Certificate under his hand, certainly and plainly ſetting down the Matter to the Patron, and that to the Perſon of the Patron, if he might have been found; and if he would not be found in the County, then at the Church-door, whereof the Preſentation was to have been. And if another man of his own head had given notice of this to the Patron, this had not been ſufficient. *Dyer 327. Co. 6. 40. Doct. & Stud. l. 2. c. 41.*

Notice by a Tenant to change the Avowry, muſt be made upon the Land aliened with a tender of all the Arrearages behinde; for if the Lord accept the Services of the Alienee, before the Arrearages paid, he doth loſe his Arrearages for ever. *Kelw. 113. Co. 3. 66.*

If one be bound to Infeoff ſuch a one as the Obligee ſhall name; now he muſt name them to the Obligor himſelf, for if he do it to a ſtranger, and not to the Obligor, it is not ſufficient. *Broo. Notice 150.*

If an Executor be ſued in another County, and he pay away his Aſſets before notice be given him, and have no Aſſets to anſwer the Sute; yet this is good, and the other hath no remedy. See before.

CHAP. CXVII.

Of a Nuſance.

1. *Nuſans*, what.

A Nuſans ſignifieth a thing done, whereby another man is annoyed in his Free-Lands, or Tenements, or otherwiſe: As when a Houſe is built, or Wall ſet up, or Water ſtopt to the grievance of a Neighbor, by which his Frank-tenement is impaired. And this is either Common, when every man is or may be equally annoyed by it; or Special, where ſome one or more are, or may be more hurt by it then others, *F. N. B. 193. O. N. B. 108, 109.*

Sometimes alſo this word ſignifieth a Writ, which is given for Relief in theſe caſes. See for this, *6 Rich. 2. 9. Crompt. Jur. 222. Weſtm. 2. 25.*

2. What ſhall be ſaid a *Nuſans*, or not.

A Nuſans may be unto a man by ſtopping, or annoying his Ways, Waters, Light, or Air, and that by Building, Diverting, Stopping, Digging, or the like: As if one ſet up or build a Wall againſt the Windows, and light of another mans Houſe; or build a Houſe, ſo that it over-hang his Neighbors, or make a Pig-ſtie, or a Chimney, or lay Dung or Carrion ſo near his Neighbors Houſe, that he is annoyed by it; theſe, and the like Acts are Nuſances, *Cujus eſt ſolum, ejus eſt uſque ad cœlum. Co. 9. 54. 5. 101.*

The erecting of Lime-kills, and Dye-houſes, may be a Nuſans to the Neighborhood.

If

If there be a High-way thorow a Copice, and the owner make Gates at both ſides to ſave the yong Sprigs, and a ſtranger travelling did unhang them, and cut them in peeces; and the owner brought Treſpaſs, and it was adjudged juſtifiable, and judgment againſt the Defendant. *James* and *Hayward*, *B. R. Quarto Car.* But it is no Nuſans to a man that hath a Mill upon a Water, that another Mill is builded upon the ſame Water by him, unleſs thereby his Water be ſtopt or turned, though he get away part of his Cuſtom by that means. *Breo. cap.* 36.

It is no Nuſans to build a new Pigeon-houſe, though the Neighborhood be annoyed by it.

It is no Nuſans to a Neighborhood, when a Butcher, or Chandler, or Brewer, doth ſet up his Trade, or Houſes for it, amongſt them. But a Nuſans may be by them, by laying of ſtinking heaps at the doors. *Paſche*, 5 *Jac. B. R.* But the building of a Brew-houſe, the keeping of a Chandler, or Butchers-ſhop in an inconvenient place to the offence of the Houſes or Gardens of Neighbors, may be a Nuſans. *Trin.* 13 *Car. B. R.*

It is no Nuſans to plant Coneys, whether a man hath any Warren or not; neither is this puniſhable any way, but he may kill them. Adjudged *Hil.* 39 *Eliz. C. B. Rowleſthons* caſe.

For Common Nuſances that are, or may be grievous to one as well as another, as in High-ways, and the like, the moſt proper and apt means of Remedy, and place of Redreſs, are the Seſſions, the Sheriffs Turns, and the Leets; for which ſee *Courts*. 3. The Remedy for this wrong.

If any caſt any Garbage, Dung, Intrails, or any other annoyance into the Ditches, Rivers, Waters, or other places within, or near any City, Burrough, or Town, the Suburbs thereof, in pain to be called by Writ before the Lord Chancellor, and to be puniſhed at his diſcretion. 12 *Rich.* 2. 13.

But for ſuch Nuſances as are more ſpecial to one mans Freehold, more then anothers, the party grieved muſt be thus relieved; if the Way, Water-courſe, or Conduit, be wholly ſtopt; and he whoſe Way, Water-courſe, or Conduit it is, be he a Freeholder of that thing, to which the Way, Water-courſe, or Conduit doth belong, he may either abate the Nuſans himſelf, or he may have an Aſſiſe of Nuſans, or a *Quod Permittat* againſt the party that doth the Nuſans. And if the party to whom the Nuſans is done, have onely a Leaſe for years of that to which the Way, Water, or Conduit doth belong, and the Way be wholly, or in part ſtopt, or if he have the Freehold, and the Way or Water be ſtopt in part onely; in this caſe the party wronged cannot have an Aſſiſe, but he muſt have an Action of the Caſe. *Co.* 5. 73. 33 *Hen.* 6. 26. *Co.* 9. 113. 5. 101. *F. N. B.* 18. 4. 42 *Aſſ. pl.* 1. 14 *Hen.* 8. *p. ult.* 4. *Quod Permittat*, what.

And if he that doth the thing, Alien the Houſe or thing by which the Nuſance is bred to another, the party grieved ſhall have a *Queſtus eſt nobis* for his Relief. 5. *Queſtus eſt nobis*, what.

For every ſpecial Nuſans, a man hath a double Remedy, either by Action, wherein he ſhall recover damages, and Judgment ſhall be that the Nuſans ſhall be removed, and thrown down, *&c.* as the cauſe doth require, or the party to whom it is done, or his Feoffee, or Alienee, if he ſell away his Land, to which the Nuſans is made, may demoliſh it, whether the Lands be in the hands of ſuch Alienee, or no, and that before any prejudice to them. But if he demoliſh it before this Action brought, he cannot after bring an Action; and if he do hanging the Action, the other may plead it in Bar of the Action; if after pleading, it ſeems, he ſhould have an *Audita querela*. *Co.* 9. 55. 5. 101. *F. N. B.* 185.

If the Nuſans be to a Frank-tenement, the party wronged, or his Heir, or Feoffee, may have a *Quod permittat* againſt the Actor, without any notice or requeſt before, to reform it; and againſt his Heir or Feoffee, after Requeſt made to him, to reform it. *F. N. B.* 124. *Co.* 5. 101. 9. 54. *Dyer* 313.

If a man have a Houſe near my Houſe, and he ſuffer it ſo ruinous, that it is like to fall on my Houſe; I may have a Writ *De domo reparanda*, and compel him to repair it by theſe means. *Co. lib Inſt.* 1 *part, fol.* 56.

It ſeems generally it is where any thing is done to the Nuſans of the Kings Tenants, or more particularly where any one doth incroach to himſelf, that he ought not in 6. *Perpreſture*, what.

any Juriſdiction, Land, or Franchiſe. Generally it is as often as any thing is done to the hurt of the Kings Tenement, the Kings Way, or of Common Waters, or of a City, *&c.* And moſt properly it is where there is a Houſe builded or incloſed, made of any part of the Kings Demeſns, or if a High-way, or a Publick Water, or Common Street, or ſuch like Publick things be taken in to private uſe. So that a *Perpreſture* is where one incroacheth, or makes that ſeveral to himſelf, which ought to be Common to many. *Co.* 1 *part of Inſt. fol.*277. 2 *part, fol.*38.

CHAP. CXVIII.

Of an Oath, Oat-Meal, Ordinary, Ordinances, Oyl, Oppreſſion, Obligation and Defeaſance.

Sect. 1. 1. *Oath.*

AS to an Oath and Swearing, theſe things are to be known.

1. That by Oaths of Witneſſes, is one way of Tryal, and Proof of Matters of Fact in Civil and Criminal Matters. And for this ſee *Tryal.*

2. *Perjury* and ſubornation of *Perjury.*

2. Perjury is a great offence by our Law, and to be ſeverely puniſhed: If it be by a Jury, in a Verdict, in a Civil Cauſe, it is puniſhable in an Attaint; for which ſee *Attaint. Co.*11.98.

3. For wilful Perjury, a man is to forfeit twenty pound, to ſuffer ſix moneths Impriſonment without Bail, and be ever after diſabled to give evidence in any Court of Record, until the Judgment given againſt him for that offence, be Reverſed by Attaint, or otherwiſe. And if he be not able to pay the Fine, he is to be ſet upon the Pillory in ſome Market-place, and to have both his Ears nailed. 5 *Eliz.* 9.

4. He that ſhall ſuborn a Witneſs, to give Teſtimony in any Court of Record, concerning any Lands, Goods, Debt, or Damage, ſhall forfeit forty pounds, and be for ever after diſabled to give evidence (as in the caſe before.) And if he be not able to pay the Fine, he muſt ſuffer ſix moneths Impriſonment without Bail, and ſtand upon the Pillory a whole hour, in the next or ſame Market-Town, where the offence was committed. 5 *Eliz.* 9. See alſo in *Maintenance. Co.* 11. 98. *Crompt. Jur.*51.75. *Co.* 3 *part. Inſt. c.*74.

3. *Swearing* and *Curſing.*

5. For common Swearing and Curſing, the Forfeiture is for the firſt offence, The Lord, and all above him in degree, thirty ſhillings; the Baronet or Knight, twenty ſhillings; the Eſquire, ten ſhillings; the Gentleman, ſix ſhillings eight pence; every other Man and Woman, ſingle and married, three ſhillings four pence; and for every offence afterwards twice as much; and for the tenth offence, to be bound with Sureties to the Good-behavior for three years: And for lack of payment, or not giving Security to pay it, and no Diſtreſs being to levy it, if the offender be above twelve years old, he is to be put in Stocks three hours for the firſt offence, and for every offence after ſix hours; if he be under twelve years old, he is to be whipped by the Conſtable, or by the Parent or Maſter in his preſence. *Act,* 22 *June,* 1650. See my *Juſtice of Peace.* 29 *Eliz.*5. 32 *H.*8.9. 23 *H.*8.3. 11 *H.*7.21. and in other Titles.

6. The Oath of Freemen of Cities, ſee *Act,* 10 *Febr.*1648. The Oath of Majors, Juſtices, and other Officers, *Act,* 5 *Sept.* 1649.

7. He that Swears, may do it, by laying hand on the Book, or by lifting up hands which he will. *Act.* 5 *Sept.* 1649.

4 *Oath Ex Officio.*

8. No man ſhall be forced under pain of Fine, Impriſonment, or the like puniſhment, to take any Oath to accuſe himſelf of any crime whereby he may be liable to any pain or puniſhment, under pain of treble damages to the party grieved: One hundred pound to him that ſhall firſt proſecute him for it, and to be diſabled to execute, to have any imployment in any Court of Juſtice, and to exerciſe any Juriſdiction by force of any Letters Patents from the King. 16, 17 *Car.* 11.

9. Com-

9. Commiſſioners to examine Witneſſes by Commiſſion out of *Chancery*, are to be ſworn by the new *Ordinance*, 22 *Aug.* 1654.

10. The Oath of Allegeance and *Ex Officio*, is taken away upon 1 *Eliz.* 3 *Jac.* See *Allegeance* and *Supremacy*.

For the Oath upon Wager of Law, ſee *Law*. And for Oaths in General, ſee my *Juſtice of Peace*.

of Ordinaries.

FOr Ordinaries, and the Statutes concerning them, whiles they were here, ſee 13 *Ed.*1.19. 25 *Ed.*3.9. 31 *H.*8.13. 32 *H.*8.7. 27 *H.*8.20. 5 *Ed.*6.4. 2 *Ed.* 6.20. 1 *H.*7.4. 13 *Eliz.*12. 2 *H.*5.1. 21 *H.*8.5. 25 *Ed.*3.7. 23 *Eliz* 1. 1 *Jac.* 4. 34 *H.*8.14. 9 *H.*6.11. 13 *Eliz.*12. *Ordinary.*

of Oat-Meal.

THe puniſhment of him which ſelleth corrupt Oat-Meal, the firſt, ſecond, and third time, ſee 51 *Ed.*1. *Oat-meal.*

of Oyl.

WHo may ſearch for Oyl brought into *London*, and elſwhere; and how the offenders ſhall be puniſhed, ſee 3 *H.*8. 14. *Oyl.*

of Ordinances.

AS to Ordinances, theſe things are to be known.

1. That no Pariſh or Corporation may make Ordinances againſt the Publick Prerogative, or good. *Ordinances.*

2. Nor to binde, but where they are allowed by the Chancellor, Treaſurer, Chief Juſtices, or three of them, or Juſtices of the Aſſiſe. See *Corporation*, 19 *H.*7.7. And therefore an Ordinance to forbid the *Londoners* to carry their Wares to Fairs, was made void, 3 *H.*7.9. *Brownl.* 2 *part.* 284. See *By-Laws*.

of an Obligation and Defeaſance.

AN Obligation is a Deed in writing, whereby one man doth binde himſelf to another to pay a ſum of money, or do ſome other thing; and he that makes this Deed, is called the Obligor, and he to whom it is made, is called the Obligee. *Finches Ley* 49. 1. *Obligation*, what. *Obligor*, *Obligee*.

And it is ſometimes Simple or Single, which is when it is to pay a ſum of money, or do ſome other thing, and when it is without any Defeaſance or Condition in, or annexed to it, which alſo is ſometimes with a penalty called a Penal Bill, and ſometimes without a penalty: And this is that which is moſt properly called an Obligation, and ſometimes alſo it is called a Single Bill, or Single Bond; and ſometimes it is double or conditional, which is when it is attended upon, and accompanied with a Condition; and then it is ſaid to be a Bond containing a penalty with Condition to pay money, or do or ſuffer ſome act or thing, *&c.* And this Condition is ſometimes called a Defeaſance, and then eſpecially when it is (as ſometimes it is) in another Deed or Inſtrument; for moſt commonly it is inſerted into the ſame Deed, wherein the Obligation being the other part of it, is contained: And then alſo it is either ſubſcribed under the Obligation, or included within the body of it, or indorſed upon the back of it. And *quacunque viâ* if the Condition be performed, the penalty is ſaved; if not, the penalty is forfeit. *Co. ſuper Littl.* 172. 2. The kindes. 3. What ſhall be ſaid a good *Obligation* in his Original Creation, or not.

An Obligation may be made upon Parchment or Paper, and in looſe Parchment or Paper; or in a peece of Paper or Parchment ſowed in a Book, and either way it is good. But if it be made on a Tally, peece of Wood, or any other thing but Paper or Parchment, albeit it be ſealed and delivered, yet it is void. *Broo. Oblig.* 67. 30. *Trin.* 49 *Eliz. B.R.* And it may be made in the firſt, or in the third perſon (notwithſtanding the Statute of 38 *Ed.*3.4. which doth intend onely Obligations made beyond the Sea.) Firſt, for the manner and form of it; and what words are ſufficient to make an Obligation.

Sea.) And therefore an Obligation ſo made, as *Memorandum quod* A. *de* B. *debet* C. *de D.* 10*l. In cujus, &c.* is good. *Co. ſuper Littl.* 229. *Fitz. Obligat.* 9.

Albeit the beſt manner and form of an Obligation, is that which is moſt uſuall; yet any words in a writing, ſealed and delivered, whereby a man doth prove and declare himſelf to have another mans money, or to be indebted to him, will make a good Obligation; and therefore if a man by Deed ſay but this, *Memorandum* that *J. A.* of *B.* do ow to *C.* of *D.* 20l to be paid at *Eaſter* next: Or *memorandum*, that *J. A.* of *B.* have had of *C.* of *D.* 20l. of which there is 10l. behinde, [or of which I ow him 10l.] Or *memorandum*, that *J. A.* of *B.* have received of *C.* of *D.* 20l. to be repaid him again. Or *memorandum*, that *J. A.* of *B.* do grant to ow [or to pay] *C.* of *D.* 20l. Or *memorandum*, that *J. A.* of *B.* do promiſe to pay *C.* of *D.* 20l. Or *memorandum*, that *J. A.* of *B.* will pay to *C.* of *D.* 20l. Or *memorandum*, that *J. A.* of *B.* have had twenty pound of the money of *C.* of *D.* Or *memorandum*, that *J. A.* of *B.* have borrowed of *C.* of *D.* 20l. Or *memorandum*, that *J. A.* of *B.* do binde my ſelf to *C.* of *D.* that he ſhall receive of me twenty pound: All theſe, and ſuch like, are good Obligations. *Dyer* 21,22,23. *Co.* 9.53. 37 *H.* 6.9. 22 *Ed.* 4.22. *Kelw.* 34. 21 *Ed* 4.39. 11 *H.* 7.6. So if one ſay, *memorandum*, that *J. A.* of *B.* binde my ſelf to *C.* of *D.* that he ſhall receive twenty pound by the hands of *J. S.* when *K.* doth come to his houſe, and at *Michaelmas* then next following five pound; this is a good Obligation, and the words [by the hands of *J. D.*] are void, *Broo. Oblig.* 56. So if one binde himſelf thus, *Memorandum*, that *J. A.* of *B.* ow to *C.* of *D.* twenty pound; for payment of which, I binde my ſelf and my goods; this is a good Obligation, and will binde the perſon, but not his goods, *Broo. Oblig.* 16. So if one by Deed, Covenant or Promiſe to do a thing, and then uſeth theſe words, *Ad quam quidem promiſſionem perimplendam obligo me in* 20l. this is a good Obligation for twenty pound, *Broo. Oblig.* 52. *Dyer* 6. So if one binde himſelf thus, *Memorandum*, that *J. A.* of *B.* am bound to *C.* of *D.* to deliver him twenty quarters of Corn by a day, *Ad quod performandum obligo me*, without more words; this is a good Obligation, *Broo. Obl.* 40. 79. So if one binde himſelf thus, *Memorandum*, that *J. A.* of *B.* binde my ſelf to pay *C.* of *D.* ten pound at *Eaſter*, and if I fail to pay it then, I do grant to pay him twenty pound; this is a good Obligation for the twenty pound, if he fail to pay the ten pound: And ſome ſay he may recover both the twenty pound, and the ten pound, *Foxals* caſe, 9 *Jac. B. R.* So if one binde himſelf thus, *Memorandum*, that in conſideration of a Bill of fifty pound, wherein *J. S.* is bound for me to *I. D.* for payment of twenty pound: I do binde my ſelf in twenty pound to the ſaid *J. S.* to ſave him harmleſs from all Actions of the ſame; this is a good Obligation, and if *I. D.* ſue *J. S.* the Bill is forfeit. Or if one binde himſelf thus, Be it known, *&c.* that *I. A.* of *B.* do ow unto *C.* of *D.* the ſum of fourteen pound, to be paid at the Feaſt of, *&c.* together with ſix pounds, which I ow him upon Bills and Recogniſances, ſubſcribed with my hand; this is a good Bill, but it is good for no more but the fourteen pound, and not for the ſix pound; for the words do onely import the time of payment of the ſix pounds. See *Brownl.* 1 *part, fol.* 72. 103. 2 *part, f.* 98,99. *Fox verſus Wright, Trin* 40 *Eliz. B. R.* Adjudged *Parret* and *Woolwards* caſe, *M.* 38,39 *Eliz.* in the *Exchequer Chamber.*

If one make a writing in the form of a Statute, which the Party doth Seal, and afterwards legally deliver; but it is not ſealed by the Kings and the Majors Seal, according to the Statute, albeit this be not a good Statute, yet it may be a good Obligation, *Trin.* 37 *Eliz. B. R. Fitz Accompt* 79.

If one binde himſelf to pay money, or do any other thing, and afterward doth adde this clauſe in the Deed, *Et ad majorem hujus rei ſecuritatem inveni* A *de* B, *&* C *de* D *fide juſſores, quorum unuſquiſque obligat ſe in toto & in ſolid'.* And theſe two do alſo ſeal and deliver the Deed; it ſeems this is a good Obligation to binde them, albeit there be no other words in the Deed, *Perk. ſect.* 158. *Fitz Oblig.* 1.

If an Obligation be made to *J. D.* to the uſe of *I. S.* this is a good Obligation for *I. S.* in Equity, and ſome have ſaid he may Releaſe it; but this is much to be doubted; for it is certain *I. S.* cannot ſue the Obligor in his own name, but when he hath cauſe of Sute he may compel *I. D.* in *Chancery* to ſue the Obligor, *Br. Obl.* 72. *Cromp. Jur.* 63.

If

If *A.* of *B.* binde himſelf to *C.* of *D.* to pay twenty pound, and ſay not when; yet the Obligation is good, and the money is due preſently. So if the Obligation be *Solvendum nunquam*, or *ſolvendum* at Doomſday, the Obligations are good, and the *ſolvendum* void, and the money is due preſently. So if *A.* of *B.* binde himſelf to *C.* of *D.* in twenty pound, *ſolvendum* A *de* B. [where it ſhould be *ſolvendum* C *de* D,] the Obligation is good, and the *ſolvendum* void, *Broo. Obl.* 47. 14 *H.* 8. 29. 21 *Ed.* 3. 46. 4 *Ed.* 4. 29. If the Obligation be made thus, [*Obligo me, &c.*] leaving out theſe words following [*hæredes, Executores & Adminiſtratores;*] this is a good Obligation, and the Executors and Adminiſtrators, but not the Heir, are bound by it. And if it be made thus, [*Solvendum* to the *Obligee & ſucceſſoribus ſuis*] and not *Executoribus, &c.*] this is a good Obligation, and the Executors and Adminiſtrators, and not the Succeſſors, except it be in caſe of a Corporation, ſhall take advantage of it, *Dyer* 13. *Broo. Oblig.* 15. 68. An Obligation may be good, albeit it contain falſe or incongruous Latin or Engliſh, or Latin be put for Engliſh, or *è contra*, if the intent of the parties may ſufficiently appear: And therefore if one be bound by the name of *Johannes* for *Johannem*, or one binde himſelf in *octogenta*, for *octoginta libris*, or in *ſeptungentis* for *ſeptuagintis libris*, in *wiginti* for *viginti libris*, in *ſewteen* for *ſeaventeen pounds*, in *quinquegentis* for *quingentis libris*, in *ſeptuageſſimo* for *ſeptuaginta libris*, in *ſexingentis* for *ſexcentris libris*, in *quinquageſſimis*, or *quinque decies* for *quinquaginta libris*, in *octogenta* for *octoginta libris*, or in *viginti livers* for *viginti libris*, in *viginti nobilibus* for twenty nobles, or in *octigenta libris* for *octoginta libris*, or *quinginta libris* for *quinquaginta libris*, or the like; theſe miſpriſions will not hurt the Obligations, for they are good notwithſtanding. But if one by the Obligation binde himſelf in *quinqueagentis libris*, or in *quinqeagentis libris*, or in *quinagentis libris*, or in *ſegintis libris*; theſe Obligations are void, for in theſe caſes the meaning is ſo uncertain, that it cannot be diſcerned, and no Averment will ſerve to ſupply it in this caſe. So if an Obligation be dated 23 *die Aprilie*, in ſtead of *Aprilis*, this is a good Obligation, and this miſtake will not hurt. See *Brownl. Rep.* 1 *part*, 62. 64. 63. 122. 2 *part*, 208. *Co.* 10. 133. *Fitz Oblig* 12. 2 *H.* 4. 14. Adjudged *Vernons* caſe, *M.* 13 *Jac. Co. B. Grays* caſe, 5 *Jac. B. R. M.* 10 *Car. B. R.* Adjudged *Fitz Hugh verſus Bridges*, 3, 4 *Eliz. Co. B. Paris* caſe, *M.* 4 *Jac. B R. Trin.* 21 *Jac. Nowels* caſe. And if an Obligation have not date, or a falſe and impoſſible date, or have but half the date, as the year of our Lord onely; or if it want theſe words, *In cujus rei, &c.* or the like, if it be ſealed and delivered, it is a good Obligation, *Co.* 2. 5. See *Fait, Numb* 5.

A Single Obligation may be to pay money, or to do any other thing that is lawful and poſſible, and ſuch Obligations are good. But if the Obligation be to binde a man to do a thing unlawful or impoſſible, it is void; and therefore if one binde himſelf in an Obligation to kill a man, burn a houſe, maintain a Sute, or the like, it is void. So if the Obligation be made for maintenance, or to that end, or if it be made purſuant to, and in execution of an uſurious contract, or the like, it is void. So if an Obligation be made againſt the Statute of 23 *H.* 6. it is void. So if one binde himſelf in an Obligation, and the matter thereof is altogether uncertain, or inſenſible, it is void; but if there be any reaſonable certainty in it, it is good enough. So if one binde himſelf to go to *Rome* in three days, under pain of twenty pound, this is void, *Co.* 10. 110. See *Fait* or *Deed, Numb.* 51. See more *Infra.* Secondly, For the Matter and Subſtance of it.

The Condition of an Obligation may be either in the ſame, or in another Deed, and it may be indorſed of the back of the Obligation, ſubſcribed under it, or contained within it; but the beſt way to make it, is the uſual way, *viz.* The Condition of this Obligation is ſuch, *&c.* and yet if it be otherwiſe, it may be good; for if an Obligation be made from *A.* to *B.* and on the back of the ſame, theſe words are indorſed [*That whereas the within bounden* A. *is bound to* B *in* 20*l. yet* B. *willeth and granteth, that if* A. *pay to* B. 10*l. at* Eaſter, *that then the Obligation ſhall be void*] it ſeems this is a good Condition: So if in the cloſe of an Obligation of 20*l.* theſe words be added, [*That if* A. (the Obligor) *pay* 10*l. to* B. (the Obligee) *at* Eaſter, *that the Obligation ſhall be void,*] this is a good Condition. So if an Obligation be made from *A.* to *B.* of 20*l.* and theſe words are ſubſcribed, [*Now therefore if the Obligor* 4. What ſhall be ſaid a good *Condition* of an *Obligation*, or not. First, For the Manner and Frame of it.

pay

pay five pound quarterly for four years, then it is agreed that the Obligation ſhall be void,] this is a good Condition. So if a ſingle Obligation be made from *A.* to *B.* of twenty pound, and after the Obligation is made, *B.* doth by another Deed grant, that if *A.* pay him ten pound at *Eaſter*, the Obligation ſhall be void; this is a good Condition or Defeaſance: But if *A.* do binde himſelf in an Obligation to *B.* of twenty pound, and after *B.* doth binde himſelf in another Obligation to *A.* to perform the Covenants of an Indenture; and in this ſecond Obligation, there is a Proviſo that *B.* ſhall not ſue upon the firſt Obligation till ſuch a time; this is not a good Condition, *Plow.* 141. 21 *H.*6.51. *Fitz Bar* 157. *Broo. Obl.*89. *Fitz Bar* 265. *Paſche*, 8 *Jac. B. Simpſons* caſe, 21 *H.*6.51. 26 *H.*8.9. A Bill was made thus, [*Memorandum, That* J. A. *ow to* B. *twenty pound; for payment whereof I binde my ſelf*, &c. *In witneſs*, &c.] And after this, is ſubſcribed theſe words, [*Memorandum, That the ſaid* A. *be not compelled to pay the ſaid twenty pound, until he recover thirty pound upon an Obligation againſt* C, *&c.* This is a good Defeaſance. *Brownl. 2 part, f.*98. If *A.* be bound to *B.* in twenty pound, with Condition, that if *B.* do not bring *A.* a horſe before *Eaſter*, that the Obligation ſhall be void; this is a good Condition. And if the Obligee will have advantage of it, he muſt perform the thing, *Et ſic de ſimilibus*, 26 *H.*8.8. So if *A.* be bound in an Obligation to *B.* in twenty pound, with Condition, that if *B.* ſhall bring twenty load of Wood to the houſe of *A.* that *A.* ſhall pay him the twenty pound, or that *A.* ſhall pay him twenty pound when *B.* ſhall bring him twenty load of Wood to his houſe; theſe are good Conditions, and the thing muſt be done before the money is to be paid, *Broo. Count.*69. If the Condition of an Obligation be, That if *A.* (the Obligor) do not pay to *B.* (the Obligee) ten pound, that the Obligation ſhall be void, this is a good Condition: But it ſhall be taken according to the words, and therefore the Obligor it not to pay it: And if he be ſued, he may plead performance of the Condition in the not paying of it, *Broo. Oblig.*42. If theſe words be omitted in the cloſe of the Condition [*That then the Obligation to be void*;] the Condition is void, but it doth not hurt the Obligation, for that remains ſingle: But if the next words, *viz.* [*Or elſe ſhall ſtand in force*] be omitted, the Condition is never the worſe; for as the addition of them doth nothing adde to, ſo the omiſſion of them doth nothing detract from the ſtrength of the Obligation. *Curia B.R. Pa.* 9 *Jac. Truman & Parrams* caſe.

Secondly, For matter and ſubſtance of it;

The Condition of an Obligation, may be to do any lawful or poſſible thing, as to pay money, deliver Goods or Cattle, acknowledge a Statute, enter into an Obligation, make a Releaſe, make an Eſtate, ſurrender an Eſtate, make Reparations for quiet enjoying, to ſave harmleſs, to defend a Title, to perform Covenants, to abide an Award, to perform a Will, to give ſo much Land or Money in Legacy, to purchaſe Lands, to appear in a Court, to marry another, not to ſue, not to meddle with an Executorſhip, not to revoke a Letter of Attorney, not to be Surety, not to play at Cards or Dice, or any ſuch like thing, and ſuch a Condition is good. So alſo it ſeems a Condition, that a man ſhall not ſell his Goods, is good: But when the matter or thing to be done by the Condition, is unlawful or impoſſible, or the Condition it ſelf is repugnant, inſenſible, or incertain, the Condition is void, and in ſome caſes the Obligation alſo. See *Weſt. Symb. Paſche*, 8 *Jac. Co. B.* And herein, theſe differences are to be obſerved. 1. When the thing enjoyned, or reſtrained to be, or not to be done by the Condition, is ſuch a thing in his own nature, as the Commiſſion or Omiſſion thereof, is *malum in ſe*, there not onely the Condition, but the whole Obligation alſo is void *ab initio*:

Againſt Law.

And therefore if one be bound in an Obligation with Condition that he ſhall kill a Man, burn a Houſe, do any other Felony, commit any Treſpaſs, maintain any Sute unlawfully; or (being an Officer) that he ſhall take Fees by Extortion, or that he (being a Sheriff, *&c.*) ſhall let a Priſoner eſcape, or that he ſhall ſave the Obligee harmleſs againſt an unlawful Deed, or that he ſhall not ſave his Land, or that he (being a Tradesman) ſhall not uſe his Trade, (and yet it ſeems a Condition, that a man ſhall not uſe his Trade in one place, or at one time, or if he do that, he ſhall pay ſo much by the year unto another, is not a Condition againſt Law,) or that a man (being an Officer and an Officer *pro bono publico*) ſhall not exerciſe his office, or the like; this Condition is void, and makes the Obligation, and ſo the whole Deed void. But when the thing to be, or not to be done by the Condition, is ſuch a thing as the Omiſſion or Commiſ-

ſion

ſion thereof in its nature is not *malum in ſe*; but onely againſt ſome maxim of Law, as that a man ſhall make a Feoffment to his own wife, or is but *malum prohibitum* onely, as that a man ſhall erect a Cottage contrary to the Statute of 31 *Eliz.* or is repugnant to the ſtate, as that a Feoffee of Land ſhall not alien it, or take the profits of it, or that a Tenant in Tail ſhall not ſuffer a Recovery of his Land, or the like; in theſe caſes the Conditions onely are void, and the Obligations remain ſingle and without a Condition. And yet perhaps, if the Obligors be ſued upon theſe Obligations, they may have relief in Equity. See *Brownl.* 1 *part*, 63,64,65, 70, 71. 2 *part*, 281. *Co.* 10. 101. 11. 53. *ſuper Littl.* 206. *Dyer* 304. *Plow.* 64. *Fitz Oblig.* 13. See *Condition* and *Covenant*. *March* 191. *pl.* 238. See *Covenant*, *Numb.* 4. *Equity.*

2. When the matter or thing to be done by the Condition, is ſuch a thing as in its nature is impoſſible to be done at the time of the making of the Obligation, there the Obligation is good, and the Condition onely is void. And therefore if I be bound in an Obligation with Condition, that I ſhall ſtand to the Award of certain perſons, *&c.* Provided, That the Award be made before the tenth day of *May* next; and provided, that I have warning fifteen days before the tenth of *May*, and this Obligation is made the nineth of *May*; this is a void Condition. And ſo if I be bound in an Obligation with Condition, that I will go to *Rome* within three days, or that I will make an Eſtate of White-acre in *Dale* worth ten pound *per annum*, when *reverâ* it is worth but five pound *per annum*, or that I will be non-ſute in ſuch an Action, or aſſure ſuch a peece of ground, when in truth there is no ſuch Action, or peece of ground; this Condition is void, and the Obligation remains ſingle and good. *Perk. ſect.* 735. *Co. ſuper Littl.* 207. *Fitz Oblig.* 17. 27 *H.* 8. 29. 21 *Ed.* 4. 54. 42 *Ed.* 3. 6. So if the Condition be, That whereas *A.* had a Judgment againſt *B.* the Obligor for twenty pound, and the Obligee hath acknowledged ſatisfaction, if therefore the Obligor ſhall before ſuch a day get a Warrant from *A.* whereby the Obligee may be ſaved harmleſs for the ſame acknowledgment, That then, *&c.* this Condition is void, and as it ſeems, the Obligation alſo, for that it is not onely impoſſible, but againſt Law alſo. But when the thing to be done by the Condition, is a thing poſſible at the time of the making of the Obligation, and after by matter *ex poſt facto*, by the Act of God, the Act of the Law, or the Act of the Obligee, it is become impoſſible; in this caſe the Obligation and the Condition both are become void: And therefore if a man be bound with a Condition, that he ſhall appear the next Term in ſuch a Court, and before the day the Obligor dieth; hereby the Obligation is ſaved. So if *A.* be bound to *B.* that *J. S.* ſhall marry *Jane G.* by ſuch a day, and before the day, *B.* himſelf marry with *Jane G.* hereby the Obligation is diſcharged, and *B.* ſhall never take advantage of it. *Hillary*, 17 *Jac. B. R.* 21 *Ed.* 4. 53. *Impoſſible.*

3. When the Condition of an Obligation is ſo inſenſible and incertain, that the meaning cannot be known, there the Condition onely is void, and the Obligation good: As if an Obligation be made by *A.* to *B.* with condition, that *A.* ſhall keep *B.* without damage againſt *J. S.* for ten pound, in which the Obligee is bound to the Obligor; this Condition is void, and the Obligation ſingle. So if the Condition be, That *A.* ſhall pay his part of the ſums of money, that ſhall be levied for the trying of the Cuſtoms of *M*, unleſs the word [*levied*] be uſed for taxed in that Countrey, the Condition is inſenſible and void. So if *A.* be bound to *B.* with Condition to ſave him harmleſs, and ſay not for what, or againſt whom; this Condition is void, and the Obligation ſingle: But if any ſenſe or certainty may be made of it, the Obligation and Condition ſhall be both good. *Paſche*, 9 *Jac. B. R.* *Inſenſible, Incertain.*

4. When the Condition of an Obligation in the matter of it, is Repugnant to the Obligation it ſelf, there the Condition is void, and the Obligation good: And therefore if the Condition of an Obligation be, That the Obligee ſhall not have benefit by the Obligation, or that he ſhall not ſue for the money in the Obligation, or the like; this Condition is void, and the Obligation ſingle: And yet this by a Defeaſance made after the Obligation may be done. 7 *Hen.* 6. 44. 21 *H.* 7. 24, 30. See *Defeaſance*. *Repugnant.*

5. When the thing to be done, by the Condition is to be done beyond the Sea, it hath been held that the Condition is void, and the Obligation ſingle, becauſe the thing was not triable here. See the Statutes of 10 *Hen.* 6. 14. 21 *Ed.* 4. 10. Not triable.

But

But it ſeems the Law is otherwiſe now, and that the matter is triable here, and the Condition good, *Trin. 7 Jac. B. R.* And in all other caſes where a Deed in general is void for Miſnoſmer, Diſability, or otherwiſe, there an Obligation is void, *Fitz. Oblig.* 2. 11.

All Bonds with Conditions for the enjoying of Spiritual Livings, contrary to the Statute of 13 *Eliz.* 20. are void by the ſtatute of 14 *Eliz.* 11.

If any Ladies or Gentlewomen be drawn by flattery, or threatning to enter into any Obligation, Simple or Conditional, to pay any money not truly due, they may be relieved by a courſe in the *Chancery*, for which ſee 31 *H.*6. 39.

5. When an Obligation ſhall be void, for that it is made to another, and not to the Sheriff, or to the Sheriff in another manner then is appointed by the Statute of 23 *H.*6. 10.

No Sheriff or his Officers ſhall take any Obligation, by colour of their Offices of any perſon in their Ward, but onely to themſelves, and in the name of their Office, with Condition, with Sureties ſufficient, that the priſoner ſhall appear at the day in the Writ; and all others taken in any other form ſhall be void. And perſons that are in his Ward, by Execution, Condemnation, *Capias Utlagatum*, Excommunication, Surety of the Peace, or ſome other ſpecial caſe, being ſent for by a Juſtice for Felony, or the like, may not be bailed; and others that are arreſted on a *Capias* for Debt, or an Indictment, or otherwiſe by Writ, Bill, or Warrant that are Mainpernable, muſt be bailed. 23 *H.*6.10.

For the better underſtanding of which Statute, theſe things muſt be obſerved, That ſuch Obligations as differ and vary from the form of this Statute in words and circumſtances onely are good, notwithſtanding this Statute. And therefore if a Priſoner make an Obligation with a Condition, to appear and anſwer in a Plea of Debt, and ſay no more, nor do ſet down the cauſe of the Debt; this is a good Obligation. *Villars* caſe, *M.* 9 *Jac. B.R.* And if the Sheriff take an Obligation with one Surety onely, or with two Sureties that are inſufficient, or with two Sureties of another County; this is a good Obligation. *Co.*10.101. So if the Debt for which the party is arreſted, be three hundred pound, and the Sheriff take an Obligation of one hundred pound for his appearance; this is a good Obligation, for in theſe caſes it is left to his diſcretion, and it doth concern him onely. So if the Condition of the Obligation be for appearance *Menſe paſche*, omitting *proximè futuro*, yet it is a good Obligation. *Villars* caſe. So if the party be arreſted by an Attachment out of the *Star-Chamber* upon a contempt, and the Condition of the Obligation is, That if the Obligee ſhall appear, and then, and there ſhall anſwer a contempt by him committed againſt the King and his Council, this is a good Obligation. *Dyer* 364. And if the party that doth make the Obligation be not in the Sheriffs cuſtody, albeit the Obligation be made in any other manner, eſſentially differing from the form preſcribed in the Statute, if it be not againſt the Common Law, it is a good Obligation. And therefore, if when a *Capias Utlagatum* be delivered to the Sheriff againſt a man, the Sheriff take Bond of him for his Fees, and his Travel; this Bond if it be not within this Statute, yet it is againſt the Common Law, and therefore void, becauſe it is by colour of Extortion. *Antleys* caſe, *Hil.* 7 *Jac. Co. B.* But where the Obligation, whether it be ſingle, or double, made by a priſoner, doth eſſentially differ by addition, alteration, or diminution from the form preſcribed in the Statute, there the Condition and Obligation both are void. *Co.*10.101. And therefore if ſuch a priſoner make an Obligation to any other beſides the Sheriff, albeit he to whom it be made be called Sheriff, or if he make an Obligation to the Sheriff himſelf, and not by the name of his Office; or if he make an Obligation to him by the name of his Office, and doth not rightly name him, (*Nowels* caſe, *Trin.* 21 *Jac. Curia.*) as if he make it to *J. S. Vicecomiti in Comitatu prædicto*, whereas it ſhould be *De Comitatu prædicto*: All theſe Obligations are void by this Statute. And if the Sheriff take an Obligation of a Priſoner for his Appearance, in caſe where he is not bailable by the Statute, and ſo let him go free; or if he take an Obligation of a Priſoner that is bailable for his Appearance, and doth inſert other things into the Condition, as to pay money for Meat, Drink, or Fees, or the like; or if he deliver a man in Execution, and take Bond of him to ſave him harmleſs; or to be a true priſoner: All theſe and ſuch like Obligations as theſe, are void by this Statute.

If

If a man be a priſoner in Ludgate upon a *Capias utlagatum*, and the Gaoler take an obligation of him with two ſureties, with condition to ſave him harmeleſſe, and to diſcharge his fees, and to yield his body at all times upon Summons &c. this is a void obligation, as well againſt the ſureties, as againſt the principall. If the under-Marſhall of the Kings Bench take an obligation of one in execution and a ſtranger with condition to ſave him harmleſſe of all eſcapes, and ſo ſuffer the priſoner to goe at large, this is a voyd obligation. If the Sheriff of Bedford having a priſoner by force of an Execution, let him goe at large, and take an obligation of him, with condition that he ſhall keep the Sheriff without damage againſt the King and the plaintiffe, and be at all times at the commandement of the Sheriff as a true Priſoner, and appear before the Iuſtices of the King at *Weſtminſter* &c. this is a void obligation. *Dier.* 118, 119. *Dier.* 324. *Plow.* 61. 62.

If a man be a Priſoner to the Sheriff for ſuſpition of Felony, and after a writ comes to him to have all his priſoners at a certain day before the Iuſtices of Goale delivery of the ſame County, and thereupon the Priſoner doth make a ſingle obligation to the Sheriff to appear before the Iuſtices the day of the writ, this is a void obligation, becauſe it is ſingle and not with condition. And if the Sheriff baile not one bailable by a ſingle obligation, it ſeems this is a void obligation. *Fitz. Oblig.*

A ſingle obligation is alwayes taken moſt in advantage of the obligee and againſt the obligor, but it is otherwiſe of the condition of an obligation, For this is alwayes taken moſt in advantage of the obligor, and againſt the obligee: 10 *H.* 7. 1. 16. 6 How a ſingle Obligation ſhall be taken.

If two, three, or more bind themſelves in an obligation thus, *Obligamus nos*, and ſay no more, the Obligation is and ſhall be taken to be joint only and not ſeverall; but if it be thus, *Obligamus nos & utrumque noſtrum*; or *obligamus nos & unumquemque noſtrum*; or *obligamus nos & quemlibet noſtrum*; or *obligamus nos & alterum noſtrum*; in all theſe caſes the Obligation is both joint, and ſeverall, ſo as in theſe caſes the obligee may ſue al the obligors together, or all of them apart at his pleaſure, but it ſeems he may not ſue ſome of them and ſpare the reſt, but he muſt ſue them al together, or all apart by ſeverall *Precipes*, and in this caſe he may have ſeverall Judgements and ſeverall executions againſt the obligors, and take all their bodies in execution, but he ſhall have ſatisfaction but once, or from one of them only, for after he hath been ſatisfied by one, the reſt ſhall be diſcharged. But in the firſt caſe where the obligation is joynt and not ſeveral, the obligee muſt ſue all the obligors together, for he cannot ſue one alone with effect without the reſt, unleſs it be in ſome ſpeciall caſes, as where one of the obligors alone doth ſeale the deed, or where all of them do ſeale, but one of them is an Infant, a woman covert, a monk, or the like, or where one of them is dead, for in theſe caſes one or ſome of them may be charged without the reſt. But otherwiſe the Plaintiff cannot proceed in his ſuit againſt one, or ſome of them without the reſt, except the defendant give him advantage, for howſoever the ſuit be well begun, for when one or ſome of them alone is, or are ſued, it ſhall not be intended that the reſt are living, untill it be ſhewed by the other party, yet the defendant is not bound to anſwer, unleſs the reſt be ſued alſo; and therefore in this caſe he or they that is or are ſued alone, are thus to take advantage of it. *viz.*, to ſhew the matter to the Court, and to plead in abatement of the writ; for if he appear and ſhew it not, but plead *non eſt factum*, or the like, to the obligation, the Iury muſt find againſt him, and he will be charged with the whole debt. And ſo alſo if one appear, and the other make default and is outlawed, it ſeems he that doth appear muſt anſwer all. See *Brownl.* 1 *part.* 208. If an obligation be, we bind us or either of us, this is joint & ſeverall at the Election of the obligee. *Brownl.* 1 *part.* 121. *Dier* 19. 310. *Co.* 5. 119. 9. 53. *old N. B.* 62. *Broo. Jointenancy* 4. 16. *Dec: 69. Hil. 39. Eli. B. R. adjudged.* Ioint and ſeverall.

Executors and Adminiſtrators ſhall be bound by the obligation of the obligor, albeit they be not named: but the heire of the obligor ſhall not be bound by the obligation, unleſſe he be named in the obligation, *viz. obligo me, haredes &c. Dier.* 14. 271. Executors. Heire.

If an obligation be made to one and his heires, or to one and his ſucceſſors; the Executors and adminiſtrators, not the heire, or ſucceſſor, ſhall take advantage of it. See before.

If one binde himſelf in an obligation of 200l. to *A.* and *B. ſolvend.* 100l to *A* and 100. to *B.* and *A.* die, it ſeems the executors of *A.* ſhall not have 100l but that *B.* ſhall have the whole 200l *ſed quære. Dier* 350.

For the time of payment.

If one binde himſelf by obligation to *I, S.* to pay him an 100l when *K.* doth come to his houſe, and at Michaelmas then next following 100l. more; Michaelmas then next following ſhall be taken for next following the making of the obligation, and not next following the comming of *K.* to his houſe. *Broo. Obli* 59.

If one bind himſelf to pay mony upon a ſingle obligation, and doth not ſay when; in this caſe it muſt be paid preſently.

If one bind himſelf by obligation to pay money at Michaelmas, and doth not ſay which Michaelmas, this ſhall be taken for Michaelmas next after the date of the obligation. And ſo alſo it ſhall be taken in the condition of an obligation. If one bind himſelf to pay at ſeverall day. See *Brownlows rep.* 1 *part.* 64. 2 *part.* 98, 99. *Dier.* 128. By three *Juſtices, Trin.* 22 *Jac. Co. B. Curia in the Marches of Wales, Trin.* 8 *Car.*

7. How an Obligation with a condition, or the Condition of an Obligation ſhall bee taken. And how it muſt & ought to be performed.

If one bind himſelf to pay 20l in the yeare of our Lord which ſhall be 1599 in and upon the thirteenth of *October* next inſuing the date of the obligation; this ſhall be taken to be due the 13 of *October* 1599. and not next after the obligation. See more *infra: Agree M.* 9 *Jac: B:* R.

The condition of an obligation when it is doubtfull, is alwaies taken moſt favourably for the obligor, in whoſe advantage it is made, and moſt againſt the obligee, yet ſo as an equall and reaſonable conſtruction be made according to the minds of the parties, albeit the words ſound to a contrary underſtanding: *Hill:* 37 *Eli: B:* R: *Sharplus verſus Hanckington: Dier:* 14: 51:

Firſt in reſpect of the perſons that are to doe the thing.

If ſomething be by a condition to be done, and it is ſet down indefinitly, and not ſet down who ſhall do it, if the obligee hath more skill to do the thing then the obligor, it ſhall be done by him; otherwiſe it ſhall be done by the obligor: as if a tailor be bound to me in an obligation with condition, that if I bring him three yards of Cloth which ſhall be meaſured and ſhaped, and if he make me a Cloak of it &c: and it is not ſaid by whom it ſhall be ſhaped, this muſt be done by the Tailor. See more in *Brownlows rep:* 1: *part* 76: and in Acts: *Perk Sect:* 785:

Secondly in reſpect of the time when the thing is to be done.

If the condition of an obligation be to pay mony, or doe any other tranſitory act to the obligee himſelf, and no time is ſet for the doing thereof, but a place only; this regularly muſt be done in convenient time, and that without requeſt: So alſo in caſe where the thing to be done is in its nature locall, but yet ſuch a thing as may be done in the abſence of the obligee, and without his concurrence, as to acknowledge ſatisfaction on a Iudgement, make a leaſe for years or the like, it muſt be done in convienent time and that without requeſt. So alſo in caſe where the thing to be done is locall, and the concurence of both parties neceſſary therunto, yet when it is to be done to a ſtranger and not to the obligee, as if the condition be that the obligor ſhall make a Feoffment to *I. S.* it muſt be done in convenient time without requeſt.

But where the thing to be done is locall, and the concurrience of both parties neceſſary thereunto, and the act is to be done by the obligor himſelf, or by a ſtranger to the obligee himſelf, as where the condition is that the obligor, or a ſtranger, ſhall infeoffe the obligee; in this caſe the obligor, or the ſtranger ſhall have time to do it during his life, unleſſe the obligee do haſten it by requeſt, and if he requeſt it ſooner, then it muſt be done in convenient time after requeſt made. And yet if the thing to be done, be to be done wholly by the obligor, or a ſtranger, and doth nothing concern the obligee, as where the condition is that the obligor ſhall goe to *Rome*, or that *I. S:* ſhall preach at *Pauls* Croſs, or the like; in the firſt caſe it may be done at any time during the life of the obligor, and in the laſt caſe it may bee done at any time during the life of *I. S.* and requeſt in this caſe ſhall not haſten it. See *Brownl.* 1. *part.* 73, 74.

If one be bound to pay 10l or to enfeoffe one upon the return of *I. S.* from Rome, in this caſe if *I. S.* die before he return from Rome, there the obligation is ſaved though the 10l be not paied. But if it be to pay 10l or to enfeoffe before Michelmas, if the obligor dye before Michaelmas, his executors muſt pay the 10l. By *Popham Juſtice, Goldsb.* 192.

If

If an obligation be with condition to grant a rent, or an annuity to the obligee during his life, to be paid at Easter, and no time is set for the doing of it; this rent must be granted before Easter next after the obligation, or else the obligation will be forfeit. And if the condition be to grant an Advowson, and no time is set for the doing thereof; It must be done before the Church become voyd, or otherwise the obligation shall be forfeit. *Co.*2.80. *super Litt.*208.

If the condition be to do a thing upon a day in the yeare, and there be two daies of that name in the yeare; in this case it seems it must be done that day that is furthest off from the time of the making of the obligation, especially if that day be the more notorious of the two daies. *Dier.*77.

If the condition be to pay 10l. the eleventh of *May* next following, and the obligation is dated the 5 of May; in this case the money must be paid the 11 day of the same Month of *May*, and not of the next Month of *May*. *Adjudg. M.*20. *Jac. B. R. Prescots* Case.

If one be bound upon the Feast day of St. Michael to pay money upon the Feast day of St. Michael next coming; this shall be understood the 12. month after, and not that very day so if one be bound in Lent to pay money in the 4 week of Lent next to come, this shall be paid that Lent come 12 Month. *Goldsb.* 137. *Pl.*40.

If the condition be to permit the obligor to thresh and cary away the Corn in the Barne of the obligee from time to time and at all times convenient, in this case the oblige shal have time, for any time of continuanceas more then two or three years&c: but otherwise perhaps if the words be [within time convenient] but he cannot take it a way on the Sabboth day or in the night, but he shal break his Bond. *Goldsb.77.pl.8:*

If the Condition be to stand to the award of *I. S.* and *I. S.* award money to be paid, but set no time for the payment of it; this must be paid in convenient time, else the obligation shall be forfeit. 22 *Ed.*4.25.

If one be bound to me in an obligation with condition, that if I enfeoffe him of White acre, he will pay me 10l; but doth not say when; this must be done assoon as I make him the Feoffment. So if one be bound to me that if the goods I have delivered to *B.* shall be lost, that *C.* shall satisfie me for them, and doth not say when; this shall be presently after the loosing. *Perk. Sect.*797.799.

If the condition be to pay *I. S.* money when he shall come to the age of 21 years; in this case it must be paid the very day *I. S.* doth come to his full age, and paiment after is not a sufficient performance of the condition. *N.*2 *Jac. B. R. Cranfenet Morses* Case.

If the condition be to come at a day to such a place to do a thing, and the thing cannot be done without the concurrence of the other partie; in this case the obligor must stay for the very last instant of the day for his coming; and it seems also he must stay at the place all the day long. 39 *El. B. R. Fitz. Barre* 92.

If the condition be to pay a rent at Michaelmas or within 20 daies after, the obligation is not forfeit before the 20 daies be past. *Adiudg. pas.*39 *Eli.*

If one be to do a thing on a day certaine, he may doe it any part of the day whiles the light doth last. And if the Condition be to doe a thing by, or before a day, it may be done the last instant of the day before, and it is sufficient. *Broo. Condition.* 145. *Dier.*17.7 *Ed.*4.3.

If the condition of an obligation be to pay money, or doe any like transitory act to the obligee on a day certaine, but no place is set down where it shall be done; in this case it must be done to the person of the obligee whersoever he be; and for this purpose, the obligor must at his perill seek out the obligee, if he be *intra quatuor mænia*, otherwise the obligation is forfeit; but if the obligee be not within the Kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an Annuity to another, and doth not set down where it shall be paid, and gives a Bond with condition for the payment thereof; in this case it must be done to the person of the obligee where ever he be. And the like law is as it seems, where the thing to be done by the condition, is to be done by or to a stranger.

3. In respect of the place where the thing is to be done.

But when the thing the party is bound by the condition to do is Locall,

he is not bound to goe any further, or to any other place, but to the place it ſelfe: And therefore if the condition be to make a Feoffment of a piece of Land, the party that is bound to doe it, is not bound to goe to any other place, but to the piece of land to doe it. And if a man make a Feoffment in Fee, or leaſe for life or years of land, rendring rent generally, and gives an obligation with condition for the payment of the rent, the Feoffee, or Leſſee, is not bound to goe to any place from the Land to ſeek the Feoffor or Leſſor to pay him this rent. *Perk. Sect.* 780, 781: 7 *Ed* 4. 4. 22 *Ed.* 4. 25 *Litt. Sect.* 340. 341.

If the condition be, to deliver 20 quarters of Corn ſuch a day to the obligee, and no place is ſet down where it ſhall be delivered; in this caſe it is ſufficient, if the obligor when the Corn is ready, doe give notice thereof to the obligee, and to wiſh him to appoint a place whereunto the obligor may bring it, and if he refuſe to appoint a place, it is at his own perill; or the obligor may bring the corn to the houſe of the obligee, (and this is the ſafeſt way) and if the obligee refuſe it, the condition is performed, and the obligation is diſcharged. *Perk. Sect.* 785.

4. In reſpect of the thing it ſelf to be done To perform Covenants.

If the condition be to perform all the Covenants in an Indenture; this ſhall be taken as well for the covenants in Law as for the covenants in Deed. *Co.* 4. 80. *Dier.* 257.

If a leaſe be made of a Manor excepting a Cloſe, and the Leſſee make an obligation to the Leſſor with condition, that the Leſſee ſhall perform *omnia & ſingula in ſcripto prædicto contenta*; by this the Cloſe ſhall be taken to be within the condition, ſo that if the Leſſee diſturb the Leſſor in the Cloſe excepted, this ſhall be a breach of the Condition. *Plow.* 67.

To make a Feoffment, Leaſe &c.

If the condition be, to make a feoffment to the Obligee of Land; in this caſe the Feoffment may be made with, or without writing, and if it be made by writing, it may be made without any warranty or covenants, and this will be a ſufficient performance of the condition. See covenant. *Numb.* 6.

To make a Releaſe, or other aſſurance.

If the condition be, that the obligor ſhall make a Leaſe to the obligee for 20 years and it is not ſet down when the Leaſe ſhall begin, it ſhall begin preſently. See more *in Brownl.* 1. *part.* 84: 94. 91. 92. *Co.* 6. 33.

If the condition be, that the obligor ſhal doe any act upon requeſt that the Counſel of the obligee ſhall think reaſonable, as for example, ſhall doe any act &c. for the releaſing of an obligation, wherein the obligee is bound to the obligor, and the obligee by adviſe of Counſel deviſeth and requeſteth a releaſe of all demands to the obligee, and to *I. S.* in this caſe the obligor may refuſe to ſeale it, albeit it be deviſed by the Counſel of the obligee, becauſe it is unreaſonable, for it muſt be a reaſonable act that the obligor by this condition is bound to doe. *Dier*, 218.

To pay money or aent.

If the condition be to pay 10l. at Michaelmas next, and 10l. yearly after, untill *I. S.* be made Knight; in this caſe albeit *I. S.* be made Knight before Michaelmas, yet the firſt 10l at Michaelmas muſt be paid. See more in *Brownlows. Rep.* 1. *part.* 104. 103 113. *Adiudg. Hil* 39 *Eli Co. B.*

If the condition bee thus: That if the obligor ſhall for ever pay yearly to the obligee &c: 10l. at the two uſuall Feaſts by equall portions, or if his heires ſhall at any time hereafter pay 100l. at one payment to the obligee, that then the obligation to be void; in this caſe albeit the obligor hath election, which of theſe two things to doe; yet becauſe the intent is apparant that one of theſe things ſhould be done, if therefore the 100l. be not paid before the firſt feaſt, the 10l muſt be paid yearly. *Adjudge. M.* 18. *Jac. B. R. Harbert verſus Rocksey.*

To warrant land and for quiet enjoying.

If the Condition of an obligation from *A.* to *B* be thus; that whereas *A.* hath ſold to *B.* a certain Meadow in Dale, that the ſaid *A.* ſhall warrant the ſame againſt Lord and King and all others, if the ſaid *B.* ſhall peaceably enjoy it to him, and his heires of the Lord of the Mannor of *M.* by the ſervices due after the cuſtom &c. in this caſe the ſubſtance of this being for quiet enjoying, it ſhall be extended that way, and albeit it be not ſaid what he ſhall warrant; yet it ſhall be taken the Land in queſtion, and the warranty ſhall be conſtrued to laſt only for the life of *B.* and not to extend to any new titles after the Covenant, eſpecially ſuch as are by the act and default of the obligee himſelf, as if he commit a forfeiture and the Lord enter, or the like. *Dier.* 42. 43.

If

If the condition be, That the Obligor ſhall ſufficiently prove ſuch a thing; this ſhall be taken for proof by enqueſt, and accordingly it muſt be done: But if the condition be that it ſhall be done by ſuch a time, or before ſuch perſons as when or where ſuch proof cannot be had, then it is otherwiſe. Where the word [proof] is put generally, it ſhall be underſtood of proof by Juſtice; but when the parties agree upon another form of proof, that ſhal prevail againſt that which is but inſtruction of Law. *See more in Brownlows* 1. *pa.* 33. 65. 2 *part.* 58. *Perk. Sect.* 791. 10 *Ed.* 4. 11. *Golds* caſe *in Harberts Rep.* 127. To prove a thing.

If one be bound in an obligation with condition to ſuffer his wife to give to her kinſfolks, children or others portions of his goods to the value of 100l. and that he will performe it, and ſhe give part to one and not to another; in this caſe the husband muſt performe it accordingly: But if the condition be to ſuffer her to give to *A* and *B.* 100l, and that he will perform it, and ſhe give 100l. to *A*, he is not bound to perform this. *Curia Trin 7. Iac. Co. B.* To ſuffer his wife to make a Will.

If the condition be, That he ſhall perform his wives Will, ſo it do not exceed 20l. and ſhe make a Will and deviſe 100l. in this caſe he is not bound to perform the Will for the 20l. *See more in Brownlows* 1 *part* 54. 112. 113. *Adjudg. Hil.* 7. *Iac. B R.*

If the condition of an Obligation be, That the Obligor ſhall infeoffe the Obligee and ſuch others, as he ſhall name by a day; in this caſe the Obligee muſt doe the firſt act, *viz.* name the others; otherwiſe the Obligor doth not forfeit his Obligation by the not doing of it: But if the condition be to infeoffe me, or ſuch others as I ſhall name before ſuch a day; in this caſe if I doe not name others, it ſeems he muſt enfeoff me before the day at his perill. 5 In reſpect of the manner and order of doing the thing and other matters.

If the condition be, that the Obligor ſhall make ſuch an eſtate of Land as *I. S.* ſhal adviſe, *I S* muſt firſt adviſe, and this muſt be made known unto the Obligor ere he is bound to doe any thing, and if he never adviſe, he is never bound to doe any thing; for it is in this caſe, as if one be bound to ſtand to the award of *I S*, and *I S.* never make any, or make a void award which is all one. *Co.* 5. 25. 7. *Ed.* 4. 13. *Perk. Sect.* 775.

If the condition be, to make ſuch a diſcharge in ſuch a court as the Obligee or his counſell ſhall adviſe; in this caſe the Obligee muſt firſt act, *viz.* adviſe and give notice of the adviſe to the Obligor before he is bound to doe the thing. But if the condition be to make ſuch a diſcharge in ſuch a Court ſuch a day, as the Judg of that Court ſhall adviſe, in this caſe the Obligor muſt at his perill procure the Judge to adviſe a diſcharge, and it muſt be done that very day, or the obligation will be forfeit, *Co.* 5. 23.

If the condition be, to pay 20l. to the Obligee when he doth come to *London*; in this caſe, the Obligee muſt doe the firſt act, *viz.* make known to the Obligor when he doth firſt come to *London*; for otherwiſe, it ſeems the Obligor is not bound to pay the money. *Per Iuſt. Nichols, M.* 13. *Ia. Co. B.*

If the condition be, that the Obligor ſhall levie a fine to the Obligee before ſuch a day, the Obligee muſt doe the firſt act *viz.* ſue out the Writ of Covenant. *See more in Brownlows* 1 *part.* 70. *Co.* 5. 127. *Dyer* 371.

If the condition be, that the Obligor ſhall deliver 20 Clothes to the Obligee ſuch a day, the Obligee paying for every cloth immediately after the delivery 20l. in this caſe the clothes muſt be delivered, albeit the Obligee refuſe to pay the money; but if [immediately after] be left out, it ſeems the Obligor is not bound to deliver the cloth unleſs the Obligee firſt pay the money. 21 *Ed.* 4. 52.

If the condition be, that the Obligor and his Heirs ſhall at any time upon requeſt made, doe any act, &c. that the Obligee ſhall require, &c. and the Obligee tender a Releaſe or other Deed to ſeale; in this caſe, if the Obligor, or his heir that is to ſeale the Deed, be an illiterate man, he may refuſe to ſeale it, untill he can get ſome body to read it unto him, but he may not refuſe or delay to ſeal it untill he can have a Lawyers adviſe upon it, but he will forfeit his Obligation, *Co.* 2. 3. 4. *Dyer* 337.

If

If the condition be, to doe any thing upon requeſt, the Obligor untill requeſt made is not bound to doe any thing towards it, neither can he forfeit his obligation till then.

And yet if in this caſe, the Obligor diſable himſelf to doe the thing he hath undertaken to doe upon requeſt before the requeſt made the obligation may be forfeit without any requeſt made. *Perk. Sect.* 77. *Co.* 5. 21.

If the condition bee, that the Obligor ſhall within a certain time ſurrender ſuch land of his for an Annuity, of ſo much as they ſhall agree upon, and they agree upon 10l. *per annum*; in this caſe the Obligor is not bound to make the ſurrender untill the Annuity be made and tendred unto him. 14. *H.* 8.

If the condition be, to deliver to the Obligee an obligation wherein the Obligee is bound &c. or to ſeale and deliver to the Obligee ſuch a releaſe of it as ſhall be deviſed by the counſell of the Obligee before Michaelmas, and the counſell doe not adviſe any Releaſe before Michaelmas; in this caſe the Obligor is diſcharged of the obligation, for the Obligee is to doe the firſt act. *Hil.* 37. *Eliz. Co. B. Greeinghams* caſe *adjudg.*

If *A* be bound to *B*, in an obligation with condition that *A* and his wife ſhall levie a fine of Land to *C* and *D* and their Heirs, and at their coſts and charges; this ſhall be conſtrued to be at the coſts of the Obligor, and not at the coſts of the Conuſees, but if the word [and] be omitted, perhaps it may be otherwiſe. *Trin.* 4. *Jac. B. R.*

If the condition be thus, That if the wife die before Michaelmas without iſſue of her body then living, that the obligation ſhall bee void; in this caſe [then living] ſhall relate *ad proximum antecedens*, and not to the death of the wife, and therefore if ſhe hath iſſue and die, and after before Michaelmas the iſſue dyeth alſo, the obligation is void. *Dier.* 17.

If the condition be, that if the Obligor ſhall waſte the goods of the Obligee (his maſter) and this waſte within three Moneths after due proof of it, either by confeſſion or otherwiſe be notified to the Obligor, that the Obligor ſhal ſatisfie the Obligee for it, and the Obligor doe confeſs the waſte under his hand and ſeale; in this caſe, it ſeems this proof though it be *extrajudiciall*, is ſufficient. *Golds* caſe *M.* 13. *Ia.*

Conditions Impoſſible.

When the condition of an obligation is to doe two things by a day, and at the time of Making of the obligation both of them are poſſible, but after and before the time when the ſame is to be done, one of the things is become impoſſible by the act of God, or by the ſole act and laches of the Obligee himſelf; in this caſe the Obligor is not bound to doe the other thing that is poſſible, but is diſcharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not poſſible to be done, he muſt perform that which is poſſible. And if in the firſt caſe one of the things become impoſſible afterwards by the act of the Obligor, or a ſtranger, the Obligor muſt ſee that he doe the other thing at his perill. And when the condition of an obligation is to doe one ſingle thing which afterwards before the time when it is to be done doth become impoſſible to be done in all or in part, the obligation is wholly diſcharged; and yet if it be poſſible to be done in any part, it ſhall be performed as neare to the condition as may be. *Co.* 5. 22. *ſuper Lit.* 207. *Dyer* 262. 15 *H.* 7. 2. 4. *H.* 7. 4.

If the condition be, to doe one of two things, as to make a Feoffment to me, or pay me 20l. in this caſe, if the Obligor doe either of them, it is ſufficient. But if the condition be in the copulative, as to enfeoff me and pay me 20l. in this caſe, the doing of one of them will not ſuffice, but he muſt doe both. 21 *Ed.* 3. 29.

If the condition be, to pay to *A B* and *C* 30l. a peece within a week after they come to 18 years of age, or within 40 dayes after their dayes of marriage after notice given thereof, which ſhall firſt happen; in this caſe, this notice muſt goe to both the parties, ſo that notice muſt be given when they are 18 years of age; otherwiſe, and untill notice given, it ſeems the Obligor is not bound to pay the money, See more in *Condition Numb.* 8. and *Covenant Numb.* 6 See more in *Brownlows rep.* 1 *part.* 77. *and in Covenant before. Brownlows Rep.* 1 *part.* 99. *Per Juſtice Dodridge. M.* 2. *Car. B. R.*

The

The matter of a condition of an obligation is ſometimes affirmative and compulſory and doth conſiſt of ſomething to be done, and ſometimes it is negative and reſtrictive and doth conſiſt of ſomething not to be done; the not doing in the firſt caſe, and doing in the latter caſe cauſeth the obligation to be forfeit, and the doing in the firſt caſe, and not doing in the latter, ſaveth the obligation. 8 When the Condition of an Obligation ſhall be ſaid to be performed and the Obligation ſaved, or not.

If one be bound in an obligation to me, with condition to enfeoff me of Land, and the obligor doe firſt make a Leaſe to me of it, and afterwards he doth make a Releaſe of it to me and my heirs this is a good performance of the condition. *See more in Brownlows Rep. 1 part 62. Co. ſuper Lit. 207. plow. 6. 7. 17 Ed. 4. 3.* To make a Feoffment.

If the condition be to make me a Feoffment of Land and he tender me a Feoffment, and I refuſe it; by this the condition is performed. So if the condition be, to make a Feoffment to my uſe, and when it is made I refuſe it; this is a good performance of the condition. But if a man bind himſelf in an obligation to me, with condition to make Feoffment to a ſtranger, and he tender the Feoffment to the ſtranger and he doth refuſe it; this is no good performance of the condition, but the obligation is forfeit. If the condition be, to enfeoff me and my wife, and he tender it to me, and I refuſe it; it ſeemes this is a good performance. *Perk. Sect. 784. Fitz. Barre 82. Perk. Sect. 758. 15 Ed. 4. 5.* Tender and Refuſall.

If one bind himſelf in an obligation to me, with condition to make me a Feoffment of the Mannor of Dale by a day, and he before the day, grant a rent-charge out of the ſame mannor to a ſtranger, and afterwards and before the day alſo, he doth make me a Feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the Obligor ſell away part of the Mannor before, or make a Feoffment to me but of a moity or a third part of the Mannor; this is no good performance of the condition. And if in this caſe, the Obligor before the day take a wife, and before the day make his Feoffment according to the condition, but the marriage doth continue untill after the day; in this caſe, it ſeems the condition is broken. *3 H. 7. 4. 4 H. 7. 4. Perk. Sect. 757.*

If the condition be, that the Obligor ſhall enfeoff me of the Mannor of Dale, and he make a Feoffment of the Mannor of Sale, and I accept thereof; it ſeems this is no performance of the condition, and that my acceptance in this caſe will not help. So if the condition be to make me a Feoffment of Land, and he give me money, a horſe or the like in recompence of this, and I accept thereof; this is no good performance of the condition: And the like Law is in all caſes where the condition is to doe any collaterall thing, as to account, build a houſe, enter into a Recogniſance, or the like, and the Obligor doth give, and the Obligee accept ſome other thing in liew thereof: And ſo alſo it is where the condition is to make a Feoffment to a ſtranger, and the Obligor give, and the ſtranger take another thing in liew thereof. Acceptance.

But if the condition be to enfeoff me of land ſuch a day, and he make, and I take the Feoffment before the day; this is a good performance of the condition. *Perk. Sect. 749. 759. Dyer 1. Perk. Sect. 751. 9 H. 7. 17. 3 H. 7. 4. 27. H. 8. 1. 14. H. 8. 15. 10 H. 7. 14.*

If the condition be to enfeoff me or my Heirs in the disjunctive, and the Obligor enfeoff me and my Heirs; this is a good performance of the condition; for it is impoſſible to enfeoff my Heirs whiles I live, and when two things are to be done by a condition, whereof the one is poſſible at the time of making the obligation, and the other is not; in this caſe it is ſufficient if he doe the thing which is poſſible. *14 H. 8. 15. Co. 5. 112.*

If the condition be, to make me a Feoffment, or pay me 20l. if the Obligor doe either of them, it is ſufficient.

But if the condition be to infeoff me, and pay me 20l. in this caſe the Obligor muſt doe both, or the condition will not be performed. *Et ſic de ſimilibus. 21 Ed. 3. 39.*

If the condition be, That the Obligor ſhall make me a ſufficient eſtate of land by the adviſe of *W.* and *S.* and they adviſe an inſufficient eſtate, and the Obligor doe make the eſtate according to that adviſe, this is a good performance To make an Eſtate.

of

of the condition: But if the condition be that the Obligor ſhall make a good and ſure eſtate, and he by adviſe of counſell make an eſtate that is not good and ſure; this is no good performance of the Condition. *Perk. Sect.* 776. *Kelw.* 95.

If the condition be, that the Obligor ſhall make me an eſtate of Land, and make the eſtate to another by my appointment; it ſeems this is no performance of the condition, *Fitz. Barre.* 55.

If the condition be, that the Obligor or his Feoffees in truſt ſhall make an eſtate to the Obligee ſuch a day, and the Feoffees doe it without the conſent of the Obligor; this is no performance of the condition. *See more in Brown.* 1 *part.* 69: 75. *Trin.* 17. *Ia. Br.*

To make further aſſurance.

If the condition be, to make further aſſurance, and the Obligor make further aſſurance upon condition, without the agreement of the other party; this is no good performance of the condition. *Paſche* 8: *Ia. Co. B:*

To ſave harmleſs.

If the condition be, to ſave me harmleſs from an Annuity wherewith my land is charged, and the Obligor doth pay the ſame yearly, and get me an Acquittance for the ſame from the party; this is a good performance of the condition. But if the condition be to diſcharge me of ſuch an Annuity; in this caſe, payment and procuring me a Releaſe, is no good performance of the condition. 37. *H.* 6. 18. *Perk. ſect.* 792.

To grant a rent, or to procure a rent to be granted.

If the condition be, that the Feoffees or Leſſees of the Obligor of ſuch Land which they have in truſt ſhall grant me a rent-charge or releaſe their right to me before ſuch a day, and there be three Feoffees, or Leſſees, and two of them only doe grant this rent, or make this Releaſe; this is no good performance of the condition. *Perk. Sect.* 790. *Fitz. Barre* 72

If the condition be, that the Obligor ſhall purchaſe and procure to me and my heirs a rent of 5 l. *per annum*, and a ſtranger hath ſuch a rent out of my Land, and he doth get him to releaſe this to me; this is a good performance of the condition; And if one be bound with condition to grant me the rent and farm of ſuch a Mill before Michaelmaſs, to be had and perceived untill I be paid 10l. and before that time he leaſe the Mill to me at a rent, and then ſuffer me to detaine ſo much of the rent; it ſeems this is a good performance of the condition. *See more in Brownlow* 1 *part* 75.

To deliver a horſe.

Tender and Refuſall.

If the condition be to deliver me a horſe, and the Obligor tender the horſe unto me, and I refuſe him; hereby the condition is performed; and ſo in all ſuch like caſes where the Obligor is to doe any collaterall thing, as ſtand to an award, or the like; if the Obligor offer to doe it, and the Obligee refuſe, the condition is performed, and the Obligation diſcharged for ever. *Co. ſuper Litt.* 207.

To pay money

If the condition be, to pay money at a day certain, and the Obligor pay a little before night, time enough for the receiver to ſee to number his money by day light; this is a good performance of the condition, And if the condition be to pay money by, or before a day; paiment the laſt inſtant of the day before is a ſufficient performance of the condition. *Dyer* 17. *ſuper Litt.* 202. *Broo. Condition* 145.

If it be to pay money to a man and his wife, paiment to the man is a good performance. *Goldsb.* 73. *pl.* 16.

Acceptance.

If the condition be, to pay me a ſum of money at a day certaine, and the Obligor pay me leſs money before the day, or all the money before or at the day, or give me ſomething elſe before, or at the day of payment in liew thereof, or pay me all the money or a leſſer ſum at the day appointed, but in another place, and not the place mentioned in the condition, & I accept thereof; in all theſe caſes the condition is well performed. But if a ſtranger to the condition doe ſo, and I accept thereof; this is no good performance of the condition as hath been adjudged. And if the Obligor pay leſs then the whole money at the day of paiment, and the Obligee accept thereof; this is no good performance of the condition. And if the thing to be done be a collaterall thing, as to account, or the like, and the Obligor give unto the Obligee money, or a horſe in liew thereof, and the Obligee accept it; this is no good performance of the condition. *Perk. Sect.* 248. 34 *H.* 6. 17. 21 *Ed.* 3. 13: *Co.* 5. 117. 9. 79. *Broo. Oblig.* 64. *Trin.* 36 *Eliz. Adjudge* 27 *Eliz.*

And

And if the obligor pay the money to the obligee after the day of paiment; this is no performance of the condition, but the obligation is forfeit, and the money paid ſhall goe in part towards the forfeiture. And yet in this caſe the Defendant at this day being ſued upon this obligation, doth uſually adventure to plead conditions performed, and give this ſpeciall matter in evidence to the Jury, who for the moſt part doth find againſt the obligee. And yet if the condition be, to pay me money at a day certaine, or to pay another money at a day certaine, and the obligor pay me or the ſtranger at ſeverall times before the day, and I, or the ſtranger accept thereof; this is a good performance of the condition. But if the obligee doe only promiſe to accept of a horſe for his money at the time of paiment, and when the time of paiment comes, and tender of the horſe is made to him, he doth refuſe him; this tender is not a ſufficient performance of the condition. *Perk. Sect.* 548. 34 *H.* 6. 17, 21 *Ed.* 3. 13. *Co.* 5. 117. 9. 79. *Broo. Oblig.* 64. *Trin.* 36 *Eliz. Adiudge.* 27 *Eli. Dier.* 18, 18. *Ed.* 4. Tender and Refuſall.

If the condition be, to pay money at a day and place certaine, and the obligor tender it at the time and place, and the obligee is not ready to receive it; or being ready, doth refuſe to receive it; this is a good performance of the condition to ſave the forfeiture of the obligation. And yet if the obligor be afterwards ſued for this money, he muſt ſay in his pleading, that he is ſtill ready to pay it, and he muſt tender it in court. But if one be bound by a ſingle obligation to pay money, and after at the ſame or ſome other time, he hath a defeaſance from the obligee, that upon paiment of a leſſer ſumme the obligation ſhall be void; and the obligee refuſe the mony when the ſame is tendred at the time when by the Defeaſance it is to be paid; in this caſe the obligor is not bound to tender the money in Court, neither hath the obligee any remedy for it. *Co. ſuper Litt.* 208, 209. 27 *H.* 8. 10. *Perk. Sect.* 784.

If the condition be, to pay me money at a day and place certaine, and the obligor doth tender it to me the ſame day in another place, this is no performance of the condition, and therefore in that caſe I may refuſe it. 41 *Ed.* 3. 25.

If the condition be, to pay money between two daies; paiment of the money upon either of thoſe dayes is not a good performance of the condition, but the paiment muſt bee between the two days. *Dier.* 17.

If the condition be, to pay me money at a day certaine, and I bid the obligor pay the money to one that I doe owe ſo much more unto, or I bid him lay out the money for mee, or I bid him keep it for ſuch a debt I owe unto him, and he doe ſo, and I accept hereof, it ſeems this is a good performance of the condition. *Perk. Sect.* 748. 27 *H.* 6. 6. *Fitz. Bar.* 43.

If the condition be to pay me money, and I appoint another to receive it, and the obligor pay it unto him; this is a good performance of the condition.

If the condition be, that a ſtranger ſhall pay to the obligee 10l. and the obligee accept a horſe for it, this is a good performance of the condition. But if the condition be that one ſtranger ſhall pay to another ſtranger 10l. and the one doth give, and the other take a horſe in liew of this; this is no good performance of the condition. See more of this in acceptance, *Sect.* 3. *Co ſuper. Litt.* 208, 209, *Dier.* 56. Acceptance.

If the condition be, to pay me 20l. of lawfull Engliſh money, and the obligor pay me in Spaniſh or in any other mony currant in this Realm; this is a good performance of the condition. But paiment in farthings is no good paiment. If the condition be, to pay me 20l. and the obligor pay me ſome of the 20l. in counterfeit pieces, which I not perceiving at the time, doe put up and accept, but after upon a review I doe perceive ſome of them to be naught, and thereupon I doe ſend it back to him again, in this caſe it ſeems the condition is well performed, and therefore the ſending back of the money againe will not cauſe a breach afterwards. *New Terms of the Law. tit. Coine. Per. Juſt. Bridgman and Curia in the Marches of Wales* 8. *Terms of the Law. Idem.*

If the condition be, that I ſhall ſtand to the award of *I.* S. and he doth award mee to pay 20l. to *W.* S. by a day, and at the day I doe tender him the 20l. but he doth refuſe it; in this caſe I have ſufficiently performed the condition, and the obligation is ſaved. See more in *Brownlows.* 2 *part* 48. 22 *Ed.* 4. 2. To ſtand to an Award.

If the condition be, that I ſhall ſtand to the award of *I. S.* and he award that I ſhall enter a Retraxit in a ſuit depending between me and the other party, and I do not ſo, but am Nonſuite, or do diſcontinue my Suit; this is no good performance of the condition. 22 *Ed.* 4. 25.

To ſhew a Releaſe. If the condition be that the obligor ſhall come ſuch a day to ſuch a place and ſhew me a Releaſe, and he doth come to the place the latter part of the day, and doth ſtay there untill the light of the day be gone, ready to ſhew his Releaſe, but I come not thither; this is a good performance of the condition. 22 *Ed.* 4.42.

For quiet enjoying. If one make a leaſe of land to me, and bind himſelf in an obligation with condition to ſuffer me quietly to enjoy the land without the let of him or anyother; in this caſe if he himſelf, nor any other by his incitement doe diſturbe me, the condition is performed; and if a ſtranger that hath title, doe enter without his procurement or occaſion, this is no breach of the condition. *Dier.* 255. 17 *Ed.* 4.3.

To appeare. If the condition be, to appear in the Kings Bench ſuch a day, to anſwer *I. S.* and at the day the obligor doth appeare, but the Plaintiff is eſſoined ſo that the defendant cannot anſwer him, or the ſuit is diſcontinued by the demiſe of the King before the day of appearance; in theſe caſes the condition is performed and the obligation ſaved. But if the obligor in this caſe when he doth appeare, doth not cauſe his appearance to be entred of Record, the obligation is forfeit. *Perk ſect.* 760. 758. 2 *Ed.* 4.3.

If the condition be to appear *coram domino Rege*, and the obligor appeare before the Kings Perſon; this is no performance of the condition. And if the condition be, to appear *coram Juſticiariis Domini Regis*, and the obligor appear before them out of Court; this is no performance of the condition. 8 *H.* 4.6.

To make a Bond. If the condition be, that a ſtranger ſhall make an obligation to the Obligee, and the ſtranger tender it, and the obligee refuſe it; this is a good performance of the condition. But if the condition be, that the obligor ſhall make an obligation to a ſtranger, and the obligor tender it, and the ſtranger refuſe it; this is no performance of the condition. *Co. ſuper Litt.* 208, 209, 10 *H.* 6. 16. 27. *H.* 8. 1.

To marry a woman. If the condition be, that the obligor ſhall marry the daughter of the obligee by a day, and he doth tender himſelf, and ſhe doth refuſe; in this caſe the obligation is forfeit, notwithſtanding this tender and refuſall. *Perk. Sect.* 756. 4 *H.* 7. 3.

To leave a Poſſeſſion. If the condition be, to deliver the key of a houſe, and the quiet poſſeſſion to *I. S.* to the uſe of the obligee, and the obligor (the houſe being rid, and every one out of the houſe, and the door locked) doth deliver the key to *I. S.* it ſeems this is no good performance of the condition, but that *I. S.* or the obligee, or his deputy ought to come and receive the poſſeſſion. See more in *Condition* at *Numb.* 9. and *Covenant.* 6

9 When a ſingle Obligation ſhall be ſaid to be broken and forfeit, or not. If an obligation that is ſingle, be not Performed, as when it is to pay money at a day, and the money is not paid, the obligation is broken. But if a man be bound by an obligation to pay money at ſeverall daies, the obligation is not forfeit, nor can be ſued untill all the dayes be paſt. And yet if the condition of an obligation be to pay money at ſeverall dayes, and the obligor doe fail to pay the money the firſt day; in this caſe the obligee may ſue for the money due by the obligation preſently. *Co.* 8 153. *ſuper Litt.* 292. *F. N. B.* 267.

If one be bound to pay money at a day certaine by a ſingle obligation or Bill, and the obligor tender the money at the day to the obligee, ſo as he will give him his Bill or a Releaſe for the money, and the obligee refuſe ſo to doe, and thereupon he doth refuſe to pay the money; in this caſe the obligation is not forfeit; for in this caſe the obligor is not bound to pay the money, unleſſe the Obligee will give up his Bill or give him a releaſe. But otherwiſe it is in caſe where one is bound to pay money by the Condition of an obligation; for there the obligor muſt pay the money at his perill, albeit the obligee refuſe to deliver up the obligation or to give a releaſe. *Broo. Oblig.* 62. *Fait* 105. *Fitz. verdict.* 13.

10. When the condition of an obligation ſhall be ſaid to be broken and the obligation forfeit, or not. If one be bound to pay money on a ſingle Bill at a day, and the obligor tender the money at the day to the obligee, and he refuſe it; in this caſe, it ſeems he hath no remedy for his money; *Sed quære*.

In all cauſes when the condition is not performed or broken, the obligation is forfeit, and till then it cannot be forfeit. And therefore, if one be bound in an obligation

obligation, with condition to pay me 10l. at Eaſter, before the day come, the obligation cannot bee forfeit; but if it be not paid at the day, the obligation is forfeit. And yet if the obligee himſelf be the cauſe of the breach of the condition, or the thing to be done by the condition, is now become impoſſible by the act of God, the obligation is now become without penalty. As if in the old daies I had been bound in an obligation to an Abbot, that *A.* ſhould infeoffe him before Chriſtmaſs, if *A.* enter into Religion, my Bond had been preſently forfeited. But otherwiſe it had been if *A.* had been profeſſed under the obedience of the obligee himſelf. See more in *Brownlows Rep.* 1 *part.* 64. 62. *Bro. Oblig.* 17. 4 *H.* 7. 4. To make a Feoffment.

If the condition be to make a Feoffment of land to me ſuch a day, and he be not upon the land ready to make the Feoffment, albeit I come not there to receive it, yet the condition is broken. *Perk. Sect* 768. 769.

If the condition be that when the obligor ſhall come to his Aunt, he will enfeoffe the obligee, or the heirs of his body, in this caſe he muſt doe it aſſoon as he doth com to her, and the obligee ſhall requeſt the Feoffment, or the obligation is forfeit. 21 *Ed.* 3. 29. *Cook*, 5. 112.

If the condition be to enfeoffe me of a Mannor by a day, and before the day the obligor doth make a Feoffment of it to another, hereby the condition is broken, and the obligation forfeit, and though the obligor repurchaſe it againe before the day, and then make the Feoffment, yet this will not cure the b each. 21 *Ed.* 4. 55.

If the condition be, to enfeoffe *B.* and *C.* and one of them die before the time be paſt wherein it ſhould be done; in this caſe hee muſt enfeoffe the ſurvivor of them, or the condition is broken. 4 *H.* 7. 4.

If the condition be, that if the obligor before Michaelmaſs make a leaſe to the obligee for thirty one years, if *A.* will aſſent, and if he will not aſſent then for twenty one years, that then &c. if *A.* do not aſſent, and the Leaſe for twenty one years be not made before Michaelmaſs, the obligation is forfeit. *Dier.* 347. To make a Leaſe.

If the condition be that the Obligor ſhall make me an eſtate upon requeſt, and he tender me an eſtate before I requeſt it, and afterwards I doe requeſt it, and he doth refuſe it; in this caſe the condition is broken, and the obligation forfeit. 7 *H.* 6. 24. To make an Eſtate.

If the condition be that the obligor ſhall make me a good eſtate of land (being Copi-hold land) and he doth ſurrender it abſolutely, and the Homage when they preſent it, doe preſent it conditionally; this is no breach of the condition. *Paſche.* 8. *Co. B. Iac.*

If the condition be to make a good eſtate of land in Fee-ſimple to *A.* (a woman) before ſuch a time, and before ſuch time the obligor taketh *A.* to wife, and the day paſs, and no eſtate is made; in this caſe the condition is broken, and the obligation forfeit. But if the obligation be made to the woman herſelfe, then it is diſpenſed with by the inter-marriage. 4 *H.* 7. 4 *Kel.*

If the condition be, that the obligor and his ſon ſhall doe all ſuch acts for the better aſſuring of land, as the obligee or his Counſell ſhall deviſe, and the obligee deviſe and tender a Releaſe to the obligor and his ſon to ſeale, and they delay and refuſe to ſeale it untill they can ſhew it to their Counſell to be adviſed upon it; this is a breach of the condition; but if they be illitterate and refuſe to ſeale it untill they can get it read; this is no breach of the condition, See more in *Brownlows. Rep.* 1. *part.* 70. *Co.* 2. 3 *Dier.* 337. To make further aſſurance

If the condition be, that the obligor ſhall ſave the obligee harmleſs from ſuch a debt, for which the obligee is ſurety for the obligor, and the obligee commeth at the time, and to the place when and where the money, for which he is engaged, is to be paid, and finding no body ready to pay the money, he doth pay it himſelf to ſave the forfeiture of the obligation; hereby the condition to ſave harmleſs is broken, and the obligation forfeit. And therefore much more if the obligee be ſued, arreſted, outlawed, or taken in Execution for the debt of the principall. So alſo if the obligee bee put in feare of arreſt for the debt of the principall, and therefore dare not goe about his buſineſs; by this the condition is broken. But if the obligee be ſued unjuſtly, either becauſe he is ſued before the money is due, or otherwiſe, or if the bond in which he is bound, be againſt law and void, and he ſuffer himſelf to be unjuſtly vexed thereupon To ſave harmleſs.

and doth not take advantage of it, it ſeems this is no breach of the condition of the Bond to ſave harmleſs. *Dier.* 186. 187. 18 *Ed.* 4. 27. 28. *Co.* 5. 24. *Old Book of Entry.* 12.

If a Bailiff diſtrain beaſts on a withernam, and afterwards re-deliver them to the party of whom he had them, and take a Bond from him with condition to ſave him harmleſs from him for whom the Beaſts were taken, and after he doth bring a detinue againſt the Bailiff for the beaſts; in this caſe the condition is not broken, for this action will not lie in this caſe. See more in *Brownlows, part:* 117. 122. 2 *H.* 4. 9.

To pay money. If the condition be to pay money to me at a day and place certaine, and the mony is not tendred at the time and place, albeit there be no body ready to receive it, if it be tendred, yet the condition is broken. *Kelw* 60.

If the condition be to pay money to me at a day and place, and the obligor in his going to the place is robbed of the money ſo as he cannot pay him; in this caſe notwithſtanding the condition is broken, and the obligation forfeit, this will not excuſe it. *Broo. Oblig* 9.

If the condition be to pay money to me at a day and place, and I ſeeing him going to the place to pay the money, do wiſh him to forbeare, and thereupon he doth ſo, and doth not pay it; in this caſe the obligation is forfeit, and this will not excuſe. But if I doe violently and actually detaine and hinder him, ſo that he cannot pay it, this will excuſe him. *Kelw* 60.

To pay Rent. If the condition be to pay me the rent reſerved on ſuch a leaſe, at the times limited by the leaſe, and it be not accordingly: hereby the condition is broken, albeit I do never demand the rent. *Hill.* 4 *Jac. Molineux Caſe.*

If the condition be to pay me the rent reſerved on ſuch a leaſe, and I enter upon all or part of the land demiſed, ſo as the rent is ſuſpended ſo long as I keep the poſſeſſion, in this caſe the non-payment of the rent during the time of the ſuſpenſion of the rent, is no breach of the condition. See more in *Brownlows Rep.* 2. *part.* 176.

For quiet enjoying. If the condition be that I ſhall enjoy land without the interruption of any perſon whatſoever, and afterwards I doe forfeit it, my ſelfe by non-payment of rent, or the like, this is no breach of the condition. *Dier.* 30.

If the condition be, that the obligor ſhall ſuffer the obligee to enjoy lands &c. and that without the let of him &c. or any other perſon or perſons &c. and one that hath an elder title doth enter; this is no breach of the condition. But if he procure this entry and diſturbance, this is a breach of the condition. *Dier.* 255. 17 *Ed.* 4. 3.

If the condition be that *B.* and others ſhall quietly enjoy land, and *A.* the obligor and *B.* the obligee doth diſturbe the others; it ſeems by this diſturbance the condition is broken. *Kelw.* 60.

If the condition be that the obligor ſhall not diſturbe me in the keeping of my Courts, and he keep the Courts and take the Fees himſelf; this is a breach of the condition. *Co.* 9. 51.

If one make a feoffment of land, and make me an obligation with condition to defend the land for 12 years &c. and I am entred by a ſtranger but never impleaded; in this caſe the condition is broken. *Co. ſuper Litt.* 384.

Two Iointenants for years of a Mill, one grants away his part to a ſtranger and dies, but the Grantee ſuffer the other Iointenant to enjoy the whole. The other reciting his Eſtate, that his companion was dead, and it was all his, he grants it all over to *I. S.* and Covenants that the other grantee ſhal enjoy it &c. a Bond with condition to perform Covenants, and after the grantee of his companion enter upon him; this is a breach of the Condition. *Brownl.* 2 *part.* 212.

To ſtand to an Award. If the condition be to ſtand to the award of *I. S.* and the obligor doth afterward counter-maund the ſubmiſſion made to *I S.* this is a breach of the condition. *Factum non dicitur quod non perſeveras. See more in Brownlows ep.* 2 *part.* 48. 290. 291. *Co.* 4. 61. 8. 83.

To give a licence. If the Condition be that I ſhall have licence to carry wood ſeven years, and the obligor doth give me a licence for ſeven years, and then doth revoke it againe; this is a breach of the condition. *Co.* 8. 82, 83. 18 *Ed.* 4. 20.

If

If the condition be, that *I, S* ſhall give me licence to goe over his ground, and *I, S* doth ſo, but another doth interrupt me; this is no breach of the condition. And yet if the condition be that I ſhall have licence to go over that ground, there perhaps ſuch an interruption may be a breach of the condition. 18 *Ed.* 4. 23.

If an obligation be made to me with condition to appear in ſuch a Court ſuch a day, and at the day he is kept in priſon at my ſuit ſo as he cannot appeare; in this caſe his not appearance is no breach of the condition; for his impriſonment ſhall excuſe him. But if his impriſonment be for Felony, or any other ſuch like cauſe of his own, *contra. Fitz. Barre.* 60. To appeare.

If the condition be, to appear in ſuch a Court ſuch a day, and before the day a *Superſedeas* doth come to the Sheriff; yet if the Obligor do not appear; the obligation is forfeit. *Dyer* 25.

If the condition be, that the Obligor ſhall ride with *I S* to Dover ſuch a day, and *I S* doth not go thither that day, in this caſe it ſeems the condition is broken, and that he muſt procure *I S* to go thither and ride with him at his perill. *Perk. Sect.* To ride to *Dover.*

If I make a Leaſe for years, and the Leſſee doth enter into an obligation with condition that he ſhall not alien the land demiſed without my licence, and I die, and then he doth alien it; it ſeems this is a breach of the condition. *Per. Iuſt. Nichols M.* 13. *Iac.* Not to alien.

If the condition be that *I S* ſhall ſerve me in all my honeſt and lawfull commands, or that *I S* ſhall be a good and honeſt ſervant to me one yeare; in the firſt caſe if I command him nothing, the condition is not broken, albeit he never tender his ſervice: but in the laſt caſe it ſeems he is to tender his ſervice to me, or otherwiſe the condition will be broken. But if I refuſe his ſervice when it is tendred, or he die within the time, the obligation is diſcharged. And yet if he depart away within the time, the condition is broken. *Perk. Sect.* 772, 6. *Ed* 4. 2. To ſerve.

If the condition be that *A* ſhall marry *B* by a day, and before the day the Obligor himſelf doth marry her: in this caſe the condition is broken. But if the Obligee marry her before the day, the obligation is diſcharged. 4 *H.* 7. 4. *Perk.* 79. To marry a woman.

If the condition be, to performe the covenants and payments of a deed, and the deed doth containe a Feoffment, and this is on condition that if the Feoffor pay ſuch a ſum of money he ſhall reenter, and he doth not pay it, in this caſe this non-paiment is no breach of the condition. But if *A* let Land by Indenture to *B* for years rendring rent, and *B* doth bind himſelf in an obligation with condition to perfo rm all the covenants contained in the Indenture, and the rent is unpaid; this is a breach of the condition and cauſe of forfeiture of the obligation. See more in *Brownlows* 2 *part* 212. 213. *Briſcoes* caſe. *Trin Iac. B. R. Adjudged Griffin & Scots* caſe. 5. *Iac. B. R.* To performe covenants.

If the condition be for the ſafe keeping of priſoners, and one doth eſcape that is in execution, and in priſon under colour of an execution, or the like, but in truth and in judgement of Law is no priſoner; this eſcape is no breach of the condition. See more in *Condition* at *Numb.* 10. To doe other things. *Brownlows Rep.* 1 *part* 32. 54. 122. 124. 2 *part.* 177. 212. 213. *Curia Trin.* 37: *Eliz.* To keep Priſoners.

If the condition of an obligation conſiſt of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are poſſible at the time of the making of the obligation, and before the time of performance one of the things is become impoſſible to be done by the act of God, or by the act of the Obligee himſelf; in this caſe the obligation is diſcharged for ever. And therefore if the condition be, That if the Obligor ſhall ſell away his wives Land, if then he ſhall either in his life time purchaſe to his wife and her heirs and aſſignes Land of as good right and value as the money by him received, or had by or upon the ſaid ſaile ſhall amount unto, or elſe do and ſhall leave unto her the ſaid *I* as Executrix by legacy or otherwiſe as much money as ſhall be by him received upon ſuch ſale; That then &c. and the Obligor doth ſell his wives Land, and then his wife doth die before him ſo that he cannot leave her the money; in this caſe the obligation is diſcharged, and the husband is not bound to purchaſe Land to her and her Heirs. *Co. ſuper Litt.* 207. 11. By what meanes and when an Obligation good in his original creation, doth or may become void, bee diſcharged or gone by *matter ex poſt facto*: Or not.

So

So if the condition be, that if *I S* do not prove the ſuggeſtion of a Bill depending in the Court of requeſts before the utas of Hillary, that then he ſhall pay 20l. &c. and *I S* die before the utas; hereby the obligation is diſcharged for ever, and he is not bound to pay the 20l. *Co.* 5. 22. 15 *H.* 7: 2. So if the condition be that if the Obligor appear in the Kings Bench in Eaſter Terme, or pay 20l. to the Obligee at Michaelmas, and the Obligor die before Eaſter Terme, hereby the obligation is diſcharged: but if he do not appear in Eaſter Terme and out-live the Term, and die after, then it ſeems the 20l. muſt be paid at Michaelmas, or the obligation is forfeit: So if the condition be that the Obligor ſhall marry *A* before Eaſter, or pay 20l. to the Obligee at Michaelmas, and *A* die, or become madd before Eaſter, or the Obligee marry *A* himſelf; and the marriage doth continue between them untill Eaſter be paſt: in all theſe caſes the obligation is diſcharged for ever. But when the thing is become impoſſible by the act or laches of the Obligor, the Law is otherwiſe. And therefore if the condition be, that *A* ſhall marry with *B* before Eaſter, or that the Obligor ſhall pay unto the Obligee 20l. at Michaelmas, and the Obligor himſelf marry with *B*, and the marriage doth continue untill after Eaſter; hereby the obligation is not diſcharged. So if the condition be to deliver up an obligation before Eaſter, or give a releaſe at Michaelmas, and the Obligor doth loſe the obligation, or the obligation is burnt; hereby the obligation is not diſcharged, for if he doth not make the releaſe at Michaelmas, he doth forfeit the obligation. *Dyer* 262. 15 *H.* 7. 4. 4 *H.* 7. 4. *Agree* 9. *Iac. in Bathurſt* caſe.

If the condition of an obligation conſiſt of one part only, or be to do one thing at a time certain, and that thing at the time of the obligation made is poſſible to be done, but afterwards and before the time when it is performed it doth become impoſſible by the act of God, or the act of the Obligee; in this caſe alſo the obligation is gone and diſcharged for ever. And therefore if the condition be to appear in perſon ſuch a day in ſuch a Court, and before the day the Obligor die, or at the day the water doth ariſe ſo high that he cannot travaile to the place without perill of life; in theſe caſes the obligation is diſcharged. So if the condition, that *A* ſhall marry *B* before Eaſter, and before the time *A* or *B* die, or become madd, or the Obligee marry *B*, and the marriage doth continue untill after the day: in all theſe caſes the obligation is diſcharged, But if the thing become impoſſible by the act of the Obligor, *contra.* And therefore if the condition be, that the obligor ſhall appeare ſuch a day, and before, and at the day he is impriſoned through ſome default of his own, ſo that he cannot appear, this will not excuſe him, no more then in caſe where he is ſo ſick that he cannot appear without perill of his life. So if the condition be that *B* ſhall marry *C* before Eaſter, and the obligor himſelf marry her, and the marriage doth continue untill after the time: in this caſe the obligation is forfeit. So if the condition give the obligor time all his life time to do the thing, the obligation is not diſcharged by his death; but in this caſe he muſt do it during his life time at his perill. 8 *Ed.* 4. 21. *Co.* 5. 22. *Perk Sect.* 769. 767. 4 *H.* 7. 4. 22 *Ed.* 4. 27. *So held in the Exchequer* 3. *Car. Curiæ Co. B. Hill.* 37. *Eliz.*

If the condition be that the obligor ſhall deliver to the obligee an obligation or ſuch a releaſe as the counſell of the obligee ſhall deviſe before Michaelmas, and the counſell of the obligee deviſe no releaſe before Michaelmas; hereby the obligation is gone for ever. *Adjudged* 37. *Eliz. Co. B. Greeningham verſus Ewre.*

If the obligation depend upon, or be neceſſary to ſome other deed, and that Deed become void, in this caſe the obligation is become void alſo; as if the condition of the obligation be to perform the Covenants of an Indenture, and afterwards the covenants be diſcharged or become void; by this means the obligation is diſcharged and gone for ever. And if one make a leaſe for years rendring rent, and the Leſſee enter into an obligation with condition to pay the rent to the Leſſor, and after it fall out ſo that the Leſſee is evicted out of the land by an elder title, whereby the rent in Law is gone; in this caſe and by this means the obligation is diſcharged and gone alſo. But if the eviction be but of a part of the Land, *contra. Bro Oblig.* 6. 88. 29 4 *H.* 7. 6

If an obligation be made to me, and delivered to *I S* to my uſe, and when it

is tendred to me, I do refuſe it and diſagree to it; hereby it is become void, and cannot afterwards be made good againe. So if an obligation be made to my wife, and I diſagree to it; hereby it is become void. *Coo.* 5. 119.

By a Releaſe made from the obligee to the obligor, or to one of the obligors, if there be more then one, the obligation may be diſcharged. And therefore, if an obligation be made to me with condition to pay money, and I by my Deed releaſe it, or acknowledge my ſelf ſatisfied the Debt, albeit I receive none of it, or but part of it in full ſatisfaction of the Debt, by this the obligation is diſcharged for ever. *Fit. Barr.* 37.

If the obligee make the obligor, or one of the obligors, or all the obligors, his Executor, or his Executors; hereby the obligation is diſcharged for ever. But the granting of Letters of Adminiſtration to one, or more of the obligors, is no diſcharge of the obligation. And if the obligor make the obligee his Executor, this is no diſcharge of the obligation. *Broo. Oblig.* 61. *Co.* 8. 136. 8 *Ed.* 4. 3. 21 *Ed.* 4. 2. 11 *H.* 7. 4.

If the obligee be a woman, and take the obligor to husband, hereby the obligation is diſcharged. *Broo Oblig.* 61.

If the condition be to enfeoff *K S* (a woman) before ſuch a time, and before the day the obligor, doth marry the woman: this doth not diſcharge the obligation. *Fitz. Barre.* 133.

If the condition be to ſerve me ſeven years, and within the time I licence him to depart, it ſeems that hereby the obligation is diſcharged: And yet if the condition be to ſtand to an Award, and it is awarded that one of the parties ſhall pay 5*l.* a year for ſeven years towards the education of *I S*, and *I S* die within the ſeven years, the obligation is not diſchareged by his death, but the money muſt be paid during the time notwithſtanding. *Dyer* 329.

If the condition be to doe two things, or ſtand upon divers points; and the Obligee ſuppoſing the breach of one of them, doth ſue the obligor, and the iſſue being joyned upon that point, it is found againſt the Plaintiff and he is barred; hereby the whole obligation is diſcharged; and ſo long as that Iudgement is in force, he can never ſue the obligation upon any other point within the condition. *Dyer* 371.

If the condition be to ſatisfie me for goods I have delivered to *I S* if they be loſt, and afterwards they be loſt, and I ſue *I S* and have him in Execution for them; by this the obligation is not diſcharged; but perhaps when I have ſatisfaction of *I S* being in Execution for the goods, the obligation may be gone. *Fitz. Barr.* 64.

And in all other Caſes by which a deed in Generall may become void by matter *ex poſt facto*, as by Raſure or the like, en obligation may become void, *See more in Brownl.* 1 *part* 47. 73. 74. 71. 79. 98.

Of a Defeaſance.

THis in a large ſence doth ſometimes ſignifie a condition annexed to an eſtate, ſometimes the condition of an obligation made with, & annexed to the Obligation at the time of making thereof: But it is more peculiarly & properly applyed to ſuch conditionall inſtruments as are made in Defeaſance and avoidance of Statutes and Recogniſances at the time of entring into the ſame Statutes or Recogniſances, and to ſuch conditionall Inſtruments as are made in Defeaſance of Statutes, Obligations, and the like, after the time of the ſame Statutes entred into, and obligations, &c. made: And it is therefore thus defined. *Defeaſance, what.*

A Defeaſance is a condition relating to a Deed, as to an obligation, Recogniſance, Statute, or the like, which being performed by the obligor or Recogniſor, the Act is diſabled and made void, as if it had never been done; which differeth from a condition only in this that this, is alwaies made at the ſame time, and annexed to, or inſerted in the ſame Deed, but that is alwaies made in a Deed by it ſelf, and for the moſt part made after the Deed whereunto it hath relation.

There

2. Where and in what caſes a Defeaſance may be; and what things may be defeated and avoided thereby; and where, and what not.

There is no Inheritance Executory, as Rents, Annuities, Conditions, Warranties, Covenants, and ſuch like, but may by a Defeaſance made with the mutuall conſent of all thoſe who were parties to the creation thereof at the ſame, or at any time after be annulled, diſcharged and defeated. And ſo is the Law of Statutes, Recogniſances, Obligations, and the like; yet ſo, as in all theſe caſes regularly, the Defeaſance muſt be made *eodem modo* as the thing to be defeated was and is created, *viz.* if the one be by Deed, the other muſt be ſo alſo; for it is a rule, that in all caſes when any Executory thing is created by a Deed, that the ſame thing by the conſent of all perſons which were parties to the creation of it, may be by their Deed defeated and annulled, and therefore that Warranties, Recogniſances, Rents, Charges, Annuities, Covenants, Leaſes for years, Uſes at Common Law, and ſuch like, may by a Defeaſance made with the mutuall conſent of all thoſe that were parties to the creation of it by Deed, be diſcharged and avoided. *Nihil eſt tam conveniens naturali æquitati quam quod unumquodque diſſolvi eo ligamine quo ligatur.* And therefore by ſuch a Defeaſance, not only the Covenant which doth create a power of Revocation, but the power it ſelf created, may be utterly defeated and avoided: But eſtates of Inheritance, and other eſtates in Taile or for life, executed by Livery, &c. cannot be avoided by Defeaſance made after the time of their creation and firſt making. And yet by another Deed of Defeaſance made at the ſame time, a Feoffment, Releaſe, Leaſe for life, or other executed thing, may be avoided as well as if it were by condition within the ſame Deed; as if a Diſſeiſee releaſe to the Diſſeiſor: this Releaſe cannot be defeated by an Indenture of Defeaſance made afterwards, but it may be defeated by an Indenture of Defeaſance made at the ſame time. *Quæ in continenti fiunt in eſſe videntur. Co. ſuper Litt.* 236. 237. 1. 111. 113. *Plow.* 137. 193. 21 *H.* 7. 23. *Bro. Defeaſance in toto.*

3. What ſhall be ſaid a good Defeaſance, and what not. For the manner of it:

To make a good Defeaſance, theſe things are requiſite.

1. That the Defeaſance be made *eodem modo*, as the thing to be defeated is created, for if the obligee by word only diſcharge the obligor, or grant not to ſue him; this will not defeat the obligation; it muſt be by Deed therefore as the former was, *Co.* 113.

But whether the Deed of Defeaſance be indented or poll is not materiall. *Bro. Defeaſ.* 12. *Fitz. Bar* 93.

2. That if it do recite the Statute or the obligation (as for the moſt part it doth) that it be done truly; for if a Defeaſance be made of a Statute or an obligation which is recited to be made the 10 day of *May*, whereas in truth it bareth date the firſt day of *May*; this defeaſance is void. *Plow.* 393.

3. That it be made between the ſame perſons that were parties to the firſt Deed, &c. And therefore if *A* be bound in an obligation to *B* in 20l. and *B* make a Defeaſance to *C*, that if *C* pay him 20l: the obligation made by *A* ſhall be void; this is no good Defeaſance, becauſe it is not made between the ſame parties: And yet if a Statute be made to the husband and Wife, and the husband alone joyn in the making of a Defeaſance, this is a good Defeaſance. 14. *H.* 8. 10. *Bro. Eſtrangal fait.* 10. *Bro. tit. Defeaſance* 3.

4. That it be made after the making of the Recogniſance, obligation, &c. and not before; for if *A* grant to *B*, that if *B* will be bound to him in 20l. by obligation, that the obligation ſhall be void, and after *B* doth bind himſelf to *A* in an obligation of 20l. this defeaſance is not good becauſe it is before the obligation *Bro. Defeaſance* 5.

And yet if the date of the defeaſance be before the date of the Recogniſance, &c. and it be delivered after, it is good enough, *Dyer* 315.

For the matter of it.

5. That it be made of a thing defeaſable, *Plow.* 137. *Bro. Defeaſance* 1.

For if a Diſſeiſee releaſe his right to the Terre-Tenant, and after there is a defeaſance made between them, that if the Releſſor ſhall pay 20l to the Releſſee, the Releaſe ſhall be void: this is a void Defeaſance.

And yet a Releaſe may be avoided by a condition or Defeaſance made at the time of making of a Releaſe as well as a Feoffment. *Bro. Defeaſance.* 6. 9. *Co ſuper Litt.* 236.

If

If the Defeaſance of a Recogniſance, Obligation *&c.* be, That if the Cogniſor, or Obligor, *&c.* pay a ſum of Money, or do not diſturb the Execution of the Will of *J. S.* or do make a Leaſe for years to *J. S.* or the like; theſe are good Defeaſances. As if the Grantee of a Rent-charge grant to his Grantor, that if he ſhall pay him twenty pound ſuch a day, the grant of the Rent ſhall be void. See *Weſt. Symb. Broo. Defeaſance in toto.* Albeit the Condition of an Obligation, that is repugnant to the Obligation it ſelf, is void and the Obligation ſingle, yet it is otherwiſe in caſe of a Defeaſance made after the Obligation; for this is good, notwithſtanding it be repugnant. And therefore if the Obligee after the Obligation made, grant by Deed to the Obligor, that the Obligation ſhall be void, or that he will not ſue the Obligation at all, or that he will not ſue the Obligation until ſuch a time, or that the Obligation ſhall be diſcharged; theſe Defeaſances are good to avoid the Obligation. 20 *Hen.* 7. 24. 21 *H.* 7. 32. *Fitz. Bar.* 71.

If the Feoffee with Warranty grant, that neither he nor his Heirs ſhall take benefit of the Warranty of the Feoffor, or his Heirs; this is a good Defeaſance of the Warranty; and if he grant not to vouch, this will diſcharge the Voucher: And if he grant not to bring a *Warrantia Chartæ*, this will bar him of that remedy. In like manner it is, if the Grantee of a Rent-charge grant to the Grantor, that he will not take any benefit by the Grant; this is a total diſcharge: And if he grant he will not bring an Annuity, this is a diſcharge of the perſon; and if he grant that he will not diſtrain the Land for the Rent, this is a diſcharge of the Land. *Broo. Defeaſance* 4. 7 *H.* 6. 43. 21 *H.* 7. 23. *Perk. ſect.* 69.

If one make a Leaſe for life by Deed, and after by another Deed doth grant to his Leſſee, that he ſhall not be impeached for Waſte; this is a good Diſcharge: And if the Leſſee afterwards grant by Deed to the Leſſor, that if he ſhall bring an Action of Waſte againſt the Leſſee, that he will not make uſe, nor take advantage of the Deed of Diſcharge; this is a good Diſcharge of the Diſcharge. *Broo. Defeaſ.* 11. *Condition* 120.

So that hereby it ſeems a Defeaſance may be of a Defeaſance, and one Defeaſance after another, and Regularly the laſt ſhall ſtand. *Agreement. Paſche*, 8 *Jac. Co. B.* And therefore if a Leaſe for years be made on Condition to pay twenty pound at *Eaſter*, and the Leaſe to be void, and before *Eaſter* the Leſſor and Leſſee agree; that if the Leſſor pay it at *Eaſter* following, the Leaſe ſhall be void, and before that time they make the like Agreement for another year; it ſeems theſe be good Defeaſances, and that the laſt ſhall ſtand. *Per Juſt. Bridgman.*

If the Defeaſance after Execution made upon a Statute be thus, That if the Conuſor pay ſo much money, the Statute ſhall be void; it ſeems, by this the Statute and Execution thereupon, is void: Howbeit, it is beſt to adde theſe words in the Defeaſance [*and the Execution thereupon.*] *Broo. Defeaſ.* 7.

CHAP. CXIX.

Of an Office.

Sect. 1.

1. *Office*, what.

THis word Office hath two ſignifications, *i.* It ſignifieth an imployment about a work; and of this in the next Chapter: But it ſignifieth alſo an Inquiſition or Inquiry made on the behalf of the Lord Protector of ſomething by vertue of his Office that doth enquire. And by Office found, is meant nothing elſe but ſuch things as are found by Inquiſition made; and of this there are two kindes *Intitling* or *Inſtructing*.

The kindes.

That is called an Office Intitling, when it doth veſt the Eſtate and Poſſeſſion of the Land, or other thing in the Lord Protector, who had therein onely a Right or Title before that time; As where an Alien doth purchaſe Land, or a Body Politick or Corporation purchaſe in Mortmain, or of a perſon attaint of Felony, or the like. And ſuch Offices as concern Fee or Frank-tenement muſt be found by virtue of Commiſſion under the Great Seal, or they are not good. The other kinde of Office is, where the Land or thing is lawfully veſted and ſetled before in the Lord Protector, but the particularity thereof doth not appear upon Record, ſo that it may be put in charge; and this is called an Office of Inſtruction, as where the Lord Protectors Tenant doth commit Felony, is attaint and dieth, or one is attainted of high Treaſon, in which caſes he hath right to the Land without Office. And ſuch things as theſe may be found by Commiſſion under the *Exchequer* Seal, and it will be good enough. And the effect of this Office, that it doth put the Lord Protector into the actual poſſeſſion of the thing, from the time of the finding; ſo that without any Entry or Seiſure he ſhall be anſwered the profits from that time.

2. *Inqueſt of Office or Inquiſition*, what.

The Inqueſt of Office, is nothing elſe but the Inquiſition, or that which is found by the Inquiry that is made by the charge and office of them that are imployed thereabouts, either as General Officers, and *Ex Officio*, or by ſpecial Commiſſion. For theſe Inquiſitions were taken ſometimes *Virtute Brevis* (that is) by virtue of certain Writs; and ſometimes *Virtute Commiſſionis*, by virtue of a ſpecial Commiſſion directed to certain men for that time and purpoſe onely; and ſometimes they have been more general, As to inquire of all Eſcheats, *&c.* and ſometimes more Special to enquire of one particular thing. But which way ever they entitle the Lord Protector, they may be uſed as evidence to other men. See *Co.* 5. 32. *Stamf. Pr. chap.* 20. 52. 13 *Ed.* 1. 25. 33 *H.* 8. 20. 4 *Ed.* 4. 20. 3 *H.* 7. 7. *Plow.* 484. *Co.* 4. 58. *F.N.B.* 257. 170. *Co.* 1. 42. 11 *H.* 4. 5.

3 Where and of what the *Lord Protector* ſhall be in poſſeſſion preſently by the Office found without Entry or Seiſure, or not.

For anſwer to this point, theſe things are to be known:

1. The Lord Protector upon an Office found for him, is preſently in poſſeſſion, without Entry or Seiſure; in caſes where his Entry or Seiſure is lawful, and the Poſſeſſion void at the time. As if an Office finde, that the Lord Protectors Tenant hath ſeiſed, or his Tenant for life hath committed Waſte; in theſe caſes the poſſeſſion will not be veſted in him, becauſe his Entry is not lawful, but he is put to ſue a *Scire facias*. If it had been found by Office, that the Kings Tenant had died ſeiſed without Heir, or his Heir within age, or he had made a Leaſe or Gift in Tail, and the Leaſe had been ended, or Donee dead without iſſue; in theſe caſes the Office had put the King in Poſſeſſion. But if it had found that the Kings Tenant was diſſeiſed, and died without Heir; the King had not been in Poſſeſſion, till the Poſſeſſion and Seiſin of the true Tenant be removed. So if the Office entitle the Lord Protector to a thing not Manual, (*i.*) of which no profit is to be taken, till it happen, as a Rent, Common, or the like, there he ſhall not be in poſſeſſion till the day. And in all theſe caſes the Lord Protector ſhall be anſwered the mean profits, from the time of his Title appearing of Record; As from the time of the Alienation in Mortmain, or making of void Letters Patents

Mean Profits.

Patents afterward adnulled, and the like. 14 *H.*7. 23. *Co.*4. 58. 34 *H.*6.5. *Stamf. Prer.* 54. 41 *Ed.*3. 11. 11 *H* 4.5.

2. In caſe of Treaſon, and a Forfeiture to the Lord Protector, by that means the Lord Protector ſhall be adjudged in actual poſſeſſion of the Land, without any Office or Inquiſition at all, by the Statute of 33 *H.* 8. 20.

The Tenant for years, Copiholder, and he that hath other profit, Apprender out of Land, whoſe Eſtates are not found in the Office, which doth intitle the Lord Protector to Land by any Attainder, ſhall enjoy their Eſtates notwithſtanding. 2 *Ed.*6.8.

Things are ſometimes found untruly by Offices; and in theſe caſes, thoſe that are like to be hurt, ~~may be hurt~~, may be relieved, by a Traverſe, *Monſtrance de droit*, by Petition, or by Pleading. And the Traverſe of an Office is nothing elſe, but the ſetting out of ones Right by a Judicial proceeding, to the end to overthrow the Lord Protectors Title. For every Office is in the nature of a Declaration, to which any man may plead, and either deny, or confeſs and avoid, by *Monſtrance de droit*, (*i.*) by ſhewing a Right: As for example, If the Office had found that *J. S.* the *Kings* Tenant died ſeiſed of the Land, the party grieved by this might have ſaid that *J. S.* did not die ſeiſed, or otherwiſe confeſs and avoid it, and ſay, That he was the *Kings* Tenant, and *J. S.* did diſſeiſe him; or that *J. S.* had onely an Eſtate upon Condition, and that before his Attainder he did break the Condition, or the like: And this Plea or Allegation ſhall be tried by a Jury in the *Upper Bench*; and if it be found againſt the Lord Protector, the party wronged ſhall have Reſtitution and Judgment be given, that the Lord Protectors hands ſhall be removed from the poſſeſſion. So where the Office doth finde the Lord Protectors Title by a Purchaſe by an Alienee, or an Alienation in Mortmain, or the like; for where the Office doth intitle the Lord Protector by matter in fait onely, and by no matter of Record, but by the Office it ſelf, thereby matter in fait onely proved to the contrary, it may be avoided, *Plow.* 488. *Broo.* 506. 34 *Ed.*3. 14. 36 *Ed* 3.13. 8 *H.*6. 16. 1 *H.*8.16. 2 *Ed.*6. 8. *Stamf. Prer.* 73-42. 9 *H.*6.15. 3 *H.*7.3. 4 *H.*7.4. *Co.* on *Littl.*77.

4. *Traverſe of an Office*, what. Where and how an *Office* may be avoided, or not. By *Traverſe.*

For the further opening hereof, take theſe caſes:

1. If upon this Traverſe it be found againſt the party, he is barred for ever, and and if it be found againſt the Lord Protector, he is barred for he cannot Traverſe it: And yet in ſome caſes he may have a *Melius Inquirendum*. *Co.* 8.164.

2. In all caſes where the Title of the party is found by the ſame Office, whereby the Lord Protector is intitled; As if it be found that *A.* did diſſeiſe *B.* and then alien in Mortmain, or the like; in this caſe the party ſhall avoid the Office by a *Monſtrance de droit*, *Co.* 8.168. But if the Office intitle the Lord Protector by matter of Record, as if it finde that *J. S.* was attainted of Treaſon, and ſeiſed of Land; if this be falſe, the party grieved by it, may avoid it by Traverſe, or by *Monſtrance de droit*, ſo long as the Attainder remains in force; and is not put to it to avoid it by Petition, as he was by the Common Law, 3 *H.*7.3. 4 *H.*7.4. 2 *Ed.*6. 8. *Co.* on *Littl. f.*77. And yet by the very Common Law, if he had matter of as high a nature; and if the Office found an Attainder and Forfeiture by Parliament, and there be another Act of Parliament, whereby the ſame Attainder was repealed; he might by the Common Law have pleaded this without Petition, 4 *H.*4. 24.

By *Monſtrance de Droit.*

By *Petition.*

3. If an Office do intitle the *King* to Perſonal Goods, as if it finde that *J. S.* was attainted of Felony, or outlawed in Debt or Treſpaſs, and at the ſame time he was poſſeſſed of a Horſe, when in truth, the Horſe was not his but another mans; in this caſe the owner of the Horſe may Traverſe it, and being found with him, ſhall have his Goods again, if the Officer have not accounted for it in the *Exchequer*, 4 *H.*4. 24. 34 *H.*6.5.

For the reſt of the Law, as to this Subject, ſee *Dyer* 302. *Broo. cap.* 118. 23 *H.*6. 17. 18 *Eliz.* 12.

CHAP. CXX.

Of Officers and Offices.

Sect. 1. 1. *Officer* and *Office*, what.

THis word Office hath more acceptions then one in our Law, but (as it is here taken) it is that Function, by virtue whereof a man hath ſome Imployment in the Affairs of another, whether of the *Supreme Magiſtrate*, or of a common perſon. And an Officer is he that is ſo imployed.

The kindes of Offices.

The Office of the *Supreme Magiſtrate* now in this Common *Commonwealth*, is the Office of the *Lord Protector*, who is the Chief and Supreme Officer for the Government of the Country, and Adminiſtration of Juſtice amongſt the people thereof, and that in general is his Office; but for his *Election*, *Office*, and *Oath*, ſee the *Government*, and *Prerogative*: And as to the Subordinate Officers under him, of theſe Officers, and their Offices, the old *Diviſion* of them was into *Eccleſiaſtical* and *Spiritual Officers*; ſuch as were *Biſhops*, *Chancellors*, *Delegates*, and divers others, who had Offices and Imployments about *Spiritual* Matters, now aboliſhed; and *Miniſters*, *Church-wardens*, *Clerks of Pariſhes*, and ſuch like, which do yet continue; and into *Civil Officers*, and ſome are mixt, having ſome of both Powers: And theſe *Civil Officers* and *Offices* were again divided into ſuch as had to do with Matters of *Juſtice*, or had to do in other matters. The firſt ſort again into *Officers* and *Offices*, *Judicial* and *Miniſterial*; *Judicial* (that is) ſuch as conſiſted, and were imployed in the Adminiſtration of Juſtice, Officers that had a Judicial voice in ſome of the Courts of Juſtice, as the Judges of the Court of *Star-Chamber*, and Court of *Wards* now removed (for which ſee *Courts*.) And the Judges of the one *Bench*, and the other *Counſellors* of the *Council Table*, the Commiſſioners of the *Great Seal*, and the Judges of all the Courts, yet continuing, and not aboliſhed, whoſe Offices you may ſee in *Courts*.

And then there are *Miniſterial Officers* of *Juſtice*; and of theſe the greater part do attend upon the *Judicial Officers*, either to prepare and make ready Matters for the Judges to determine, or elſe to execute what they have before determined: And ſuch are *Sheriffs*, *Serjeants at Law*, *Counſellors*, *Attorneys*, *Coroners*, *Keepers of Priſons*, *Bailiffs*, *Church-wardens*, *Treaſurers* of the County Stock, and many others.

And ſome Offices are partly *Judicial* and partly *Miniſterial*; ſo is the *Sheriffs Office*, and ſo are ſome other Offices.

The *Miniſterial Officers* do ſome of them belong to one Court, and ſome of them to another Court. The Officers that do not any thing in the Adminiſtration of Juſtice, are moſt of them ſuch as attend upon the *Lord Protector*, or other great men, as *Bailiffs*, *Purveyors*, *Stewards*, *Surveyors*, *Parkers*, and the like: Alſo ſome Officers are *County Officers*, and ſome *Pariſh Officers*; and ſome Offices are more of Charge, then of Profit; and ſome more of Profit, then of Charge.

Sect. 2. 2. The Duty of all *Officers* in general.

And as touching all ſorts of Officers and Offices in the general, theſe things are to be known.

1. Every man ought to be qualified and fitted for the Office he doth undertake; and this is eſpecially required in *Judicial Offices*: And therefore if the King grant ſuch an Office to an unskilful man, it is void. And if ſuch an Office be granted in Reverſion, it is void; for happily when it comes to be executed, the Officer may be diſabled, *Non compos mentis*, *&c.*

2. *Judicial Officers* ought to come to their Offices freely, and not give money for them; for if they buy, they muſt ſell them.

3. Theſe Officers of all ſorts are to attend their Offices, eſpecially thoſe that have to do with the Adminiſtration of Juſtice, they are to be induſtrious in execution

execution of the things given them in charge, and therein to be faithful and juſt.

4 They are to be contented with the Wages and Fees allowed them, which in moſt caſes are certain and known, either being ſet down by ſome Law, or uſually paid. And if they take any more then this, this is an offence called Extortion, and to be ſeverely puniſhed. *Fees.* *Extortion, what.*

5. If Officers that have to do in the Miniſtration of Juſtice be corrupt, cowardly, or negligent, they are to be puniſhed; and ſometimes they forfeit their Offices by it: See for this in *Forfeiture.*

And for Extortion in a *Sheriff*, ſee 23 *Hen.*6. 26. 1 *H.*4.11.

In a *Coroner*, 3 *Ed.*1. 10. 1 *H.*8. 7. 3 *H.*7.1.

In a *Clerk* of the *Market*, 13 *R.*2.4.

In other Officers, 3 *Edw.* 1. 26. 33 *Hen.* 8. 39. 7 *Edw.*6. 1. 27 *Hen.*8. 11. 26 *H.*8.3. 2 *H.*4.8. 23 *H.*8.6. 2 *H.*4. 23. 19 *H.*7. 8.

But for all theſe things, ſee *Co.* 11. 3. 90. upon *Littl.* 233, 234. *Crompt. Jur.* throughout. Sir *Tho. Smith de Republica* 38. 6 *R.*2.9. 8 *R.*2.4. 1 *R.*2.5. 1 *Ed.*4.1. 5, 6 *Ed.*6.16. 2 *Ed.*2.3. 3 *Ed.*1. 29. *Finches Law* 237. *Plow.* 379. *Dyer* 205. 5 *R.*2. 16. 2 *H.*4.8, 10, 23. 23 *H.*8.9. 26 *H.*8. 9. 27 *H.*8. 11. *Weſtm.*2. 42,44. 4 *Edw.*3.10. 5 *Rich.*2.9, 12, 13, 14, 15, *&c.* 29 *Eliz.* 4. 23 *Eliz.* 3. And in Title *Forfeitures, Courts. Acts*, 7 *Novemb.* 1650. 7 *Jan.* 1650.

Sect. 3.

As touching Officers in general, theſe things are further to be known. 3. Some other things to be known of all *Officers* in general, and of *Offices* in general.

1. Offices of the King are to be granted, and that freely without reward to men fit for them.

2. They that have the making of *Juſtices of Peace, Sheriffs, Cuſtomers*, and other Officers of the *King*, may not chooſe for Favor and Reward, but upon Merit and Deſert. *Co* upon *Littl.*234. 12 *R.*2. 2.

3. If an Office, either of the Grant of the King, or a Subject, which doth concern the Adminiſtration of Juſtice, or the Kings Revenue, or the Commonwealth, or the Intereſt, Benefit, or Safety of the Subject, or the like, be granted to a man that is unexpert, and hath no skill and ability to exerciſe it; the Grant is meerly void, and the party incapable. Hence it is, That a Grant of any Office of *Judicature* to an Infant, or one not of ſound minde, is void: So the Grant of the *Stewardſhip* of a Manor to ſuch a one is void. And hence it is, That the Grant of a Reverſion of ſuch an Office, though to a man never ſo skilful, is void, becauſe he may be uncapable when it happens, *Co.* upon *Littl.* 3. 6. *Co.* 11. *Heydons* caſe. Nor can ſuch an Office be granted in Fee, or for years, to fall to an Executor; but it muſt be granted at will, or for the life of the Grantee. But a *Miniſterial Office* may be granted in Reverſion: And the Grantee of an Office of Truſt to an Infant, to be executed by his Deputy, happily in ſome caſes may be good, though it be in Reverſion, *March. Rep. f.*39

4. Some Offices after they are granted, are grantable and aſſignable to others, and ſome are not grantable over. And in ſome Offices, the Officer may make a Deputy under him, and in ſome Offices he may not do ſo.

For the clearing of this therefore take theſe things:

1. If an Office that is an Office of *Skill, Truſt, Fidelity*, and *Diligence*, be granted to one, as the *Chirographers Office*, *Clerk* of the *Crown*, *Clerk* of the *Pipe*, *Remembrancer*, *Stewardſhip* of a *Court*, or *Parkerſhip*, or the like, be granted to one; in this caſe he cannot grant it over to another. *Co.* 4. *Mittons* caſe. *Co.* 9. Sir *George Reynolds* caſe, and *Countie* of *Salops* caſe.

2. That between an Aſſignee and a Deputy, there is a great difference; For the Deputy hath no Eſtate, nor Intereſt at all in the Office, nor may he do any thing in his own name, but in the name of the Officer, and here the Officer muſt anſwer for his Deputy: And if he cauſe of Forfeiture, the Office will be forfeit, as by the Maſter. But the Aſſignee doth all things in his own name, hath an intereſt in the Office, and muſt anſwer for himſelf. *Co* 9. 48. *Aſſignee.* *Deputy.*

3. It is a general Rule, That a *Judicial Office* cannot be granted, or exerciſed by Deputy;

Deputy; and yet, it ſeems, a Stewardſhip of a Law days, or Courts Baron, may be executed by Deputy; but a *Miniſterial Office* may be ſo granted or done; and in this caſe the things done by the Deputy are good. And yet, it ſeems, in this caſe the Officer muſt anſwer for his Deputy. *Brownl.* 2 *part.* 334, 335. *M.* 13 *Jac. B.R. Phelps* and *Winſons* caſe.

4. It is another Rule, That ſuch Offices as are *Offices of Science, Fidelity*, and *Diligence*, are ſo *Perſonal*, that in theſe a man can make no Aſſignee, or Deputy, unleſs the grant of the Office be made to them, and their Aſſigns, or be made to be exerciſed by them, or their Deputies, or their ſufficient Deputies. And of this nature is the Office of a *Steward, Parker*, and ſuch like. And yet in this caſe, if ſuch an Office as a *Parkerſhip* be granted to a Nobleman, or to an Infant, they ſhall make a Deputy. *Co.* 9. 48, 49. *Plow.* 384. 379.

5. The Office or Deputation of any Office, or any part thereof, if it concern the Adminiſtration of *Juſtice*, or the Receipt, Controlment, or payment of the *Kings* money, or Surety of the *Kings* Lands or Cuſtoms, or any Adminiſtration or neceſſary attendance in the *Kings Cuſtom-houſe*, or the keeping of the *Kings* places of ſtrength, or the *Clerkſhip* of any *Court of Record*, ſhall not be bargained or ſold, or any reward, or agreement for reward taken for it; if he do, the ſeller forfeits the Office, and the buyer is diſabled to enjoy: And yet all the acts he doth, whiles he is in the Office, ſhall be deemed good. 5, 6 *Ed* 6. 16. *Co.* on *Lit.* 234, *Goldsb.* 180.

6. The great Officers that are made *Judges*, and other Officers in Courts of *Juſtice*, muſt ſubſtitute ſuch under them, as be ſufficient and faithful, and for whom they will anſwer. 2 *H.* 6. 10.

7. Officers being ſued for any thing done about their Offices, they may plead the General Iſſue, and give the Special Matter in Evidence, ſhall have increaſe of Coſts, muſt be ſued in their own County, and cannot be ſued elſwhere. See 21 *Jac.* 12. *Ord.* 3 *March*, 1654. 7 *Jac.* 5.

8. They muſt take great heed they go not beyond, or abuſe their power, for their own profit or revenge, and ſo expoſe themſelves to Sutes, and loſe the Protection, which the Law doth give them in the Execution of their Offices.

9. That for ſuch Offices as are of charge, and not of profit to the Officer, he that grants the Office, may at his pleaſure diſcharge his Officer. But if there be profit to the Officer, *contrà*, except it be granted at will. So if he have a colateral certain Fee, for one may not fruſtrate his own Grant. *Co.* upon *Littl.* 233. *Plow.* 379.

Bribery, what. 10. If a *Judicial Officer* take Gifts or Rewards to pervert *Juſtice*, and doth ſo; this is Bribery, that upon Indictment in the *Upper Bench*, or before *Judges* of *Aſſiſe*, may be puniſhed by Fine and Impriſonment. And if any Officer by colour of his Office, exacteth and forceth any man to pay any thing that is not due, or above what is due, or before the time it is due; this is Extortion. And for this he ſhall be puniſhed by Fine and Impriſonment, and render double to the party grieved. *Co.* upon *Lit.* 168. 10. 100. *Weſt.* 1. 29. 31 *Ed.* 3. 4. 1 *H.* 4. 11. 28 *H.* 6. 5. *Weſtm.* 1. 26, 27: See more in *Co.* 3 *part. Inſt. c* 68, 69. The word Extortion hath a larger ſenſe, and is referred to all violent and injurious exactings and takings, eſpecially by Officers, by colour, or by countenance of their Office. *Plow.* 64. *Crompt. Juſt. of Peace* 8.

Extortion, what.

Fees of Officers. 11. For the Fees of the Officers of all Courts, See in the *Compleat Attorney*, and for others, ſee 5, 6 *Ed.* 6. 25. 33 *Hen* 8. 39. 2, 3 *Phil. & Ma.* 10. 22 *H.* 8. 4. 28 *H.* 8. 5. 31 *Eliz* 8. 27 *Ed.* 3. 4. 8 *Eliz.* 12. 5 *Eliz.* 5. 27 *H.* 8. 6. 5 *Eliz.* 4. 1 *Jac.* 22. 2 *H.* 4. 23. 23 *H.* 6. 10. 11 *H.* 7. 4. 12 *H.* 7. 5. 17 *Ed* 4. 4. 27 *Eliz.* 4. 39 *Eliz.* 19. 29 *Eliz.* 4. 23 *H.* 8. 6. and others.

12. For the Fees in *Chancery* ſee the new *Ord.* 22 *Auguſt*, 1644.

The Officers *Judicial* and *Miniſterial* of all the Courts of *Juſtice*, are very many, we ſhall name ſome of them.

Sect. 4.

In the Parliament, Speaker of Parliament, what.

1. In the *Parliament*, the *Judicial Officers* are all the *Knights* and *Burgeſſes*, amongſt whom there is one called a *Speaker of the Parliament*, which is an Officer that is (as it were) the Common Mouth of the reſt, to him every man doth addreſs himſelf in his Speech; and he is after debates to put the queſtion, and to ſee that the Orders and Rules of the *Houſe* be obſerved. See for this Mr. *Rowels* Book.

2. There

2. There is a Clerk of the *Parliament Rolls*, which is the Officer that recordeth and putteth into *Parliament Rolls*, all things there done for the preſerving thereof to poſterity. See for him, *Crompt. Jur.* 4.8. Sir *Tho. Smith de Republica* 38. *Clerk of the Parliament Rolls*, what.

3. There is a *Committee of Parliament*, which is a ſelect number of the Members there, to whom any matter is referred by the whole *Houſe*, to be conſidered of, and ſo prepared for, and reported to the *Houſe*. *Weſt. Symb. part* 2. *ſect.* 144. *Committee*, what.

4. And there is an Officer called the *Black-Rod*, which is one that is an *Uſher* to execute the Commands of the *Houſe*: This word is uſed for other Officers alſo. *Black-Rod*, what.

In the *Chancery*, the *Lord Chancelor*, or *Lord Keeper* of the *Great Seal*, or the *Lords Commiſſioners* of the *Great Seal* (which are all but one Officer) are the *Judges* called ſometimes by one of theſe names, and ſometimes by another. And theſe are great Officers, and have much power. In the *Chancery*. *Lord Chancelor*, or *Keeper*.

2. There are under theſe great Officers twelve *Maſters of the Chancery*, the chief whereof is the *Maſter of Rolls*, who is an aſſiſtant to the *Lord Chancelor*, and one that in his abſence, heareth Cauſes, and giveth Orders. *Maſter of the Rolls*, what.

3. The *Maſters of the Chancery*, are a kinde of aſſiſtants to the *Lord Keeper*. Of theſe, ſome are Ordinary, as the Twelve, whereof the *Maſter of the Rolls* is one; and theſe ſit in Court with the *Lords Commiſſioners*, and ſometimes have matters referred to them. The reſt of the *Maſters* are at large about the Country, to take *Affidavits*, and the like. *Maſters of Chancery*, what.

4. The Clerk of the *Crown*, whoſe office is by himſelf or his Deputy, always to attend the *Lord Keeper* to take care of *Commiſſions* of *Juſtices of Aſſiſe*, *Oyer and Terminer*, and the *Peace*, *Pardons*, the *Writs* of *Parliament*, and *Retorns* thereof, and *Writs of Execution* upon *Statutes Staple* forfeit. *Clerk of the Crown in Chancery*, what.

5. The Clerk of the *Petti-Bag*, whoſe office is to Record the Retorn of all *Inquiſitions*, *Liveries*, *&c.* To make all *Patents* of *Cuſtomers*, *Gawgeors*, *Comptrollers*, and *Awlnegeors*; *Conge de Eſliers* for *Biſhops*, all *Liberates* upon *Extent* of *Statutes Staple*, the *Recovery* of *Recogniſances* forfeited, and all *Elegits* upon them, for Selling of *Subſidies*, *Writs* for Nomination of *Collectors*, and all *Traverſes* upon any Office, Bill, or otherwiſe, and to receive the money due to the *King* for the ſame. And of theſe Officers there are three in this Court, of which three the *Maſter* of the *Rolls* is the chief. *Clerk of the Petti-Bag*, what.

Sect. 5.

6. The Clerk of the *Hamper*, whoſe office is to receive all the money due to the *King* for the *Seal*, of *Patents*, *Commiſſions*, *Charters*, and *Writs*, which *Patents*, *&c.* he is to receive and deliver to them that ow them, and the Officers Fees. *Clerk or Warden of the Hamper*, what.

7. The *Comptroller* of the *Hamper*, whoſe office is to take all theſe Records, and overlook them, which are delivered to him by the Clerk of the *Hamper* in Bags, and the *Comptroller* takes Notes of them, and of the *Kings* and Officers of the Courts dues for them, and ſo chargeth the Clerk of the *Hamper* therewith. And of theſe there are two in this Court. *Comptroller of the Hamper*, what. *Examiner*, what. *Curſitor*, what. *Six Clerks*.

8. The *Examiner* whoſe office is to examine upon Oath, Witneſſes and Parties that are to be ſworn in any Sute. *Serjeant at Arms*. *Regiſter*. *Uſher*.

9. The *Curſitor* is one that maketh out *Original Writs*, and of theſe there are four and twenty that divide the Counties amongſt them. *Clerks of Appeals*, of *Faculties*, of *Patents*, of *Preſentations*, of *Diſmiſſions*, of *Licenſes*, of *Inrollments*, of *Protections*, of *Subpena's*, and of the *Chappel*, *Commiſſioners* to examine Witneſſes, *&c.*

10. There are alſo in this Court the Officers called the *Six Clerks*, the *Regiſter* that keepeth the Books of the proceedings of the Courts, *Serjeant at Arms*, *Uſher*, and *Cryer* of the Court, *Clerk of Appeals*, the *Sealer*, the *Chafe Wax*, the Clerks of *Faculties*, of *Patents*, of *Preſentations*, of *Diſmiſſions*, of *Licenſes*, of *Inrollments*, of *Protections*, of *Subpena's*, and of the *Chappel*, of which are ſeven *Commiſſioners* to examine Witneſſes, *&c.* The Clerks of the *Star-Chamber*, and *Court of Wards* that were there, are gone. See for theſe Officers, 7 *R.* 2. 14 5 *Eliz.* 18. 14, 15 *H.* 8. 8. 33 *H.* 8. 22. *Crompt. Jur.* 41. Sir *Tho. Smith de Republica*. See before in Title of *Courts*, and my *Firſt part of the Marrow of the Law*, in my *Treatiſe of the Chancery*; and the new *Act* for the *Regulating of the Chancery*.

In the Upper Bench, there are under the Chief Juſtice, and the other Judges that are the Judicial Officers, divers Miniſterial Officers. In the *Upper Bench*.

1. There is a *Preignotary*, whoſe Office is to enter the Records, and Pleadings of *Preignotary* or *Protonotary*, what.

Clerk of the Crown, what. *Secundary Attorneys.* *Clerks of the Exigent, of the Papers, of Errors.* *Cuſtos Brevium, Cuſtos Sigilli, Vergers.*

of all Civil Actions that are depending in the Court: And the Clerk of the *Crown* is to frame, read Inditements, and to enter the Records of all Criminal Matters depending in the Court: Theſe are the chief of the Miniſterial Officers; and the *Secundary* is the next Officer to them.

2. There are other Inferior officers belonging to this Court, called *Attorneys*, the Clerks of the *Exigent*, of the *Papers*, and of the *Errors*, the *Cuſtos Brevium*, and the *Cuſtos Sigilli*, and the *Marſhal*, and in both Courts, *Vergers* or *Vergerers*. 2 *H.* 4. 10.

Sect. 6. In the *Common Pleas.*

There are likewiſe in this Court of *Common Pleas*, under the Chief Juſtice, and the other Judges, the Judicial Officers, divers Miniſterial officers. As

Preignotary, what.

1. There are here for the chief Clerks, three *Protonotaries*, whoſe work it is to enter and inrol all the Pleadings in Suits there, make out all *Judicial Writs*, *Venire facias*, and ſuch like, and all *Exigents* and *Superſedeas* to them, all Writs of *Execution*, Writs of *Privilege*, *Scire facias*, *Procedendo*, *Prohibitions*, *Audita Querela*, Writs of *Falſe Judgment*; they inrol all *Recogniſances*, acknowledged in that Court, and *Common Recoveries*; here are *Secondaries* alſo in this Court. 2. There is a Clerk of the *Warrants*, whoſe office it is to enter all *Warrants* of *Attorney*, inrol all *Deeds* of *Bargain* and *Sale*, acknowledged in or out of the Court, before any of the *Judges* of the Court, and extreat into the *Exchequer*, all Iſſues, Fines, and Amercements growing to the *King* out of that Court. 3. There is a Clerk of the *Kings* Silver, whoſe office is to enter all the Fines that are levied in the Court, and what Fine the *King* is to have for his Licenſe. 4. The Clerk of the *Juries*, whoſe office is to make out the Writs of *Habeas Corpora*, and *Diſtringas*, to bring in *Juries*, and to take the Retorn thereof. 5. The *Chirographer*, whoſe office is to Ingroſs and Record all the Fines that are acknowledged in the Court. 6. The Clerk of the *Treaſury*, whoſe office is to look to the Records of the Court, make out Records of *Niſi Prius*, certifie Records into other Courts, make ſearch for Records, and make Exemplifications of Records. 7. Clerk of the *Eſſoyns*, whoſe office is to enter all the Matters about *Eſſoyns*, and to provide Parchment, and make and mark Rolls for all the reſt of the Officers of the Court, and to deliver them to, and receive them from them again. 8. The Clerk of the *Outlawries*, whoſe office it is to make out the Writs of *Outlawry* or *Capias Utlagatum*, that iſſue out of the Court. 9. The *Cuſtos Brevium*, whoſe office is to receive and keep all the Writs, and put them upon Files, to enter the Writs of *Covenant* and *Concord* upon every Fine, and to receive of the *Protonotaries*, all the *Poſtea's* upon the Records of *Niſi Prius*, iſſuing out of this Court, which he is to lay up. 10. The *Exigenter*, whoſe office is to make out all *Exigents* and *Proclamations* in all Actions where *Proces* of *Outlawry* doth lie, and Writs of *Superſedeas* thereupon: There are four of theſe in this Court, 11. The *Filazer*, whoſe office is to make out all *Original Proces* after the Defendant is retorned ſummoned, he maketh out all the *Capias*, *al. Capias*, and *Pluries Capias*, all Writs of *View*; he may enter *Imparlances*, the *General Iſſue*, and *Judgments* by *Confeſſion*, and *Executions*, where the Apparance is made with him; and *Superſedeas* when the Defendant doth appear upon the *Capias*: There are of theſe fourteen in this Court. 12. There is alſo a Clerk of the *Seal*, as there is in the *Upper Bench*, who in both Courts, it ſeems, is he that hath the Cuſtody of the *Seal* of the Court. 5 *H.* 4. 14. 2 *H.* 3. 8. 18 *H.* 6. 9. *F.N.B.* 76. *Co.* 6. 63. 13. And there are *Attorneys* in this Court alſo, who do manage the buſineſſes there depending for their Clients.

Secondary, what.

Clerk of the Warrants, what.

Clerk of the Kings Silver, what.

Clerk of the Juries, what.

Chirographer, what.

Clerk of the Treaſury, what.

Clerk of the Eſſoyns, what.

Clerk of the Outlawries, what.

Cuſtos Brevium, what.

Exigenter, what.

Filazer, what.

Clerk of the Seal, what.

Sect. 7. In the *Exchequer.*

There are in the *Exchequer*, under the *Chancellor* of the *Exchequer*, *Lord Chief Baron*, and the reſt of the *Barons*, there, the *Judicial* Officers, divers *Miniſterial* Officers: As

Chancelor of the Exchequer, what.

Remembrancer, what.

1. The *Remembrancer*, whoſe office is to overlook and minde the Officers of the Court of their Duty for the benefit of the *King*. And of theſe there are three, one called the *Kings Remembrancer*, who entreth in his office all the Recogniſances taken in this Court, taketh Bonds for any of the *Kings* Debts, or for Apparance, or performing *Orders*, and maketh *Proces* upon them; he maketh *Proces* againſt *Collectors* of Publick money, to call them to account, receives all Informations upon *Penal Laws*, taketh the Stallment of Debt, and keepeth the *Evidences* of the *Crown Land*.

Another

Another is called the *Treaſurers Remembrancer*, whoſe work it is to make out Proceſs againſt all Sheriffs, Eſcheators, Receivers and Bailiffs for their Accompts, and againſt men for Debts due to the King: He takes the Extreats of all Fines, Iſſues and Amerciaments ſet in other Courts, and certified thither, and delivers them to the Clerk of the Eſtreats, and he receiveth and recordeth all the Accompts of Officers. And the *Remembrancer of the firſt Fruits* taketh all Compoſitions for Firſt-Fruits and Tenths, and maketh Proceſs againſt ſuch as pay not the ſame.

2. There are two Officers called *Chamberlains*, who were wont to keep a Controlment of the Pells of the Receipts and Layings out, and keep the Keys of the Treaſury, where divers antient Books of matters of the Crown were kept. There are alſo *Under-chamberlains*. *Chamberlain*, what. *Under-Chamberlains*, what.

3. There is a *Clerk* of the *Eſtreats*, who did every Term return the Eſtreats out of the Lord Treaſurers *Remembrancers* Office, and writeth them out to be levied for the King, and made Schedules for the ſummes that were to be diſcharged. *Clerk of the Eſtreats*, what.

4. There is the *Clerk* of the *Pell*, who is to enter every Tellers Bill into a Parchment-Roll of Receipts, and to make another Roll of Paiments, and to ſet down by what Warrant it was paid. *Clerk of the Pell*, what.

5. There is the *Clerk* of the *Pipe*, who hath all Accounts and Debts due to the King delivered and drawn down out of the *Remembrancers* Offices, charged into a great Roll: And he ſendeth to the Sheriff to levy the ſame Debts upon the Goods and Chattels of the Debtors; and if they have no Goods, then doth he draw them down to the Lord Treaſurers *Remembrancer* to write Extreats againſt their Land. He hath in charge before him the antient Revenue of the Crown, and is to ſee the ſame anſwered to the King by the Sheriffs and Farmers. He maketh the Charge to the Sheriffs of their Summons of the *Pipe* and *Green-wax*, and ſeeth to it that it be anſwered on their Accounts. And he hath the ingroſſing of all the Leaſes of the Kings Lands. *Clerk of the Pipe*, what.

There is alſo a *Comptroller* of the *Pipe*, who ſendeth Summons twice a year to the Sheriffs to levy the Debts of the *Pipe*, and keepeth a Comptrollment of it. And a *Comptroller* of the *Pell*, which are the two Chamberlains Clerks, who ſhould keep an Account of all the Officers Receipts and Diſburſments, and diſcover if any be falſe.

6. There is the *Clerk* of the *Pleas*, in whoſe Office all the Officers of that Court (by ſpecial privilege) are to ſue or be ſued in any Action. *Clerk of the Pleas*, what.

7. There is a *Clerk* of the *Nichils* or *Nihils*, who maketh a Roll of all ſuch ſums as are nihiled by the Sheriffs upon their Extreats of *Green-wax*, and delivereth the ſame into the Lord Treaſurers *Remembrancer* his Office, to have execution done upon it for the King. *Clerk of the Nichils*, what.

8. There are alſo Four *Tellers*, whoſe Office is to receive all money due to the King, and to give to the Clerk of the *Pell* a Bill to charge him therewith: And they are alſo to pay all money due from the King to any perſon, by Warrant from the Auditors of Receipt. And of theſe Paiments and Receipts they are to make weekly and yearly Books, and them deliver to the Lord Treaſurer. *Sect.* 8. *Tellers*, what.

9. There are *Auditors*, who take the Accounts of thoſe Receivers, Sheriffs, Collectors and Cuſtomers who receive the Kings money, and ſet them down and perfect them. *Auditors*, what.

10. There is a *Forein Oppoſer*; and to him all Sheriffs and Bailiffs do repair, by him to be oppoſed of their *Green-wax*, and from thence draweth down a Charge upon the Sheriff and Bailiff to the Clerk of the *Pipe*. *Forein Oppoſer*, what.

11. There is a *Marſhal*, who is Keeper to the Kings Debtors committed during the Term: He alſo aſſigneth Auditors to Sheriffs and other Accomptants, before whom they are to account. *Marſhal*, what.

12. There are four ordinary Officers called *Uſhers*, that attend the Judges of the Court at their pleaſure. *Uſhers*, what.

13. There are two *Parcel-makers*, that make the Parcels of the Officers Accounts, who are to accompt for money they have received to the Kings uſe; and this they *Parcel-makers*, what.

are to deliver to one of the Auditors, that he may make up the Accompt thereof.

Attorney. Receivers of Firſt-fruits. Cutters of Tallies.

14. There are alſo there, an Attorney, Receivers of Firſt-fruits, and other Receivers, and Cutters of Tallies or Tally-makers. See for this, *Stat.* of 5 *R.* 2. 1. *ch.* 14, 15. 37 *Ed.* 3. *ch.* 4. 34 & 35 *H.* 3. *ch.* 16. 51 *H.* 3. *ch.* 5. 33 *H.* 8. *ch.* 33.

In the Court of *Wards* and *Liveries.*

There were in this Court of *Wards*, beſides the *Maſter* of the Court, the *Attorney*, *Surveyor*, *Auditors* and *Receiver*, who were the Judges, there were other Miniſterial Officers, as *Auditors*, a *Treaſurer*, a *Receiver-general*, the *Regiſter*, *Attornies* or *Clerks*, and a *Meſſenger*. Theſe are all gone with the Court. See *Courts.*

In the *Star-Chamber.*

There were alſo in the Court of *Star-chamber*, beſides the Judicial Officers, who were the Lord *Chancellor*, the Lord *Treaſurer*, all the Kings Council, all the Temporal and Spiritual Lords, who were all of them Judges in this Court, divers Miniſterial Officers, as *Examiners* and others. But theſe are alſo gone with the Court: See *Courts.*

In the Court of *Requeſts.*

There is to be in the Court of *Requeſts*, beſides the *Maſter of the Requeſts*, who is Judg alone, a *Regiſter* and *Examiner*, who are Miniſterial Officers.

In the *Dutchy of Lancaſter.*

There is to be in this *Dutchy*-Court, beſides the *Chancellor* who is the Judg, divers Judicial Officers, as the *Attorney*, *Receiver-general*, *Clerk* of the Court, *Surveyors*, *Auditors*, beſides ſome Aſſiſtants, as an *Attorney* in the *Exchequer*, and another in the *Chancery*, and four learned Lawyers of the *Lord Protectors* Council, *Cromp. Jur.* 136.

Admiral.

The Court of the *Admiralty* hath Miniſterial Officers attending on it. See for this in *Courts.*

The *Council-Table*, the Courts of the *High-Steward*, of *Redreſs of Delays*, of *General Surveyors*, and the reſt of the Courts not named, when they ſtood, had divers Miniſterial Officers in them: But being all paſſed away, we paſs them over. All other Courts alſo have Officers; it were infinite to name them, and therefore we ſhall paſs them alſo, and content our ſelves that we have named the Officers of the moſt eminent Courts.

Lords Preſidents.

There were *Lords Preſidents* of the Kings Council, of *Wales*, of *York*, of *Barwick*: We alſo paſs them over.

In the Courts of the *Juſtices of Oyer and Terminer.* *Clerk of the Aſſiſe*, what. *Marſhal.* *Cryer.*

There are in the Judges and Juſtices Courts in their Circuits, beſides the Judicial Officers, ſome Miniſterial Officers alſo; as the *Clerk of the Aſſiſe*, whoſe Office is to record all things judicially done by the Juſtices of Aſſiſe, Gaol-delivery, &c. in their Circuits; and the *Marſhal*, who doth help to manage the buſineſs of the Court; and there is a *Cryer* alſo.

In the Courts of the *Seſſions of Juſtices of Peace.* *Cuſtos Rotulorum*, what. *Clerk of the Peace*, what.

There are in the Courts of Seſſions of Juſtices of Peace, beſides themſelves the Juſtices who are the Judicial Officers, other ſpecial Officers. The one is the *Cuſtos Rotulorum*, he that keeps the Rolls and Records of the Seſſions of the Peace, and commonly of the Commiſſion of the Peace; and he is always one of the Juſtices of the Peace and of the *Quorum*. And the Clerk of the Peace, whoſe office in the Seſſions is to read the Indictments, inroll the Acts, make out the Proceſs, and take Retorns thereof, and to certifie into the *Upper-Bench* Tranſcripts of Indictments, Outlawries, Attainders and Convictions before the Juſtices in this Court, and Fines, Iſſues, Forfeitures into the *Exchequer*. See for this, *Lamb. Juſt. of Peace*, 379. *Act*, 17 *Novemb.* 1650.

Sect. 9.

We ſhall now give you the names of the Officers of moſt eminencie, that had relation to the King, and his Court or Houſe, or were otherwiſe under him.

Lord High-Steward of England, what.

There was a Lord *High-Steward* of *England*, who was next the King, and was but for a little time and for ſome ſpecial purpoſe only. See for him, *Cromp. Jur.* 82. *Co.* 4 *par. Inſt. ch.* 4.

Lord High-Treaſurer, what. *Under-Treaſurer*, what.

A Lord *High-Treaſurer* of *England*, under whoſe charge was all the Kings wealth in the *Exchequer*, and he had the check of all Officers any way imployed in the collecting of the Revenues of the Crown. See Sir *Tho. Smith de Repub. ch.* 14. And under him was the *Under-Treaſurer* of *England*, 39 *Eliz.* 7.

The

The *Lord Keeper of the Privy-Seal:* And under his hands did paſs all Charters ſigned by the King, before they came to the Great-Seal. *Lord Keeper of the Privy-Seal, what.*

The *Keeper of the Forreſt*, was one that had the government of all things belonging to the Kings Forreſts, and the check of all the Officers thereof: And he is upon notice from the chief Juſtice in Eyre of the Forreſt, of a Juſtice-ſeat to be held, to warn all the Officers of the Forreſt to be there. And under him there is a Warden of the Forreſt. See *Manwood, Courts*, and *Forreſt*. *Warden or Keeper of the Forreſts, what. Warden of the Forreſt, what.*

The *Lord Warden of the Cinque-Ports*, who hath ſome power like to the power of the Admiral, in the Ports or Haven-Towns towards *France*, called the *Cinque-Ports*, which he hath the ſpecial charge of, *Co. 4 par. Inſt. ch. 42.* *Lord Warden of the Cinque-Ports, what.*

There was an *Earl-Marſhal* or *Conſtable* of *England*, or both; whoſe office was about matters of Arms, Chivalry and War, 13 *R. 2 ch. 2. ſtat. 1.* *Conſtable of England or Earl Marſhal, what.*

There was a *Marſhal of the Kings Houſe*, whoſe office is to hear the Pleas of the Crown, and to puniſh faults committed within the Verge twelve miles of the Court, and to hear and determine matters between thoſe of the Kings houſhold, and wherein difference was between one of them and another. *Knight-Marſhal, or Marſhal of the Kings Houſe, what.*

The *Marſhal of the Kings Hall*, who was to place the Gueſts, and ſee other ſuch like things done of that nature. *Marſhal of the Kings Hall, what.*

The *Steward of the Kings Houſe*, that was an Officer of great command, called the Maſter of the Houſhold, whoſe Office it ſeems the Marſhal of the Houſe had, 24 *H. 8. 13.* 1 *Mar.* 2 *Parl. ch. 4.* *Steward of the Kings Houſe, what.*

The *Lieutenant*; which was either the Lieutenant-General, or Captain-General of his Army, or one that did repreſent his perſon or occupy his room in any work or place; and the Preſident was no other, 4 *H. 5. 6.* *Lieutenant, what. Preſident.*

The *Lord Chamberlain*, who did command and order all Officers touching the Kings houſhold for ſo much as was called the Chamber, which were the Bed-chamber, Privy-chamber, Preſence-chamber, and Great-chamber, Council-chamber, Privy-Cloſet, &c. and to order all the Kings Servants to attend him to the Chappel, and to order how men might ſpeak with him. And in his abſence the Vice-chamberlain did all this, 13 *R. 2. ſtat. 2. ch. 1.* *Lord Chamberlain, what. Vice-chamberlain, what.*

The *Lord Treaſurer of the Kings Houſhold*, who in the abſence of the Steward of the Kings Houſe, with the Comptroller and Steward of the Marſhalſey, did hear and determine matters of the Crown committed within the Palace of the King, *Stamf. pl. Cor. l 3 c. 5.* *Sect. 10. Lord Treaſurer of the Kings Houſhold, what.*

The *Comptrollers*. There was a Comptroller of the Kings Houſe, who was to overlook the other Officers of the Houſhold, and eſpecially of their Accounts, and to diſcover if they did amiſs. So there is a Comptroller of the Navy, of the Cuſtom, of the Mint, and of *Calis*, 35 *Eliz.* 4. 21 *R. 2. 11.* 2 *H. 6. 12. Cromp. Jur. 105.* 33 *H. 8. 12.* *Comptroller, what. Of the Houſe. Of the Navy. Of the Cuſtom. Of the Mint.*

The *Maſter* of the Kings great *Wardrobe*, who had charge of all the antient Robes of the Kings and Queens, and all their coſtly Hangings. And under him there was a Clerk of the Wardrobe, who alſo took ſome account of it, 39 *Eliz. 7.* 1 *Ed. 4. 1.* *Maſter of the Kings Wardrobe, what.*

The *Clerk of the Signet*, who was wont to attend the Kings Secretary with the Privy-Signet for the ſealing of Letters and Grants that had paſſed his hands by Bill aſſigned; and of them there were four, 27 *H. 8. 11.* *Clerk of the Kings Wardrobe, what. Clerk of the Signet, what.*

The *Clerk of the Check*, who was one that had the check and controllment of the Yeomen of the Guard, and thoſe that were to watch about the King, and to diſpenſe with their abſence, or keep up their wages, 33 *H. 8. 12.* *Clerk of the Check, what.*

The *Clerk of the Privy-Seal.* Of theſe there were four to attend the Lord Keeper of the Privy-Seal, or principal Secretary, if there were no Lord Privy-Seal, for the ſigning of all things that have paſſed the Signet; and are to go to the Great Seal; or to make out Privy-Seals for Loan of money, or the like, *Stat. 27 H. 8. chap. 11.* *Clerk of the Privy-Seal, what.*

The *Cofferer* of the Kings Houſhold, who was next the Comptroller, and in the Counting-houſe and elſwhere at other times, had a ſpecial charge and overſight of other Officers of the Houſhold, how they carried themſelves; and he paid their wages, 39 *Eliz.* 7. *Cofferer, what.*

Sect 11. About the *Mint.*

About the *Mint* the King had many Officers. The *Warden* of the *Mint*, who took in and paid for the Silver, and did overſee all the work. The *Maſter-Worker*, who receiveth the Silver from the Warden, cauſeth it to be melted, and delivereth it to the Moniers, and taketh it from them again when it is melted. The *Comptroller*, who is to ſee that the Money be made the juſt aſſiſe, and to comptroll the Officers where it is otherwiſe. The *Maſter of the Aſſay*, who weigheth the Silver, and ſeeth it be according to the Standard. Then is the *Auditor* to take the Accounts, and make them up Auditor-like. Then is the *Surveyor* of the Melting to ſee the Silver caſt out, and that it be not altered after it is delivered to the Melter, which is after the Aſſay-maſter hath made trial of it. Then is the *Clerk of the Irons*, to ſee that the Irons be clean and fit to work with. Then the *Graver*, who graveth the Stamps for the Money. Then the *Smiter of Irons*, who after they be graven ſmiteth them upon the Money. Then the *Melters*, that melt the Bullion before it come to the coyning. Then the *Blanchers* who aneal, boil, and cleanſe the Money. The *Porter*, who keeps the Gate of the Mint. The *Provoſt*, who is to provide for all the Moniers, and to overſee them. The *Moniers*, who are ſome of them to ſheer the money, ſome to forge it, ſome to beat it abroad, ſome to round it, ſome to ſtamp or coin it, 21 *R.* 2. *ch.* 16. 9 *H.* 5. 5. 2 *H.* 6. 14.

Warden.
Maſter of the Mint.
Maſter-worker.
Comptroller.
Maſter of the Aſſay.
Auditor.
Surveyor.
Clerk of the Irons.
Graver.
Smiter.
Melters.
Blanchers.
Porter.
Provoſt.
Moniers.

Maſter of the Horſe, what.

The *Maſter of the Horſe*, who was one that had the Rule and charge of the Kings Stable of Horſe, 39 *Eliz.* 7.

Maſter of the Poſts, what.

The *Maſter of the Poſts*, or Poſt-maſter, who was to appoint, pay, and diſplace all ſuch through the Nation as provide Poſt-horſes of their own keeping, or ſhall have power to take them up, 2 *Ed.* 6. 3.

Maſter of the Ordnance, what.

The *Maſter of the Ordinance*, whoſe office was to look to all the Ordnance and Artillery of the King, 39 *Eliz.* 7.

Maſter of the Armory, what.

The *Maſter of the Armory*, who was to take care of the Kings Armor for his perſon or horſes, and the ſtore and proviſion of Armory in any ſtanding Armories, 39 *Eliz.* 7.

Maſter of the Kings Muſter, what.

The *Maſter of the Kings Muſter*, was a Martial Officer to look to the Officers and Soldiers of his Army, Horſe and Foot, to ſee that the Companies and Troops were full and well armed, and duly paid. There was alſo a Receiver-general of Muſter-Rolls, 35 *Eliz.* 4.

Receiver-general of the Muſter-Rolls, what.

Maſter or Steward of the Kings Houſhold, what.

The *Maſter of the Kings houſhold:* He was the ſame with the Steward of the Kings houſhold; a great Officer he was of command in the Kings houſe, and was (as it ſeems) that Officer that was after Marſhal of the Kings houſe, 32 *H.* 8. 39.

Maſter of the Jewel-houſe, what.

The *Maſter of the Jewel-houſe*, who had the keeping and charge of all the Kings Gold, Silver, Plate and Jewels, 39 *Eliz.* 5.

Sewar or *Sewer*, what.

The *Sewer* or *Sewar*, who did uſe to uſher in the Meat to the Kings Table.

Purveyor, what.

The *Purveyor*, who was to make Proviſion of Diet for the Kings Houſhold, 23 *H.* 8. 14.

Conſervator of the Truce, what.

The *Conſervator of the Truce and Safe-Conducts*, which was in every Port to enquire of things done againſt the Kings Truce and Safe-Conducts, *Stat.* 2 *H.* 5. *chap.* 6.

Comptroller of the Market, what.

The *Comptroller of the Market*, who did ſee to the Kings Meaſures and Weights, and that they be obſerved all *England* over, 13 *R.* 2. *ch.* 4.

Lieutenant of the Tower, &c.

Theſe were moſt of the Officers about the King that were eminent, or had relation to him for the ordering of his Eſtate, Houſhold, and that which was his. There were alſo other Officers, as the *Lieutenant* of the Tower of *London*, and Governors of Caſtles, the Conſtable or Warden of the Caſtle of *Dover*, or of the Cinque-Ports, and many more. And many now out of uſe, as *Marchers*, and many others.

Serjeant at Law.
Counſellors, Attornies, Cryers, Jurors.
Purſuivants or *Meſſengers.*

There are other Civil Officers yet many more: Some that are general, or have relation to Courts, and are almoſt in, or have dependance upon every Court; as Serjeant at Law, Counſellors, Sollicitors, Attornies, Cryers, Jurors, who are to find and judg of matters of fact in civil and criminal cauſes, and ſuch like: And in ſome Courts, Purſevants or Meſſengers to fetch men in Priſoners, as in the *Exchequer*

and

and other Courts. The *Verger* or Port-bearing Verge, that carries the Rod before the Judges. *Porters* that keep doors, and the like. *Vergers*, or *Port-bearing Verge.*

There are alſo Officers now out of uſe, and whoſe Offices are devolved to Officers of other names, as *Conſervators of the Peace*, whoſe Office is now in the Juſtice of Peace, and many others. *Conſervators of the Peace*, what.

There are other Officers appointed in ſpecial places, or for ſome ſpecial uſe, that have no dependance on any Court; as the *Corrector of the Staple*, that recordeth the Contracts of Merchants, 27 *Ed.* 3. 2. *ch.* 22, 23. *Sect.* 12: *Corrector of the Staple*, what.

A *Gauger*, who is to examine Tuns, Hogſheads, Pipes, Barrels, and Tercians of Wine, Oil, Honey, Butter, and to give them a Mark of Allowance before they be ſold in any place, 27 *Ed.* 3. 8. 31 *Ed.* 3. 5. 4 *R.* 2. 1. 14 *R.* 2. 8. 18 *H.* 6. 17. 22 *H.* 6. 6. 31 *Eliz.* 1. *Gauger*, what.

Officers or *Rulers* of Markets and Fairs, who are to ſee there be an open place for Sale of Horſes, and that Toll be entred in the Toll-book upon the Sale, 2 & 3 *Ph.* & *M.* 7. *Rulers of Fairs and Markets.*

A *Common-Informer*, who hath leave and power to preſent any man upon a penal Law, 18 *Eliz.* 5. 29 *Eliz.* 5. *Co.* 3 *par. Inſt. c.* 88. *Common Informer*, what.

Searchers and Sealers of Leather, 1 *Jac.* 22. Searchers of Tile, 17 *Ed.* 4. 4. *Searchers and Sealers of Leather.*

Overſeers of Cloth, 3 *Ed.* 6. 2. 21 *Jac.* 18. 39 *Eliz.* 20. 43 *Eliz.* 10. *Overſeers of Cloth.*

A Toll or Tax-Gatherer or Cuſtomer, or Collector of monies, 14 *Eliz.* 7. *Cuſtomer* or *Toll-gatherer.*

Forreſters or Parkers, who look to the Games of Forreſts and Parks, 21 *Ed.* 1. *Searchers of Tile*

Receivers-general of Muſter-Rolles, Muſter-Maſters, Aulnegeor to look to the Meaſure of Cloth, 25 *Ed.* 3. 4. 1. Searchers or Finders, Heralds, and many others ſuch like. So the Miniſter of the Pariſh is to keep a Book to regiſter the Names of Rogues puniſhed. *Aulnegeor.* *Receiver-general.* *Miniſter of the Pariſh.*

There are ſome Officers of inferior Courts which we have not named; as Stewards of Law day Courts, Hundred-Courts, and Manor-Courts or Court-Barons; Free-Suiters, Homagers, Bailiffs, Reeves and Beadles. And in the Forreſt-Courts divers, as Conſtable, Verderors, Beadles, Bailiffs-errant, and the like. For which ſee *Forreſt.* And amongſt theſe in ſome places there are ſome ſtrange Officers, as Ale-taſters or Ale-cunners, Carvals, Port-Reeves, and others, which the Law doth ſcarce take notice of.

The *Stewards* of theſe inferior Courts, are in the Law-day Court the Judg and principal Officer, and in the other Courts a ſpecial Officer, who is to govern theſe Courts according to Law, and to record all the proceedings thereof. See *Manor.* *Stewards of Courts*, what.

In the Hundred-Court and Court-Baron, as to the Trial of Actions, the Free-holders or Free-ſuitors are the Judges, and they are to order and judg matters according to Law. And in the Copiholders, or Cuſtomary Court of the Manor, the Lord or his Steward is Judg. But the Steward is to ſee, that all things in Surrenders, Admittances, and other paſſages be done according to the Cuſtom, and that they be duly entred and recorded in the Rolls of the Court, *Co.* 1 *par. Inſt.* 61. of *Copihold*, 123. *Co.* 4. 30. 9. 48. See my *Court-keepers* Guide, *St.* 1 *Jac.* 5. *Free-ſuitors*, what.

In the Copihold or Cuſtomary Court, the Jurors are called *Homagers*, whoſe work is to preſent and find the Cuſtom, and all matters of fact done within the Manor in relation to the Cuſtom. *Homagers*, what.

The *Bailiffs*. This word is a general word, and is applied to Officers for Counties and Hundreds that belong to the County and Hundred, that ſerve Proceſs, ſummon to Court, and execute the Warrants of the Stewards of thoſe Courts, and of the Sheriff and other ſuperior Officers: And it is applied to Bailiffs of Manors, who do uſe to diſpoſe of the affairs of his Lord there, pay and receive his Rents, look to Forfeitures, &c. and ſee the Cuſtoms obſerved. He in ſome Manors is called a Reeve. See for this, *Co.* 4. 30. *Dyer* 148. 12 *H.* 7. 23. *Bro. Bail.* 31. *Treſp.* 288. 14 *Ed.* 3. 9. *Stat.* of *Lincoln*, 10 *Ed.* 2. See *Manor.* *Bailiff*, what. *Reeve*, what.

This word *Beadle* is uſed out of Forreſts alſo, for an Under-Bailiff of a Manor, or Meſſenger of a Court, who is to execute the Attachments and other Proceſs directed from the Lord or Steward of the Court, and to preſent all Pound-breaches, Waifs and Eſtrays. *Beadle*, what.

There

Major of a City or Corporation. Aldermen. There are alſo in Cities and other Corporate Towns, divers Officers, as Majors, Aldermen, Bailiffs, Recorder, Town-Clerk, Sword-bearer, Serjeants, Stewards, and the like. The principal Officer in moſt places is called the Major, and next to him in thoſe places are the Aldermen. In other places the principal Officers are one, or more, called Bailiffs. And all theſe of the one ſort and the other, are within their Liberties Juſtices of the Peace, and have within their Precincts all or much of the ſame power which the Juſtices of Peace have within their Counties.

Juſticiarii ad pacem infra libertates.

Recorder, what. The *Recorder* is he, whom the Major and other Magiſtrates of ſuch Cities and places, having Juriſdiction or Court of Record within their Precinct by the Kings Grant, do aſſociate to them for their better direction in matters of Juſtice, and proceedings according to Law. And in ſome Cities they have under him a *Town-Clerk*, in his abſence to do all this for them. Their *Stewards* receive and lay out their money for the Corporation, and give account of it. And their *Serjeants* are to arreſt men for Debts, &c.

Town-Clerk, what.

Steward, what.

Serjeants, what.

There are alſo ſome Officers newly appointed, and that are but for a time, that perhaps will continue but a while, the Laws by which they are made being but of ſhort continuance; as the Commiſſioners and Sub-Commiſſioners, and Clerks of *Exciſe*; the Commiſſioners, Receivers, Aſſeſſors and Collectors for the *Contribution*, and divers others. See the *Ordinances* for that purpoſe.

Commiſſioners of Exciſe.

Water-Bailiffs. Wharfinger. Portgreve. There are Officers alſo belonging to Sea-Towns and Ports; as *Water-Bailiffs*, to ſearch Ships, Fiſh, and gather the Toll of the Wharf, *Stat.* 28 *H.* 6. *ch.* 5. *Wharfinger*, the Keeper of a Wharf. A *Portgreve*, being a chief Magiſtrate in ſome Town.

Sect. 13. There are other Officers, that are ſome of them County-Officers; ſuch as is the *Sheriff*, the *Coroner*, the *Eſcheator*, the *Treaſurers of the County-ſtock*, *Maſters of Bridewell*, *Gaolers*, *Eſcheators*, *Clerks of the Market*, and ſuch like.

And then there are ſome others that are Pariſh-Officers; ſuch are the *Churchwardens*, *Overſeers of the Poor*, *Surveyors of the High-ways*, *Regiſters*, *Conſtables*, *Clerks*, *Haywards*, and ſuch like.

And there are ſome Officers that are for a Hundred; as *High-Conſtables*, *High-Collectors*, and the like. And ſome of theſe County-Officers have Courts, and ſome have relation to Courts, as the *Sheriff*, *Coroner*, *Clerk of the Market*.

Sheriff, what. The *Sheriff* is a County-Officer, partly Judicial, and partly Miniſterial, of great antiquity and authority; who was antiently always an Earl, and he was always choſen by the King, and made by his Letters-Patents only for one year. His charge and duty is, to look to the preſervation of the Kings Peace, to ſee the Writs and Executions that come out of the Courts executed, to impanel Juries, to gather up the Kings debts, to look to the profits of the County, and the regiſtring of the Acts of the County-Court, and the like; and herein his Office is Miniſterial. He is alſo to puniſh the leſſer criminal matters in his Leet or Turn-Court, wherein his Office is Judicial; for in the greater cauſes, the Juſtices of Aſſiſe that go about in their Circuits yearly do diſpatch them. And theſe Officers do uſually make a Deputy or Under-Sheriff, who doth execute the Office under them.

Under-Sheriff, what.

But for all that doth concern this Office, ſee Statutes, 28 *Ed.* 1. 14. 19 *Ed.* 2. of Sheriffs. 1 *R.* 2. *ch.* 11. 1 *H.* 4. 11. 4 *H.* 4. 3. 12 *Ed.* 4. 3. 17 *Ed.* 4. 6. 21 *Jac.* 5. 13 *Eliz.* 21. 11 *H.* 7. 15. 1 *Ed.* 4. 2. 23 *H.* 6. 10. *de finibus levatis.* 4 *Ed.* 3. 10. 21 *Ed.* 1. 2. 2 *&* 3 *Ed.* 6. 4. 8 *Eliz.* 16. *Act*, 11 *July*, 1650. *Co.* 9. 19. 97. *Dyer* 60. *Plow.* 74. 43 *Eliz.* 6. 29 *Eliz.* 4. 27 *Eliz* 7. 12. 8 *Eliz.* 16. 1 *M.* 1. 34 *H.* 8. 16. And ſee the Books that treat of this Office only, as *Dalton* of the *Sheriffs Office*, at large. See *Wingate's Abridgment of the Statutes.*

Feodary, what. The *Feodary* was an Officer authorized by the Maſter of the Court of Wards and Liveries, to aſſiſt the Eſcheator in the finding of Offices and other things concerning the Kings Wards. This Office and Officer is now laid aſide, there being no uſe of him.

The

The *Eſcheator* was an Officer of the Common-Law, that did look to the Eſcheats of the King within the County, and certifie them in the *Exchequer*: But he is now laid aſide. See the Books made of this Officer and his Office. *Eſcheator, what.*

The *Clerk of the Market* is an Officer (for the moſt part) ſet up in every County to look to this, That all the Meaſures wet and dry, (that is) Ells, Yards, Lagens, Quarts, Pottles, Gallons; and Weights, as Pound, Ounce, &c. be anſwerable to the example of the Standard in the *Exchequer*. Sometimes there hath been an Officer in the Kings houſe, to take care of the Standards, and to look to the examples thereof all over the Land; and ſo it may be done by one Officer. He is the *Comptroller* of the Market. *Stat.* 1 *Ed.* 4. *ch.* 1. 13 *R.* 2. 4. See more of this, *Stat:* 16 *Car.* 19. *Clerk of the Market, what.*

The *Coroner* is an antient Officer appointed by the Common-Law for matters of the Crown; and of theſe are many in one County. His work is principally to enquire of every man that is killed and doth come to an untimely death, by what means he came to his end; keep a Court, and call a Jury to conſider of every circumſtance, and to enquire who they were that committed the fact, and what Lands or Tenements, Goods or Chattels they had at the time of the fact committed, and to ſeiſe them to the Kings uſe: They are alſo to enquire of Treaſure-trove. He is alſo to look to the keeping of the Peace: He is to keep the Records of the Pleas of the Crown taken before him: He is alſo to view the dead bodies ſlain, and cauſe the Murderer to anſwer for it upon the Indictment taken before him. This Officer is choſen by the Freeholders of the County at their County-Court. But for this ſee the Treatiſes of this Officers Office at large, *Stamf. lib.* 1. *ch.* 52. and in many other places. 1 *H.* 8. 7. 28 *Ed.* 3. 6. *Sect.* 14. *Coroner, what.*

The *Treaſurers* of the County-Stock for the relief of poor maimed Soldiers and Mariners, are certain Officers yearly choſen by the Juſtices of Peace, to have the charge of the Receipt and Diſburſments of the money taxed and levied upon the whole County yearly for the relief of poor maimed Soldiers and Mariners. For this ſee my Book of the *Offices of Conſtables, &c. par.* 2. *ch.* 5. *Treaſurer of the County-ſtock for relief of poor maimed Soldiers and Mariners.*

The *Treaſurers* of the County-Stock for the Relief of poor maimed Soldiers cauſed by the late Wars, and the Widows and Orphans of ſuch as have been ſlain or dead in the Service, are certain Officers yearly appointed by the Juſtices of Peace, to have the charge of the Receipt and Diſburſment of the money taxed and levied upon the whole County yearly for the Relief of poor maimed Soldiers and Mariners, and the Widows and Orphans of ſuch as died in the Service of the *Parliament*. For which ſee the Ordinance of *May* 28. 1647. and *Aug.* 10. 1647. *Treaſurers of the County-ſtock for relief of poor maimed people, and the Widows and Orphans of ſuch as died in the Service of the Parliament.*

The *Treaſurers* of the County-Stock for the Relief of Priſoners in the *Kings-Bench* and *Marſhalſey*, and for the Relief of Hoſpitals and Alms-houſes within the ſame County, are certain Officers yearly appointed by the Juſtices of Peace, to have the charge of the Receipt and Diſburſments of the money taxed and levied upon the whole County yearly for the Relief of the Priſoners in the *Kings-Bench* and *Marſhalſey*, and for the Relief of Hoſpitals and Alms-houſes within the ſame County. See for this my Book of the *Office of Conſtables*, 2 *par. ch.* 6. *Treaſurers of the County-ſtock for relief of the Priſoners in the Kings-Bench and Marſhalſey.*

The *Collector* of the money for the Relief of the Priſoners in the Common-Gaol, is an Officer appointed by the Juſtices of the Peace, to have the charge of the Receipt and Diſburſments of the money taxed and levied upon the whole County for the Relief of the Priſoners in the Common-Gaol. See for this my Book of *Conſtables, &c.* 2 *par. ch.* 7. *Sect.* 15. *Collector of the money for the relief of the Priſoners in the Common-Gaol, and his Office.*

The *Governor* or *Maſter* of the Houſe of Correction, is an Officer appointed by the Juſtices of Peace, to have overſight and government of the Houſe of Correction, and of perſons committed to the ſame. See my Book of *Conſtables, &c.* 2 *par. chap.* 4. *Governor of the Houſe of Correction, and his Office.*

The *Conſtables* are ſaid to be Officers of the Commonwealth, appointed for the maintenance of the Peace thereof, and to be attendant to Court-Leets, Juſtices of Peace, and Coroners, for the Executions of their Warrants within their Precincts and Liberties. And Mr. *Lambert* ſaith, The name of a Conſtable in a Hundred or Franchiſe, doth mean that he is an Officer that did ſupport the Kings Majeſty in the main- *Conſtables, Tythingmen, &c.*

maintenance of his Peace within the Precinct of his Hundred or Franchiſe. And of
High-Conſtables what. theſe Conſtables there are now ſaid to be two ſorts: The firſt ſort are the High-Conſtables, which are for the whole Hundred, Lathe, Rape or Wapentake, the which do comprehend many Pariſhes, Tythings and Villages; and therefore theſe Officers in reſpect of place have a more large command then Petty-Conſtables have. Theſe Officers were ordained by the Statute of *Wincheſter*, which doth appoint (amongſt other things) That for the better keeping of the Peace, two Conſtables in every Hundred and Franchiſe ſhall make the View of Armor. And they are called High-Conſtables, in compariſon of the Conſtables or Petty-Conſtables that be in the Towns or Pariſhes within their Hundreds or Franchiſes; whoſe duty is likewiſe to maintain the Peace within the ſeveral limits of their Towns or Pariſhes And of theſe High Conſtables there were to be, and were antiently two in every Hundred; but at this day there is but one in many Hundreds.

The other ſort of Conſtables are the Petty-Conſtables or the Under-Conſtables, who are only for ſome part, as for a Town, Pariſh, Village, Tything or Hamlet within the Hundred; (for, every Hundred hath his High-Conſtable, and every ſeveral Tything within the Hundred hath the Petty-Conſtable, Tythingman, or the like within it.) So that the command of the Petty-Conſtable is only in one part of the Precinct of the High Conſtable: But otherwiſe for his Authority, by the antient Common-Law, his Office (as far as his Precinct doth extend) is the ſame with the Office of the High-Conſtable over the whole Hundred.

The Tything-men, Borſholders, Boroughead or Headborough, Thirdborough, and Chief Pledg, or by whatſoever names they be called in any Towns, Pariſhes, Tythings, Boroughs, Hamlets or other places, and their Offices, are in effect in moſt places but one and the ſame; for in ſome Counties this Officer is called by one name, and in other Counties by another name: As in *Kent* he is called Borſholder, in *Warwick-ſhire* Thirdborough, and in other places he is called Conſtable, and in ſome places he is called Tythingman; for he that is called and ſworne the Tythingman of any place, is (in effect) the Conſtable of the place: And therefore in ſuch places for the moſt part there is no other Officer called or ſworne by the name of a Conſtable. For as Petit-Conſtables, about the beginning of the Reign of *Edward* the Third, were deviſed in Towns and Pariſhes for the aid of the Conſtables of the Hundred; ſo afterwards Borſholders, and ſuch like, were uſed as Petit-Conſtables within their own Tythings and Boroughs.

But if it be ſo (as in ſome few places) that there is one Conſtable for the Commonwealth, and there is alſo one or more Tythingmen, and the Conſtable doth execute all the Office, and the Tythingmen are but as Attendants on him, and ſeem to have but little power, or it be as in ſome places; the Tythingman is to do ſervice to the Lord of the Manor rather then to the Commonwealth, and he is a Cuſtomary Tythingman choſen at the Lords Court: Or if it be ſo that there are two or more Tythingmen, and one of them is for the Commonwealth to execute the Office of Conſtable, and is always choſen at the *Leet*, and this Tythingman time out of mind hath been uſed to do nothing about the Office of the Conſtable, but to do other things; in theſe caſes the Cuſtom of the place may and muſt be continued, and ſuch Tythingmen ſhall not be compelled to do more then by Cuſtom they have uſed to do: Howbeit otherwiſe, and in all other places, all theſe Officers are comprehended within this word *Conſtable*, and all theſe Offices are contained within this Office. See for this at large in my Book of the *Office of Conſtables, &c.* 1 *par. chap.* 1.

Sect. 16. *Churchwardens.* *Churchwardens* are Officers choſen yearly by the major part of the Pariſhioners according to the Cuſtom of the place, to look to the Church and Church-yard, and things thereunto belonging. See for this at large in my Book of the *Office of Conſtables, &c. par.* 2. *ch.* 1.

Sidemen or Queſtmen. *Sidemen* were thoſe that were yearly choſen according to the Cuſtom of the place, to aſſiſt the Churchwardens in their Preſentment to the Ordinary.

Overſeers of the Poor. The *Overſeers of the Poor*, are certain Officers appointed yearly to be joyned with and aſſiſtant to the Churchwardens of the Pariſh, in the overſight and ordering of the

the Poor of the Parish. See this at large in my Book of *Constables, &c. part* 2. *chap.* 2.

The *Supravisors* of the Surveyors of the High-ways, are Officers yearly chosen by the Constables and Churchwardens of the Parish, to look to the Amendment of the High-ways within the Parish. See for this also a large Treatise in my Book of the *Office of Constables, &c. par.*2. *ch.*3. *Supravisors of the High way.*

The *Register* of a Parish, is a new Officer of a Parish chosen by the Parish, and allowed by the Justices of the Peace, for the publication of Contracts of Marriage, and for the taking and keeping of an Entry of all the Marriages, Christenings and Burials within the Parish. *Act, Aug.* 24. 1653. See for this in the same Book also. *Register of a Parish,* what.

The *Hayward* is an Officer appointed in every Town to be the common Herd of the Town, to impound the Cattel that do trespass in the Fields, to look to the Fields, to see that no Pound-breaches be made, and if any be, to present them at the Leet, and to make Replevins, &c. *Kitch. f.* 46. *Hayward,* what.

The *Parish-Clerk* is a Civil Officer that is in every Parish; whose work is to keep the Church clean, look to keep the things there in safety, ring the Bells as occasion is, bury the dead, and the like: And he is to be chosen and removed according to the Custom of the place, *March Rep.*101. *Parish-Clerk,* what.

The next and last sort of Officers are such as were the Spiritual or Ecclesiastical Officers, such as were the Ordinary, Chancellor, Register, Commissary, and the like who are now gone.

The Ordinary was an Officer instituted by the Common-Law, to have ordinary Jurisdiction in causes Ecclesiastical. His Office was partly Judicial; for he was to judg in Ecclesiastical matters about Wills, Administrations, Bastardy, Marriage, and the like: And partly Ministerial; for he was to execute the commands of the Kings Courts. See for his Office, *D. & St.* 28. *Perk. sect.*486. *Co.*9.37. 5. 51. upon *Lit.* 96. 300. and by divers Statutes. And thus in every Diocese was the Bishop of the Diocese, and under him he had his Chancellor, *St.* 32 *H.*8.*c.*15. and his Register to enter and record all that the Chancellor did. *Ordinary,* what. *Chancellor of the Diocese,* what. *Register,* what.

The *Commissary* was an Ecclesiastical Officer that had special Jurisdiction in some places remote in the Diocese far from the chief City, where the Chancellors principal Consistory was, where he did exercise his ordinary Jurisdiction. And he was ordained to supply the Bishops Jurisdiction and office in the out-places of the Diocese, or else in such Parishes as were peculiar to the Bishop, and exempt from the Archdeacon: For where by Composition or Prescription the Archdeacons had Jurisdiction within their Archdeaneries, as in most places they had, this Commissary was superfluous. But of this see *Co.* 5. in the *Ecclesiastical case, f.*9. *Commissary,* what.

The *Official* was sometimes he that the Chancellor did appoint under him: And sometimes it was taken for him that the Archdeacon did substitute in the executing of his Jurisdiction, 32 *H.* 8. 15. *Official,* what.

The *Custos* of the Spiritualties, was an Officer that had the Ecclesiastical Jurisdiction in any Diocese during the vacancie of the See; which did by Law belong to the Dean and Chapter. *Custos of the Spiritualties,* what.

This word did signifie any one that was deputed under one of these Ecclesiastical Judges; he was called *Delegate* or *Surrogate.* *Delegate,* what. *Surrogate,* what.

By what means an Office may be lost, see *Forfeiture.*

Who shall be exempt from Offices, or not, see *Priviledg.*

For the making and ordering of Officers under the power of Justice of Peace, see my *Justice of Peace* Book, *Chap.*25.

See more the old Statutes for Officers, 12 *R.*2.2. 14 *R.*2.10. 17 *R.*2.5. 1 *H.*4.13. 2 *H.*6.10. 31 *H.*6.5. 5 *&* 6 *Ed.*6.16.

Steward of a Leet, *Stat.* 1 *Jac.* 5.

CHAP. CXXI.

Of Pardon, Patents, Painters, Peace, Paving, and Perpetuity.

Of a Pardon.

Pardon, what. THis word *Pardon* is uſed in the Law, for the remitting or forgiving for a Felonious or other offence committed againſt the Supreme Magiſtrate.

The kinds. It hath been divided from the ground, or the manner of it. 1. It hath been ſaid to be, *Ex gratia Regis:* which is that which the Supreme Magiſtrate doth in ſome ſpecial caſes, out of reſpect to the Perſon, or for ſome other circumſtance, ſhew and afford out of his own Royal prerogative or power. 2. Of courſe: which is that the Law gives, and the King of courſe was to grant in caſe of ſome light offence, as Homicide caſual and the like. It is alſo expreſs, or implied; which may be called, in Fait, or in Law. And it is alſo general, when it is of all offences or Felonies; or it is ſpecial, of ſome particular offence. See *Stat.* 13 *R.* 2. *ch.* 1. 2 *R.* 3. 2. *Plow.* 401. See *Co.* 3 *par. Inſt. cap.* 105.

Sect. 1: What offences may be pardoned, and how, See *Stat.* 6 *Ed.* 1. 9. 2 *Ed.* 3. 2. 4 *Ed.* 3. 13. 10 *Ed.* 3. 2. 14 *Ed.* 3. 15. 27 *Ed.* 3. 2. 13 *R.* 2. 1. 5 *H.* 4. 2. 5 *Ed.* 3. 12. 27 *H.* 8. 25: 3 *H.* 8. 12. 23 *H.* 6. 8.

How it ſhall be taken. For the Anſwer of this, take theſe Caſes.

1. By the Pardon of Murder, Manſlaughter is pardoned.

2. By the Kings Pardon of Felony or Treaſon, the Lands or Goods forfeit were not reſtored without a ſpecial Patent of Reſtitution.

3. By the Kings Pardon the blood was not reſtored, but the further corruption of blood was prevented. So that if a man have a ſon, and then be attainted and after pardoned, after this he doth purchaſe other Lands, and then hath another ſon; this other ſon ſhall inherit it.

4. Where a Statute doth give part of the Penalty to the King, and part to the Proſecutor, and after the Suit begun the King had pardoned the offence; by this the Kings part was diſcharged, but the party might have proſecuted ſtill for his part of the Forfeiture; but if the Releaſe had been by the Pardon before the Suit begun, it had been otherwiſe.

5. If the King had pardoned the not making of a Bridg, the Bridg muſt be made notwithſtanding; the offence paſt by *non feaſans* is only pardoned.

6. If one ſmite a man the firſt of *May*, and the ſecond of *May* the King had given him a Pardon for all Felonies, and the third of *May* he had dyed of this blow; by this he had been pardoned.

7. If after a man had been attainted of Felony or Treaſon, the King had pardoned him all Felonies, Murthers, and Executions of them, Outlawries, Waiving, &c. and pardon and releaſe all Forfeitures of Lands and Goods; by this his life is ſaved, and his Land, if no Office be found, but not the Goods without Reſtitution. See for theſe things, *Addition to Inſt.* Doddr. *Treatiſe, f.* 86. *Brownl. Rep.* 1 *par.* 70: 37 *H.* 6. 4. *Kelw.* 86. *Dyer* 286. *Bro. chap.* 204. 103. 6 *Ed.* 4. 4. *Plow.* 401: *March* 214:

See for Pardons, *Stat. Glouc.* 9. 2 *Ed.* 3. 2. 4 *Ed.* 3. 13: 10 *Ed.* 3. 2, 3. 14 *Ed.* 3. 1: 15. 27 *Ed.* 3. 1, 2. 13 *R.* 2. 1 5 *H* 4. 2:

For the laſt General Pardon; ſee it, *Act* 24 *Febr.* 1651.

Of

Of a Patent.

PAtents are certain Writings made and publiſhed by the *Lord Protector*, and ſealed with the Broad-Seal, giving to him ſomething which he had not before: And by theſe the Kings have been uſed to grant ſuch things as they have paſſed to their Subjects. And theſe are Records of a high nature; and therefore they need not Delivery, nor Livery of Seiſin, or any ſuch thing to perfect them, as the Deeds of other men do, but the thing will paſs without it. *Sect.* 1. *Patent*, what.

Non obſtante, is a Clauſe inſerted into theſe Patents, which in ſome caſes will help ſome default that otherwiſe would be in them. See for this, and Patents, and *Conſtat* and *Inſpeximus*, Statutes, 21 *Jac.* 25. 29. 45 *Eliz.* 3. 18 *Eliz.* 2. 19 *H.* 7. 7. 37 *H.* 6. 21. 18 *H.* 6. 11. 27 *H.* 8. 11. 3 & 4 *Ed.* 6. 4. 1 & 2 *Ph. & M.* 1. 4 & 5 *P. & M.* 1. 43 *Eliz.* 2. 18 *H.* 6. 1. 6. 28 *H.* 6. 2. 1 *H.* 4. 6. 2 *H.* 4. 21. 6 *H.* 8. 15. 34 *H.* 8. 21. 1 *Ed.* 6. 8. *Co.* 4. 36. *Cromp. Jur.* 81. 94. and in other places. *Non obſtante*, what. *Conſtat* and *Inſpeximus*.

Of Painters.

OF Painters in *London*, See *Stat.* 1 *Jac. ch.* 20.

Of Paving.

FOr paving the Streets in *London*, See *Stat.* 24 *H.* 8. 11. 32 *H.* 8. 17. 34 & 35 *H.* 8. 12. 13 *Eliz.* 23. 23 *Eliz.* 12. 1 *Jac.* 22. For paving of *Chicheſter*, See 18 *Eliz.* 19.

Of Peace.

PEace is a quiet and harmleſs carriage and behaviour towards all the people of the Nation. And Surety for the Peace, is a Recogniſance taken by a Juſtice of Peace or other that hath authority ſo to do, of a man to the Lord Protector to keep the Peace. But ſee for this a large Diſcourſe in my Book of *Juſtice of Peace*, 1 *part*. *Peace*, what. *Surety of the Peace*, what.

The Good-behaviour is much of the ſame nature with that of the Peace, and ſo is the Surety for it: But that this Surety doth comprehend the Surety for the Peace, and much more; and leſs will break this, then will break the other. *See for this alſo in the ſame Book.* *Sect.* 1. *Good-behaviour and Surety for it*, what.

For the Peace, theſe things are to be known.

1. That all men are required to keep it between themſelves and others, and forbidden to break it.

2. They are to do what they can to keep it between others; and for this every man is as a Conſtable.

3. There are divers Offices appointed and impowered of purpoſe to look to it, and to puniſh the breach of it.

4. It is broken, when any thing is done contrary to that quiet, friendly and harmleſs behaviour required of all men; which is an offence againſt the Law.

5. This offence hath its degrees, and is greater or leſs according to circumſtances. The greater are Felonies, Riots, Routs, unlawful Aſſemblies, Forcible Entries, pulling down of walls, houſes, and the like. The circumſtances are, Perſons: To ſtrike a Judg; for a Servant to ſtrike a Maſter, is a great offence: For any man to ſtrike an Officer, is a greater offence then to ſtrike another man. So the place doth aggravate: To ſtrike a man in a Church or Church-yard with a weapon, or to draw a weapon to that purpoſe, is very penal. So all fighting and quarrelling every where is puniſhable.

Challenge. So to challenge another to fight with him, or to receive ſuch a Challenge, is very penal. See my Book of *Juſtice of Peace, ch.*36.

All theſe are greater Breaches of Peace. The leſſer and more ordinary are, by light blows, words and geſtures. And for theſe, if men do but ſpeak any diſgraceful or provoking words to, or of one another, or uſe any diſgraceful or provoking geſtures towards another, they may be puniſhed by the Juſtices of Peace.

6. Proceſs of the Peace and Good-behaviour, ſhall not iſſue out of the *Chancery* or *Kings-Bench*, but upon Motion in open Court, and good cauſe ſhewed upon Oath, which ſhall be indorſed upon the back of the Writ. And if that cauſe be after diſproved, the Judges of that Court may commit the Offender to Priſon, till he pay the grieved his coſts and damages, *St.* 21 *Jac.*8. But ſee more of this in my *Juſtice of Peace*, and ſee *Impriſonment:* See *Co.* 3 *par. Inſt. cap.*72,73.

7. Riding armed in a terrible way, is againſt the Peace,and puniſhable, *Co.* 3 *par. Inſt. cap.*72,73.

Of Perpetuity.

PErpetuity was an Entail with an Addition, a Deviſe taken up to make a Perpetuity: That whereas an Eſtate-tail by a Deviſe of a Common-Recovery was made barrable; to bar and prevent this, men did entail their Lands with this Condition, That none of them that had the Land by the Entail, ſhould do any Act to put it from the next Heir; and if he did, that he ſhould forfeit his Eſtate, and that the next Heir ſhould enter upon him. But this being found of dangerous conſequence, the Law hath adjudged all theſe Conditions againſt Law, and ſo void, and by this avoided Perpetuities. See *Condition.*

CHAP. CXXII.

Of Pewter, Braſs, and Pewterers. Phyſitians and Chyrurgeons. Pillory and Tumbrel. Pyracie. Plague.

Pewter, &c. WHere and how Pewter and Braſs ſhall be made, ſold and weighed, See Statutes, 19 *H.* 7: 6. 4 *H.* 8. 7. 25 *H.* 8. 9. 33 *H.* 8. 4.

Sect. 1. *Phyſitians, Chyrurgeons, and Apothecaries.* FOr Phyſitians, Chyrurgeons and Apothecaries, theſe things are to be known.

1. The College of Phyſitians in *London* is a Corporation. And for that which doth concern that Corporation, ſee Statutes, 14 *H.*8.5. 1 *M.*9.34. 35 *H.*8.8.

2. The Phyſitians in *London*, how they may practiſe Chyrurgery, ſee Statute 32 *H.* 8: 40.

3. No man but an Under-Graduate of an Univerſity here, is to practiſe Phyſick in the Country; unleſs he have been firſt examined and approved by, and have a Teſtimonial of his Sufficiencie from the College of Phyſitians, *Co.* 8. 114. Statute 14 *H.* 8: 5.

Officers, 4. Phyſitians in *London* may not be put into the Office of Conſtable, or any ſuch like Office, or ſerve in Juries, Watching, Bearing of Arms there. But by this it followeth, that in other places they are not exempt, but they may be made to ſerve in any ſuch Office, 32 *H.*8. 40. 3 *H.*8.11. 14 *H.*8.5. 5 *H.* 8.6.

5. In *London* they have power to ſearch Apothecaries Wares, 32 *H.*8.40. 5 *H.*8. 6.

6. The

6. The Phyſitians and Chyrurgeons in *London*, and within ſeven miles thereof, might not before that College was erect, have practiſed, unleſs he had been allowed by the Biſhop of *London* or Dean of *Pauls*, in other places by the Biſhop of the Dioceſe. But theſe are gone; and therefore now Chyrurgery is not prohibited to any man: But men may be indicted and puniſhed by Fine and Impriſonment, till paiment of the Fine, that practiſe Phyſick, not being allowed by the College of Phyſitians, upon the Statutes of 14 *H.* 8. 5. 3 *H.* 8. 11.

Pillory and Tumbrel.

THe Pillory is an Engine appointed for the puniſhment of ſome certain offences, whereby the Offender ſtands aloft, and putteth his head through a kind of door.

Tumbrel is an Engine appointed for the puniſhment of Scolds; it is now called a Cucking-ſtool or Ducking-ſtool; wherein ſhe is to be made to paſs down into water over head and ears three or four times, 31 *H.* 3. *Kitch.* 13.

Plague.

FOr this matter of the Plague, See how ſick perſons muſt be provided for and ordered, and what Officers of all ſorts are in this caſe to do, *Stat.* 1 *Jac. ch.* 31. and *Wingates* Abridgment of it.

CHAP. CXXIII.

Of a Pledg. The Pope, and Papiſts.

THis word *Pledg* is ſometimes applied to Things; and of this ſee in *Mortgage*. And ſometimes to Perſons; and ſo it is no more but one that is Surety for another, and bound to ſee that done which that other hath undertaken: And if the Principal do not diſcharge the duty for which they are bound, the Surety when he is charged may relieve himſelf by a Writ called *Plegiis acquietandis*. But this Writ lieth for no Pledges, but ſuch Pledges are called Pledges in the Eſpecialty, and bound by the name of Pledges. Nor in that caſe neither are they chargeable, where the Principal is ſufficient. And if the Surety be made to anſwer the debt, he ſhall hold the goods and debts of the Principal till he be ſatisfied, *F.N.B.* 137. *Mag. char.* 8. This word is taken for a Surety in another ſenſe; and for this ſee *Chief-Pledg*.

Pledg, what.

Plegiis acquietandis, what.

Pope, Papiſts and Recuſants.

FOr that which doth concern the Pope and Papiſts, ſee Statutes, 3 *R.* 2. 3. 27 *E.* 3. *de proviſionibus*. 7 *R.* 2. 12. 1 *H.* 5. 7. 13 *R.* 2. 2. 7 *H.* 4. 6. 3 *H.* 5. 4. 25 *H.* 8. 20, 21. 28 *H.* 8. 16. 1 & 2 *P. & M.* 8. 5 *Eliz.* 1. 13 *Eliz.* 2. 23 *Eliz.* 1. 29 *Eliz.* 6. 35 *Eliz.* 1. 2. 1 *Jac.* 4. 3 *Jac.* 4. 7 *Jac.* 2. 6. 3 *Car.* 2.

Jeſuites and Seminary-Prieſts here are Traitors, 23 *Eliz.* 1. 27 *Eliz.* 2.

To ſay Maſs, is Two hundred Marks forfeit, and a years Impriſonment. To hear Maſs, is a Hundred Pounds, and a years Impriſonment, 23 *Eliz.* 1.

For Popiſh Books, *Agnus Dei*, Croſſes, Pictures, Beads and Images, *Stat.* 3 & 4 *Ed.* 6. 10. 3 *Jac.* 5. 13 *Eliz.* 2.

For their Popiſh Bulls and Abſolutions, ſee *St.* 13 *Eliz.* 2. 23 *Eliz.* 1.

For Appeals to *Rome*, and the owning of Authority from thence here, ſee *Pope* before, and *St.* 25 *H.* 8. 19, 20, 21.

Jeſuites or Seminary Prieſts.

Maſs.

Images and Books.

Bulls and Abſolutions.

Rome.

CHAP.

CHAP. CXXIV.

Of Poor people, Poſſeſſion, Poſſibility, and Præmunire.

Poor and Beggers.

FOr the Poor, take theſe things.

1. As touching ſuch Poor as are painful, and have need of help, they are to be relieved, and the impotent Poor to be maintained.

Sect. 1. *Bridewel.*

2. The idle Poor are to be forced to work, or to be puniſhed: And they may be ſent to *Bridewel*, a Work-houſe for idle perſons. As touching which, theſe things are to be known. 1. The Juſtices of the Peace at the Quarter-Seſſions, at the charge of the County, may erect Houſes of Correction to keep, ſet to work, and correct the poor, idle or diſorderly. 2. Incorporate the ſame. 3. And that without Licence of the King. 4. Make and appoint Bridewels or Workhouſes, the Governors thereof, and give allowance of wages to them. 5. Provide Stocks of money, and all that is neceſſary for this end. 6. Make what Orders they pleaſe, according to Law, for the Government of the ſame. 7. Thither may the Juſtices ſend, Firſt, all ſuch as be of any Pariſh, and have able bodies to work, though they do not wander, yet refuſe to work at the wages taxed, or commonly given in thoſe parts, if they have not means to live by. Secondly, Or having lawful means to live by, if they be either idle, or diſorderly perſons. Thirdly, ſuch lewd women who ſhall have Baſtards, which may be chargeable to the Pariſh: But if they will diſcharge the Pariſh of the keeping of the Baſtard, they cannot be puniſhed by Bridewell. Fourthly, any man or woman able to work, that ſhall threaten to run away and leave their Families to the Pariſh; unleſs they give ſufficient Sureties to diſcharge the Pariſh. Fifthly, And he or ſhe that doth ſo run away, is to be puniſhed as an incorrigible Rogue. 8. Theſe the Governors of theſe houſes may puniſh by putting fetters or gyves on them, or moderate whipping of them. 9. Theſe idle and diſorderly perſons muſt be in no ſort chargeable to the Country, but ſhall have Allowance as they deſerve by their own labour, 43 *Eliz.* 2. 7 *Jac.* 4. 39 *Eliz.* 4, 5. 18 *Eliz.* 3. 21 *Jac.* 1. *Co.* 2 *par*, *Inſt.* 728.

Alms.

3. None may beg Alms, nor may any give to them that do beg Alms.

Overſeers of the Poor.

4. To ſee to theſe things, there are ſpecial Officers called Overſeers of the Poor, appointed in every Pariſh.

5. Theſe Overſeers may raiſe money on the Pariſh by Rates.

6. They may binde the Poor Apprentices.

7. They may ſet up any Trade to put the Poor to work.

Hoſpitals.

8. There are in ſome places Hoſpitals or publike houſes erect for the Relief of Poor people. As touching which, theſe things are to be underſtood.

Any man that will, that may grant Land, may make and found, or take order to have made and founded a Corporation for a Bridewel, or the Relief of poor, needy or impotent people, by the name of the Maſter and Brethren, or what other names he pleaſeth. 2. Then may he, being ſeiſed of Land in Fee-ſimple, grant ſo much as is above Ten, and under Two hundred pounds a year, to it by that name in Fee-ſimple. 3. He may do this without the Kings Licence. 4. It muſt be by Deed inrolled. 5. He may give any Goods or Chattels to it. 6. After this, make what Orders he pleaſeth for the Government thereof. 7. Appoint a Viſitor, and his power, *Stat.* 13 *Eliz.* 17. 39 *Eliz.* 5. 21 *Jac.* 8. If any miſ-imployment be hereof, it may be helped by a Commiſſion to enquire of Charitable Uſes, upon *Stat.* 43 *Eliz.* 4. See the Statutes at large.

9. And in ſome places there is Money given to Charitable uſes, as to binde forth Apprentices, and the like.

10. If a man be become poor by reaſon that any rich man keeps his Eſtate from him, and ſo he becomes chargeable to the Pariſh; happily the Churchwardens may by

by a Suit in Equity force the paiment of ſomething, *March* 90. *pl.* 145.

11. For poor Soldiers, Soldiers maimed in the Wars, and the Wives and Children of ſuch as were ſlain in the Wars, ſee *Act* 13 *Sept.* 1651. and *Act* 8 *May*, 1647. 10 *Aug.* 1647. 30 *Sept.* 1651.

For all theſe things, you may read Statutes, 43 *Eliz.* 1. 3 *Car.* 4. 18 *Eliz.* 3. 35 *Eliz.* 7. 1 *H.* 5. 3. 39 *Eliz.* 5. 21 *Jac.* 1. 43 *Eliz.* 4. 31 *Eliz.* 6. 10. 1 *Jac.* 25. 3 *Car.* 4. 7 *Jac.* 3. 18 *Eliz.* 10. 2 *H.* 6. 2.

Poſsibility and Impoſsibility.

POſſibility (in the Law-ſenſe) is a thing that may, or may not be: And it is either remote, or neer; or common, or extraordinary. As, that one man may die before another, is a neer, common, or ordinary Poſſibility: But that one man ſhall be married to a woman, and then that ſhe ſhall die, and he be married to another woman; this is a remote and extraordinary Poſſibility, or a Poſſibility upon a Poſſibility.

Impoſſibility is a thing that (by our Law) cannot be: As that a man ſhould be Heir to another man, whiles he to whom he ſhould be Heir is living. So, that a man ſhould give and take by one and the ſame Deed, is impoſſible, *Stat.* 15 *H.* 7. 10. 1 *H.* 4. 1.

Poſſeſsion.

POſſeſſion or Seiſin of Lands, is the actual enjoying of that which either in truth or pretence is ours. And ſo it is either in Deed, or in Law. In Deed, where a man hath Right or Title to Land, and he doth actually enter and put his foot upon it: *Poſſeſſio, quaſi pedis poſſeſſio.* Or elſe it is in Law: which is, where Lands are deſcended or given to a man, and he hath not as yet actually entred into it; yet in eye of Law he is in the poſſeſſion of it, becauſe he is Tenant to every mans Action that will ſue for the Land. So was it in caſe of the King; he was not ſaid to be in actual poſſeſſion till an Office found, *F. N. B.* 194. *Co.* upon *Littleton*, 111. 153. *Kelw.* 3. *Poſſeſſion* or *Seiſin*, what. The kinds.

Seiſure ſeems to be the ſame with Poſſeſſion; but that this is uſually applied to Lands, and that to Goods and Chattels, the which a man is then ſaid to ſeiſe when he taketh them into his hands, *Co.* upon *Lit.* 153. 118. *Seiſure*, what.

Eſplees is (as it were) the ſeiſin or poſſeſſion of a thing, by the taking of the profit or commodity thereof. As the Eſplees of a Common, is the taking of the Graſs or Common by the mouths of the Beaſts that common there: The Eſplees of an Advowſon, is the taking of the groſs Tythes by the Parſon preſented thereunto: The Eſplees of a Wood, is the ſelling of the Wood; the Eſplees of an Orchard, the ſelling of the Apples and other Fruit there growing; and the Eſplees of a Mill, is the taking of Toll. And this in Actions that are in the meer Right, and not meer poſſeſſory Actions, muſt be alleadged in pleading. But for this ſee *Finches ley*, 357. 26 *H.* 8. 3. 8 *Ed* 3. 38. *Eſplees*, what.

As to Poſſeſſion, in this place take theſe things.

1. Where there are two in poſſeſſion of the ſame thing at one time, the Law will adjudg him in poſſeſſion that hath the Right. Rules concerning Poſſeſſion.

2. If one only be in poſſeſſion, and he only hath the Right, the Law will keep him there. *Conditio poſſidentis.*

3. Where each party contending hath an equal Right, he that is in poſſeſſion is in the beſt condition; but otherwiſe matter of Right is more favoured in Law, then matter of Poſſeſſion.

4. Unity of Poſſeſſion will make a Suſpenſion or Extinguiſhment. As if the Lord purchaſe a Tenancie of his own held of him by Hariot-ſervice; in this caſe the Hariot is extinct by Unity of poſſeſſion, becauſe the Seigniory and Tenancie are now in one mans poſſeſſion. *Kitch.* 134. *Lit.* 158. *Old N. B.* 97. 14 *H.* 7. 5. *Plow.* 296. See *Extinguiſhment*. *Co.* upon *Lit.* 368.

Of a Præmunire.

Præmunire, what.

PRæmunire was a Writ, or the offence on which the Writ was grounded. The offence was by ſuing to *Rome* for any thing of Preſentations, or in any Suits, or ſuing in the Spiritual Courts for ſuch things as for which remedy was to be had in the Temporal Courts; and by this they loſt their goods, and were to be impriſoned at the Kings pleaſure. The puniſhment is to be inflicted in other caſes now out of uſe. See *Stat.* 23 *Ed.*3.5. *ch.*22. and divers others. *Co.*3 *par. Inſt. cap.*54.

CHAP. CXXV.

Of Preſence and Abſence. Prices.

Preſence and Abſence.

FOr Preſence and Abſence, this only is to be known.

1. That a Gift or Grant of Land or Goods may be to a man abſent, but in caſe where Livery of Seiſin is neceſſary.

2. In that caſe the Preſence of one may ſerve for all the reſt of the Feoffees or Grantees. For theſe things ſee *Co.*3.26,27,29.5.94. See *tit. Feoffment.*

3 Sometimes a Livery of Seiſin, and ſo a Deed, is weakened by the Preſence of others upon the Land. See for this, *Co.*3.23. and *Feoffment, chap.*

4. Sometimes the Preſence of a man where an offence is done, will make a man guilty of the ſame offence. See *Acceſſary, chap.*

5. Sometimes the power of a ſuperior Magiſtrate doth take away the power of an inferior Magiſtrate, *Co.*9.118.

Of Prices.

FOr Prices, theſe things are to be known.

1. Victuallers are to ſell their Victuals at reaſonable Prices, 23 *Ed.*3.6.

2. Corporations may ſet the Rates, 3 *H.*8.8. 12 *Ed.*4.2.

3. Juſtices may aſſeſs the Price of Wines, 24 *H.*8.14. And who may ſell Wines, and how, ſee *Stat.* 7 *Ed.*6.5. 5 *Eliz.*5. 1 *Jac.*25. 8 *Eliz.*9,10.

CHAP. CXXVI.

Of Prerogative.

Prerogative, what.

PRerogative is (in a Legal ſenſe) the Priviledg, Power, or Prehemi-nence that is given to one man above another, to have or do ſome-thing more then another. And this is either ſeparable, or inſepa-rable; certain, or caſual.

Sect. 1.

This Prerogative is greater and leſs, according to the quality of the Perſons in whoſe hands it is. And becauſe the King was, as the *Lord Protector* now is ſupreme and above all others, being ſtiled by Law, the Head of the Commonwealth, Father of the Country, Maſter of the whole Family of the Nation, Chief Juſtice of all *England*, and a kind of Petty-God on Earth; the Law (for the excellency of his perſon) did attribute to him (ſimilitudi-narily after a kind, and by way of reſemblance) divers of the Excellencies of God: as Immortality; and therefore in ſome ſenſe he was ſaid not to die, and the death of the King was called the Demiſe of the King: Soveraignty, Majeſty, Power, Verity, Juſtice, and the like.

Lord Protector.

Demiſe of the King, what.

For

For this purpoſe he is conſidered in a twofold capacity; the one Politick, the other Natural. In the firſt capacity it is, that he is ſaid juſt, yet not abſolute as God is, but limited; yet he was ſaid not to die, &c. not to do injuſtice, that he cannot do wrong. And upon this account it is, that the Lands, Jewels and Goods he hath in this capacity as Head of the Commonwealth, and are the Lands and Goods of the Commonwealth, ſhall go after his death to his Succeſſor, not to his Heir or Executor. But conſidered in his Natural capacity, he dieth like other men, and his Lands and Goods he hath in this capacity ſhall go to his Heir and Executors as the Lands and Goods of other men, and not to his Succeſſor.

And yet theſe Capacities do ſomewhat participate one of another. And therefore all Obligations and Eſpecialties made to him (whatſoever they be) ſhall go to his Heirs or Executors at his own diſpoſing. See for theſe things, *Stamf. Prer. cap.* 1. *Co.* 11. 74. 12 *H.* 7. 19. 10 *H.* 7. 18. 1 *H.* 7. 18. 7 *Ed.* 4. 17. *Stat.* 2 *H.* 7. *ch.* 8. 21 *H.* 7. 21. *Co.* 7. 7. 6. 27. *Plow.* 238. 331. and other places.

In the opening of this point, we ſhall firſt ſhew his Prerogative alone, and what he of himſelf may have and do more then any other man. Theſe things we ſhall diſtinguiſh into, 1. The things he is to have and do by the antient Common and Statute-Laws of the Land. 2. The things he is to have and do by the New *Act* of *Government.* In ſhewing of his Power, we ſhall ſhew, 1. What he may not do. 2. What he may do. 2. Then in the ſecond place, we ſhall ſet forth his Power as he is aſſiſted by, and accompanied with his Parliament. 3. And then we ſhall ſpeak of his Power, as it is aſſiſted by, and joyned with his Council.

The *Lord Protector* alone hath very many large and great Priviledges and Preheminencies given him (as in the place of the King) by the antient Laws of the Nation, and by the New *Act* of *Government*, above all other men. And theſe are ſome of them more Royal, as to make Judges, confer Honors, and the like. And ſome are leſs Royal, as to grant Waifs, Strays, &c. Some of them are inſeparable to his Office, and cannot be granted over and communicated to, or taken or uſed by others. Some of them are in matter of Profit; ſome in matter of Honor and State only: Some of them do conſiſt in doing, and ſome in having and taking. As in the particulars that follow. The Prerogative of the *Lord Protector* alone.

The King was, and the *Lord Protector* is ſtinted and reſtrained by the antient Laws of this Nation, thus. That he cannot make or alter Laws, or change Cuſtoms: He cannot make a man inheritable to Land, that is not inheritable; change the Cuſtom of *Gavelkind*, create a new Manor, change a Hariot-Cuſtom into Money, create a Copihold-Tenure. 1. What he cannot do, or have.

He may not ſell, deny or delay to any man the Law as the mean, nor Juſtice and Right as the end. He may not therefore by his Letters forbid Judges to do right, or command them to do wrong; nor, did he, are they to obey him. Much leſs may he do wrong and injuſtice. The Rule is therefore, *Nihil aliud, &c.* (*i.*) He may do nothing but what of right he may do. *Potentia injuriæ eſt impotentia:* It is weakneſs to be ſtrong to do evil. (*See the Authorities before cited*)

The King could not therefore compel his people to make or yield any Gift, Loan, Benevolence, Taxe, or ſuch like Charge, without common conſent by Act of Parliament. He could not compel men to give, or lend him money, and upon refuſal adminiſter an unlawful Oath, nor conſtrain men to be bound to make appearance before, and give attendance upon him and his Privy-Council, nor impriſon, confine, or otherwiſe moleſt them for it.

He could not without cauſe ſhewed impriſon any man, or when any man was impriſoned, keep him and his Cauſe from his Trial at Law, and ſending into the Courts of Juſtice being ſent for by *Habeas corpus, &c.* or command a man to Priſon againſt the Writs and Proceſs of Law.

He could not in time of Peace billet or quarter Soldiers or Mariners upon men againſt their will in their houſes, nor give Commiſſions to try men by Martial Law. For, all theſe things were declared by the whole Parliament to be againſt the Fundamental Laws of the Nation, 3 *Car. The Petition of Right.*

Sect. 2.

He may not make nor inflict Puniſhments or Mulcts upon any man for any thing as an offence, which the Law doth not make an offence; nor greater, or other, or otherwiſe then the Law appointeth.

Nor may he enter upon or take away any mans lands or goods, but in a courſe of Law as other men may do. And therefore it is, that if Goods be pledged for Ten pounds to a man that by ſome offence hath forfeited it to the Lord Protector, he muſt pay the Ten pounds, if he will have the Pledg.

He cannot ſuppreſs lawful Trades, nor grant Monopolies, or do any ſuch like thing to grieve or prejudice his Subjects, though it be only in Recreation, if it be lawful, *Co.* 11.87. *Plow.* 487.

All theſe and ſuch like things he may not do by the antient and ſtanding Laws of the Nation. And now by the new *Act of Government* it is declared, 1. That he ſhall not alter, ſuſpend, abrogate or repeal the Laws now in force. 2. That he cannot lay any Taxe or Impoſition of money, but by common conſent in Parliament, or by the conſent of his Council in one ſpecial caſe hereafter named. 3. He cannot enforce men by Laws and Penalties to change their Religion. 4. Nor alter or revoke any thing in the Writing of Government, *Govern. Numb.* 35,36,37,38,41.

What he may have, and do.

Now for the things which he by his Prerogative may have, receive and do more then ordinary men, they conſiſt in theſe things following.

The Lord Protector, called by the Government, *The Protector of the Commonwealth of England, Scotland and Ireland*; He is the Supreme Magiſtrate of the three Nations, and from him as from a fountain is all Magiſtracie and Juſtice to be derived.

In the making of *Officers* and *Courts of Juſtice.*

He now by the *Act of Government* hath, as the Kings heretofore had by the Laws of the Nation, the making of all ſubordinate Officers and Miniſters of Juſtice, Commiſſioners, Judges, Juſtices, Sheriffs, and the reſt; ſave only the Chancellors, Keepers or Commiſſioners of the Great Seal, the Treaſurer, Admiral, Chief Governors of *Ireland* and *Scotland*, and the Chief Juſtices of both the Benches, who by *Art.* 34. of the *Government*, are to be choſen by the approbation of Parliament, and in the intervals of Parliament by the approbation of the major part of the Council, to be afterwards approved by the Parliament. And if any new Courts of Juſtice be to be erected, he muſt do it, *Plow.* 498. *Government, Numb.* 3.26. *Stat.* 27 *H.* 8.24.

In the conferring of *Honors.*

All Honors likewiſe flow from him: And therefore if any be to be made Duke, Marquiſs, Earl, Vicount, Knight, or the like, he muſt make them ſuch. *Government, Numb.* 3.

In the ſtile of *Writs, Commiſſions, &c.*

All the Writs, Proceſſes, Commiſſions, Patents, Grants, and other things which did uſe to go in the name, and under the ſtile of the *King*, and after of the *Keepers of the Liberty, &c.* are now to go in the name and ſtile of the *Lord Protector:* And all perſons that are ſued for publike offences, are to be ſued, and acts of Juſtice to be done in his name. *Government, Art.* 2.32.

In his *Revenue* and *Income.*

There were divers Manors, Honors, Caſtles, Houſes and Lands, Jewels and Goods antiently belonging to the Kings as Kings, annexed to the Crown; moſt of which are ſold: But that which remaineth, he is to have. And now by the *Government* he is to have a conſtant yearly Revenue provided and ſetled by the Cuſtoms and ſuch other ways as he and his Council ſhall agree upon, to maintain the ſtanding Army and Navy; and to make up Two hundred thouſand pounds a year to defray the other neceſſary Charge for Adminiſtration of Juſtice, and expence of the Government, *Art.* 27. And by the 31 Article of the *Government* it is declared, That all the Lands whatſoever unſold and undiſpoſed, belonging to the Commonwealth, (except the Forreſts and Chaſes and Lands thereto belonging, the Lands of the Rebels in *Ireland*, in the Counties of *Dublin, Cork, Kildare* and *Caterlagh*, and the Land forfeit in *Scotland* in the late Wars, and the Lands of Papiſts and Delinquents in *England* who have not compounded) that they be veſted in the Lord Protector and his Succeſſors, not to be aliened but by conſent of Parliament.

In things forfeit.

He hath a Prerogative in Lands and Goods forfeited for offences done. And as to this, theſe things are to be known.

1. That

1. That in caſe of Attainder of Treaſon, he is to have all the Lands of the Traitor of whomſoever they be held; and his entailed, as well as his Fee-ſimple Land. *By Traitors.*

2. And in caſe of Attainder of Felony, he is to have all the Lands of the Felon that are held of the Protector himſelf, and all the reſt of his Lands of whomſoever they be held, for one year and a day, to the end he may make a deſtruction upon them. And in caſes of Treaſon and Felony both, he is to have the Forfeiture of all the Goods and Chattels of the Offender, unleſs ſome other can make a Title to them by Grant of ſome of the Kings, or by Cuſtom or Preſcription, (which was by Grant at firſt.) But for this ſee *Forfeiture*, *Treaſon*, and *Felony*. *Co.* upon *Lit.* 31 a. *By Felons.* *An jour & waſte.*

3. He is to have (in rigor of Law) as forfeit by every man outlawed in any perſonal Action, an Appeal of Maihme, or Indictment of Treſpaſs, all his Goods and Chattels of what nature ſoever for ever, and the profits of all his Land for the Offenders own life. For this ſee *Outlawry*. *By outlawed perſons.*

4. All the Forfeitures, or parts of Forfeiture that are limited and given by any penal Law to the King, Commonwealth, Keepers of the Liberties, ſhall go to him, according to the limitation of the Law. *See Statutes.* *By penal Laws.*

5. All the Fines and Amerciaments generally impoſed upon Offenders in any of the Courts of Juſtice at *Weſtminſter*, are given to him, and he ſhall have them, if they have not been granted away by former Kings. See *Fines* and *Amerciaments*. *Fines and Amerciaments.*

6. All Iſſues forfeit by default of Appearance, and the like, are given to him alſo. *Iſſues.*

7. If Lands be given to Superſtitious uſes, he ſhall have them as forfeit. See *Uſes*. *Superſtitious uſes.*

8. If an Alien purchaſe Land, the Lord Protector ſhall have it from him as forfeit. See *Alien*. *Alien.*

9. And all Debts due by Recogniſances and the like Engagements forfeit, are his. But for all this of Forfeiture in general, ſee 9 *Aſſ.* 63. 25 *Ed.* 3. 2. 17 *Ed.* 2. 14. 27 *H.* 8. 25. 9 *H.* 3. 22. *Debts by Recogniſance, &c.*

10. It is by the 31. Article of the *Government* declared, That all Debts, Fines, Iſſues, Amerciaments, Penalties and Profits certain and caſual, due to the Keepers of the Liberties, &c. ſhall be due to him to be paid in the publike Receipt, and be ſued for in his name. *Sect.* 3.

He is by his Prerogative to have divers other matters of profit. As, *In other matters of profit.*

1. The King was to have the Firſt-fruits, (that is) the profits of one year, and the Tenths after of all the Spiritual Livings. But this it ſeems is now diſpoſed to other uſes. For this ſee *Service of God*, and Statutes 26 *H.* 8. 3. 25 *H.* 8. 20. 27 *H.* 8. 8. 32 *H.* 8. 22. *In Firſt-fruits.* *In Tenths.*

2. He is to have all Mines of Gold and Silver, and that are mixed with other Oar, if the Gold and Silver be of the greater value, in whoſe ground ſoever they be found, *Plow.* 314. *Cromp Jur.* 112. *In Mines of Gold and Silver.*

3. All Waifs, Eſtrays, Wreck, do originally belong to him, and he muſt have them, unleſs any Subject can ſhew a Grant, or a Cuſtom or Preſcription for them, *Co.* 7. 16. *Plow* 315. *Stamf. Prer.* 40. *In Waifs, Eſtrays, Wreck.*

4. All the Lands and Goods that no man can make any property in, are his: As the Lands that are gotten by the Sea or Seavern are his, and not the mans whoſe Land is adjoining. *In things that have no owner.*

5. He is to have all the Royal Fiſhes, as Whales, Sturgeons, and the like; and Fowls, as Swans, and ſuch like, by whomſoever or whereſoever they be taken. *In Royal Fiſh and Fowl.*

6. The Tythes that ariſe in ſuch places in Forreſts as are not within any County, are his. *In Tythes out of any County.*

7. All Coin and Treaſure found under, or above ground, whoſe Owner cannot be known, doth belong to him or his Patentee, *Co* 7. 16. *Plow.* 315. *Stamf. Prer.* 40. *In Treaſure-trove.*

8. By the antient Common-Law, the King might have made any Coin he had pleaſed current here by his Proclamation only; and the Value, Weight, Baſeneſs and Fineneſs, Stamp and Print thereof were wholly at his diſpoſal. But for other Weights and Meaſures, the King could not alter them by his Proclamation. And now alſo it ſeems, in the Coin he can make no alteration, becauſe it is ſetled by Parliament, *Act* 17 *July*, 1649. *Co.* 5. 114. *Plow* 316. *In Coin.*

In the Lands of *Ideots, &c.*

9. He is to have the Cuſtody of the Body and Lands of Natural Fools and Ideots, and he is to take their Lands during their lives without doing waſte, 17 *Ed.* 2. 9. 32 *H.* 8. 46. See *Ideot*. He alſo is to preſerve the Lands of Lunaticks, 17 *Ed.* 2. 10. *Co.* 2 *par. Inſt.* 14.

In *Wardſhips, &c.*

10. The Kings formerly had the Wardſhips of thoſe Heirs under age, that their Anceſtors held their Lands by the *Capite*-Tenure; and divers profits he had by this Tenure: But all this is gone, and the Law herein now changed. See *Gard.* So alſo the Kings had formerly a Prerogative in the Temporalties of the Biſhops, during the vacation: But this is alſo now loſt and gone with the Biſhops.

In *Temporalties of Biſhops.*

In *Cuſtoms and Impoſt.*

11. He is to have the Cuſtoms to be paid by Merchants for the Goods and Merchandiſes that are brought into, and carried out of the Land. See for this *Cuſtoms.*

In making of *Corporations.*

12. He alone by his Prerogative may make what Corporations he pleaſeth, *Finches ley* 84.

Franchiſes.

13. About Franchiſes, 1. He may make and grant Franchiſes, Fairs, Markets, and the like; and it is ſaid he may impoſe a ſmall Toll where none was before. But moſt of thoſe Franchiſes which belong to him, he may grant over to others, as Felons goods, Waiſs, Eſtrays, and the like. See for this, *Franchiſes.* 2. He may by a *Quo Warranto* put any man to ſhew what Right he hath to any Franchiſe. 3. And it is ſaid he alone may infringe the Liberties he himſelf hath granted to another, without a *Non omittas, Paſche* 21 *Jac.* by *Coke* and *Hobard* in the *Exchequer.*

About *Denizzation.*

14. He alone may make of an Alien a Denizen; but he cannot Naturalize him. See *Alien.*

About Entire things.

15. In caſe of entire things, he ſhall have all. If one Obligee be outlawed, the Lord Protector ſhall have the whole Obligation.

There are other Prerogatives, that are not ſo much in matter of profit: As,

In *Aſſent to Bills in Parliament. Royal Aſſent.*

1. The King had a Prerogative called a Royal Aſſent; which was to the Election of a Biſhop by a Dean and Chapter, and to a Bill paſſed by both Houſes of Parliament. All the power that the Lord Protector hath herein now, is: The Bill agreed upon in Parliament muſt be preſented to him, and he muſt have twenty days time to conſider it; and if in that time he do not aſſent to it, nor ſatisfie the Parliament about it, the Parliament may paſs it for a Law without him. *Government, Art.* 26.

In *Pardons.*

2. He may pardon any offence (but Treaſon and Murder) after, not before the offence is committed: And he may reſtore the Offender to his lands and goods: And he may prevent a further Corruption of Blood, but the Blood that is corrupted hecannot reſtore; nor can he by his Pardon prevent an Appeal, *St.* 27 *H.* 8. 24, 25. *Bro. ch.* 396. *March* 213. *Government, Art.* 4.

About making of *Proclamations.*

3. No publike Proclamation can be made by any but by him; only in ſome Corporations they claim it by Cuſtom, and it is probable it came at firſt by a Kings grant. See *Proclamation.*

About a *Protection.*

4. No Protection for a Defendant can be to keep him off from a Suit, but by him, which can be but for a time, and becauſe he is in his ſervice, *F. N. B.* 28. 25 *Ed.* 3. 19.

About *Patents to beg.*

5. He only can give Patents to beg; and without ſuch a Patent no man can beg.

About making *Appropriations, Forreſts* and *Caſtles.*

6. No Appropriation could have been made, nor Tenant *in Capite* have aliened, or his Wife have married without his Licence. No Forreſt could have been made but by the King. But theſe things are gone, or out of uſe. No man may build a Caſtle now without his leave. *Charta de Forreſta,* 1 *Ed.* 4. 1. 27 *H.* 8. *ch.* 24.

Sect. 4. About matters of *War.*

7. By the antient Common-Law, the King alone commanded the *Militia* by Sea and Land; might have raiſed War againſt, and made Peace with any Nation, and therein might have required all men bound by their Tenure, to ſerve him according to their Tenure; but this Tenure is now gone. But all other men were by Law to ſerve the King in his Wars; only this, he could not force them to ſerve him at their own charge. For the reſt, ſee *War.* But now by the *Government, Art.* 5, 6. the Lord Protector (ſitting the Parliament) is to diſpoſe and order the *Militia* and Forces

Forces both by Sea and Land, and direct in all things concerning the holding of a good Correſpondence with Forein States, by conſent of Parliament; and in the Intervals of Parliament, he is with the adviſe and conſent of the major part of his Council to diſpoſe and order it. And in *Art.* 27. it is declared, that Ten thouſand Horſe and Dragoons, and Twenty thouſand Foot be kept and maintained in *England*, *Scotland* and *Ireland*, for the defence thereof, and a convenient number of Ships to guard the Seas; and that a conſtant Revenue for the Pay of them be ſetled by the Lord Protector and his Council, not to be altered but in Parliament.

8. His Perſon is priviledged, and cannot be arreſted in any caſe, nor his Goods taken for a Diſtreſs, Toll, Cuſtom, or otherwiſe; nor can he be ſued as other men are ſued. *About Arreſt of his perſon or his goods.*

9. He hath a Prerogative in many things above others about a Preſentment to a Church, wherein theſe things are to be known. 1. If he preſent to a Church by Lapſe, and the party die before Induction, he ſhall preſent again, *Co.* 9. 132. 2. The Church ſhall not be ſaid to be full againſt him till Induction, *Bro. Preſent.* 46. 3. There ſhall be no Lapſe againſt him, but he may preſent notwithſtanding, *Prerog. Reg. cap.* 9. 4. Double and treble Uſurpations cannot hurt his Inheritance to the Preſentment. And yet if a Common perſon uſurp and preſent upon him, and the Clerk of the Uſurper is inſtituted and inducted; the Lord Protector may not preſent till he have removed him by a *Quare impedit*, *Co.* 6. 30. 5. Plenartie is no bar to him in a *Quare impedit*, *Co.* 7. 28. See more in this, *Stat.* 13 *Ed* 3. 1. 13 *R.* 2. 1. 4 *H.* 4. 22. 6. And now by the new Ordinance, That ſuch as do not preſent to Benefices void within ſix moneths after the avoidance, to the Commiſſioners for Approbation, a fit perſon; the Lord Protector ſhall preſent for that turn, *Ordin. March* 20. 1653. 7. And where a Miniſter is put out for Scandal, &c. the Patron hath four moneths to preſent; and if he do it not in this time, it doth come to the Lord Protector by lapſe, *Ord.* 30 *Aug.* 1654. *About a Preſentment to a Church.*

10. No Act of his ſhall be conſtrued an Eſtoppel, to conclude and prejudice him. *About Eſtoppel.*

11. He hath a Prerogative above others in his Poſſeſſion; which doth lie in theſe things. 1. He cannot be put out of poſſeſſion of a permanent thing, as Land, or the like. And therefore if one that had been his Ward, had made a Feoffment of his Land whereof he had the Wardſhip, this had not put him out of poſſeſſion; nor can he be diſſeiſed of his Land. But otherwiſe it is of a tranſitory thing, as of a Ward, Advowſon, or the like. 2. No Freehold or matter of Inheritance can be tranſlated from him to another by matter in fait alone; but by matter in fait, and matter of Law together, it may be diveſted. 3. There can be no Diſcontinuance of any Land, whereof there is any Reverſion or Remainder in him. See for theſe things, 1 *H* 7. 19. *Stamf. Prerog.* 74, 75. *Plow.* 553. 32 *H.* 8. 36. 34 *H.* 8. 20. 4. The Sale of his Goods in a Market, will not take away his Property therein, *Hil.* 6 *Jac. per* Chief Juſtice. *About his poſſeſſion and eſtate, and property of lands and goods.* *Diſcontinuance.* *Property.*

12. No Laches nor folly ſhall be imputed to him, nor ſhall he be hurt thereby. And therefore a Fine, and no Claim in five years, or a Lapſe to a Preſentation of a Church cannot hurt him: And yet he ſhall be barred by twenty years poſſeſſion, upon the Statute of 21 *Jac.* 1 *H.* 7. 14. 17 *Ed.* 2. 8. *About Laches.* *Time of Limitation.*

13. He may by his Officers require things neceſſary for the proviſion of his Houſhold and Stable, of them that have to ſpare, at reaſonable Rates, and cannot be denied. See for this in *Purveyors*. *About Purveyance.*

14. The Kings Palace at *Weſtminſter* did extend from *Charing-croſs* to *Weſtminſter-Hall*: And the ſame, and ſome other of the Kings antient Palaces have divers Priviledges annexed to them, 28 *H.* 8. 12. *About his Palaces at Weſtminſter and elſewhere.*

15. His Servants in Ordinary are priviledged by Law from ſerving any ſuch Offices as may require their attendance; as the Office of Conſtables, Churchwardens, and the like. But if any ſhall put themſelves into his Office Extraordinary, of purpoſe to eſcape Offices, this will not do. *Reſolution of the Judges.* *About his Servants.*

16. He may countermand his Preſentment to a Church at any time before Inſtitution and Induction, which another may not do. *Dyer* 348. 292. *About Countermand.*

17. If

In *Equality of Titles.* 17. If his Title and another mans come together, he ſhall be preferred. And therefore if a man make a Feoffment in Fee of Land, on Condition that the Feoffee ſhall not commit Treaſon, and he doth ſo; the Lord Protector ſhall have the Land, *Brownl.* 1 *par.* 20. *Goldsb.* 20.

There are yet divers other things wherein the Lord Protector hath a Prerogative above other men: As,

In *Exemption from Statutes.* 1. In things that do relate to the penal Laws and Statutes of the Nation. For the opening whereof, theſe things are to be known. Firſt, that albeit he ſhall have advantage by any penal Law or Statute, as another man ſhall, though he be not named in the Statute; yet he ſhall not be bound by any Statute in the affirmative or negative, that doth reſtrain him, or that may be prejudicial to him in his Prerogative, as the Statutes of Limitation, *Merton chap.* 8. 32 *H.* 8. 2. 32 *H.* 6. 6. *Weſtm.* 2. 5. 13 *Eliz.* 10. Or that doth bar him of ſome Eſtate, Right, Title or Intereſt that he hath, unleſs he be particularly named in the Statute, as in *Weſtm.* 1. 35. 25 *Ed.* 3. 11. And yet ſuch Statutes as are expreſly, or by conſequence *pro bono publico*, being to ſuppreſs fraud, wrong, or any wickedneſs, as the Statute *de Donis*; theſe do binde him, unleſs he be particularly excepted, *Co.* 11. 68. upon *Lit.* 43. *Co.* 4. 33. 5. 14. *Plow.* 240. 223. *Cromp. Jur.* 15. Secondly, He may diſpenſe with penal Laws: And as to this, theſe things are to be known. 1. When there is any neceſſity, or reaſon of inconvenience to the party with whom he doth diſpenſe, he may diſpenſe with breach of any Statute that is penal, when the Forfeiture is popular, and given to him alone, if it be ſo that the thing to be diſpenſed with be *malum prohibitum*: But if the thing to be diſpenſed with be *malum in ſe*, or there be not ſome ſpecial reaſon for a diſpenſation, he cannot diſpenſe with it: And yet this alſo which is *malum in ſe*, he may pardon after it is done; and therefore it is held he may licenſe a man to coin money, but cannot licenſe him to levy a Nuſance in the High-way, *Co.* 11. 86. 2 *H.* 7. 6. *Bro. Parl.* 16. 21 *Ed.* 3. 46. 21 *Jac.* 3. 11 *H.* 6. 7. *Plow.* 246. 2. If a Statute ſay, that the Kings Licence in that caſe ſhall be void, and the Licence have a Clauſe of *Non obſtante* in it; there it is held to be good, 11 *H.* 7. 11. 3. But a Licence with, or without a *Non obſtante*, to diſpenſe with a Statute before it is made, cannot be good. And therefore it hath been held, that a Licence to carry Bell-mettal notwithſtanding any Statute that ſhall be made to the contrary, is void, 11 *H.* 7. 7. 23 *H.* 6. 18. *Dyer* 52. 4. He may diſpenſe with his Chaplain whiles he is attending his ſervice, *Articuli Cleri, chap.* 8. See for this, *Co.* 3 *par. Inſt. chap.* 86.

Sect. 6. In *Suits.* 2. He hath Prerogative above other men about Suits; and that either in Suits brought by him againſt others, or brought by others againſt him. As to the Suits brought by him againſt others, take theſe things. 1. He may in his Suits brought in any Court, (for he may ſue where he will) amend his Declaration the ſame or another Term, *F. N. B.* 7. *Cromp. Jur.* 18. 2. He cannot be Nonſuited in any Action, *Bro. ch.* 1. 8. 3. He may put in double matter, and the party muſt anſwer to it all, 6 *H.* 7. 5. 4. He may waive his Iſſue, and demur in Law; or waive a Demurrer, and plead to Iſſue in the ſame Term, but not in another Term, 7 *H.* 6. 85. 5. No Wager of Law can be in a Suit of his, or a Suit concerning him, as in *Quo minus* brought by another in the *Exchequer*, *Co.* 4. 95. 6. He may have an Action of Accompt againſt Executors, *Plow.* 321. *Lit.* 118. 7. His Title is always found by Office, and he is not to be put to a real Action for the Trial thereof. 8. He ſhall pay no Coſts, nor others that ſue to his uſe, *Bro. c.* 353. 9. He ſhall recover Coſts in all Suits brought by him upon any Eſpecialty, 33 *H.* 8. 39. 10. If any man be indicted of Treaſon or Felony, which is always at his ſuit, and the party accuſed deny the fact, he can have no Council to plead for him: But if it be matter of Law that he hath pleaded, he ſhall have Council to plead for him, 1 *H.* 7. 3. *Stamf. Prerog.* 151. 11. No Plaintiff that doth ſue to his uſe, ſhall pay Coſts in any ſuch Suit, 24 *H.* 8. 8. 12. No Juror in a Suit between him and another, may be challenged by his Adverſary; but he may challenge a Juror without ſhewing of any cauſe, *Finches ley.* And for Suits brought by others againſt him, he hath theſe Preheminences above others. 1. He may not be ſued as another man may be; but whoever will

will ſue him, he muſt ſue by Petition in the *Chancery*, *Stamf. Prer.* 76. *Plow.* 553. *Stat.* 25 *Ed.* 3. *ch.* 19. 2. Nor can he be vouched on a Warranty, which is in the nature of a Suit; and yet one may have aid of him, 15 *H.* 7. 10. 3. Nor ſhall he be received, *Plow.* 553. 4. In caſes where he is made a party to a Suit, or may be prejudiced in any Real Action, a Writ of *Search* lieth, which is to ſearch in the Treaſury before the Plea proceed, if any thing may be there found to maintain his Title. But in an *Ejectione firme*, or Perſonal Action, this may not be granted, *Stat.* 27 *H.* 8. 28. *Dyer* 320. *Co.* upon *Lit.* 77. See more in the next. 5. If a thing in Action be granted to him, he may ſue for it in his own name, *Dyer* 232. *Search*, what.

3. The *Lord Protector* hath Prerogative above other men about the means of getting and recovery of any thing that is due to him from another. And for the opening of this, theſe things are to be known. About the Recovery of his *Debt* or *Duty*.

1. All Obligations and Eſpecialties made unto him, are in the nature of Statutes ſtaple; and he ſhall have that remedy upon them for the gaining of his Debt, as another man hath upon a Statute-ſtaple. For which ſee *Stat.* 33 *H.* 8. *chap.* 39. 13 *Eliz.* 4.

2. Though Heirs be not named in the Eſpecialty, yet they ſhall be bound by it, 33 *H.* 8. 9.

3. All the Lands that a man hath (of what Eſtate ſoever he hath it) his Body and Goods alſo, ſhall be ſubject to the payment of the Debts men owe to him: And if the Debtor die, all his Lands (whether entailed or otherwiſe) all his Goods and Chattels ſhall be put in Execution to ſatisfie the Lord Protectors debt. And herein alſo he ſhall have Preheminence: He ſhall be firſt paid, although he do not firſt bring his Action againſt the Executors or Adminiſtrators. And this he may recover, albeit there be no Executor or Adminiſtrator. But if there be Goods to ſatisfie, the Lands are not to be medled with. See for this, *Stat.* 33 *H.* 8. 39. 9 *H.* 3. 18. 27 *Eliz.* 3. 33 *Eliz.* 41. *Kelw.* 14. *Plow.* 440. *Co.* 7. 19. 8. 171. 7. 20. *Plow.* 240. 249. 301. *Co.* 5. 54. 11. 103. *Mag. charta*, *ch.* 8.

4. And yet if an Executor *bona fide* ſhall ſell a Leaſe left him, or any Iſſue in tail ſhall *bona fide* ſell his entailed Lands; theſe Sales are good, and he ſhall not have Execution of this Land, *Plow.* 240. 249. *Co.* 11. 93.

5. And if two Jointenants be of Land, and one of them be indebted to the Lord Protector, he may not have Execution of the other Jointenants part, 40 *Aſſ. pl.* 36.

6. If there be Sureties for theſe Debts, they are not to be medled with where the Principals be ſufficient and willing to pay, 33 *H.* 8. 39.

7. He ſhall have a *Diſtringas*, a ſpecial Writ to bring in the party.

8. And for Officers and others that take up his money, or are Accomptants to him, their perſons, lands and goods of what nature ſoever, in their own or their Executors or Adminiſtrators, or in the hands of whomſoever, (if they have them by Covin) ſhall be chargeable for it. For it is a Rule, That if any Accomptant to the King be, for any money, goods or chattels come to his hands, or any ſuch thing come of his into the hands of a Subject by matter of Record or matter in fait, that all the Land of ſuch a Subject is chargeable for it, and the Kings Officers may ſeiſe the ſame into whoſe hands ſoever it is come afterwards by deſcent, purchaſe, or otherwiſe: And all the Land that any ſuch Officer or Debtor hath at the time of his being Officer or in Debt, is chargeable for the Debt. But it ſeems no Goods are chargeable, but ſuch as the Debtor hath at the time of the Extent and Execution. And no ſhifting Deviſe of the Accomptant in this caſe by purchaſing Lands in other mens names, or the like fraudulent Conveyance, will prevent the Lord Protector of his full remedy againſt it. And if the Accomptant come not in to accompt, or withdraw himſelf from his Accompt, he forfeits his Office, and may be further puniſhed. See for all this, *Stat.* 7 *Jac.* 15. 27 *Eliz.* 3. 14 *Eliz.* 4. 7. *Mag. charta*, 8. *Weſtm.* 1. 19. *Articuli Cleri*, 12. 33 *H.* 8. 39. 34 *H.* 8. 2. *Co.* 11. 92. on *Lit.* 90. *Plow.* 320. *Dyer* 224. *Diſtringas*.

8. And hence it is, that his Debtor hath a kind of Prerogative-remedy by a *Quo minus* in the Exchequer, which any man indebted to the Lord Protector may have againſt

Quo minus. againſt his Debter, ſuppoſing that hereby he is diſabled to pay the Lord Protector, and in this Suit the Plaintiff hath many Priviledges that other men have not.

9. His Suits for his Debts ſhall be in the proper Court where they grow due, 33 *H.* 8. 39.

In taking *Diſtreſs.* 10. His Officers in diſtraining for him, may do that which other men may not do, as in theſe things, (*i.*) For Iſſues loſt, they may diſtrain in any place, the High-way or Street, and upon the Church-land. But the Oxen of the Plough may not be taken, no, not for the Lord Protector in any caſe, if there be enough beſides to be had, *Co.* 2 *par. Inſt.* 132.

11. For Rents due to him, he may either call for them in by Proceſs out of the *Exchequer*, or recover them by Diſtreſs. Wherein theſe things muſt be known. 1. He may diſtrain for a Rent-ſeck, as well as for any other Rent. 2. He may diſtrain for any Rent-charge, Seck or Service out of the Land charged with it, or out of which it iſſueth, and out of the Seigniory and Manor upon any of the Lands of the ſame Tenant which he hath in his own hands, and doth manure with his own Cattel. But the Cattel of his Leſſee for life, years, or at will upon their Land ſo held, are not liable to this diſtreſs. 3. He may diſtrain for ſuch a Rent in the High-way or Street. 4. It ſeems he may ſell the Diſtreſs, if the Owner do not redeem it in the time of fifteen days. 5. But in caſe of Forfeiture of a Rent for not paiment, there it ſeems the Lord Protector muſt make his demand as another man muſt do. See for all this, *Co.* 2 *par.* 132. *Brownl.* 1 *par.* 17, 18. 6. Delay of paiment of the Rent to him, is very penal and dangerous. See *Stat.* 33 *H.* 8. 39. 7. The money in another Court may be arreſted for his Debt, *Plow.* 322.

Sect. 7. About *Grants* from, and to him.

4. He hath a Prerogative above all others in matters of Grants and Gifts. And that either in ſuch as are made by him to others, or ſuch as are made by others to him. As to the firſt, theſe things are to be known.

Infant. 1. He may, though he be an Infant and under age, give or grant any thing; and Nonage in the King would not have hurt his Grant, *Bro. chap.* 373. *Co.* upon *Lit.* 43.

2. Nothing but things in Action, Chattels perſonal, and tranſitory things, as Felons goods and the like, will paſs from him otherwiſe then by matter of Record, 1 *H.* 7. 14. *Plow.* 553. *Dyer* 232.

3. He may grant over to another a Thing in Action, a Poſſibility, a Condition, and ſuch like thing not grantable by any other man, 2 *H.* 7. 8. See *Choſe in Action.*

4. He may in his Gift or Grant except and ſever a thing that in its own nature is inſeparable, *Dyer* 288.

5. His Grant ſhall not be conſtrued to enure to ſeveral intents, nor to any other intent then what is expreſſed in the Deed; nor to enure to two intents, unleſs they be both expreſſed in the Patent, *Plow.* 502. *Bro. Pat.* 44. 37 *H.* 6. 20.

6. He may give or grant Fee-ſimple on Condition not to alien, which another cannot do, 21 *H.* 7. 8.

7. He may upon an Eſtate granted by him, reſerve a Rent to a ſtranger, which another man cannot do, 21 *H.* 7 8.

8. When it doth appear in the body of the Grant, that he is deceived either by a falſe Suggeſtion, or with a falſe Conſideration, or in a point of Law, he may avoid his own Grant. And therefore it is held, that if he grant Land to one and his Heirs-males, that this is void; for he intends by this a Fee-tail, and this in Law is a Fee-ſimple, *Plow* 455. *Co* 11; 74. 10. 110. *Goldsb.* 120. 20.

9. Every Gift and Grant of his made upon the ſurmiſe of the party, ſhall be conſtrued moſt beneficially for him, and moſt againſt the party to whom it is made, *Co.* 10. 110, 111. 37 *H.* 6. 20. and ſhall have a moſt benigne interpretation. And therefore if an Obligation be made by two jointly and ſeverally, and he releaſe to one of them, this will not releaſe the other, as it will in the caſe of a common perſon. And if a Leaſe be made of three Acres, reſerving Rent upon Condition, and the Reverſion is granted away of two Acres; this, if it be in the caſe of a common perſon, is an Extinguiſhment of the Condition; but otherwiſe it is if it be by the Lord Protector, *Co.* 5. 112.

10 Knights

10. Knights Fees, Advowſons Dowers, will not paſs by general words in his Grant, without ſpecial words to paſs them, 17 *Ed.* 2. 15.

And as touching Grants made to him, theſe things are to be known. 1. He cannot take any Lands, though it be but for years, but by matter of Record, as Office, or the like; and ſo the thing will paſs without Livery of Seiſin: But all Gifts and Grants to him of Land in any other manner, are void. But for Obligations, Chattels perſonal, and Tranſitory things, as *Catalla Felonum & Fugitivorum*, Wreck, Treaſure-Trove, the profits of Land, of a perſon outlawed in a perſonal Action; to theſe he may be entitled without Office or matter of Record, *Co.* 11. 77. *Plo.* 242. *Dyer* 232. 2. A Thing in Action, as a Debt, or the like, may be granted or aſſigned to him, and he may ſue for it in his own name, *Dyer* 232. *Stat.* 7 *Jac. ch.* 15. But they muſt be ſuch as grew due to his Debtor or Accomptant *bona fide*, and not otherwiſe.

The power of the Lord Protector aſſiſted with his Council.

The Power of the *Lord Protector* aſſiſted and joyned with the *Parliament*, is in theſe things. 1. The ſupreme Legiſlative power is in them over *England*, *Scotland* and *Ireland*; and they together may make Laws: But if he agree not to their Bills in twenty days, they may paſs them without him, *Governm. Art.* 2. 32. 2: He is to order and diſpoſe the *Militia* during the Parliament with their conſent, *Governm. Art.* 4. 3. So alſo is he during this time to direct all things concerning the keeping of Correſpondencie with Forein Princes and States with their conſent, *Government Art.* 5. 4. The raiſing of money to bear the charges of the Forces by Sea and Land, muſt be by the Parliament. 5. And yet a conſtant yearly Revenue for the maintenance of the ordinary Forces, is to be ſetled by the Lord Protector and his Council. See *Governm. Art.* 27. and ſee *Parliament*.

The power of the Lord Protector aſſiſted with his Parliament.

Of the *Council*.

The Council of the Lord Protector, are ſuch Officers as are choſen and ſworne to aſſiſt him in the exerciſe of the chief Magiſtracie and Adminiſtration of the Government of the three Nations. For their Election, Number, and Oath, ſee *Government Art.* 21. 42.

The power of the Lord Protector aſſiſted with his Counsil.

The Power of the *Lord Protector* aſſiſted with his *Council*, is in theſe things. 1. The exerciſe of the chief Magiſtracie, and Adminiſtration of the Government of the People of *England*, *Scotland* and *Ireland*, is in the Lord Protector aſſiſted with his Council, *Governm. Art.* 2. 2. The Lord Protector with advice and conſent of the greater part of this Council, in the Intervals of Parliament, are to order the *Militia* and Forces by Sea and Land, direct in all things a Correſpondencie with Forein Princes and States; and they have the power of the *Militia*, and of the making of War and Peace, *Governm. Art.* 5. 3. They are to raiſe, ſettle and eſtabliſh out of the Cuſtoms, and by other ways they ſhall think fit, a yearly Revenue to be paid in to and iſſued out of the publike Treaſury, to maintain Ten thouſand Dragoons and Horſe, and Twenty thouſand Foot for the ſecurity of the three Nations, and for a convenient number of Ships for the guarding of the Seas, and Two hundred thouſand pounds a year beſides to defray the other charge for Adminiſtration of Juſtice, and other expences of Government; not to be altered but by the Lord Protector and the Parliament. And if any Abatement be made of theſe Forces, and money thereby ſaved, it ſhall be imployed to publike uſe by conſent of Parliament, when any is, or elſe by the Lord Protector and his Council, *Government Art.* 27, 28, 29. 4. He and they are to approve or diſapprove of the union or ſevering of Churches. See *Religion*. 5. They alſo are to approve of all Grants of, and Additions to, and Subſtractions from Augmentations. See *Religion*.

CHAP. CXXVII.

Of Priviledges.

Priviledges, what.

PRiviledges are Liberties and Franchiſes granted to a Perſon, Office, Place, Town or Manor, or which they do claim above other perſons or places.

Sect. 1. The kinds.

And theſe are either Perſonal, or Real. The perſonal Priviledg is that which is granted to any perſon either againſt, or beſides the courſe of the Common-Law. As for example; A Parliament-man may not be arreſted himſelf, or any of his Attendants during the time of the Parliament. An Officer attending in the Chancery, or Court of Upper-Bench, or Common-Pleas, regularly cannot be ſued in any other Court, but muſt be ſued in his own Court, and is to be exempt from certain Offices: And if he be ſued elſwhere, he may remove the Suit by Writ of *Priviledg*, in which is included a *Superſedeas*, and on which he may have an Attachment. So Tenants in antient Demeſne.

Writ of Priviledg.

The Real Priviledges of Places are many: As of the *Univerſities*, as that none of them ſhall be called to *Weſtminſter* in Suits upon any Contract. Antient Demeſn-Manors, and Townſmen and Citizens in divers antient Towns to be exempt from Toll, and the like. Of this nature is Toll, Turn, Sake, Soke, Infangthief, Outfangthief, and Ordelf, and the like. All this began by the Kings Grant, but is now claimed by Cuſtom and Preſcription. For all which, and that which doth concern this Title, ſee more in *Franchiſes, chap.* and in *Dyer* 61. 328. 377. 9 *Ed.* 4. 53. 27 *H.* 8. 20. 2 *H.* 7. 7. *Finches ley*, 321. *St.* 5 *H.* 8. 6. *Cromp. Jur.* 4. 7. 11. 14. 19. 48. 52. 59. 230. See *Cuſtom and Preſcription.*

Who are priviledged from ſerving Offices,

For Anſwer to this point, theſe things are to be known.

1. That all men are liable to ſerve the Offices of Conſtables, Churchwardens, and the like Offices, that are not perſons exempt by Law, as all Clergy-men, Peers, and ſome others.

2. None but Men are to ſerve theſe Offices, not Widows or Maids.

3. Clerks attending the Courts at *Weſtminſter*, and whoſe attendance is neceſſary, cannot be put in ſuch an Office wherein a perſonal and continual attendance is neceſſary, as Conſtable, Churchwarden, or the like: But any Office that may be executed by Deputy, they may be forced to ſerve.

4. Some that heretofore had a deſire to exempt themſelves, made themſelves Servants to the King Extraordinary; but the Judges did diſallow it; otherwiſe the Kings Servants are to be exempt.

5. Phyſitians and Chyrurgeons in *London* are not to ſerve theſe Offices; but otherwiſe Phyſitians, Lawyers, and all ſuch men are liable to ſerve in theſe Offices in extremity; but becauſe of their much imployment otherwiſe, they are thought fit to be ſpared, *March.* 30. See *Phyſitian.*

CHAP. CXXVIII.

Of Privies, Parties, and Eſtrangers; and Prohibition.

PRivies, Parties and Strangers are relative terms uſed in reference to many caſes of Law. The Parties to a Fine or Deed, are thoſe which are named therein as Parties to it; and in relation to them, all others are ſaid to be ſtrangers. Privies are ſaid to be ſuch, as by common intendment in reſpect of ſomething hath paſſed between them, are acquainted with a thing done, and are partakers or have intereſt in it. And theſe are oppoſed or related in this reſpect to ſtrangers, between whom no ſuch dealing or Conveyance hath been. And in reſpect of this, there is ſaid to be a Privity between them. The which is ſaid to be either in Deed, or in Law.

Privies and Privities, what.

The kinds.

Privies and Privities are alſo ſaid to be either in Eſtate, as where a Leaſe is made at will for life or years, or a Feoffment in Fee, there is a Privity between Leſſor and Leſſee, Feoffor and Feoffee, and his Heirs, &c. and they are called Privies. So if one make a Leaſe for life of Land to *A.* the Remainder to *B.* here is a Privity of Eſtate betweeen *A.* and *B;* and the Leſſor. So between Jointenants, and between Parceners till partition, Husband and Wife, Donor and Donee in Tail, Gardein in Chivalry and his Gard, Tenant in Dower or by the Courteſie, and the Heir, there is a Privity, and they are Privies. So if a Gift be in Tail, the Remainder in Fee; there is a Privity between the Tenant in Tail, Donor, and he in Remainder in Fee. So if one leaſe for years, and after the Leſſee aſſign all or part of the Term; the Aſſignee and the Leſſor are Privies in Eſtate. So if the Leſſor grant over his Reverſion, or the Reverſion eſcheat; here is a Privity between the Grantee or the Lord by Eſcheat, and the Leſſee; *Co.* 4. 127. 8. 42. 10. 92. upon *Lit.* 252.

Sect. 1. In *Eſtate.*

Another kind of Privies and Privities are in Contract, which is by reaſon of a perſonal Contract; and this extendeth only to the perſon of the Leſſor and Leſſee: As where a man doth make a Leaſe for years, there is ſuch a Privity between the Leſſor and Leſſee, *Co.* 3. 23.

In *Contract.*

Another kind of Privity is in Eſtate and Contract both; and this can be between none but Leſſor and Leſſee. Another kind of Privity and Privies is by Deed. And this is where a Leaſe is made for life, and afterwards by another Deed the Reverſion is granted to a ſtranger in Fee; this Grantee is called a Privy by Deed, becauſe he hath the Reverſion by Deed. Another ſort are Privies in Law, which is where there is Lord and Tenant, and the Tenant leaſeth the Tenancie for life, and dyeth without Heir, ſo that the Reverſion doth eſcheat to the Lord; in this caſe he is ſaid a Privy in Law, becauſe that he hath his Eſtate only by the Law, that is, by Eſcheat, which is an act of the Law. And he ſometimes is called a Privy in Tenure, *Co.* 4. 27. *Perk. ſect.* 432. And ſo it is if the Tenant alien in Mortmain, and the Lord enter for a Forfeiture; here is a Privity in Law. So it is, where-ever there is a Lord and a Tenant that holdeth by ſervice, *Co.* 8. 43.

In *Eſtate and Contract.*
In *Deed.*
In *Law or Tenure.*

Another ſort of Privies and Privities, are Privies in Blood, which are ſuch as are linked in Conſanguinity; as Heir general, Heir ſpecial, or Heir general and ſpecial, *F. N. B.* 137. *Dyer* 3. *Co.* 4. 126.

Sect. 2. In *Blood.*

Another ſort of Privies are Privies in Right only: So is it where one poſſeſſed of a Term granteth his Eſtate upon a Condition, and maketh his Executors, and dieth; in this caſe they are called Privies in Right or Repreſentation. So alſo Adminiſtrators are called Privies in Right or Repreſentation. Alſo the Succeſſors of every Body Politick or Corporate, are called Privies in Right, *Co.* 4 127. upon *Lit.* 27. 214. *Dyer* 112.

In *Right or Repreſentation.*

Privies in Succeſſion, are the Succeſſors of a Corporation. See more for this, *Co.* upon *Lit.* 310, 311. & 316, 317, 318. *Co.* 6. 58. 10. 48.

In *Succeſſion.*

There is a Privity alſo by Delivery. If I deliver a man Goods to carry to *D.* and then he ſteal them, this is Felony; for the Privity is gone, when the Goods come there, *Stamf pl.Cor.lib.*1.5.

Where a Privity is neceſſary, and what Privity, for the maintenance of an Action of Debt, Covenant, Waſte, or for Entry for a Condition broken, making good of a Surrender or of a Releaſe, ſee the *Titles.*

Where a Privity ſhall be ſaid to be gone or not, but to continue ſtill.

For anſwer to this, take theſe Caſes. 1. If Tenant in tail do make a Leaſe for his own life, this doth not determine the privity of Eſtate. But if he make a Leaſe for anothers life, *contra*, *Co.*8.75. 2. Where Tenant in tail doth become Tenant after poſſibility of Iſſue extinct; this doth not determine the privity, *Co.* 8.75. 3. The death of one Jointenant doth not determine the privity that was between them and the Lord above them, *Co.*8.75. But if one Jointenant aſſign away all his Eſtate, it is otherwiſe. 4. If Leſſee for life or years aſſign away all his Eſtate, the Privity in Eſtate is gone between Leſſor and Leſſee; and ſo between Jointenants, if one aſſign all his Eſtate. But if the Aſſignment were only of part of the Eſtate, or of the whole upon a Condition, and he enter for the Condition broken, it were otherwiſe, *Co.*8.75. 5. If there be Leſſor and Leſſee for years rendring Rent, and the Leſſee aſſign away all his Intereſt, yet the Privity doth continue, and the Leſſor may bring an Action of Debt for the Rent ſtill. But if the Leſſor grant away the Reverſion, the Privity and Action are gone, *Co.*8.75,76. 6. If there be Lord and Tenant, and the Tenant is diſſeiſed, yet the Privity of Tenure doth remain, *Co.*8.43.

Of a Prohibition.

Sect. 1. *Prohibition,* what.

A Prohibition is a Writ framed for the forbidding of any Court to proceed in a Cauſe there depending, upon ſuggeſtion that the cognition thereof belongeth not to the ſaid Court. But the word was uſually taken for the Writ which did lie for one which was ſued in the Spiritual Court for a cauſe belonging to the Temporal Juriſdiction. And by this Writ, the Party his Counſel, the Judg and Regiſter were forbidden to proceed any further in the Cauſe, *Fitz.Br.*39. It was uſually granted to the High-Commiſſion, Council of the *Marches* of *Wales*, and other Courts now aboliſhed; and therefore we ſhall paſs them over.

The proceeding in it.

And theſe Writs iſſue out of the Chancery, Upper-Bench, or Common-Pleas, and are grantable to the Court of Requeſts, Admiralty, County-Court, Court-Baron, or any other inferior Courts of Record, or not of Record now remaining, in caſes where they meddle with things out of their Juriſdiction, or otherwiſe miſdemean themſelves, to command the Judges, Officers and Parties to proceed no further. And if they do proceed afterwards, an Attachment doth go forth againſt them for their Contempt. But if it do after appear, that the matters for which he was impleaded in thoſe inferior Courts, are to be determined there; then the party ſhall have a Writ of Conſultation, commanding the Judges of that inferior Court to proceed again, and the cauſe ſhall be remanded to them: And then no new Prohibition was to be had. See for all this, *Co.*4. 127. 11. 16. *Brownl.* 2 *par.* 1, 2, *&c.*

Conſultation.

Where it was grantable, or not.

many Statutes now of little uſe, and there is little of this at this day. But when it was given and granted, it was given and granted where the inferior Court did meddle beyond their Juriſdiction, as where the Spiritual Court did meddle with Lay-matters, and other Courts did meddle beyond their Commiſſion and Inſtructions, as when the County-Court or Court ſue for above Forty ſhillings, or for Charters, or Freehold, or for Treſpaſs *vi & armis*, *&c.* Or elſe they did deny Law and Juſtice to the Defendants there: As when in the Court of *Requeſts* they did ſue for a Debt there after the time of Limitation, or a man hath a Releaſe, and they will not allow it, or the like, *Fitz.*46,47. *F.N.B.*46. *O.N.B.*31. *Bro. Juſticies* 5.

The *Indicavit* is alſo much of the nature of the *Prohibition*, and was directed to the Court Chriſtian, now gone, *F.N.B.*36.

Conſultation, what.

Conſultation is a Writ, whereby a Cauſe that was formerly removed by a Prohibition out of an inferior to a ſuperior Court, is ſent back again, *F. N. B.* 50. *March* 141.

See

See in *Stat. de Circumſpectè agatis, de Conſultatione, Articuli Cleri,* 1 *Ed.* 3. *St.* 2. 18 *Ed.* 3. 2. 5. 45 *Ed.* 3. 30. 50 *Ed.* 3. 4.

CHAP. CXXIX.

Of Property.

PRoperty is the Right that a man hath to any thing which no way dependeth upon another mans courteſie: And he that hath this, is called a Proprietary. *1. Property, what.*

Property is either of Lands, or of Goods and Chattels. And of both theſe there are ſaid to be three kinds. 1. Abſolute, which is where a man hath a power to do with a thing what one will; and he hath ſuch a Right in it, that therein he hath no dependance on any other. 2. Qualified or limited, which is a Property to ſome purpoſes only. So the Husband hath property in his Wives real Chattels and Debts, by the Marriage; but in her Chattels perſonal he hath an abſolute property. So of a Pledg, he to whom it is pledged hath but a ſpecial property in it, and the general property is in him that did pledg. So Leſſee for life or years hath a qualified or ſpecial property in the Trees growing on the Land, to ſhroud them, and to have the fruit and ſhadow of them; but he cannot cut and take them away, as the Leſſor who hath the general Property of them may do by the leave of the Leſſee. *Proprietary, what. The kinds. Sect. 1. Husband and Wife. Pledg. Leſſor and Leſſee.*

There is alſo a poſſeſſory Property of Lands, Goods and Chattels. So a man may have a Poſſeſſion of Lands, to which he hath no Right at all. And ſuch a Property only a man hath in things which are *feræ naturæ, (i.)* of a wild nature, as Fiſh in a Pond or River; wild Beaſts, as Deer, Conies and Hares, and the like, in a Field or Park; or Fowl, as Pheſants, Partridges, Swans, or the like, by reaſon of Priviledg, as becauſe it is a Free Warren, or the like, and old Pidgeons in or about a houſe. And yet if any of theſe things be made tame, as a Hawk be reclaimed, or a Deer, Ferret, Pidgeon, Cony, Pheſant, Partridg, or other ſuch like Creature be made tame, ſo long as it is tame, a man is ſaid to have a Property in them as in his Oxen and Kine. But if once they get away and turn wild again, not having *animum revertendi, (i.)* a mind to return, the Property is gone. And yet it is held, that a man whiles his Hawk is in flight of a Partridg, or his Hounds in purſuit of a Hare, or a mans Deer get out of his Park, and he make freſh purſuit after him; that in theſe caſes he hath a kind of property in the wild creature: But if they once get away from him, every man that can may take them. Alſo if a man take wild Beaſts or Fowl, and keep them alive in a Room, though they be not tame, yet he hath a property in them whiles they are there. So alſo a man hath a property in Fiſh in a Trunk, young Pidgeons in his Houſe or Boxes, young Hawks in his Wood till they flie; And if any take them away, he may have an Action of Treſpaſs, and ſay they were his. So he may likewiſe for breaking his Cloſe, and taking away his Conies, Deer, Pheſants or Partridges out of his Warren; but he cannot ſay for taking [his] Deer, &c. *Feræ naturæ.*

Nor can any Felony be committed by the taking away of any of theſe wild things, unleſs they be made tame: So alſo Felony may be by taking away the Fiſh of a Pond. But in all living tame things, as in Oxen, Cows, Sheep, Hens, Ducks, Geeſe, Capons, Horſes, Swine, Goats, and their Egs and young ones, and the like; and in all dead things, as Emblements, Timber, Jewels, Houſholdſtuff, Implements, Utenſils, Mony, Plate, Corn, Hay, wood fell'd, wares, merchandiſes, Carts, Ploughs, Inſtruments of Muſick, *Sect. 2. Felony.*

Coaches, and ſuch like Moveables, a man may have an abſolute and general Property.

Alſo a man may have a Property in ſome things of a baſe nature, by the taking whereof no Felony can be committed; as a Blood-hound, Maſtiff, Hounds, Spaniels, and the like. And for theſe a man may have an Action of Treſpaſs, and ſay he took his Dog. And ſo a man may have a Property in Swans.

Treſpaſs.

Alſo of things that are of a tame nature, one man may have but a poſſeſſory, and another man may have the abſolute Property. As for example: If I borrow a Horſe or other thing for a purpoſe, in this caſe I have a ſpecial poſſeſſory property in it to uſe it to that purpoſe for which I borrowed it; and therefore he that hath the general property of it, which is the Lender, cannot take it away againſt our agreement; and if he do, I may have an Action of the Caſe againſt him for it. And if I borrow a Horſe to ride to *Dover*, and ride out of the way, the Owner cannot take him away, but may have his Action of the Caſe againſt me for it. And if one man deliver me Goods to deliver over to another, he hath the general property or ownerſhip of them, inſomuch that they may be taken in Execution for his Debt, and he may have a Trover for them: And I have ſuch a poſſeſſory property in them, that if they be taken from me, I may have Trover for them. And thus (as it ſeems) one may have a ſpecial property in a Chattel perſonal during ones life by agreement, as where for money I hire a mans Horſe for my life. And in all theſe caſes of a double intereſt or property, one of them cannot deprive the other of his intereſt or property without injury, *Co.* 7. 17. *Plow.* 524. 21 *H.* 7. 14. 7 *H.* 7. 18. 8. *Dyer* 306. *Co. ſup. Lit.* 145. 14 *H.* 8. 1. *Kelw.* 88. 118. *Co.* 11. 50. *March* 12. *pl.* 32. 48. 77. 110. *pl.* 188. *Regiſt:* 93. 102. 22 *H.* 6. 59.

Action of the Caſe. Trover.

Sect. 3. 2. How the Property of Lands or Goods may be gained or altered, or not.

The Property of Lands may be gained many ways: For a man may get the property or ownerſhip of Lands by Entry, by Diſcent, by Eſcheat, or by Conveyance; and by Conveyanae a man may take and get a Property in Land, and attain an Eſtate therein in Fee ſimple, Fee-tail, for life or years: And ſo he may have it by Fine, Recovery, Deed, or laſt Will. And by Deed he may take by way of Feoffment, Uſe, Gift, Grant, &c. See the Titles. *Plow.* 524. *Dyer* 334.

The Property of Goods and Chattels may be gained or altered by Act in Law; ſo by Forfeiture, Executorſhip, Adminiſtration, and the like: Or by Act of the party; ſo by Gift, Feoffment, Fine, Recovery, Uſe, Covenant, Grant, Bargain, Sale, and Will. And for things that are wild, a man may get a poſſeſſory or qualified property in them four ways. 1. By induſtry, as when he maketh them tame. 2. Or by the place, when they are in his Houſe or Chamber-cloſe, or as Fiſh in a Trunk, or the like. 3. By weakneſs, as young Hawks or Pigeons. 4. By the privilege of the place, as in a Warren. But for the opening hereof further, take theſe Caſes following.

By Act of Law.

1. If a Ship be taken by Pyracie, or by Letters of Mart, and be not brought *infra præſidia* of that King, by whoſe Subject it was taken; in this caſe it is no lawful prize, and the property not altered, and therefore the ſale by the Taker thereof is void, *March* 110. *pl.* 188.

Forfeiture.

2. An Alien-Enemy doth take my Goods in battel, and a Denizen doth take them away from him, and the Owner doth not come and demand them before the ſun-ſet; by this they are loſt, and the property is in him that did retake them, *Kelw.* 62, 63, 58.

Felons goods. Waif, Eſtray, &c.

3. If Goods become forfeit by Felony, or as Goods waived, an Eſtray or Wreck; by this the Property is altered and removed from the Owner. See *Waif*, *Eſtray*, *Forfeiture.*

Goods attached.

4. Goods are attached to bring the party in to appear, and the Defendant doth make default and not appear; by this the Goods are forfeit, and the property altered, *Dyer* 338. *Bro. Attach.* 10.

5. If a Tenant hold by Cuſtom to pay a Hariot at his death, and he die, the property is in the Lord, 8 *H.* 7. 20. See *Hariot.*

Treſpaſſor.

6. If one take away my Goods as a Treſpaſſor, and I ſue him for this, and recover damages for it; by this the Goods by act of Law are made his, *Kelw.* 62, 63, 58.

7. By

7. By an Executorſhip or Adminiſtration, the Property of the Deceaſed's goods is altered and veſted in the Executor or Adminiſtrator. And if an Executor pay ſo much money out of his own Eſtate as the Goods come to, by this he hath gained the Property of the Goods in his own right, which he had before but as Executor: And if he pay but in part to the worth of the Goods, for ſo much the Property is gone. And if two Executors be, and one of them only having Goods enough to pay the Debts, and he pay them; by this he alone hath gotten the Property thereof, *Goldsb.*79. *pl.*50. *Kelw.*62. 13 *H.*4.2. *Executor.*

8. If a man marry a wife that hath perſonal Goods in her own right; by this the Law doth give them to him as his own Goods, 21 *H.*7.29. *Husband and Wife.*

9. If a Sheriff take my Goods in Execution upon a *Fieri facias*, yet is the Property thereof ſtill in me until he doth make ſale thereof, *Dyer* 98. 67. *Brownlow*, 1 *par.* 41.

10. If a man take away my Goods under pretence of Title; it hath been ſaid, this will alter the Property thereof, *Bro.Prop.*35. But I doubt of this.

11. If my Servant (I being a Mercer) take away my Goods, or my Shepherd, Butler, or other Servant take, or ſell away my Goods, unleſs it be in caſe of Sale in Market-overt, no Property is altered by this; for by this relation as a Servant, and his Poſſeſſion, he hath by Law neither general nor ſpecial Property; and therefore I may have Treſpaſs for his taking, and if he imbeſil them, it is Felony, *Goldsb.* 72. *pl.* 18. And if a man borrow my Goods, or find my Goods, or take them from me in jeſt, or as a Diſtreſs, or ſteal them from me, and no more; by this no Property is altered, 20 *H.* 7. 52. *Bro. Prop.* 27. But by a Sale hereof afterwards in a Market-overt, the Property may alter. *See afterwards.* *Treſpaſs. Felony.*

12. One doth grant to another a hundred Cords of Wood, to be taken in ſuch a Wood by the aſſignment of the Grantor; in this caſe before aſſignment nothing paſſeth, and therefore he cannot till then grant it away; and if he die before it be done, the Grant is void, and the Executor ſhall not have it, *Goldsb.* 184. *pl.*123. So if I ſell to one the beſt Horſe in my Stable, and there be more Horſes there then one; by this no Property is altered till the Vendee hath made election, *Kelw.*69.77. *Election: Executor.*

13. If the man that hath Goods or Chattels do give them away in his life-time, this will alter the Property. See *Gift.* *Sect. 4. By act of the party.*

14. If he give away his Goods by his Will, this may alter the Property. See *Teſtament.*

15. If a man ſell away his Goods by word or deed, by this the Property may be altered. For this ſee *Bargain* and *Sale*, and *Contract*. And for the further cleering of this point, take theſe things: That in every Sale or Contract of Goods that muſt alter Property, there muſt be theſe things. 1. There muſt be a good Conſideration for the Sale, and the Contract muſt be perfect. And for both theſe points, ſee *Contract*. 2. If it be perfect and well made, and the Goods ſold are the Sellers own Goods; there, wherever the Contract be made, in or out of a Market, it is good between the parties to change the Property, and to paſs the thing ſold to the Vendee; yea, albeit the Seller know of an Execution againſt him, and ſell the Goods to prevent it. *Addition* to *Juſt. Doddridg*, *f.*40. But ſee *Colluſion*. And if a Sheriff ſell the Goods he hath in Execution, the Sale is good and unavoidable, albeit the Judgment be afterwards reverſed, *Dyer* 98. 67. And if one ſell Corn in Sacks, the Property may be altered, though it be not delivered, 33 *H.*6.5. So it ſeems it is where Goods be taken on a Statute, and not delivered to the party Plaintiff. But before Sale by the Sheriff, the Property is not altered, *Dyer* 67. 98. But by a ſpecial Act of Parliament it is provided, That the Sale of Goods wrongfully gotten to any Broker in *London*, *Weſtminſter*, *Southwark*, or within two miles of *London*, ſhall not alter the Property thereof, *Stat.* 1 *Jac.* 21. 3. The Sale of any living or dead Goods (except Horſes) in a Fair or Market, on the Fair or Market-day, (be the Goods whoſe they will, and however come by) yea, although they were ſtollen, is good, and ſhall change the Property thereof and ſettle it in the Buyer. And this Sale will not only bind and conclude the parties buying and ſelling, but all others that have any right to the thing ſold, *D. & S.* 328. *Perk. ſect.*93. But herein theſe Cautions muſt be taken in. *Contract. Sheriff. Horſes.*

1. It muſt be a Sale by one that is able to ſell, and one capable of buying. And therefore it is held, That a Sale there by a tender Infant that the Buyer may perceive to be within age, or a Woman covert that the Buyer knows to be ſo, (except it be of ſuch things as ſhe doth uſually deal in, or by her Husbands conſent;) or if a man ſell to another his own Goods, theſe Sales are not good, 21 *H.* 7. 40. 23 *Eliz. Gibſons* Caſe. *Co.* upon *Lit.* 20. *Perk.* 713.

2. It muſt be a Sale, and not a free Gift without any valuable Conſideration, 12 *Ed.* 4. 10. *Co.* 2 *par. Inſt.* 713.

3. The place wherein the Sale is, muſt be in the Market or Fair: for a Sale out of a Market or Fair, is not good: Nay, it was held by Juſtice *Bridgman*, That a Sale in a place which in reputation is a Fair or Market, and in truth is not ſo, is not good. And if one the day before the Market or Fair buy ſtollen Goods of one, and give him Earneſt, but he hath time to take or leave till the next day by Noon, and then the things are brought into the Fair or Market, and then and there they agree, the Buyer pays his money and Toll; it ſeems this is not good to alter Property, *Co.* 5. 83. *Dyer* 99. And therefore it ſeems the whole Contract muſt be made in the Fair or Market.

4. The Sale muſt be made *bona fide:* And therefore if there be any Covinous agreement made between me and another to ſell the Goods of a third man in a Fair or Market, to the end to deprive him thereof: Or if I do ſell the Goods of another man ſo to one that knoweth them to be his, and not my Goods; this will not alter the Property, nor conclude him, 33 *H.* 6. 5. *Co.* 3. 78. 5. 83.

5. Some have held, That the Sale muſt be on a Working-day, and not upon the Lords day, to alter Property. And therefore it is held in *London*, That a Sale any day but the Lords day, there, is good, becauſe every day there is a Market-day. But others hold the contrary for the alteration of Property: And ſo it ſeems the Law is taken, that the Sale is good, and Property changed; but the parties may be puniſhed for prophaning the day. *Fieri non debet, ſed factum valet:* It ought not to be done; but being done, it is good, *Stat.* 12 *Ed.* 4. 8. *Dyer* 12. *Co.* 5. 83. *Comins* Caſe, 38 *Eliz. B. R.*

Sect. 5. 6. The Sale muſt be in open place, and in the uſual and proper place of the Sale of ſuch things. And therefore it is held, That a Sale of Goods in *London* in an open Shop where ſuch things are uſed to be ſold, as Plate in a Goldſmiths ſhop, Cloth in a Drapers ſhop, or the like; this Sale is good. But if Plate loſt, or a Jewel borrowed be there ſold in a Drapers or a Scriveners ſhop openly, or in a Goldſmiths ſhop or houſe privately behind the doors or curtains; or if Cloth be there ſold in a Ware-houſe or Back-houſe, and not in the Shop; or a Horſe be ſold in *Cheapſide*; that theſe Sales are not good to alter the Property, *Co.* 5. 83. *Stat.* 4 *H.* 7. 5. 1 *Jac.* 21. *D. & S.* 149. *Co.* 2 *par. Inſt.* 713.

7. The Goods ſo ſold muſt be the Goods of a Subject, and not the Goods of the Lord Protector; for in this caſe the Sale is not good, nor is the Property altered, *Stat.* 7 *H.* 7. *chap.* 12. *Co.* 2 *par.* 713. *Plow.* 243. *Stat.* 35 *H.* 6. *chap.* 39.

8. The Sale muſt be made in the day-time between Sun-riſing and Sun-ſet. And therefore it is held, that a Sale in the night is not good, *Co.* 2 *par. Inſt.* 714. *Old B. Entries*, 327.

9. The Goods muſt be free at the time of the Sale. And therefore it is held, That if one ſteal my Goods, and after the Lord Protectors Officer ſeiſe them, and then he or another ſell them in a Fair, &c. this Sale is naught: And therefore if I proſecute the Felon, and cauſe him to be attainted, I ſhall have Reſtitution of my Goods again, *Stamf. pl. Cor.* 365. *Co. Inſt.* 2 *par.* 714. 21 *H.* 8. 11.

Felon.

Reſtitution.

10. It hath been held by ſome, that Toll muſt be paid, or at leaſt entred upon the Book after the Sale, and that otherwiſe the Sale is not good. But the Law is held to be otherwiſe; and it is held in all caſes, and for all things but for Horſes, the Sale is good, and Property changed without paying or entring of Toll. And ſo it hath been adjudged for Law upon a Sale in any Fair or Market in *England*, in *Cumin* and *Bowyers* Caſe, 38 *Eliz. B. R.* *Co.* 2 *par. Inſt.* 714. 716. 2 & 3 *P. & M.* 7. 9 *H.* 6. 45.

But

But by the Statute of 34 *H.* 8. 26. the Sale of Goods or Chattels ſtollen in any Market or Fair in the Dominion of *Wales*, will not change the property there, but the Owner upon proof thereof ſhall have his Goods again. But in *England* the Law is otherwiſe.

11. If the thing ſold be a Horſe beaſt that is ſtollen; the ſale will not be good, nor property changed as to the Owner of the thing ſold, unleſs all theſe things following do concur in the caſe.

1. It muſt be ridden, led, walked, driven, or kept ſtanding by the ſpace of one hour together at the leaſt, between ten of the clock and ſun-ſet.

2. This muſt be in an open place, and in the places wherein Horſes there are commonly uſed to be ſold, and not within any Yard, Back-ſide, Houſe, or other privy or ſecret place.

3. All the parties to the Contract there preſent in the Fair, &c. muſt come together with the Horſe to the Toll-taker or Book-keeper.

4. The Book-keeper muſt then write down in his Book the names, Chriſtian and Sirnames, and dwelling-places of the parties to the Contract, the colour, and one ſpecial mark at the leaſt of the Horſe. *Sect.* 6.

5. If any Toll be due, it muſt be paid; otherwiſe a Penny muſt be paid for the Entry.

6. Either the Book-keeper or other Officer of the Fair or Market muſt take upon him the perfect knowledg of the Seller, both his names and place of dwelling, which muſt be entred into the Book there; or elſe the Seller muſt bring to the Book-keeper or other Officer of the Fair, one ſufficient perſon a Voucher, that muſt teſtifie that he knoweth the Seller, his true names, myſterie, and place of dwelling. And it is held, this Branch extendeth to all Horſes, ſtollen or not ſtollen. *Voucher.*

7. Not only the Chriſtian name, Sirname, Myſterie, and place of dwelling or reſiencie of the Seller, but alſo of the Voucher (if any be) muſt be entred in the Book.

8. The very true price *bona fide* given for the Horſe, muſt alſo be entred in the Book. But in this caſe it ſeems there needs not any large Entry; and no more is required in the Entry, but that the Book-keeper or Voucher did know the parties, &c. For if they ſay they know, and do not know, yet the Sale and Entry is not good. And yet if in truth it be all falſe that is teſtified by the Voucher or the Book-keeper, in this caſe the Sale is void. But the Book-keepers Entry *prima facie* ſhall be preſumed to be true, till the contrary be proved, that there is no ſuch perſon as the Seller owned by the Book-keeper or Voucher: But being proved that none ſuch was there at the time of the Sale, the Sale is void. And all this was agreed by the Court at *Glouceſter*-Aſſiſe, by the Lord Chief Baron *Wild*, *Trin.* 10 *Car. B.R. A.* brought Trover againſt *B.* for a Horſe: *B.* pleaded Sale and Toll paid, &c. *A.* replied, that there were no ſuch Vouchers *in rerum natura*, (*i.*) in being: *B.* demurred, and it was adjudged for *A.* the Plaintiff upon a ſpecial Verdict. *Stat.* 2 & 3 *Ph. & M.* 7. 2 *Ed.* 3. 15. 5 *Ed.* 3. 3. 27 *H.* 6. 5. But all this notwithſtanding, a man may without all this caution ſell in a Fair or Market his own Horſe to which no man hath any pretence of Right. See more, *Stat.* 31 *Eliz.* 12. 3 *Eliz.* 22. *Co.* upon *Littleton*, 714, 715.

9. There are divers other things by the Statutes required herein: As, that the Rulers of Fairs muſt appoint, 1. A ſet and fit place for the ſale of Horſes. 2. A ſufficient Book and Book-keeper. 3. That the Book-keeper ſhall take his Toll, if any be due, between ten a clock and ſun-ſet. 4. That he deliver his Book to the Ruler of the Fair. 5. That no man ſhall make a falſe Voucher, or vouch that he knoweth not to be true. 6. That no Book-keeper ſhall enter that as of his own knowledg, which he knoweth not to be true. 7. That the Book-keeper ſhall give to the Buyer requiring it, and paying two pence, a Note in writing of the Contents of the ſame Bargain, under the Book-keepers hand. But theſe extend not to the prejudice of the Sale; for albeit theſe be omitted, yet the Sale is good, and Property changed.

Sect. 7.

10. And if any ſtollen Horſe be ſold according to all theſe Conditions; yet if the Owner thereof, his Executor or Adminiſtrator, or any other by his appointment ſhall within ſix moneths of the Felony done, claim, and by two Witneſſes within forty days after prove his claim, and that the Horſe was his within ſix moneths before the claim, before a Juſtice of Peace in or neer the place where the Horſe is found, and ſhall pay or offer to pay ſo much money as the Buyer gave, or ſhall depoſe before the Juſtice of Peace he did give for him; the Property is ſaved to the Owner, and he may either take him, or bring an Action for him, *Stat.* 31 *Eliz.* 12. *Co.* 2 *par. Inſt.* 715,716,717,718.

11. If one ſell my Goods unduly, not as before is ſet down, I may have them again, for the Sale will not bind me that am a ſtranger; but the Sale is good between the parties themſelves: And the Goods being duly ſold as before, will change the Property, albeit the Goods be the Goods of an Infant, Woman-covert, Ideot, in priſon or beyond ſea; and ſuch as have right to them in anothers right, as an Executor or Adminiſtrator, *D. & S.* 39. *Plow.* 243. *Co.* 2 *par. Inſt.* 713,714.

12. If I promiſe another for good conſideration to deliver him twenty Buſhels of Corn by a day, by this no property hereof is altered. So if I for good cauſe buy twenty Buſhels of Corn of a man at large, and not in Sacks, or ſet apart in a place certain; by this the property thereof is not altered. Otherwiſe it is if it be divided, and in a place certain, *Kelw.* 77.69.

13. If one covenant with me, That if I pay him Ten pounds ſuch a day, I ſhall have all his Goods in ſuch a place, and I pay him the Ten pounds; this is a good Sale, and the Property is in me, 27 *H.* 8. 16.

But by a bare ſtealing or taking away of Goods, or borrowing, without a Sale in a Market or Fair, no Property is altered; and therefore the Owner may ſeiſe them where-ever he find them. See more in *Chattels* and *Contract.*

3. Where a Property is determined, or not.

If one have my Corn, and after he turn it into Malt; or my Money, and turn it into Plate, or my Plate into Money; or my Timber, and turn it into a Houſe: In theſe caſes I may not take the things in kind, for hereby my Property is gone. And yet if the thing remain in kind as it was, and may be known, though it be mixed with another thing, or ſomewhat altered; as if one take my Cloth, and make a Garment; or my Leather, and make Shoes or Boots of it; or my Iron, and make a Bar of it; or my Timber, and make a Bar of of it: In theſe and ſuch like caſes it is ſaid I may take my own again, 5 *H.* 7. 15.

Alſo if one take my Sow, and after ſhe happen to have young Pigs; in this and ſuch like caſes the Property doth continue, and I may take the old and young together.

CHAP.

CHAP. CXXX.

Of Prophecies, Proclamation, Protection, Proteſt.

THE Penalty of publiſhing any falſe Prophecie, to the intent to make Inſurrection or Diviſion, ſee *St.* 5 *Eliz.* 15. *Co.* 3 *par. Inſt. cap.* 55. *Prophecies.*

Proclamation is a publike notice given of any thing whereof the Supreme Magiſtrate thinketh fit to advertiſe the people: As that if a man do not render himſelf at ſuch a time, he ſhall be reputed a Rebel; or to forbid, or command ſuch a thing. This is a piece of the Prerogative of the *Lord Protector*; and is in caſe of neceſſity, and for a time, of the force of a Law, called therefore *Lex temporis*: And many things he may do by this alone, as change the Coin of the Nation, *&c.* For which ſee *Prerogative.* And none other may do this, but Corporations in ſome caſe, and where they have a Cuſtom for it. See for this, *Stat.* 31 *H.* 8. 8. 7 *R.* 2. 6. 34 *H.* 8. 13. 18 *Ed.* 6. 12. *Cromp. Jur.* 42. *Bro. Proclam.* 10. See *Prerogative.* And yet where any Law doth enable to it, as about Fairs, or the like, there it may be done. See *Fairs.* This word is uſed for other Proclamations, or Proclamations in other caſes. For which ſee *Cromp. Jur.* 14. 16. 20. 21. *Stat.* 3 *R.* 2. 3. 8 *H.* 6. 10. 13 *H.* 4. 7. 33 *H.* 8. 9. 5 *Eliz.* 9. 23 *H.* 6. 11. 7 *H.* 4. 15. 32 *H.* 8. 9. 2 *Ed.* 3. 15. 5 *Ed.* 3. 5. and others. *Sect.* 1. *Proclamation.*

Protection is a word of divers ſignifications: For there is a general Protection of the *Lord Protector*, which is extended to all Subjects, Denizens and Aliens, whoſe offences have not made them uncapable thereof. And there is a particular Protection by Writ. And ſo it is of two ſorts: One to give a man freedom from Suits, which lieth for a man that is to paſs over the Sea in the *Lord Protectors* ſervice, to quit him in the mean time from all Pleas between him and other men, except Pleas of Dower, *Quare Impedit*, Aſſiſe *de novel Diſſeiſin*, Darrein Preſentment, Attaints, and Pleas before the Juſtices in Eyre. The ſecond is for the ſafety of a mans Perſon, Servant, Goods, Lands and Tenements whereof he is lawfully poſſeſſed, from violence, &c. Theſe are now of little uſe. See a large Treatiſe of them in 25 *Ed.* 3. *Stat.* 5. 5 *Ed.* 3. 7. 13 *R.* 2. 16. 7 *H.* 4. 4. 1 *R.* 2. 8. *Co* upon *Lit.* 131. and in many other places. See for the firſt, *Allegeance.* This word alſo is ſometimes taken for the Priviledg of a Parliament-man, and his Servants from Arreſt, during the Parliament-time: For which ſee *Priviledg.* *Protection.*

This word *Proteſt* hath two ſignifications in Law. The one is by way of Cautel, to call Witneſs (as it were) or openly to affirm, that he doth either not at all, or but after a ſort yield his conſent to an Act; as to the proceeding of a Judg in a Court wherein his Juriſdiction is doubtful; or to anſwer upon his Oath further then he is bound, *Plow.* 176. Another is by way of Complaint, to proteſt a mans Bill. For example: If I give money to a Merchant-man in *France*, and take his Bill of Exchange to be repaid in *England* by one to whom he aſſigneth me; if at my coming I find not my ſelf ſatisfied to my content, but denied or delayed, then I may go in the Burſe, or ſome open concourſe of Merchants at the *Exchange* or elſwhere, and proteſt that I am deceived by him; and thereupon if he have any Goods remaining in any mans hand in this Land, by the Law of Merchants I am to be paid out of them. *Proteſt. what.* *Merchants.* *Bill of Exchange.*

CHAP. CXXXI.

Of Purchaſe.

Purchaſe, what.

PUrchaſe ſtrictly taken, is the Poſſeſſion that a man hath in Land or Tenements, which he hath by his own act, and not by title of deſcent from his Anceſtor, *Co. lib. Inſt. f.* 3. *par.* 1. And a Purchaſor is he that comes to Land by theſe means. But it ſeems this word [Purchaſe] ſometimes hath a larger extent, and is taken by way of oppoſition unto Deſcent; when one hath, or cometh by Land in any other nature by Limitation of Eſtate, then by Deſcent.

For Anſwer to this Queſtion, take theſe Caſes.

Sect. 1. Where an Heir ſhall be ſaid to be in as a Purchaſor, and not by Deſcent, or not:

1. When an Eſtate doth originally reſt in the Heir, and was never, neither might ever by any poſſibility be in the Anceſtor; there the Heir ſhall be ſaid to be in the nature and manner of a Purchaſor; and he ſhall never be ſaid to be in by Deſcent, where no Right, Title, Action, or Uſe doth or might deſcend to him from the Anceſtor. As if a woman conſent to a Raviſher, and have a daughter, and ſhe enter by the Statute for the Forfeiture; now ſhe ſhall be ſaid to be in by Purchaſe: And therefore a ſon born after ſhall never deveſt this out of the daughter, *Co.* 1. 95. 98. 5 *Ed.* 4. 6. See *Enfant.*

Enfant born after.

2. So if a Remainder be limited to the right Heir of *J. S.* and he die having a Daughter; the Daughter is in nature of a Purchaſor, and not by Diſcent; and therefore the Son born after ſhall never have it from her, *Co.* upon *Littleton*, *f.* 164.

3. So if a power of Entry for a Condition broken deſcend, and the Daughter enter for the breach of a Condition, and after the Son is born, the Son ſhall never have it; and yet here the Daughter ſhall be ſaid to be in by Diſcent, eſpecially in caſe where ſhe doth pay the money to redeem Land conveyed away upon Condition. But if the Condition were broken in the life of the Anceſtor, being to be performed by the Feoffee, &c. or it were performed by the Feoffor, and the Land deſcend; here the Daughter ſhall be in by Deſcent, and the Son born after ſhall have it, *Co.* 1. 99. *lib. Inſt. par.* 1. *f.* 76.

4. Where by any Conveyance to the Anceſtor, an Eſtate for years only is limited to him, the Remainder to another for life, the Remainder to the right Heirs of the Leſſee for years; there the Heirs ſhall be ſaid to be in as Purchaſor. So if a Remainder for life be limited to the Heir in the ſingular number, there the Heir ſhall be ſaid to take by Purchaſe for life: But where the Anceſtor taketh an Eſtate of Freehold firſt, *contra*. And whether the Remainder be raiſed by way of Uſe, or by Act executed, it is all one. See *Cromp. Juriſd.* in *Court of Wards*, *in toto*. *Co.* 1. 104. *& ſuper Lit.* 319.

5. But in caſe where an Heir taketh any thing which might have veſted in the Anceſtor, although it do veſt firſt in the Heir, and do never veſt in the Anceſtor, yet the Heir ſhall be ſaid to be in in nature, courſe and degree of Deſcent, and not of Purchaſe; though not directly and to all purpoſes, as to take away the Entry of one that hath right, to have his Age, or be in Ward: As if a Fine be levied to *A.* in Fee, and he die before Execution, here his Heir ſhall be in by Deſcent. And therefore if there be an elder Son, and he die, his Wife with child, and the ſecond Son enter, the Child of the eldeſt Son, after he is born, ſhall ouſt him and have the Land. So of a Recovery. So if one have a Seigniory by Deſcent, and after the Tenancie eſcheat, and after a Son that is next Heir is born, he ſhall have the Tenancie, *Co.* 1. 98. 106. *Bro. Age* 51. *Co. lib. Inſt. f.* 22. 1 *par.* 37. 6.

So

So if two exchange Land, and the one entreth, and the other dieth before his Entry, and then his Heir entreth (as he may) he is by way of Deſcent; and therefore if in that caſe a Son be born after, he ſhall ouſt the Daughter and Heir that entred before, *Perk.* 57.

6. So if one do covenant with me, That when *J. S.* ſhall convey to him the Manor of *W.* he will ſtand ſeiſed of the Manor of *J. S.* to the uſe of me and my Heirs, and I die, and after *J. S.* convey to him the Manor of *W.* Now in this caſe my Heir ſhall be in this Land in nature of Deſcent, and not by Purchaſe, *Co.* 1. 99.

7. So if a Feme conſent to a Raviſher, or a Remainder be limited to right Heirs as in the caſes above: If he that ſhould firſt enter die before Entry, and the younger Son enter, and after the Son of the elder Son is born, that Son ſhall enter for Heir, he ſhall be ſaid to be in in nature of a Diſcent, *Co.* 1. 99.

8. Where the Eſtate is made by way of Limitation in the intent of the parties, there the Grantee ſhall never take it by way of Purchaſe; but rather then ſo, the Grant ſhall be void. As if one leaſe for life on Condition, that if the Leſſor die without Heirs, the Leſſee ſhall have the Land to him and his Heirs, and after the Leſſee dieth, and then the Leſſor dieth without Heir, the Leſſees Heir ſhall not have it, *Plow* 48. 3.

9. Where an Anceſtor by any Gift or Conveyance taketh an Eſtate of Franktenement to himſelf, and in the ſame Conveyance another Eſtate is limited mediately, or immediately to his Heirs in Fee or in Tail; in ſuch caſes [*his Heirs*] are words of Limitation, and he ſhall be in by Deſcent, not by Purchaſe.

Who is capable of a Purchaſe, and to be a Purchaſor, and by what names, See *Diſability* and *Grant*.

CHAP. CXXXII.

Of Purveyors.

Purveyors were ſuch Officers as did take up and make proviſion for the Kings Houſhold, Horſes, Wars and Caſtles: And as touching whom theſe things are briefly to be known. *Purveyors, what.*

1. That theſe Officers may take up that Proviſion for the *Lord Protectors* Houſe and Horſes, Wars, Caſtles, that is needful, within and without Liberties, and no more. *Stat.* 27 *H.* 8. 24. 14 *Ed.* 3. 19. 9 *H.* 3. 19. 3 *Ed.* 1. 7. 14 *Ed.* 3. 19. 10 *Ed.* 3. 4.

2. They muſt have, and ſhew their Commiſſion, *Stat.* 36 *Ed.* 3. 2. 28.

3. They muſt not take without agreement with the Owners, *Stat.* 28 *Ed.* 1. 2 *Ed.* 1. 2. 14 *Ed.* 3. 19.

4. They muſt do this with all indifferencie and equality upon all men, and not ſpare ſome, 3 *Ed.* 1. 13. 28 *H.* 6. 2. 36 *Ed.* 3. 3. But ſuch perſons as are excepted in the Statutes, 18 *Ed.* 3. 4. 3 *Ed.* 1. 14. 14 *Ed.* 3. 2. 1 *R.* 2. 3. 13 *Eliz.* 22. 2 & 3 *P. & M.* 15.

5. They muſt meaſure Corn, and accept of reaſonable meaſure, 4 *Ed.* 3. 3. 25 *Ed.* 3. 2. 36 *Ed.* 3. 3. 11 *H.* 7. 4. 1 *H.* 5. 10. 11 *H.* 6. 8.

6. What they take, muſt be prized by the Conſtables, and four of the Town where they take up any thing, and ſet what price they pleaſe, 28 *Ed.* 3. 2. 5 *Ed.* 3. 2. 10 *Ed.* 3. 2. 25 *Ed.* 3. 2.

7. They muſt make preſent payment for what they take, 9 *H.* 3. 19. 3 *Ed.* 3. 7. 3 *Ed.* 1. 31. 11 *H.* 7. 4. 1 *H.* 5. 10. 2 *H.* 4. 15. 20 *H.* 6. 8.

8. They

8. They may not abuſe any mans Goods, nor put any thing in their own purſes, nor keep away their money, *Stat.* 3 *Ed.* 3. 31. 25 *Ed.* 3. 6. 15. 9 *H.* 3. 11. 3 *Ed.* 1. 31. 28 *H.* 6. 2.

9. If they take otherwiſe then their Commiſſion is, it is Felony, *Stat.* 36 *Ed.* 3. 2. And how their Commiſſions muſt be, ſee *Stat.* 2 *&* 3 *P. & M.* 6.

10. If they abuſe their authority, they may be reſiſted, *Stat.* 14 *Ed.* 3. 19. 23 *H.* 6. 2. Or ſued by the parties grieved, 36 *Ed.* 3. 2.

11. They cannot take Timber growing upon the Inheritance of a Subject, without his leave, no more then the Inheritance it ſelf, *Co.* 2 *par. Inſt.* 35.

CHAP. CXXXIII.

Of Quantity, Weights and Meaſures.

Quantity, what.

The kinds.

Quantity is a certain meaſure, according to which any thing is ſaid to be long, broad, or deep. And Meaſures (in conſideration of Law) are either of Land, or of other things. And thoſe things are either things which are meaſured by the Pint, Quart, &c. which are wet, as Oyl, Wine, and the like; or dry, as Whear, Apples, and the like: Or ſuch as are meaſured by the Ell, Yard, &c.

Sect. 1. *Virgata terræ* or *Yard-land*, what.

A Yard-land (in Latine, *virgata terræ*) is a quantity of Land called by this name; but no certain quantity: Nor is it all one in all places, (as ſome would have it) juſt twenty Acres in all Countries: For in ſome Countries it containeth twenty Acres, in ſome twenty four, in ſome thirty Acres, according to the eſtimation of the Country. And therefore it is, that a Fine *de Virgata terræ* is void for incertainty, *Co.* upon *Lit.* 69.

Oxgang of Land what.

An Oxgang of Land is not a certain quantity of Land, as fifteen Acres, whereof eight make a Plough-land; but it it is a certain quantity of Land ſo called, and more or leſs according to the eſtimation of Countries, *Co.* upon *Lit.* 69.

Librata terræ, what.

Librata terræ (as ſome ſay) containeth four Oxganges, and every Oxgange thirteen Acres. Others ſay it is ſo much as is worth twenty ſhillings a year.

Hide of Land, what.

A Hide of Land alſo is an uncertain quantity of Land by that name: Some men think it to be as much as may be plowed by one Plough in a year; others would have it a hundred Acres, and that eight Hides do make a Knights Fee. But it is to be reckoned according to the eſtimation of the Country.

Selion of Land, what.

And ſo is a Selion of Land (in Latine, *Selio terræ*) it ſometimes ſignifieth an Acre, ſometimes half an Acre, ſometimes more, and ſometimes leſs; and ſometimes a Ridg, *Cromp. Juriſd.* 222. It cannot be demanded in a Fine, it is ſo uncertain.

Fardingdeal, or *Farrundel of Land*, what.

A Farundel of Land ſeemeth to be the fourth part of an Acre, *Cromp. Juriſd.* 220.

Obolata.
Denariata.
Solidata.
Librata.

We read of *Obolata terræ*, which ſome would have to be half an Acre. *Denariata*, an Acre. *Solidata*, twelve Acres. And *Librata* to be twelveſcore Acres, in proportion to the quantity of Money.

Furlong of Land, what.

A Furlong of Land (called in Latine *Ferlingus*) is a quantity of ground containing twenty, others ſay forty Lugs, Perches or Poles in length, and every Pole two hundred and ſeventeen Foot and a half; of which Furlongs, eight a mile. Others take it for the eight part of an Acre, 35 *Ed.* 2. 6.

A

A Perch is uſed with us for a Rod or Pole of ſixteen foot and a half in length, whereof forty in length and four in breadth make an Acre of ground: But by cuſtom of ſome Countries it is eighteen in ſome, twenty one in ſome, twenty four, twenty five foot in ſome, and in ſome more, in ſome leſs, *Cromp. Jur.* 122. Some ſay it is a Rood of Land; and that a Rood of Land is ten Perches, the fourth part of an Acre, *Stat.* 5 *Eliz.* 5. 31 *Eliz.* 7.

A Perch, what. *Rod.* *Pole.* *Rood of Land*, what.

The Acre of Land (as ſome ſay) is ſo much as may be plowed in one day with one Yoke of Oxen. But the ordinary Acre is forty Perches in length, and four in breadth; and according to this Meaſure muſt he lay his four Acres, that doth erect a Cottage, *Cromp. Jur.* 222.

Acre of Land, what.

Sect. 2.

Cark of Wooll, is a quantity thereof, whereof thirty make a Sarpler, 27 *H.* 6. 2. It is ſaid by ſome, that a Load of Wooll is eighty Tods, each Tod two Stone, each Stone fourteen Pound: And that a Sack of Wooll in common accompt is equal with a Load, or twenty ſix Stone; and that a Sarpler or Pocket of Wooll is half a Sack; and that a Pack of Wooll is a Horſe load, which conſiſteth of ſeventeen Stone two pounds: For a Stone of Wooll is fourteen pounds, but in ſome places it is more; and a Tod of Wooll is twenty eight pound in weight, or two Stone; and that a Sack of Wooll is twenty ſix Stone and fourteen pounds, *Stat.* 11 *H.* 7. *ch.* 4. 31 *Ed.* 3. 8.

Cark of Wooll, what. *Tod of Wooll.* *Sack of Wooll.* *Stone of Wooll.* *Sarpler or Pocket of Wooll.*

It is ſaid that all our *Engliſh* Meaſures are compounded of the Penny Sterling, which weigheth thirty two Corns of Wheat of the middle ſort, and that two of thoſe Pence make an Ounce, 12 Ounces a Pound in Weight, or ſixty ſhillings in number; and that eight pound of Wheat maketh a (Jalon, or) Gallon, as it is now called, and eight Gallons a Buſhel, four Buſhels a Curnock, and eight Buſhels a Quarter: And that fifteen Ounces of the quantity aforeſaid do make a Merchants Pound, and that twelve ſuch Pounds and a half do make a Stone, and that fourteen Stone do make a Weight; and that two Weights, or twenty eight Stone make a Sack of Wooll, which ought to weigh a Quarter of Wheat; and that twelve Sacks make a Laſt of Wooll. So that a Weight and a Sarpler ſeemeth to be all one, and that a Load and a Sack is all one. But a Laſt of Herring is Ten thouſand; a Laſt of Pitch or Tar, or Aſhes, is fourteen Barrels; a Laſt of Hides or Skins, is twelve dozen of them; a Laſt of Corn is ten Quarters, *Stat.* 31 *Ed.* 3. *ſtat.* 2. *ch.* 2. 31 *H.* 8. 14. 1 *Jac.* 33. 14 *Ed.* 3. *ch.* 22. *Fleta, l.* 2. *c.* 12. *Cromp. Juſt. of Peace*, 83.

Ounce. *Pound.* *Buſhel.* *Galon.* *Curnock.*

Sect. 3.

A Kintal or Quintal is a certain meaſure or weight of Wood, Iron, or ſuch like thing or merchandiſe, to the value of a Hundred, or ſomething under or over, according to the divers uſes of ſundry Nations.

Kintal or *Quintal*, what.

A Clove is ſaid to be the two and thirtieth part of a Weight of Cheeſe, (*i.*) eight pound, *Stat.* 9 *H.* 6. 8. And the weight of Cheeſe and Butter in ſome Countries is three hundred weight, after an hundred and twelve pound to the Hundred, which is three hundred thirty ſix pounds, or an hundred thirty ſix pounds of Averdepois weight.

Clove, what.

Two Pints make a Quart, two Quarts make a Pottle, two Pottles make a Gallon, eight Gallons make a Firkin, ſixteen Gallons make the Kilderkin, Half-barrel, or Rundlet; four Firkins make a Barrel, two Barrels make a Hogſhead, two Hogsheads make a Pipe, wherein is a hundred twenty ſix Gallons; and two Pipes, which is two hundred fifty two Gallons, make a Tun A Terſe or Tierſe is but the ſixth part of a Tun, or third part of a Pipe. But Honey hath in the Kilderkin ſixteen, in the Barrel thirty two Wine-gallons: And ſome things are otherwiſe meaſured. See the Statutes for the things in particular.

Pint. *Quart.* *Pottle.* *Galon.* *Firkin.* *Kilderkin.* *Barrel.* *Hogſheads* *Pipe.* *Tun.* *Tierce.*

Of Pounds are made Pecks, of Pecks Buſhels, of Buſhels Coombs or Curnocks, and four Pecks the Buſhel, four Buſhels the Coomb or Curnock, eight Buſhels the Quarter, which is two Curnocks; the Quarter is eight Buſhels. The Weigh.

Pound. *Peck.* *Buſhel.* *Curnock.* *Quarter.* *Weigh.*

The Buſhel muſt be eight Gallons, or ſixty four pounds or pints of Wheat, *Stat.* 1 *R.* 3. *ch.* 13. Water-meaſure ſold within Ship-board, muſt be five pecks. The Buſhel doth differ in many places. The Rents and Farms of Lords muſt be as they have been.

As to all theſe things, this is to be known.

1. That

Sect. 4. 1. That Weights and Meaſures are uſed in reference to Land, dry things, and moiſt things.

2. There are two ſorts of Weights in uſe with us at this day. The one called the *Troy*-Weight, which is twelve ounces, or twenty ſhillings Sterling. Twenty Penny-weight makes an Ounce, twenty four Grains make a Penny-weight, twenty Mites make a Grain, twenty four Droits make a Mite, twenty Perits make a Droit, twenty four Blanks make a Perit, *Act* 17 *July*, 1649. The *Troy*-Weight which is twelve ounces in the pound, and no more; by which Pearls, Precious-Stones, Electuaries, and Medicinable things, Gold, Silver, and Bread is weighed.

The other is called *Averdepois*, which is ſixteen ounces, or twenty five ſhillings Sterling in the Pound: And by this all other things, as Grocery wares, Phyſical Drugs, Butter, Wax, Wooll, Steel, Lead, and the like are weighed. But to the Averdepois weight there is allowed to every Hundred twelve pound; ſo as a hundred and twelve pounds makes a Hundred weight, fifty ſix pounds half a Hundred weight, and twenty eight a Quarter. Three Barley-corns make the Inch, four Inches a Handfull, twelve Inches a Foot, three Foot make a Yard, three Foot and nine Inches make the Ell; five Yards and a half, which is eighteen Foot and a half, make a Perch, Pole or Rod, 27 *Ed* 3. 10.

3. That the Meaſure and Eſtimate of Land is to be eſtemed according to the Country, and not according to the Statute: And ſo all Contracts for Land or other things, by word or in writing, are to be underſtood and expounded. And therefore if a Sale be of Tods, Buſhels, Yards or Ells, it ſhall be meaſured and accounted according to the Cuſtom of the place, but not according to the Statute. Therefore a Grant of a Selion, or Oxgang, or Hide of Land, is to be accounted according as it is commonly taken in the place where the thing doth lie. A ſale of Acres of Wood, Acres by the Meaſure of the Country: And ſo of Meaſures of Corn, Tuns, Weights, Buſhels, and the reſt.

4. There muſt be but one Scantling of Weights and Meaſures throughout the whole Land:

Eſtandard or Standard of the Exchequer.

5. This Weight and Meaſure muſt be according to the Standard of the *Exchequer*.

6. The ſame muſt be ſealed with the *Protectors* Seal; the Peck, Gallon, Pottle, Quart and Pint, Buſhel and Half-buſhel, and none elſe, by the opinion of ſome men.

7. The Averdepois-Weight is allowable according to the Cuſtom of the place.

8. Meaſures of Corn muſt be ſtriked all of them.

9. The Meaſure and Weights wherewith men buy and ſell, muſt be ſealed and marked by the Officer to be according to the Standard in the *Exchequer*, which is the principal or ſtanding Meaſure of the *Lord Protector*, to the ſcantling whereof all the Meaſures through the Land are, or ought to be framed by the Clerk of the Market, Aulneger, and other Officers according to their Function.

10. To look to this, there is to be an Officer of purpoſe, called the Clerk of the Market, and in Corporations commonly the Head-Officer, who hath this Office alſo.

11. If any of theſe Officers refuſe to ſeal the Weights and Meaſures that are good, or ſeal ſuch as are not good, they forfeit Five pounds.

12. For the Weight and Value of our Money, ſee *Act of Parliament*, 16 *July*, 1649.

For other things concerning Weights and Meaſures, ſee *Plow.* 140. 41. 27 *H.* 8. 14. *Kelw.* 87. *Cromp. Jur.* 222, *&c. Mag. Char. ch.* 25. *Stat.* 31 *Ed.* 1. *Pillory and Tumbrel, de Piſtoribus.* 14 *Ed.* 3. 12. 25 *Ed.* 3. 9, 10. 13 *R.* 2. 9. 9 *H.* 5. *Parl.* 2. 8. 8 *H.* 6. 5. 9 *H.* 6. 8. 11 *H.* 6. 8. 7 *H.* 7. 4. and the *Aſſiſe of Bread*, 16 *Car.* 39. See a more exact Account of Weights and Meaſures, in *Cromp. Jur. Daltons Juſt. of Peace, chap.* 5. *Wingates Abridgment of the Statutes.* My *Juſt. of Peace* Book, *chap.* 28.

Receipt

Receipt ſeemeth to be an Admiſſion of a Third perſon to plead his right in a Cauſe formerly commenced between two others. As for example: If a Tenant for Term of life or years bring an Action about the Land, and in this he in Reverſion doth come in Court and prayeth to be revived, to defend the Land and to plead with the Demandant; this word is applied to an Admittance of a Plea, though the Controverſie be but between two only. *Bro. Reſc.* 205. *Dower* 448. *Receipt*, what.

See for this the Statutes, *Stat. Glouc.* 11. *Stat. de Defenſione Juris.* 13 *R.* 2. 17. 13 *Ed.* 1. 3.

CHAP. CXXXIV.

Of Records.

REcords are authentical and uncontrollable Writings, which are of that high and ſacred nature, credit and authority in the Judgment of Law, that they or any thing contained in them cannot be apparently or directly gainſaid or denied; neither have they need of any proof, for they prove themſelves, and muſt be tryed only by themſelves, and are the beſt Evidences to prove any thing for others, that can be; and it is a proof before the proof of Witneſſes. And though they do contain apparent falſhood, and tend to the miſchief and overthrow of any perſon, yet they are not to be denied: And therefore no Averment lieth againſt them, as to ſay they were made at any other time then they bear date. And hence it is, that if one be certified in the *Exchequer* to be outlawed, he may not deny it, nor hath he any remedy but to reverſe it. And hence it is, that to raſe or imbeſil them is ſo great an offence, as Felony. (See *Crown.*) *Sect.* 1. *Records*, what. *Evidence.* *Proof.* *Averment.* *Raſure.* *Imbeſilling of a Record.*

If a man have occaſion to uſe a Record, he may have a Copy or Tranſcript of it, or he may have it exemplied under the Great Seal. For if a man will plead a Record in another Court then that wherein it doth remain, and it be denied, and no ſuch Record be pleaded to it where an Action is brought upon it, or it be pleaded in bar of an Action; there he that is againſt the Record, may demand Oyer, that is, ſight of the Record; and then the other party ſhall have day to bring the ſame into the Court. And if then he bring it not, this ſhall be ſaid to be a Failer of the Record, and Judgment ſhall be given againſt him. It muſt therefore be exemplified under the Great Seal, and then it muſt be ſent into the *Chancery* by *Certiorari*, and ſo brought into the Court where it is denied: And an Exemplification under the Seal of the ſame Court wherein it is, is not ſufficient, if the Record it ſelf be denied: But if ſomething in it only be denied, it may be good enough to give in Evidence to a Jury. And ſo alſo a true Copy of it being proved by Witneſs, is ſufficient to give in Evidence to a Jury. *Tranſcript of a Record*, what. *Exemplification of a Record.* *Nul tiel Record*, what. *Oyer de Record*, what. *Failer de Record*, what. *Certiorari.* *Evidence.*

For *Conſtat* and *Inſpeximus*, ſee *Co.* 5. 52. And for all the reſt, *Co.* upon *Lit* 225. 4. 53. 72. 10. 92. 5. 53. upon *Lit.* 218. 280. *Plow.* 434. 493. *Cromp. Jur.* 66. 21 *H.* 7. 9. 8 *H.* 6. 12. 13 *Eliz.* 6. 34. 34 *H.* 6. 14. 1 & 2 *P. & M.* 13. 8 *R.* 2. 4. See *Patent.* *Co.* upon *Lit.* 260. For the Removing, and Amendment of a Record, ſee *Remover* and *Amendment.* For Exemplification, ſee *Stat.* 3, 4 *Ed.* 6. 4. 13 *Eliz.* 6. And for the *Vacat* of a Record, ſee *Cromp Jur.* 31. Where to find a Record, ſee *Stat.* 9 *Ed.* 3. 5. *Conſtat & inſpeximus.* *Vacat* of a Record.

CHAP. CXXXV.

Of a Common-Recovery.

Sect. 1. *Common-Recovery,* what.

A Recovery in general, is the obtaining of any thing injuſtly taken or detained by Judgment or Trial of Law. And it is either a Common-Recovery, which is ſuch a Recovery as is uſed for a Common Aſſurance of Land; or other Recovery, which is not uſed as an Aſſurance of Land. And the Common-Recovery that is uſed for the Aſſurance of Land, is nothing elſe but *fictio juris*, or a certain form or courſe ſet down by Law to be obſerved, for the better aſſuring of Lands and Tenements to men. And this is ſomewhat after the example of the Recovery upon Title, which is without conſent, and contrary to the will of him againſt whom the ſame is had: For there is in this a colourable Suit, wherein there is a Demandant, which is called the Recoverer; and a Tenant, which is called the Recoveree; and one that is called to warrant upon a ſuppoſed Warranty, which is called the Vouchee, *Co.* on *Lit.* 154. 23 *Eliz. ch.* 3. *Doct. & St.* 41. *Weſt. Sym. Recovery.*

Recoverer. Recoveree. Vouchee.

2. The kinds.

The Common-Recovery is ſometimes with a ſingle Voucher, which is when the Writ is brought againſt him that is to paſs the Land immediately, and he doth vouch over the Common Vouchee. And ſometimes it is with a double Voucher, which is when the Writ is brought againſt another to whom he that is to paſs the Land hath aliened it, and he doth vouch him that is to make the Aſſurance, and he doth vouch over the Common Vouchee: And this is the ſureſt way, and the ſafeſt kinde of Recovery.

3. The manner and order of ſuffering a *Common-Recovery.*

In this formality of a Common-Recovery, the courſe is, That by agreement of the parties, a real Action is begun by a Writ of Entry, brought by him that is to have the Land aſſured againſt him that is to make the ſame Aſſurance, if it be with a ſingle Voucher, or if it be with a double Voucher, againſt him to whom he that is to make the Aſſurance hath aliened the Land. And in this Suit, the Recoverer that doth bring the Action, doth ſurmiſe that the Tenant againſt whom the Writ is brought hath no right to the Land, but that the Recoverer hath right thereunto, and the Tenant came to it from ſuch a ſtranger whom the Demandant doth name. And to this the Tenant doth appear in perſon, or by an Attorney, and then doth enter into defence of the Land: But in pleading doth vouch to Warranty, *(i.)* doth alleadg that he bought the Land of *J. S.* a ſtranger, who in the Conveyance thereof bound himſelf and his Heirs to warrant and make good the Title to him or them to whom it is conveyed: And thereupon he prayeth that *J. S.* may be called in to defend the Title; and then he is allowed by the Court to call in *J. S.* to ſay what he can for the juſtifying of his right to the Land before he ſo conveyed it: And hereupon *J. S.* doth appear, and make ſhew as if he would defend the Title, but doth pray a further day may be aſſigned to him to make his defence; which being granted him by the Court, at the day appointed, he by agreement, Covin, and aſſent of the parties doth not come in, but make default: And thereupon the Land is to be recovered by him that brought the Writ againſt the Tenant, and he is left for his remedy to *J. S.* upon his Warranty; and accordingly Judgment is given by the Court, That the Demandant or Recoverer ſhall recover the Land demanded againſt the Tenant, and that the Tenant ſhall recover ſo much Land of *J. S.* of his own Land in recompence for the Land recovered from him, which he ought to have warranted and defended, but ſuffered to be loſt. And this Recovery over, is called a Recovery in Value, or *pro rata:* But if the Recovery be with a double Voucher, or a treble Voucher, *J. S.* is upon his appearance to call or vouch to warrant *J. D.* and to alleadg in the ſame manner as the Tenant doth, and ſo pray that *J. D.* may come in, and thereupon *J. D.* doth come in and appear, and make default. And ſo if there be more

Recovery in value, or *pro rata,* what.

more Vouchers; and then there muſt be ſeveral Recoveries over in value againſt every one of them: But he that is the laſt Vouchee, is always the Common Voucher, who is one of the Cryers of the Court of *Common-Pleas*; a man not worth any thing, and one that hath no Land to render in value upon the ſuppoſed Warranty. And by his Deviſe, grounded upon the ſtrict Principles of Law, the firſt Tenant doth willingly let go the Land for the aſſurance of the Purchaſor, and yet in truth hath no recompence over, becauſe the Vouchee hath no Land to render in value. And by this means, if one hath an Eſtate-tail in Lands which he is deſirous to ſell, or to convert into an Eſtate in Fee-ſimple, the ſame is commonly done: For the Tenant in Tail doth cauſe the Purchaſor, or ſome friend of his, to bring a Writ of Entry againſt him for this Land, and he appeareth to the Writ, and in pleading ſaith, That the Land came to him or his Anceſtors from ſuch a man or his Anceſtors, who in the Conveyance bound themſelves to warrant it: And thereupon that man is called in, who doth appear and make default, and thereupon Judgment is had againſt him in manner as aforeſaid. Or if he would have the Recovery with a double Voucher, then doth he by Fine, Feoffment, or Deed of Bargain and Sale inrolled, diſcontinue the Land; and then cauſe the Recoverer that is to have the Land, to bring his Writ of Entry againſt the Diſcontinuee, and he doth vouch the Tenant in Tail, who doth vouch over the Common Vouchee; and ſo it is done: And by this the Eſtate-tail that the Tenant in Tail hath or had, is barred and bound, for that it appeareth now he had no power to entail the Land whereunto he had no juſt title; and beſides he ſhall recover a recompence in value, and this is adjudged in Law to go in ſucceſſion of Eſtate, as the Land ſhould have done: Which is the reaſon why the Recovery is a Bar to all that are in Remainder and Reverſion, as well as to the Iſſues in Tail. *Co.* 1. 94. 10. 43. 45. *F.N.B.* 134. *Co.* 9. 6.

And in the ſuffering of theſe Recoveries, the Tenants and Vouches do appear moſt commonly in perſon in Court, and ſo the Recovery is finiſhed in Court preſently without more doing. But ſometimes they will not, or cannot appear in perſon; and then they do uſe to appear and ſuffer the Recovery by Attorney: And in this caſe there muſt be a Conuſance for a Warrant of Attorney taken, to authorize the Attorney or Attorneys in this manner, if it be for a treble Voucher. *Warrant of Attorney.*

Glouc. ſſ. *Command* A.S. *and* B *his wife, that juſtly &c. they render to* C.D. *the Manor of* N. *with the appurtenances &c. which he claimeth to be his right and inheritance, and in which the ſame* A.B. *hath not ingreſs, unleſs after the Diſſeiſin which* H.H. *unjuſtly and without Judgment made to the aforeſaid* C. *within thirty years now laſt paſt, &c. as is ſaid &c.*

Glouc. ſſ. A.S. *and* B. *put in their place* W.W. *and* R.R. *their Attornies jointly and ſeverally againſt* C.D. *of a Plea of Land, &c.*

Glouc. ſſ. M.M. *Gent. whom* A.S. *and* B. *called to warrant, put in his place* J.J. *and* L.L. *his Attornies jointly and ſeverally againſt* C.D. *of a Plea of Land.*

Glouc. ſſ. G.W. *Gent. whom* M.M. *called to warrant, put in his place* R.G. *and* R.S. *his Attornies jointly and ſeverally againſt* C.D. *of a Plea of Land.*

And in theſe caſes to make two Attornies at the leaſt, and to give them an authority jointly and ſeverally, that if one of them die before the Recovery be ſuffered, the other may have power to do and diſpatch it. And theſe Warrants of Attorney for the ſuffering of Recoveries, are to be acknowledged and certified in the ſame manner as the Conuſances of Fines acknowledged in the Country are; ſave only that Recogniſances for Warrants of Attorney for Recoveries may be taken by any Judg of the Court of Common-Pleas, or any Serjeant at Law, without a *Dedimus poteſtatem*: But if any others take it, they uſe to do it by a ſpecial *Dedimus poteſtatem*; which is to command the Commiſſioners therein named, to come to ſuch perſons, and to take the names of their Attorny or Attornies in the Suit, and to certifie the ſame into the *Chancery* under their Seals ſuch a day. And if there be any Woman-covert that is to make the Conuſance, it ſeems ſhe is to be examined as in the caſe of the Conuſance of a Fine. And when this is done, the Recovery may be ſuffered by the Attornies, without the perſonal appearance of the parties. *Dedimus poteſtatem.* *Examination.*

And this is as good a Recovery as the other which is ſuffered by the perſons themſelves appearing in Court, but that it will require longer time for the perfection of it: For in this caſe there muſt go forth a *Summoneas ad Warrant.* which muſt have nine Retorns ere the Recovery can be perfected, and by that time one of the parties may be dead.

And when the Recovery is thus ſuffered by the parties in perſon, or by their Attornies, the ſame is to be entred by one of the Clerks of the Common-Pleas, upon the Rolls of the ſame Court, there to remain upon record. And herein there muſt go forth a Writ of Execution, called *Habere facias Seiſinam*; which is ſent to the Sheriff of the County where the Land doth lie, to put the Recoverer in poſſeſſion of the Land, (except the Recovery be of a Reverſion of Land after a Leaſe for years of it, in which caſe the Reverſion ſhall be in the Recoverers by a Claim without any Writ.) And this Writ the Sheriff doth return as executed according to the Contents thereof, albeit in truth he never do any thing upon it. And after this, all the ſame Proceedings is to be exemplified by the Clerk of the ſame Court, *Co.* 10. 43. *Co.* 1. 94.

Habere facias Seiſinam.

4. The uſe, nature, and operation of it.

A Recovery being matter of Record, is much of the nature of a Fine, and ſuch a thing whereof the Law taketh notice: For it is now become a formal and orderly manner of Aſſurance of Lands, and one of the Common Aſſurances of the Kingdom, or a common way and means to paſs Lands from one to another. And therefore if a Tenant for life ſuffer ſuch a Recovery of his Land, it is a Forfeiture of his Eſtate; an Uſe may be averred upon it as well as upon a Fine, and it may be avoided for Covin as well as any kind of Conveyance elſe. But it is of ſpecial uſe, and hath a ſpecial vertue to bar and bind Eſtates in Tail, and all the Remainders and Reverſions thereupon. And becauſe many of the Inheritances of the Kingdom do depend upon this Aſſurance, and it is oft-times the greateſt Aſſurance Purchaſors have for their money, therefore it hath much favour from the Law at this day: And therefore the Law will not endure it ſhall be diſputed againſt; for, *Communis Error facit Jus.* And hence it is that it ſhall not be avoided for ſmall Errors: For it is another Rule of Law, *Conſenſus tollit Errorem.* And if a Recovery be ſuffered by a Tenant in Tail, hereby he hath not only diſcontinued, barred, and diſcharged the Eſtate-tail, and ſo defeated himſelf and his Iſſues the former owner of the Land, and all the Remainders and Reverſions thereupon that ſhould take place after the Eſtate-tail, whether they be in *eſſe*, or contingent only; but alſo all former Eſtates, Leaſes and Charges made by him in remainder or reverſion. For as when the Eſtate-tail in poſſeſſion is not barred by a Recovery, the Eſtates in reverſion or remainder are not barred; for, *Quod non in magis propinquo, non in magis remoto valebit:* So it is *è converſo*, where the Eſtate-tail in poſſeſſion is barred by the Recovery, all the Remainder, and the Reverſions, Conditions, Charges, Incumbrances, and Eſtates dependent upon it are barred alſo, except it be in ſome ſpecial caſes where the *Remainder* or *Reverſion* was in the King. And therefore if *A.* be Tenant in Tail, the *Remainder* to *B.* in Tail, the *Remainder* to *C.* in Fee; and *B.* or *C.* doth make a Leaſe for years of the Land, or grant a *Rent*-charge out of the Land, or enter into a Statute, or the like, or grant the *Remainder* or *Reverſion* upon Condition, and after *A.* doth ſuffer a Common-recovery of the Land, and after dieth without iſſue; in this caſe the Recoverer ſhall hold the Lands diſcharged of all theſe Eſtates and Charges in *Remainder*. But otherwiſe it is if *A.* himſelf make a Leaſe, or enter into a Statute, and then ſuffer a Common-recovery of the Land; in this caſe this *Recovery* doth not avoid, but affirmeth the Leaſe or Charge: For whereas it was before voidable by the Iſſue in Tail, or him in *Remainder* or *Reverſion*; now it is good againſt them all, and the Recoverer alſo ſhall hold it charged and ſubject to the Leaſe and Charge of the Tenant in Tail.

Forfeiture. Averment. Covin.

This kind of an Aſſurance therefore is in ſome reſpects better then a Fine: For, a Fine will bar the Heir in Tail, but not him that is in *Remainder* or *Reverſion*; but a *Recovery* will bar them all. *Co.* 5. 41. 10. 37. 39. 3. 5. 6. 41. 42. *D. & S.* 41. 49. 50. *Stat.* 13 *Eliz. ch.* 5. 23. *ch.* 3. *St.* 7 *H.* 8. *ch.* 4. *Co.* 1. 62. 25. 44 *Ed.* 3. *ch.* 22.

In

In every good and binding Common-recovery, theſe things are requiſite:

5. What ſhall be ſaid a good Common-recovery, and who ſhall be barred and bound thereby, or not.

1. That there be a Demandant, a Tenant, and Vouchee, as the efficient cauſes thereof; for if either of theſe be wanting, it is not a compleat Recovery. And therefore if a Common-recovery be had againſt a Tenant in tail without a Voucher, this is void. And for this it is to be known, that ſuch perſons, and by ſuch names may be Demandants, Tenants, and Vouchees in Recoveries, as may be Cognizors and Cognizees in Fines. And therefore a Recovery ſuffered by an Infant appearing by his Guardian, is good, and will bind him and all others. So alſo a Recovery had againſt a Woman that hath a Husband, being joyned with her Husband, will bind her and all others.

Sect. 1. *Infant. Woman-covert.*

2. That there be Land demanded as the matter, and that the thing be demandable. And for this it is to be known, that of ſuch things, and by ſuch names as a Writ of Covenant for the levying of a Fine may be had, a Writ of Entry for the ſuffering of a Recovery may be had, ſave only it may not be of a Trench, of a ſtanding Pool, one Load of Land, of Eſtovers, Homage, Fealty, Services to be done, of an Oxgange of Wood, of Felons Land, of a Garden, Cottage, Croft, a Yard-land, a Quar of Minerals, a Market, neither of an Upper-Cockloft. And yet of ſome of theſe alſo it may be by other names. Alſo a Recovery may be had of a Rent, Common, Advowſon, Franchiſes, and the like, but not of an Annuity.

Sect. 2.

3. That it be had and ſuffered in that order and form as Law requireth, *viz.* That there be a Writ of Entry brought, an appearance of the Tenant in fact, a Voucher, and an appearance of the Tenant in Law, the Vouchee, Judgment and Execution, in manner as aforeſaid: For if there be any ſubſtantial defect in theſe things, the Recovery may be thereby avoided by Writ of Error; but if it be only in form, it will not hurt.

4. That there be a lawful Tenant to the *Precipe*, *(i.)* That the Writ of Entry be brought againſt one that at the time of the Writ brought is Tenant of the Freehold, either by right, *(i.)* that hath an Eſtate for life, at leaſt in the Land; or by wrong, *(i.)* that is a Diſſeiſor of the Land demanded, and whereof the Recovery is had. And therefore in this caſe the courſe is, where the Land to be recovered is in poſſeſſion, and a Fine and Recovery is had of it together, the Fine is ſued out firſt; for this doth make the Cogniſee Tenant of the Freehold of the Land, and the Recovery is had againſt him. And when the Recovery is to be had of a Reverſion, and that there is an Eſtate for life in being of the Land whereof the Recovery is to be had, (For an Eſtate for years, or any ſuch like Eſtate will not hinder the ſuffering of a Recovery) there the courſe is, to get a Conditional Surrender from the Tenant for life, of his Eſtate to him in Reverſion or Remainder, to the end that he may be perfect Tenant of the Inheritance; and then the Writ of Entry may be brought, and the Recovery had againſt him: For if a Writ of Entry be brought againſt the ſtranger, and he vouch the Tenant in tail in poſſeſſion of the Land, and ſo a Recovery is had; or if there be Tenant for life of Land, the Remainder or Reverſion to another in tail or in fee, and a ſtranger doth bring a Writ of Entry againſt him in the Remainder or Reverſion, or againſt a ſtranger who doth vouch him, and ſo a Recovery is had; theſe Recoveries are not good. And yet if the Writ be brought againſt the Tenant of the Land, and a ſtranger that hath nothing in the Land together, and ſo a Recovery be had; this Recovery is good enough. And if a Diſſeiſor make a Gift in tail of the Land to another, and the Writ is brought againſt him, and he vouch the Diſſeiſee, and he vouch the Common Vouchee; this is a good Recovery. *Dyer* 252. *Co.* on *Lit.* 46.3.6. *Co.* 3.6. on *Lit.* 46. *Lit Br. ſect.* 519. *Plow.* 514. *D. & S.* 49. See *infra.*

Prerogative.

5. That it be in ſuch a caſe as is not prohibited by ſome Statute-Law; for if the King give any of his own Land whereof he is ſeiſed, or cauſe or procure another in conſideration of money or other Land, to give the Land whereof he is ſeiſed in tail to any of his Subjects or Servants, in recompence of their ſervice, or the like, the Remainder to the King in Fee-ſimple or Fee-tail, ſuch Eſtates in tail cannot be barred by a Common-recovery. And therefore if ſuch a Tenant in tail ſhall ſuffer a Recovery of ſuch Lands, it is void, and it will neither bar the Iſſues in Tail, nor any of them in Remainder, nor the King. 34 *H.* 8. 20. *Co.* on *Lit.* 371. 2. 5. 16. *Co.* 8. 77, 78:

But

But if the King make ſuch a Gift in Tail, keeping the Reverſion to himſelf, and after doth grant the Reverſion to another; in this caſe the Tenant in Tail may ſuffer a Recovery, and bar the Eſtate-tail, and the Reverſion alſo. And where a Subject by the Kings proviſion doth make ſuch a Gift in Tail, and then doth grant the Remainder to the King for life or years only; in this caſe the Eſtate-tail, Remainders, and Reverſions alſo may be barred by a Common-Recovery. So in other caſes where a Subject doth make a Gift in Tail, the Remainder to the King in Fee; this Eſtate-tail may be barred by a Common Recovery. And therefore if there be Tenant in Tail, the Remainder or Reverſion in Fee to another, and he in Remainder or Reverſion by Deed indented and enrolled doth bargain and ſell his Remainder or Reverſion in Fee to the King; or if one covenant to ſtand ſeiſed to divers Uſes in Tail, the Remainder to the King in Fee; in theſe caſes the Eſtates, and the Reverſion and Remainders depending thereupon, may be barred by a Common-Recovery.

So if a man make a Gift in Tail, the Remainder in Fee, and he in the Remainder doth grant his Remainder to another for life, the Remainder in Fee to the King on Condition the Eſtate ſhall be void upon the tender of Twenty pounds; in this caſe the Eſtate-tail, and the Reverſion alſo and Condition thereupon may be barred. So if the Duke of *Lancaſter* had made a Gift in Tail, and the Reverſion had deſcended to the King; this Eſtate-tail might have been barred by a Recovery. So if Prince *Henry* ſon of *H.* 7. had made a Gift in Tail, the Remainder to *H.* 7. in Fee, which Remainder by the death of *H.* 7. had deſcended to *H.* 8. in this caſe the Tenant in Tail might have barred the Eſtate-tail by a Recovery. And yet if the King had made a Gift in Tail, the Remainder in Tail, or grant the Reverſion in Tail; in theſe caſes a Common-Recovery might not have been ſuffered to bar the Entail, Remainder, or Reverſion.

And if the Husband, for the advancement of his wife in Jointure, and the preferment of the Heirs of their two bodies, make an Eſtate in Tail to him and his Wife, and the Heirs of their two bodies; and the Wife after her Husbands death, alone by herſelf or any other Husband ſuffer a Common-Recovery of the Land whereof this Eſtate is made; this Recovery will not bar the Eſtate-tail, *Stat.* 11 *H.* 7. *c.* 20. *Co.* 3. 58. 61. 59. But if in this caſe the Recovery be ſuffered by the Heir in Tail, or by the Heir in Tail and his Mother together, it is a good Recovery. And therefore if *A.* be ſeiſed of Land in Fee, and he make a Feoffment in Fee to the intent that the Feoffee ſhall reconvey it to him and his wife, and the Heirs-males of his body; and this is done accordingly, and they have iſſue a Son, and ſhe ſurrender or make a Forfeiture, and he enter and ſuffer a Recovery; this is a good Recovery and Bar to the Eſtate-tail. Or if the Writ be brought againſt the Mother, and ſhe vouch the Heir in Tail, and ſo a Recovery is had, this Recovery will bar the Eſtate-tail. And howſoever at the Common-Law, a Recovery againſt the Tenant for life, with a Voucher upon a lawful Warranty and a Recovery in value, was a Bar to him in Remainder or Reverſion, and there was no remedy in this caſe; yet at this day it is otherwiſe, *Stat.* 14 *Eliz. ch.* 8. *Co.* 15. 62. 10. 43. 45. 3. 6.

Sect. 2. And therefore if Tenant in Tail after poſſibility of Iſſue extinct, Tenant by the Courteſie, or any other Tenant for life, do ſuffer their Lands to be recovered from them by Covin and Agreement, either as immediate Tenants, or as Vouchees upon feigned Titles, without the conſent and to the prejudice of him in Remainder or Reverſion: ſuch Recoveries are void, and will not bar the Remainders or Reverſions, but are Forfeitures of the Eſtates of ſuch Tenants for life. Inſomuch that if a Tenant for life be made Tenant in fact to the Writ, or Tenant in Law upon the Voucher, and ſo a Recovery be had; as if Tenant for life make a Leaſe for years, and the Leſſee for years doth make a Feoffment in Fee, and the Feoffee doth ſuffer a Common-Recovery, in which the Tenant for life is vouched, and he vouch the Common Vouchee; theſe Recoveries will not bind the Reverſions or Remainders. But there is no proviſion made at this day to preſerve the Reverſion or Remainder expectant upon an Eſtate-tail; nor to avoid a Recovery of a Tenant for life, where he in the next Remainder is agreeing and aſſenting to it.

Forfeiture.

And

And therefore if there be Tenant for life, the Remainder to *A.* in Tail to *B.* in Tail, &c. with divers Remainders over, and the Tenant for life doth ſuffer a Common Recovery, in which he doth vouch *A.* who doth vouch the Common Vouchee; in this caſe this is a good Recovery, and doth bar the Eſtate-tail, the Remainders, and Reverſions alſo. And if one be ſeiſed of Land in Fee, and have two Sons, *A.* by his firſt wife, and *B.* and a Daughter by his ſecond wife, and he deviſe the Land to his wife for her life, the Remainder to *B.* his Son in Tail, and the Reverſion of the Fee deſcend to *A.* and the Writ of Entry is brought againſt the Tenant for life, and ſhe vouch *B.* and he doth vouch the Common Vouchee, and ſo a Recovery is had without the conſent of the Heir in Reverſion, this is a good Recovery, and a Bar to all the Eſtates in poſſeſſion, Remainder and Reverſion. And if a Writ of Entry be brought againſt the Tenant for life, and he make default; after default, and the next in Remainder in Tail is received, or he pray in aid of him in Reverſion or Remainder, and then they vouch over, and ſo a Recovery is had; this is a good Recovery, and a Bar to all the Eſtates in Remainder and Reverſion. But if the Writ of Entry be brought againſt the Tenant for life, and him in the Remainder in Tail together, and they vouch the Common Vouchee, and ſo a Recovery is had; this will be no good Recovery to bar the Eſtate-tail. And if Spiritual perſons, as Biſhops, Deans, Parſons, and ſuch like ſuffer a Recovery of their Eccleſiaſtical lands, ſuch a Recovery is void, and will not bind the Succeſſors. *Sect.* 4. *Co.* on *Lit.* 44. *Plow. Mauxels* Caſe. *Co.* 10. 373. 1. 94. *Plow.* 357.

But if it be not in ſome ſuch prohibited caſe as before, and the Recovery be had by and between ſuch perſons, and of ſuch things, and in ſuch a manner as aforeſaid; in ſuch caſes albeit there be in truth no Warranty made upon which the Voucher is had, and albeit there be nothing to be recovered in value, for that the Vouchee hath no Land to recover over in recompence, and albeit that no Execution be done in the life-time of the party againſt whom the Recovery is had, yet is the ſame regularly a perpetual Bar to the parties againſt whom the ſame is had, and their Heirs, of all the Eſtates they have in Fee-ſimple, Fee-tail, or for life in them, and againſt them in Remainder or Reverſion, and their Remainders and Reverſions that are depending upon the Eſtates: with this difference. The Recovery with the ſingle Voucher doth not bar any Eſtate but ſuch as the Tenant in Tail hath, at the time of the Recovery had, in poſſeſſion: So that if the Tenant in Tail be in of any other Eſtate, as by Diſſeiſin, or the Conveyance of the Diſſeiſor, or the like, this Eſtate is not barred. But the Recovery with the double Voucher doth bind and bar all Intereſts, Eſtates and Titles, that the Vouchee hath at the time of the Entry into the Warranty. All which is further illuſtrated by the Examples following: *Co.* 3. 59. *Lit. Br. ſect.* 38. 12 *Ed.* 4. 13. 13 *Ed.* 4. 1.

If the Writ of Entry be brought againſt the Tenant in tail, and he vouch the Common Vouchee, and ſo a Recovery is had; this Recovery with ſingle Voucher is a good Recovery, and Bar to the Eſtate-tail, if it be then in poſſeſſion, and not put to a right, and to all the Remainders and Reverſions depending thereupon. *Co.* 3. 5. 10. 37.

So if Lands be given to *A.* in Tail, the Remainder to the right Heirs of *B.* (*B.* being then alive) and the Writ of Entry is brought againſt the Tenant in Tail, and he doth vouch over the Common Vouchee; this is a good Recovery, and a Bar to the Eſtate-tail, and the Remainder alſo. But if the Tenant in Tail be diſſeiſed, and then ſuffer a Recovery with a ſingle Voucher; or the Diſſeiſor make a new Eſtate in Tail to the Tenant in Tail, and then the Tenant in Tail doth ſuffer a Recovery with a ſingle Voucher; or if the Tenant in Tail make a Feoffment in Fee of Land, and then take back a new Eſtate to himſelf from the Diſcontinuee in Tail or in Fee, and then doth ſuffer a Recovery with a ſingle Voucher: By this Recovery the Entail is not barred; but by a Recovery with a double Voucher, in theſe caſes, the Eſtate-tail is barred. And therefore as where the Tenant in Tail doth levy a Fine, make a Feoffment, or bargain and ſell the Land by Deed indented and enrolled, and the Writ is brought againſt the Conuſee, Feoffee, or Bargainee, and he doth vouch the Tenant in Tail, and he doth vouch the Common Vouchee; this doth bar the Eſtate-tail, and the Remainders and Reverſions depending thereupon. *Co.* 1. 135, 136. 3. 59. 12 *Ed.* 4. 19. 13 *Ed.* 4. *Co.* 10. 45.

So

So if in theſe caſes the Conuſee, Feoffee or Bargainee doth make a new Eſtate in Tail to the Conuſor, Feoffor or Bargainor, or he diſſeiſe the Conuſee, Feoffee, or Bargainee, and then levy a Fine, make a Feoffment or Bargain, and ſell to another againſt whom the Writ of Entry is brought, and he vouch the Tenant in Tail, and he doth vouch the Common Vouchee; by this Recovery the firſt and ſecond Eſtate-tail, and all the Remainders and Reverſions depending thereupon are barred. So if Lands be given to *J. S.* and the Heirs-males of the body of his wife engendered, and he hath iſſue a Son, and after his wife dieth, and he diſcontinue and take an Eſtate to him and the Heirs-females of the body of his ſecond wife, and after diſcontinue again, and after take an Eſtate to him and the Heirs-females of his own body, and after diſcontinue again, and the Writ of Entry is brought againſt the laſt Diſcontinuee, and he doth vouch the Tenant in Tail, who doth enter into the Warranty generally, and voucheth the Common Vouchee; this is a good Recovery, and Bar to all the Eſtates in Tail, and to all the Remainders and Reverſions alſo. And if *A.* before the Statute of Uſes, had been Tenant in Tail, and had made a Feoffment in Fee to *B.* and he and *B.* had after made a Feoffment to *C.* to the uſe of *A.* and his wife, and the Heirs of their two bodies, and then ſhe had died, and after *A.* had entred upon *C.* the Feoffee, and made a Feoffment to *W.* in Fee, againſt whom *J. S.* had brought a Writ of Entry, and he had vouched *A.* the Tenant in Tail; this had been a good Recovery, and a Bar to all the Eſtates. And if Lands be given to husband and wife, and the heirs of the body of the husband, with Remainders over to ſtrangers, and the husband alone doth diſcontinue; the whole Land by Fine, Feoffment, or Bargain and Sale, by Deed indented and enrolled, and the Writ of Entry is brought againſt the Diſcontinuee, and he doth vouch the huſband alone without the wife, and the husband doth vouch the Common Vouchee, and ſo a Recovery is had; this is a good Recovery for the whole Land, and a Bar to all the Eſtates in Tail and Remainder, and Reverſion, but not to the Eſtate of the wife for her life after the husbands death. But if Lands be given to the husband and wife, and the heirs of their two bodies, with Remainders over to ſtrangers, and the husband alone diſcontinue, and the Recovery is ſuffered as in the laſt caſe; it ſeems this is no Bar to the Eſtates in Tail or Remainder, or Reverſion for any part of the Land.

Co. 3. 5. *Plow.* in *Mauxels* Caſe, 1. 8.

Co. 3. 5. 6. 32.

And yet if Lands be given to *J. S.* and *J. D.* in Tail, and *J. S.* diſcontinue the whole, and the Writ of Entry is brought againſt the Diſcontinuee, and he vouch *J. S.* alone, this a good Recovery for the one half of the Land, and a Bar to all the Eſtates. And if Lands be given as before unto husband and wife, and the heirs of their two bodies, and the Writ of Entry is brought againſt them both, and they vouch the Common Vouchee; or the husband alone doth diſcontinue, and he vouch the husband and wife both, and they enter into the Warranty, and vouch the Common Vouchee, and ſo the Recovery is had; theſe are good Recoveries for the whole, and a Bar to all the Eſtates in Tail, and to the Eſtate of the Woman, and to all other Eſtates. And where Lands are given to a man and his wife, and the heirs of the body of the wife, or to the wife and the heirs of her body, and the Writ of Entry is brought againſt the husband and wife, and they vouch the Common Vouchee; theſe are good Recoveries, and will bar the husbands and wives, and the Eſtates in Tail, Remainder and Reverſion.

Husband and Wife.

Lit. Brown. 37.

And where a man hath Land in which his wife hath a Jointure, or to which ſhe will have title of Dower after his death; if the Writ of Entry in this caſe be brought againſt them both, and they vouch the Common Vouchee, and ſo a Recovery is had; this Recovery will bar them both; but the husband alone, without her, cannot bar her of any ſuch Eſtate by a Recovery, for ſhe may falſifie and avoid it after his death. And if Lands be given to husband and wife, and the heirs of the body of the husband, and the Writ of Entry be brought againſt the husband alone, and he vouch the Common Vouchee, and ſo a Recovery is had with a ſingle Voucher; this is no good Recovery for any part of the Land, nor Bar to any of the Eſtates, albeit the husband do ſurvive the wife.

Sect. 3. *Plow.* 514.

Co. 3. 5. 1. 12 *Ed.* 4. 14. *Co* 3. 6.

And

And yet if the Lands be given to two others, and the Heirs of the Body of one of them, the Remainder over to a ſtranger, and the Writ of Entry is brought againſt one of them; and he vouch the common Vouchee, and ſo a Recovery is had; this is a good Recovery, and a Bar to all the Eſtates for the one half of the Land.

If Land be given to *A.* in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, and *A.* doth make a Feoffment in Fee, and the Writ of Entry is brought againſt the Feoffee, and he doth vouch *B.* (being him in the ſecond Remainder in Tail) to Warranty, and he doth vouch the common Vouchee; this is a good Recovery, and a Bar to the ſecond Eſtate-tail, and all the Remainders and Reverſions depending thereupon; and yet it is no Bar of the firſt Eſtate-tail which *A.* hath.

If the Writ of Entry be brought againſt a Mortgagee, and he doth vouch the common Vouchee, and ſo a Recovery is had; this is no good Recovery to Bar, or binde the Mortgagor, but that he may enter upon the Condition broken. *Curia, Mich.* 18 *Jac. B. R.* So was it held by moſt of the Judges in the caſe between *Pell* and *Brown.*

So if one give Lands to *B.* and his Heirs, ſo long as *C.* ſhall have Heirs of his Body, and *B.* doth ſuffer a common Recovery, and vouch the common Vouchee; this is no good Recovery to Bar the Donor of the poſſibility: For in both theſe caſes, he that is to be barred, hath no Remainder or Reverſion, but an intereſt or poſſibility which cannot receive a recompence in value.

But if in theſe caſes the Mortgagee vouch to Warranty the Mortgagor, or *B.* the Donee vouch the Donor, and ſo they Vouch over the common Vouchee, and ſo the Recovery is had; theſe will be good Recoveries to Bar both them, and their Heirs for ever.

And if one have an Eſtate in Fee-ſimple, determinable on a Limitation, or a Condition, As if Lands be given to *A.* and his Heirs, until *B.* pay him one hundred pound, and then that it ſhall remain to *B.* and his Heirs; and *A.* in this caſe doth ſuffer a common Recovery, and vouch the common Vouchee. It ſeems this is no Bar to *B.* and his Heirs, but that upon payment of the one hundred pound, he ſhall have the Land.

So if one by his Will Deviſe his Land thus, I give unto *A.* my Son, and his Heirs for ever, my Land in *W.* paying twenty pound to *B.* when *A.* ſhall come to one and twenty years of age, and then to *A.* and his Heirs for ever; and if *A.* ſhall die without Heirs of his Body, *C.* being then living, that then *C.* ſhall have it to him, and his Heirs for ever; and *A.* pay the twenty pound to *B.* at his full age, and then ſuffer a Recovery of the Land; this is no Bar to *C.* of his Eſtate. *Co.* 3. 5.

But here it muſt be noted, that in the caſes before where it is ſaid, That a Recovery is void, it is meant as to the Heirs, and them in Reverſion, and Remainders; for as to the parties themſelves, that do ſuffer the Recovery, the ſame is for the moſt part good, and bindeth them by way of Eſtoppel and Concluſion.

And it muſt be noted alſo, That a ſtranger that hath right to the Land at the time of the Recovery ſuffered, is not barred at all by the Recovery, or by his *Lacheſs* of *Non-claim, &c.* as in the caſe of a *Fine.* See *Brownl.* 1 *part,* 36. 193. 2 *part.* 171.

The Recoverors in common Recoveries, their Heirs and Aſſigns, ſhall have the like Remedy againſt Leſſees for lives and years of the Land recovered, their Executors or Aſſigns, by Diſtreſs, Avowry, Action of Debt, for the Rents and Services reſerved upon their Leaſes, that ſhall be due after the ſame Recoveries had; and alſo like Actions of Waſte done after the Recovery had; and like Remedy upon a diſturbance in a Preſentation to an Advowſon, and in like manner and form, as the Leſſor ſhould, or might have had, if the ſame Recoveries had never been had, albeit the ſame Leſſees do never Attorn to the ſame Recoverors. And if a man make a Leaſe for years to begin at *Michaelmas,* reſerving Rent, and before *Michaelmas* he ſuffer a Recovery; in this caſe the Recoveror ſhall diſtrain for this Rent, which the Leſſor before the Recovery, could not diſtrain for: But if the Recovery had not been had, he might have diſtrained. 7 *H.* 8. 4. *Dyer* 31. *Co.* on *Littl.* 104.

Sect. 6. A Recovery may be defeated, fruſtrated, and avoided (which is called the falſifying of a Recovery) in part, or in all, for many cauſes; as for that, there is ſome groſs and ſubſtantial Error in the manner of the proceedings. But the Recovery is not avoidable for Falſe or Incongruous Latin, Raſure, Interlining, Miſentring of any Warrant of Attorney, Miſretorning or not Retorning of the Sheriff, or other want of Form in Words, and not in Matter of Subſtance, becauſe it is done by the conſent of the Parties. Or it may be avoided, for that he againſt whom the Writ of Entry is brought, is not Tenant of the Freehold, by right or wrong, at the time of the Writ brought, As when the Writ is brought againſt a ſtranger that hath nothing in the Land, and he doth vouch the Tenant in Tail in Poſſeſſion of the Land. Or a Recovery may be avoided, for that he that hath the Eſtate, and the Right, is neither Party nor Privy to the Recovery, As when the Writ of Entry is brought againſt the Diſſeiſor, and he vouch a ſtranger that hath nothing in the Land: Or a Recovery is had againſt the Husband alone of the Land, whereunto his Wife hath Title of Dower: Or a Recovery may be avoided, for that another hath ſome Eſtate, in the thing whereof the Recovery is had at the time of the Recovery ſuffered, As when there is a Recovery had of Land, whereof there is a Leaſe or Eſtate for years, by Statute, Elegit, or the like: Or it may be avoided, for that the Rovery is had by Coven, As when it is ſuffered by Tenant for life, to diſ-inherit him in Reverſion; or when it is gotten by ſome undue practiſe and ſiniſter dealing, for in this caſe it is ſometimes made void by a *Vacat* or Sentence of a Court.

And where a Recovery is avoidable or reverſable, for any of theſe, or ſuch other like cauſes, it muſt be avoided by him, whom it doth concern, that is barred and bound by the ſame Recovery that ſhould have had the Land, if the ſame Recovery had not been, and not by any other whom it doth not concern. As if an Erroneous Recovery be ſuffered by Tenant in Tail; in this caſe his Iſſues, or if they fail, the next in Remainder or Reverſion, ſhall defeat it.

So alſo if the Land be recovered againſt a ſtranger, the Tenant in Tail ſhall avoid it; and if the Land be recovered againſt a Diſſeiſor, the Diſſeiſſee ſhall avoid it: And if the Land be recovered againſt him in Reverſion or Remainder, the Tenant for years, by Staute or Elegit, ſhall avoid it: But in theſe laſt caſes, they ſhall falſifie and avoid it, during their particular Eſtates onely.

So alſo the Wife ſhall falſifie the Recovery ſuffered by her Husband alone, as to her Title of Dower onely, and no longer, or further. And he in the Reverſion or Remainder, ſhall falſifie and avoid the Recovery ſuffered by the Tenant for life, either in the life time of the Tenant, or afterwards. But neither he in Reverſion or Remainder, or any one, by or under him, or any other, can falſifie a Recovery ſuffered by the Tenant in Tail in Poſſeſſion, except it be for ſome ſuch cauſes as before. And the Recoveror himſelf cannot falſifie a Recovery. So neither can a Guardian, or a Tenant of a Manor, As if one hold Land of a Manor, and a ſtranger recover the Manor by a feigned Title; a Tenant of the Manor cannot falſifie this Recovery.

And in all theſe caſes, where a Recovery is avoidable, and a man hath power given to falſifie: He muſt do the ſame by Writ of Error ſometimes, as in the caſe of Erroneous proceedings; and ſometimes by pleading and the ſetting forth of the Special Matter, as in the caſe where Tenant is not Tenant of the Freehold, or when the Recovery is had by Coven, againſt the Tenant for life, or the like; and ſometimes by the ſhewing and ſetting forth of the Practiſe to the Court, and a Motion made, that a Vacat may be had upon the Judgment for the cauſes alleaged. 33 *Eliz.* 3. *Co.* 5. 40. 21 *H.* 8: 15. *Co.* on *Littl.* 46. 104. *Co.* 3. 78. *Dyer* 249. *Co.* 3. 4. 1. 62. 5. 39. *Plow.* 515.

CHAP.

CHAP. CXXXVI.

Of Relation.

IT is *fictio juris* to make a nullity of a thing from the beginning, for a certain intent which had eſſence; or more plainly, A fiction of Law, whereby ſomething is for Special Purpoſe, deemed never to have been, which in truth was; or as others define it, It is a Term of Law where in conſideration of Law, two times, or other things are ſo conſidered, as if they were all one; and the thing ſubſequent is ſaid to take his effect at the time preceding, As if one deliver a writing, to be delivered to one upon payment of money: Now when the money is paid, this Delivery ſhall relate unto the firſt Delivery, and be of force from that time. *Sect.* 1. 1. *Relation*, what. *Delivery* of a *Deed.*

And this the Law doth moſt commonly make to help Acts in Law, and not the Acts of the Parties, and *propter neceſcitatem ut res magis valeat quàm pereat*, (that is) for neceſſity to make the thing to take effect; and therefore it ſhall never work to any other collateral intent, but ſhall be reſtrained onely to the ſame thing, and to the ſame intent, and between the ſame parties onely, and ſhall not be ſtrained to a third perſon, that is not party, nor privy to prejudice him; neither ſhall it make that *tortious*, that was lawful before; *nec operatur alicui damnum*, (that is) nor ſhall it enure to hurt any body: As in the caſes beneath, *Co.* 1. 99. 7. 39. *Plow.* 488.

Relations are allowed in caſes of Conditions, Judgments, Executions, and Actions, in caſes of Offices, in caſes of Inrollments, in caſes of Acts of Parliament, in caſes of Adminiſtration, Probate of Wills, in caſes of Agreement, in caſes of Forfeitures, in caſes of Indentures, to guide a precedent Aſſurance: For which ſee the *Titles*, 10 *H.*6. 6. *Dyer* 136: But it ſeems in caſes of Attornment it doth not allow a Relation; and therefore if one Reverſion be granted to two men, by two ſeveral Deeds: And he that hath the laſt grant get Attornment firſt, and after the other get Attornment alſo, the ſecond Grantee that got the Attornment firſt ſhall have the Reverſion. *Co.* 1. 99. 7. 39. 5. 26. *Co.* 2. 73, 78. 3. 83. 9. 9, 15. *Littl. ſect* 552. 2. Where *Relations* are allowed, or not.

A Judgment againſt an Heir upon the Obligation of his Anceſtor, ſhall have Relation to the time of the Writ firſt purchaſed, and from that time it will avoid all Alienations made by the Heir. See *Judgment*. Where a Judgment againſt any man doth binde his Lands he hath in Fee ſimple, and Execution ſhall relate for them to the time of the Judgment put for Goods and Chattels, *contrà*. *Sect.* 2. 3. Where *Relation* ſhall be of matter of Record, and how of a Judgment.

If an Office had intitled the King, by reaſon of a Seigniory, it ſhall relate to the time of the Anceſtors death, to this ſpecial intent, to give the King the Meſn profits of the Land: And if it intitle him *ratione prioris recti, &c.* by reaſion of his firſt Right or Title, it ſhall relate to the time of the Right or Title accrued, as to the time of the Condition broken, or Alienation in Mortmain, to give the King the Meſn profits. But where he was intitled to Land *jure protectionis ſuæ Regiæ*, (that is) by his Regal Protection; as in caſe of an Idiot, a *nativitate*, or *nomine deſtrictionis*, (that is) in the name of a Diſtreſs: As where his Tenant did alien, or his Widow marry without Licence, ſo where he was intitled by an Attainder of Felony. In theſe caſes the Office ſhall have Relation, as to avoid all Alienations, and mean Incumbrances to the time of the Nativity of the Idiot, Alienation, or Marriage of his Tenant, and Felony committed, but as to the mean profits to the time of the Office found onely. And therefore if the Husband and Wife be Joyntenants of a Leaſe, and the Husband kill himſelf, and this was after found by Office: this ſhall relate to the time of the murther, and ſo intitle the King to the whole, *Co.* 8. 170. 4. 126: *Stamf. pl. cap.* 13. *Kelw.* 71: *Plow.* 486. *Co.* 9. 131. Of an *Office.*

Of an Inrollment of a Deed of *Bargain* and *Sale.*

The Inrollment of a Deed of Bargain and Sale, when it is done within the ſix moneths, ſhall to moſt purpoſes relate to the time of the Delivery, or of the Date of the Deed. And it is given as a Rule, that it ſhall have relation to the time of the Delivery of the Deed, *viz.* To avoid all mean Eſtates and Charges made to a ſtranger by the Bargainor after the Delivery of the Deed before the Inrollment, but not to diveſt any eſtate lawfully ſettled in the interim in the Bargainee himſelf: And therefore if one bargain and ſell his Land by Deed indented to one, and after before the Deed is inrolled, he enter into a Statute, or grant a Rent-charge out of this Land, or make a Leaſe of the Land to another, and then the Deed is inrolled within the time; in this caſe the Relation ſhall avoid all the mean Charges and Eſtates. And if *A.* bargain and ſell his Land by Deed indented to *B.* and afterwards doth ſell the ſame Land by Deed indented to *C.* and the Deed made to *C.* is firſt inrolled, and then the Deed made to *B.* is inrolled alſo within the ſix moneths; in this caſe *B.* ſhall have the Land, and the Relation of his Inrollment ſhall make the Inrollment of the other Deed void. So if *A.* levy a Fine of the Land to *C.* yet *B.* ſhall have the Land. But if the firſt Deed made to *B.* be not inrolled within the ſix moneths, and the Deed to *C.* be inrolled within the ſix moneths, *contrà. Dyer* 218. *Curia, Mich.* 3 *Jac. B. R.*

If *A.* bargain and ſell Land to *B.* and after levy a Fine to *B.* of the ſame Land, and after within ſix moneths the Deed is inrolled; in this caſe *B.* ſhall take by the Fine, and not by the bargain and Sale. *Co.* 4. 71.

If one Joyntenant alien all his Lands in *Dale* to *A.* and before the Inrollment, the other Joyntenant die, and after the Deed is inrolled; in this caſe but a Moyety, and not the whole Land doth paſs. *Bro. Fait Inroll.* 9.

If *A.* bargain and ſell his Land to *B.* and after this *A.* doth become a Bankrupt, and the Commiſſioners ſell the Land to *C.* and after the Deed is inrolled within ſix moneths; in this caſe *B.* and not *C.* the Purchaſor ſhall have the Land. So held 4 *Car. B. R.*

Sect. 3. If *A.* bargain and ſell his Land held in *Capite* to *B.* in Fee, and *B.* dieth before Inrollment, and then the Deed is inrolled; in this caſe the Heir of *B.* ſhall be in Ward for the Land. And ſo was it held by all the Juſtices in Sir *Walter Earls* caſe, *Paſche*, 15 *Jac. Curia, Ward.* And yet in this caſe the Wife of the Bargainee ſhall

Dower. not have Dower, as was held by *Anderſon*, Chief Juſtice, and Juſtice *Walmſley.* 3 *Jac. Co. B.* And again in Sir *Robert Barkers* caſe, 6 *Jac.* And if one bargain and ſell his Land to *J. S.* and after this the Rent incur; and then the Deed is inrolled; the Bar-

Rent. gainee, and not the Bargainor, ſhall have the Rent. *Per Curiam B. R. Hill.* 11 *Car.*

If *A.* bargain and ſell his Land to *B.* in Fee, and then marry *C.* and die, and *C.* is endowed, and after the Deed is inrolled; in this caſe the Dower of the Woman ſhall be taken away by Relation, as was held in Baron *Frevils* caſe. 22 *Eliz. Co. B.*

Releaſe. If *A.* bargain and ſell Land to *B.* and *C.* in Fee, and *B.* releaſe to *C.* before the Inrollment; this Releaſe is void. 3 *Jac. Co. B.*

If *A.* Diſſeiſſor, bargain and ſell the Land diſſeiſed to *B.* in Fee, and the Diſſeiſſee doth releaſe to the Bargainor, and after the Deed is inrolled; in this caſe this Releaſe ſhall avail *B.* So held in *Mockets* caſe. 10 *Eliz.*

If *A.* bargain and ſell his Land to *B.* and *B.* before Inrollment doth bargain and ſell the Land to *C.* the firſt Deed is inrolled, and then the ſecond is inrolled; in this caſe the laſt bargain and ſale is void, and ſhall not be made good by Relation, as was held by the Court in Sir *Robert Barkers* caſe. 6 *Jac.*

Condition. If a Leaſe be made, rendring Rent on condition to re-enter for not payment, and the Leſſor bargain and ſell the Reverſion by Deed indented; and after the Deed made the Rent is arrear, and then the Deed is inrolled; in this caſe it ſhall not relate to give re-entry for the Condition broken. So was it held in Sir *Chriſtopher Hattons* caſe.

Leaſe. If *A.* bargain and ſell Land to *B.* in Tail, and *B.* before Inrollment of the Deed, doth make a Leaſe according to the Statute of 32 *H.* 8 and after the Deed is inrolled; this is a good Leaſe. So hath it been adjudged.

If

If *A.* acknowledge a Statute to *B.* and *B* extend it, and after it, and before a *Liberate*, *A.* become Bankrupt, and the Commiſſioners ſell the Land, and after the *Liberate* is had; in this caſe the *Liberate* ſhall relate to the extent, and avoid the ſale by the Commiſſioners. *B. R.* 4 *Car.* Of a *S.*

If a Feme-ſole deliver a Deed as an Eſcrow, to be afterwards delivered as her Deed, and before this delivery as her Deed, ſhe die, or take a Husband; yet if this Deed be after delivered it ſhall be good by Relation, and ſaid to take effect as *ab initio*, (*i.*) From the beginning. *Co.* 3. 35. *Plow.* 344. And for the Relation of a Deed made by a Woman-ſole, or Infant, ſee *Deed.* Yet where an Obligation is delivered as an Eſcrow, and the Obligee before the ſecond Delivery, releaſe the debt or duty, this were no bar of the Debt; for to this collateral purpoſe, it ſhall not relate. So if an Infant or a Feme-covert deliver a Deed as an Eſcrow, and before the ſecond Delivery ſhe become Sole, or he become of Age; this Deed ſhall not be made good by Relation. *Perk. Sect.* 139. *Co.* 3. 35. *Goldsb.* 163. *Sect.* 4. 4. Where a Relation ſhall be of matter of *Deed*, or not.

So if a Diſſeiſee make a Leaſe for years, and deliver it as an Eſcrow to another, and command him to enter into the Land, and deliver it as his Deed to the Leſſee, here it ſhall be ſaid to take effect by the ſecond Delivery, and ſhall not relate; for then the Leaſe would be void. So if a Feoffee on condition grant a Rent-charge out of the Land, and the Grantee bring an Annuity; this is a good Annuity between them two, but ſhall not relate to prejudice the Feoffor, if he re-enter on this condition. *Co.* 3. 35. & *Co.* 3. 29.

If one make a Feoffment of a Manor by Deed, or without Deed, and a long time after Livery, the Tenants do attorn to the Grantee: Now by this the Attornment ſhall relate to paſs the Manor *ab initio*; but not to charge the Tenants for the Arrearages in the mean time. So if one Infeoff an Infant or Feme-covert, and after give, grant, or deviſe the Land, or any thing out of it, and after the Infant or Woman diſagree to it; this ſhall relate to this purpoſe, to diſcharge the Husband or Infant from damages for the time; but not to make the Void Gift or Grant good. So if a Diſſeiſor make a Feoffment to *A.* and *B.* by Deed, and give Livery to *A.* in the name of both, and *A.* dies, and *B.* diſagrees; this ſhall relate to charge him of the mean profits, but to no other purpoſes. *Co.* 3. 29. *Co.* upon *Littl* 310. 5. Where a Relation ſhall be, of other things.

When the Wife is indowed by the Heir of her Husband, ſhe ſhall be in immediately from the Husband; and therefore if the Husband were a Diſſeiſor, and the Heir in by diſcent, yet the Diſſeiſor may enter upon the Wife: for things relating to a time long before, be as if they were done at that time. 36 *H.* 6. 7. *Littl.* 92.

See more in *Grants, Teſtaments, Forfeitures, Attainders*, and in *Crompt. Jur.* 19. 15. 7. 12. *New Book of Executors*, 76, 77.

CHAP.

CHAP. CXXXVII.

Of a Releaſe.

1. *Releaſe, what.*

A Releaſe is the giving or diſcharging of the Right or Action which a man hath or may have, or claim againſt another man, or that which is his: Or it is the conveyance of a mans Intereſt or Right which he hath unto a thing, to another that hath the Poſſeſſion thereof, or ſome Eſtate therein. And this albeit, it may be made by other words, as *Dedi*, *Conceſſi*, or *Renunciaſſe*, or ſuch like; yet it is moſt commonly and properly made by theſe words, *Remiſiſſe*, *Relaxaſſe*, *& quietum clamaſſe*, all which are much to one purpoſe. He that makes the Releaſe is ſometimes called the Releſſor, and he to whom it is made, the Releſſee. *Terms Ley. Weſt. Symb. lib.* 2. *ſect.* 466.

Releſſor, Releſſee.

2. The kindes.

There are two kindes of Releaſes like unto thoſe of Confirmation, *viz.* A Releaſe Expreſs, or in Deed, and that is a purpoſed Releaſe, when the Act done, or Deed made, is intended a Releaſe: And this is always done by writing; and then it is defined by ſome to be an Inſtrument, whereby Eſtates, Rights, Titles, Actions, and other things be ſometimes extinguiſhed, ſometimes transferred, ſometimes abridged, and ſometimes enlarged, which is after this manner. *Noverint, &c. me* A. *de* B. *remiſiſſe, relaxaſſe & omnino de me* [*vel pro me*] *& hæred meis quietum clamaſſe* C. *de* D. *totum jus, titulum & clameumque habui, habeo vel quoviſmodo in futuro habere potero de & in uno meſuagio cum pertin' in* F, *&c.* And a Releaſe implied, or in Law, and that is when the Law by Intendment and Conſtruction, and by way of conſequent doth make a Releaſe of an Act done to another purpoſe: And this is ſometimes by writing, and ſometimes without writing. Theſe Releaſes alſo are ſometimes of a bare and naked right, and ſometimes of a right accompanied with ſome Eſtate or Intereſt; and ſometimes they are of Actions real, or in Lands or Tenements, and ſometimes of Actions perſonal, of, or in Goods or Chattels, and ſometimes of Actions mixt, partly in the Realty, and partly in the Perſonalty. *Co. ſuper Littl.* 264, 265.

3. The nature and operation of it in general.

A Releaſe is much of the nature of a Confirmation, for in moſt things they agree and produce the like effects: This therefore is ſaid ſometimes to enure by way of *mitter le eſtate*, that is, by way of giving or transferring or enlargment of an Eſtate or Intereſt, and ſo doth give ſome new Intereſt or Eſtate to him to whom it is made: And ſometimes it is ſaid to enure by way of *mitter le droit* onely, that is, by way of giving, transferring, and diſcharging of a right Title or Entry unto him, to whom it is made. And ſo it doth ſometimes perfect an Eſtate that was imperfect and defeaſible before, and enure by way of Entry and Feoffment: And ſometimes alſo it doth enure to make a Conditional eſtate abſolute: And ſometimes alſo it doth work and enure by way of extinguiſhment or diſcharge: And then alſo ſometimes it doth enure by way of diſcharge or extinguiſhment, as againſt all perſons, and ſo as that whereof all perſons may take advantage: And ſometimes it doth enure onely as a Diſcharge againſt ſome perſons onely, and as to or againſt other perſons by way of *Mitter le droit*: And ſome of theſe in Deed enure by way of Extinguiſhment, for that he to whom the Releaſe is made, cannot have the thing releaſed: And ſome of them have ſome quality of ſuch Releaſes, and are ſaid to enure by way of Extinguiſhment, but in truth do not, for that he to whom the Releaſe is made, may receive and take the thing releaſed. And in ſome caſes alſo a Releaſe like a Confirmation, doth enure by way of Abridgment. But a man cannot Bar himſelf hereby of a Right that ſhall come to him hereafter; and therefore it is held, that theſe words uſed in Releaſes, [*Quæ quoviſmodo in futuro habere potero*] are to no purpoſe. *Co. ſuper Littl.* 193, 273, 277. *Co.* 1. 147. *Littl. ſect.* 606. 459. 465. 466. 446.

Lands,

Lands, Tenements and hereditaments themſelves may be given and transferred by way of releaſe, and all rights and titles to lands may be given, barred and diſcharged, by releaſe, and ſo alſo may rights and titles to goods and chattells. Alſo all actions reall, perſonall and mixt, may be given, diſcharged or extinct by releaſe; for howſoever rights and titles of entry cannot be granted by act of the party, nor any action may be granted from one man to another by act of the Law or the party, yet all theſe may be releaſed to the terre-tenant, And a right to a freehold or Inheritance, ſeigniory or rent *in preſenti* or *futuro* may be releaſed five manner of waies, and the firſt three waies without any privity at all. 1. To the Tenant of the free hold in deed or in Law. 2. To him in the remainder 3. To him in reverſion. The other two waies in reſpect of privity without any eſtate or right, as by demandant to vouchee, Donor to Donee after the Donee hath diſcontinued. *Brownl.* 1 *part* 110. 116. 149. *Co.* 10. 48 *ſuper Litt.* 268: 269. 266. 4. What things may be releaſed Or not. And how.

Alſo conditions annexed to eſtates, powers of revocation of Uſes, Warranties, Covenants, Tenures, Services, Rents, Commons, and other profits to be taken out of Lands may be diſcharged, extinguiſhed and determined by releaſe to the Tenant of the land, &c. *Bro. Releaſe in toto.*

Alſo poſſibilities of Land &c. if they be neer and common poſſibilities albeit they be not grantable over to another perſon, yet may they be releaſed to him that hath the preſent eſtate of the land. And therefore if a man poſſeſſed of a terme deviſe it to *A* for life, the remainder to *B* and his Heirs males during the terme; in this caſe albeit *B* may not grant his intereſt over yet he may releaſe it to *A*. and if *A* deviſe to *B* twenty pound when he comes to the age of twenty four years, and die; in this caſe *B* after he is of the age of twenty one years may releaſe this legacy. So a covenant to doe a future act may be releaſed before it be broken.

And it ſeems alſo the conuſee of a Statute or recogniſance may releaſe to a Feoffee of part of the Land, and ſo barr himſelf of Execution of that Land.

And if I grant to *I S* that if he doe ſuch a thing he ſhall have an annuity of twenty pound for his life; in this caſe it ſeems *I S* may releaſe this before the condition be performed. And if I make a Feoffment to *I S* to divers uſes with power to revoke it; I may releaſe this power to one that hath an eſtate of freehold in poſſeſſion, reverſion or remainder in the Land. And yet if I make a Feoffment to *I S* with proviſo that if *B* revoke, that the uſes ſhall ceaſe; in this caſe *B* cannot releaſe this pow er.

And a remote poſſibility that is altogether incertaine cannot be releaſed. And therefore if the ſonn of the Diſſeiſee releaſe to the diſſeiſor in the life time of his father; this releaſe is void. And ſo if the conuſee of a Statute releaſe his right to the land of the conuſor before execution; this releaſe is void. And ſo if a plaintiff releaſe to a Bail in the Kings Bench before Judgement given, this releaſe is void. *Co.* 10. 47. 51. 52. 5. 70. 71. *ſuper Litt.* 265. *Lit. Sect.* 446. *Co.* 1. 111. 111. *Dier.* 57. *Co.* 1. 113. 174.

So if one promiſe to pay me ten pound upon the ſurrender of my Land to him, and that if he ſhall ſell it for above fifty pound that then he ſhall pay me tenn pound more, and I releaſe this to him before he do ſell it and before I do ſurrender, in this caſe this doth not releaſ the ſecond promiſe becauſe it is not releaſable. *Adjudged Trin.* 14, *Jac. B. R.*

Alſo Debts, Legacies, and other duties may be releaſed and diſcharged thereby before or after they become due. And therefore a rent or annuity may be releaſed before the day of payment.

And ſo alſo may a debt due by obligation: Judgements, Executions, Recogniſances and the like, by apt words be diſcharged by releaſe. *See infra*

If the charge or duty grow by record, the diſcharge and releaſe thereof muſt be by record alſo. And if it grow by writing, the diſcharge and releaſe muſt be by writing alſo. *Nihil eſt magis rationi conſentaneum quam eodem modo quodque diſſolvere quo conflatum eſt.* And therefore a duty growing by a verball agreement may in ſome caſes be releaſed by word without writing. 5. How and after what manner theſe things may be releaſed.

But

But regularly lands and Tenements cannot be given, nor rights and titles to lands, and actions be diſcharged by releaſe without a Deed in writing.

Condition. Defeaſance.

A releaſe that doth enure by way of *mitter le eſtate, mitter le droit*, or extinguiſhment, may be made upon condition or with a defeaſance, ſo as the condition or defeaſance be contained in the releaſe or delivered at the ſame time with it, for no defeaſance made after can avoid the force of a releaſe made before. *Co ſuper Litt.* 274. *Perk. Sect.* 718. *Lit.* 467. *Co.* 1. 111. 21. *H.* 7. 24.

And yet a releaſe may be delivered as an eſcrow, and ſo the force of it may be ſuſpended for a time.

But a releaſe of a condition may not be made upon a condition.

Nor may a releaſe of a chattell be upon a condition ſubſequent, but it may be upon a condition precedent.

And therefore if a man releaſe a debt to another upon condition that the releſſor may have ſuch a debt owing from a third perſon to the releſſee; this is a good condition. *Curia. B. R. Hill.* 9 *Car. Barkley & Perkes* caſe.

A releaſe of all actions may be made untill a time paſt, as untill the firſt of *May* laſt, or untill the day of the date of the releaſe; and this will diſcharge all actions till then and none after. *Dier* 307. 21 *H.* 7. 24. *Co. ſuper Litt.* 274. *Sect.* 467.

But a releaſe cannot be made of a right or action for a part of an eſtate, or for a a time only, as for one year, or untill *Michaelmas* next, or the like: for a releaſe of ſuch a thing for one day or for one hour is a releaſe of it for ever.

And yet a man may releaſe his right in a part of the land. And therefore if a man be diſſeiſed of two acres, he may releaſe his right in one of them and enter into the other acre.

Alſo a releaſe in the nature of an acquittance may be of part of a debt.

And therefore if one be bound in an obligation of four hundred pound to pay two hundred pound at *Michaelmas*, and at *Chriſtmas* after the Obligee by his Deed releaſeth three hundred ninety pound parcell of the ſaid four hundred pound; this is a good releaſe for ſo much and no more. *Adjudged Barkley & Perkes* caſe. *Hil.* 9 *Car. B. R.*

6 What releaſes may be made of lands or Tenements. And what ſhal be ſaid a good releaſe in deed Or not. And by whatwords it may be made.

In every good releaſe in Deed, howſoever it enure, theſe things are requiſite.

1 That there be a good Releſſor, and a good Releſſee, and a thing to be releaſed.

2 That the deed be well ſealed, delivered &c. And if it tend and enure by way of enlargement of eſtate, then theſe things are further required to make the releaſe good.

1. When it doth enure by way of enlargement or paſſing of an eſtate.

1 He that doth make the releaſe muſt have ſuch an eſtate in himſelf as out of which ſuch an eſtate may be derived and granted to the Releſſee as is intended by the Releaſe, as if he have the reverſion in Fee of Lands, he may releaſe to a Tenant for years and thereby encreaſe his eſtate to an eſtate for life or in tail, or he may paſs his whole Fee-ſimple by the releaſe. *Dyer.* 251.

1. In reſpect of the eſtate of the releſſor. Surrender.

But if there be Leſſee for years rendring rent, and the reverſion is granted for life the remainder over in Fee, and the Grantee of the reverſion releaſe all his right to him in remainder, and then he in the remainder grant the Reverſion, and the Tenant for life releaſe to the Grantee alſo; in this caſe it ſeems both theſe releaſes are void and cannot enure as releaſes, howbeit it may be if they have words of ſurrender in them they may enure as ſurrenders. *Per Juſtice Jones.* 5 *Car. Dier idem.*

So if there be Leſſee for years, the remainder in Tail, the remainder in Fee, and the Leſſee for years being a woman doth marry with him in the remainder in Fee, and he in remainder in Tail releaſe to him in remainder in Fee; this is a void releaſe. *Adjudged Trin.* 5. *Jac. B. R. Buttlers* caſe.

So if Tenant for life releaſe to him in remainder in Fee or in Tail; it ſeems this is void and cannot enure as a releaſe

So if there be Tenant for life, the remainder in Tail, the remainder in Fee, and he in remainder in Fee releaſe to the Tenant for life; this will not increaſe his eſtate.

And if the Tenant in Tail in in this caſe releaſe to the Tenant for life, his eſtate ſhall be no longer increaſed hereby then for the life of the Tenant in Tail. *Lit. Sect.* 598. *Plow.* 556. *Co. ſuper Litt.* 345.

2. He

2. He to whom the releaſe is made muſt have ſome eſtate in poſſeſſion in deed or in law, or in reverſion in deed, in his own or anothers right of the lands whereof the releaſe is made to be as a foundation for the releaſe to ſtand upon; for a releaſe which muſt enure to enlarge an eſtate cannot work without a poſſeſſion joined with an eſtate. And therefore the releſſee muſt be leſſee for life, years, or tenant by ſtatute Merchant, Staple, Elegit, or as gardian in chivalry that doth hold the land over for the value, or at leaſt he muſt be tenant at will. And therefore if a man let his land to another for term of years to begin preſently, and after the leſſor or his heir doth releaſe to the leſſee (after his entry and being in poſſeſſion) all his right in the land; this is good to enlarge the eſtate according to the time ſet down in the releaſe. But if the releaſe be before the term begin, or after the term begin and before the leſſee have entred; (howſoever if any rent be reſerved on the leaſe it may enure and be good to extinguiſh that rent) yet it is not good to enlarge the eſtate. And yet if a tenant for 20. years in poſſeſſion make a leaſe to *B.* for 10. years, and *B.* enter and he in the reverſion releaſe to the firſt leſſee for years; this is a good releaſe to enlarge the eſtate. 2. In reſpect of the eſtate of him to whom the releaſe is made.

So if a man make a leaſe for years the remainder for life or years, and the firſt leſſee doth enter; in this caſe a releaſe to him in remainder is good to enlarge the eſtate.

So if I grant the reverſion of my tenant for life to another for life, and after releaſe to him and his heires; this is a good releaſe to enlarge the eſtate. *Co ſuper Lit.* 270. 273. 265. *Litt. Sect.* 459. *Plow.* 423. *Dier.* 4. 15 *H.* 7. 14.

So if a man make a leaſe for life or years to a feme ſole, and ſhe take a husband; and he in the reverſion releaſe to the husband and his heires; this is a good releaſe to enlarge the eſtate according to the words of the releaſe. But if the caſe be ſo that a man had an eſtate in poſſeſſion of land, and he be now out of the poſſeſſion of it, and have but a right only to it; or if he have a poſſeſſion only and no eſtate; or if he have neither eſtate nor poſſeſſion; in theſe caſes a releaſe made to ſuch a one will not availe to enlarge his eſtate. *Co. ſuper Litt.* 273.

And therefore if a man make a leaſe for life the remainder for life, and the firſt leſſee dieth, and the leſſor releaſe to him in remainder for life, before his entry; this is a good releaſe to enlarge his eſtate, for he hath an eſtate of freehold in law capable of enlargement by releaſe before entry. But if there be leſſee for life, the remainder for life, the remainder in tail, the remainder in fee, and the leſſee for life is diſſeiſed and during the poſſeſſion of the diſſeiſor he that hath right doth releaſe to one of them in the remainder, this is void. So if lands be given in tail or leaſed for life, and the donee or leſſee is diſſeiſed, and during the poſſeſſion of the diſſeiſor the donor or leſſor doth releaſe all his right to the donee or leſſee, this is void and will not enlarge his eſtate, howbeit if there be any rent reſerved on the eſtate it will extinguiſh the rent.

So if the tenant by the curteſie grant over his eſtate, and after he in reverſion doth releaſe to the tenant by the curteſie, in this caſe his releaſe is void and wil not enlarge his eſtate.

So if an Infant make a leaſe for life, and the leſſee granteth the eſtate over with warranty, and the Infant at full age doth bring a *Dum fuit infra ætatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant being the Infant doth releaſe to him and his heires, this will not enlarge his eſtate, for in truth he had no eſtate before, and that which is not cannot be enlarged.

And if leſſee for life or years, releaſe to him in remainder or reverſion, this cannot be good as a releaſe, howbeit if there be apt words it may amount to a Surrender.

And if a man have only an occupation of land as tenant at ſufferance, as when a leſſee for years doth hold over his terme, or the like; no releaſe to him can work any enlargement of eſtate, for albeit he have a poſſeſſion yet hath he no eſtate, and beſides in this caſe there is no privity: which is the third thing required in theſe releaſes, *Co. ſuper Litt.* 270. *Litt. Sect.* 451. *Litt. Sect.* 455, 456. *Co. ſuper. Litt.* 273. *Dier.* 251. *Co. ſuper Litt.* 271. *Litt. Sect.* 461.

3. In reſpect of privity.

For as in all theſe releaſes that enure by way of increaſe or paſſing an eſtate, there muſt be ſome eſtate in the releſſor and the releſſee, ſo there muſt be ſome privity in eſtate between them at the time of the releaſe made, for an eſtate without privity is not ſufficient. And therefore it muſt be, between donor and donee, leſſor and leſſee, and the like, as in the caſes before, between him in reverſion and the leſſee for life or years, tenant by ſtatute Merchant or Staple, or by Elegit or Gardian in Chivalry that keepeth the land for the value. And if tenant for life leaſe for years, and he in the reverſion and the tenant for life doe joine together and releaſe to the leſſee for years; this is a good releaſe to enlarge the eſtate. So if he in reverſion releaſe to the husband that hath an eſtate in the right of his wife only for life or years; this is a good releaſe. So if leſſee for years make a leaſe of the land but for part of the terme, the privity continueth ſtill, and therefore a releaſe to him is good to enlarge the eſtate.

But if he aſſigne over all the terme then the privity is gone, and therefore a releaſe made to him afterwards is void. And then a releaſe made to the aſſignee of the terme is good to enlarge the eſtate. And if a diſſeiſor make a leaſe for life or years, and after he and the diſſeiſee joine to gether to make a releaſe to the leſſee for life or years this is a good releaſe to enlarge the eſtate. But if the diſſeiſor in this caſe make a leaſe for life or years, and the diſſeiſee or he that hath right releaſe to the tenant for life or years; in this caſe the releaſe is void for want of privity. And if there be leſſee for years the remainder for life, and he in reverſion releaſe to the leſſee for years or him in remainder for life and his heirs all his right; this is a good releaſe to work an enlargement of eſtate. So if one make a leaſe for life, and grant the reverſion for life, and then the leſſor doth releaſe to the grantee of the reverſion and his heirs; this is a good releaſe to enlarge the eſtate of the grantee, and here is privity enough.

If *A.* be tenant for life, the remainder to *B.* in tail. the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth releaſe all his right to *B.* being in poſſeſſion; this is a good releaſe and gives the Fee-ſimple. See *Brownl.* 1 *part.* 207. *Co. ſuper Litt.* 269. *Litt. Sect.* 461. *Plow.* 541. *Co. ſuper. Litt.* 273. *Dier.* 4. *Co.* 3. 22. *Plow.* 540. 14 *H.* 7. 4. *Litt. Sect.* 518. *Co. ſuper Litt.* 273. *Bro. Releaſe.* 71.

But if *A.* make a leaſe to *B.* for life, and the leſſee maketh a leaſe for years, and after *A.* in the life time of the tenant for life maketh a releaſe to the leſſee for years, this releaſe is void and will not enlarge his eſtate for want of privity.

So if a man make a leaſe for twenty years, and the leſſee make a leaſe for ten years, and the firſt leſſor doth releaſe to the ſecond leſſee and his heirs; this releaſe is void.

So alſo if the donee in taile make a leaſe for his own life, and the donor releaſe to the leſſee and his heirs; this releaſe is void.

So alſo if the donee in taile make a leaſe for his own life, and after the donor releaſe to the donee and his heirs; it ſeems this is not a good releaſe.

Alſo one Jointenant or coparcener may releaſe to another and thereby transferre all his Eſtate and give the whole intereſt unto his companion; and this is a good releaſe to paſs all his or her part of the land.

And if there be three Jointenants in fee and they make a leaſe for life, and after two of them releaſe all their right in the land to the third; this is a good releaſe.

So if one make a leaſe for life to another, and after grant the reverſion to ſeven, and the tenant for life doth atturn, and after four of the ſeven releaſe all their right to the other three, and after one of the three releaſe to the other two; theſe are good releaſes.

So if a leaſe for years be made to two, to begin at a day to come, a releaſe by one of them to the other is good to give all the terme and all the land to the releſſee.

But it ſeems one tenant in common cannot releaſe to another tenant in common. *Co. ſuper Lit.* 273. *Litt. Sect.* 516. *Bro. Releaſe.* 77. *Perk. Sect.* 84. 10 *Ed.* 4. 3.

The

The fourth thing that is required in ſuch a releaſe is ſufficient words in law not only to make a releaſe, (which is required in all releaſes) but alſo to raiſe and create a new eſtate. For this therefore know that all releaſes (of what kind ſoever) are commonly made by theſe words, *Remiſiſſe, Relaxaſſe, & quietum clamaſſe*, as being the moſt ancient and ſignificant words for this purpoſe. And amongſt theſe the word Releaſe is the moſt effectuall word, as that which doth include the other two, and as that which is the proper and peculiar word for this kind of conveyance. But there are other words alſo by which a releaſe may be made, as *Renunciare, Acquietare, &c.* And therefore it is held that if one have common in anothers land, and he by deed releaſe it to him thus: *Renuntio Communiam meam &c.* this is a good releaſe. And if the leſſor doe but grant to his leſſee for life that he ſhall be diſcharged of the rent; this is a good releaſe of the rent. And it is a rule, That by what words a debt or duty may be created, by words of a contrary ſignification it may be releaſed. And therefore if one doe acknowledge himſelf to be ſatisfied and diſcharged a debt, this is a good releaſe of the debt. And for words to raiſe the eſtate it is uſuall and moſt ſafe to ſpecifie in the deed what eſtate he to whom the releaſe is made ſhall have; and in moſt caſes this is needfull: for it is generally true, that when a releaſe doth enure by way of enlargment of eſtate no inheritance in feeſimple or fee taile can paſs without apt words of inheritance. And therefore if I make a leaſe of land to another for his life, and after I releaſe to him all my right without more ſaying in the releaſe, hereby his eſtate is not enlarged. But if I releaſe to him and his heirs; by this he hath a fee-ſimple. And if I releaſe to him and the heirs of his body; by this he hath an eſtate taile. But where a releaſe worketh by way of *mittere le eſtate* there in ſome caſes there needs not any words of inheritance, as in caſes where releaſes are made between Jointenants or coparceners, as where a joint eſtate is made to the husband and wife and a third perſon and their heires, and the third perſon doth releaſe all his right to the husband alone, or to the wife alone. So if there be three Jointenants, and one of them doth releaſe to one of the other two; in all theſe and ſuch like caſes there needs not any limitation of the eſtate, for the releaſe is good without it, *Co. ſuper. Litt.* 273. 264. 301. 9 *H.* 6: 35. *Dier.* 116 *Litt. Sect.* 544. *Co. ſuper. Litt.* 264. *Dier.* 307. *Co.* 9. 52. *Co. ſuper Litt.* 273. *Litt. Sect.* 465. 468, 469.

4. In reſpect of the words whereby it is made.

In every good releaſe in deed that doth tend and enure to give diſcharge or extinguiſh any right or title of lands it is alſo further requiſite, *Litt. Sect.* 466. *Co. ſuper. Litt.* 265. *Co.* 5. 70. 71. 1. 112. 8. 151.

2. When it doth enure by way of paſſing & extinguiſhment of a right or title only.

1. That he that doth make it hath at the time of the releaſe made ſome right or title to releaſe.

1. In reſpect of the eſtate of the releſſor.

As where one doth diſſeiſe me of land, and I releaſe to him all my right in the land this is a good releaſe. So if one diſſeiſe my tenant for life, and I (being the next in remainder or reverſion in fee) do releaſe to him that did make the diſſeiſin, this is a good releaſe. So if the husband make a leaſe for life, and then take a wife and dieth, and the wife releaſe her dower to him in reverſion; this is a good releaſe. And ſo alſo if after the mariage a man make a leaſe for life the remainder in fee, and ſhe releaſe all her right to him in remainder in fee, or to him in reverſion; this is a good releaſe and will barr her for ever.

And therefore if the Releſſor have only a poſſibility of a right, or a right happen to come to him after the releaſe, this is not ſufficient to make the releaſe good. And therefore if the father be diſſeiſed, and the ſon before the fathers death releaſe all his right to the diſſeiſor, and after the father dieth, ſo that the right doth deſcend; this is no good releaſe to bar the Releſſor of his right. So if there be Grandfather, father and ſon, and the father diſſeiſe the Grandfather, and make a feoffment, and the ſon releaſe in the lifetime of his father, and after the father and grandfather die; this releaſe in this caſe will not bar him. So if a leaſe be made for life, the remainder to the right heirs of *I. S.* and the leſſee is diſſeiſed, and the eldeſt ſon of *I. S.* living, his father doth releaſe to the diſſeiſor; this releaſe is void. So if the conuſee of a ſtature &c. doe releaſe to the conuſor all his right in the land; this is void, and he may ſue execution after notwithſtanding. *Litt. Sect.* 446. *Co.* 10. 47, 42. *ſuper. Lit.* 265. *Co.* 10. 57. *Co.* 5. 70.

Or if the Releſſor have only a power, this is not ſufficient to make the releaſe good.

And therefore if a man by his will deviſe that his executors ſhall ſell his land, and dieth, and the executors releaſe all their right and title in the land to the heir; this releaſe is void. *Litt. Sect* 446. *Co.* 10. 47. 42. *ſuper Litt.* 265. *Co.* 10. 57. *Co.* 5. 70. *Co. ſuper Litt.* 265.

2. In reſpect of the eſtate of him to whom the releaſe is made,

2. In all caſes of a releaſe of a bare right of a Freehold in lands or tenements, he to whom the releaſe is made muſt at the time of the making thereof in any caſe have the Freehold in deed or in law in poſſeſſion or ſome ſtate in remainder or reverſion in deed (and not in right only) in fee-ſimple, fee-tail, or for life of the lands whereof the releaſe is made; for rights of entry, and actions, and the like, are not to be transferred to ſtrangers, but are thus to be releaſed, and ſuch releaſes are good. As if the diſſeiſee releaſe to the diſſeiſor himſelf who hath the freehold in deed, or to the heir of the diſſeiſor before his entry, who hath the freehold in law, or to the leſſee for life of the diſſeiſor; theſe releaſes are good. So if a diſſeiſor make a leaſe to *A.* and his heirs during the life of *B.* and *A.* die, and the diſſeiſee releaſe to his heir before his entry; this is a good releaſe. So if a Fine *ſur conuſance de droit come ceo &c.* or *ſur conuſance de droit* only (which is a feoffment on record) be levied, or if tenant for life by agreement of him in the reverſion ſurrender to him in the reverſion, or if a man doe bargain and ſell his land by deed indented and inrolled, or uſes are raiſed by covenant on good conſiderations; in all theſe caſes the conuſee, him in reverſion, bargainee, and *ceſtuy que uſe*, have a freehold in law in them before entry.

And therefore a releaſe to them (of the right of the land by him that hath it, is good and will bar the Releſſor. But otherwiſe it is in caſes of Exchange, Partition, or upon Livery within the view, for in theſe caſes no releaſe is good until an actuall entry made, for till then they have neither freehold in right nor law. So if a diſſeiſor make a gift in tail, or leaſe for life or years of the land, and keep the reverſion, and then the diſſeiſee or his heir releaſe to the diſſeiſor all his right: this is a good releaſe to bar his right for ever. So if the heir of the diſſeiſor be diſſeiſed, and the firſt diſſeiſee doe after releaſe to him all his right; this is a good releaſe to bar him. So if a donee in tail diſcontinue in fee, and the donor releaſe to the diſcontinuee and die; this is a good releaſe againſt the donor. So if the donee in tail be diſſeiſed, and after the donor releaſe to the donee all his right: this is good, but in this caſe nothing of the reverſion will paſs by the releaſe, for the donee had then nothing but a right.

Extinguiſhment.

But if any rent be reſerved on the eſtate tail, the rent is gone by the releaſe. So if a leaſe be made to one for life rendring rent, and the leſſee is diſſeiſed, and the leſſor releaſe to the leſſee and his heirs all his right; in this caſe albeit the rent be extinct, yet nothing of the right of the reverſion doth paſs. And yet if a woman that hath right of dower releaſe to the guardian in Chivalry: this is a good releaſe, and her right or title of dower is gone. But if a diſſeiſor make a leaſe for years, and the diſſeiſee releaſe to the leſſee for years; this releaſe is void becauſe he hath no freehold. But if he make a leaſe for life, and the diſſeiſee releaſe to the leſſee for life, this is a good releaſe.

So alſo a releaſe to the diſſeiſor after the leaſe for years made is good. And if leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor make a leaſe for years, and the firſt leſſee releaſe to him, this is a good releaſe. Alſo in ſome caſes a releaſe made to one that hath neither freehold indeed, nor freehold in law, is good when he hath an eſtate in reverſion or remainder, as in the caſe before, where a releaſe is made by the diſſeiſee to the diſſeiſor after he hath made an eſtate for life. So if the demandant in a reall action releaſe to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other beſides the demandant, it is void. So if the tenant in a reall action alien hanging the *precipe quod reddat* againſt him, and after alienation the plaintiff releaſe all his right in the land to him, this is a good releaſe. So if a diſſeiſor make a leaſe for life, the remainder

to

remainder to another for life, the remainder to a third in taile, the remainder to a fourth in fee, and the diſſeiſee releaſe to either of them in remainder; this is a good releaſe. But if in this caſe tenant for life be diſſeiſed, and after he that hath right (the poſſeſſion being in the diſſeiſor) doth releaſe to either of them in remainder; this is a void releaſe. *Brownlows.* 2 *part.* 254. But in all the caſes of a releaſe of a bare right to him that hath an eſtate of a freehold in deed orin law, generally there needs no privity to make the releaſe good: as in the caſe before of a releaſe made to the tenant for life of the diſſeiſor, and them that follow. For if tenant for life make a leaſe to another for life of the leſſee, the remainder over in fee, and the firſt leſſor releaſe all his right to him to whom the tenant made the leaſe for life; this is a good releaſe and a perpetuall bar, albeit the releaſe be not to him and his heirs. And ſo it is in caſe of a reverſion. *Co. ſuper Litt.* 267. *Co. ſuper Lit.* 266 275. *Lit. Sect.* 448 1 *H.* 6. 4. *Dier.* 302. *Litt. Sect* 449. *Co. ſuper Litt.* 266. *Litt. Sect.* 455, 456. *Co. ſuper Litt.* 265. *Litt. Sect:* 448, 449 450. 451. *Co.* 8. 151. *Co. ſuper. Litt.* 275. *Lit. Sect.* 470. 471. *Co.* 10. 48. 3. In reſpect of privity.

If leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor make a leaſe for years, and the leſſee that is ouſted doth releaſe to the leſſee of the diſſeiſor; this is a good releaſe. And yet if the diſſeiſee doe releaſe to the leſſee for years of the diſſeiſor; this is void.

If leſſee for a thouſaad years be ouſted by the leſſor, and he make a leaſe for two years, and the leſſee for a thouſand years releaſe unto him; this is a good releaſe. But if a leſſor diſſeiſe his leſſee for life, and make a leaſe for a thouſand years, and the leſſee for life releaſe to this leſſee of a thouſand years; this releaſe is void.

If one be diſſeiſed, and after another doth diſſeiſe him, and the diſſeiſee releaſe to the laſt diſſeiſor; this is a good releaſe. So if *A.* diſſeiſe *B.* who infeoffeth *C.* with warranty, who infeoffeth *D.* with warranty, and *E.* diſſeiſeth *D.* to whom *B.* the firſt diſſeiſee releaſeth; this is a good releaſe, and doth defeat all the mean eſtates and warranties. So if my diſſeiſor leaſe for life, and the leſſee for life alien in fee, and I releaſe to the alienee all my right, &c. this is a good releaſe and will bar me of my entry: but if my entry be gone, as if I leaſe for life, and my leſſee be diſſeiſed and that diſſeiſor is diſſeiſed, and I releaſe to the ſecond diſſeiſor; in this caſe the firſt diſſeiſor may enter upon the ſecond. So if my diſſeiſor in the caſe aforeſaid make a leaſe for life, and the leſſee for life maketh a feoffment to two, and I releaſe to one of the feoffees; this is a good releaſe and will bar me and my diſſeiſor alſo. So if tenant for life let the land to another for the life of the leſſee, the remainder to another in fee, and the leſſor releaſe to his tenant for life; this is a good releaſe. *Co. ſuper Litt.* 277. *Litt. Sect.* 473. 470, 471. 478.

If one that hath a ſon within age be diſſeiſed and die, and the diſſeiſor die ſeiſed, and the land deſcend to his heir, and a ſtranger abate, to whom the ſon when he comes of age doth releaſe; this is a good releaſe. So if one be diſſeiſed by an infant which doth alien in fee, and the alienee die ſeiſed, and his heir entreth, the diſſeiſor being within age, and the diſſeiſee releaſe to the heir of the alience; this is a good releaſe. But where an inheritance or an eſtate for life is releaſed to one that is but tenant for years, the releaſe is not good without privity. And therefore if tenant for life or in fee releaſe to the leſſee for years of his diſſeiſor; this is not good. But the releaſe of a term of years to the leſſee for years of him that doth eject him is good enough without privity, as in the caſe before. 9 *H.* 6. 43. *Co.* 10. 48.

But here note that in caſes of a void releaſe of a right to an inheritance or freehold where there is a warranty contained in the deed, the warranty may be good, and be uſed by way of rebutter, albeit the releaſe be void. As if the ſon of the diſſeiſee releaſe with warranty in the life time of his father, or there be grandfather, father and ſon, and the father diſſeiſe the grandfather, and make a leaſe with warranty and die, in both theſe caſes albeit the ſon be not barred by the releaſe, yet he is barred by the warranty. *Co. ſuper. Litt.* 265. Warranty.

4. Such words as will make a good releaſe in the caſes of releaſes that enure by way of enlargment of eſtate, will make a good releaſe in theſe caſes. And note that this kinde of releaſe is good without any limitation or ſpecifying of the eſtate, for 4. In reſpect of the words whereby it is made.

for by a releaſe of all a mans right without ſaying To have and to hold to him and his Heirs, &c. in all the caſes before, he that makes the releaſe is barred of his right for ever, for if I be ſeiſed of an eſtate in Fee by wrong, and he that hath right releaſe to me all his right, albeit it be but for one houre, yet this is a good releaſe for ever. *Co. ſuper Litt. ſect.* 467.

7. What Releaſes may be made of other things. And what ſhall be ſaid a good Releaſe in Deed of ſuch things. Or not. And by what words. Of a ſeigniory, Rent-ſervice, common, or the like.

If there be Lord and Tenant, and the Lord releaſe to the Tenant all his right that he hath in the Seigniory, or all his right that he hath in the Land, &c. this is a good releaſe to extinguiſh the ſeigniory. And in this caſe there need no words of inheritance or limitation, for by releaſe of all the right in the ſeigniory; the ſame is extinct for ever, without ſaying [to him and his heirs]. And yet in this caſe the Lord may by apt words releaſe his Seigniory to the Tenant only in Tail, or for life, and it ſhall be good ſo long.

But if a Lord grant to his Tenant that he ſhall doe his ſuit to another Manor of the Lords, or that the Tenant ſhall give him yearly twelve pence for his ſuit; this grant will not extinguiſh and determine the ſervices or Tenure. *Lit. ſect.* 480. *Co. ſuper Lit.* 280. 305. *Perk. ſect.* 70.

If there be Lord and Tenant, and the Tenant be diſſeiſed, and after the Lord releaſe all his right, &c. to the Tenant; by this releaſe the ſervice or ſeigniory is extinct, for albeit a right regularly cannot be releaſed to him that hath but a bare right, yet a ſeigniory may be releaſed and extinct to him that hath but a bare right in the Land.

But if the Tenant make a Feoffment in Fee, and then the Lord releaſe all his right, &c. to the Tenant; this is not good to extinguiſh the ſeigniory or ſervices, but it will diſcharge all the arrearages. *Lit. ſect.* 457. *Co.* 10. 48. *ſuper Lit.* 268.

If a rent-charge, common of paſture, or any other profit apprender be iſſuing out of my Land, and he that hath it doth releaſe it to me; this is a good releaſe and will extinguiſh it. But if I be diſſeiſed of the Land, and have but a right at the time of the releaſe made: the releaſe is not good, as it is in the caſe of a rent-ſervice and a ſeigniory.

But if lands be given to me in Tail, or for life rendring rent, and I be diſſeiſed, and after the Donor releaſe to me all his right in the Land; this is a good releaſe and ſhall extinguiſh the rent. So if in this caſe where I am Tenant in Tail, and I make a Feoffment in Fee rendring rent, and after I releaſe to the Feoffee: this is a good releaſe and hereby the rent is extinct. And if two coparceners be of a rent, and one of them take the Terre-Tenant to husband, and after either of them releaſe; theſe releaſes will be good. *Lit. ſect.* 480. 536. 537. *Co. ſuper Lit.* 305. *Lit. ſect.* 455. 456. *Co. ſuper Lit.* 273.

If one diſſeiſe me of land, and then grant a rent charge out of the Land, and I reciting the ſame grant releaſe to the Grantee; this releaſe it ſeems is good, and will bar me ſo as after my reentry I ſhall not be able to avoid it. *Lit. ſect.* 527. *Co. ſuper Lit.* 300.

Of an Advowſon, &c.

If two have the grant of the next advowſon or avoidance of a Church; before it be void one of them may releaſe to the other, but afterwards they cannot; *Co. ſuper Lit.* 270.

Of a Condition.

If *A* make a Feoffment in Fee, gift in Tail, leaſe for life or years to *B* on condition that upon ſuch a contingent it ſhall be void; in this caſe *A* may before the condition broken releaſe all his right in the Land, or releaſe the condition to *B*; and this will be good to make the eſtate abſolute and to diſcharge the condition. So if a Feoffee on condition make a gift in Tail or leaſe for life, and after the Feoffor releaſe to the Donee or Leſſee; this is a good releaſe to diſcharge the condition. So if a copyholder ſurrender to the uſe of another on condition, and this is preſented to be without condition, and after the ſurrendror doth releaſe to him to whoſe uſe the ſurrender was made all his right, &c. this is a good releaſe and doth extinguiſh the condition.

But if a Diſſeiſor make a Feoffment on condition, and the Diſſeiſee releaſe to the Feoffee on condition; howſoever this doth bar the right of the Diſſeiſee, yet it doth not diſcharge the condition. *Co.* 1. 112. *Perk. ſect.* 823. 764.

Where

Where a power or authority is ſuch that doth reſpect the benefit of the releſſor, as in the uſuall caſes of power of revocation of uſes, when the Feoffor, &c. hath power to alter, change, determine or revoke the uſes being intended for his benefit, and he releaſe to any one that hath a freehold in poſſeſſion, reverſion, or remainder, by the former limitation: this is a good releaſe and doth extinguiſh the power, and make the eſtates that were before defeaſible abſolute, and it doth ſeclude him from any power of alteration or revocation. But if the power be collaterall, or the uſe of a ſtranger, and nothing to the benefit of him that makes the releaſe: as if *A* make a Feoffment to *B* to divers uſes; provided that *B* ſhall revoke the uſes, and *B* releaſe to any one of them that hath a uſe, this doth not extinguiſh the power, as in caſe where the power is given to *A*, and *A* doth releaſe it. *Co.* 1. 112. 113. 173. 174. Of a power of revocation.

If a Feoffment be made with warranty, and the Feoffee releaſe the warranty; this doth extinct it. And ſo it is of other warranties. But if Tenant in Tail releaſe the warranty annexed to his eſtate Tail, this doth not extinguiſh this warranty. Of a warranty.

Any man may releaſe any debt or duty due to himſelf. Alſo a man may diſcharge or releaſe any thing due, or any wrong done to his wife before or after the marriage. And therefore if a Treſpaſs were done, or a promiſe were made to my wife before the marriage; I may at any time during the marriage releaſe this. So if any wrong be done, or obligation, ſtatute, or promiſe made to her alone; or to her and me together at any time during the marriage; I alone may releaſe and diſcharge this. Of debts and other duties perſonall.

1 In reſpect of the perſons.

Husband and wife.

And if my wife be an Executrix to any other man, I may releaſe any debt or duty due to the teſtator. *See Brownlows* 1. *part* 15. 19. *Bro. Releaſe* 88. 21 *H.* 7. 29. *Co.* 5. 27.

And if a Legacy be given to a woman ſole to be paid at *Michaelmas* next, and I marry with her, and I releaſe the legacy before the day: it ſeems by this the legacy is gone. *Per. ch. Juſtice B.* R. *Mich.* 17. *Ja.*

An Infant Executor may releaſe a debt duly paid unto him of the teſtators debt. *Co.* 5. 27. Infant.

But if he releaſe that which he doth not receive, it is a void releaſe. And regularly the releaſe of an infant is void.

An Executor before probate of the Will may releaſe a debt or duty due to the teſtator; and this releaſe is good to bar him. *Co.* 5. 27. 9. 39,

2 In reſpect of the time.

A future or contingent promiſe may be releaſed and diſcharged before the contingent happen. A debt on an obligation, or rent may alſo be releaſed before the day of payment as well as after, but not by the ſame words. And therefore if one promiſe to *I S* that upon the ſurrender of *I S* he will pay him an hundred and ten pound, and after the promiſe, and before the ſurrender he releaſe this debt; this doth diſcharge the Debt. But if the promiſe be that if the ſurrendree ſhall ſell the land, and ſhall have five hundred pound, that then he ſhall pay to the ſurrendror an hundred pound more, and the ſurrendror before ſale releaſe this ſum; this is no diſcharge of it; And yet a releaſe of the promiſe is a diſcharge of it. And if *A* promiſe to me that if *I S* doe not pay to me an hundred pound 1 *Octobris*, that he doth owe me, that *A* will pay me the hundred pound, 10 *Novembris*, and I 10 *Septembris* releaſe to him this debt, or all actions and demands; in this caſe this releaſe is not good to diſcharge this promiſe. But by a releaſe of the promiſe, the ſame is diſcharged. *Trin.* 14. *Jac. in Eltons* caſe. *Hil.* 16 *Jac. B.R. Briſcoe verſus Heirs.*

If a man releaſe to another all actions, and doe not ſay further which he hath againſt him; this is as good a releaſe as if theſe words were inſerted. *Quod neceſſario ſub intelligitur non deeſt. Bro. Releaſe* 29. Of actions.

And all theſe releaſes muſt be made by apt words, and ſuch as law ſhall judge ſufficient for that purpoſe. *Co.* 9. 53.

And in all caſes care muſt be had there be no miſtake, for miſtakes will make releaſes and confirmations void as well as other grants

And

And therefore if *A* make a releaſe to *B* in this manner: *Noveritis, &c. me* A *de* B *remiſiſſe &c.* B *omnes actiones quas idem* B *habet verſus*, A, whereas it ſhould be *quas idem* A *habet verſus* B; this releaſe is void. *See more in Brownlows Rep. 2 part. 215. Bro. Releaſe 56. 58,*

8. What ſhall be ſaid a Releaſe in Law. Or not. And how.

If there be Lord and Tenant, and the Lord purchaſe the Tenancy; by this means the ſervices are releaſed and extinct in Law.

And if the Lord diſſeiſe his Tenant, and make a Feoffment in Fee by deed or without deed; this is a releaſe in Law of the ſeigniory. *Co. ſuper Litt. 264.*

Of a ſeigniory

If a diſſeiſee diſſeiſe the heir of the deiſſeiſor, and make a Feoffment with or without a deed; this is a releaſe in fee in Law of the right.

Of a right to land.

And if he make a leaſe for life, this is a releaſe in Law of the right ſo long as the leaſe doth laſt. *Co. idem.*

Of a right of action. Executor.

If a creditor, as an Obligee, or the like, make a debtor, as the Obligor, &c, his Executor; by this means the action is releaſed by act of Law, and yet the duty remains ſtill, for the Executor may retain ſo much of the goods of the Teſtator. And if the creditor be a woman, and ſhe marry with the debtor; by this the debt is releaſed in Law. And if there be two Obligees or debtees, and one of them being a woman, is married to the Obligor; this is a releaſe in Law of the debt, albeit the Creditor be an Infant. *See more in Brownlows Rep. 1 part 64. 73. Co. ſuper Litt. 264. 8 E. 4. 3. 21 E. 4. 2.*

But if there be a woman *Executrix* to the debtee, and ſhe take the debtor to husband; this is no releaſe in Law. *M. 30. & 31. El. B. R. Adjudged.*

And if an Obligor be made Adminiſtrator of the goods and chattels of the Obligee; this is no releaſe in Law. *Co. 8. 136.*

9 The force and virtue of it. And how it ſhall enure and be conſtrued and taken. 1 In reſpect of the perſons. And where a releaſe made by one ſhall bind another. And where not. And where a releaſe made to one ſhal enure to others. Or not. Executors.

Where divers joyn in any ſuit or action to recover any perſonall thing of which they are to have the joynt benefit or intereſt when the law doth not compell them to joyn, there the releaſe of one of them ſhall bar all the reſt. And therefore if two men joyn in an action of Debt, Treſpas, or the like, and one of them alone doth releaſe to the defendant; this is a bar to the other plaintiffs alſo. So if a ſtatute or an Obligation be made to two or more, and one of them releaſe it to the Conuſor or Obligor, this is a diſcharge of the whole duty, and a bar to the reſt, ſo that they can make no uſe of the Statute or Obligation. But if divers be charged in any action and they for the diſcharge of themſelves only joyn in a Suit or action, where alſo they can doe no otherwiſe being compelled by law to joyn: in this caſe the releaſe of one of them ſhall not hurt the others. And therefore if divers joyn in a writ of Error, Attaint, or *Audita querela*, and one of them releaſe to the defendant in the writ, this will not bar the reſt of their remedy, but they may goe on in their ſuit notwithſtanding. *Co. 6. 25. 5. 22. Bro. Releaſe 84. 94. ſtat. 23 H. 8. ch. 3.*

If there be two or more Executors and one of them alone releaſe a debt or duty to the teſtator before judgement had in a Suit had by all the Executors againſt the Debtor, this will bar all the reſt. But otherwiſe it ſeems it is after judgement had. 16. *H.* 7. 4.

If a writ of ward be brought by two, and one of them releaſe, this ſhall not bar his companion, but ſhall enure to his benefit, for hereby he ſhall have the whole ward. *Co. ſuper Lit.* 205.

A releaſe made to the Tenant in Tail, or for life of the right to the land, ſhall avail and enure to him that hath a reverſion or remainder in deed. And ſo *é converſo.* A releaſe made to him that hath a remainder or reverſion will avail and enure to the benefit of him that hath the eſtate tail for life, or years precedent. As if a Diſſeiſor make a leaſe for life, and the Diſſeiſee releaſe to the Tenant for life, this ſhall enure to the Diſſeiſor. So if he or a Tenant for life make a leaſe for life, the remainder for life, the remainder in Tail, the remainder in Fee, and the Diſſeiſee or firſt Leſſor doth releaſe all his right to any one of them in remainder, this ſhall enure unto, and benefit all the reſt. And if the husband make a leaſe of his wives Land to one for life, the remainder to another in Fee, and the wife after his death doth releaſe all her right in the land to him in remainder: this ſhall enure to the Leſſee for life. *Lit. Sect.* 452. 470. *Co ſuper Litt.* 275. 290. 267. 268. *Co.* 8. 151.

If

If a diſſeiſor make a leaſe for life, and the diſſeiſee releaſe all his right to the tenant for life; this ſhall enure to the benefit of the diſſeiſor. But if the diſſeiſee releaſe no more to the tenant for life but all actions; this releaſe will not benefit him in remainder or reverſion after the death of the tenant for life. *Co. ſuper. Litt.* 275.

If a diſſeiſor make a feoffment to two in fee, and the diſſeiſee releaſe to one of the feoffees, this ſhall enure to both. *Litt. Sect.* 472.

If tenant in tail be diſſeiſed by two, and he releaſe to one of them; this ſhall enure to both.

But if the Kings tenant be diſſeiſed by two, and he releaſe to one of them; this ſhall not enure to the other. So if two jointenants make a leaſe for life, and then diſſeiſe the tenant for life, and he releaſe to one of them; in this caſe his companion ſhall have no benefit by it. *Co. ſuper. Litt.* 276.

If tenant in fee ſimple be diſſeiſed by two, or two doe abate or intrude, and he doth releaſe to one of them; the other ſhall have no benefit by this. But if tenant for life doe after a diſſeiſin done to him releaſe to one of the diſſeiſors; this ſhal enure to both. *Litt. Sect.* 472, 522.

And if two diſſeiſors be, and they make a leaſe for life or years, & after the diſſeiſee doth releaſe to one of the diſſeiſors, this ſhall enure to them both, and to the benefit of the leſſee for life alſo. *Co. ſuper. Litt.* 276.

And if leſſee for years be ouſted, and he in reverſion diſſeiſed; and the leſſee releaſe to the diſſeiſor; the term of years is hereby extinct, and the diſſeiſee may take advantage of it and enter preſently.

But if two jointenants in fee be diſſeiſed by two diſſeiſors, and one of the diſſeiſees releaſe to one of the diſſeiſors all his right; this ſhall enure to the other, for this extendeth but to a moity.

If a releaſe be made by a woman of her dower to the guardian in Chivalry, this ſhall enure to the heir, and he may take advantage of it. *Co. ſuper. Litt.* 266.

If tenant for life be diſſeiſed by two, and he in the reverſion and the tenant for life join in a releaſe to one of the diſſeiſors; this ſhall not enure to the other. But if they doe ſeverally releaſe their ſeverall rights, their ſeverall releaſes ſhall enure to both the diſſeiſors. *Co. ſuper. Litt.* 276.

If mortgagee upon condition after the condition broken be diſſeiſed by two, and the mortgagor that hath the title of entry doth releaſe to the one diſſeiſor; this ſhal enure to both.

And like law is for an entry for mortmain, or a conſent to raviſhment *Co. idem.* &c.

If there be Lord and two jointenants, and the Lord releaſe to one of them; this ſhall avail his companion. *Co. ſuper. Litt.* 269.

If tenant in fee-ſimple make a feoffment in fee, and after the Lord releaſe to the feoffor, this ſhall not enure to the feoffee to extinguiſh the ſeigniory. But if he releaſe to the feoffee, this ſhall enure to the feoffor to extinguiſh the ſeigniory.

If there be lord and tenant, and the tenant make a leaſe for life, the remainder in fee, and the Lord releaſe to the tenant for life; the rent is hereby wholly extinguiſhed, and he in remainder ſhall take advantage of it; as when the heir of a diſſeiſor is diſſeiſed, and the diſſeiſor makes a leaſe for life, the remainder in fee, and the firſt diſſeiſee doth releaſe to the tenant for life; this ſhall enure by way of extinguiſhment to him in remainder, *viz.* to the leſſee for life firſt, and after to him in remainder. *Co. ſuper. Litt.* 279.

If two tenants in common of land grant a rent of forty ſhillings out of it, and the grantee releaſe to one of them; this ſhall not enure to the other. But if one be tenant for life of lands the reverſion in fee to another, and they join in the grant of a rent out of the lands, and the grantee releaſe either to the tenant for life, or to him in reverſion; this ſhall enure to the other and extinct the whole rent. *Co. ſuper. Litt.* 267.

If two men gain an advowſon by uſurpation, and the right Patron releaſe to one of them; this releaſe ſhall enure to them both. *Co. ſuper Litt.* 276.

If two be bound jointly and ſeverally in any obligation, or other eſpecialty, and the obligee, &c. releaſe to one of them; this ſhall enure to diſcharge the other alſo if it be a good releaſe as to him that makes it.

But otherwiſe it is in caſe of a releaſe made by the King. *Co.* 5. 59 *ſuper Litt.* 232. *Litt. Sect.* 376.

Prerogative. And If two do a treſpaſs to another together, and he to whom it is made doth releaſe it to one of them; this ſhall enure to diſcharge the other.

To husband & wife. If husband and wife, and *I. S.* purchaſe to them and the heirs of the husband, and after *I. S.* releaſe all his right in the land to the husband; the wife ſhall have no benefit by this, but it ſhall enure to the husband alone *Dier.* 319. *Co. ſuper. Litt.* 273 276. 14 *H.* 8. 6.

And if there be two women joint diſſeiſereſſes, and the one take a husband, and the diſſeiſee releaſe to the other; in this caſe the husband and wife ſhall take no benefit by this.

And if the diſſeiſee releaſe to the husband; this ſhall enure to him and his wife and the other woman.

And if one that hath a rent out of my wives land releaſe it to me and my heirs; this ſhall enure by way of extinguiſhment, and my wife will have advantage of it. And yet if the words be [grant and releaſe] the rent to the husband and his heirs; in this caſe the husband may take as a grant if he will.

Note. But here note in all theſe caſes of releaſes, when one man will take advantage of a releaſe made to another, he muſt have the releaſe to ſhew and plead. *Co. ſuper. Litt.* 232.

If I bee diſſeiſed, and I releaſe to the diſſeiſor all actions I have or may have againſt him; this is but perſonall, and ſhall not be expounded to bar my heir after my death of his remedy, neither will it bar me of my remedy againſt his heir after his death. *Co* 10. 51. 22 *H.* 6. 1.

So if I deliver goods to another, and afterwards I releaſe to him all actions, and then he die; by this I am not barred ſo, but I may ſue his executors.

See more in *Confirmation, chap* 18. *Numb.* 7.

2. In reſpect of the thing releaſed. Of all actions. A releaſe of all actions without any more words, is better then a releaſe of all actions reall only, or a releaſe of all actions perſonall onely, for by a releaſe of actions, or a releaſe of all manner of actions, without more words, are releaſed and diſcharged all reall, perſonall, and mixt actions then depending, and all cauſes of ſuit for any reall or perſonall thing: as Appeals for the death of an anceſtor, conſpiracies, ſuits by *Scire facias* to have execution of a Judgement, detinue for charters. *Co.* 8. 153. 5. 28. 70. *Kelw.* 113, *Co. ſuper. Litt.* 286. 290. 292. 289. *Lit. ſect.* 492. 505, 506. 512, 513. *Broo. ſtat.* 39.

And if two conſpire to indite me, and I releaſe to them all actions, and after they goe on with their conſpiracy; by this releaſe I am barred to doe any thing againſt them.

By this releaſe alſo of all actions, a debt due to be paid upon a ſtatute or an obligation at a day to come, albeit the releaſe be before the day is diſcharged, and by this alſo the ſtatute it ſelf if it be at any time before execution is diſcharged.

And if one be to pay forty pound at four days, and ſome of the days are paſt, and ſome to come, and the debtee make ſuch a releaſe, by this the whole debt is diſcharged. See more *Brownlows.* 1. *part.* 84. 80.

Alſo in a *Scire facias* upon a Fine or a Judgement, this releaſe is a good plea in bar.

But this releaſe of all actions will not diſcharge Executions, or bar a man of taking out of Executions, except it be where it muſt bee done by *Scire facias.* Neither will it diſcharge or bar a man of ſuits by *Audita Querela,* or writ of Error to reverſe an erroneous judgement, neither will it diſcharge covenants before they be broken, nor will it diſcharge any thing for which the releſſor had no cauſe of action at the time of the releaſe made, as if a woman have

title

title of dower, and doe releaſe all actions to him that hath the reverſion of the land after an eſtate for life ; or a man is by an award to pay me ten pound at a day to come, and before the time I make ſuch a releaſe; or I make a leaſe rendring rent, or an annuity is granted to me, and before the rent-day, I make the leſſee or the grantor ſuch a releaſe; in theſe caſes, and by a releaſe in theſe words without more the dower debt, rent, or annuity, is not diſcharged.

It being made before the day of paiment of an Annuity to the grantee of an Annuity, it will diſcharge the Arrerages before accrued, but not the paiments after. 4 *Ed* 4. 4co. for a releaſe is not avoidable to any right or Action but what a man hath at the time of the releaſe, *Goldsb.* 163. And therefore it is there held by *Gawdy* and *Popham* Juſtices. That where an Obligation is delivered as an Eſcrow, and the obligee releaſe to the obligor all actions, and after the obligation is delivered as his deed; this releaſe will not diſcharge it. 5 *H.* 7. 27.

And if a man have two remedies or means to come by land, as action and entry, or by goods, as action and ſeiſure, or the like; in this caſe by a releaſe of all actions he doth not barr himſelf of the other remedy. *Et ſic è converſo. Litt. Sect.* 496, 497.

And if a man doth covenant to build an houſe, or make an eſtate, and before the covenant broken the covenantee doth releaſe unto him all actions; by this the covenant it ſelf is not diſcharged. And yet after the covenant is broken, this releaſe will diſcharge the action of covenant given upon that breach. *Co. ſuper Litt.* 292.

By a releaſe of all a mans right into any lands or tenements without more words is releaſed and diſcharged all manner of rights of action and entry the releſſor hath to, in or againſt the land, for there is *jus recuperandi, proſequendi, intrandi, habendi, retinendi, percipiendi, poſſidendi*, and all theſe rights, whether they accrue by fine, feoffment, deſcent, or otherwiſe, are extinct and diſcharged; ſo that if the leſſee have gotten into the land of the releſſor by wrong, by this releaſe the wrong is diſcharged, and the releſſee is in the land by good title. *Co.* 8. 151. *Plow.* 484. 6 *H.* 7. 8. *Co.* 3. 29. 6. 1. *ſuper Litt.* 345. Of all right.

Alſo by this releaſe are diſcharged and releaſed all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an eſtate for life, and make ſuch a releaſe to him in reverſion, this doth barr her. By ſuch a releaſe alſo from the Lord to the tenant the ſervices are extinct.

But this releaſe wil not bar a man of a poſſibility of a right that he hath at the time of the releaſe, or of a right that ſhall deſcend to him afterwards. And therefore if the conuſee of a ſtatute before Execution releaſe all his right into the land to the terretenant; or the heire of the diſſeiſee in the life-time of his father doe releaſe to the diſſeiſor all his right; theſe releaſes doe not bar them. Nor will this releaſe bar a man of an *Audita Querela*, and ſuch like things. And yet if the tenant in a reall action after the demandant hath recovered the land, releaſe to him all his right in the land; this doth bar him of a writ of Errour for any errour in the proceeding in that ſuit. *Co.* 10. 47. *ſuper. Litt.* 289.

And if there be Lord and tenant by fealty and rent, and the Lord by his deed reciting the tenure doth releaſe all his right in the land ſaving his ſaid rent; by this releaſe the right of the ſeigniory, ſave only of the ſeigniory of the rent and fealty, is extinct.

And if the Lord releaſe to his tenant all his right to the land and ſeigniory, *ſalvo ſibi dominio ſuo, &c.* hereby the ſervices only, not the tenure is extinct. *Co. ſuper Litt.* 159. *Dier.* 157.

And if one have a rent-charge out of my land, and make ſuch a releaſe of all his right to the land to me that am the terretenant without excepting of the rent; hereby the rent is extinct and gone for ever. *Perk. Sect.* 644.

By a releaſe of all a mans title into lands or tenements, without more words is releaſed and diſcharged as much as is releaſed by the releaſe of all a mans right, and both theſe releaſes have the like operation, for howſoever title ſtrictly and properly Of all title.

is where a man hath lawfull cauſe of entry into lands where of another is ſeiſed, for which he can have no action, yet it is commonly taken more largely, and doth include a right alſo.

And *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt. Kelw.* 484. 6, 7, 8. *Co: ſuper. Litt* 265. 345.

Of entry or right of entry,

By a releaſe of all entries or rights of entry a man hath into lands, without more words a man is barred of all right or power of entry into thoſe lands upon any right whatſoever.

And if a man have no other means to come by the land but by an entry; and he hath releaſed that by theſe words; he is barred for ever. But if one have a double remedy, *viz.* a right of entry, and an action to recover his right by, and then releaſe all enrries; by this he is not barred of his action. *Co.* 8. 151.

Of actions reall.

By a releaſe of all actions reall without more words, are diſcharged all reall and mixt actions then depending, and all cauſes of reall and mixt actions not depending.

And therefore all cauſes of ſuing of aſſiſes, writs of entry, *Quare Impedit*, actions of waſte, and the like, which the party hath at the time of the releaſe made, are hereby diſcharged. But this releaſe will not bar him that doth make it of any cauſes of action that ſhall ariſe and accrue afterwards. Neither will it bar him of an appeal of death or robbery, writ of Error, or any ſuch like thing. Nor of any thing which a releaſe of all actions will not bar. And yet when land is to be reſtored or recovered by judgement in a writ of Error; this releaſe is a bar to the writ of Error. So if a judgment be given upon a falſe verdict in a reall action, a releaſe of all actions reall is a bar in an attaint. See more. 1 *part.* 65. *Litt. Sect.* 492, 493. 495. *Co.* 8. 151. *Litt. Sect.* 115. 500. *Co. ſuper Litt.* 288, 289.

Of actions perſonall.

By a releaſe of all actions perſonal without more words are diſcharged all perſonall actions then depending, and all cauſes of perſonall actions wherein a perſonall thing only is to be recovered, and therefore hereby are diſcharged all cauſes of ſuing out of actions of debt, treſpaſs, detinue, or the like. Alſo all mixt actions, as actions of waſt, *Quare Impedit*, an aſſiſe of novel diſſeiſin, writ of annuity, appeal of maihme, and the like. *Bro. Releaſe.* 47. *Co. ſuper. Litt.* 285. 9 *H.* 6. 57. *Litt. Sect.* 502.

And if debt, &c. or damages be recovered in a perſonall action by falſe verdict, & the defendant bringeth a writ of attaint, or if a writ of *Audita Querela* be brought by the defendant in the former action to diſcharge him of execution; by this releaſe the defendant in both caſes is barred of his ſuit. *Co. ſuper. Litt.* 289.

Alſo when by a writ of Error the plaintiff ſhall recover, or be reſtored to any perſonall thing only, as debt, damage, or the like: as if the plaintiff in a perſonall action recover any debt, &c. or damages, and be outlawed after judgement; in this caſe in a writ of Error brought by the defendant upon the principall judgement, this releaſe will bar him.

But where by a writ of Error the plaintiff ſhall not be reſtored to any perſonall or reall thing, this releaſe is no bar: as if a man be outlawed in an action perſonall by proceſs upon the originall, and bring a writ of Error, and then releaſe, this is no barre to him: *Co. ſuper. Litt.* 288. *Litt. Sect.* 503.

If a man by wrong take or find my goods, or they be delivered to him, and I releaſe to him all actions perſonall; notwithſtanding this releaſe, I may in this caſe take my goods again, albeit I be barred of my action by this releaſe.

Neither is this releaſe a bar in an appeal of robbery or death.

Neither will it bar in any caſe where a releaſe of all actions will not bar.

Neither is it any bar to an action of debt brought for an annuity granted for a term of years for any arrearages that ſhall grow due after the releaſe.

Nor for any rent or ſum of *nomine pene*, when the releaſe is before the ſame day, or *nomine pene* happen.

Neither is it a bar in ſuch reall actions wherein damages are recoverable only by the ſtatute, and not by the common law, as in a writ of Dower, entry, *ſur diſſeiſin*

diſſeiſin in le per Mordanceſter, Aile, &c. See more Brownl. 1 *part.* 64: *Lit. Se ct.* 497. 498. 500. *Co. ſuper Lit.* 292. 285.

By a releaſe of all debts without more words, are diſcharged and releaſed all Debts then owing from the releſſee to the releſſor upon eſpecialties, or otherwiſe, all Debts due alſo upon Statutes. *Co. ſuper Lit.* 76. 291. *Fitz. Andita Querela.* 3. Of Debts.

And therefore if the Conuſor himſelf, or his Land, be in Execution for the Debt, and he hath ſuch a releaſe, he muſt be diſcharged: and ſo he cannot upon a releaſe of all actions.

By a releaſe of all duties without more words is a releſſor barred, and the releſſee diſcharged of all actions, judgements, and Executions, alſo of all obligations. And if the body of a man be in Execution, and the plaintiff make him ſuch a releaſe; hereby he ſhall be diſcharged of execution, becauſe the duty it ſelf is diſcharged. Of Duties.

And if there be rent or ſervices behind to the Lord from his Tenant, and the Lord make ſuch a releaſe to his Tenant; by this it ſeems the arrearages are releaſed. *Co.* 8. 153. *& ſuper Lit.* 291.

This word is of ſomewhat a more large extent then actions, for by a releaſe of all ſuits without more words is releaſed and diſcharged as much as by a releaſe of all actions. Of Suits.

And hereby alſo are diſcharged all executions in the caſe of a ſubject. But in the caſe of the King it doth not releaſe executions. Prerogative.

And this doth not releaſe a Covenant before it be broken. *Co.* 8. 154, 157, 5: 70: *ſuper Litt.* 291.

By a releaſe of all quarrels without more words, all actions reall and perſonall, and all cauſes of ſuch actions are releaſed and diſcharged. So likewiſe by the releaſe of all controverſies, or by the releaſe of all debates. But this will not bar the releſſor of any cauſes of Suit that ſhall ariſe after, and was not at the time of the releaſe: as the breach of a Covenant which ſhall be after, albeit the Covenant be before, is not diſcharged hereby. *See more in Brownlows rep.* 64. 65. 115. 80. *Co. ſuper Litt.* 292. 8: 157: 5. 70. Of Debates, quarrels, controverſies.

By a releaſe of all covenants without more words, all covenants then broken and all that ſhall be after broken that were then made, and in being, are diſcharged. *Qui deſtruit medium deſtruit finem Co.* 1. 112. 10. 51. *ſuper Lit.* 292. Of Covenants

But a releaſe of all Actions, Suits, Quarrels, Debts, Executions and Treſpaſſes before any covenant broken, is no bar to the Action of Covenant:

So if one be baile for another and enter into a recogniſance that if Judgement paſs againſt the principall, and he will not either pay the condemnation or yield his body to priſon that then he will pay it,

And the creditor before Judgement releaſe to the Conuſor as is before, and it was adjudged to be no bar of the Execution againſt the baile. *Goldsb.* 162. *plea.* 66. for it was not an abſolute, but a contingent duty.

And therefore if a Leſſee doe Covenant to leave a houſe leaſed to him at the end of the terme as it was at the beginning of the terme, and the Leſſor before the end of the terme releaſe to the Leſſee all Covenants; this doth diſcharge the Covenant.

But this releaſe doth diſcharge nothing elſe but Covenants. *Adjudged Hill.* 4: *Jac. B. R. Hancocks* caſe.

By a releaſe of all Statutes, from the Conuſee to the terre-tenant without more words the Statute is diſcharged. Of Statutes.

And yet if he releaſe all his right in the land of the Conuſor; this will not diſcharge the land of Execution. *Co.* 10. 47.

By a releaſe of all errors and writs of errors, and writs of error, and that before they be brought, are extinct and diſcharged. *Co* 2. 16. *Lit. Sect.* 503. Of Errors.

And if a man be outlawed in a perſonall action by proceſs upon originall, and make ſuch a releaſe; this will bar him.

By a releaſe of all Warranties or Covenants reall, all Warranties then made and being, are for ever diſcharged. *Litt. Sect.* 148. Of Warranties.

By

Of Legacies. By a releaſe of all legacies without more words, a man doth bar himſelf of all the legacies given him *in preſenti* or *futuro*, ſo that if he be to have a legacy at 24 years old, and at 21 years of age he releaſe to the Executor all legacies or this legacy in particular; this is a bar to him of this legacy for ever. *Co.* 10. 51. *Dyer* 56: *Co. ſuper Lit.* 76.

And yet a releaſe of all demands in this caſe is no diſcharge of this legacy.

Of Rent. By a releaſe of Rent the Rent is extinct and diſcharged whether the day of payment be come or not. But a Releaſe of all actions will not diſcharge a Rent before the day of paiment come. *Co. ſuper Lit.* 292.

Of promiſes. By a Releaſe of all promiſes or *Aſſumpſits* without more words a man may bar himſelf of a contingent or future thing that by other words could not be releaſed, as if a man promiſe to me that if *I S* doe not pay me one hundred pound the tenth of *March* next, that he will pay it me the twentieth of that month, and before the time I releaſe to him all actions and demands; this will not diſcharge the promiſe. But if I releaſe to him all promiſes, this will bar mee. *Et ſic de ſimilibus. Adjudged Hil.* 16. *Jac. B. R. Briſcoe verſ. Heires. Co.* 10. 51.

Of Judgements. By a Releaſe of all Judgements without more words he that maketh it is barred of the effect, of any Judgement he hath againſt the Releſſee, for if Execution be not taken out he is now barred of it.

Of Executions And if the Releſſee, or his land, &c. be in Execution he and it ſhall be diſcharged thereof by *Audita querela.*

And by a Releaſe of all Executions without more words, a man is barred of taking or having out of any Execution upon any Judgement either before *Scire facias* or after.

But if after Execution be made by *Capias ad Stat. Elegit*, or *fieri facias* the plaintiff Releaſe to the defendant all Executions, he cannot plead ſuch a Releaſe but he *Audita querela.* muſt have an *Audita querela*, and that he may have to diſcharge him of Execution. *Lit. Sect.* 507. *Co* 8. 151. *ſuper Lit.* 290.

Of Appeales. By a Releaſe of all appeales, are diſcharged all appeales of Felony, of Death, of Robbery, of Rape, of Burning, of Larceny depending, and all cauſes not yet moved alſo. *Co. ſuper Lit.* 287. 288.

Of Advantages. By this Releaſe of all advantages, it ſeems actions of Debt upon account are diſcharged *Co.* 8. 150.

Of Conſpiracies. By a Releaſe of all conſpiracies, all conſpiracies paſt are diſcharged, and ſuch alſo as are only begun and ſhall be proſecuted and perfected after the Releaſe, are likewiſe hereby diſcharged. *Kelw.* 113.

Of forgeries. By a Releaſe of all forgeries before publication the forgery is diſcharged, but not the publication, and therefore the Releſſor may take his remedy for that notwithſtanding *Co.* 10. 48.

Of demands or Claimes. A Releaſe of all demands is the beſt Releaſe of all, and this word is the moſt effectuall word of all, and doth indeed include and comprehend within it moſt of all the Releaſes before. *Co. ſuper Litt.* 291 *Co.* 8. 54. *Lit. ſect.* 501. 509. 510.

By a releaſe of all demands without more words are Releaſed all rights and Titles to Land, Warranties, conditions annexed to eſtates before they be broken or performed, and after they be broken.

Alſo by this releaſe are releaſed and diſcharged all Statutes, Obligations, Contracts, Recogniſances, Covenants, Rents, Commons, and the like.

Alſo all manner of actions reall and perſonall, Appeales, Debts, Duties.

Alſo all manner of Judgements, Executions. Alſo all Annuities, and Arrearages of Annuities and Rents. And therefore if a man have a Title of entry by force of a condition, &c. or a right of entry into any Lands; by ſuch a releaſe the right and Title is gone. And if a man have a rent-ſervice, rent-charge, Eſtovers, or other profit to be taken out of the Land; by ſuch a releaſe to the Tenant of the Land it is diſcharged and extinct. *See more Brownl. 1 part.* 80. 64. 65, 115. 116. 186.

And therefore if a Termor for years grant the Land by indenture to *A* rendring rent, and at the end of the firſt yeare he releaſe to the Grantee all demands; the rent is hereby extinct during all the time. *Adjudged B. R. paſc.* 17. *Jac. Wottons* caſe:

A releaſe of all demands will diſcharge a rent due. *Goldsb.* 168. a debt upon an Award to be paid at a day to come being made before the day. But if it be a duty that reſts meerly in poſſibilitie and contingencie, as if one be bound that if *A* deliver to him at a day Hay he will pay money; this cannot be releaſed by this before the day, ſo a *nomine pene* waiting upon a rent, untill the rent be behind, ſo to pay 10l upon the birth of a child, or the like. *Brownlows 1 part 1. 9. 115.* And a releaſe of all claimes it ſeems is much of the ſame nature.

But by a releaſe of all demands or of all claimes is not releaſed any ſuch thing as whereof a releaſe cannot be made, as a meer poſſibility, or the like. *Co. 5. 70.*

Neither will this releaſe diſcharge a covenant or promiſe that is future and contingent before it be in being. Nor a covenant before it is broken: and therefore if the Leſſee of a houſe covenant to leave it as well in the end of his terme as it was in the beginning of his terme, and before the end of the terme the leſſor releaſe to the Leſſee all demands; this is no bar to an action brought for a breach of the covenant afterwards. *Hil. 4. Jac. B. R. Hancocks* caſe *Adjudged.*

And if a man in conſideration of a ſumm of money given to him by a woman ſole aſſume to her that if ſhe mary one *M* that he will pay to her after the death of *M* one hundred pound by the year if ſhe ſurvive him, and ſhe mary him, and the husband releaſe all demands and then die; this is no bar to the duty.

So if one promiſe a woman that if ſhe will marry him that he will leave her worth one hundred pound if ſhe doe ſurvive him, and before the marriage ſhe releaſe to him all actions and demands; this doth not diſcharge the promiſe. *Hil. 6. Jac. B. R. Belcher & Hudſons* caſe.

And note that all theſe words are of the ſame force when they are joyned with other words as when they are alone. Note.

If two Tenants in Common of land grant a rent-charge of forty ſhillings out of it to one in Fee, and the Grantee releaſe to one of them; this ſhall extinguiſh but twenty ſhillings, for that the grant in judgement of law is ſeverall. *Co. ſuper Litt.* 267.

If one have ſeverall cauſes of action againſt two, and make a joynt releaſe to them; this ſhall be taken to be a releaſe of all joynt and ſeverall cauſes of action 19 *H. 6. 4.*

So if an Executor have ſome cauſe of action for himſelf, and ſome for his Teſtator, and he releaſe all actions, indefinitly; this releaſe doth diſcharge both ſorts of actions. *Bro. Releaſe* 31. 29.

If the Tenancy be given to the Lord and a ſtranger, and to the heires of the ſtranger, and the Lord releaſe to his companion all his right in the Land; this ſhall enure not only to paſs his eſtate in the Tenancy but alſo to extinguiſh his right in the Seigniory. *Co. ſuper Litt.* 280.

If there be Lord and Tenant of two acres, and the Lord releaſe all his right in one of them to the Tenant; hereby the ſervices are extinct for both. *Perk. Sect. 71. Bro Releaſe 85. 9 E. 3.*

So if one have a rent-charge out of twenty acres, and releaſe all his right in one acre; hereby all the rent is extinct.

And yet if *A* leaſe white acre to *B* for life rendring rent, and afterwards doth releaſe part of the rent; this is good only for ſuch part.

If I be ſeiſed of Land in Fee and I make a Leaſe of it to one for life, and after I releaſe all my right in the Land for the life of the Tenant for life, ſo as neither I nor my Heirs ſhall have claim or challenge any thing or right in that Land for the life of the Tenant for life; by this releaſe nothing is extinct or diſcharged but the cauſes of action of waſt that were then, and not any cauſe that ſhall happen afterwards. *Bro. Releaſe 65.*

If a Statute be entred into the twentyeth of *Aprill*, and the Conuſee by a releaſe dated the ninteenth of *Aprill* (meaning to except the Statute) doth releaſe all debts and demands till the making of the releaſe; by this releaſe the Statute is diſcharged. But if the words had been to the day of the date of the releaſe *contra. See more in Brownlows Rep. 2 part.* 300.

If

If a promiſe be of two parts, and he to whom it is made doth releaſe one part; it ſeems this is a releaſe of both. *Per Juſtice Dodrige Trin.* 14. *Jac.*

If *A Jan.* 1. enter into an obligation of forty pound to *B.* and *B July* 13 make a Deed thus, It is agreed between *B* on the one part and *A* on the other part, that upon good conſiderations *B* doth acknowledge himſelf fully ſatisfied and diſcharged of all bonds, debts or demands whatſoever from the beginning of the world to this day by the ſaid *A*, and that he the ſaid *B* is to deliver all ſuch bonds as he hath yet undelivered to *A* except one bond of forty pound yet unforfeit which is for the paiment of, &c. which was the obligation before; in this caſe it was adjudged a good releaſe and diſcharged of all the bonds excepting that one, and that this exception ſhall goe to all the premiſſes, *Co.* 9. 53.

3 In reſpect of the time or eſtate.

A releaſe of a right, or an action cannot be for a time but it will be for ever.

And therefore if a releaſe be made to any one that hath a Fee-ſimple by wrong by him that hath the right for one houre, one yeare, for life, or yeares; this is a good releaſe for ever *Litt. Sect.* 467. 470. *Co. ſuper Litt.* 273. 264. 280. *Kelworth* 88. *Co. ſuper Litt* 9.

And if the Diſſeiſee releaſe all his right in the land to the Diſſeiſor without naming his Heires or ſetting down any time how long the releſſee ſhall have the land or the right of the Diſſeiſee therein; this is a good releaſe for ever, and doth make the eſtate of the diſſeiſor good for ever, and ſo doth make a good eſtate in Fee-ſimple without theſe words [his Heirs, &c] And if the Diſſeiſor or his Heire make a gift in Tail, or a leaſe for life, and the Diſſeiſee releaſe all his right to the Donee or Leſſee for life, To have and to hold for life only; this is a good releaſe of his right for ever.

But if the Diſſeiſee do Diſſeiſe the Heire of the Diſſeiſor, and make a leaſe for life (which is a releaſe in Law;) by this the right is releaſed during that time only.

So if one Jointenant or parcener releaſe to the other all his right in the Land, without the words [heires] or any more word; this releaſe doth give to his companion his whole intereſt for ever.

And when the Lord, or Grantee of a rent releaſe to the Tenant, or terre-tenant generally; by theſe releaſes a Feeſimple is transferred without any words of heires, &c. And yet the Lord may releaſe his Seigniory to his Tenant, to hold to him in Taile or for life, and this ſhall be taken and enjoyed accordingly. But if the Lord doth releaſe the Seigniory to his Tenant without any words of heires put in the Deed, the ſame is extinct.

And if I let land to a man for terme of yeares and after I releaſe to him all my right which I have in the Land, without uſing any other words in the Deed; or releaſe to him, To have and to hold for his life; in both theſe caſes he hath an eſtate for his life only. *Lit. Sect.* 545. 546. 565. *Plow.* 556. *Dier* 263.

And if I leaſe land to a man for his own life, and after releaſe to him To have and to hold for his own life; hereby he hath but an eſtate for his own life.

But if I make a leaſe to him for anothers life; and after releaſe to him *Habendum* to him for his own life, by this he hath an eſtate for his own life.

But if I be ſeiſed of land in Fee-ſimple and let it to another for life or years, and then releaſe all my right to him To have and to hold to him and his heirs, hereby he hath the Fee-ſimple.

And if I releaſe all my right to him To have and to hold to him and the heires of his body, hereby he hath an eſtate Tail.

And if one be ſeiſed in Fee of a rent ſervice or charge, and grant it firſt for life, and then releaſe it to the Grantee To hold to him and his heirs, or to him and the heires of his body: this ſhall enure to an enlargement according to the agreement. *Lit. Sect.* 549.

But if one grant a rent-charge out of his land *de novo*, and after releaſe to the Grantee all his right in the rent, To have and to hold to him in Fee-ſimple or Fee-tail: this doth not enlarge the eſtate.

And

And if Tenant in Tail, or for life make a Leaſe for years, and after by Deed doth Releaſe all his right to the Leſſee for years in poſſeſſion, to hold to him and his Heirs for ever; this will not make the Eſtate of the Leſſee good for longer time, then the life of the Releſſor. *Littl. Sect.* 606. 610. 24 *Eliz.* 3. 28.

If one make a Leaſe for ten years, the Remainder for twenty years to another, and he in Remainder, Releaſe all his right to the Leſſee for ten years; in this caſe the Releſſee hath an Eſtate for thirty years, and no leſs; for one Leaſe for years cannot drown in another. *Co. ſuper Littl.* 273.

If I let Land to a Woman ſole for her life, or for years, and ſhe take a Husband, and after I Releaſe to them two to hold for their lives; this ſhall enure no further then the intent, and in the firſt caſe he ſhall hold joyntly with his Wife, but in her right, whiles ſhe doth live, and after for his own life, if he ſurvive, and in the laſt caſe they ſhall have the Freehold joyntly. *Littl. Sect.* 526. *Co. ſuper Littl. fol.* 299. 300.

If there be Lord and Tenant by Fealty and Rent, and the Lord granteth the Seigniory for years, and the Tenant attorneth, and the Lord Releaſeth his Seigniory to the Tenant for years, and to the Tenant of the Land generally; by this the Seigniory is extinct for ever, and the Eſtate of the Leſſee alſo: But if the Releaſe be to them and their Heirs; then the Leſſee ſhall have the Inheritance of the one Moyety, and the other is extinct. *Co. ſuper Littl.* 280.

10. *Acquittance*, what.

It is a diſcharge in writing of a ſum of money, or other duty which ought to be paid or done; As if one be bound to pay money on an Obligation, or Rent reſerved upon a Leaſe, or the like, and the party to whom the money or duty ſhould be paid or done upon the Receipt thereof, or upon ſome other Agreement between them, maketh a writing under his hand, witneſſing that he is paid or otherwiſe contented, and therefore doth acquit and diſcharge him of the ſame. The which is ſuch a diſcharge, and Bar in the Law, that he cannot demand and recover the ſame again contrary thereunto, if the acquitance be ſhewed. *Terms Ley.*

11. Where a man is not bound to pay money without he hath an *Acquitance.*

The Obligor is not bound to pay money upon a ſingle Bond, unleſs the Obligee will make to him an Acquitance or Releaſe; nor is he bound to pay it before he hath the Acquitance: And in this caſe the Obligor may compel the Obligee to make him an Acquitance. And ſo alſo it is in caſe of a Statute Merchant, one is not bound to pay the money thereupon, before he hath the Acquitance or Releaſe of the Plaintiff. But otherwiſe it is in caſe of an Obligation with a Condition; for there a man may aver payment. 22 *Ed.* 4. 6. 41 *Ed.* 3. 25. 1 *H.* 7. 15. 22 *Ed.* 4. 6. *Broo. Debt* 43. *Oblig.* 10.

CHAP. CXXXVIII.

Of a Remitter.

Sect. 1. 1. *Remitter, what.*

REmitter is where a man is come to two Titles in Lands or Tenements, and his latter is defective, and not ſo good as the former; or when a Mans Entry is taken away by Diſcent or Diſcontinuance, and he hath the Frank-tenement caſt upon him by a new Title; in this caſe he ſhall be, or at leaſt may be (if he will) reſtored to his firſt Title, and then he ſhall be ſaid to be in by that Title, and that ſhall be ſaid to him a Remitter.

It is thus defined by ſome. Remitter is an operation of Law upon the meeting of an ancient Right, redmediable; and a latter ſtate in one perſon where there is no folly in him, whereby the ancient Right is reſtored, and ſet up again, and the new defeaſible Eſtate vaniſhed away. *Quod prius eſt verius, Co.* upon *Littl.* 347, 348. As if a man be diſſeiſed, and the Diſſeiſor makes a Feoffment to the Diſſeiſee; in this caſe the Diſſeiſee may (if he will) be remitted to his elder Title, or he may chuſe: For in ſome caſes where it is not to the prejudice of a ſtranger, he that hath the Titles, may chuſe whether he will hold by the former, or the latter Title; and if he enter generally, where he hath two Titles, the Law will judge him in of his elder Title, until he have done ſome act to declare his Election. So that there are two things requiſit in a Remitter; firſt, Ancient Right; ſecondly, A new Poſſeſſion: And the reaſon of it, is the Ancient Right, which is, firſt, moſt ſure; ſecondly, moſt worthy: And for the Poſſeſſion, it ought to be where the party gets the Poſſeſſion, and not by an act wherein is folly. Thirdly, the efficient cauſe is an act in Law: And for the ancient Right, it muſt be a Right not a Title, and it muſt be a Right of Entry, and in that caſe, however he come to the Poſſeſſion, he ſhall be remitted, unleſs it be by Eſtoppel; and this Remitter by Right of Entry, is not waveable. *Crompt. Jur.* 120. *Littl. chap Remitter. F.N.B.* 149. *Dyer* 68.

Election.

Sect. 2. 2. *In what caſe a Remitter ſhall be.*

For Anſwer hereunto, theſe things are to be known:

1. In all caſes, when a man hath a lawful Right of Entry into Land, and the Poſſeſſion be caſt upon him by Act of Law, *nolens volens*, he muſt be remitted; but if it come by his own act, it is in his Election, whether he will be remitted, or not: As if after he have one Title, he take any eſtate by any other way and means, then by Fine or Deed indented, (whereby he may be eſtopped) he ſhall be remitted. *Broo. cap.* 252.

Election.

2. If one Leaſe for life to one, and he alien in Fee, and the Alienee make an Eſtate to the Leſſor; in this caſe the Leſſor is remitted. *Littl. Sect.* 694. 695.

3. If Lands be given to a Tenant in Tail, the Remainder to another in Tail, the Remainder to another in Fee; and the Husband of the Wife diſcontinue, and the Husband and the Wife take back a new eſtate to them for their lives; this is a Remitter to them, and all them in the Remainder. *Littl. Sect.* 673.

4. If an Eſtate be made to the Husband in Tail, the Remainder to his Wife for life, the Remainder to *B. C. D* in Fee: And after another Eſtate is executed to the Husband and Wife for life, the Remainder to another, and ſhe enter generally after the Husbands death, ſhe ſhall be judged in, as in her Remitter, without ſpecial Claim made; for that is her beſt Eſtate. By three Judges. Where the party that is to be remitted, hath a Right of Entry, howſoever he come to the Poſſeſſion, unleſs it be by Eſtoppel, he ſhall be remitted. By Juſtice *Dodridge.* 16 *Jac. B. R*

To a Tenant in Tail, and his Iſſue.

5. If a Tenant in Tail diſcontinue the Tail, and after diſſeiſe his Diſcontinuee, and die ſeiſed; the Iſſue in Tail that comes in now by diſcent, ſhall be remitted, and the Title of the Diſcontinuee is utterly defeated, though the Iſſue be an Infant, or

Feme-

Feme-covert. *Littl. ſect.* 147. If a Tenant in Tail infeoff his Iſſue in Tail within age, and after die, the Iſſue is remitted, though he be of full age before the death of the Anceſtor. *Littl. ſect.* 660. If one diſſeiſe the Diſcontinuee of a Tenant in Tail, and Infeoff the Iſſue, the Iſſue after the Anceſtors death, ſhall be remitted. *Plow.* 48. 19 *H.* 8. 12. *Infant.*

6. If a Tenant in Tail diſcontinue in Fee, and then take back an Eſtate in Fee, and after deviſe the Land by will, and the Deviſee wave the Deviſe; in this caſe the Iſſue ſhall be remitted, *contrà*, if he had not waved it. *Dyer* 221. *Kelw.* 4.

7. If Lands be intailed to a man and his wife, and the Heirs of their two Bodies engendred, and they have a daughter, and the wife die, and the husband marry another, and have another daughter by her, and diſcontinue the Tail; and after doth diſſeiſe the Diſcontinuee, and die ſeiſed, and the Land diſcend to the daughters; the eldeſt is remitted for one moyety, but the youngeſt is not for the other moyety. *Littl. ſect.* 662.

8. If a Tenant in Tail infeoff his Heir Apparant in the Tail, and another, the Iſſue is remitted for the one moyety, but not the other for the other moyety. *Lit. ſect.* 663.

9. If a Tenant in Tail infeoff his Iſſue in Tail, and another of the Intail Land, and Livery of Seiſin is made to the other, according to the Deed, and the ſon not knowing of it, doth not agree to the Feoffment, and after the other die, and the ſon never meddle with the profits of the Land, during his Fathers life, and then the Father die; now the ſon is remitted. *Littl. ſect.* 684. If a Tenant in Tail infeoff his Iſſue, being within age, and his wife in Fee, and dieth; this is a Remitter to the Iſſue preſently by the death of the Tenant in Tail. *Co. ſuper Littl.* 351.

10. If the Husband alien the Lands he hath in the right of his wife, and after take back an Eſtate again to them for their lives, or otherwiſe; now in this caſe, if the wife do ſurvive the Husband, ſhe ſhall be remitted; and that though this ſecond Eſtate to the husband and wife be by Fine: But if the wife die firſt, the Heir of the wife ſhall not be remitted, if the ſecond Eſtate were a Fee-ſimple. *Littl. ſect.* 666, 667. *Sect. 3.* To a Wife that hath a Husband.

11. If the husband diſcontinue his wives Land, and the Diſcontinuee is diſſeiſed, and the Diſſeiſor doth make a Feoffment in Fee or Leaſe for life to the wife; in this caſe ſhe ſhall be remitted; but if it were by Covin between the Diſſeiſor and the wife, *contrà*: *Co.* 3. 78. *Littl. ſect.* 678. If the Tenant in Tail diſcontinue the Tail, and have iſſue a daughter of full age; and ſhe take a Husband, and the Diſcontinuee makes a Releaſe of it to the Baron and wife, for their lives; this is a Remitter to her, and ſhe is in of the Eſtate-tail. *Littl.* 671.

12. If Lands be given to a man and his wife, and the heirs of their two bodies, and after the husband alien the Land in Fee; and take back an eſtate to him and his wife for their lives; in this caſe they ſhall be both remitted. *Littl. ſect.* 671.

13. If the Husband diſcontinue his wives Land, and take back an Eſtate to him and his wife, and a third perſon; this is a Remitter for their Wives moyety, not for the other. *Littl. ſect.* 676. And if the Husband in this caſe take back an Eſtate to him, and his wife, during the life of the Husband; this is a Remitter to his wife preſently. *Littl. ſect.* 676.

14. If one diſſeiſe me, and after make a Feoffment to me with Warranty, now I may be remitted, if I will, or I may make uſe of the Feoffment, with Warranty at my Election. 12 *H.* 7. 20. To the Diſſeiſee or his Heir. *Election.*

15. If a Diſſeiſor make a Leaſe for years or life, or any other Eſtate to the Diſſeiſee by Deed, or without Deed; this is a Remitter, *contrà*, if it were by Fine. *Litt. ſect.* 693. 12 *H.* 7. 20.

16. If my Father diſſeiſe me, and after die ſeiſed, and the Land diſcend to me, I am and muſt be remitted. *Kelw.* 41. 12 *H.* 7. 20.

Sect. 4. 17. If the Heir of the Diſſeiſor, that is in by diſcent, make a Leaſe for life to *J. S.* the Remainder for life, or in Fee to the Diſſeiſee; in this caſe, after the death of *J. S.* the Diſſeiſee ſhall be remitted; for when two Titles meet, the beſt ſhall be preferred. 11 *Ed.* 4. 1. *Littl. ſect* 685.

To an Infant. 18. If one diſcontinue the Land of an Infant, and after one diſſeiſe the Diſcontinuee, and infeoff the Infant, the Infant ſhall be remitted; but if there were any Covin between the Infant and Diſſeiſor, *contrà. Co.* 3. 78.

19. If a Tenant in Tail infeoff a Feme-ſole, and the Iſſue in the Tail, being within age, take her to wife after the death of the Anceſtor; in this caſe he is remitted, and his wife hath nothing in the Land, but if he had been of age when he had married her, *contrà. Littl. ſect.* 665.

20. If two Joyntenants be, one of full age, and the other within age, and they be diſſeiſed, and the Diſſeiſor die ſeiſed, and his Heir enter (the other Joyntenant ſtill within age) and the Heir of the Diſſeiſor make a Leaſe to them; this is a Remitter for the moyety of him within age, but for the other moyety, *contrà. Littl. ſect.* 696.

To a Parſon of a Church. 21. If I be ſeiſed of an Advowſon in groſs, and an uſurpation be had againſt me, and at the next avoidance I uſurp again; in this caſe I ſhall be remitted.

3. In what caſe no *Remitter* ſhall be. No Remitter ſhall be in theſe caſes.

Firſt, When the party doth come to the ſecond Title, by Act of Parliament.

Secondly, When he comes to it by Fine or other Record.

Thirdly, When there is not both an Action and a Right, with a diſcent come to the party to be remitted; for if the Right and the Poſſeſſion of the Land be in ſeveral perſons, and he that hath the Right, hath one againſt whom to bring his action, there ſhall be no Remitter.

Fourthly, When the party comes to the laſt Title by his own wrong.

Fifthly, When a man hath but a Title of Entry onely, as for Mortmain, Eſcheat, Condition broken, or the like. *Co.* upon *Littl.* 348.

Sixthly, When two Rights onely diſcend, there muſt be an Ancient Right, and a new Eſtate; for one Right cannot work a Remitter to another Right.

Seventhly, No Remitter ſhall be to a Right remedileſs; for the which, one can have no Action. *Dyer* 54. *Co.* 3. 3. *Plow.* 207. *Kelw.* 44. *Littl. ſect.* 147.

Sect. 5. For the illuſtrating of which, take theſe caſes.

To a Tenant in Tail, or his Iſſue. 1. If a Tenant in Tail infeoff the Iſſue in Tail, after he is of full age, and die, the Iſſue ſhall not be remitted to his elder Title. *Littl. ſect.* 664.

2. If a Tenant in Tail ſince the Statute of Uſes, make a Feoffment in Fee to the uſe of the Iſſue in Tail, and die; in this caſe the Iſſue ſhall not be remitted, but in this caſe, if any Entry be given to the Iſſue by Law, he may take it. But if the Iſſue in this caſe wave the Poſſeſſion, and bring a Formedon in the Diſcender, and recover againſt the Feoffees, he ſhall be remitted. *Broo. Remitter* 149. *Plow.* 114. *Dyer* 23.

3. If a Tenant in Tail ſuffer a Common Recovery, and after diſſeiſe the Recoveror, and die; his Iſſue ſhall not be remitted, though the Recovery be erroneous, as long as it ſtands in force, and is not reverſed; for neither an Action without a Right, nor a Right without an Action can make a Remitter. *Co.* upon *Littl.* 349.

4. If the Iſſue in Tail diſſeiſe the Diſcontinuee of his Father, and then infeoff his Father, and he die, and the Land diſcend to him; in this caſe he ſhall not be remitted. *Perk. ſect.* 397.

5. If a Tenant in Tail have Iſſue two ſons of full age, and he Leaſe the Land intailed to his elder ſon for life, the Remainder to his yonger ſon for life; this is no Remitter to the eldeſt; but if he die without Iſſue of his body, this is a Remitter to the yongeſt. *Littl. ſect.* 682.

6. If the Tenant in Tail, and his Iſſue, diſſeiſe the Diſcontinuee of the Tenant in Tail,

Tail, and the Tenant in Tail die, whereby the Lands diſcend to the Iſſue; now thongh he ſhall be remitted againſt all ſtrangers, yet not againſt the Diſcontinuee. 11 *Ed.* 4. 2.

7. If the Husband and Wife alien the Land of the Wife by Fine, and after take back any Eſtate to them again; in this caſe the Wife ſhall not be remitted. To a Wife that hath a Husband.

8. If the Husband diſcontinue the Tenements of his Wife, and take back an Eſtate to him for term of his life, the Remainder to his Wife, during the Husbands life; this is no Remitter, but after if ſhe ſurvive him, it is a Remitter, *Littl. ſect.* 680.

9. If the Husband make a Feoffment in Fee of the Land, he hath in the right of his Wife, and then take back an Eſtate in Fee to him, and his Wife, and ſhe die, and he over-live her; now her heir ſhall not be remitted.

10. If the yonger Brother diſſeiſe the elder, and the elder bring an Aſſiſe, and is barred, and after the yonger die without Iſſue, and the Land diſcend to the elder; in this caſe the elder is not remitted. *Dyer* 5. To the Diſſeiſee, or his Heir.

11. A man ſhall never be remitted to an Advowſon Appendant, though he have right, till he have recontinued the Manor, to which it is Appendant. So if one purchaſe an Advowſon in Fee, and ſuffer uſurpation, and ſix moneths, and it be after caſt upon him, by diſcent or other Act in Law, he ſhall not be remitted. So if the Uſurper grant the Advowſon, to the Purchaſor and his Heirs, and he dieth, his Heir is not remitted. If a Tenant in Tail of a Manor, to which an Advowſon is Appendant, make a Diſcontinuance, the Diſcontinuee granteth the Advowſon to Tenant in Tail, and his Heirs, the Tenant in Tail dieth, the Iſſue is not remitted: But *contrà*, if one be remitted to the principal, he ſhall be remitted to the Acceſſary, though ſevered by the Diſcontinuee. *Co.* upon *Littl.* 349. 4. For the thing, to which a man is to be remitted.

If the Feoffee of the Tenant in Tail charge the Land, or make Leaſes, or the like, and after the Iſſue is remitted; theſe charges and acts of the Feoffee, are avoided; ſo in all like caſes. *Littl. ſect.* 659. 5. What Acts ſhall be avoided by the *Remitter*, or nor.

If the Tenant in Tail infeoff his Iſſue in Tail, within age, and after being of full age, and then charge the Land, and after the Tenant in Tail die; now the Iſſue being remitted, the charge is avoided. *Littl. ſect.* 660.

If the Husband diſcontinue the Wives Land, and the Diſcontinuee make an Eſtate to the Husband and Wife, on Condition, and after the Husband die, and the Wife is remitted, here the Condition is avoided. *Littl. ſect.* 660.

CHAP.

CHAP. CXXXIX.

Of Remover of Records, Cauſes, and Perſons, out of one County into another.

Sect. 1.

1. *Remover.*

Emover is where a Sute or Cauſe is removed out of one Court into another; and for this purpoſe there are divers Writs and Means. Some of theſe are to remove the Cauſe onely, and ſome of them are to remove the Perſon and his Cauſe both. *Co.* 11. 41. Some of the firſt ſort are to remove Cauſes out of Courts of Record, and ſome to remove Cauſes out of Courts that are not Courts of Record. *Corpus cum Cauſa, Habeas Corpus*, is to remove the perſon, being a priſoner about the Cauſe, and his Cauſe; the *Habeas Corpus*, alſo Writs of Privilege, Prohibition, *Cerciorari*, Recordary, and others, are to remove the Cauſes onely. Writs of Error and Attaint alſo do remove Sutes. 21 *Jac. chap.* 23.

2. *Recordo & proceſſu Mittendis*, what.

There is an old Writ called *Recordo & proceſſu mittendis*, by which this was done.

Corpus cum cauſa, what.

Corpus cum cauſa, is a Writ iſſuing out of the *Chancery*, to remove both the Body and the Record, touching the Cauſe of any man lying in Execution, upon a Judgment for Debt into the *Upper Bench, &c.* there to lie until he have ſatisfied the Judgment. *F.N.B.* 251. *Dyer* 61.

3. *Habeas Corpus*, what.

Habeas Corpus, is a Writ lying where a man is indicted of Treſpaſs before Juſtices of Peace, or in a Court of any Franchiſe, and upon his apprehenſion being laid in priſon for the ſame, he may have out of the *Upper Bench*, thereby to remove himſelf thither at his own coſts, and to anſwer the cauſe there, *&c.* And the order in this cauſe is firſt to procure a *Cerciorari* out of the *Chancery*, directed to the Juſtices for the removing of the Indictment into the *Upper Bench*, and upon that to procure this Writ to the Sheriff, for the cauſing of his Body to be brought at a day. *F.N.B.* 250.

Cerciorari.

This Writ is uſed alſo for the removing of other Cauſes in other caſes, from one Court to another. *F.N.B.* 7. 250. 78. 110. *Crompt. Jur.* 46.

Sect. 2.

4. *Cerciorari*, what.

A *Cerciorari*, is a Writ that lieth where one is impleaded in a baſe or inferior Court, that is a Court of Record, and one of the parties contending, ſuppoſing he may not have Juſtice there upon a Bill in *Chancery*, compriſing ſome matter of Conſcience, as that he hath not had, or is not like to have Juſtice there, he ſhall have this Writ to remove the Record into the *Chancery*, that the cauſe may be there determined. And if he do not prove the matter of his Bill, there the other party ſhall have a Writ of *Procedendo* to ſend back the Record thither again, there to be ended.

Procedendo.

And by this other Records, as Indictments, Recogniſances, and the like, may be removed, and ſent up; and the courſe is to ſend the Record firſt into the *Chancery*, and not firſt to certifie it into the *Upper Bench* or *Common Pleas*, but out of the *Chancery*, to ſend it thither by a *Mittimus*, which is the ſending of a Record into another Court. And a Writ of Error is a *Cerciorari* in it ſelf. 2 *H.* 5. 2. *F.N.B.* 242. 12 *Ed.* 4. 11.

Mittimus.

This lieth in many other caſes. *March.* 196. *pl.* 241.

Remand, what.

The Remanding of a Cauſe, is the ſending it back into the ſame Court, out of which, it was called and ſent for.

Sect. 3.

5. *Procedendo*, what.

Procedendo is a Writ whereby a Plea or Cauſe, formerly called from a baſe or inferior Court to the *Chancery*, *Upper Bench*, or *Common Pleas*, by Writ of Privilege

or

or *Cerciorari*, is releaſed and ſent down again into the ſame Court, to be proceeded in there, after it appeareth, That the Defendant hath no cauſe of Privilege, or that the matter compriſed in the Bill, is not well proved. *Co.* 6 63. 21 *R.* 2. 11.

Now as touching all theſe things, the removing of Perſons and Cauſes, theſe things are to be known.

1. The Judges of the *Upper Bench*, may ſend priſoners from thence in the Country to be tried, if they pleaſe. 6 *H.* 8. 6.

2. No *Habeas Corpus* or *Cerciorari*, is to be granted to remove any priſoner out of any Gaol, or to remove any Recogniſance, except the Writ be ſigned by the Chief Juſtice, or in his abſence by one of the other Judges own hands, under pain of five pound forfeit by him that makes the Writ: But the Writ is good (as it ſeems) and to be obeyed, though his name be not to it. 1, 2 *Phil. & Ma.* 13.

3. No Writ to remove a Sute begun in an Inferior Court of Record is to be obeyed, unleſs it be delivered to the Steward of the ſame Court, before Iſſue or Demurrer joyned, ſo as the Iſſue or Demurrer were not joyned within ſix weeks, next after the Arreſt, or Appearance of the Defendant. 21 *Jac.* 23.

4. No Writ to remove a Cauſe, is to be received and allowed, unleſs it be delivered to the Judge of the Cauſe, before the Jury hath appeared, and one of them ſworn to try the cauſe; for then it is too late. 43 *Eliz.* 5.

5. No Writ to remove any Cauſe out of an Inferior Court of Record ſhall be allowed, if the cauſe be not five pound, or above, and do not concern Freehold, or Inheritance, Title of Land. Leaſe, or Rent, where an Utter Bareſter of three years ſtanding, is Steward or Aſſiſtant to him. 21 *Jac.* 23.

6. But if there be a Fore gn, or other Plea pleaded, that is not tryable there, then it is removable. *Idem.*

7. Writs of Error and Attaint are allowable, as formerly. *Idem.*

8. A Sluce being once remanded by *Procedendo*, ſhall never after be removed again. *Idem.*

9. No *Cerciorari* to remove any Indictment of Riot, Forcible Entry, Aſſault and Battery, is to be allowed, unleſs it be delivered at the Quarter Seſſions in open Court: And that the parties indicted, do there put in Bond of ten pound to the proſecutor, to pay him ſuch Coſts and Damages as the Juſtices of Peace ſhall ſet down. 21 *Jac.* 8.

10. No Writ of *Cerciorari* ſhall be allowed to remove any Information or Indictment againſt any man, or proceedings for any thing within the new *Ordinance* for High-ways, made *March.* 1654.

11. No *Cerciorari* or *Habeas Corpus*, ſhall be allowed to remove any Indictment for any offence about Corn, Wine, Beer, Ale, Fiſh, Fleſh, Salt, Butter, Cheeſe, or other dead victual whatſoever. *Act*, 23 *October*, 1650.

12. No *Cerciorari* ſhall be allowed to remove an Indictment for making, or taking of Challenges. *Ord.* 29 *June.* 1654.

13. *Cercioraries* ſhall not be allowed to remove Bills of Indictment of Riot, Forcible Entry, or of Aſſault and Battery, unleſs the party indicted will become bound with ſufficient Sureties, ſuch as the Juſtices of Peace in Seſſions ſhall like of, to pay to the Proſecutor within a moneth after Conviction, ſuch Coſts and Damages as the Juſtices ſhall aſſeſs. 21 *Jac.* 8. But other Indictments may be removed without this Caution.

14. Two men and their wives were indicted for a Forcible Entry, who brought a *Cerciorari*, and ſome of them refuſed to be bound according to the Statute of 21 *Jac.* yet the Cauſe is to be removed, *March. f.* 27. *pl* 63.

15. If the Sureties tendred, be worth ten pound a peece, the Juſtices muſt accept them for the ten pound Bond, upon the Statute of 21 *Jac.* the ſame.

16. After tender of ſufficient Sureties, according to the Statute, all the proceedings of the Juſtices, are *Coram non judice*, (*i.*) as before no Judge. *March* 27.

17. Upon a *Cerciorari* to remove an Indictment againſt a man, he is to be bound to proſecute with effect (that is) to traverſe the Indictment, or quaſh it for defect. And if he do appear, an Attachment ſhall go out againſt him. *March* 76. *pl.* 118.

Of

Of a Recordary, &c.

6. *Recordary*, what.

A Recordary is a Writ iſſuing out of the *Upper Bench* or *Common Pleas* to the Sheriff, to command him to ſend a Plaint that is before him, without Writ in his County Court, into that Court, from whence the Recordary is, to the end, that the cauſe may be there determined: And this the Sheriff is to ſend up and certifie under his own, and the Seals of four of the Suitors that are Judges of the ſame Court. And he is withal to warn the other party to be in the Court there at a time certain.

Suitors.

7. *Pone*, what.

And a Pone doth nothing differ from this, but that it is to remove a Sute that is there before the Sheriff, by Writ and not by Plaint: And if this be ſued out by the Plaintiff in the firſt Sute, it may be had without ſhewing any cauſe at all for it: But if it be ſued out by the Defendant, he muſt ſhew cauſe for it. As if it be to remove a Plea in a Replevin by Plaint, to ſhew that the Defendant doth avow for Damage-feaſant, that the Plaintiff doth juſtifie for Common of Paſture, which is a Plea touching Freehold, and therefore ſhould not be without Writ. *F. N. B.* 119. 47. 70. 18. 71. 3 *Hen.* 6. 30. 12 *Edw.* 4. 11. 21 *Jac.* 23. 13 *Edw.* 1. 2. 43 *Eliz.* 5.

Tolt, what.

A Tolt is a Writ whereby a cauſe depending in a Court-Baron, is removed into the County-Court.

Sect. 4.
8. *Accedas ad Curiam*, what.

Accedas ad curiam is a Writ iſſuing out of the *Upper Bench* or *Common Pleas*, directed to the Sheriff, to command him to go to ſuch a Court of ſuch a Lord or Franchiſe, as County-Court or Court-Baron, or other Court that is not a Court of Record.

Where a Plaint is ſued for taking of Beaſts as a Diſtreſs, or ſome falſe Judgment, is ſuppoſed to be given in a Sute there; and that there he do make Record of the ſame Sute, in the preſence of the Sutors of the ſame Court, and four Knights of the County; and the ſame certifie into the Court, from whence the Writ came, at the day limited in the Writ. But this cannot be had of either ſide, without ſhewing of ſome cauſe.

And the cauſes for which theſe Sutes are uſed to be removed, are becauſe they queſtion Freehold there, or ſome thing is pleaded that is Foreign, and not triable in the Court.

And the Recordary, Pone, and this Writ, are to no other purpoſe but to remove a Sute into a Superior Court, and are in the nature of a *Certiorari*. And upon the Removal, the Sute is at an end in the Inferior Court: And if the other party, or any of the Judges, or other Officers of the Court, do proceed after the Removal of the cauſe, the party that removed the Sute, may have an Attachment againſt them. And after it is once ſent away, it can never be ſent back again, but muſt be tried there. See *F. N. B.* 70. *Plow.* 74. *Finches Ley* 444.

See *Superſedas*, *Prohibition*, *Error*, *Attaint*.

CHAP.

CHAP. CXL.

Of a Rent.

A Rent is a Sum of money, or other Conſideration, iſſuing yearly out of Lands or manual Tenements. *Redditus à redeundo, quia retroit; vel à reddere, i. retro dari.* This differeth eſſentially from an Annuity: For a Rent doth always iſſue out of Lands or Tenements, and the Land alſo is the debtor. Otherwiſe it is of an Annuity, which is chargeable upon the perſon of a man only, and he alone is the Debtor for this. *Co. ſuper Lit.* 141, 142. *Plow.* 132, 138, 139. And of Rents there are ſaid to be three kinds. *Sect.* 1. 1. *Rent*, what it is.

1. Rent-ſervice; which is, where a man doth hold his land of his Lord by Fealty and certain Rent, or to render and yield Hens, Capons, Roſes, Spurs, Bows, Arrows, Horſes, Wheat, or the like; or to perform any office, or yield any attendance, or the like: And to this Rent, Diſtreſs is incident of common right. The kinds of it.

2. Rent-charge; which is where an Eſtate is made of Lands or Tenements to another in Fee-ſimple, Fee-tail, for life or years, rendring a Sum of money or other thing to be paid yearly to him that made it and his Heirs; and there is a Clauſe in the Deed, That if the Rent be behind, it ſhall be lawful for the Feoffor, Leſſor or Donor to diſtrain for it upon the Land. Or where one doth grant a Rent out of his Lands or Tenements to another in Fee for life or years, with ſuch a power to ſtrain for the Rent if it be behind: And to this no Diſtreſs is incident of common right, but by the agreement of the parties the Land is charged with the Diſtreſs; and hence it is called a Rent-charge.

3. Rent-ſeck is where a *Rent* is reſerved or granted (as in the caſe before) without any clauſe of Diſtreſs, or power to diſtrain: And this is called *Redditus ſiccus*, dry *Rent*; becauſe he that is to have it, till he hath gotten Seiſin of it, hath no remedy to recover it, if it be denied to him; and then he hath no other remedy but an Aſſiſe for the recovery of it. *Terms of the Law, Rent. Co. ſuper Lit.* 142. *Lit. c.* 12. *Finches ley*, 155. *D. & S. c.* 30. And regularly a man cannot have, or challenge, or make a title to any kind of *Rent*, unleſs it be a *Rent*-ſervice, or a *Rent* charge in the caſe of Preſcription, or for equality of Partition, unleſs he have a Deed to ſhew for it. *Co.* 6. 63. *Lit.* 40. *Co. ſuper Lit.* 142. 146. Title to it.

If one be ſeiſed of Land in Fee, and make a Gift of it in tail, or make a Gift in tail to one, the *Remainder* in tail to another, or a Leaſe for life or for years, keeping the *Reverſion* in him, without any Clauſe in the Deed enabling him to diſtrain for it; this is a *Rent*-ſervice ſtill. But if the *Reverſion* be gone, it doth continue no longer a *Rent*-ſervice, for there can be no *Rent*-ſervice but where there is a *Reverſion*, *Lit.* 214, 215. 228, 229. *Plow.* 132. 142. *Co.* on *Lit.* 162. And therefore if one by Deed indented make a Feoffment in fee to one, or a Gift in tail, or a Leaſe for life or years to one, with the *Remainder* over to another in Fee, and reſerve a *Rent* upon any ſuch Eſtate without any clauſe of Diſtreſs for not paiment; this is a *Rent*-ſeck, not a *Rent*-ſervice. So if one ſeiſed in Fee of Land by Deed-poll or Indenture, grant a *Rent* iſſuing out of his Land, without any clauſe of Diſtreſs for not paiment; this is a *Rent*-ſeck. *Lit. ſect.* 214. 215. 217. *Co* 6. 58. *ſup Lit* 150, 151. If there be Lord and Tenant, and the Lord grant the *Rent* (except Fealty, which is incident to every *Rent*-ſervice) this is a *Rent*-ſeck, *Perk ſect.* 113. So if one hold his Land by Homage, Fealty, and other Services, yielding a *Rent*, and the Lord grant away the *Rent* reſerving the Services, or grant the Services ſaving the *Rent*; in theſe caſes the *Rent* is a *Rent*-ſeck, *Lit. ſect.* 226, 227. *Co ſup. Lit.* 151. If one leaſe Land to another for life rendring *Rent*, and after he in *Reverſion* grant away this *Rent* to another; this during the life is a *Rent*-ſeck, *Lit. ſect.* 228. If one deviſe a *Rent* by Will in Fee-ſimple, Fee-tail for life or for years, without any clauſe of Diſtreſs, this is a Rent-ſeck; but if it be with a clauſe of Diſtreſs, it is a Rent-charge, *Co.* 6. 56. *Dyer* 348. 2. What kind of Rent it is. *Rent ſervice.* *Rent charge.*

If one make a Feoffment in Fee, Gift in Tail, Leaſe for life or years of Land to one; or a Gift in Tail, Leaſe for life or years, with the *Remainder* over to another in Fee, and upon any ſuch Eſtate reſerve a *Rent*, and in the Deed there is a power to diſtrain in the Feoffor, Donor, or Leſſor, if the *Rent* be behind; this is a *Rent-charge*, *Co. ſuper Lit.* 143. *Plow.* 132. *Lit. ſect.* 217.

So if one by Indenture or Deed-poll grant a yearly *Rent* to be iſſuing out of his Lands to another in Fee-ſimple, Fee-tail for life or years, with ſuch a power in the Deed, 13 *Ed.* 4. 6. 5 *H.* 6. 6. *Lit. ſect.* 218.

So if the Tenant of a Land chargeable with a *Rent-ſeck*, grant a power to diſtrain upon the Land for the *Rent* to him that hath it; this is now become a *Rent-charge*, *Dyer* 348.

So if one Coparcener upon a partition to make an equality, agree that the other ſhall have a *Rent* out of his part of the Land; this is a *Rent-charge* for which the other may diſtrain, though there be no Deed for the *Rent*, nor clauſe of Diſtreſs in a Deed, 15 *H.* 5. 5.

If one by Will in writing deviſe a *Rent* out of his Land, with a clauſe of Diſtreſs; this is a *Rent-charge*, *Co.* 5. 18.

If the Tenant of the Land grant a Diſtreſs to him that only hath a *Rent-ſeck*, this now is become a *Rent-charge*, *Co.* 5. 118. *Dyer* 328. *Co. ſuper Lit.* 13.

Rent-ſeck. If one by Deed indented make a Gift in Tail, or Leaſe for life or years, with a Remainder over in Fee, or a Feoffment in Fee, and reſerve a Rent upon any ſuch Eſtate, without any clauſe of Diſtreſs for non-paiment; this is a Rent-ſeck. *Lit. ſect.* 216. 217. 215.

So if one ſeiſed in Fee of Land by Deed-poll or Indenture, grant a Rent iſſuing out of his Land, without any clauſe of Diſtreſs in the Deed; this is a Rent-ſeck. *Co.* 6. 5. 8. *Co. ſuper Lit.* 150.

If there be Lord and Tenant, and the Lord grant the Rent, (except the Fealty which is incident to every Rent-ſervice) this is Rent-ſeck. *Perk. ſect.* 113.

If one hold his Land by Homage, Fealty, and other ſervices, yielding a Rent, and the Lord grant away the Rent reſerving the Services; this is a Rent-ſeck. *Co. ſuper Lit.* 151. *Lit ſect.* 226, 227.

If one deviſe a Rent by Will in Fee, Fee-tail, for life or years, without any clauſe of Diſtreſs; this is a Rent-ſeck. *Co.* 6. 56.

If a Lord have two Daughters and dieth, and upon partition one hath the Rent, the other the Fealty; this is Rent-ſeck. *Co. ſuper Lit.* 150. *Dyer* 384.

If one leaſe Land to another for life rendring Rent, and after he in Reverſion grant away this Rent to another; during the Reverſion, this is a Rent-ſeck. *Lit. ſect.* 228. So if he grant the Services, ſaving the Rent. *Co. ſuper Lit.* 151.

3. What ſhall be ſaid a good Rent by Grant or Reſervation, or not: And how taken. In reſpect of the thing out of which it doth iſſue.

For Anſwer to this, take theſe Caſes.

1. If a Leaſe be made of a Manor, Lands, Meadows, Paſtures, Mill, or the like, rendring a Rent, or a Rent be granted iſſuing out of ſuch things; this is a good Rent, for theſe things are chargeable with a Rent. So if one be ſeiſed of a Reverſion or Remainder of Land after an Eſtate for life, years, or in tail, and grant or reſerve a Rent-charge out of it; this is a good Grant and Reſervation, and the Land ſhall be charged when it comes in poſſeſſion. *Co.* 7. 27. *Plow.* 157. 100. *Co.* 4. 49. *Plow.* 198. *Co. ſuper Lit.* 144.

2. If one that hath but a Leaſe for years of Land, leaſe the Land rendring Rent, or grant a Rent out of the Land; this Grant or Reſervation is good during the Term: And if he had granted for a longer time, yet it is good for the time of the Leaſe. But if one be poſſeſſed of a Term of White-acre, and ſeiſed in Fee of Black-acre, and grant a Rent out of both theſe Acres for life; the Rent ſhall iſſue out of Black-acre only. *Co.* 2. 36. 14 *H.* 7. 2. *Co.* 7. 23.

3. If one make a Leaſe for years of Land, and after grant a Rent-charge out of the ſaid Land; this is a good Rent: And if the Leſſee ſurrender, the Rent ſhall begin preſently. So if one grant a Reverſion or Remainder rendring a Rent, it is good. *Co. ſuper Lit.* 47. *Plow.* 198.

4. If

4. If one make a Leaſe of the Veſture or Herbage of his Land, reſerving a Rent; this is a good Rent. *Co.* 7. 38.

5. If one grant a Meſnalty reſerving a Rent, it is good; for the Tenancie may eſcheat, and then the Donee may diſtrain for all the Arrearages, 1 *H.* 4. 1.

6. A Rent iſſuing out of a Rectory, is good.

7. But if one grant a Rent out of anothers Land, this is void as to charge the Land; and though he after purchaſe the ſame Land, yet this will not make the Land chargeable, but it will be a good Annuity to the perſon. *Brownlow*, 1 *par.* 30.

If one grant or reſerve any Rent out of a thing that is not manorable, or that is *Hereditamentum incorporeum*, it is void. And therefore if one grant or reſerve a Rent out of a Fair, Market, Tythes, or Hundred, Offices, Corrody, Grinding at a Mill, Liberties, Priviledges, Piſchary, Common, Advowſon, or the next Avoidance of a Church, or the right of Land only, or the like; ſuch Grants and Reſervations are void.

So if one grant a Rent iſſuing out of another Rent, or reſerve a Rent upon the Grant of another Rent; ſuch Grants or Reſervations are void. So if one recite that he hath a Rent, and grant it over, reſerving a Rent out of it, this is void. But yet theſe Grants of Rent may be good to charge the perſon in an Annuity. And yet if one have a Rent-ſervice, he may grant it, or part of it away; and if the Tenant attorn, this is a good Grant: But if it were a Rent-charge, it ſeems contrary. See for this, *Co. ſuper Lit.* 142, 144. *Co.* 7. 27. *Plow.* 132. *Co.* 10. 60. 93. *Co.* 1. 59. *Kelw.* 161. 3 *H.* 6. 20.

8. If one be diſſeiſed, and after grant a Rent out of the Land, this is void: But if it be by Fine or Indenture, it may be good by way of Eſtoppel, *Co.* 2. 53.

9. No Rent granted out of, or reſerved upon any incorporeal thing, as Commons, Offices, and the things before named, is good: And yet in caſe of the King, ſuch a Grant or Reſervation may be good; for it is a rule, That a Rent muſt always be reſerved out of ſuch a thing whereunto the Leſſor may reſort for Diſtreſs. And yet in the caſe of a common perſon alſo, if a Leaſe for years be made of any ſuch incorporeal thing rendring a Rent, the Reſervation may be good by way of Contract to give an Action. But in caſe of a Leaſe for life of ſuch thing, it is void to all purpoſes. *Co. ſuper Lit.* 47.

One may have or grant a Rent by Fine, or Fine and Render. See *Fine. Br. Reſ.* 2. *Co.* 2. 72. *St.* 27 *H.* 8. *c.* 10.

The Tenant by Grant may give the Lord power to diſtrain for his Rent or Services in any other place, as well as that which is held of him. 9 *H.* 6. 9.

If one grant Twenty ſhillings *Annui redditus de J. S. Annuatim percept.* it ſeems this is a good Grant to charge both the Perſon and Land. *Kelw. ibid.*

If one grant a Rent, *percipiendum apud Manerium de S.* it ſeems this is a good Grant to charge the Perſon and Land. 41 *Ed.* 2. 15.

If one ſay, *Obligo me J. S. & hæredibus ſuis in annuali redditu de decem lib. quem percipio de Manerio meo de S. & obligo Manerium prædictum ad diſtringendum*; it ſeems this is a good Rent-charge, to charge both perſon and Land. 46 *Ed.* 3. 48.

So if one grant Rent *extra* White-acre, or *de* White-acre, or *percipiendum in vel ad* White-acre; all Grants of Rent made with theſe or ſuch like words, may be good. See 46 *Ed.* 3. 48. 22 *Aſſ.* 66. 21 *H.* 7. 4. 41 *Aſſ. pl.* 3.

If a Leaſe be made rendring Rent, and it ſay not to whom; yet this is a good Reſervation. See more *infra* in *Reſerv.* 27 *H.* 8. 19.

One may reſerve a Rent upon a Bargain and Sale, and this will be good by the Saving in the Statute of Uſes. Adjudged, *Wykes* Caſe, *M.* 40 *Eliz. B. R. Dyer* 45. A Rent-charge may be claimed and had againſt another by Preſcription; That a man and his Anceſtors, whoſe Heir he is, time out of of minde have been ſeiſed of it, and uſed to diſtrain from it, when it

hath been arrear. And thus a man may make a good Title to this Rent without Deed. But one cannot preſcribe in him, and thoſe whoſe Eſtate he hath; for that he cannot have their Eſtate but by Writing. *Co. ſuper Lit. f.* 144. *Lit.* 46. *Co.* 6. 63.

If one grant a Rent-charge out of his Land, Provided that the Grant ſhall not extend to charge the perſon of the Grantor in an Annuity; this is a good Rent-charge, but the perſon of the Grantor ſhall not be charged in an Annuity. And yet if ſuch a Grant were of Rent out of his Land without clauſe of Diſtreſs with ſuch a Proviſo, this Proviſo were void, unleſs the Grantor do give the Grantee Seiſin of the Rent at the time of the Grant. *Co.* 6. 58. *Co. ſuper Lit. f.* 146: *Co.* 7: 23.

If one grant a Rent out of his Coffers, or out of all his Lands in general, with a clauſe in the Deed, That if the Rent be not paid, the Grantee ſhall diſtrain for it in the Manor of *S.* this is a good Rent to charge both the perſon and Manor of *S.* but not any other Lands.

So if one poſſeſſed of Black-acre for years, and ſeiſed of White-acre in Fee, grant a Rent out of both for life, with a clauſe of Diſtreſs in both; the Rent doth iſſue out of White-acre only: But yet both the perſon and the two Acres are to be charged for the Rent. And ſo in all like caſes.

But if one grant a Rent for life out of his Term, the Land is charged during the Term, if the Grantee live ſo long. *Stat.* 26 *H.* 8. *chap.* 5. *Co.* 7. 23. *Co. ſuper Lit: f.* 146.

If one grant to another, that he ſhall diſtrain for a Rent of Forty ſhillings a year in his Manor of *S.* if it be not paid him yearly at Michaelmas; this is a good Rent-charge to charge the Manor, but not the perſon of the Grantor. *Plow.* 139. *Co.* 7. 24. *Lit.* 219, 220.

If the Father be ſeiſed of Land, and he and his eldeſt Son join in a Leaſe for years to begin after the Fathers death, and ſay, Rendring Rent to the Heir of the Father; this were a good Reſervation: But if the Reſervation be to the Son by name, it is void, for he is but as a ſtranger. *Adjudg. Trin.* 12 *Jac. B. R. Oats* and *Frith.*

One may grant a Rent by Will, and a clauſe of Diſtreſs alſo by the Will; and this is good. *Co.* 8. 84. *Dyer* 348.

As if one by Will deviſe Ten pounds to be paid out of his Land quarterly at the moſt uſual Feaſts, and for non-paiment to diſtrain, and the Diſtreſs to keep till paiment of Arrearages; this is a good Rent by Will, for life of the Deviſee. *Co. ſup. Lit:* 144.

One may reſerve a Rent upon a Deed of Bargain and Sale. *Co. ſuper Lit. f.* 144.

If one ſeiſed of Land in Fee, bindeth his Goods and Chattels to the paiment of a yearly Rent; or, *Obligo Manerium meum de C. & omnia bona in dicto Manerio exiſtent. A. de B. in annuo redditu de vigint: ſol. ad diſtringendum per Ballivum Dom. Regis pro reddito prædicto:* Theſe be good Grants of Rent to charge the Land. *Co. ſuper Lit.* 147:

If one grant a Rent of Forty ſhillings out of his Manor of *D.* and grant over by the ſame or another Deed, That if the Rent be behind, the Grantee ſhall diſtrain in the Manor of *S.* the Rent doth iſſue out of one Manor; but this is a good Grant to charge both Manors with the Rent. *Co. ſuper Lit.* 147. 7: 23.

Sect. 3: If a man be ſeiſed of twenty Acres of Land, and grant a Rent of twenty pounds *percipiendum de qualibet acra terræ meæ*; this is a good Grant, and ſeveral out of every Acre; ſo that in all it is twenty pounds a year. 21 *H.* 6. 10. *Co. ſuper Lit. f.* 147.

If one by Deed grant a Rent-charge to a man out of his Land for life, and granteth further by the ſame Deed, that he had his Heirs may diſtrain in the Land for the ſame Rent; this is a good new Grant of a new Rent in Fee-ſimple. *Co. ſuper Lit.* 147. 148.

Upon

Upon a Releaſe that doth enure to create or enlarge an Eſtate, or by way of *Mitter le State*, a Rent may be reſerved; but not upon a Releaſe that works by way of *Mitter le Droit*, or by way of Extinguiſhment. *Co. ſuper Littleton*, *f.* 193.

If a Company in *London* grant an Annuity out of their cleer gain; that Annuity is good, and thoſe words void. *Trin.* 17 *Jac. Co. B.*

If one grant a Rent-charge without the words, [*For me and my heirs*] this is good to charge both the perſon and Land during the Grantors life; but after it will charge the Land only. *Dyer* 344.

If one by his Will dated the nineteenth day of *October*, deviſe to *J. S.* a yearly Rent of Ten pounds to be iſſuing out of his Land, with clauſe of Diſtreſs, and doth not ſay when it ſhall be paid, or what day; yet this is a good Rent, and ſhall be paid that time twelvemoneth the nineteenth of *October*. *Co.* 6. 56.

A Rent may be granted upon Condition, and it may be granted for life, years, or in Tail or in Fee, or for life and years with Remainder over; and theſe manner of Grants of Rents are good. *Plow.* 30. See *Remainder.*

A Rent may be had or reſerved without Deed for owelty of partition, or upon a Leaſe for life or years, or Gift in tail, or to a woman out of the Land for which ſhe is endowed: But a Rent for inequality of Exchange cannot be without Deed. *Co. ſuper Lit.* 169.

A Rent *de novo* cannot be granted without Deed; and if it be, it is void: But one may have a Rent by Preſcription, *(vide ſupra.) Doct. & Stu. vide Faits. Bro. Reſervat.* 18.

If one ſeiſed of a Rent in Fee, grant it after the death of *J. S.* it ſeems this is a void Grant. 8 *H.* 7. 3.

If a Leaſe be made rendring Rent to a ſtranger, this Reſervation is void. *Br. Reſer:* 15. 22. *Plow.* 155.

So if it be rendring a Rent to the Leſſor, and another that is a ſtranger; it is void as to the ſtranger, unleſs the ſtranger be party to the Deed. *Trin.* 12 *Jac. Co. B. Co: ſuper Lit.* 113.

So if a Father and eldeſt Son join in a Leaſe, rendring Rent to the Son after the death of the Father; this is void as to the Son. *Trin.* 12 *Jac. Co. B. Oats* Caſe.

If Lands be given in Frankmarriage, reſerving a Rent; the Reſervation is void till the fourth degree paſt, and afterwards good. 26 *Aſſ.* 66.

If the Eſtate be void on which the Reſervation is made, the Reſervation is void alſo, 14 *Jac. B. R.*

A Rent cannot be reſerved on a Parol-Feoffment; but on a Feoffment by Deed-poll it may. 14 *Car. B. R.*

For Anſwer to this, how a Reſervation ſhall be expounded, take theſe Caſes: How it ſhall be taken.

1. If a Rent be reſerved on a Leaſe, and it is not ſaid how long it ſhall continue, or to whom it ſhall go; in this caſe it ſhall continue as long as the Eſtate doth continue, and ſhall go to the Heir, or him that hath the Reverſion. *Dyer* 45. *Kelw.* 88.

2. If one by Deed indented demiſe to *A.* for life, with divers Remainders over, *Reddend. inde* to the Leſſor and his Heirs a Rent; this Rent ſhall extend to all the Eſtates, if he in Remainder after the Eſtate for life will agree to it. *Co.* 5. 111. 10. 107.

3. If one leaſe for a year with theſe words, [*And if the parties ſhall agree for a new Leaſe for longer time then for three years, yielding during the Term aforeſaid*] in this caſe the Reſervation ſhall extend as well to the firſt year, as to the three laſt years. *Co.* 10. 106. 107. 5. 111. *Brownlow, Rep.* 2 *par.* 30. See more in *Chap.*

If one leaſe for life or years, and the Leſſee do covenant to pay Ten pounds by the year Rent, and ſo it is ſet down in the Deed, not in the nature of a Reſervation, with

with rendring, yielding or paying ſuch a ſum, or any ſuch like words; this is not a Rent, but a Sum of money in groſs, for which the party cannot have the ſame remedy as he may for a Rent, but an Action of Debt or Covenant. *Dyer* 361. *Plow.* 133. *Browning* and *Beſtons* Caſe.

4. What payment ſhall be ſaid to be a ſum in groſs, and not a Rent.

If one ſeiſed of Lands, and poſſeſſed of divers Implements and Chattels, make a Leaſe for years of it, and the Leſſee covenant and grant that he will pay during the Term an hundred pounds at ſuch days; this is no Rent, nor in the nature of a Rent, but a Sum of money in groſs. *Dyer* 276.

If one grant to do a thing, *& toties quoties defectus fuerit*, he ſhall forfeit Ten pounds; this is no Rent, but a Sum in groſs, for which Debt only lieth, *Dyer* 24.

5. What payment ſhall be ſaid an Annuity, and not a Rent.

Annuity, what.

An Annuity is a yearly ſum of money, or other thing to be had from the perſon of the Grantor. Sometimes this word alſo is taken for the Writ of Annuity, which is provided for the recovery of this yearly paiment, if it be behind. And to this a man may make to himſelf a Title by Preſcription or Grant. And this by Grant a man may have in Fee-ſimple, Fee-tail, for life or years, to be received of the perſon of the Grantor, or of him and his heirs. And by this the Grantee or his heirs, or either of their Grantees may take advantage. *Lit. f.* 41. *Plow.* 13. 27. *Co. ſuper Lit. f.* 144.

Sect. 4.

If one grant a Rent, Annuity, or Sum of money out of his Coffers, or out of his Land, and ſay not what Land, nor where; this is an Annuity, not a Rent. *Lit. f.* 48.

If one grant a Rent-charge out of anothers Land; this ſhall be an Annuity, and ſhall charge the perſon of the Grantor. *Co.* 6. 58.

If one grant a Rent out of ſuch a thing as is not chargeable with a Rent; there this ſhall be an Annuity to charge the perſon. *Co.* 6. 58. 10. 93.

If the King had given a Sum of money to one newly dignified, or another man grant an Annuity *pro conſilio impenſo & impendendo*, or for exerciſing an Office: And ſo in all ſuch like caſes where no Land is chargeable with the ſum or paiment, and the ſum be yearly, it ſhall be reputed an Annuity.

A Company in *London* granted an Annuity of Twenty pounds *per annum*, and to give Counſel, out of their cleer gains in the Trade; this is a good Annuity, and thoſe laſt words are void. *Co. B. Smiths* Caſe, 17 *Jac.*

A Rent-charge alſo is ſometimes converted into an Annuity; and for this ſee *Suſpenſion.*

6. The Remedy for Recovery of an Annuity.

As no Freehold is chargeable with an Annuity, ſo no Diſtreſs can be taken for it, neither can the party have any remedy for the recovery of it but a Writ of Annuity, in which he ſhall recover all the arrearages behind of the Annuity; and when once he hath a Judgment upon this Writ, ſo long as this is of force, he ſhall never have any other Writ of Annuity, nor new Action againſt the party, but a *Scire facias* out of that Judgment. But after an Annuity is determined, the party unto whom any Arrearages be behind, may bring an Action of Debt for them.

But for ſuch a Rent as may be granted without Deed, a Writ of Annuity doth not lie, though it be granted by Deed. And for a Writ granted for owelty of partition, no Writ of Annuity doth lie. And where a Rent is apportioned by Act in Law, this Writ of Annuity faileth. *Co.* 7. 9. *F. N. B.* 152. *Dyer* 26. 373. *Co.* 6. 45. upon *Lit. pl.* 144, 145, 150.

7. The Remedy for Recovery of a Rent. *Diſſeiſin.*

If one be once ſeiſed, and hath a Freehold of any Rent, and be after diſſeiſed of it, he may have an Aſſiſe to recover it. And note that the Diſſeiſon of a Rent is, when the party is diſturbed in the means of Recovery of his Rent, which for a Rent-charge may be by five cauſes or means. As,

1. By Reſcous, which is when the party hath diſtrained one, and the Diſtreſs is reſcued, or being upon the Land to diſtrain, cannot be ſuffered. *Lit. f.* 236, 237. 240. 239. *Br. Diſſeiſ.* 69.

2. Replevin, which is where an Action of Replevin is brought upon the Diſtreſs taken.

3. Denier,

3. Denier, which is the denying or not paiment of the Rent on the Land, when it is required.

4. Incloſure, which is when the party doth come to the place whence the Rent doth iſſue, or where he hath power to diſtrain, and it is incloſed by walls or the like, that he cannot come at it: But if the place were not newly, but antiently incloſed, then it were no Diſſeiſor.

5. Foreſtalling; which is when the party is going to diſtrain for the Rent, and the Tenant hearing of it doth foreſtall the way with force and arms, or threaten to kill or wound, ſo that he dare not go to diſtrain.

And for a Rent-ſervice this may be by three cauſes, as by Reſcous, Replevin, and Incloſure. And for a Rent-ſeck by three cauſes, Denying, Incloſing, and Foreſtalling. But this Aſſiſe lieth not until an Actual Seiſin of the Rent, *Co. ſuper Lit.* 153. 160, 161. 99 *Ed.* 3. 15.

In an Aſſiſe for the Rent, the Plaintiff ſhall recover the Rent and Damages: But in a Reſcous he ſhall recover the Damages only, and the thing diſtrained ſhall be taken again as a Diſtreſs.

For an Annual Rent due from a Freeholder, the Lord may diſtrain; but he cannot have Debt for Rent or Corporal ſervice as long as the ſame doth continue, but after it is ended he may. *Co.* of *Copiholds*, 50.

If a Leſſee for twenty years of Land, grant it to a ſtranger for part of the years rendring Rent; in this caſe the Grantor may diſtrain, or have an Action of Debt for the Rent. *Perk. ſect.* 693. *Co.* 1. 97.

If one were never ſeiſed of a Rent-charge, and diſtrain, and a Reſcous is made, he cannot have an Aſſiſe, but muſt have a Reſcous. *Co.* 1. 97.

In caſe where one may diſtrain for a Rent, he may not diſtrain in any other place but ſuch out of which the Rent doth iſſue, unleſs it be where the Diſtreſs is given in another place (as above) but in any other part of the Land where he will he may diſtrain. See *Diſtreſs. Br. Rent*, 2. *Lit.* 48. *Plow.* 239.

If one at Michaelmas make a Leaſe for years, rendring Rent at Michaelmas or ten days after; the Leſſor may bring an Action of Debt for the laſt years Rent, and ſuppoſe it to be due at Michaelmas. *Barwicks* Caſe, *Tr.* 9 *Jac.*

If a Leaſe be made rendring Rent, on Condition of Re-entry for non-paiment, and the Leſſor re-enter for non-paiment, yet he may bring an Action of Debt for the Rent. So it ſeems where a Re-entry is given, and the Leſſor hath made a legal demand, though he received the Rent after, yet he may re-enter notwithſtanding. *Kelw.* 153. 112.

Recoverors upon Common-recoveries ſhall have the ſame remedy for their Rents by Diſtreſs, or an Action of Debt againſt Leſſees for years before Attornment, as the *Recoverees* had. *St.* 7 *H.* 8. 4. 21 *H.* 8. 15. *Co. ſuper Lit.* 104. See more, *Co. ſuper Lit.* 323. *& Debt.*

For every *Rent*-charge, if it be unpaid, the party to whom it is due hath this remedy: Either he may diſtrain upon the Land charged with it, or he may bring an Annuity againſt the Grantor at his election; unleſs it be in caſe where by the original agreement one of theſe remedies are debarred, as the caſe above, *Grant de Rent-charge*, Proviſo it ſhall not charge the perſon, &c. 8. The remedy for Recovery of a Rent-charge.

But where the party hath this double means of remedy, he may not make uſe of both: For if once he bring a Writ of Annuity (in caſe where the perſon is chargeable, and the Writ doth well lie) and declare; by this the Land is diſcharged for ever. And if he once diſtrain and avow for the *Rent* in a Court of *Record*; by this the perſon of the Grantor is diſcharged for ever, *Co. ſuper Lit.* 145. So if the Grantee bring an Aſſiſe and make his plaint; but the purchaſe of the Writ of Annuity or Aſſiſe doth not determine his Election, *Dyer* 344. *Lit. ſect.* 219. *Co.* 7. 24. *Plow.* 13. 5 *H.* 7. 33. *Dyer* 362. *F. N. B.* 152.

If a *Rent*-charge be granted with a Proviſo it ſhall not charge the perſon of the Grantor, and after the *Rent* is determined, and there are arrearages behind; in this caſe notwithſtanding the Proviſo, the party may have an Action of Debt for the arrearages, *Co.* 7. 39. *Dyer* 217.

And

And though a Deed that is with a clauſe of Diſtreſs for Rent, do grant further that he ſhall keep the Goods diſtrained againſt Gages and Pledges, yet they are ſubject to *Replevin*, *Co. ſuper Lit.* 145. 282. For elſe by a new invention all Replevins ſhall be taken away.

If one have a Rent-charge for years, and the Term expire; in this caſe he may not diſtrain for the Rent, by the opinion of Juſtice *Crook & Barclay. Paſc.* 10 *Car. Crawley contra.* But he muſt have an Action of Debt, as he muſt whiles the Leaſe doth continue.

But in all caſes where the Land charged is diſcharged by the act of the party, as purchaſe of part, or the like, the Grantee cannot have an Annuity; but if it be determined by the act of God, or Law, there he ſhall have an Annuity, as of a Rent granted for anothers life. *Co.* upon *Lit.* 148.

If one be ſeiſed of Land for the life of *J. S.* grant a Rent out of it for twenty one years, and *J. S.* die; in this caſe the Rent ſhall continue for the years, but the Land is diſcharged. *Co. ſuper Lit.* 148.

Of recovery of Rent-ſervice.

For a Rent-ſervice reſerved on a Leaſe for years, if it be unpaid, the party to whom it is due may either diſtrain for it, or elſe he may bring an Action of Debt and recover it. *Lit. ſect.* 213. 331. But for Rent-ſervice in other caſes, it ſeems he hath no means of Recovery of it, but by Diſtreſs and Aſſiſe. (See *ſupra, & Diſtreſs.*) *Perk. ſect.* 693. So upon a Gift in tail or Leaſe for life. *Littleton, ſect.* 213.

If one that hath but a Leaſe for years, make a Leaſe of the Land for part of the time, rendring the Rent, and the Rent is behind, the Leſſor may have an Action of Debt for this Rent; by which it ſeems this Rent is a Rent-ſervice. *Plow.* 521. 9 *H.* 5. 8.

Executors.

Executors ſhall have the like remedy for Rent-charge and Rent-ſervice due to their Teſtator, as their Teſtator had, and they may diſtrain for the arrearages due in their Teſtators time: And ſo alſo ſhall the Tenant of the Land, whether he be Heir or Feoffee to him that ſhould have paid it, Heir or Feoffee of the Heir or Feoffee, *& ſic in infinitum*; Iſſues in tail, or he to whoſe uſe, or any other that come into the Land from or under him that ſhould have paid it. As for example, if one make a Leaſe for years rendring Rent, and the Rent be arrear, and the Leſſor make his Executor and die, and the Land deſcend to his heir; the Executor may bring an Action of Debt for this Rent. *Co. ſuper Lit.* 162. *St.* 32 *H.* 8. *c.* 37. *Co.* 4c. 50. *Dyer* 373.

So if one grant a Rent for life out of his Land, and the Rent is arrear in divers Feoffees time of the Land one after another, and the Grantee die, his Executors may bring an Action of Debt againſt every one of the Feoffees, and recover the arrearages of him for his own time. *Qui ſentit commodum, ſentire debet & onus:* But if a Tenant in tail make a Feoffment, and the Diſcontinuee charge the Land, and after enfeoff the Iſſue in tail and die; the Iſſue is remitted to his firſt Eſtate, and ſhall not be charged with this Rent.

So if one have a Rent-charge or Rent-ſervice for life or in fee, and it be arrear, and after he grant away the Rent to another, and the Tenant attorn, and then he die; his Executor ſhall never recover theſe arrearages by this Statute, but they are loſt. *Co.* 7. 37.

If one have ſuch a Rent for the life of *J. S.* and *J. S.* die, yet the party may have his remedy againſt the Occupier of the Land by Diſtreſs. As if one deviſe a Rent out of the Land by Will, with clauſe of Diſtreſs to *B.* for the life of *C.* and the Heir to whom the Land charged doth deſcend doth leaſe it to *D.* the Remainder to *E.* in Fee, and the Rent is behind in the life of *D.* and *D.* die, and after *C.* die; Now in this caſe the Lands in the hands of him in Remainder ſhall be charged with theſe Arrearages, and the party may diſtrain for them. *Stat.* 32 *H.* 8. *ch.* 37. *Co.* 6. 118.

Husband and Wife.

If any ſuch Rents be arrear to Femes-ſole that after marry, or Femes-covert during the Coverture; the Husband, his Executors or Adminiſtrators ſhall have the ſame remedy for it the Wife had by Action of Debt or Diſtreſs. As if a Feme-

ſole

ſole have a Rent-charge granted to her for life, and the Rent be behind, and after ſhe take a Husband, and the Rent be behind again, and ſhe die; the Husband may recover both theſe Rents by this Statute. See the Statute at large, and *Co. ſuper Lit. f.*162. *Co.*4.50. *F.N.B.* 121.

Corporal ſervices, as Work-days, and *Nomine pœnæ*, and the like, are not within this Statute; but all others are. *Co. ſuper Lit. f.*162.

Of Recovery of a Rent-ſeck.

In theſe three ſpecial Caſes, one may diſtrain for a Rent-ſeck.

1. Where a Woman hath it for part of her Dower, *in favorem dotis:*
2. When the King is to have it by his Prerogative.
3. When a Parcener is to have it for equality of partition.

But in all other caſes there is no remedy for a Rent-ſeck, but by an Aſſiſe; and that a man cannot have neither, until he have got Seiſon of the Rent, (See *Seiſon*) after this manner as followeth. See alſo ſome caſes before, where one may diſtrain. *Co. ſuper Littl. f.* 147. *Kelw.* 104. *Co.* 7. 28. *Littl. f.* 235. *Co.* 6. 56. 58.

Sect. 6. *Demand.*

After this Rent is due, and Seiſon had thereof, he muſt demand it at the laſt part of the day of paiment: But if no Tender be made of it at the day of paiment, though no Demand be then made, then the party may at any time after the day come on the Land, and demand the Rent; and if the Tenant or ſome other for him be not there ready to pay it, this is a Denial in Law, upon which he may have an Aſſiſe, and therein he ſhall recover the Rent, Arrearages, and Coſts and Damages.

But if there were a Tender by the Tenant on the very day, the laſt moment thereof (as it muſt) and no man ready to receive it; in this caſe he hath no ſuch remedy, unleſs he can after meet with the Tenant upon ſome part of the Land, and there demand it.

And therefore then in that caſe, the beſt way is to be on the Land the next day of paiment, and there demand the Rent and Arrearages thereof the laſt part of the day: And if no body tender it, this is a Denial upon which he may have an Aſſiſe. See more in *Demand. Lit.*235. *Co.*7. 28. *Lit.*233. *Co. ſuper Lit. f.*153.

Note.

And here note that a man may have ſuch a Condition, or Conditional Clauſe in the Deed, that by it the Leſſor upon Non-paiment of the Rent may enter and keep the Land as a Pledg till the Rent be paid For which ſee *Co. ſup. Lit.* 202,203. But not that he ſhall hold the Diſtreſs againſt Gages and Pledges, *Co. ſup. Lit.* 283. if it be a Diſtreſs for Rent. *Lit. ſect.*327. *Plow.*524.

8. *Demand* or *Requeſt*, what. Where it is needful,

It is the calling upon any man for any thing that is due; and this ſometimes is called Requeſt.

Demand for Rent muſt be made, though the Tenant or any for him be not there to pay it. *Co. ſuper Lit.* 153.

To have a Re-entry, or *Nomine pœnæ.*

In moſt caſes when a man will enter into Land upon a Condition for Non-paiment of Rent, or will have a Penalty or *Nomine pœnæ* of a greater Sum for Non-paiment of a leſs; he muſt firſt make a Demand or Requeſt for it, and that in that manner for time, place and order, as is ſet down here; elſe his Entry is unlawful, and he ſhall not have the *Nomine pœnæ*, and that though there be no words in the Deed between them that it ſhall be firſt demanded, and though no man be upon the Land to pay it or tender it.

But perhaps if the words of the Condition be, That he ſhall enter, or the Eſtate ſhall ceaſe without Demand; there Demand may not be neceſſary. 2 *H.*7:14. *Br. Tend.* 41.

As if one leaſe for life, Leaſe, Tail, or in Fee, rendring Rent at Michaelmas, Provided that if it be behind and unpaid after the day, the Leſſor, Feoffor, or Donor ſhall re-enter: In this caſe he muſt demand it firſt.

So if there be a Covenant or Condition, that if the Rent be not paid the day, the Leſſee ſhall forfeit Twenty ſhillings *Nomine pœnæ*, or in any ſuch like manner; he muſt demand it ere this Forfeiture ſhall be loſt. *Co. ſuper Lit.* 153. 201, 202. *Co.* 432. *Noy* 97. *Dyer* 329. 13. 79. 51. *Plow.* 172. 70. *Co.* 6. 56. *Perk. ſect.* 836. *Co.* 10. 129. 14 *Ed.* 4. 4.

If a Leaſe be made of Land in *Bucks*, rendring Rent at the Exchange in *London* on Condition to re-enter; here Demand muſt be made before Re entry. *Adjudg Trin.* 37 *Eliz. B.R.*

If Leſſee be bound by Obligation to pay the Rent reſerved, it muſt be demanded. *Reſolv. B.R. Hobard Rep.* 12.

To have a Diſtreſs or an Aſſiſe:

If one deviſe Land to one by Will, and a Rent to another iſſuing out of it; and that if the Rent ſhall be arrear, the Deviſee of the Rent after demand ſhall diſtrain; it ſeems in this caſe he cannot diſtrain till he have demanded it. *B. R. Symonds* Caſe, *Hil.* 4. *Jac.* And ſo in like caſe, *Co.* upon *Littleton*, 144. 202. *mutatis mutandis.*

So if a Rent be reſerved by Deed, and that if the Rent be behind and lawfully demanded at the houſe, that the Leſſor ſhall diſtrain; he cannot diſtrain till demand, *March* 147. unto 218.

One muſt demand a Rent-ſeck and Arrearages after it is due, before he can have an Aſſiſe for it. And this Demand muſt be made alſo upon the Land in ſome overt place, the laſt day of paiment.

But for a Demand to enable one to diſtrain, that muſt be made, if the agreement be ſo, before Diſtreſs. *Co. ſuper Lit.* 202.

Sect. 7. To have another Debt or Duty.

An Annuity (it ſeems) muſt be demanded, before any can recover any Damages for withholding it: And if one be bound to another he ſhall quietly enjoy an Annuity, it ſeems this Obligation is not forfeit, till he hath demanded the Annuity.

But of a Sum of money one is bound to pay by Covenant or Obligation yearly, *contra.*

So if one be bound to pay money on a ſingle Obligation, or by a Contract, and no day is ſet forth; the party may chooſe whether he will pay till Requeſt or Demand be made for it by Suit or otherwiſe; and if he do not demand it otherwiſe before he ſue for it, he ſhall recover no Damages notwithſtanding, but his bare money.

But if there be an Obligation of a greater Sum, with Condition to pay a Leſſee, or one be bound in another Obligation, *contra.* To pay the money in that Obligation, it is otherwiſe, *Bro. Tender*, 22. *Condition*, 153. 173. 16 *H.* 7. 14. 14 *H.* 8. 19.

So if one be bound to pay money on an Award, *Brownl.* 1 *par.* 46. 49. 23. 53. 56. 65.

If one be bound to pay Twenty pounds by a Bill upon Demand, or to do any other duty, if it be by Eſpecialty, there needs no Requeſt to be made or laid in the Declaration for the duty: But if it be without Eſpecialty, there it muſt be made and ſet forth in the Court for the duty, eſpecially if it be in caſe of Collateral *Aſſumpſit*; as if one promiſe to pay Ten pounds Rent to another at a years end, being demanded, if it be not paid before. *Paſch.* 17 *Jac. B.R. Baſſports* Caſe.

If one ſay to another, Lend *J. S.* Ten pounds, and if he pay you not by the years end, then that he will pay it upon requeſt; in this caſe a Requeſt is neceſſary, and it muſt be after the year. *Hil.* 17 *Jac. B. R. Baſſpoles* Caſe, *Hill* and *Wades* Caſe, 16 *Jac. B. R.*

And

And in all caſes where Demand makes the duty, or is parcel of the duty; there it is neceſſary, otherwiſe not.

9. Where Demand is not neceſſary of a Rent.

If one deviſe Lands by his Will to another, on Condition he ſhall pay Twenty pounds a year out of it at two Feaſts to *J. S.* in this caſe neither *J. S.* nor the heir of the Deviſor need to demand the Rent: But the Deviſee of the Land at his peril muſt pay it to ſave the Condition, and that without Requeſt. *Dyer* 348. 74.

But if one deviſeth a Rent by Will, and willeth that if default of paiment be, the Executors or Deviſee ſhall have the Land; in this caſe the Deviſee of the Rent muſt demand Rent, before any Forfeiture ſhall be of the Land. *Dyer* 348.

If a Rent be granted with Condition, and that if it be arrear, that the Grantee may diſtrain; here the Grantee need not demand it before he diſtrain, but may diſtrain the firſt day after it is due. *Plow.* 70.

If the King be to enter or have a *Nominè pœnæ* for Non-paiment of Rent, he is not bound to demand it, but his Patentee muſt demand it as another man. *Kelw.* 153. *Co.* 7. 28.

If one be bound by Obligation or Covenant to pay the Rent reſerved on ſuch a Leaſe; in this caſe to make a Forfeiture of the Obligation, or Breach of the Covenant, there needs no Demand. But if it were to perform the Covenants, *contra*, there it muſt be demanded. *Brownlow, 2 par.* 176. *Stat.* 22 *H.* 6. *ch.* 57. *Bro. Tend.* 20.

In other caſes.

If one be bound to pay Twenty pounds by a Bill upon Demand, an actual Demand in this caſe is not neceſſary. *Adjudg. Hil.* 39 *Eliz.* 11 *H.* 4. 18.

If one deliver Goods to deliver back again upon Requeſt; here needs no actual Requeſt before a Suit. So in a Detinue.

But if one be bound to deliver Goods upon Requeſt, an actual Requeſt muſt be made before a Suit can be had. *Brownl.* 1 *par.* 10.

10. When and how Demand muſt be made. The *Time.*

Where Demand is requiſite for to gain a Re-entry into Land, or a *Nomine pœnæ*, there it muſt be made in the place ſubſcribed, here the laſt day given to the Leſſee for the paiment of his Rent, and the laſt part of the day, ſo long time before the Sun-ſet as wherein the money to be paid and received may be conveniently told and numbred by day-light, or before Sun-ſet. And when the Leſſee hath two times given to him for paiment, as when the Leaſe is rendring Rent at Michaelmas, or within twelve days after, or in like manner; here demand muſt be made the laſt part of the firſt day, (*i*) Michaelmas day, and the laſt part of the laſt of the twelve days.

Sect. 8.

But if the longer time had been put into the Condition only, as rendring Rent at Michaelmas, Provided that if it be behind twelve days after, the Leſſor ſhall reenter; in this caſe he need not demand it at Michaelmas, but the laſt part of the twelve days only, and that is ſufficient; and when he doth come to demand, it is good to continue his Demand till night, and the Leſſor is not bound to make any other Demand at any other time, neither is a Demand any other time good. *Co. ſuper Lit. f.* 202. *Co.* 4. 72. 51. *Dyer* 329. 130. 79. 51. *Plow.* 172 76. *Co.* 6. 56. *Perk. ſect.* 836. *Br. Tend.* 41. 2 *H.* 7. 7. 14. *Co.* 10. 129. *Co.* 7. 28. *Barwicks* Caſe.

If one have a Rent-ſeck to be paid at a day arrear, he need not demand it with the Arrearages, the laſt part of the day when it ought to be paid; but he may demand it at any time afterwards. *Co. ſuper Littleton, fol.* 154. *Co.* 7. 28.

If one be to demand a Rent only before he diſtrain, he is not bound to that point of time as before, but there he may demand it at any time after the day of paiment of it. *Co. ſuper Lit. f.* 144. 153. *Co.* 7. 28.

Bnt a Demand to enable a Diſtreſs only, may be at any time after the day, and it is good enough. *Mich.* 40, 41 *Eliz.* between *Stanley* and *Read. Co.* 7. 28.

The *Place.* It muſt be made the time aforeſaid upon ſome part of the Land whence the Rent doth iſſue, and upon that part that is moſt eminent and notorious: As a Capital Meſſuage and great Porch in that houſe, and at the Fore-door, and not at the Back-door; and though the Fore-door be open, yet the Leſſor or Feoffor need not go in, though he ſee the Leſſee or Feoffee within to tender it; but if he do it at the Fore-door, it is ſufficient: And if there be no Houſe, ſome Gate or Stile upon ſome High-way going through the Lands charged. And if there be two places of paiment, as if it be, [Yielding and paying the Rent at ſuch a Stile, or in the Dwelling-houſe, or the like] there Demand muſt be made at both places, for the Leſſee hath election to pay it at either. So if it be, [Yielding or paying at or in a place] the Demand muſt be made at and in the place.

And if the Rent be to be paid at any place out of the Land charged with it, then the Demand muſt be made at that place, and need not to be made upon the Land charged, and there in the moſt notorious place. *Co. ſuper Lit.* 201. *Co.*4.32.6,46. *Dyer* 329.73.130.5. *Plow.*172.30. *Perk.* 836. 2 *H.*7.14. *Co.*10.129. *Co.*7.28. *Lit ſect.*341. *Co.*4.72.

If no other place be appointed, the Demand ſhall be made upon the Land always by the Leſſor, or his ſufficient Attorney. *Noy* 98. *Brownl.* 1 *par.* 138.

If the King make a Leaſe rendring Rent at the Receipt of the Exchequer, and he grant the Reverſion; his Patentee muſt demand it upon the Land, and need not demand it at the Exchequer. But if no place were mentioned in the Kings caſe, the party is bound to pay it at the Kings Receipt. *Co. ſuper Lit.* 201.

A. mortgaged Land to *B.* on Condition, that if he pay *B.* money, he ſhall reenter: After, before the day of paiment, *A.* is attainted; in this caſe *B.* is to demand the money at the Exchequer, and not upon the Land, nor is the King bound to tender it. *Goldsb.*137. *pl.*41.

And the Leſſor is not bound to make any Demand at any other place; neither is a Demand at any other place good. *Co. ſuper Lit.* 153.

But if there be a Houſe and Land, a Demand at the Houſe is needful to have a Reentry on a Condition; but a Demand on the Land to have an Aſſiſe, is good enough for a Rent-ſeck. *Co. ſuper Lit.* 153.

If the Feoffment were of a Wood only, there Demand muſt be made at the Gate, or in the High-way that leads through it; and if one place be as notorious as the other, the Feoffor may demand it at either: And therefore in that caſe it is good for the Feoffee to tender it at both, for elſe it will not avail if the Leſſor be not there. *Co. ſuper Lit.* 202.

The manner of doing it. The Leſſor himſelf, or ſome body for him, muſt come upon the place at the time when the Demand muſt be made, (as is ſhewed you before) and there he muſt make an actual or verbal Demand of the Rent; and it is good to ſet forth how much it is, and to ſhew his readineſs there to receive it, in this manner: *Here I demand of* J.S. *Twenty pounds due to me at the Feaſt of &c. for a Meſſuage &c. which he holdeth of me in Leaſe by Indenture, &c.* And there let him remain until it be dark, that he cannot ſee to tell the money. And all this muſt be before ſubſtantial Witneſſes. And if it be to be paid on the Land, it ſeems the Leſſor muſt do the firſt act, (*i.*) demand it, before the other is bound to pay it; and the other is not bound to tender till he demand it. But if it were paid at a place out of the Land, then the Leſſee is bound to do the firſt act, (*i.*) tender it at his peril. But it is ſafe for both to do their parts. *Abundans cautela non nocet. Dyer* 329. 130. 79. 51. *Plow.* 70.

As for an Example to all this: If one make a Leaſe of a Houſe, divers Lands and Woods to another for years, rendring an Hundred pounds Rent at Michaelmas, Provided that if the Rent be behind ten days after Michaelmas, the Leſſor ſhall reenter, or the Leſſee ſhall forfeit Ten pounds *Nomine pœnæ:* In this caſe if the Leſſor will take advantage of this Forfeiture of Land or Money, he or ſome body for him muſt come the laſt part of the laſt of the ten days, (time enough before Sun-ſet to tell an Hundred pounds) to the ſame Houſe, and there demand the Rent, and

continue

continue there till Sun-ſet; and if at that time the Rent be not tendered by the Leſſee, or ſome body for him, or if it be denied, this is a Diſſeiſon of the Rent for which he may have an Aſſiſe; and for this alſo the Leſſor may re-enter, and recover the *Nomine pœnæ*. See the Books above. *Bro. Diſſeiſ.* 69.

If a Feoffment be with Condition to reinfeoff the Feoffor, and no time ſet, ſo that he hath time for life, if requeſt haſten it not: If the Feoffor or any other party make requeſt, it muſt be to the Feoffee, that he will be at a certain time on the Land, and make the State. *Co. ſuper Lit.* 219. *Sect.* 9.

Every good Demand and Requeſt for Rent, muſt be made as before; and if it fail in any of thoſe circumſtances, it is not good. But if the Leſſor and Leſſee agree and be contented to have it otherwiſe, there it may be good enough: For, *Modus & conventio vincunt legem; & volenti non fit injuria.* *Co.* 7. 28. *Co.* 5. 40. *Dyer* 78. 51. 68. *Bro.* 483. 11. What ſhall be ſaid a good Demand, or not.

If one leaſe for years rendring Rent, on Condition that if it be arrear forty days after the day, the Leſſor and his Heir ſhall re-enter, and the Leſſor demand it, and after die; this is a good Demand to give Re-entry to his Heir: But if the Leſſor die after the day, and then the Heir demand it, this is not a good Demand to give a Re-entry. 13 *H.* 4. 17. *D. & S.* 35.

A Demand of more then the Rent is, is a good Demand notwithſtanding for the Rent to gain a Re-entry, or *Nomine pœnæ*.

If two make a Leaſe rendring Rent, on Condition that if it be behind and unpaid by them, they ſhall re-enter, and one of them die, and the Survivor demand it, it is a good Demand. So if the Leaſe were made to two, and one of them die, and the Rent is demanded of the Survivor of them. *Dr.* 207. 41 *Ed.* 3. 16. See *Tender infra*, for more

If a Rent-ſeck be to be paid at *Eaſter*, and the day be paſt, and the Rent not paid nor demanded at the day, and he demand it after the day, this is not a good demand, unleſs he meet with the Tenant upon ſome part of the Land, and there demand it. See *Co.* 10. 129. *Co.* 7. 28.

If the Leſſor demand the Rent before he die, his Heir may enter. *Noy* 97. See for Demand of Rent, *Goldsb.* 129. *pl.* 25; 124. *pl.* 9.

It is a careful Offer of a thing that ought to be paid or done, at the time and place it ought to be paid and done. And this word, as it is applied to Rent, ſeems to be a Relative to Demand, and both of them to look one to another: For in moſt caſes, then and there a man is bound to tender a thing to another, where and when that other is bound to demand; and there and then that other may and muſt demand, where he hath liberty to tender. And the Law will not make the Leſſor to attend then or there to demand, where and when it doth not enjoin the Leſſee to tender: Neither ſhall the Leſſee have liberty to tender any where or time, but when or where the Leſſor is bound to wait to demand it: And therefore moſt of the Queſtions for *Tender*, are anſwered in *Demand*. *Br. Tend.* 23. *Co. ſuper Lit.* 211. See *Obligation*. 12. Tender or paiment, what.

And note, that in all caſes where Tender is requiſite, and it be made legally, though the party refuſe, yet it ſhall give him as much advantage as if the other had accepted it; and the other in moſt caſes is without remedy for his money. And in caſe of Tender of money, Tender in purſes or bags, without ſhewing or telling of it, is ſufficient. *Co. ſuper Lit.* 207. 206. 209. *Noy* 94, 95.

In all caſes where by Demand of the Rent the Leſſor &c. muſt name a Re-entry, or *Nomine pœnæ*, there the Leſſee &c. by Tender of the Rent muſt ſave the Forfeiture; and Tender is neceſſary therefore. 2 *H.* 7. 6. 13. Where it is neceſſary, and not.

But the King, if he be to pay a Rent, is not bound to tender it.

If one tender Rent at the day, and be after ſued for it, he need not tender it again in Court. *Br. Tend.* 6.

So for money tendred on a Condition of Obligation, according to the Condition.

If one enfeoff another on Condition, that he and his heir ſhall render to a ſtranger and

and his heir twenty ſhillings, &c. and if he fail, that the Feoffor ſhall re-enter; this is no Rent, and therefore here needs no Demand, but the other is bound to pay it at his peril. *Co. ſuper Lit. f.* 213.

14. How it muſt be made. For the time.

If the Leſſee &c. will tender to ſave the penalty or Forfeiture of Land or money, he muſt do in that manner for time and place, as the Leſſor muſt demand it; and he need not do it at any other time, in any other place, or in any other manner. *Plow.* 172. *Dyer* 109. *Plow.* 70. *Dyer* 79. 6 *H.* 7. 2. *Lit.* 341. (See the particulars above.) As if a Leaſe be made rendring Rent at Michaelmaſs, and the Leſſee bind himſelf by a collateral Covenant or Obligation to pay it at the day; here he muſt tender it at the very day to ſave the Covenant or Obligation. *Bro. Tender* 41. 11. 20.

Sect. 10.

Note for the time of paiment of Rent there are four times. 1. Voluntary, but not ſatisfactory, and yet good to ſome purpoſe: As if a Leſſee, Donee, &c. pay the Rent before the day, this is good to give Seiſon for to enable him that hath the Rent to bring an Aſſiſe. The ſecond time is voluntary and ſatisfactory in ſome caſes: As if it be paid the morning of the laſt day, and the Leſſor die before the end of the day; this is good againſt the Heirs and Executors, but not againſt the King, if he were to have it. The third is the legal and abſolute ſatisfactory time, which is a convenient time before the laſt inſtant of the laſt day; and then it muſt be paid or rendred. The fourth is ſatisfactory, but not voluntary, but coercive when it is done by Suit. *Co.* 10. 127. *Lit ſect.* 127. *Plow.* 172.

If the Leaſe be rendring Rent at Michaelmaſs, or twelve days after, or in that manner, he may tender it the laſt part of either of the days, and good: And if he tender it the firſt, and the Leſſor be not there, and he tender it not the laſt day, and then the Leſſor demand it, he cannot re-enter. *Co.* 10. 129. *& Curia, B. R.*

For the place.

If the Leſſee will make a Tender of his Rent, it muſt be done and made in the moſt notorious place of the Land, unleſs the Rent be to be paid at a place out of the Land, then there it muſt be tendered. See in *Demand. Plow.* 711. *Lit. ſect.* 341. *Co.* 4. 71. *Bro. Tend.* 23. *Co. ſuper Lit. f.* 105. 201.

If the King leaſe Land rendring Rent at the Receipt of *Exchequer*, and after grant the Reverſion to a Subject: Now after this Grant, Tender of the Rent upon the moſt notorious place of the Land is ſufficient. *Co.* 4. 72.

If there be a time and place certain ſet down for the tender of a ſum in groſs upon a Condition, the tender muſt be there and then, and neither of the parties are bound to any other place. *Co. ſuper Lit.* 211, 112.

If one will tender money due on a Condition, (which is not Rent) it muſt be to the perſon of the party whereſoever he is. *Co. ſuper Lit.* 210.

If Land be mortgaged for money; at the day the Heir, Executor, Adminiſtraor, Ordinary, Gardein in Soccage or Chivalry, or any one, if the Heir be an Infant, may tender the money. *Co. ſuper Lit.* 206, 207.

If Land be mortgaged, and a Condition is to pay money on a day; it ſeems the Tender muſt be (as in the caſes of Rent before) a convenient time before Sun-ſet: But if the Feoffor tender it to the perſon of the Mortgagee at any time of the day of paiment, it is ſufficient. *Co. ſuper Lit.* 206. 208.

15. What ſhall be ſaid a good Tender or paiment, or not; and how it ſhall be taken.

That is a good Tender, that is made with all the circumſtance and regard of time and place, as before. If a Rent be to be paid at one of two days, the Leſſee hath election which of them; and if he pay it either of the days, it is ſufficient, as in the caſes in the laſt Diviſion. So if it be in one of two places, as rendring Rent in the Church of *A.* or in the Church of *B.* Tender in either of them is ſufficient; but Demand muſt be made in both places. So if a Rent be to be paid at or in any place, Tender in either is ſufficient. *Co. ſuper Lit.* 202.

When a Rent is to be paid to Jointenants or Coparceners, (it ſeems) Tender to one of them is good and ſufficient. So alſo Tender by one Jointenant (it ſeems) is good for all the reſt. *Bro. Tend.* 16. 19.

If a Leſſor diſtrain for Rent, and the Leſſee tender him all the Arrearages, and the

the Leſſor refuſe, he cannot diſtrain after; for this is a good Tender to bar him in Avowry, and it ſeems he can have no remedy for his Rent after. So if two days Rent be behind, and he tender him one days Rent, this is good for one day: *Contra* where he tender him but part of a days Rent only. *Stat.* 7 *H.* 4. *chap.* 18. *Bro. Tender* 2.

Tender of money in Farthings is no good paiment *in Curia Manches*, nor *&c.* Sometimes paiment, or Tender and acceptance of one thing for another, or of a in another place, is good for . See *Acceptance* and *Condition.*

If the Feoffee cometh to the Feoffor to any place upon any part of the ground the day of paiment, and offer the Rent, albeit it be not the moſt notorious place, nor at the laſt inſtant of the day, yet the Feoffor is bound to receive it, or elſe ſhall he not take any advantage by Demand. *Co.* upon *Lit. f.*202.

If Rent be payable at Michaelmas, on Condition that if he pay not in a week, &c. Here if the Feoffee meet the Feoffor on the Land within that week, and tender it, it ſeems good. *Co.* upon *Lit. f.*202.

But a Tender out of the Land to the perſon of the Leſſor, when the Rent is to be paid upon the Land, is not good. So a Tender after the days of paiment be paſt, is not good. So a Tender in a Wood or other ſecret corner, where there be more notorious places amongſt the Lands out of which the Rent doth iſſue, is not good: But if the Leſſor will accept it at any other place before the laſt day of paiment, it ſeems then it is good enough.

So Tender in word only, or a Talk of Rent, when he doth not ſhew it, is not good; for he muſt prove he had, and tendered ſo much money as the Rent is.

A Tender of a Sum in groſs on a Condition, is not good on the Land, unleſs the party be there to receive it. *Bro. Tend.* 11. *Perk. ſect.* 83. 22 *H.* 6. 65. *Perk. ſect.* 837, 838. *Co. ſuper Lit.* 210.

If a Feoffment be on Condition that the Feoffor ſhall pay to the Feoffee twenty pounds, and ſet no time, and the Feoffor die: Now his Heir, Executor or Adminiſtrator cannot tender the money; for Tender by them is not good to perform the Condition, *Co. ſuper Lit.* 207, 208.

If one owe me ten pounds by Obligation, and ten pounds otherwiſe, and he pay me ten pounds generally, it ſhall be intended the ten pounds upon the Obligation, *Brownl.* 2 *par.* 108.

Paiment of money to the Wife due to the Husband, is not a good paiment, *Co.* 7. 28.

See much of this Queſtion in *Conditions*, What is a good performance, and what not, in *fol.* See *Goldsb.* 129. *pl.* 25. 124. *pl.* 9.

If there be Leſſee for life, or for years determinable upon life, and this Leſſee make a Leaſe for years, reſerving Rent to be paid at the four Quarter-Feaſts, and the life die, ſo that the primitive eſtate end before the Quarter-day; now by this the Rent of this Quarter is gone, *Co.* 10. 127. *Sect.* 11. 16. Where a Rent ſhall be ſaid to be gone or not.

If all the Land be evicted before the laſt day of paiment by one that hath an eigne title, the whole Rent is gone. *Contra*, if it be but part of the Land; for then the Rent ſhall be apportioned. See *Apportionment.* *Co.* 10. 127. *Plow.* 71. 134. As if there were a Judgment againſt the Leſſor before the Leaſe, and after the Leaſe an *Elegit* is ſued forth, and the Leſſee evicted; and this Plea will bar the Rent. *Days* Caſe, *Trin.* 37 *Eliz.*

If a Rent be granted to one in Fee, or to a Corporation, and the Grantee die without Heir, or the Corporation be diſſolved; it ſeems in this caſe the Rent is determined. See more in *Co.* 5. 17. 27 *H.* 8. 10.

If there be Leſſee for life rendring Rent, and the Leſſor grant and confirm the Land to the Leſſee and his heirs; by this the Rent is determined. *Co ſuper Lit.* 278. 301. 307. 308.

If

If Leſſee for life make a Leaſe for years rendring Rent, and after ſurrender; now he hath no remedy for his Rent. Juſtice *Bridg.*

If a Diſſeiſor charge the Land, and after the Diſſeiſee recover the Land in an Aſſiſe, the Rent is determined: But if one that hath Land rightfully charge the Land, and another that hath none recover it in a fained Action, *contra.* See *Brownlows Rep.* 2 *par.* 76.

If one make a Leaſe at Will rendring Rent, and after the Leſſor determine the Will; now the Rent is determined alſo.

If two Jointenants be, and one of them grant a Rent-charge and die; now the Rent is determined, and the Survivor ſhall hold it diſcharged: But if the Survivor had accepted a Releaſe of the Right of his Companion, *contra.* See more in *Extinguiſhment.* See *Perk. ſect.* 592, 593, &c. *Co.* 6. 16.

If a Rent or an Annuity be granted in reſpect of an Office, and the Office be determined, the Rent ſhall determine alſo. *Plow.* 382.

If a Diſſeiſor grant a Rent-charge out of the Land, and after accepteth a Releaſe of the Diſſeiſee; the Rent is not gone, no more then a Condition added to an Eſtate made by the Diſſeiſor, to whom the Diſſeiſee releaſeth: But if the Diſſeiſee enter and make a Feoffment, *contra. Co. ſuper Lit.* 277.

If one make a Leaſe for years rendring Rent, and after grant this Rent to *J. S.* and the Tenant attorn, and after the Leſſee for years ſurrender; yet the Rent doth continue, and it ſeems he may have an Action of Debt to recover it: So if Leſſee for years grant a Rent-charge, and after ſurrender his Eſtate, yet the Rent is not determined. *Co.* 8. 144. 20 *Ed.* 4. 13. *Plow.* 198.

If a Tenant in tail grant a Rent-charge out of his Land, and after ſuffer a Common-Recovery; this doth not avoid, but affirm and make good the Charge. See *Womans Lawyer, f.* 169. *Co.* 2.

If *A.* leaſe Copihold and Freehold Terre and Licenſe, rendring Rent, this is an entire Rent; and if he in Reverſion grant the Reverſion of both, that which doth paſs by Surrender ſhall relate to make the entire Recovery to paſs, and the Rents ſhall continue entire, *Capels* Caſe. See *Extinguiſhment.*

17. Who ſhall have a Rent, and the Arrears of it.

The Rent in moſt caſes doth follow the Reverſion, if there be any, as the Acceſſary doth the Principal. *Co.* 5. 55. *Lit. ſect.* 390. *Dyer* 5.

If one ſeiſed in Fee of Land make a Leaſe of it rendring Rent, and ſay not to whom, and it be behind, the Executors ſhall have the Arrearages, but for the time to come it ſhall go with the Reverſion. So if the Reſervation had been to the Leſſor, then the Executors ſhould have had the Arrearages after his death, the Heir the Rent to come.

So if a Husband poſſeſſed of a Term of Land in the right of his Wife, leaſe part of the Land rendring Rent, and die; the Wife ſhall not have this Rent, but the Executor of the Husband. 26 *H.* 8. 7.

If one ſeiſed of Land in Fee, leaſe it for years, rendring Rent to him and his heirs at Michaelmas, or within twenty days after, and after Michaelmas before the twenty days ended the Leſſor die or grant away the Reverſion, and the Tenant attorn; in the firſt caſe the Heir, not the Executor ſhall have the Rent; in the laſt the Grantee ſhall have it. *Dyer* 287. 204. *Co.* 10.

If one ſeiſed in Fee of a Houſe make a Leaſe thereof, and of certain Implements therein for years, rendring Rent to him, his Heirs and Aſſigns, and the Leſſor die; now this Rent ſhall go to the Heir during the Leaſe, and not to the Executor. But if the Leſſee had covenanted to pay ſo much money by the year to the Leſſor, his Heirs and Aſſigns; in this caſe the Executors, not the Heir ſhould have had this Sum during the Leaſe. *Dyer* 361. 275.

If a man ſeiſed of a Term for twenty years in the right of his wife, leaſe the ſame for ten years to a ſtranger rendring Rent, and the Rent is arrear, and the husband die; it ſeems the wife ſhall have this Rent, not the Executor. But the contrary adjudged, *B. R. inter Bloxton & Heath. Perk. ſect.* 834.

If

If a woman and her ſecond husband leaſe the Land ſhe was endowed of by her firſt husband, rendring Rent, and the Rent be arrear, and ſhe die; the ſecond husband, nor the heirs of the firſt husband ſhall have theſe Arrearages. See more for this in *Chattels. Bro. Rent* 10.

If one ſeiſed of Land *ex parte matris*, make a Feoffment in Fee rendring Rent to him and his heirs; this Rent ſhall go to the heirs *ex parte matris*: But if it had been a Leaſe for life, or Gift in tail, *contra*; there the Rent had gone to the heirs *ex parte matris*.

If *A.* Leſſee for years die, and make *B.* his Executor, and *B.* leaſe part of the Term to *C.* rendring Rent, and die inteſtate, and *D.* gets Adminiſtration; *D.* ſhall not have the Rent, as it ſeems, becauſe he comes in Paramount. *Sect.* 12.

A. Tenant in tail diſcontinue to *B.* *B.* leaſe it to *C.* for years rendring Rent, Arrearages of Rent incur; *A.* dies, his Iſſue doth recover againſt *B.* in a *Formedon*, yet the Leſſee ſhall pay the Arrearages to *B.* for *B.* ſhall pay Damages. *Juſtice Haughton, Hil.* 18 *Jac. B.R.* See more in *Baron* and *Feme.*

Sect. 13. *Reſervation* or *Render*, what.

It is that Rent or Service which the Grantor in any Grant tieth the Grantee to perform to him, or the Lord Paramount; for which ſee *Fait*. And this is conſiderable at Common-Law, or by Cuſtom of Manors; for which ſee *Co.* 10. 128. 11. 18. *Plow.* 134.

Prender.

The word *Render* alſo is uſed in Fines, when the Fine is double, and containeth a Grant or Render back again of ſome Rent, Common, or other thing out of the Land it ſelf to the Cognizor. Alſo there be certain things that lie in Prender, which may be taken by the Lord or his Officer when they chance, without any offer made by the Tenant; as the Ward of Lands, the Body of the Heir, and the like. And other things that lie in Render muſt be delivered or anſwered, as Rent, Reliefs, Herriots, and the like. And if a man make a Gift in tail without any Reſervation, the Law makes a Reſervation of the ſame Services to the Donor, by which he doth hold, *Co. ſuper Lit. f.* 143. And upon a Leaſe for life or years, there the Law reſerveth Fealty only, *Perk. ſect.* 696.

How it ſhall be taken.

If a Leaſe be made rendring Rent, without any more ſaying how long it ſhall continue, or to whom the Rent ſhall go; in this caſe the Rent ſhall continue as long as the Eſtate, and ſhall go to the Heir or him that hath the Reverſion, *Dyer* 451. *Kelw.* 88.

If one by Deed indented demiſe to *A.* for life, with divers Remainders over, *Reddend. inde* to the Leſſor and his heirs a Rent; this Reſervation ſhall extend to all the Eſtate, if he in Remainder agree to it after the Eſtate for life. *Co.* 10. 107. *Bro Reſerv.* 7.

If one leaſe for a year, with theſe words, [And if the parties ſhall agree for a new Leaſe for longer time then for three years, *Reddend. durante Termino prædicto*;] this Reſervation ſhall extend to the firſt year, as well as to the three laſt. *Co* 11. 106.

Nomine pœnæ, what.

It is a greater Sum of money, or Penalty appointed to be paid in default of paiment of a leſſer, or of doing ſome other thing.

Note, that for the Arrearages of a *Nomine pœnæ* there is no remedy given by the Statute of 32 *H.* 8. 37. and yet the ſame as an Incident to the Rent ſhall deſcend to the Heir: For the Grantee himſelf during his life, and his Executors or Adminiſtrators after his death may have an Action of Debt for it. *Co. ſuper Lit.* 162.

Recouper, what.

It is the keeping back and ſtopping of ſomething which is due, to ſatisfie another duty to the party which is to pay the firſt. As for example, where I have a Rent-charge iſſuing out of Land, and I diſſeiſe the Tenant of the Land, and he recover the Land and Twenty pounds Damages againſt me; now I may recoup and keep back out of that Damages as much of the Rent as is due to me in the time: Or if there were a Rent-charge iſſuing out of the Land to another, and I had paid it, I ſhall be allowed it. *Co.* 6. 31. *Dyer* 2.

Arrearages, what. Arrearages are Duties behind and unpaid after the days and times in which they are due, as Rent or other thing reſerved. And for theſe, if a man have any due to him of a Rent-ſervice or a Rent-charge, and after he accept the Rent at one of the days whereon it ought to be paid, and give an Acquittance for it; by this he is *Acceptance.* barred of all the Arrearages, though the Acceptance and Releaſe were made by the Husband, and the Rent were due to the Wife whiles ſhe was ſole: And no proof ſhall be admitted to the contrary. *Plow.* 133. *Co.* 3. 65. *Dyer* 171. *Co. ſuper Lit.* 373.

Denier, what. Note. Denier is properly the denying of a thing due where it is required; and every Non-paiment of a Rent upon demand, is a Denial in Law. And note that whereſoever there is a lawful Demand of a Rent, and the ſame is not paid, whether the Tenant be preſent or abſent, there is a Denial in Law, albeit there be no words of Denial. And where there is no Demand made, there is no Denial. *Noy* 54. *Co.* 8. 146. *Co. ſuper Lit.* 153.

CHAP. CXLI.

Of Reſcous, Reſeiſer, Reſtitution, and Retorn.

Sect. 1. *Reſcous, what.* REſcous doth ſignifie an act of Reſiſtance againſt lawful Authority. And it is either of a Diſtreſs, for which ſee in *Chap.* 68 Or it is of the perſon of a man, and that is in divers caſes: As where a Bailiff or other Officer doth arreſt a man upon a Writ, and he himſelf doth violently get away, or ſome others do violently take him away and procure his eſcape from the Arreſt; in this caſe when the Sheriff hath retorned this Reſcue, as he muſt upon the Writ when the Retorn thereof is called for, then the parties that made the Reſcue *Fine.* muſt anſwer to it; and if it be found againſt them, they will be fined for it, or the party grieved by it may have a Writ of Reſcous againſt them.

Or it is where an offender after Arreſt is reſcued by others. In this caſe if the *Felony.* Arreſt be for Treaſon, the Reſcue is Treaſon; if for Felony, the Reſcue is Felony, and the Reſcuer a Felon. And if the Sheriff arreſt a man by a *Capias* for Felony, and he be reſcued, it is Felony, although the party be innocent. And yet if the Sheriff or any other man arreſt a man without authority of Law, in this caſe he may reſcue himſelf, or another man may reſcue him, and this is no offence. *Co. ſuper Lit.* 161. *F.N.B.* 101.

Reſeiſer and Reſumption, what. Reſeiſer was the taking again of Land into the Kings hand, whereof a general Livery or Ouſterlemain was formerly ſued amiſs, and not according to Law. And Reſumption was the taking again into the Kings hands ſuch Lands, as before upon a falſe ſuggeſtion or other error he had delivered to the Heir, or granted to any man by his Letters-Patents.

Reſtitution, what. Reſtitution is the yielding up again of any thing unlawfully taken from another: And it is uſed for the putting of him in poſſeſſion of Land, that is put out by a Forcible Entry: For which ſee *Forcible Entry*. It is alſo taken for a Writ by which the Goods of a man ſtollen from him are reſtored, upon the Statute of 21 *H.* 8. 1. And as to the Reſtitution of Goods, theſe things muſt be known.

Felon. 1. Where a man doth make freſh ſuit after the Felon, and overtake him with his Goods, then he may take them again. Or if he do not ſo, yet if he proſecute the Felon, and cauſe him to be indicted and found guilty, though he be not executed,

cuted; in theſe caſes he may have this Writ of Reſtitution from the Judg. But otherwiſe it is if the Thief be outlawed for the Felony, and where he is condemned or outlawed for another Felony, and where the Goods are come to the Crown as forfeit; for here the Owner is without remedy, *Cromp. Jur.* 98. *Co.* 3 *par. Inſt.* 242, 243. *Stat.* 31 *Eliz. ch.* 11. 21 *H.* 8. 11. *Addition to Juſt. Dodd. f.* 41.

2. There was a Reſtitution to Biſhops and Spiritual perſons, of the Temporalties belonging to their Biſhopricks and Spiritual Livings, now out of uſe. See *Regiſt.* 294.

3. If upon an Erroneous Judgment, and a *Fieri facias*, a mans Goods be ſold, or a Term is ſold, the Owner cannot have it again, but he ſhall be reſtored to the money made of it. But upon an *Elegit*, if a Term be extended and delivered to the Plaintiff, he ſhall be reſtored to the Term it ſelf.

4. If one Leaſe or Goods be ſold by the Sheriff upon a ſpecial *Cap. utlagatum*, and it be reverſed for Error; in this caſe he ſhall be reſtored to the thing in kinde, *Co.* 8. 142, 143 6. 74, 75.

5. If a ſtollen Horſe be well ſold in a Fair, the right Owner or his Executors, if they come within ſix moneths after the ſtealing at the Pariſh or Corporation where he ſhall find him, and make proof by two ſufficient Witneſſes to the next Juſtice of Peace or Head-Officer of the Corporation, that the Horſe was his, and repay the Buyer ſo much as he upon his own oath before ſuch Juſtice will ſay he gave for him, he ſhall have him again. *Stat.* 31 *Eliz.* 12. See *Co.* 3. *par. Inſt. c.* 108.

This word *Retorn* is taken three ways. Sometimes it is applied to the Caſe of a *Replevin*, where it is called a *Retorno habendo*. See it in *Chap.* 25 Sometimes it is applied to the days of Apparence in every Term: And in this ſenſe, *Hillary*-Term hath four; *Eaſter*-Term, five; *Trinity*-Term, four; and *Michaelmas*-Term, ſix Retorns. But it is taken in a third ſenſe, and applied to Officers, Sheriffs, Bailiffs, and the like: And ſo it is nothing elſe but a Certificate made by an Officer to the Court from whence a Writ or a Warrant doth come, of what he hath done touching the ſerving of the ſame Writ or Warrant, *Weſtm.* 2. *ch.* 39. And as to it in this ſenſe, theſe things are to be known. *Retorn*, what?

1. The Writs that are to do things in Franchiſes, are to be directed to the Sheriff, and he muſt ſend to the Bailiff of the Franchiſe, who muſt make his Retorn to the Sheriff, and the Sheriff muſt retorn to the Court from whence the Writ came, 7 *Ed.* 4. 14. 12 *Ed.* 4. 15.

2. Moſt Original and Judicial Proceſs muſt be retorned into the Courts from whence they came, after they be executed. But for this ſee *Co.* 5. 90. 2 *H.* 6. 7. and ſee in *Execution*. *Execution.*

3. If the Officer do refuſe or delay to make *Retorn* where it is neceſſary, in ſome caſes the Court will fine him, and in ſome caſes amerce him or ſet iſſues upon him, and in ſome caſes ſend out Proceſs of Contempt againſt him to compel him to make his *Retorn*. *Contempt.*

4. And in all caſes where Officers do make a *Retorn*, they muſt be ſure to make a true, and ſee they do not make a falſe *Retorn*; for ſo the party hurt thereby may have an Action of the Caſe againſt him; for which ſee *Action of the Caſe*. *Action of the Caſe.*

5. Alſo in their *Retorns* they muſt take care, eſpecially in ſuch *Retorns* as do ſtand for a kind of Declaration, and for an Accuſation, as in the *Retorn* of *Reſcous*, and the like, they muſt be ſure to make their *Retorn* certain and perfect, and they muſt put their names to them when they have done, *Co.* 11. 40. 4. 67. *Plow.* 63. 117. 129; *Kelw.* 165. *Bro. Proceſs* 14. 62. 64. 127, 128.

See for *Retorn* of Sheriffs and Bailiffs, *Stat. Weſtm.* 2. 39. 12 *Ed.* 2. 5. 2 *Ed.* 3. 5.

CHAP. CXLII.

Of a Reverſion and Remainder.

Sect. 1.

1. *Reverſion, what.*

REverſion ſignifieth in our Law, a Poſſibility reſerved to a mans ſelf and his heirs to have again Lands or Tenements made conditionally over to others; upon the defect or failing of ſuch Condition. Or as others define it, It is a certain Eſtate remaining in the Leſſor or Donor, after the particular Eſtate conveyed or granted to another by Leaſe for years, life, or Gift in tail.

And the difference between a Remainder and a Reverſion, is, That a Remainder is general, and may be to any man elſe as well as to him that doth grant or convey the Land, &c. for life or otherwiſe: A Reverſion is to himſelf from whom the Conveyance of the Land &c. proceeded, and is commonly perpetual as to him and his heirs alſo. Alſo a Remainder is appointed over at the ſame time, but the Reverſion is not ſo, *Co. lib. Inſt. f.* 22. 1 *par.* 142. *Noy* 39.

2. The nature of it.

Aid.

Attornment.

Extinguiſhment

And this is of that nature, as it will be more eaſily transferred from one to another then an Eſtate in poſſeſſion: And though the particular Eſtate, and this Eſtate in *Reverſion* be divers and diſtinct, and therefore the Tenant may pray in aid of him in *Reverſion*, yet they have relation one to other. And therefore if there be Leſſee for life or years, and he in *Reverſion* diſſeiſe his Leſſee for life, or ouſt his Leſſee for years of his Term, and make a Feoffment, and the Leſſee enter on the Feoffee claiming his Eſtate only; this is a good Attornment. And if they come both together, the one will extinguiſh the other; and he that hath a *Reverſion* cannot be ouſted of it, unleſs the Tenant be ouſted of his Eſtate and Poſſeſſion alſo. As if one ſeiſed of a Manor, make a Gift in tail of part of it rendring *Rent*, and the Owner is diſſeiſed, and the Tenant in tail attorn to the Diſſeiſee; yet the Diſſeiſee ſhall have the *Rent* of the Tenant in tail, *Co.* 7. 97. *Plow.* 162.

If Tenant for life and he in *Reverſion* join in a Leaſe for life, or Gift in tail by Deed, reſerving a *Rent*; this ſhall enure to the Tenant for life only during his life, and after to him in *Reverſion*, *Co.* upon *Lit. f.* 214.

3. What ſhall be ſaid a good Reverſion, and how.

If one ſeiſed in Fee, give to the uſe of himſelf for life, or the uſe of another for life, and after to the uſe of another in tail, and after to the uſe of the right heirs of the Donor; here the Donor hath a good Fee-ſimple expectant upon an Eſtate-tail as a *Reverſion*, and not as a *Remainder*. So where no Eſtate for life is limited to the Father; for there the Law maketh an Eſtate for life, and the Heirs take by deſcent, *Co.* 2. 90. *Dyer* 7. *Co.* upon *Lit.* 22.

If one have a Leaſe of Land for twenty years, and he leaſe for two years rendring *Rent*, and after grant all his Eſtate and Term to another, and the Leſſee for two years attorn; this is a good Grant of the Term, and the Grantee hath it by way of *Reverſion*, *Co.* 4. 52.

Sect. 2. But if one make a Feoffment in Fee upon Condition or Limitation, reſerving the *Reverſion*; this is no good Reverſion, for all the Eſtate is gone by the Feoffment, and

and a Reverſion or Remainder, cannot be Expectant upon an Inheritance in Fee-ſimple, abſolute or determinable. *Co.* 10.95:

If a Reverſion be granted of a Judicial Office, it is a void Grant, *Officia Judicia non conceduntur antequam, vacent. Co.* 11. 4. *Office.*

All Pattentees and Grantees of Reverſion, ſhall have advantage of every Condition, Covenant, and Agreement, againſt Tenants for life or years, which have their Leaſes by Indentures. 4. The Remedy of him in *Reverſion* againſt him that hath the particular Eſtate for any wrong done to him, concerning the Land.

So alſo the Leſſees againſt the Grantees of Reverſion. See *Condition, Covenants. Co.* 3.62. 5.56. 112: & 8. 95. *Condition. Covenant.*

If the particular Tenant do commit Waſte, he in Reverſion may have an Action of Waſte. See *Waſte*, and 32 *H.*8, 34. *Plow.*175. *Dyer* 61. 131. 309. *Weſtm.* 2. *cap.* 4.5. *Waſte.*

A Copiholder for life cannot by any Forfeiture deſtroy the Eſtate of him in Reverſion. 39 *H.*6. 5. Where the Tenant may hurt the *Reverſion*, or not. *Sect.* 3.

Remainder (*Quaſi terra remanens,*) it is a power or hope that one hath to enjoy Lands, Tenements, or Rents, after the Eſtate of another expired; or the reſidue of an Eſtate appointed over at the ſame time: As if one give or grant Lands or Tenements to one for life or years, the Remaider to another in Fee, Tail, life or years; and in this caſe the Remainder, and the particular Eſtate, do make (as it were) but one Eſtate, and therefore the Remainder is called the Reſidue of the Eſtate; and for this cauſe it is that that which is done by, or to one of them in many caſes ſhall binde and advantage the other, as an Attornment or Releaſe made to one of them, ſhall advantage the other. And this doth differ from a Reverſion, for the Remainder is always a ſucceeding Eſtate, appointed and limited over the time, the precedent Eſtate was made, and the Reverſion is an Eſtate left in the Giver, after the particular Eſtate for years, life, or intail, made by him. See more in *Crompt. Juriſd. cap.* 11. 6. 6. *Remainder*, what. *Attornment. Releaſe.*

A Remainder is, and may be created ſometimes by Fine, Deed, or other Conveyance, and ſometimes by Will; or it may be without Deed by a Livery of Seiſon: And the moſt apt and proper word to create an Eſtate by way of Remainder, is the word Remainder it ſelf; As a Leaſe to one for life or years, the Remainder, or [and that it ſhall remain to] another, and the like: But an Eſtate by way of Remainder may be made and limited by other words. And therefore it is agreed for Law, That if a Leaſe for years or life be made to *B.* the Reverter to *C.* or [and that after his death, the Lands *Redibunt* at *C.*] or [and after to *C.*] or [and after that the Land ſhall go to *C.*] or [and that the Land ſhall diſcend to *C.*] or [provided on condition, That if ſuch a thing happen, *C.* ſhall have it,] or any other ſuch like words. All theſe are good Remainders. See more in *Broo. Donee & Remainder. Plow.* 134. 9 *Hen.* 8. 2. *Co.* 3.20. *Plow.* 159. 170. 542. 7. How, and by what words a *Remainder*, is and may be made.

To make a good Remainder by the Rules of Law, theſe things are requiſite. 8. What ſhall be ſaid a good *Remainder* in his Original Creation, or not.

1. There muſt be a particular Eſtate Precedent, as an Eſtate for life or years, or a Frank-tenement diſcendible, or ſpecial occupancy; and that muſt be created at the ſame time when the Remainder is made, as a foundation to ſupport the Remainder, for neither without ſuch a particular Eſtate: Nor yet upon a Fee-ſimple, Conditional, or limited, can a Remainder depend.

2. This particular Eſtate muſt continue until the Remainder happen, for if it do determine before the Remainder, it is void.

3. There muſt be a remnant of Eſtate in the Leſſor, to grant more then the particular eſtate.

4. The

4. The Remainder muſt paſs out of the Leſſor or Donor preſently, to him in Remainder, or elſe it muſt be put in cuſtody of Law, and in Abeyance, elſe it is not good.

Sect. 4. 5. The Remainder muſt veſt in Eſtate, either preſently, during the particular Eſtate, or *eo inſtanti* when the particular Eſtate doth determine, and not before nor after; for if the particular Eſtate be ended, before it happen, the Remainder is void, or if it happen before the particular Eſtate be ended, the Remainder is void.

6. There muſt be a perſon capable at the time of the Creation of the Eſtate, or at leaſt by common and ordinary poſſibility, one that may be capable by that time the Remainder happen.

7. If the Remainder be to come, and upon a poſſibility, it muſt be ſuch a poſſibility as is near common and ordinary, as death, death without iſſue, Coverture, or the like; and not remote, as Entry into Religion, or the like, for then it is void. See the caſes below, *Plow.* 136. *Co.* 10. 97. 320. *Plow.* 34, 35. 21 *Hen.* 7. 12. *Co.* 3. 20. *Littl.* 162. *Co.* 1. 66. *Perk.* 12. *Dier* 140. 18 *Hen.* 8. 4. *Plow.* 155.

In reſpect of the manner of Limitation. By Deed. If a Leaſe be made by Deed for life or years, the Remainder over, and Livery of Seiſin be given, it ſeems this is a good Remainder, *Quere.* For it ſeems experience is otherwiſe. See the Addition to Juſtice *Dodridge, f.* 31.

So alſo is a Gift in Tail, with a Remainder over in Fee. *Co.* upon *Littl.* 143. *Littl. ſect.* 60. 22 *H.* 6. 1.

If a Leaſe be made for life, with Condition, That if the Leſſee for life die, that it ſhall remain over; this is a good Remainder. *Plow.* 25. 27 *H.* 8. 24.

If a Leaſe be made for life, the Remainder to the right Heirs, or *primo genito filio de J. S.* this is a good Remainder. *Co.* 2. 51.

If a Leaſe be made for life, and after the Leſſor confirm by his Deed, the Eſtate of the Tenant for Term of life, the Remainder over to another in Fee; this is a good Remainder. *Co.* upon *Littl.* 317.

If a Leaſe be made to *J. S.* for life, provided, That if he marry the daughter of the Leſſor, he ſhall have the Fee; this a good Remainder, and the Fee will increaſe. *Plow.* 25.

If a Leaſe be made to *A.* for life, the Remainder to the right Heirs of *A.* and the Heirs of that right Heir; this is a good Remainder, but *A.* may Bar his Heir of it. *Co.* 1. 66. *Dyer* 309.

Sect. 5. If a Leaſe be made for life, the Remainder to *J. S.* in Tail, and if *J.* S. die without iſſue, or marry the Remainder to *J. B.* this Remainder upon this Contingent to *J. B.* is good. *Dyer* 304. *Co.* 2. 50.

If a Leaſe be made to *J. S.* for life, and after the death of *J. D.* the Remainder to another, this is a good Remainder, and will veſt well enough, if *J. D.* die, during the life of *J. S.*

So if a Leaſe be made to *A.* for life, the Remainder to *B.* for life, and if *B.* die befor *A.* then to remain to *C.* for life, this is a good Remainder, and will veſt well enough if *A.* ſurvive *C.*

So if one have a ſon of nine years of age, and make a Leaſe till his ſon come of full years, and after that it ſhall remain to another in Fee, if he live to his full age; this will be a good Remainder not elſe. *Co.* 3. 20.

If a Feoffment be to the uſe of an eldeſt ſon for ſixty years, the Remainder to a yonger ſon for life, the Remainder to the Heirs Males of the eldeſt; it ſeems this is a good Remainder. *Trin.* 7 *Jac.* By the Juſtices.

If a Leaſe be made of a Houſe for life, the Remainder to *W.* for life, *Si ipſe inhabitaret ſuper prædict' domum*; and if *W.* happen to die before the firſt Tenant, then it ſhall remain to *K.* for life, this is a good Remainder. *Plow. fol.* 4.

If Lands be given to *A.* and *B.* ſo long as they live joyntly together, the Remainder to the right Heirs of him that dieth firſt, this is a good Remainder. *Co.* on *Littl.* 378.

If

If one by Will deviſe his Land to *A. B.* for eight years, and after that the ſame ſhall remain to his Executors, until his ſon ſhall come of age of one and twenty years; and then that it ſhall remain to him and his Heirs for ever; this is a good Remainder to the ſon and his Heirs, but if it were by Deed, *contrà*. *Co.* 3. 20. By Will.

If one deviſe to *J. S.* the Remainder to one in *ventre ſa meere*; it ſeems this is a good Remainder. Chief Juſtice. *Mich.* 13 *Jac. B. R. John Simpſons* caſe.

If one by Deed, inrolled and indented, bargain and ſell to one for life, the Remainder to another in Fee; this is a good Remainder by this means. *Co.* 1. 45. By Bargain and Sale.

If a Rent that is in *eſſe*, be granted with a Remainder over, this is a good Remainder. *Plow.* 35. In reſpect of the thing granted.

And ſo it ſeems of a Rent newly created, granted to one for life, the Remainder to another; if there be a clauſe for the Grantee to diſtrain for his life, and after for him in Remainder for his time. So if one that hath a Rent-charge in Fee, grant it for life to the Tenant of the Land in Fee with a Remainder over; this is a good Remainder. *Finches Ley.* 133.

If an Eſtate be made to *J. S.* and his Heirs, during the life of *W.* this is a good Eſtate precedent, on which to limit a Remainder; and therefore a Remainder limited upon this Eſtate, is good, as upon a Leaſe for life or years; for this in effect, is but a Leaſe for life. In reſpect of the precedent Eſtate.

So if two Joyntenants be, and one make a Leaſe for life, the Remainder to his Companion, it is a good Remainder. *Co.* upon *Littl. fol.* 192, 208. *Durels* caſe, *Hil.* 1 *Jac.*

And if I give a Remainder after my death, it is void. *March.* 51.

But if a Leaſe be by Deed for life or years to a Monk, with a Remainder over, the Remainder, is void: But ſuch a Remainder made by a Will, is good enough, *Broo. Grant* 133. For lack of a particular Eſtate.

If a Leaſe be by Deed for life, the Remainder to another, and the Leſſee for life wave his Eſtate; now this Remainder is void: But if the Creation of the Eſtates were by Will, *contrà*. *Co.* 1. 101. 37 *H.* 6. 36. *Sect.* 6.

If one by Deed convey Land in Fee-ſimple to one on Condition, That if he do not ſuch a thing, or if ſuch a thing happen, that the Land ſhall remain to other, this is a void Remainder. *Co.* 10. 97. *Co.* 3. 20. *Plow.* 34.

But if this were by Will, perhaps it might be a good Remainder for one Fee-ſimple cannot depend upon another. *Co. lib. Inſtit.* 1 *part*, *fol.* 18. *Broo. Donee*, *fol.* 45.

If one by Deed convey Land to one and his Heirs, ſo long as *J. S.* hath Heirs of his Body, and after that it ſhall remain to *W.* this Remainder is void: But perhaps if this were by Will, it might be good; but otherwiſe a Remainder will not depend upon a Fee-ſimple determinable. *Co.* 10. 97. *Plow.* 35.

If he in Reverſion confirm to the Tenant for life, with a Remainder over, or the Heir endow his Mother with a Remainder over; theſe Remainders are void, for the particular Eſtate was not made at the ſame time: But if the Leaſe had been *pur autre vie*, and the confirmation for his own life, with a Remainder over, it had been good. *Co.* 3. 20. 1. 175. *Doct. & Stud. fol.* 20.

If one Leaſe for life, and that upon ſuch a Contingent the Eſtate ſhall ceaſe, and then after that it ſhall remain to another; this Remainder is void. *Co* 3. 20. 21 *H.* 7. 22. *Plow.* 25. 155. For lack of continuance of particular Eſtate.

If one Leaſe for life, and that two days after the death of the Tenant for life, it ſhall remain over to another; this is a void Remainder. 21 *H.* 7. 22.

If a Leſſor diſſeiſe his Tenant for life, and after make a new Leaſe to him for life, with a Remainder over, this Remainder is void, becauſe the Leſſee for life, is remitted, to his firſt Eſtate, and the laſt eſtate for life is gone. *Plow.* 25. *Littl. Sect.* *Remitter.* *Remitter.*

If one Leaſe to *A.* for one and twenty years, if *B.* live ſo long, and after the death

death of *B.* that this ſhall remain over in Fee. So if a Leaſe be made for years, the Remainder to the right Heirs of *J. S.* In theſe caſes, if this be by Deed, the Remainders are void. *Co.* 3.20.

So if one having iſſue a ſon not of age, makes a Leaſe till his ſon ſhall come to his full age, and after he ſhall ſo do, that it ſhall go to another in Fee, it ſeems this is void. *Idem.*

Sect. 7. For want of a Remnant of Eſtate.

If a Tenant in Tail, Poſſeſſion or Remainder, grant all his Eſtate to *J. S.* the Remainder to *J. D.* This Remainder is void, for he had nothing more in him to grant. So if there be Tenant for life, the Remainder in Tail, and he in Remainder grant all his Eſtate and Right to one *Habend,* during the life of the firſt Tenant, and after to the uſe of the King; this is a void Remainder. *Co.* 2. 52. *Co.* 2. 50.

For that it doth not veſt in time convenient.

If a Leaſe be made to two, the Remainder in Fee to one, after the death of the firſt, this is a void Remainder. *Plow.* 24. 18 *H.* 8. 4.

If a Leaſe be for life, the Remainder for life, and that after the death of the firſt Tenant for life, yet ſhall remain to a ſtranger in Fee; this ſecond Remainder is void. *Plow.* 24.

If *A.* Leaſe to *B* for the life of *B.* and after the death of *A.* to *B.* and his Heirs; if *A.* ſurvive *B*, this Remainder is void. *Co.* 10. 85.

For that he in Remainder is not capable.

If a Leaſe be for years, or life, the Remainder to a Monk, or other dead perſon in Law; this Remainder is void, though he became after deraigned, and ſo is made capable, and this be before the Remainder happen. *Co.* 2. 50. *Broo. Donee, fol.* 37.

If a Leaſe be made to *J. S.* for life, the Remainder to the eldeſt Iſſue-male of *B.* and the Heirs-males of his Body, *B.* hath iſſue a Baſtard ſon, this Remainder is not good to him; but after he hath been born a while, that by reputation he hath gotten the name of a ſon, a Remainder may be good to him ſo made as before. So if one make a Leaſe for life to *R.* the Remainder to the eldeſt Iſſue-male of *R.* to be begotten of the body of *J. S.* whether the ſame be legitimate or illegitimate, and they have iſſue a Baſtard; this Baſtard ſhall not have this Remainder. So a Remainder limited to the firſt reputed ſon, or Baſtard, is not good in the caſe of *Blodwel* and *Edwards. Hil.* 38 *Eliz. Co. lib. Inſt.* 1 *part, fol.* 3.

If a Leaſe be made for life or years, the Remainder to the ſon of *J. S.* and he have no ſuch ſon at that time, though he happen after to have ſuch a ſon, yet this Remainder is void. *Co.* 2. 50. *Dier* 340. 10 *Ed.* 3. 46.

So if it be a Leaſe for years or life, the Remainder to a Corporation, and there is none of that name.

So if it be a Leaſe for life or years, the Remainder to ſuch a one as the particular Tenant ſhall name, though he do after name one, yet the Remainder is void. *Broo. Donee* 37. *Co.* 2. 51. 9 *H.* 6. 24.

Sect. 8. If a Leaſe be for life or years, the Remainder to the right Heirs of *J. S.* and there is no ſuch *J. S.* then in being; this is a void Remainder, though after ſuch a one happen to be born, and to have an Heir, and *J. S.* die before the Remainder happen. So if there were ſuch an *J. S.* if he were living. *Co.* 1. 58. 2 *Hen.* 7. 13. *Co.* upon *Littl.* 217.

If *A.* have iſſue a ſon and daughter, and a Leaſe for life be made, the Remainder to the Heirs Females of the body of *A. A.* dieth, the Heir Female in this caſe ſhall take nothing, for ſhe is not Heir. See the *Engliſh Lawyer,* 14, 15. *Co.* upon *Littl. fol.* 2.

For lack of Certainty. If a Leaſe be made to one, until he ſhall enter into Religion, the Remainder to *H.* this is a void Remainder. *Co.* 1. 51.

Alſo the caſes in the laſt Diviſion anſwer to this. See them there, and ſee more in *Plowden, Colthirſts* caſe.

If a Leaſe be made to *A.* for life, the Remainder to *B.* in Tail, the Remainder to *C. in forma prædicta*; this Remainder to *C.* is void: But if it had been to *C. in eadem forma*, it had been good. 14 *Hen.* 4. *cap.* 15. *Co. lib. Inſtit.* 1 *part, fol.* 25.

If

If one give Lands to one in Tail, on Condition, that if he alien in Fee, that then his Eſtate ſhall ceaſe, and the Lands ſhall remain to another; this is a void Remainder: And yet if one make a Leaſe for life to *A B.* and *C.* And if *B.* ſurvive *C.* then the Remainder to *B.* and his Heirs; this is a good Remainder on this Contingent. *Littl. ſect.* 721. *Co.* upon *Littl.* 377. For that it doth not paſs out of the Grantor.

If a Leaſe be made for years, the Remainder to the right Heirs of *J. S.* (which *J. S.* is then living) this Remainder is void; but a Leaſe for life with ſuch a Remainder over, is good. *Plow.* 83. *Co.* 1. 132, 136.

If one ſeiſed in Fee make a Leaſe for life, the Remainder to himſelf in tail; this is a void Remainder. *Co.* 3. 20. *Broo. Reſer.* 14. So if one make a Gift in Tail or Leaſe for life, the Remainder to his own right Heirs; this Remainder is void, *Co. lib. Inſt.* 1 *part, fol.* 23.

If a Leaſe be made to *A.* for life, the Remainder to *B.* for life, provided, That if the Leſſor ſhall have any ſon, during his life, that ſhall live till his age of five years; that then the Eſtate limited to *B.* ſhall ceaſe, and that it ſhall remain to another; this ſecond Remainder upon a Contingent, is void: For a Remainder muſt come at firſt by Livery, and cannot commence after upon a Contingent. 36 *Eliz. Co. B.*

If an Eſtate be made at Will, with a Remainder over; this is not a good Remainder, for this Eſtate will not ſupport a Remainder. *Co.* 8. 75.

Sect. 9. Who ſhall take a Remainder: The next of Blood.

If one have iſſue two ſons *A.* and *B.* and dieth. *B.* hath two ſons *C.* and *D.* and dieth. *C.* the eldeſt ſon hath Iſſue, and dieth, a Leaſe is made for life to *A.* the Remainder to the next of blood in Fee; now by this *D.* ſhall take, and not the iſſue of *C.* So if a Leaſe be made to a ſon, the Remainder to the next of Blood; it ſeems the Father, and not the Uncle, ſhall take by this. So if a man hath two ſons, and the eldeſt have a ſon and die, and a Remainder is limitted to the next of his Blood, the yongeſt ſhall take it. *Co. lib. Inſt.* 1 *part, fol.* 10, 13.

9. Where a Remainder ſhall be deſtroyed, and how.

If an Eſtate be to *A.* for life, the Remainder to the right heirs of *A.* or the right heirs of *B.* or the right heir, and heir of ſuch right heir, or the like, and *A.* make a Feoffment in Fee: Now by this, the Remainder is deſtroyed for ever, and can never be revived. But if the Tenant for life had been diſſeiſed onely, and ſo died, the Remainder might have continued and veſted well enough. *Co.* 1. 60. 136.

If Lands be given or granted for life, the Remainder to the right heirs of *W.* and *W.* is attainted of Treaſon or Felony; now the heir ſhall never have this Remainder. But if the Limitation had been to the Heirs Males of *W. contrà. Co.* 10. 102. *fol.* 2. *Broo. cap.* 302.

If a Diſſeiſor make a Leaſe for life with a Remainder over, and after the Diſſeiſee enter; now the Remainder is deſtroyed and gone for ever. *Littl. ſect.* 521. *Broo. cap.* 302.

If *A.* infeoff *B.* and his heirs to the uſe of *C.* and *D.* his wife, and the heirs of the ſurvivor of them, and *C.* makes a Feoffment to *E.* and dieth; this Feoffment doth deſtroy the Contingent Remainder, Adjudge. *Co.* 1. 135.

If a Gift in Tail be made to *A.* the Remainder to the right heirs of *B.* and the Donee makes a Feoffment to *B. A.* dies; in this caſe the heir ſhall not have the Remainder. *Piggot* and *Smiths* caſe.

CHAP. CXLIII.

Of Rogues, Ryot, Rout, and unlawful Aſſembly.

Sect. 1. *Rogues*, what.

FOr Rogues, theſe things are to be known.

1. That all perſons above ſeven years old that go about begging or wandring idly, under any pretence whatſoever, are to be accounted Rogues: But none under ſeven years old, are to be reckoned Rogues.

2. All idle perſons that go about, uſing unlawful arts, as Juglers, Fortune-tellers, *&c.* are accounted Rogues.

3. All Proctors, Patent gatherers, Collectors for Gaols, Priſons, or Hoſpitals, are ſo to be accounted; but not Patent gatherers for fire.

4. All Fencers, Bear-wards, Common Players of Interludes, and Minſtrels, that wander about, are ſo to be eſteemed.

5. All Pedlers, Tinkers, Petty-Chapmen, and Glaſs-men, wandring about, are ſo to be accounted.

6. All wandring perſons, and common Laborers, being able to work, that loyter and refuſe to work for reaſonable wages, not having whereon to live.

7. Such as having Licenſe to beg in their own pariſh, beg elſwhere.

Egyptians, what.

8. Thoſe who wander in the habit of *Egyptians*, not being Felons, are alſo accounted Rogues. And *Egyptians* are a counterfeit kinde of Rogues, that being Engliſh or Welſh-people, accompany themſelves together, diſguiſing themſelves in ſtrange Robes, blacking their faces and bodies, and framing to themſelves a ſtrange Language, wander up and down, and under pretence of telling of Fortunes, curing diſeaſes, and ſuch like abuſe the ignorant common people, by ſtealing all that is not to hot and to heavy for their carriage.

9. Soldiers and Marriners that beg (not being Felons) and eſpecially where they counterfeit a Certificate of their Commanders, are ſuch alſo.

10. And ſo are all theſe that follow. Perſons that go to, or from *Bath*, and do not purſue their Licenſe.

11. A Rogue whipped that doth beg again, or not purſue the direction of his Teſtimonial.

12. He that doth go with a general Paſport, and not from Pariſh to Pariſh.

13. He that goeth with his Paſport by himſelf, without a guide: Nay, it is held, that all Paſports are void, and that none can go with a Paſs, but he will be a Rogue.

14. Servants that go out of their Pariſh without a Teſtimonial, or with a forged Teſtimonial.

15. Such as do run away, or threaten to run away from their charges, and to leave them to the Pariſh.

16. A Soldier or Mariner that hath a Penſion, and ſhall beg or counterfeit a Certificate.

17. Thoſe that are ſick of the Plague, and wilfully go abroad in company contrary to the command of Officers; all theſe are held to be Rogues. And if it be a Woman that hath a Husband, ſhe may be a Rogue, as well as a Man: But if the Parents be not Rogues, the Children cannot be ſo, unleſs they beg, and become ſo.

What ſhall be done with them.

They that are ſuch perſons, are thus to be dealt with.

1. They are to be whipped openly, till their bodies be bloody.

2. They muſt have a Paſs or Teſtimonial under the Hand and Seal of one Juſtice of Peace, or under the Hands and Seals of the Miniſter, Conſtable, and one of the Pariſh beſide, appointing whither he ſhall go, which way, and in what time.

3. With this Paſs he is to be carried and conveyed from Pariſh to Pariſh, by the Officers thereof, the next way to the Pariſh where he was born, if it may be known by

by his confeſſion, or otherwiſe; if not, then to the Pariſh where he laſt dwelt by the ſpace of one year; or if neither can be known, then through the Pariſh, through which he laſt paſt, without puniſhment: And the Officer of that Pariſh is to carry him to the Houſe of Correction, or Common Gaol, where he is to be till he be placed, if able, in ſervice, if otherwiſe, in an Alms-houſe. See 5 *Eliz.* 4. 43 *Eliz.* 3. 7 *Jac.* 4. 39 *Eliz.* 4, 17. 1 *Jac.* 7. 12 *R.* 2. 8. 23 *Ed.* 3. 7. 22 *H.* 8. 12. 1 *Ed* 6. 2, 3. 3, 4 *Ed.* 3. 16. 35 *Eliz.* 7.

Reſolution of the Judges upon the Statutes, upon which theſe things are to be known.

1. Generally the Wife and Children muſt go and be paſſed, with the Husband and Parents: And if a Wife become vagrant, ſhe is to be ſent to her Husband.

2. None may be forced to turn Rogue, ſo as to be ſent, *&c.*

3. None but a Rogue is thus to be uſed; for if a Servant be out of his time, idle, or go into another Pariſh, and is there idle, he is not ſo to be handled, ſo neither is a traveller or paſſenger.

4. The childe of a Woman, hanged for Felony, is to be ſent to the place of its birth, and if that cannot be known, to the place where ſhe was taken.

5. He that doth run or threaten to run from his charge, *&c.* He that being allowed by the Overſeers to beg doth exceed his Licenſe: Such as are infected with the Plague, and go abroad, and able idle perſons that be poor, and refuſe to work: All theſe upon their delivery, are not to be ſent to their place of birth, but to their place of dwelling, if they have any, if not, where they laſt dwelt for a year. And the loyterer that will not work for the wages aſſeſſed, may be ſent to the Houſe of Correction.

6. He that is found in the privy ſearch, may be puniſhed by the Juſtice of Peace, or ſent to the Houſe of Correction, there to be ſet a work.

7. He is not to be relieved; for if any Officer do give him money, or an Ale-houſe-keeper lodge him, he forfeits ten ſhillings.

8. He that doth any thing in hinderance of the Execution of the Statute of 31 *Eliz.* 4. loſeth five pound, and is to be bound to the Good-behavior.

Incorrigible Rogue, what.

He that doth appear to be dangerous to the people, that doth offer violence, or uſe any threatning ſpeeches towards them, or will not leave his Roguiſh life, but being puniſhed and ſent home, doth rogue again; or that doth affirm, he was born in ſuch a place, or laſt dwelt a year in ſuch a Town, and when he is come thither, it appears to be falſe; or ſuch a one as is able to labor, and he doth threaten to run away, and leave his charge to the Pariſh, or doth ſo. All theſe are to be reputed Incorrigible Rogues, and are to be brought by the Conſtable to the next Juſtice, who may ſecure them. And two Juſtices may ſend them to Gaol, or the Houſe of Correction, till the Quarter Seſſions, and then they are to be branded on the left Shoulder with an hot Iron, *&c.* and from the Seſſions to be ſent to the place of their laſt habitation. 1 *Jac.* 7. 25. And he that falſifieth his birth, is to be ſent away by the two next Juſtices to the Gaol or *Bridewel*. See more of this in my *Juſtice of Peace*.

What is to be done with them.

Of a Ryot, Rout, and unlawful Aſſembly.

FOr the better underſtanding of the Law in this, theſe things are to be known.

Unlawful Aſſembly, what.

1. That an unlawful Aſſembly, is where three or more do meet to do an unlawful act againſt the Peace, as to beat down a Pale, Ditch, Houſe, or the like, or to do a lawful thing in an unlawful way or manner, as to diſtrain for his Rent with force and violence; but they do nothing. A Rout is when they go forward (after they are thus met) in a turbulent way to effect, but do not finiſh it. A Ryot is when they do not onely begin, and go on, but finiſh their work: So that in theſe offences there muſt be theſe things concurrant.

Rout, what.

Ryot, what.

What ſhall be ſaid to be a *Ryot, Rout*, or *Unlawful Aſſembly*, or not.

Firſt, There muſt be three or more perſons in the work, and this may be made up of Women and Children of any diſcretion: But this offence may be committed, though ſome of the company ſtand by, and do nothing; for if they ſtand by and countenance it, it is as bad, as if they did it: But if they come by chance, and intend nothing, *contrà*.

Secondly, Their Aſſembly that they go with, or their intent muſt be evil, to do ſome hurt to men, or that which is theirs (which in ſome caſes will be preſumed;) as if the Lord with two or more perſons, enter on his Copiholder with force, and cut and take his Corn, becauſe he doth not pay him his Fine; this is a Ryot, and yet this Entry lawful: So if a man make reſiſtance againſt the Sheriff, or any other in their doing of Juſtice. So if two or three make a forcible Entry; and this may be puniſhed both ways. Meetings and Aſſemblies of any perſons upon matches made for Cock-fighting, are unlawful Aſſemblies, and (it ſeems) may now be puniſhed as a Ryot. *Ord* 31 *March*, 1654. And ſo (as it ſeems) are Meetings to ſet up May-Poles, eſpecially when it is done with Guns and Drums. *Ord. April*, 1644. If many come together unarmed, they know not why themſelves; this is no offence puniſhable, unleſs it can be known, they came to ſome evil intent, or they do miſcarry themſelves in ſome evil act.

If one ride or go abroad with his Servants armed, and in harneſs, and do no more; this is an Unlawful Aſſembly if not a Ryot: But if he intending a Ryot by an Entry in to Land, or the like, go with his ordinary ſervants, who know nothing, and they do enter, this is not a Ryot in the ſervants, if it be any in the Maſter. To go in a Privy Coat of Mail, is not this offence: And albeit one be threatned, and in danger of his life, and to defend himſelf he gathers aforce, and they ride about armed; this is a Ryot, yet if they did abide in his houſe, happily it may be juſtified. But if a man do onely go abroad with his houſhold ſervants, which he hath commonly in his Family, though they be more then his ability to keep; this is no offence, and if they hap to make an affray, or do any unlawful thing; this will not amount to this offence, except it can appear they had an intent before to do it, but an affray onely.

The Watch in *London* on *Midſummer* night, Aſſemblies for merry Meetings onely; wherein there is no breach of the Peace, nor terror to the People, are not taken to be this offence: But take heed they be not ſuch Meetings, as are forbidden, as May-Pole Meetings, Cock-fighting Matches, or at prohibited times, as upon the Lords-day; for this may make it queſtionable. But if there happen to be an affray at ſuch Meetings, it is not interpreted to be this offence: But the coming to ſuch a Meeting with ſuch an intent, or the taking of ſides and parties at ſuch a time, and in ſuch a caſe eſpecially, if after their parting they meet again, may amount to this offence.

If a Jury come to try an iſſue, and they happen to fall out and fight; this is not this offence, but an affray. The Sheriff, and other Officers of Juſtice, in going about with Troops and Arms, do not commit this offence.

Thirdly, The manner of their motion and action, (if the matter be good) muſt be bad, as when it is turbulent; ſo that by their coming together, they breed ſome apparant diſturbance, either by word, geſture, or action; ſo that peaceable men are feared, or light men imboldened; for as a man may do an unlawful thing, ſo as it may not be a Ryot; ſo he may do a lawful thing, ſo as to make it a Ryot: And therefore if a convenient number onely, with convenient Tools, onely meet together to abate a Common Nuſance; as where a man hath erected a Wearton, a Common River, where the people paſs with their Boats, and they come to the place, and make a Trench in his ground that did it, the better to do it; this is no offence. But if in doing this, they come weaponed, or in the night, or uſe threatning ſpeeches, that they will do it, if they die for it, or the like; this may make it a Ryot. So if I claim a peece of Timber, and another hath better right to it then I have, and I take a convenient number of perſons, and peaceably remove it; this is no Ryot.

Fourthly, If a man hath Title to Corn, and he come with a great number to cut it with Sickles; this is no Ryot. But if he have no Title, it is otherwiſe. *Hughs Rep.* 438.

How this offence may be puniſhed, and what the Juſtices of Peace, may and ought to do herein. See my Book of *Juſtice of Peace*, ſee 17 *R.*2.8. 13 *H.*4.7. 2 *H.*5.8,9. 8 *H.*6.14. 19 *H.*7.13.

CHAP.

CHAP. CXLIV.

Safe Conduct, Sequestration, Serjeant at Arms, Sea, Scold, and Cucking-Stool.

SAfe Conduct is a Security given by the Lord Protector under the Broad-Seal to a ſtranger, for his quiet coming in, and paſſing out of the Realm. See 15 *H.*6.3. 18 *H.*6.8. 20 *H.*6.1, 13. 1 *H.*6.4. 9 *H* 3.30. 25 *Ed.*3.2. and others. *Safe Conduct*, what.

Sequeſtration is the ſeparating of a thing in Controverſie, from the poſſeſſion of both thoſe that contend for it; and it is either voluntary, which is that which is uſed and done by the conſent of both parties, or neceſſary; which is that which the Judge of his Authority doth, whether the parties will or not. This word alſo was uſed for the act of the ordinary diſpoſing the Goods and Chattels of one deceaſed, whoſe Eſtate no man will meddle with; as alſo the gathering of the Fruits of a Benefice, void to the uſe of the next Incumbent. *Dyer* 232, 252, 160, 271. 28 *H.* 8. 11. And thoſe that do thus gather the things contended for, are called Sequeſtrators, and theſe have no intereſt; for they can bring no Action of Treſpaſs. *Stapletons* caſe. *Hil.* 14 *Jac. B. R.* *Sequeſtration*, what. *Sequeſtrators.*

Sequeſtro Habendo was a Judicial Writ, for the diſſolving of a Sequeſtration made by the Biſhop, at the Kings Commandment of the Fruits of a Benefice, thereby to compel the perſon to appear at the Sute of another (which is a courſe to be taken againſt a Parſon, if he appear not to a Sute) and the Parſon upon his Appearance, may have this Writ for the Releaſe of the Sequeſtration. *Regiſt. Judicial, fol.*36. *Sequeſtro Habendo*, what.

The Commiſſioners for Approbation of Miniſters may ſequeſter the Profits of a Church-living, whiles it is in Sute, and ſupply the place therewith. See *Ordinance*, 20 *March*, 1653. So may the Commiſſioners of the Counties, for the caſting out of Scandalous Miniſters, or School-Maſters, they may ſequeſter the Profits of the Church. See *Religion.*

As for Sequeſtration, and Sequeſtrators of Papiſts and Delinquents, and Compoſition with them, ſee *Act*, 25 *Jan.* 1649. 9 *April*, 1649. 21 *Octob.* 1653.

Serjeant at Arms, ſee 13 *R* 2. 6. *Serjeant at Arms.*

For the Sea, ſee 18 *Ed.* 3. *Stat.* 1. 3. *Sea.*

A Scold is a troubleſome and angry Woman, who by her brauling and wrangling amongſt her Neighbors, doth break the Publick Peace, and begets, cheriſh, and increaſe Publick Diſcord. *Sco'd and Cucking-ſtool.*

She is to be preſented for it, by, and puniſhed in the Leet, in the Cucking-ſtool, Ducking-ſtool, or Tumbrel, an Engine appointed for that purpoſe, which is in the faſhion of a Chair: And herein ſhe is to ſit, and to be let down in the water, overhead and ears, three or four times, ſo that no part of her ſhall be above water, diving or ducking down (though againſt their wills, as Ducks uſe to do under the water. *Kytch Court-Leet.*13. The puniſhment.

For Searchers, ſee 4 *H.*4.31. *Searchers.*

CHAP.

CHAP. CXLV.

Of Seals of the Lord Protector, Seiſure of Goods, Sewers, and Seavorn.

Sect. 1. *Seals*, what.

THe Lord Protector hath four Seals, which he doth uſe in his Gifts and Grants, and publick and private Acts.

The firſt is the Grand Seal, which is the chief; and of which, the Lord Chancelor, or Keeper, or Commiſſioners for the time being, have the Cuſtody: And by this onely, the Lord Protector doth, and may Seal Writs, and grant or give away any Office, Manors, Lands, or Tenements; for by the Common Law, no Grant of any Land by the King, was available or pleadable, but under the Great Seal of *England*, of which onely, all the Courts are to take notice: And therefore though this Seal be chargable, becauſe every thing doth paſs the Privy Signet, and Privy Seal, before it come to this; yet it is the ſafeſt and ſureſt way to have any thing from the Lord Protector, under this Seal.

The ſecond is the Privy or Petit Seal, and by this he doth, and may give Fees, grant Prohibitions againſt a man, that he ſhall not go out of the Realm, preſent to a Church, make an Attorney, diſcharge debts, or the like: But he cannot give or grant away Lands by this onely, nor Seal Writs with this.

The third is the Privy Signet, and by this alſo he may prohibit a man to go out of the Realm, preſent to a Church, or the like; but by this he cannot diſpoſe his Treaſure, or diſcharge debts, or the like.

The fourth is the Exchequer Seal, and by this the King did uſe to grant ſmall matters, as Cottages, and the like, or to make a Leaſe of greater things for three lives onely; and the Law doth allow of ſuch grants, becauſe elſe no man would take them, the charge of the Grand Seal is ſo great: And how the Clerks that have the Cuſtody of the Seals, muſt uſe them, and what Fees they muſt take for the ſame. See 28 *Ed.* 1. 5. *Co.* 2. 17. *Bro.* 310. *Co.* 11. 90. *F.N.B.* 20. 85. *March.* 55. *pl.* 85. 4 *H.*7. 14. 11 *R.*2. 10 *Art. ſuper ch.* 9. *Co.* 2. 17. 27 *H.*8. 11, 27. 1, 2 *Ph. & Ma.* 1.

For the Parliament Seal, ſee *Act*, 22 *Jan.* 1650.

For Sealing, and the Seals of other Mens Deeds, ſee *Deed.*

For Seavorn, ſee 34, 35 *H.*8. 9.

As to the Seiſing of the Goods of a Delinquent, theſe things are to be known.

Seiſure of Goods for offences.

1. No Goods can be taken, and ſeiſed to the uſe of the Lord Protector, before the ſame are forfeit.

2. The ſame cannot be Inventoried, and the Town charged therewith, before the owner be indicted of Record.

3. So there are two manner of Seiſures, one verbal without taking, removing, or carrying away, onely to make an Inventory, and charge the Town. And the other an actual Seiſure, and taking away the ſame.

4. Before Indictment, neither may be; and after Indictment, the firſt Seiſure onely, and not the latter, may be made by any Officer of the King. *Co.* 3 *part*, *Inſt. cap.* 103. See *Crown*, *ſect.* 15.

Sewers.

Sewar or Sewer hath two ſignifications with us.

Firſt, It did note him that came in before the Meat to the King, or great Mens Tables, and did place the Diſhes. The other ſenſe is, That it meaneth the Paſſages, Gutters, or Rivers, that carry Water into the Sea.

Commiſſioners for Sewers, what.

And the Commiſſioners of Sewers, are thoſe that are authoriſed under the Great Seal to over-look theſe, and to ſee Drains, and Ditches, well kept and maintained in the Mariſh, and Fen Countries, for the better conveyance of the Water into the Sea, and the preſerving of the Graſs for the Food of Cattle.

And for theſe things, ſee 25 *H.*8. 10. 13 *Eliz.* 9. 1 *Mar.* 11. 3 *Ed.*6. 8. 7 *Jac.* 20. 6 *H.*6. 5. 8 *H.*6. 3. 18 *H.*6. 10. 23 *H.*6. 9. 12 *Ed.*4. 6. 4 *H.*7. 1. 6 *H.*8. 10. 23 *H.*8. 5. 3 *Jac.* 18. 14. And Mr. *Robert Callis* Reading.

CHAP.

CHAP. CXLVI.

Of the Service of God or Religion.

Sect. 1.

AS touching the Service of God, or Religion, and the Laws of the Nation now in force, and of use relating thereunto, these things are to be known.

1. The great regard the Law hath of Religion.

1. That the Christian Religion contained in the Scriptures, is held forth and commended, as the Profession of these Nations; yet so, as no man is to be compelled to it by Penalties, or otherwise, then by the endeavor of sound Doctrine, and the examples of good Conversation, and by the encouragement of painful, and able Teachers for instructing of the people, and confutation of Error, and Heresie. *Government*, *Art.* 35, 36, 37.

2. That such as profess Faith in God by Jesus Christ, though differing in judgment from the Doctrine, Discipline, or Worship, publickly held forth, shall not be restrained, but protected in the Profession of the Faith, and Exercise of their Religion; so that they abuse not this liberty to the civil Injury of others, and to the actual Disturbance of the Publick Peace on their parts: Provided, That this liberty be not extended to Popery or Prelacy; nor to such as under the Profession of Christ, hold forth and practise licentiousness. *Government*, *Art.* 36, 37, 38.

3. That the Law hath a special regard of it, and therefore it holdeth forth these Religious Principles.

First, That Religion and Justice are the main Pillars of the Commonwealth.

Secondly, And that that is the best reason that makes for Religion. *Co.* 5. 14.

The main things the Law doth take care of, in order to the Advancement and Preservation of Religion, are Religious times or days; Religious things, as the holy Scriptures, holy Ordinances, or Worships, and an orderly performance of them; Religious places, and Religious Orders of Men, and Officers; such as are the Ministers of the Gospel, and as to them, their due qualification, election, disposal, and reward.

As touching Religious times, these things are to be known.

2. *Lords day.*

1. That by our Law, there is no day now ordinarily to be kept holy, but the Lords day. *Act*, 27 *Sept.* 1650. The Common and Statute Laws also, do highly advance the Authority, and severely injoyn the Sanctification, and forbid all manner of profanation of this day. 5, 6 *Ed.* 6. 3. *Plow.* 265. *Co* 9. 66. And therefore all works (but works of Piety, Charity, and other works of necessity) are forbidden on this day. And for this cause it is, That if any part of the proceedings of a Sute in a Court of Justice be entred and recorded, as done this day, it makes it all void; and all serving Warrants or Proces on this day, but in special cases, is void; and it is a rule, *Dies dominicus non est juridicus*. And if a Keepers Deer be stoln out of his Park, whiles he is at Church serving God (though this in another case be a forfeiture of his Office) yet in this case, and at this time, it is not at all penal to him. 5 *Ed.* 3. 27.

2. But this notwithstanding it is lawful, to pursue and arrest Felons, such as break the Peace, suppress uproars, quench fire in houses, visit sick people, and the like. *Co.* 5. 83. *Plow.* 265. See more of this in my Office of the *Justice of Peace*, Chapter of the *Lords day*

Holy days.

3. But as to the other Holy days called Feast days, they are now totally abrogated, and at an end. *Act*, 27 *Sept.* 1650 But the fifth day of *November* we are to meet once to thank God for our deliverance from the Gun-powder Treason. 3 *Jac.* 1.

As

3 *Holy Scriptures.*

As touching the holy Scriptures, theſe things are to be known.

1. The Maximes of the Law, concerning them, which are theſe.

Firſt, That they are of Soveraign Authority. 34 *H.* 6. 40.

Secondly, That the Goſpel of Jeſus Chriſt is of infallible truth.

Thirdly, That any Statute, Preſcription, Cuſtom, or Canon againſt it, is void, and not to be admitted.

2. *Blaſphemy and Hereſie.*

Fourthly, To maintain and publiſh, by Preaching, Printing, Writing, or Teaching any thing contrary to them; As in the firſt place, That there is no God, that he is not preſent in all places, that he doth not know, and fore-know all things, that he is not Almighty, that he is not perfectly holy, that he is not eternal, or that either of the three perſons of the Godhead is not God, or that theſe three are not one eternal God, or that Chriſt the Son, is not equal with the Father, or ſhall ſo divide the Manhood of Chriſt, or that the Godhead, and Manhood of Chriſt, are ſeveral Natures, or deny that the Manhood of Chriſt, is without ſin, or that Chriſt, died, roſe again, or did not aſcend into Heaven bodily, or that his death is not meritorious to Believers, the Reſurrection, or day of Judgment, or that the Scriptures are not the Word of God, or that Chriſt is not the Son of God, and ſhall be obſtinate herein, it is Felony. And in the ſecond place, if any man affirm, as before, That all ſhall be ſaved, that man hath free-wil, that God may be worſhipped by Images, Purgatory, or that the Soul dieth, or ſleepeth after death, that the Revelations or Workings of the Spirit, are a Rule of Faith, though againſt the Word, that Man is not to believe above Reaſon, that the Moral Law is at an end, that a Chriſtian need not pray nor repent, that Baptizing of Infants is void and unlawful, or deny the Lords day, or Sacraments, or the Miniſters and Magiſtrates office, or are rebaptiſed, and be obſtinate herein, is to be impriſoned, till he give Sureties not to do ſo again. And in the third place, If any ſeriouſly maintain (he being not diſtracted) by Word or Writing, any Creature to be God, or to be equal with God in his Attributes, or that God dwells in the Creature, or ſhall deny the Holineſs and Righteouſneſs of God, or ſay, That wicked perſons, wickedneſs, or wicked acts of Swearing, Drunkenneſs, or Leudneſs, are not unholy againſt Gods Word, or are approved by him, or that ſuch things, or ſuch perſons therein, are like God, or ſhall ſay, That theſe acts of denying or blaſpheming God, or the holineſs or righteouſneſs of God, or that the acts of curſing God, or ſwearing profanely or falſly by the Name of God, or the acts of Lying, Stealing, Couſening and Defrauding others, Sodomy, Drunkenneſs, Filthy, and Laſcivious ſpeaking, are not things in themſelves ſhameful, wicked, and abominable in any perſon whatſoever to be practiſed, or ſhall affirm, That the acts of Adultery, Drunkenneſs, and the like open wickedneſs are in their own nature, as holy and righteous, as Prayer, Preaching, or giving thanks to God, or ſhall maintain, That whatever wickedneſs is acted by them, may be done without ſin, or that ſuch acts are acted by God, or the Majeſty of God, or Eternity that is in them, that Heaven and Happineſs is in the acting of theſe things, or that ſuch men as act them, are moſt like to God or Eternity, which do commit the greateſt ſins with leaſt remorſe, or ſenſe, or that there is no ſuch thing really and truly, as ſin, unrighteouſneſs, or unholineſs, but as a man or woman judgeth thereof, or that there is neither Heaven nor Hell, Salvation or Damnation, or that theſe are one and the ſame thing, *&c.* For the firſt offence herein, he is to be impriſoned in the Gaol, or *Bridewel*, three moneths without Bail; for the ſecond offence, to be baniſhed, and if he retorn, to ſuffer as a Felon. *Ord* 2 *May*, 1648. 9 *Auguſt*, 1650. But now we muſt examine, how the puniſhment of men upon theſe, will ſtand with the Articles of the Government, which willeth that men be, not puniſhed for their opinions, that hold the Head-Faith in God by Jeſus Chriſt and do not injury, nor make diſturbance, nor hold forth, nor practiſe Popery, nor Licentiouſneſs: It ſeems then neceſſary here to diſtinguiſh amongſt theſe Opinions; and to make theſe onely puniſhable by theſe Acts and Ordinances, which deny the Godhead in his Eſſence, or Attributes, or Chriſt in his Natures, or Offices; of which ſort, are moſt of the firſt, and laſt rank; and all thoſe that tend to Licentiouſneſs, as all thoſe of the laſt rank. And

thoſe

thoſe that are Popiſh, as Freewil, Purgatory, Images, and the like; ſuch as are againſt the Scripture, as that Revelations, and workings of the Spirit, are the Rule of Faith, though againſt the Word of God, and ſuch like. And thoſe that are againſt Magiſtracy and Miniſtry altogether; and ſuch like, which are againſt Peace, and tend to Licentiouſneſs; that theſe onely are to be puniſhed, and that the leſſer, and not dangerous opinions, denying Presbytery, Baptiſing of Infants, and affirming, That men muſt be re-baptiſed, and the like; that theſe are not puniſhable now by theſe Laws. *Quere* therefore well of this.

As touching the External worſhip of God, by preaching and hearing Gods Word, Prayer to, and praiſing of God, and the Adminiſtration of the Sacraments; theſe things are to be known. 5. The Preaching and Hearing of Gods Word. Prayer to, and praiſing of God, and Adminiſtration of the Sacraments.

1. The Law requireth that theſe things are to be done.

2. That they be ſolemnly, conſtantly, unanimouſly, purely, reverently, and devoutly done, and performed, both by the Miniſter and the people. See 5, 6 *Ed.* 6. 1. 1 *Eliz.* 2. 23 *Eliz.* 1. 13 *Eliz.* 1. But moſt lively and excellently in the Preamble of the Statute of 5, 6 *Ed.* 6. 3. 1 *Ed.* 6. 1. 2, 3 *Ed* 6. 1.

3. But men are not by Law bound now to, but forbidden the uſe of the Book of Common Prayer, nor are men now bound in the Worſhip of God, to the Superſtitious rights thereby injoyned, and formerly uſed, as the Croſs in Baptiſm, kneeling at the Lords Supper, and bowing at the name of Jeſus; but theſe are ſent after the abominable Maſs, to the place from whence they came. *Act*, 27 *Sept.* 1650. *Ordinance*, 3 *Jan.* 1644. *Ord.* 23 *Auguſt*, 1645. 6. *Common Prayer Book.*

But the External Form and Order, now by the Law ſet forth, and commended to the Nation for the doing of theſe Services of God, is the Directory; for this by a Law is to be put in execution for publick worſhip in all places. *Ordinance*, 23 *Aug.* 1645. 7. *Directory.*

And as to theſe things, this is here to be known.

1. He that uſeth the Common Prayer-Book in publick or private, forfeits for the firſt offence five pound, for the ſecond offence ten pound, for the third offence impriſonment for a year without Bail.

2. He that doth not uſe the Directory, or by writing, or otherwiſe doth deprave it, ſhall be fined by the Judges at their diſcretion, not under five pound, nor above fifty pound.

This Law ſeems now to be altered by the Government: *Art.* 36, 37, 38. And that no man now is to be moleſted about Forms of Religion; and that this is the ſenſe of the preſent Authority, appears by the Ordinance for ejecting of Scandalous Miniſters. 29 *Aug.* 1654.

As touching Religious places, ſuch as are Churches and Chappels, which are greater and leſſer Meeting-places of Pariſhes onely, theſe things are to be known. 8. *Churches.*

1. That the Law doth not own them, as places capable of Holineſs by any Conſecration, but as convenient places for the meeting of the people, and doth therefore take care for the keeping of them repaired. For which ſee my Book of the Office of Church-wardens, and *Act*, 9 *Feb.* 1647.

2. The Law doth take order for keeping of the Congregations there about Gods Worſhip in Peace, without diſturbance; and therefore any diſturbance done there, is very penal. 2, 3 *Ed.* 6. 1. 1 *Eliz.* 2. 1 *Mary* 3. And all fighting, quarrelling, or ſtriking there, or in the Church-yard, is to be ſeverely puniſhed. 5, 6 *Edw.* 6. *chap.* 4.

3. For the better ſecuring hereof, the Church-yard is alſo to be defended in peace. 5, 6 *Ed.* 6. 4. *It is therefore Ordered, That if any do maliciouſly ſtrike another, or draw his Weapon of purpoſe to ſtrike another in any Church, or Church-yard, he is to have one of his Ears cut off.* 5, 6 *Ed.* 6. 4. *Church-yard.*

4. But the Pariſhioners are not now bound as heretofore, to come to their own Aſſemblies, or Pariſh, or to any Pariſh Church to ſerve God; but ſo as they ſerve him, they may joyn themſelves unto what Aſſembly, and in what place they pleaſe. *Act*, 27 *Sept.* 1650. Going to Church.

Abbeys, Monaſteries, Chantries.

5. As for other places called heretofore Religious Houſes, ſuch as were Abbeys, Priories, Monaſteries, Chantries, being places of Superſtitious Chanting or Singing, and ſuch like Houſes, they are aboliſhed, and gone, and Conventual Cathedral Churches; for Biſhops, Deans, and ſuch like, are going after them, but it is Pariſh-Churches and Chappels the Law takes care of. See *Free Chappel.*

9. Religious Perſons, or *Clergy.*

As touching Religious Perſons, that is Miniſters, and Preachers of the Goſpel; ſometimes called in our Law by the name of Religious Men, ſometimes by the name of Clergy-men, ſometimes Eccleſiaſtical Perſons, ſometimes Spiritual Perſons, ſometimes (but improperly the Church) the Church, and ſometimes Parſons, Curates, and Vicars.

As to theſe and the Law concerning them, in order to the preſervation of Religion; theſe things are to be known.

Sect. 3.

1. That they are to be well qualified for, and orderly called and admitted into the office, and then being called to any People or Pariſh, their duty is to look to, and watch for the Souls of theſe people, to diſpence the Bread of Life by Preaching, to pray for the people, to uſe, and ſhew Charity toward the poor, and Hoſpitality towards all. And that this may be the better done, the Law doth require they ſhould be reſident, and will not allow them to be abſent from their charges, but by ſome ſpecial Diſpenſation: And for this, they are to have the Profits of the Church and Church-hay, the Glebe-land, and the Tithes of all the yearly increaſe within the Pariſh; alſo the Oblations; Obventions, and Mortuaries, uſually paid in the place; and all Encouragements: And that the preſent maintenance by Tithes, be not taken away, nor impeached, until a better proviſion can be made. *Government, Art.* 35. And in reſpect of their continual attendance upon their ſacred Function, they are freed from all perſonal charges that may hinder them in their Calling; for ſuch ſhall not be choſen, Bailiffs, Beadles, Reeves, or other ſuch like Officers, nor be compelled to come to the Sheriffs Leet; and they may have an Action of Treſpaſs for any Treſpaſs in the Trees, or Graſs of the Glebe, or Church-hay. They may make any Leaſe of their Tithes, or their Glebe, during the time they are Parſons, but they can do no Act to bar their Succeſſors now, unleſs it be within the Statutes of Eccleſiaſtical perſons: For they have not the meer Right of the Land in them, in Right of their Churches, but the Fee-ſimple is in Abeyance; and therefore they cannot diſcontinue, but every Act they do will be avoided, when they ceaſe to be Incumbents, except ſuch as be done by conſent of Patron and Ordinary, which will binde for ever, if none of the Statutes touching Eccleſiaſtical perſons hinder.

But for the particular opening of theſe things, and the ſetting forth the Law herein, as it ſtands at this day, we ſhall ſpeak ſomething to theſe two things.

Firſt, What he is to be, and do.

Secondly, What he is to have and receive.

Qualifications of *Miniſters.*

For the firſt of theſe. 1. The Law requires that ſuch as enter into the Office of a Preacher of the Goſpel, be duly qualified; that he be unblameable in converſation, ſound in opinion, able to teach; and for this, the Biſhop was carefully to examine him, and by information from others, to ſatisfie himſelf herein: And now there are called Commiſſioners ſpecially appointed to try, examine, and admit ſuch as are preſented to any place.

And as touching them, and this thing, know theſe things.

1. That none can come into any Benefice, or Lecture now, but he muſt paſs through this Examination, and have their Approbation under the Seal of their Office.

Inſtitution and *Induction.*

2. This being done, it will be as much, and as good, as Inſtitution and Induction.

3. Theſe Commiſſioners before they Approve any, muſt have a Certificate under the hands of three perſons, at leaſt; whereof one a Miniſter of known Godlineſs and Integrity of the holy and good converſation of the Man.

Augmentation.

4. All perſons that will receive any Augmentation, by Parliament Proviſion, muſt be thus approved and allowed. *Ord.* 20 *March*, 1653.

2. He ought to be admitted and allowed; he was therefore to be called, approved, and allowed by a Biſhop, or by one of the Univerſities; and without this, no man was to have taken upon him the Office. 13 *Eliz.* 12. 31 *Eliz.* 26.

3. And

3. And he that is to come to a Benefice at this day, muſt have ſome kinde of Preſentation to it, ſuch as the time doth yield, if it be from the Lord Protector, or the Keepers of the Great Seal, by the Great Seal, from any other he muſt have a Gift or Collation. *Preſentation.*

But here by the way for a third thing, it muſt be noted, That the Preſentation or Collation muſt be free, and the Incumbent muſt come in without corruption: And it is therefore provided by the 13 *Eliz.* 12. That if any ſell any Spiritual Living; as if a Patron take money or other Reward, to preſent his Clerk or a Clergyman to any Parſonage, or Vicarage, or take upon him the Parſon or Vicar, or promiſe for any Reward, to reſign again upon requeſt all ſuch Preſentations, and the Inſtitutions and Inductions thereupon gotten, by this means are void; and the party giving and taking, do each of them forfeit the double value of the Church for one year; and the party that doth give, is hereby made incapable of that Church for ever. 31 *Eliz.* 6.

Wherein theſe things are further to be known.

1. That if a man give the reward himſelf, he is ſaid to be *Simoniacus*, but if it be given by another without his Privity, he is ſaid to be *Simoniace promotus*, and in both caſes it is alike dangerous and penal. *Co.* on *Littl.* 120. 10. *Simony.*

2. *A.* (the Church being void) Contracts Simoniacally with the Patron to have the Preſentation, and upon this corrupt Agreement he preſents *R*, a man ignorant of this Agreement; in this caſe he was removed. *Calverts* caſe in the *Exchequer.* *Brownl. Rep.* 2 *part*, 164.

3. This Law of Simony doth hold as well where the Patron that doth preſent is an uſurper, as otherwiſe; but in this caſe the Rightful Patron, and not the Lord Protector, ſhall have the next Preſentation, but otherwiſe it is where the Rightful Patron doth make ſuch a corrupt Contract. *Co.* upon *Littl.* 120. For in this caſe, albeit he that comes in upon this corrupt Contract, be admitted, and die in the Parſonage, yet the Lord Protector hath not loſt his turn, but ſhall preſent; but if he had reſigned, or made Ceſſion, and then another had been preſented, and then the firſt Clerk had died, then the Lord Protector had loſt his Preſentment. *Brownl. Rep.* 1 *part*, 164. *Sect.* 4.

4. But to ſell or buy for ones ſelf, or for ſome other, the next avoidance of a Benefice for Reward, it ſeems is not Simony. *M.* 8 *Jac. B.R.* And yet ſee *Winchcombs* caſe, 14 *Jac. C. B.* The caſe was *A.* a Clerk, when the Church was full, agreed with the Patron to give him ninety eight pounds when the Church ſhould become void, the then Incumbent being a very old and ſickly man; and agreed that the Patron ſhould grant the Avoidance to a Friend of the Clerks, who did preſent him; this was held a Simonical Contract. See this in *Brownl. Rep.* 1 *part*, 7.

A Contract by one with the Patrons Brother (the Church being then full) that if he could procure three Grants of the next Avoidance to be ſurrendred, and the Patron to preſent him, when it became void, he would make him a Leaſe of Parcel of the Tithes of the Rectory, and he during the life of the Incumbent got the Grants to be ſurrendred, and all the reſt was done, and it was agreed to be void.

5. And in this caſe the Church will be void without Deprivation or Sentence Declaratory. *March* 84. *pl.* 139.

6. An Incumbent preſented by Simony, cannot ſue a Pariſhioner for Tithe. *March.* 84 *pl.* 139. *Co.* 3 *part*, *Inſt.* 71.

But the Law at this day doth not require, that he ſhould reade and ſubſcribe the Articles of Religion, nor take the Oath of Supremacy, nor obſerve any of the Orders, Forms, or Ceremonies contained in the Book of Common Prayer, or in the Canons, nor that he ſhould be inſtituted, and inducted into a Benefice, when he is to receive it, but it is ſufficient that the ſame be given to, or conferred upon him. And now by the new Ordinance, 20 *March.* 1653. it is declared, That all thoſe *Subſcription and reading of Articles.* *Oath of Supremacy.* *Common Prayer.*

that come into any Benefice, according to the Rules thereof, ſhall be as fully intitled to the ſame, as if they had been inſtituted, and inducted into it. And by another new Ordinance, 30 *Auguſt.* 1654. it is provided, That where one was formerly evicted or ſequeſtred, and yet he keeps in the place, and none was put in by the 30 of *Auguſt*, 1654. The Patron may preſent within four moneths after the 28 of *Auguſt*, 1654. to the Commiſſioners for Approbation, and they may admit him. And in places of all ſuch Miniſters, as the Commiſſioners of the Counties ſhall eject for Scandal, *&c.* The Patron muſt preſent within four moneths after the ejectment, to the Commiſſioners for Approbation. And if he that is ejected die, or reſign, theſe Commiſſioners for Approbation, may give the Miniſter Admiſſion; and this is as good as Inſtitution and Induction, in all theſe caſes.

Inſtitution and *Induction.*

11. *Non-Reſidence*, what it is.

2. Being in the Office, and a Charge in his Hands, he ought then to be reſident, and abiding amongſt his people, and there to watch over, and look to their Souls, and there to be an example of Piety, Sobriety, Honeſty, Charity, and Hoſpitality to them; and it is forbidden him to be non-reſident. And therefore Plurality (that is) that ſuch a man ſhould have two or more Spiritual Livings, or Promotions, is generally forbidden to ſuch a man; and the conſequence of it, is this, That by the taking of the ſecond, the firſt doth become void, and he loſeth the firſt by Seſſion: And this is againſt the ancient Common Law it ſelf; and it is now forbidden by divers Statutes, except onely in ſome ſpecial caſes, to ſome great mens Chaplains (that is) ſuch Miniſters as depend upon them for the Service of God in their Houſes, where commonly they have a Chappel. But if any ſuch perſon having a Benefice (be it Parſonage or Vicarage) ſhall not be Reſident upon it, but wilfully abſent himſelf by the ſpace of one moneth for a time, or two moneths, at ſeveral times in one year, he loſeth ten pound by the Statute of 21 *H* 8.13. And no Diſpenſation will ſerve in this caſe: But ſuch perſons as were in the Kings ſervice beyond the Sea, during that time onely, Schollars under forty years old, ſtudying at the Univerſity, that have Office, or do Exerciſe there, and are in the Univerſity, and preſent at their Houſe Exerciſes, and ſuch as did, Exerciſes themſelves, the Chaplains of the King, and divers other great perſons might have been Non-reſident, ſo long as they were attending upon ſuch great men in their Houſes; ſo ſuch as are impriſoned, or ſick, or attending upon, and by order of any Court, are excuſed of their Reſidence. And if there be a Parſonage Houſe, ſome hold that he muſt be Reſident upon it; but if not, he may reſide elſwhere in the place. *Co.* 4. 79. 118. 9. *F. N. B.* 34. *Articuli Cler.* 8, 9. 14 *H* 8. 17. *Co.* 6. 21. 28 *H.* 8. 23. 26 *H.* 8. 14. 25 *H.* 8, 16. 33 *H.* 8. 28.

Plurality, what.

Seſſion, what.

Chaplain, who.

Where a Miniſter may be Non Reſident, and have Plurality of Livings, or not.

If any man that hath a Benefice, with cure of Souls, of the yearly value of eight pound, or above, do accept of, and ſhall be duly put into another Benefice with cure of Souls, and be in poſſeſſion thereof; the firſt ſhall be adjudged void, and the Patron may preſent again, and no Diſpenſation can be in this caſe.

2. He is amongſt his people, to teach nothing but ſound doctrine, and purely to adminiſter the holy Sacraments, he is to take care of the holy Worſhip of God: For this ſee *Co.* 11. 70. 6. 21. 13 *Eliz.* 12. 2, 3 *Ed.* 6. 1. 5, 6 *Ed.* 6. 6.

3. He is to Preach once on the fifth of *November.* 3 *Jac.* 1.

Common Prayer.

Ceremonies.

4. But he is not bound now to, but forbidden the uſe of the Common Prayer-Book; nor is he bound now to any Ceremonies therein, nor any thing enjoyned concerning the ſame, or by the Biſhops Canons, or touching the reading of the Articles of Religion, or the Statute of 5, 6 *Ed.* 6. to perſwade men to come to their Pariſh Church; for theſe Laws are abrogated. *Ordinance*, 5 *March*, 1653. *Act*, 27 *Sept.* 1650. *Ord.* 3 *Jan.* 1644.

12. *Dilapidations.*

5. He is to take care to keep up, and maintain in good repair the Houſes, and Buildings ſtanding upon, and belonging to his Benefice. For if there be any Dilapidations (that is) wilful, or negligent ruine, or decay therein, the Executors, or Adminiſtrators of the perſons, in whoſe time the ſame was done or ſuffered, muſt make amends to him that doth ſucceed in the ſame Spiritual Living: And he might have ſued for the ſame in the Spiritual Court. And if the offender in this caſe had made a Deed of Gift, to defeat the Succeſſor of the effect of his Sute, it had been void.

void. 13 *Eliz.* 10. The Spiritual Court being now gone, we know not what remedy may be had in this caſe, unleſs the *Chancery* will give relief herein: But by the new *Ordinance*, 29 *Auguſt.* 1654.

The Miniſters put into places in the room of others, put out for ſcandal, *&c.* are to look to the repair of the Houſes, and be forced by Juſtices of the Peace thereto. Alſo the Sequeſtrators, whiles they have it in their hands, muſt repair out of the profits.

He is to take care to diſcharge the firſt-fruits, and tenths, that the charge thereof be not left upon his Succeſſor. 13. *Firſt-fruits and Annates, what.*

The firſt-fruits are the profits of every Spiritual Living for one year. And this had now been given to the Lord Protector; the ordering of which, is in the *Exchequer*: For every one that is choſen, appointed, and preſented to any Parſonage, or Vicarage, which doth exceed the value of eight Marks, muſt before he intermeddle with the profits thereof, pay unto or agree, and give ſecurity for to the Lord Protector, or ſuch as he doth appoint to take the ſame, the firſt-fruits of their Spiritual Promotion, under pain to forfeit the double value thereof: And if the Benefice be under eight Marks in value, then he is to give ſecurity to pay the ſame firſt-fruits three years after his Induction thereunto. 27 *Hen.* 8. 7. 2, 3 *Edw.* 6. 20. 7 *Edw.* 6 4. 1 *Eliz.* 4. 34, 35 *H.* 8. 17. 26 *H.* 8. 45. *March.* 5. 10. 1 *Eliz.* 4. But it ſeems all this now is ſet apart for the maintenance of the Miniſtery. See *Act*, 8 *June.* 1649.

6. So alſo he is to diſcharge the Tenths; the Tenths are a yearly portion of tribute, to the value of the tenth part of all the profits appertaining to a Spiritual Living; and this is now reduced to a certainty and known. And this every Parſon and Vicar muſt have paid before the firſt of *April*, yearly, to the uſe of the Lord Protector. It was wont to be paid to the Biſhop, and by him into the *Exchequer*, but now it is paid immediatly into the *Exchequer*; and by that Court the ſame is forced in. 26 *H.* 8. 3. 32 *H.* 8. 45. *March.* 5. 1 *Eliz.* 4. But this alſo, it ſeems, is now imployed as the firſt-fruits are. *Act*, 8 *June*, 1649. and *Ord.* 2 *September*, 1654. 14. *Tenths, what.*

7. He may not meddle with any Temporal Juriſdiction, or Authority to the Exerciſe, whereof he is diſabled. 16, 17 *Car.* 17. And he is forbidden the taking of Farms, or taking of Parſonages or Vicarages, and the involving of himſelf in ſecular affairs. See for this, 21 *H.* 8. 13. *Dyer* 358.

8. He is forbidden by Law to make a deſtruction upon the Benefice, or to leſſen the Revenue, and therefore he can lay no charge, nor make any Eſtate upon any part of it, for longer time, then his own life, except onely of ſuch Lands as have been uſually let, which he may let for three lives, or one and twenty years. 13 *Eliz.* 1. 14 *Eliz.* 11. 18 *Eliz.* 10. And no Leaſe he can make of ſuch a Benefice with Cure, is good longer then he is ordinarily Reſident, and ſerving the Cure there without abſence, above fourſcore days in one year. 13 *Eliz.* 20. 18 *Eliz.* 10. 14 *Eliz.* 11. And yet he that is allowed to have two Benefices, may let one of them to his Curate that ſhall ſerve that Cure. But that Leaſe will be good onely, ſo long as the Curate ſhall be Reſident there, without forty days abſence in one year. 13 *Eliz.* 20. 18 *Eliz.* 10. 4 *Eliz.* 11.

9. He is as another man to pay his ſhare of Rates to the Poor, Church, and Highways. *Rates.*

And now for the ſecond thing, what theſe perſons are to have and receive, theſe things are to be known.

They have to their perſons divers privileges above other men: For firſt, ſuch a man cannot be arreſted upon a Statute-merchant, or Staple, and if he be, he may have a Writ called *Quod Clericus captus & deliberetur*; nor may he be arreſted for any cauſe but Felony, whileſt he is *bona fide* in the doing of his Office, and about his Divine Function: And if therefore he be taken out of the Pulpit, whileſt he is Preaching or Praying, ſome have ſaid, That for this he may have an Action of Falſe impriſonment, againſt them that do it: But whether it be ſo, or no, this is certain, That for this, the perſons that do it, may be indicted and fined. And for arreſting *Quod Clericus captus virtute ſtatuti deliberetur*, what.

arresting a Minister in the going to, or coming from Church, about the Service of God, the Bailiffs and those that have any hand in it, may be bound to the Good-behavior. But if the Minister shall keep himself in the Church, of purpose to prevent such Arrests, this privilege will not hold. *Regist. Orig.* 147. 50 *Edw.* 3. 5. 1 *R.*2. 15.

2. He is to be freed, and exempt from, and not bound to serve in any office that may disturb, or distract him in his calling: And therefore he is not bound to serve the office of Constable, Tithingman, Bailiff, Beadle, Church-warden, Overseer of the Poor, or the like office. Albeit he hath secular Lands, besides his Spiritual Promotion, and in respect thereof chargable, if he were another man; yet he is exempt for this also. And if any such office be put upon him, he may be relieved by a Writ called *Quod Clerici non eligantur in officio, &c.* And by this Writ he may be discharged. *F.N.B.* 177.

Quod Clerici non eligantur in officio, what.

3. He is not bound to appear, or do service in a Leet, or Law-day, as other men are, *Marlb cap.*10. And to discharge them if they were, they had a Writ to relieve them *F.N.B.*160.

4. They ought not in person to serve in the Wars; also they ought to be quit, and discharged of Tolls, and Customs, Average, Pontage, Paviage, and the like, for their Ecclesiastical Goods: And if they had been molested therefore, they might have had Remedy by a Writ, provided for the purpose. But this and many others, are gone and lost. *Co.* 2 *part*, *Inst* 4. 121.

Sect. 6.

5. And as they have privileges for their persons, so for their possessions of Lands and Goods; therefore it is provided, That no Distress be taken in the Ancient Fees, or Lands belonging to the Church; as in the Glebe of a Parson, or the like, that their Goods be not distrained for a fifteenth, due from the whole Parish, if they be, he may be relieved by a Writ called *Quod personæ nec Prebendarii distringantur, &c.* That neither themselves, nor their Farmers, or Tenants, were to be forced by Purveyors for the Kings use. See for this 9 *Ed.*2. 9. *F. N. B.* 173, 176. *Crompt. Jur.* 38.

Quod personæ nec Prebendarii distringantur, &c. what.

6. They are to have a competency of maintenance: And for this, the Law gives them these things.

First, They are to have the Houses belonging to the Minister, the Glebe, the Tithes, the Profits of the Churchyard, the Oblations, Obventions, and Mortuaries thereunto belonging: But for all this see my Book of *Tithes*, and the Profits sequestred and received, during the Vacation, are to be paid unto the Parson succeeding, save onely the charge of taking in, *&c.* And for serving the Cure in that time 21 *H.*8.11.

Emblements; Will.

Secondly, They are to have the Corn growing upon the Glebe when they die, and may by their Will give it to whom they will. *Idem.*

Leases.

Thirdly, They may make any Lease of, or charge upon their Benefice, for their own lives, and Leases for three lives, and one and twenty years of the Land that hath been usually so let. 13 *Eliz.*10.

15. *Augmentations.*

Fourthly, There are now divers Additional helps for their maintenance by way of Augmentation.

As touching which, these things are to be known.

1. There is a great Revenue given, to be imployed to this purpose, and Commissioners specially appointed to take and receive accompt thereof, and to look to the improvement thereof. See the *Acts* and *Ordinances*, 8 *June*, 1649. 5 *April*, 1650. 2 *Sept.* 1654.

2. These Laws judg an hundred pound a year competent for Ministers, save onely in Towns, and Cities.

3. These Commissioners are to overlook all the Augmentations, and by, and with the Approbation of the Lord Protector, and his Council, they may make, adde to, and take from what they please.

16. *Union* and *Division* of Parishes and Churches.

4. For their help of maintenance, they may divide or unite Churches.

As touching which, take these things.

1. The Commissioners may procure from the *Chancery*, the Retorn of all the former

former Commiſſions executed, and have new Commiſſions where they pleaſe, for the diſcovery of the value of Parſonages and Vicarages, with, or without Cure of Souls, the Incumbents, Scituation of the Churches, *&c.*

2. When they are informed of the caſe, by and with the Approbation of the Lord Protector and his Council, out of Parliament time, they may unite two, or more Churches together; and all the profits thereof, if one of them be not maintained at the charge of the Pariſhioners, and appoint which Church ſhall be the Meeting-place, and then they muſt be taxed altogether to repair, but other taxes ſhall go as before; have their Church-wardens as formerly, the Patrons ſhall preſent by turn, as the Commiſſioners ſhall ſet down.

3. In this caſe, where they ſee good, they may pull down one of the Churches, and keep the materials for publick uſe.

4. They may alſo, by and with the Approbation aforeſaid, ſever and divide Pariſhes, and fix the maintenance out of the profits of the Church where they think fit. See the *Ordinances* at large for theſe things.

5. And now in the laſt place, if being in this office he be found inſufficient, or ill-affected, or be ſcandalous there for his life or doctrine, he is to be ejected by the *Ordinance*, 29 *Aug.* 1654. 16. Scandalous and ill affected *Miniſters* and *School-Maſters.*

And for this, theſe things are to be known.

1. There are Commiſſioners of every County to put in execution this Ordinance.

2. Any five of theſe Commiſſioners may Convent before them, any ſcandalous, ignorant, negligent, inſufficient, and diſaffected Miniſter, Preacher, School-maſter, and examine witneſſes againſt, and put him out of his place, if they finde him guilty of matter of ſcandal, or ill-affection to the Government, in any of the particulars here mentioned.

3. The things for which he is to be put out, are;

Firſt, If he hath been formerly ejected or ſequeſtred, and yet keeps in his place.

Secondly, If he hath held and maintained any of the blaſphemous Opinions of the third and laſt rank before-named, at *Sect.* 1. Or have held, taught, and maintained the Popes Supremacy, Tranſubſtantiation, Purgatory, Worſhipping of Images, That the conſecrated Hoſt, Crucifixes, or Images, are to be worſhipped; that Salvation may be merited by Works, or be found guilty of profane Swearing or Curſing, Perjury or Subornation of Perjury, Adultery, Fornication, Drunkenneſs, common haunting of Taverns or Ale-houſes, frequent Quarrelling or Fighting, frequenting playing at Cards or Dice, profaning of the Sabbath-day, or allow the ſame in their Families, or countenance it in their Pariſhes, or Schollars, or have publickly and frequently read, and uſed the Book of Common Prayer, ſince 1 *Jan.* 1653. Or have been publickly profane Scoffers at, or Revilers of the ſtrict Profeſſion, and Profeſſors of Religion, or Godlineſs, or do encourage or countenance by word, or practiſe *Whitſon*-Ales, Wakes, Morrice-Dances, May-poles, Stage-plays, or ſuch like Licentious practiſes, or have by Writing, Preaching, or otherwiſe declared their diſaffection to the preſent Government, or are negligent, non-reſident, and careleſs of Praying, Preaching, *&c.* or of their Schollars, if they are School-maſters, having no good excuſe for it.

Thirdly, If he be put out for inſufficiency, it muſt be with conſent, declared of five Miniſters alſo.

Fourthly, Where they put out a School-maſter, they may put in another, as long as he lives, as oft as the place ſhall be void.

Fifthly, They may ſequeſter the Profits of the Livings, out of which they put out any Miniſter in the hands of ſome of the Pariſh, to provide for the place, repair the houſes, and to keep for the next Incumbent.

Sixthly, If the party put out, be gone, they may allow his Wife and Children a fifth part, and force payment thereof by Sequeſtration.

Seventhly, None may keep School in the place where he was put out, under pain of ten ſhillings a day. See the *Ordinance* of the ſecond of *September*, 1654. at large.

And

And now, as touching all the reſt of the rabble of the Men, and Orders formerly called Religious, of the Regular and Secular Clergy, ſuch as were the Abbots, Priors, Monks, Fryers, Canons, Nuns, Arch-Biſhops, Biſhops, Deans, Arch-Deacons, Prebends, and the like: Theſe are aboliſhed, and gone, and not owned by our Law at this day. *Ord. 9 Octob.* 1646.

Metropolitan Biſhop.

Suffragan Conſecration. *Conge de Eſlier.* *Regio Aſſenſu.*

We are ſilent therefore about Metropolitans, Biſhops, Suffragans, and ſay nothing of *Conge de Eſlier*, Conſecration, *Regio Aſſenſu*, and ſuch like aboliſhed things. See *Name*.

Convocation-houſe.

The Convocation-houſe was the Houſe wherein the whole Clergy did aſſemble to conſult of Matters Eccleſiaſtical, in time of Parliament: It did conſiſt of two Houſes, an upper houſe, where the Arch-Biſhops and Biſhops alone did ſit, and a lower houſe, where all the reſt of the Clergy did ſit: And the lower houſe was made of Clergy men, choſen for Cathedral and Collegiate Churches, and for the Common Clergy of every Dioceſs, which were called Proctors of the Clergy, like to the Members of the Houſe of Commons: And in both theſe Houſes they had one they called a Prolocutor, like to the Speaker in the Parliament But theſe things are now gone, and aboliſhed; and yet it ſeems the Provincial or Sinodial Canons and Conſtitutions formerly made by the Clergy, in the Convocation-houſe, or in their other Convocations, that are not contrary to the Royal Prerogative, or the Laws and Cuſtoms of the Realm, are ſtill in force, if there were any way to put them in execution, as there is not; for the Biſhops and their Courts are gone, and therefore the Canons can be of no force at this day. 25 *Hen.* 8. 19. 27 *Hen.* 8. 15. 3 *Edw.* 6. *cap.* 17.

Proctors of the Clergy.

Prolocutor.

Canons.

Diſcipline.

As to Diſcipline by Church-cenſures; this is now left to the Regular, and orderly Churches to be uſed and ordered amongſt themſelves in Chriſt, and his Goſpels way.

But for National Diſcipline by way of Excommunication, Suſpenſion, and the like, there can be none ſuch uſed in theſe days, Biſhops being gone; for there is no Law, nor way for it.

See the old Statutes of the Clergy, and that which concerneth them. 25 *H.* 3. 2 *H.* 6. 1. 47 *Ed.* 3. 5. *Weſtm.* 1. 34. 50 *Ed.* 3. 5. 1 *R.* 2. 13, 14, 15. 4 *H.* 4. 23. 25 *Hen.* 8. 19. 5, 6 *Edw.* 6. 13. *Acts*, 8 *June*, 1649. 5 *April*, 1650. 2 *Septemb.* 1654.

For the aboliſhing of Biſhops, Deans, and Chapters. *Acts*, 23 *Novemb.* 1646. 26 *April*, 1649.

Sale of their Lands, *Acts*, 25 *June*, 1649. 23 *June*, 1649. 2 *June*, 1649. 20 *June*, 1649.

CHAP.

CHAP. CXLVII:

Of Shoo-makers, Tanners, Curriers, and Skinners.

Sect. 1. Shoo-makers, Tanners, Curriers.

NO man may uſe the Trade of Tanner, the ſame time, and ſo long as he doth uſe the Trade of a Butcher, under pain to forfeit ſix ſhillings and eight pence, for every day he ſhall uſe both theſe occupations together. 1 *Jac.* 22.

None may uſe the Trade of Tanning of Leather, or make gain thereby, but ſuch as have been brought up as Apprentices, or hired ſervants in the Trade ſeven years, except the Wife and Sons of a Tanner, as hath been brought up and uſed in the Trade four years; or the ſon or daughter of a Tanner, or him that ſhall marry ſuch a Wife, or daughter, to whom a Tan-houſe and Fats are left, upon pain to forfeit all the Leather that ſuch a perſon ſhall Tan. *Idem.*

No perſon ſhall uſe the Trade of Tanning of Leather, ſo long as he doth uſe the Trade of a Shoo-maker, Currier, Butcher, or any other Artificer, uſing, cutting, or working of Leather, under pain to looſe all the Hides, or Skins, they ſhall work, during that time. Nor the Myſtery of Currier, ſo long as he ſhall uſe the Trade of a Tanner, Cord-wayner, Shoo-maker, Butcher, or other Artificer, that uſeth cutting of Leather, under pain of ſix ſhillings and eight pence for every Skin or Hide, he ſhall curry, during that time.

No perſons may buy or beſpeak any rough Hide, or Calves Skin in the Hair, to Tan the ſame; but Tanners and ſuch as do Tan the ſame, under pain to forfeit them, or the value thereof.

Foreſtalling.

No Tanner or other may foreſtal any Hides, coming towards any Fair or Market, nor ſhall buy any Hide in any place, but in an open Fair or Market, unleſs it be of one that killed the Beaſt, for the proviſion of his own houſe, under pain of ſix ſhillings and eight pence, for every Hide ſo bought.

None may buy or ſell any Tanned Leather, not wrought and converted into made Wares, but onely ſuch as will work and convert the ſame Leather into made Wares, under pain of forfeiture of the Leather.

All Artificers that do uſe to convert Tanned Leather into made Wares, may buy for that purpoſe all kinde of Tanned Leather at *Leaden-hall*, in *London*, every Monday, the ſame being daily ſearched and ſealed.

Sadlers, Girdlers.

Sadlers and Girdlers may ſell their Necks and Shreds of Tanned Leather red.

No perſon uſing the Trade of Tanning of Leather, ſhall ſuffer any Hide or Skin to lie in the Limes, till the ſame be over-limed: Nor ſhall put any Hides or Skins into any Tan-Fats, before the Lime be well and perfitly ſokened and wrought out of them: Nor ſhall uſe any thing, or ſtuff in or about the workmanſhip or Tanning of Leather, but onely Aſh-bark, Oak-bark, Tapwort, Mault, Meal, Lime, Culver-dung, or Hen-dung: Nor ſhall ſuffer it to hang wet in the Froſt, till it be frozen: Nor ſhall dry or parch the ſame with the heat of the fire, or the Summer Sun: Nor ſhall Tan any Hide that is rotten by long lying: Nor ſhall ſuffer the Hides for Sole-Leather to lie in the Woozes leſs time then nine moneths: Nor ſhall negligently work the Hides in the Woozes: Nor ſhall put to ſale any Hide that ſhall not be wrought, as aforeſaid, under pain to forfeit the juſt value thereof.

No Tanner muſt raiſe with any mixtures, any Hide to be imployed, to back, bend Leather, Clouting Leather, or any other Sole-Leather, unleſs the ſame be for largeneſs and growth, fit for that uſe, upon pain of forfeiture thereof.

No perſon may ſell any kinde of Tanned Leather red, and unwrought, but in open Fair or Markets, in the places therefore commonly accuſtomed, unleſs the ſame were firſt lawfully ſearched, and ſealed in ſome open Fair or Market, or place appointed

pointed for that purpoſe; nor ſhall offer any Tanned Leather red, and unwrought before the ſame be ſearched and ſealed, under pain to forfeit for the ſame for every Hide ſix ſhillings and eight pence, and for every dozen of Calves skins, or Sheeps skins, three ſhillings and four pence, and the ſame Hides.

If any man offer to put to ſale his Leather before it be ſufficiently Tanned, and dried, he ſhall loſe ſo much of the ſame Leather, and of every Hide, as ſhall be ſo untanned or undried, to be judged and cut off from the reſt, by the direction and diſcretion of the Triers.

Tanners. Tanners muſt not ſet their Fats in Tan hills or other places where the Woozes, or Leather that ſhall be put to Tan in the ſame, may take any unkinde heats, or may put any Leather into any hot or warm Woozes, or ſhall Tan any Hide, Calve-skin, or Sheep-skin, with any hot or warm Woozes, under pain to forfeit ten pound, and ſtand on the Pillory three Market days for every offence.

Curriers. No perſon in any Market or Corporate Town, ſhall curry any Leather in any Shoo-makers or other houſe, beſides his own; nor ſhall curry any Leather, except it be well and perfectly Tanned; nor curry any Hide or Skin, being not well dried after his wet ſeaſon; in which wet ſeaſon he ſhall not uſe any ſtale Urine, or other deceitful mixture to hurt the ſame; nor ſhall curry any Leather fit for utter Sole-Leather, with any other ſtuff, but hard Tallow, and with enough of that; nor ſhall curry any Leather meet for over Leather and inner Soles, but with good ſtuff, freſh, and not ſalt; nor ſhall burn or ſcald any Hide or Leather in the currying; nor ſhave any Leather to thin; nor ſhall gaſh or hurt any Leather in the ſhaving, or otherwiſe, but ſhall work it ſufficiently in all points, under pain to forfeit for every offence, (unleſs it be in gaſhing or hurting by ſhaving) ſix ſhillings and eight pence; and for ſuch offence double ſo much as the Hide or Skin is impaired thereby.

Shoo-maker. No Shoo-maker or other, living in *London*, or within three miles of it, that doth uſe wet curried Leather, ſhall put it to be curried to any but to one that is free of the Company of Curriers in *London*, under pain to forfeit the Leather, or value thereof. And no perſon within that circuit, may uſe any Leather in made Wares, but ſuch as have been ſearched and ſealed by the Warden of the ſame Company, under pain to forfeit for every Hide or Skin ſix ſhillings and eight pence, beſides the Leather it ſelf.

Currier. No Currier muſt refuſe to curry any Leather brought to him by any one that is a cutter of Leather, with ſufficient ſtuff to liquor the ſame, but ſhall well and ſufficiently diſpatch the ſame within three days, at the moſt, under pain to forfeit ten ſhillings for every Hide or peece of Leather, not ſo done.

The Wardens of the Company muſt ſearch all the Leather brought to any of the Company to be curried, and after it is curried well, within one day ſeal it.

Shoo-maker. No Cordwainer or Shoo-maker, ſhall make any Boots, Shooes, Buskins, Startups, Slippers, or Pantofles, of Engliſh Leather wet curried (other then Deer-skins, Calves-skins, or Goat-skins, dreſſed like unto Spaniſh Leather) but of Leather, well and truly tanned and curried as before, or well tanned onely, and well and ſubſtantially ſewed with good thred, well twiſted and made, and waxed with Wax well Rozoned, and the ſtitches hard drawn with Hand-Leathers, without mixing the Over-Leathers; nor ſhall put into any of their Ware they make, any Leather made of a Sheep-skin, Bull-hide, or Horſe-hide; nor into the upper Leather of any Shooes, Startups, Slippers, or Pantofles, or into the nether part of any Boots (unleſs it be in the inner part of the Shoo) any part of any Hide, from which the Sole-Leather is cut, called the Wombs, Necks, Shank, Flank, Pole or Cheek; nor ſhall put in the upper Sole any other Leather, then the beſt of the Ox or Steer-hide; nor into the inner Sole, any other Leather then the Wombs, Neck, Pole, or Cheek; nor in the Treſſwels of the double ſoled Shooes, other then the Flanks of the Hides aforeſaid; nor ſhall make or put to ſale in any year, between the laſt of *September*, and the twentieth of *April*, any Ware to be worn above four years of age, wherein is any dry Engliſh Leather (other then Calves-skins, or Goat-skins) to be dreſſed like unto Spaniſh Leather, under pain to forfeit for every offence the ſaid Wares, or the value thereof.

Searchers. The Maſters and Wardens of the Company of Shoo-makers, Curriers, *&c.* in *London*, muſt ſearch all the Wares in *London*, and three miles about four times in every year,

year, in the houſes of all ſuch kinde of Artificers, and thoſe they finde inſufficient, they may ſeize and take away: And the Major and Aldermen of *London*, muſt every year appoint honeſt Freemen of the ſame Company to be Sealers of Leathers, who muſt ſeal what upon ſearch they finde to be ſufficient; but Sheep skins are not to be ſealed. Alſo Majors, Bailiffs, and other Head-officers in all Cities, Boroughs, and Market Towns, and Lords of Liberties, Fairs and Markets, out of the Circuit of *London*, and three miles about it, yearly appoint and ſwear two or more ſufficient men of the place, to view, ſearch, and ſeal with a ſeal for the purpoſe, the Leather of that place, under pain of forty pound: And they muſt view and ſeal what they finde ſufficient; and if they finde any Leather bought or ſold, which ſhall be otherwiſe tanned, or curried, then is before appointed; or any Ware otherwiſe made, then is before preſcribed, they may ſeiſe and keep the ſame, until it be tried by the Triers. *Sealers.*

In *London*, the Major after any Leather or Wares ſeiſed, and notice given to him, muſt appoint ſix Triers, who upon their Oath, muſt try whether the Leather or Ware is ſerviceable, or not. And in other places, ſuch as appoint ſealers, ſhall preſently after notice to them given of any Leather or Wares ſealed, appoint and ſwear ſix Triers, to try the Leather or Wares ſeiſed, whether they be ſerviceable or not; and if not, they be to forfeit five pound. All red tanned Leather (except Sheep skin Leather) to be ſold in *London*, muſt firſt be brought into *Leaden-hall*, and ſearched, ſealed and regiſtred, before it be brought into houſe: And none muſt be ſold within *London*, or three miles, before this be done: And no ſuch Wares muſt be ſold there, but in open Shop, common Fair or Market. All Juſtices of Gaol-delivery of the Peace, Majors, *&c.* Stewards of Leets, may hear and determine all thoſe offences. *Triers.*

No tanned Leather ſhall be ſold by weight, under pain of forfeiture of it. See 1 *Jac.* 22. 4 *Jac.* 6. As for the Statutes of 5, 6 *Ed.* 6. 15. concerning the ingroſſing and tranſporting of Leather, and ſome other things therein named, we conceive the ſame to be repealed by 1 *Jac.* 22. 4 *Jac.* 6. and therefore not abridged.

For Skinners, ſee 3 *Jac.* 9. 4 *Jac.* 6.

CHAP. CXLVIII.

Of Silk, Sope Veſſels, Spices, Spiritualties, Staple, Steel, and Spiritual Perſons.

FOr Silk. See 19 *H.* 7. 21. *Silk.*

For Sope Veſſels, ſee 23 *H.* 8. 4. *Sope Veſſels.*

For Spices, ſee 1 *Jac.* 19. *Spices.*

Theſe were ſuch Profits as he received, as Biſhop not as a Baron of the Parliament, ſuch as were his Viſitation-Fees, and making Prieſts, and the like: And their Temporalties, were the Lands annexed to their Biſhopricks. *Spiritualities of Biſhops.* *Temporalities of Biſhops.*

Staple doth ſignifie this or that Town or City, whether the Merchants of *England*, by common Order, or Commandment, did carry their Wools, Woolfells, Cloaths, Lead, Tin, and ſuch like Commodities of our Land, for the uttering of them by the great. See 27 *Ed.* 3. 1. 2, 36 *Edw.* 3. 7. 45 *Edw.* 3. 1. 15 *Rich.* 2. 3, 9. 2 *Ed.* 3. 9. *Statutum Stapulæ* 16. 18. 28 *Ed.* 3. 13. 36 *Ed.* 3. 7. 38 *Ed.* 3. *Stat.* 1. 7. 12 *R.* 2. 6. 14 *R.* 2. 1, 3. *Staple*, what.

For Steel and Iron, ſee 2, 3 *Ed.* 6. 27. *Act.* 27 *Nov.* 1650. *Act*, 2 *April*, 1651. *Steel and Iron.*

Of Spiritual Perſons.

FOr Spiritual or Clergimen, (as they are called) theſe things are to be known.

1. They cannot make what Leaſes they pleaſe of their Church-Land, but are reſtrained. See for this *Leaſe*, *Numb.* 7.

2. The Succeſſor by Acceptance of Rent, upon a Leaſe made by his Predeceſſor, may affirm a Leaſe, he might have avoided. See for this *Acceptance.*

3. What Leaſes, made by them, are good, or not. See *Leaſes.*

4. They have ſome privileges above other men. See *Service of God.*

5. For the aboliſhing of Biſhops, Deans, and Chapters. See *Ord.* 23 *Novemb.* 1646. 20 *April*, 1649.

CHAP. CXLIX.

Of a Statute.

1. *Statute*, what.

A Statute is a Bond or Obligation of Record: But this word is ſometimes uſed in another ſenſe, *viz.* For a Decree made in Parliament called an Act of Parliament. *Terms Ley. Stat. de Mercatoribus. Acton Burnel.* 11 *Ed.* 1.

2. The kindes. *Statute Merchant*, what.

And of theſe Obligations, there are three kindes: Firſt, A Statute Merchant; ſecondly, A Statute Staple; thirdly, A Recogniſance. The Statute Merchant is a Bond acknowledged before one of the Clerks of the Statute Merchant and Major, and chief Warden of the City of *London*, or two Merchants of the ſaid City, for that purpoſed aſſigned, or before the Major, chief Warden or Maſter of other Cities, as *York*, *Briſtow*, or the like; or the Bailiff of any Burrough or Village, or other ſufficient men for that purpoſe, appointed and authoriſed, ſealed with the ſeal of the Debtor or Recogniſor, and of the King, which is of two peeces; the greater whereof is kept by the Major or chief Warden, and the leſſer by the ſaid Clerk. And this albeit at firſt it was ordained and uſed for Merchants onely, yet at this day, it is and may be uſed and given by any others, and is become one of the Common Aſſurances of the Kingdom.

Statute Staple, what.

The Staple, doth ſignifie this or that Town or City, whether the Merchants by common Order and Commandment, do carry their Commodities, as Wool, and the like, to utter by the great. And the Statute Staple is either properly or improperly ſo called: That which is properly ſo called, is defined to be a Bond of Record, acknowledged before the Major of the Staple, in the preſence of one or two Conſtables of the ſame Staple, and is ſealed with the Seal of the Staple, and ſometimes alſo with the Seal of the party, the which it ſeems is not neceſſary. And this is founded upon the 27 *Ed.* 3. 9. and was invented, and is uſed onely for Merchants and Merchandiſes of the ſame Staple; this is of the ſame nature the Statute Merchant is.

Recogniſance, what.

That which is improperly ſo called, is alſo called a Recogniſance, which is alſo a Bond of Record, teſtifying, That the Recogniſor doth ow to the Recogniſee a ſum of money: And of theſe there are divers kindes; for there is one Recogniſance founded upon the Statute of 23 *H.* 8. 6. And this is always to be acknowledged before the Chief Juſtice of the *Kings Bench*, or of the *Common Pleas*, in the Term time, or in their abſence out of Term, before the Major of the Staple at *Weſtminſter*, and the Recorder of the City of *London*, for the time being. And it is to be ſealed with the Seal of the Conuſor, and with the Seal of the King, appointed for that purpoſe, and with the Seal of the Chief Juſtice, Major, and Recorder, before whom it is acknowledged; and they before whom it is taken, do ſubſcribe their names to it: And this was ordained, and may be, and is uſed by Merchants, or any other whomſoever for payment of debts, or aſſurance of other things; and this alſo is of the ſame nature the Statute Merchant is: And both this, and the two former, are much of the nature of Judgments had upon Sutes in the Courts of *Kings Bench* and *Common Pleas*, and therefore they are called Pocket Judgments. 27 *Ed.* 3. *Stat.* 2. *cap.* 1, 2, 3. 27 *Ed* 3. 9. 22 *H* 8. 6. *Co. ſuper Littl.* 289. 15 *H.* 7. 16. *Co.* 8. 153.

Pocket Judgments.

There

There are alſo divers other kindes of Recogniſances, that are taken by and acknowledged before the Lord Keeper, Maſter of the *Wards*, Maſter of the *Rolls*, Maſter of the *Chancery*, Juſtices of the one *Bench*, or of the other, (ſome of which are called Bails) Barons of the *Exchequer*, Judges in their Circuits, Juſtices of the Peace, Sheriffs, and others; ſome whereof are by the Common Law, and ſome by certain Statutes. And amongſt theſe, ſome are without Seal, and recorded onely, and ſome are ſealed and recorded alſo; and ſome of them are in a ſum certain, as the Recogniſances taken in the *Common Pleas* for Bail are, and ſome of them are incertain, as thoſe Recogniſances that are taken for Bail in the *Kings Bench*, which are after this manner, *Si judicium redditum, &c. tunc volo & concedo*, That the debt recovered againſt the Defendant, ſhall be levied of my Goods and Chattels, *&c.* And theſe alſo are much of the nature of the former kinde of Recogniſances; and all Obligations made to the King, are of the ſame nature, and have the force of a Recogniſance. See 33 *H.*8. 22, 39. 3 *H.*7. 1. 10 *H.*6 1. *Dyer* 315. 307. *F.N.B.* 251. *fol* 132. *cap.* 133. *a.* 68. *a.*

Bail.

Prerogative.

Statutes and Recogniſances are ſometimes ſingle, without any Defeaſance, and ſometimes they are double, *i.e.* with a Defeaſance or Condition, upon the performance whereof, the ſame are to be avoided.

The Debtor, or he that doth enter into the Statute or Recogniſance, is called the Recogniſor or Conuſor, and the Debtee, or he to whom it is made, is called the Recogniſee or Conuſee.

Conuſor, Conuſee.

To make a good Statute or Obligation of Record, the form preſcribed muſt be purſued.

3. What ſhall be ſaid a good Statute or Recogniſance, and what not.

1. In reſpect of the perſons before whom; and therefore, the Statute Merchant or Staple, or the Recogniſance founded upon the Statute of 23 *H* 8. may not be acknowledged before any others, beſides the perſons appointed by the Statutes: Neither may any other Recogniſance be acknowledged before any, but ſuch as either have power *Ex Officio*, and by their Offices to take them, or have ſpecial Commiſſion ſo to do; and therefore a Recogniſance taken by a Conſtable, is void. If a Recogniſance be made to the Lord Keeper, and two others, and it be acknowledged before himſelf, this is void as to him. *Dyer* 35. *Littl. Broo. ſect.* 484. 511. *F. N. B.* 267 *a. Dyer* 220.

Firſt, In reſpect of the perſons before whom it is acknowledged.

2. In reſpect of the manner of making and acknowledging of it; and therefore if the ſubſtantial form, appointed by the Statutes, be not obſerved, it will be void. If therefore a Statute Merchant be not ſealed with the Seal of the Debtor, and there be not a Seal of two peeces annexed to it, this is no good Statute, neither can it take effect as a Statute; howbeit in this caſe, if it be delivered by the party, it may take effect as an Obligation: But if the variance from the Statutes, be onely in ſome circumſtance, this will not hurt a Statute or a Recogniſance. And therefore it is held, That albeit there be no time ſet for the payment of the money in the Statute, yet the Statute is good, for then it is due preſently. And albeit the Statute be written with anothers hand, and not with the hand of the Clerk of the Statutes, or the like; yet is the Statute good enough. And if a Statute Staple be not ſealed with the Seal of the party that doth acknowledge it, yet it ſeems it is good enough, for the Statute doth not require it; but a Recogniſance within the Statute of 23 *Hen.*8. cannot be good, except the Seal of the party be to it, for ſo are the words of the Statute. *Hollingſworth verſus Aſcugh. Paſche*, 35 *Eliz. Co. B.* Adjudg. *Perk* 3. Juſtices. *Co. B. Trin.* 22 *Jac.*

Secondly, In reſpect of the manner of making it.

Obligation.

If a Recogniſance or a Statute be to pay money at ſeveral days, it is good enough, and if the Conuſor fail one day, Execution may be ſued of the whole Statute. *Co.* 8. 153.

Every Statute Staple or Merchant, not brought to the Clerk of the Recogniſances within four moneths next after the acknowledging, to enter a true Copy thereof, ſhall be void, againſt all perſons, their Heirs, Succeſſors, Executors, Adminiſtrators and Aſſigns onely, which for good conſideration ſhall after the acknowledging of the ſame Statute, purchaſe the Land, or any part liable thereunto, or any Rent, Leaſe, or profit out of it. 27 *Eliz.* 4.

The

4 All the Proceedings upon a Statute or Recognisance, and the manner and order of Execution thereupon.

The proceedings upon a Statute or Recognisance, to have the Fruit and effect thereof, is not like to the proceedings in other cases of Sutes upon Obligations, and the like, to reduce them to Judgment, but as they are in their own nature much like to the nature of a Judgment, so is the Proceeding and Execution thereupon, much like to the Proceeding and Execution upon a Judgment; And therefore the Conusee may, if he please, bring an Action of Debt upon a Statute, and wave all other Proceeding, or otherwise, if he like not this course, he [*or if he be dead, his Executor or Administrator, and if his Executor be dead, the Executor of his Executor*] may assoon as the same is forfeit, have present Execution of it after this manner: He must bring his Statute to the Major and Clerk, or other Officer, before whom it was acknowledged, and there if they finde the Record of it, and the day to be past for the payment of the money, they are to apprehend and imprison the body of the Conusor, if he be a Lay person, and can be found within their jurisdiction; and if he cannot be found there, they are to certifie the Record into the *Chancery*, which also if they refuse to do, they may be compelled unto by a *Certiorare*: And if that Certificate be faulty, or Execution be not done upon it, by reason of the death of the Conusee, or otherwise, the Conusee or his Executor or Administrator, may have another Certificate: And thereupon, in case of the Statute Merchant, he shall have a Writ of *Capias* out of the *Chancery*, directed to the Sheriff of the County where the Conusor lives, to apprehend and imprison him (if he be not a Clergiman) and this is to be retorned in the *Common Pleas*, or *Kings Bench*. And when the Conusor is taken, he shall have time for a quarter of a year to make his agreement with the Conusee, and to sell his Lands or Goods to satisfie the Conusee: And for that purpose, he may sell his Lands or Goods, albeit he be in prison, and his sale is good and lawful: And if in that time, he do not satisfie the Conusee, or if upon the *Capias*, the Sheriff retorn a *Non est inventus*, then by another Writ [*or by divers Writs, if the Lands or Goods lie in divers Counties*] called an *Extendi facias*. And in the case of a Statute Staple, presently after the Certificate into the *Chancery*, the Conusee shall have a Writ to take his body, and extend his Lands and Goods retornable in *Chancery*; and this Writ is a Commission directed to the Sheriff of the County, where the Lands and Goods lie for the valuing of the same, whereby all the Lands, Goods, and Chattels of the Conusor shall be appriſed and valued at a reasonable rate by a Jury of sworn men, charged by the Sheriff for that purpose; which Inquisition so taken, is to be retorned by the Sheriff; and thereupon the Lands, Goods, and Chattels are to be taken into the Sheriffs hands, and by him to be delivered to the Conusee (which the Sheriff may do if he will, without any Writ) to hold unto the Conusee, until he be satisfied his debt and damages. And if the Sheriff refuse so to do, the Conusee shall have a Writ out of the *Chancery*, called a *Liberate*, to compel him to deliver to the Conusee the Lands, Goods, and Chattels, so found by Inquisition, and taken into his hands upon the Extent, which the Sheriff need not to retorn. [*Fitz. Accompt* 97. *Execution in toto. Broo. Statute in toto. Stat. Acton Burnel de Mercatoribus.* 27 *Ed.* 3. 9. *F. N. B.* 130, 131, 132. *Dyer* 180. 15 *H.* 7. 15. *Co.* 4. 67. 7 *Hen.* 7. 12. *Plow.* 61, 62, 82. *Co. super Littl.* 290. 23 *Hen.* 8. 6. 5 *H.* 4. 12. 2 *Rich.* 3. 7. 14 *Edw.* 3. 11. *Littl. Broo. Sect.* 294. 123. 226. *Dyer* 299. *Co.* 5. 87. 4. 82, 57, 66. 11 *Hen.* 6. 10. *Kitch.* 116.] Or the Conusee may enter upon the Land himself, and take the Goods out of the Sheriffs hands; and this act of the Sheriff and Jury, upon this Writ, is called an Extent: And if the Jurors or Appraisors upon the *Extendi facias*, over-value the Lands or Goods in favor to the Debtor, the Conusee hath no remedy but by motion in that Court where the Writ is retornable at the Retorn day, or at least the same Term wherein the Writ is retornable, to desire that the Appraisors may take the Lands or Goods at the Rate they have valued them, in the same manner as the Conusee is to have them. But if the Conusee accept of the Lands and Goods from the Sheriff, or suffer the Term to pass, wherein the Writ is retornable, he is too late, and hath no Remedy at all. And if the Appraisors do undervalue the Lands or Goods, in favor to the Debtee, it seems the Conusor hath no Remedy at all, for he may at any time pay all or the residue of the debt and damages unlevied, and have his Land again if he please. And in case

Certiorare.

Capias.

Extendi Facias, what.

Liberate, what.

Extent, what.

caſe where the Inquiſition or Extent taken and made, is inſufficient, as if part of the Land onely be extended in the name of all the Lands, or it is found the Conuſor died ſeiſed of Land, and it is not ſaid of what eſtate, or the like, the Conuſee ſhall have a new Extent, and this is called a Re-extent; and this he may have, albeit the Lands or Goods be delivered to the Conuſee by a *Liberate*, if the Conuſee have not entred upon, and accepted it, but if he once accept it, he can never after have a Re-extent. *Re-extent.*

And when the Conuſee is in poſſeſſion of Lands by ſuch an Extent as before, then is he Tenant by Statute; and after the Conuſee is once ſetled in peace in the Lands extended, he ſhall hold it until he be ſatisfied his debt, and his reaſonable coſts and damages for travel, ſute, delay, and expence. But it ſeems the time ſhall not run out, nor be ſaid to begin until the Entry of the Conuſee into the Land; for if the Land be extended, and remain ſeven years without a *Liberate* made, yet he may have a *Liberate* at the end of the ſeven years: And aſſoon as the Conuſee ſhall be ſatisfied his debt and damage by the Goods and Chattels of the Conuſor, and by the ordinary and certain, or extraordinary and caſual profits of the Land, the Conuſor ſhall have his Land again: And for that purpoſe, if the Conuſee refuſe to give him an account, and to yield up his Land to him the Conuſor, howbeit he may not enter, yet may compel the Conuſee thereunto by a Writ called a *Venire facias ad computandum*, in the nature of a *Scire facias*, by which the Conuſor ſhall call the Conuſee, his Executors or Adminiſtrators to account; and if upon the account, it ſhall appear he is ſatisfied, the Conuſor ſhall have his Land again; and if it appear he is over-ſatisfied, he ſhall anſwer the overplus to the Conuſor. But the Conuſor may not enter upon the Conuſee until he hath brought this Writ, and made it thereupon to appear that the Conuſee is ſatisfied: And if in caſe the Conuſee be dead, his Executor or Adminiſtrator, may have Execution of the Statute, without any *Scire facias* upon the ſhewing of the Statute, and the Teſtament in *Chancery*: And if the Sheriff retorn that the Conuſor is dead, the Execution ſhall be made of his Lands onely in the hands of his Heir, or the Purchaſor; but if the Heir be under age, the Execution cannot be done until he be of full age: And if the Conuſor die in priſon, the Execution ſhall be of his Lands, Goods, and Chattels; and if the Gaolor that hath him in priſon ſuffer him to eſcape, he muſt anſwer the debt: And if it fall out that the Conuſee, his Executors or Adminiſtrator be ouſted, or diſturbed of his Execution by the Conuſor himſelf, or any other during the time of the Extent, he may relieve himſelf againſt the diſturber by Aſſiſe, or other Action, as another in the like caſe may do: And if he be rightfully ouſted or diſturbed by one that hath better right, as by one that hath a former Statute, or the like, or by the Act of God, as by Fire, Water, or the like; in theſe caſes the Conuſee ſhall hold the Land over after the time of his Extent, until he be ſatisfied. But when it is through his own neglect onely, that he is unſatisfied, as where the Lands are delivered to him by the *Liberate*, and he after his Entry into them, make a Conditional Surrender of them: As if Lands of the value of ten pound by the year, be delivered to him in Execution for forty pound, and he within four years make a Conditional Surrender of them to the Conuſor, and after he enter for the Condition broken; in this caſe he ſhall not hold the Land over the four years, for he muſt take the profits upon his Extent preſently. The proceeding in Execution of the Statute Staple, and the Recogniſance founded upon the Statute of the 23 of *Henry* the Eight, is after the ſame manner throughout, as the proceeding in Execution of the Statute Marchant is, with theſe differences onely. (Adjudge *Butler verſus Wallis, Paſche*, 38 *Eliz. B R.*) That upon the Execution of the Statute Marchant, there doth iſſue forth a *Capias* againſt the body, before any Execution be to be made of the Lands, or Goods, and Chattels, and the Lands and Goods cannot be extended until a quarter of a year be paſt after the body is taken, or the Sheriff have retorned a *Non eſt inventus*; but upon the Execution of the Statute Staple, and the Recogniſance, the Body, Goods, and Lands, may be taken together at the firſt; this therefore is a more ſpeedy Remedy then the former. Alſo upon a Statute Marchant, one may have an Action of Debt, but otherwiſe upon a Statute Staple, and the *Capias* upon the Statute Merchant may be retornable in the *Kings Bench*, or *Common Pleas*, but the

Tenant by Statute.

Venire facias ad computandum, what.

Executor.

Age.

Eſcape.

the Writ of Execution upon the other, is to be retorned in the *Chancery*. 15 *H.*7.16. *F N.B.* 130, 131.

The proceeding upon the other ſort of Recogniſances, are after another manner; for upon Recogniſances at the Common Law, if the money be not paid at the day, the Conuſee his Executor or Adminiſtrator, is to bring a *Scire Facias* againſt the Conuſor, or if he be dead, againſt his Heirs when they be of full age; or if the Lands the Conuſor had at the time of entring into the Recogniſance, be ſold againſt the Purchaſers of theſe Lands, which the Conuſor had at any time after the Recogniſance entred into, to warn them to come into that Court whence the *Scire facias* cometh, and to ſhew cauſe why Execution ſhould not be done upon the ſaid Recogniſance: And if the party or parties cannot be found to be warned, or being warned, do not appear at the time, or appearing, ſhew no cauſe why the debt ſhould not be levied, then the Conuſee ſhall have Execution of a Moyety of his Lands by Elegit; or if the Conuſor be living, of all his Goods by *Levari* or *Fieri facias* at his Election, but he cannot have Execution of his body, unleſs he bring an Action of Debt upon the Recogniſance, or it be by courſe of the Court, as it is in the Kings Bench upon a Bail, in which caſe a *Capias* doth lie. *Dyer* 360. 315. *Weſt.* 2. 18. *Broo. Execution* 129. *Co.* 3. 11. 15 *H* 7.16. *Kitch.* 117.

Elegit. *Levari facias.* *Fieri facias.* *Capias.*

Sureties. The proceeding againſt the Sureties in Statutes ſhall be as the proceeding againſt the Principal; but in caſe where there are Movables of the Principal to ſatisfie the debt, the Surety (as it ſeems) ſhall not be charged. *Stat. de Mercatoribus.*

5. What things are ſubject and liable to Execution upon a Statute or Recogniſance; and when, and how, and what not.

When a man doth enter into a Statute or Recogniſance, the Land of the Conuſor is not the Debtor, but the body; and the Land is liable onely in reſpect that it was in the hands of the Conuſor, at the time of acknowledging of the Statute, or after; and the Land is not charged with the Debt, but chargably onely at the Election of the Conuſee; but the perſon is charged, and the Land is chargable in reſpect of the perſon, and not the perſon in reſpect of the Land. And therefore albeit the Conuſor alien his Land to another, yet he remains Debtor ſtill, and his body and his Goods ſhall be taken in Execution; and yet when Execution is ſued upon the Land, the Land is charged and become Debtor alſo. *Plow.* 72. *Co.* 10. 50, 51. *Broo. St. Marchant.*

First, In reſpect of the nature and quality of the things themſelves.

The body of the Conuſor himſelf, but not the body of his Heir, Executor, or Adminiſtrator, is liable to Execution, and may be taken, albeit there be Lands, Goods, and Chattels to ſatisfie the Debt; and all the Demeſn and Copihold Lands, Tenements, and Hereditaments, Corporael and Incorporeal of the Conuſor, that are grantable over, as his Manors, Meſſuages, Lands, Meadows, Paſtures, Woods, Rents, Commons, Tithes, Advowſons, and the like: Alſo all his Goods and Chattels, as Leaſes for years, Wardſhips, Emblements, Cattle, Houſhold-ſtuff, and the like, are liable to Execution upon a Statute. *Stat. de Mercatoribus. Co.* 3. 12. *Plow.* 72. *Co.* 2. 59. *Littl. Sect.* 358. *Dyer* 205. *Broo. Stat. Marchant* 44. *Dyer* 7. *Co. ſuper Littl.* 374. And therefore if a man make a Leaſe for life, or years, and after enter into a Statute, or Recogniſance; this Reverſion *cum acciderit* ſhall be ſubject to Execution, and the Conuſor cannot (as it ſeems) by any ſale thereof prevent it; and yet the contrary hath been held for Law. *Littl. Broo. Sect.* 227. *Dyer* 373. And if one make a Feoffment in Fee, or Leaſe for life, reſerving a Rent; this Rent is extendable, and the Conuſee may diſtrain for it. *Doct. & Stud.* 53. *Broo. Stat, Marchant* 44. *Dyer* 205. So if the Leſſee for life, make a Leaſe for years rendring a Rent, and then the Leſſee for life enter into a Statute; this Rent is ſubject to Execution, and it ſeems the Conuſee may bring an Action of Debt againſt the Leſſee for years for it. *Harringtons* caſe. *Paſche*, 9 *Jac. B. R.* And albeit the Rent become extinct by the purchaſe of the Conuſor or otherwiſe, yet as to the Conuſee it ſhall be ſaid to be in *eſſe* and ſubject to Execution ſtill. And therefore if a Rent be granted unto me for my life, after the death of my Wife, and after I do acknowledge a Statute, and then my Wife die, and then I Releaſe the Rent to the Terre-tenant; this Rent ſhall be liable to Execution. *Co.* 7. 38. But Annuities, Offices in Truſt, Seigniories in Franck-almoign, Homage, Fealty, Rights, Things in Action, and ſuch like things are not liable to Execution upon Statutes or Recogniſances.

niſances. Alſo a remainder in Tail, or in Fee after an Eſtate Tail in poſſeſſion, is not liable to execution in theſe caſes, except it happen to come into the poſſeſſion of the Conuſor. *Goldsb.* 120 *pl.* 5. *Dyer* 7. *Co. ſuper Litt.* 374. *Doct. & St.* 53. *Co.* 2. 59. 1, 2.

The Lands, Tenements and Hereditaments that are Copihold, albeit the Conuſor have the Fee-ſimple of them, yet are ſubject to execution, only for the life of the Conuſor; but his demeſne Lands wherein he hath an eſtate in Fee ſimple, are liable to Execution for ever if need require. Ancient demeſne land is liable to Execution yet ſee that Copihold land not liable by *Brownl. Rep.* 1 *part* 34, *Stat. de Mercatoribus* *Dyer* 299. *Plow.* 82. *Co.* 7. 39. 3. 12. *Bro. Recogniſance* 7. *Co.* 1. 62. 13 *H.* 7. 22. *Bro. Stat. Marchant* 36. *Brownl.* 1 *part* 23. Second, in reſpect of the eſtate, property and poſſeſſion of the conuſor in the things.

The Lands the Conuſor hoth in jointenancy with another, are ſubject to execution during the life of the Conuſor and no longer; for after his death the ſurviving jointenant ſhall have all; but if the Conuſor ſurvive his companion, then all the Land ſhall be ſubject to execution: and the Lands the Conuſor hath as Tenant in Tail, are liable to execution only during the life of him being the Tenant in Tail; for afterwards they ſhall go to his iſſue in Tail.

And yet if the Tenant in Tail after he hath entred into a Statute, ſuffer a recovery of the Land intailed, in this caſe the Land ſhall be ſubject to execution as if it were Fee-ſimple Land.

And the Lands the Conuſor hath in the right of his Wife, ſhall be charged and ſubject to execution only during the lives of the Husband and Wife together, and no longer.

If a Feoffment be made in condition to make an eſtate to another by a day of the ſame Land, and before the day the Feoffee enter into a Statute or a Recogniſance; this Land ſhall be ſubject unto execution untill the Feoffor reenter, for the breach of the condition. *Littl. Sect.* 358.

If one be ſeiſed of Land, and then enter into a Statute; this Land ſhall not be ſubject to execution: and yet if the Conuſor do after recover the Land by entry or action, it ſhall be lyable to Execution. *Co.* 2. 59.

The goods and Chattels whereof the Conuſor is ſolely poſſeſſed, and poſſeſſed in his own right; and the Goods and Chattels of which he is jointly poſſeſſed with another; and the Goods and Chattels he hath in the right of his Wife, are liable to execution.

But the Goods or Chattels that he or his Wife hath as Executor or Executrix to another or as pledged only, it ſeems are not ſubject to Execution. And if the Conuſor deliver goods to another to deliver over to *I. S.* theſe goods before they be delivered over are liable to execution.

And if he have leaſes for years in the right of his Wife, and die before Execution be done, it ſeems theſe leaſes are liable to execution. *Sed quære.*

But if the Conuſor have goods in his Cuſtody of another mans, or have goods he hath diſtrained in the nature of a diſtreſs, theſe are not liable to Execution. *Stat. de Mercatoribus. Co.* 3. 11. 12. *Plow.* 524. *Co.* 8. 171. 5. 90. *Dyer* 67.

All the Lands, Tenements and Hereditaments which the Conuſor had at the time of the Statute or Recogniſance entred into, or at any time after, into whoſe hands by what means ſoever the ſame are betide and come at the time of Execution, are ſubject and liable to the Execution. But the Lands the Conuſor had and did put away before the time of the Statute or Recogniſance entred into are not liable to Execution. And all the Goods and Chattels the Conuſor hath and are found in his hands at the time when the Execution is to be made by the *Extendi facias*, are liable to the Execution. But the Goods and Chattels he had and did *Bonâ fide* do away before the time of Execution done, are not liable to the Execution. *Co.* 3, 12. *Stat de Mercatoribus.* 3. In reſpect of the time.

And in all theſe things before ſubject to Execution, the Conuſee may take all or part at his pleaſuree. And therefore if the Conuſor have ſold his Lands to diverſperſous, or have ſold ſome of his Lands to divers perſons, or to one 4. In reſpect of the quantity.

man, and keep the reſt in his hands, or it deſcend to his Heir; the Conuſee may ſue Execution upon the lands in either of their hands at his election; ſo that if the Cogniſee after the Statute entred into and before execution purchaſe part of the land of the Cogniſor, he may notwithſtanding have execution, upon the reſidue in the hands of the conuſor, or in the hands of his heir; and yet ſo that in ſome of theſe caſes his execution may be afterwards avoided, and he compelled to ſue execution againe. *See Brownlows 1 part 38. 2 part. 97. Broo. Stat. 10. 48. 25. Plow. 72. See infra.*

The Cogniſee upon other Recogniſances ſhall have the ſame things in execution, as a man ſhall have after a judgment in a Suite in the Kings Bench or Common-Pleas by *Fieri facias*, or *Leviari facias*, all his goods and chattels, and by *Elegit* the moity of his lands, and all his chattels beſides the Cattel of his plough and implements of husbandry. But in theſe caſes he cannot take the body of the Conuſor in execution; unleſs it be upon a new Suite, or in caſe of baile, in the Kings-Bench. *Weſtm. 2. chap. 18. Plow. 72. Co. 3. 12. Dier. 306. Kelw. 100.*

5. Where a man ſhall have a Re-extent or new execution, and where not.

Howſoever by the Common-Law after a full and perfect execution had by extent returned and of record, there ſhall never be any reextent, yet by a ſpeciall Act of Parliament it is provided, that if after lands, &c. be had in execution upon a juſt or lawfull title, wherewith all the ſaid lands, &c. were liable tied or bound at ſuch time as they were delivered or taken in execution, they ſhall be taken or recovered away from him before he hath received his full debt and damages, in this caſe after a *Scire facias* had againſt the Conuſor his heirs, executors, adminiſtrators, or purchaſors, he (or his executors or adminiſtrators if he be dead) ſhall have a new execution to levie the reſidue of the debt and damages then unſatisfied. 32 *H.* 8. 5. Wherein theſe things are to be obſerved.

1. In caſe where the Conuſee is unlawfully and wrongfully diſturbed either by the Conuſor or by a ſtranger in the taking of the profits of the land delivered to him in execution; there he may and muſt bring his action and recover damages, and theſe damages ſhall go toward his ſatisfaction; for in this caſe and for this diſturbance, he ſhall not hold the land a day the longer. And where he is hindred by his own neglect or act in the taking of the profits of the land, as where his debt is 40l. and he hath 10l. a year delivered to him by which he may ſatisfie himſelf in four years, and within the time he make a conditionall ſurrender to the Conuſor, and enter for the condition broken; in this caſe he ſhall not hold the land over, neither ſhall he have any Reextent.

And where the let or diſturbance is ſuch, as wherein the Conuſee hath remedy given him by the Common-Law to hold the land over after the diſturbance removed; in this caſe he ſhal have no new execution nor Reextent within this Statute; for where the Conuſee hath remedy in *præſenti* for part, or in *futuro* for all or part, this Statute extendeth not to it. And therefore where the Conuſee is hindred in the taking of the profits of land by the Act of God, as by fire, overflowing of water or the like; or the act of the party Conuſor, or any by or under him, as when one is bound to *A.* in a Statute of 100l. and after to *B.* in a Statute of 200l. and *B.* extendeth the land firſt, and then *A.* extendeth the land and taketh it away from *B.* or when the Gardian in Chivalry doth put out the Conuſee by reaſon of the Wardſhip of the heire of the Conuſor, or the Wife of the Conuſor doth claime her dower and put out the Conuſee, or one diſſeiſe his leſſee for life, or out his leſſee for years, and then acknowledge a Statute, and after execution is ſued againſt him, and then the land is delivered to the conuſee, and after the leſſee for life or years doth enter; in all theſe caſes, becauſe by the Common-Law, the Conuſee may hold over the land after the time given him by the extent and after the impediments removed, untill he be ſatisfied his debt and damages, therefore, he ſhall have no aid of this Statute by Reextent; for he is then only to be relieved by this Statute when as he is evicted and diſturbed, and is wholly and clearely without any remedy at the Common-Law. *Co. 4. 66. 82. Plow. 61. 15 H. 7. 15. Co. ſuper Litt: 299. Kitch. 116.*

2. Where the Statute ſaith [Untill he, &c. or his aſſigns ſhall fully and wholy have levied

levied the whole debt and damages] if he hath aſſigned ſeverall parcels to ſeverall aſſignes, yet all they ſhall have the land but untill the whole debt be paid.

3. Where the words be [for the which the ſaid lands, &c. were delivered in execution] If *A.* diſſeiſor convey the lands to the King who granteth the ſame over to *A* and his heirs to hold by fealty and 20*l.* rent, and after granteth the Seigniory, to *B. B.* acknowledgeth a Statute, and execution is ſued of the Seigniory, *A.* dieth without heire, and the conuſee entreth and is evicted by the diſſeiſee; in this caſe he ſhall have the ayd of this Statute; but the Perquiſite of a Villain being evicted is out of the Statute.

4. Where the words be [delivered and taken in execution] yet if after the *Liberate* the Conuſee enter (as he may) ſo as the land is never delivered, yet it is within the remedy of this Statute.

5. Albeit the Statute ſpeake only of the recoveror, obligee, &c. and not of their executors, adminiſtrators, or aſſignes, yet the Statute ſhall extend to them.

6. Where the Statute ſpeakes of a *Scire facias* out of the ſame Court, &c. if the record be removed into another Court and there affirmed, he may have a *Scire facias* out of that Court.

7. Where the Statute gives a *Scire facias* againſt ſuch perſon and perſons, &c. that were parties to the firſt execution, their heirs executors or aſſigns, &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor, &c. ſo as nothing in his hands were liable but the land recovered, if this land bee evict from the tenant by execution, no *Scire facias* ſhall goe againſt him, his executors, &c. but if he hath other lands ſubject to execution, then a *Scire facias* lieth againſt him or his aſſignes, but not againſt his executor; neither in that caſe can he have a *Scire facias* upon this Statute againſt the firſt debtor or recogniſor, but if there be ſeverall aſſignes of ſeveral parcels of lands ſubject to the execution, one *Scire facias* will lie againſt all the aſſignes. See more in *Brownl.* 2. *parts* 122.

A Statute or recogniſance and the execution thereupon may be diſcharged divers waies, as by defeaſance, releaſe, paiment of the mony, debt, and damages, or the reſidue thereof unlevied, delivery up of the Statute, Spurchaſe of part of the land by the cogniſee, or the like. 7. Where and by what means a Statute or Recogniſance, and the execution thereof ſhall be diſcharged, ſuſpended, or avoided in all or in part, and where not.

And therefore if there be a defeaſance to the Statute or recogniſance, and it be to pay mony at a day, or to performe ſome other thing, and the money be paid, or the thing done accordingly, this is a diſcharge of the Statute. And therefore if ſuch a Statute or recogniſance be afterwards ſued againſt the Conuſor, he may bee relieved by an *Audita Querela.* And if *A.* bind himſelf to *B.* by a Statute of 20*l.* and *B.* ſue execution, and the lands of *A.* are delivered to him in execution untill he levy the money, and after *B.* doth make a defeaſance to *A.* by Indenture, that if *A.* pay 10*l.* by a day certaine, that then the Statute or Recogniſance ſhall be void; if this be don accordingly, the Statute and the execution thereupon is defeated and diſcharged. *D.* 297. 315. *Co.* 6. 13. 20 *Aſſ. pl.* 7. *See Defeaſance.* By defeaſance.

And if the Cogniſee before execution or after, releaſe to the Cogniſor the Statute or recogniſance, or the debt; this is a perpetuall diſcharge of the Statute and the execution thereupon. But if the Conuſee before execution releaſe to the Conuſor all his right in or to the land; this will not diſcharge the whole execution; for if he may not ſue execution of the land afterwards (as it ſeems he may this notwithſtanding) yet he may ſue execution of his body and goods. By releaſe.

But ſuch a releaſe after execution made of the land, will no doubt diſcharge the land.

And yet if a Conuſee releaſe all his right in the land to the Feoffee of the Cogniſor of a parcel of the land, it ſeems this will diſcharge the land of execution, albeit it be before the execution ſued that this releaſe is made.

And ſo it is ſaid it was reſolved *Mich.* 26. 27. *Eliz. Co. ſuper Litt.* 76. 10. 47. 50. 51. *ſuper. Litt.* 265. *Broo. St. Mar. chant.* 25. *See Releaſe.*

If the Cogniſee aſſigne the Statute or Recogniſance to the Cogniſor or to the Terre- By purchaſe or ſurrender of the Land.

Terre-Tenant by way of diſcharge of the Debt or Land; it ſeems this is a good releaſe and diſcharge of it in Law. And if the Cogniſee purchaſe any part of the Land of the Cogniſor after the Statute or Recogniſance entred into; this is no diſcharge of the Statute or the Recogniſance, but the Cogniſee may have Execution notwithſtanding of the Lands that are left in the hands of the Cogniſor, or of his body, or goods, or all. But if the Cogniſee purchaſe parcell of the Lands, and a ſtranger another parcell; in this caſe the Lands that are purchaſed by the ſtranger ſhall be diſcharged of Execution. And if the Cogniſee after Execution ſued, purchaſe any part of the Land, or the Fee-ſimple of all or part of it doth deſcend to him; by this the whole Execution is diſcharged. And if the Cogniſee purchaſe all the Lands of the Cogniſor; by this the Execution as to the Land is ſuſpended, but this is no diſcharge as to the body and goods of the Conuſor, for they are ſubject to Execution ſtill. And if the Conuſee reinfeoff the Conuſor again, the Execution may be revived again againſt the Lands of the Conuſor, ſo that they will be ſubject to Execution again, whether they do continue in his hands or be ſold away to others.

So alſo if the Conuſee enfeoffe a ſtranger after he doth purchaſe the Land, and the ſtranger doth enfeoffe the Conuſor; in this caſe alſo the Execution is revived, and the Lands ſhal now be ſubject thereunto as they were before, *Barrow & Graies* caſe 38. *Eliz. Plow.* 72. *F. N. B.* 104. *Litt. Bro. ſect.* 293. 11 *H.* 7. 4. *Br. Audita Querrla.* 49. *Stat Merchant* 42. *Co. ſuper Litt.* 150. 25. *Aſſ. Pl.* 7. *Bro. Stat. Merchant* 25. *Litt. Bro. ſect.* 441. 5. *H.* 7. 25.

If a Leſſee for life make a leaſe for years rendring a Rent, and after enter into a Statute to *I. S.* and then enter into another Statute to *I. D.* and after he doth grant his eſtate to *I, S.* by this the Execution of the Statute made to *I, S.* is ſuſpended, and therefore during the ſuſpention, it ſeems *I, D.* albeit he be after in time, may ſue and have the Rent in Execution. *Harringtons* Caſe. *Paſche* 19. *Iac. B. R.*

8. Where the Conuſor, or his Heir, or an alienee, or purchaſor ſhall have contribution upon a Statute or Recogniſance, or not.

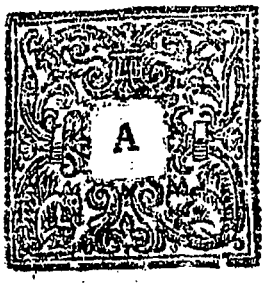
If the Conuſor after he hath entred into a Statute or Recogniſance, doth convey away his Land to divers perſons, and then the Conuſee ſue Execution of the Statute upon the Lands of one or ſome of them, and not of all; in this caſe he or they whoſe Lands is, or are taken in Execution, may by an *Audita querela* or *Scire Facias*, have contribution from the reſt, wherein theſe differences muſt be obſerved: That one Purchaſor ſhall have Contribution from another: And therefore if the Conuſor ſell ſome Lands to *I, S.* and other Lands to *I, D*, and the Conuſee ſue Execution only of the Lands of *I, S. I, S.* ſhall have contribution againſt *I, D.* And the Feoffee of the Purchaſor, the Feoffee of the Heir of the Conuſor, the Feoffee of the Feoffee, and another Feoffee ſhall have contribution of the Heir of the Conuſor: But the Conuſor himſelf ſhall not have Contribution from a Purchaſor; and therefore, if he ſell part of his Lands, and keep part in his hands, and the Conuſee ſue Execution only of the Lands in the hands of the Conuſor or his Heirs; in this caſe, neither he nor his Heirs ſhall have any contribution from the Purchaſors; and one Heire ſhall have contribution from another. And therefore, if one be ſeiſed of two Acres, the one in Burrow-Engliſh, the other of other Land, and he enter into a Statute and die, and he hath but two Daughters, and the Execution is ſued upon the land of one of them; he ſhall have contribution from the other. So where ſome land doth diſcend to the Heire of the part of the Father, and ſome to the Heir of the part of the Mother. *Plow.* 72. *Co.* 3. 12. 6. 13.

If one be ſeiſed of Lands in Fee in the County of *A*, and *B*, and enter into a Statute or Recogniſance, and the Conuſor die, and then the Conuſee die alſo, and his Executor doth ſue Execution of the Lands in *B* only, and hath Execution, and after the Heir doth ſell theſe Lands; in this caſe the Vendee ſhall have no contribution. So alſo it ſeems the Law is, if the Heir ſell the Land to divers, and one of the Purchaſors appear to the *ſcire facias*, and the Iudgement is given againſt him, and he afterwards ſell the Land, his Vendee ſhall have no contribution: And in all theſe caſes where it is ſaid the one Purchaſor ſhall have contribution, it is not intended that the reſt ſhall give or allow him any thing by way of contribution, but that the party whoſe Lands are extended, may by *Audita Querela* or *ſcire facias*,

facias, as the caſe requireth, defeat the Execution, and thereby ſhall be reſtored to all the mean profits, and force the Conuſee to ſue his Execution upon all the Land, that the Land of every one of the Terre-tenants may be equally extended. See more in my Book of *Common Aſſurances*.

CHAP. CL.

Of a Statute Law.



Statute is taken ſometimes for an Obligation of Record; but here it is taken for a Decree, or Act of Parliament, made by the Lord Protector, and Parliament of the Nation, (which is the Repreſentative, and Body of the ſame) for the Goverment thereof; and theſe Laws are over, and beſides the Univerſal or Common Law of the Nation. *Sect.* 1. 2. *Statute*, what.

And ſo a Statute is either general, and publick, or particular and private. Thoſe that are general alſo, are either ſuch as concern all the Subjects of this Realm alike, as the Statutes of Champerty, Maintenance, the Statutes of 13 *Eliz.* 10. 18 *Eliz.* 11. 1 *Ed.* 6. 14. *Magna Charta* 25. *Weſtm.* 2. 25, 18, 41. 23 *H.* 8. *de Attaint.* 4 *H.* 7. 17. and divers others, or ſuch as concern all the Species of one General of Men, or things onely; as all the Spiritual Tye, or all Officers. *Weſtm.* 1. 26. All Trades and Myſteries, or all Lords, or the like. *Marl.* 3. And ſo it is where the Matter is Special, ſo that under it be nothing but Individuals; yet if it be General, as to the perſons, it is a General Law. *Co.* 4. 76. The kindes.

Thoſe Statutes that are particular or private, are either ſuch as are general in a particular; as which concern all Sheriffs, or all Biſhops, or all Deans, or all Cloathiers, or all Colledges in the Univerſities, or the like. 18 *Eliz.* 6. 23 *H.* 6. 18. Or elſe a particular and ſpecial, when it doth concern one Individual; as the Sheriff of *Norwich*, Dean of *Windſor*, College of *Eaton*. *Plow.* 65. 13 *Ed.* 4. 8. *Dyer* 119.

So when the Law, as to the perſon, is general, but the matter it doth concern, is Individual or ſingular. *Co.* 4. 26.

Alſo ſome Statutes are Affirmative, and ſome Negative; and ſome bring in a new Law, and ſome do onely declare the old. *Co.* 4. 76.

This word is taken for the firſt part of an Act or Statute, which is as a Key to open the minde of the Makers, and to ſhew what miſchiefs they intend to remedy that make the Statute; and ſome Statutes have theſe, and ſome are without them. *Preamble*, what.

An Action upon a Statute, called an Action Popular, is an Action which is given to a man by ſome Statutes, where none was before, and is called Popular, becauſe it is not given to one, but to every man that will; and yet if one hath begun the Sute, another cannot ſue it out. *F.N.B.* 43. *Co.* 10. 75. See *Action*, and the duty of *Informers* upon ſuch Statutes. See 18 *Eliz.* 5. 21 *Jac.* 4. 31 *Eliz.* 5. and *Informers*. 2. *Action Popular*, what.

If one hath any occaſion, or cauſe to make uſe of a Statute that is general in any Court, he need not to plead it, and ſet it forth at large, but onely that part, or ſo much as doth concern him, and will ſerve his turn, or the ſubſtance of it. 3. Where a *Statute* muſt be pleaded, or not.

And if one will charge another with the breach of any ſuch Statute, there need no more be ſaid, but *encounter tiel Statute*, &c. For the Judges in their giving of Judgments, are bound to take notice of the ſaid Statutes: But if the Statute be ſpecial, or particular, or private, there if any man will have benefit by, or make uſe of him, or will charge another upon him, he muſt plead, and ſhew the Statute at large; for otherwiſe the Judges in their Judgments, are not bound to take notice of them. *Crompt Jur. fol.* 15, 16, 17.

All

What ſhall be ſaid a good Statute, or not.

All Statutes that agree with the Statutes of Heaven, and Ordinances of God, though they croſs, and utterly overthrow any of the former Statutes or Laws of the Nation, are good: But if they be expreſly repugnant to the Laws of God, as that no man ſhall help or comfort them that be in diſtreſs; they are not good, but utterly unlawful; but it muſt be made by all the Parliament. See *Crompt. Jur.* 190. 34 *H.*6.40.

The Expoſition of Statutes belongs onely to the Judges, and Juſtices of Courts, and they are to be guided by theſe general rules. *March* 90. *pl.*148.

General Rules for the Expoſition of Statutes.

1. They muſt mark the Coherence, and take all the parts together, and then expound them, as neer to the intent and minde of the Makers, as poſſible they can conceive, and not ſtick too much in the words; for, *Qui hæret in litera, hæret in cortice, & notitia Ramorum Statuti, non in Sermonis foliis, ſed in rationis radice poſita eſt.* *Co.*10. 100. And therefore if the Law be, that whoſoever ſhall kill a man, ſhall be hanged; if a Mad-man do ſo, or one in Execution of Juſtice do ſo, this Law muſt not be extended to him: But yet the words are to be regarded alſo; and therefore it is a rule, That *à verbis legis non eſt recedendum & maledicta eſt expoſitio quæ corrumpit viſcera textus.* *Plow.*18.396. *Co.*10. 100.

2. Where an Act Affirmative, and that is the Introduction of a new Law, doth give power, or Intereſt to a perſon certain, or a thing is to be done before a perſon certain, in that caſe *Incluſio unius eſt excluſio alterius:* But if it be the Declaration of an old Law, *contrà*, unleſs there be a Negative clauſe annexed. *Co.*11. Dr. *Foſters* caſe. An Affirmative Subſequent Law will not repeal, or abrogate an Act Affirmative Precedent, unleſs it be contrary to it in Matter; nor alter the Common Law before, neither will ſuch an Act take away Cuſtoms. Alſo, if the Statute be Negative, and but the Declaration of an ancient Common Law, and in Affirmance thereof, this will not alter a Cuſtom. *Co.* on *Littl. f.*115. but otherwiſe the rule is, The latter Laws do abrogate the former Laws.

3. One part of a Statute muſt expound another; and this is one of the beſt means to finde the ſence. *Co.* on *Littl.*381.

4. There muſt be an Equity in expounding all Laws, and this doth ſometimes extend the ſence beyond the words, and ſometimes it doth abridge the ſence, and make it narrower, and leſs then the words. *Plow.* 65.

5. When the words of a Statute are ſpecial, but the reaſon is general, the Statute is generally to be underſtood. *Co.*10. in *Rewſages* caſe.

6. That which is generally ſpoken, muſt be generally underſtood; for he that ſpeaketh all, leaveth out nothing. *Idem.*

7. Such an Expoſition muſt be made, as to ſuppreſs the miſchief, and advance the remedy intended. *Co.* on *Littl.*381.

8. The words muſt always be taken in a lawful, rightful ſence. *Idem.*

9. Every Act made againſt an Injury or Grievance, doth expreſly or implicitly give to the party wronged, a Remedy. *Co.* 2 *part, Inſt.* 55.

Where-ever a Statute doth forbid any thing to a man, the party grieved may not onely have this Action upon the Statute for his private relief, but alſo the offender ſhall be for his contempt puniſhed at the Kings Suit, by Fine and Impriſonment. *Co.* 2 *part, Inſt.*131. 163.

CHAP. CLI.

Of Sute, Subſtance, and Circumſtance.

THis word is ſometimes taken for a Sute in Law, which is nothing but an Action. See *Action.* *Sect. 1: Sute, what.*

Alſo ſometimes it is taken for the following of one in chaſe, as Freſh-ſute. See *Eſcape.* The kindes.

Alſo ſometimes it is taken for the Attendance, which a Tenant or other doth ow to the Court of his Lord. And ſo it is taken here, and then it is either Real or Royal, which is the ſervice that men ow to the Sheriffs Turn or Leet, or other Law-days, unto which, men are bound to come, to hear, and learn the Laws by which they are to be governed; and it is called Royal, becauſe of their Allegeance which men are ſworn to there; and therein their Oath is, That they ſhall be loyal Subjects to the King. Sute at a Law day.

And this ſervice is not to be done in reſpect of the Land that he holdeth within the County or place where the Leet is, but by reaſon of his perſon and abode there, and ought to be done twice a year; and for default hereof, he is to be amerced, and not diſtrained. *Amerced, what.*

Sute Covenant is, where one is bound and hath undertaken by Covenant to do Sute to the Court of another.

Sute Cuſtom is, where by the Cuſtom of the place, the Tenant or other is to do Sute to the Court of the Lord.

Sute Service is the Sute that one is bound to yield to his Lords Court, or the Sheriffs County Court, or ſome Hundred, from three weeks to three weeks; and this is not to be done, in reſpect of a mans perſon or abode in the place, wherein the Court is; but in reſpect of a mans Land which he holdeth of the Manor, or within the County or Hundred, where the Court is. And for default of this, a man ſhall be diſtrained and not amerced: And if a man refuſe to do his Sute he oweth to ſuch a County Court, or Court Baron, he may be compelled to it by Writ called *Secta ad Curiam.* And if a Tenure be to come to a Leet or Hundred to do ſome ſpecial Service, as to be Cryer, *&c.* it is a good Service, but not a Sute Service. *Bro. Sute* 17. *F.N.B.* 158. *Secta ad Curiam, what.*

And in this caſe of Sute Service, which is to be done in reſpect of the Land, if the Land come to diverſe Parceners, the eldeſt of them muſt do all the Sute; and for that purpoſe, if he or ſhe refuſe, may be compelled by a Writ called *Secta faciendа per illum qui habet initiam partem:* But in this caſe the eldeſt ſhall have Contribution of the reſt; and if the eldeſt do make all the Sute, and the reſt will not contribute, he may have a Writ of *Contributione facienda* againſt them, and compel them to it. Who ſhall do the Sute. *Secta per illum qui habet initiam partem, what.* *Contribution. Contributione facienda, what.*

So in all other like caſes, where there be many Feoffees, the Lord ſhall have but one Sute, and the reſt ſhall contribute. *F. N. B.* 126. *Marlb. chap.* 9.

But if one have Land in divers Hundreds, he can do no Sute, but where he doth dwell; and if he be diſtrained to do Service elſwhere, he may diſcharge it by a Writ. *Fitz.* 16.

None ſhall be diſtrained to do Sute of Court, unleſs he be ſpecially bound to it by his Charter of Feoffment, except ſuch as they, or their Anceſtors were wont to do it: Forty years before the making of this Statute, where then they were infeoffed by Deed or without Deed.

If a man live within one Hundred, and hold Land of *J. S.* as of his Hundred of *W.* which is another Hundred, and of another man, yet he muſt do Sute in the Hundred where he dwells, by reaſon of his perſonal reſidence, and ſo to the County Court. *Mich.* 9 *Car.* Sir *Piercy Harberts* caſe in the *Exchequer.* See the old Statute of *Marlb.* 9.

CHAP.

CHAP. CLII.

Of Subſidy and Superſedeas.

Sect. 1.
Subſidy, what.

SUbſidy was a Tax or Tribute, aſſeſſed by Parliament, and granted by the Commons to be levied of every Subject according to the value of his Lands or Goods, after the rate of four ſhillings in the pound for Land, and two ſhillings eight pence for Goods, as was moſt commonly uſed; and the manner of Aſſeſſing every Mans Lands or Goods, was this

Firſt, There did iſſue a Commiſſion out of the *Chancery*, to Men of Honor or Worſhip, in every County; by vertue whereof, To call unto them the Head-Conſtables or Bailiffs of every Hundred, and by them the Conſtable, and three or four of the ſubſtantialleſt Houſholders in every Town, within their Hundred, at a certain day: Which men ſo called, or as many of them, as the Commiſſioners thought good to uſe, did rate the Inhabitants of their own Town, in ſuch reaſonable manner as they thought meet, yet by the diſcretion of the ſaid Commiſſioners, and then every man after his value ſet down, muſt at their time, pay to the Collectors appointed, after the rate aforeſaid.

Tonnage and *Poundage.*
For the Subſidy of Tonnage and Poundage, ſee *Cuſtoms* and *Franchiſes*, and the *Act*, 11 *March*, 1650.

Tax and *Tallage*, what.
Tax and Tallage was a *Dizme Quinzime*, or other Subſidy granted to the King by Parliament.

Quinzime, what.
Quinzime was called a Fifteen, and it was a payment granted by the Parliament to the King, and by him laid upon the Subjects; which was rated after the Fifteenth part of Mens, Lands, or Goods in the Country; and after the tenth part of Mens Goods in Cities and Burroughs. 7 *H.*7.5. *Broo.* 242. *Co.* 2 *part*, *Inſt. fol.* 77.

Tenth.

So that this doth differ from a Subſidy, for that is uncertain as mens Eſtates be, becauſe it doth light on the perſon; this is certain, becauſe it doth light on the Towns, Pariſhes, and Villages in general; and it is ſo called, becauſe it amounteth to one Fifteenth part of that the Town was valued at heretofore; and every Town, City, and Village, greater or leſs, do or may know by the *Exchequer* Roll, what their Fifteen doth a mount unto: And this was to be levied of Mens Lands, or Goods, as the Cuſtom and uſe of the place was. *Dyer* 143.

Dizmes, what.
Dizmes was a Tribute laid on the Spiritualty, and granted to the King by Parliament, as the *Quinzime* was upon the Laity. *Broo.* 342.

Impoſitions of Benevolence.
All Exactions and Impoſitions of money upon the people, without their conſent in Parliament, by way of Benevolence.

Pole money, *Ship-money.*
Poll-money, Ship-money, and the like, declared to be unlawful, and taken away. See 25 *Edw.* 1. *De tallagio non concedendo tem' Ed*, 1. 1 *Ed.* 3. *Stat.* 2. *cap.* 6. 11 *Rich.* 2. 9. 9 *H.*4.7. 1 *R.*3.2. 19 *H.*7.8. 16, 17 *Car.* 14. 3 *Car.*

See the new Government. *Numb.* 30.

No Impoſition of money may be but in Parliament, ſee *Cuſtoms*. *Co.* 2 *part*, *Inſt. cap.* 30. *Petition of Right*, *B. Car.*

Superſedeas, what.
Superſedeas is a Writ that lieth in divers caſes, and implies a Command or Requeſt to forbear or ſtay the doing of that, which in appearance of Law were to be done, were it not for the cauſe, whereupon the Writ is granted. As for example.

A man is to have Surety of the Peace againſt him, of whom he will ſwear, that he is afraid, and the Juſtice required hereunto, cannot deny him; yet if the party be

be formerly bound to the Peace, either in the *Chancery*, or elſwhere; this Writ of *Superſedeas* lieth to ſtay the Juſtice from binding the ſame party to the Peace, which otherwiſe he might not deny. *F. N. B.* 236. *Poulton de Pace* 26.

Where it lieth, or not, and how.

Where a man doth bring a Writ of Error to Reverſe a Judgment, he may have a *Superſedeas* to ſtay Execution upon the Judgment; but if the Judgment were for Debt on an Obligation, ſingle or double, or upon a Contract, he muſt firſt enter into a Recognizance to proſecute with effect, according to the Statute of 3 *Jac.* 8. *Plow.* 49. 5 *H.* 7. 22. *Dyer* 284. 193. 81.

If one be ſued, and a *Capias* or Exigent be awarded againſt a man, in the Term he may have a *Superſedeas* out of the ſame Court, whence the *Capias* did iſſue, or out of the Term, from the *Chancery*; that the Sheriff ſhall take Surety of him and let him go, or that he ſhall not arreſt him, if he be not arreſted. *F. N. B.* 137.

So if one be indicted before the Juſtices of the Peace, and a *Capias* is out, he may by this Writ command the Sheriff to take Sureties for his appearance, and not to arreſt him, or if he have to let him go.

If the Sheriff in his County Court will proceed in ſuch Cauſes, as wherein he is not to meddle, the party grieved may have a *Superſedeas* and ſtay him, and ſo in divers other caſes. *F. N. B.* 236, 237.

But in Attaint, he ſhall not have a *Superſedeas* to ſtay Execution; nor in caſe, where a Sheriff or Gaolor doth ſet at liberty one that is in his cuſtody upon an Execution, and after doth take him again: For in this caſe he muſt have an *Audita Querela*. See *Audita Querela*. *Crompt. Juriſd.* 52, 59. 64. 24. 91. 98. 113.

All Writs of *Superſedeas* ſhall be void, granted for Peace or Good-behavior in the *Kings Bench* or *Chancery*, unleſs ſuch Proces be granted upon motion in open Court, and good cauſe ſhewed upon Oath, and the ſame indorſed upon the Writ, and upon ſufficient Sureties, and unleſs the Proſecution againſt the party for the Peace or Good-behavior, be *bona fide*. And here falſe Sureties for the gaining of ſuch Writs ſhall be puniſhed. 21 *Jac* 8.

CHAP. CLIII.

Of a Surrender and Tenants.

1. *Surrender*, what.

A Surrender properly taken, is the yielding or delivering up of Lands or Tenements, and the Eſtate a man hath therein, unto another that hath a higher and greater Eſtate in the ſame Lands or Tenements: But it is ſometimes improperly applied to other things. He that doth Surrender, is called the Surrendror, and he to whom it is made, is called the Surrendree. *Co. ſuper Littl.* 337.

Surrendror, *Surrendree.*

2. The kindes.

And there be three kindes of Surrender. 1. A Surrender properly taken at the Common-Law. 2. A Surrender by Cuſtom of Lands holden by Cuſtom, or Cuſtomary Eſtates, whereof we ſpeak not here. 3. A Surrender improperly taken, as of a Deed, or Grant of a Rent-charge, of a Patent, and of Lands in Fee-ſimple to the King.

The Surrender properly taken, is of two ſorts. 1. Expreſs, or in Deed, which is when it is done by apt words, and the Expreſs Agreement of the parties. 2. In Law or implied, which is when it is wrought by conſequent and operation of Law, or when the Law doth interpret or enure ſomething done to another intent to make a Surrender of it. And in the firſt caſe it is ſometimes by word onely, and ſometimes by writing; and when it is by writing, it is ſaid to be an Inſtrument teſtifying by apt words, That the particular Tenant of the Lands or Tenements for life or

years doth conſent and agree that he which hath the next and immediate remainder or reverſion thereof ſhall alſo have the particular eſtate of the ſame in poſſeſſion, and that he yeeldeth the ſame unto him.

3. The effect of it.

The Fruit and effect of a ſurrender is, that it doth paſs the eſtate of the ſurrendror to the ſurrendree, and that hereupon the eſtate of the ſurrendror is drowned and extinct in the eſtate of the ſurrendree, And yet not ſo but that to ſome purpoſes it ſhall bee ſaid to have continuance ſtill. And therefore if tenant for life grant a rent-charge and after doth ſurrender his land; in this caſe the rent-charge ſhall continue notwithſtanding the ſurrender. So if leſſee for life make a leaſe for years rendring rent, and the leſſee for life ſurrender his eſtate, in this caſe albeit the primitive eſtate for life be yeelded up, yet the derivative eſtate for years ſhall continue notwithſtanding, but the ſurrendree ſhall not have the rent reſerved upon the leaſe for years. So if leſſee for life or years break a covenant with his leſſor, and after ſurrender his eſtate to him, his breach of covenant is not hereby ſalved, for the leſſor may have an action of covenant ſtill notwithſtanding the ſurrender. And if one ſeiſed of land grant a rent out of it in fee, and this rent is extended on a ſtatute, or granted for leis time to another and then the grantee doth ſurrender the deed of the grant of the rent to the tenant of the land; in this caſe the rent ſhall continue as to him that hath execution and the grantee. And if one make a leaſe for years rendring rent, and the leſſee ſurrender his eſtate to the leſſor; hereby the rent is extinct: but if the leſſor grant the rent to a ſtranger before the ſurrender *contrà*. And if one leaſe for years, and the leſſee let parcel of his term to his leſſor rendring rent, and after the leſſee ſurrender his whole eſtate; in this caſe it ſeems the rent is determined. *Co. ſuper Litt.* 338. *Co.* 1. 96. *Bro. ſurrender.* 47. *Perk. Sect.* 591. *Co.* 8. 145. 7. 39. *Bro. Sur.* 47.

Extinguiſhment.

Covenant.

4. What ſhall be ſaid a ſurrender in law of lands. And by what means an eſtate ſhall be ſurrendred in law. Or not By acceptance and taking of a new eſtate.

If leſſee for life or years take a new leaſe of him in reverſion of the ſame thing in particular contained in the former leaſe for life or years; this is a ſurrender in law of the firſt leaſe. As if leſſee for his own or anothers life in poſſeſſion or reverſion take a new leaſe for years; or a leſſee for forty years take a new leaſe for fifty years, the firſt leaſe in both theſe caſes is ſurrendred.

And this rule holdeth, albeit the ſecond leaſe be for a leſs time then the firſt, as if leſſee for life accept a leaſe for years, or leſſee for twenty years, accept a Leaſe for two years. And albeit the ſecond leaſe be voidable, as being made upon condition, as if leſſee for twenty years take a new leaſe for 20. years upon condition that if ſuch a thing happen the ſecond leaſe ſhalbe void, and the thing doe after happen; in this caſe both theſe leaſes are become void. As where the leſſor doth grant the reverſion to the leſſee upon condition, and after the condition is broken.

Or if the ſecond leaſe be made by tenant in tail, or the like: as if a man make a leaſe for years of land, and then make a Feoffment to another of the land, and then take back an eſtate to him and his wife of the land, and then make a new leaſe to the leſſee for ten years; this is a ſurrender in law of the firſt leaſe. But if the ſecond leaſe be meerly void, then it is otherwiſe. And therefore if the leſſor doe by words of covenant only promiſe to his leſſee that he ſhall have a new leaſe, and doe never actualy make him; this is no ſurrender in law. And this rule as it ſeems holdeth alſo, albeit the ſecond leaſe be to the leſſee and a ſtranger, or to the leſſee and his wife: and albeit the ſecond leaſe be by word only, and the firſt leaſe be by deed, if ſo be that the thing granted by the leaſe be ſuch a thing as may paſs by word without writing; and albeit the ſecond leaſe be in another right, as if the husband have a leaſe for years in theright of his wife and then take a new leaſe to himſelf in his own name: and albeit the firſt leaſe be to begin preſently, and the ſecond be to begin at a day to come, or *è converſo*; and albeit there be a mean eſtate between, as if land be let to *A.* for years, and after let to *B.* for years, to begin after the firſt term, and the aſſigne of *A.* doth take a new leaſe. So if one demiſe land for ten years to one, and after demiſe it for ten years to another, to begin at *Michaelmas*, and after the firſt leſſee accept a new leaſe. For in all theſe caſes there is a ſurrender in law of the firſt leaſes. 14 *H.* 8. 15. *Plow.* 194. *Dier.* 28. *Co.* 10. 67. *Perk. Sect.* 617. *Co.* 5. 11. *Fitz. Surrender.* 3. *Co. ſuper Lit.* 218. 37 *H.* 6. 17. *Dier.* 140, 141. *Dier* 272. *Dier.* 178. 177. *Co* 5. 54. 55. *Kelw.* 70. *Dier* 140. 141. 1. *Dier* 178. *Paſc.* 40. *El. Co. ſuper. Lit.* 338. *Co.* 6. 69. 10. 53. 67. 5. 11. *Dier* 280. *Dier* 93. 112.

And

And if there be two leſſees for life, or years, and one of them take a new leaſe for years, this is a ſurrender of his moity; whereby it doth appear that a ſurrender in law may be made of ſome eſtates which cannot be ſurrendred by a ſurrender in fait; for *fortior eſt diſpoſitio legis quam hominis.* And hence it is that a corporation aggregate may make a ſurrender in law without deed, although it cannot make an expreſs ſurrender without deed. But if the leſſee doe only licence the leſſor to make a feoffment and to give livery of ſeiſin: or do give livery of ſeiſin for him as his Atturney: or doe licence him to enter into the land and no more, neither of theſe things ſhall be ſaid to be a ſurrender in law. So if the ſecond leaſe be made of another, and not of the ſame thing whereof the firſt leaſe is made, as where the firſt leaſe is of the land, and the ſecond is made of a rent or other profit to be taken out of the land, or the firſt is of a Manor, and the ſecond of the Bayliwick or Stewardſhip of the Manor, or the firſt is of a Park, and the ſecond is of the Keeperſhip of the Park; in theſe caſes there is no ſurrender of the firſt leaſe. Alſo if the ſecond leaſe be not a good leaſe, perhaps it ſhall not be conſtrued a ſurrender. See *Co.* 2. *Lanes Caſe.* 17. *Dier.* 46. *Co.* 2. 60: *Co.* 6. 69. 10. 67. *Perk. Sect.* 608. *Bro. Surrender.* 48. *Trin.* 5. *Jac. Co.* 6. 69. *Adjudged.*

And if leſſee for 20 years make a leaſe for 10 years and he after take a leaſe for 5 years; this is not properly a ſurrender, but it maketh void the firſt leaſe as it enureth by way of diſſolution of Contract.

But if the firſt leaſe be of the land it ſelf, and the ſecond leaſe is of the veſture of the ſame land, this is held to be a ſurrender of the firſt leaſe. So if the ſecond leaſe be not to begin untill the firſt leaſe end, the taking of this ſecond leaſe is no ſurrender of the firſt leaſe. So it hath been ſaid if one make a leaſe of black acre in Dale, and the leſſee accept a ſecond leaſe of all the lands of the leſſor in Dale in generall words, and the leſſor that doth make the leas have divers other lands there beſides this acre, that this is no ſurrender of the firſt leaſe. *Sed quere* of this, for others do much doubt it.

So if one enter into land, and make a leaſe for the trial of the title only, and after the leſſor (he and the leſſee being both out of poſſeſſion) make another leaſe of the ſame thing to the leſſee; it ſeems this is no ſurrender of the firſt leaſe: but if the leſſor enter before he make the leaſe *contra. Trin.* 5. *Jac. Sir Jo Chamberlains caſe. See Dier.* 200. *Co.* 5. 11. *Per. Curiam. B. R.* 9, *Jac.*

To make a good ſurrender in deed of lands, and to make them to paſs by ſuch a ſurrender, theſe things are firſt of all required. 5. What ſhall be ſaid a ſurrender in deed of lands. And when they ſhal be ſaid to paſs by ſuch a ſurrender. Or not

That the ſurrendror be a perſon able to grant and make, and the ſurrendree a perſon capable and able to take and receive a ſurrender, and that they both have ſuch eſtates as are capable of a ſurrender. And for this purpoſe.

1. That the ſurrendror have an eſtate in poſſeſſion of the thing ſurrendred at the time of the ſurrender made, and not a bare right thereunto only. 1. In reſpect of the perſon between whom it is made, and their eſtate & poſſeſſion.

2. That the ſurrender be to him that hath the next immediate eſtate in remainder or reverſion, and that there be no intervenient eſtate coming between.

3. That there be a privity of eſtate between the ſurrendror and the ſurrendree.

4. That the ſurrendree have a higher and greater eſtate in the thing ſurrendred, then the ſurrendror hath, ſo that the eſtate of the ſurrendror may be drowned therein.

5. That he have the eſtate in his own right, and not in the right of his wife &c.

6. And that he be ſole ſeiſed of this eſtate in remainder or reverſion, and not in jointenancy.

7. Some make a ſeventh and that is that he that doth ſurrender be in poſſeſſion of the thing ſurrendred. And therefore hold that the ſurrender of land made in *London* of land in *Eſſex* of the land when the ſurrendror is out of the poſſeſſion is void. *Goldsb.* 47. *Pl.* 3.

As for examples, infants, women covert, mad and lunatick men, and all ſuch like perſons, as are diſabled to grant, are diſabled to make a ſurrender,

and none but ſuch as may grant their land may ſurrender their land. *See Perk. in his chap. of ſurrender in toto. Bro. Surrender in toto. Fitz. Surrender in toto. Co. ſuper. Litt.* 338. A Corporation aggregate of many cannot make an expreſs ſurrender without a deed, but it may make ſuch a ſurrender by deed. And ſuch perſons as are diſabled to take by a grant are diſabled to take by a ſurrender, and ſuch as may bee grantees, may be ſurrendrees; and therefore a ſurrender made to an infant is good.

Husband and wife. If the husband have a leaſe or eſtate for years in the right of his wife, he alone, or he and his wife together may ſurrender this; but if the husband have an eſtate for life in the right of his wife, being tenant in dower or otherwiſe, and he alone, or he and ſhee together ſurrender this; this ſurrender is good only during the life of the husband, except it bee made by fine. *Co.* 10.67. *Perk. Sect.* 613. 612. *Bro. ſurrender.* 44. 21 *H.* 7. 25.

Executors. Tenant in common. One executor may ſurrender an eſtate or leaſe for years which the executors have in the right of their teſtator. If there be two tenants in common, and one of them have the particular eſtate, and the other the fee-ſimple; as where an eſtate is limited to two and the heirs of one of them, and he that hath the eſtate for life doth alien his part to a ſtranger; in this caſe the alienee may ſurrender to the other jointenant. So if there be three jointenants for life, and the fee-ſimple is limited to the heirs of one of them; and one of the jointenants for life doth releaſe to the other, and he to whom this releaſe is made doth ſurrender to him that hath the fee-ſimple; this

Iointenant. is a good ſurrender of a third part. But otherwiſe one jointenant cannot ſurrender to another jointenant, albeit he be tenant for life which doth make, and the tenant in fee-ſimple, that doth take the ſurrender. *Perk. Sect.* 586, 587. *Fitz. ſur.* 2. A leſſee for life or years, may ſurrender to him that is next in remainder in fee-ſimple, or fee-tail, or to him in reverſion in fee, and this is a good ſurrender, and a ſurrender as it ſeems may be made to the grantee of the reverſion before atturnment, ſo as atturnment be afterwards made. *Perk Sect.* 584. *Co ſuper Litt.* 338. *Per. Sect.* 600. *Bro. ſur.* 4.

Livery of ſeiſin. And in caſe of the ſurrender of an eſtate for life there needs no livery of ſeiſin as in caſe of the grant of an eſtate for life. *Dier.* 251. 358. 280. A leſſee for years of a term to begin at a day to come cannot ſurrender it by an actuall ſurrender before the day the term begin, as he may by a ſurrender in law. *Perk. Sect.* 601, 602. 4 *H.* 7. 10. *Co.* 6. 69. If leſſee for life be diſſeiſed, or leſſee for years be ouſted, and before his entry or the getting of the poſſeſſion again, he ſurrender his eſtate to him in reverſion; this ſurrender is void. So if a woman that hath title of dower ſurrender it to him in reverſion before ſhe hath recovered it; this ſurrender is void. And yet if leſſee for years after his term is begun and before his entry, when no body doth keep from him the profits, doe ſurrender his eſtate; it ſeems this is a good ſurrender; but if another enter before him, and keep him out, it ſeems otherwiſe. *Perk Sect.* 600, 601, 602, 603. If there be leſſee for years, the remainder for life, the remainder or reverſion in fee, and the leſſee for years be ouſted, and he that ouſted him die ſeiſed, and then the leſſee for years enter, and then the tenant for life ſurrender to him in remainder or reverſion in fee; this is not a good ſurrender, for there is in this caſe but a bare right of remainder for life and in fee; bnt if the leſſee for years had not been ouſted, it had been a good ſurrender. If there be leſſee for years, the remainder for life, the remainder in fee; the leſſee for years may ſurrender to the leſſee for life, and ſo may the tenant for life to him in remainder or reverſion in fee, but if there be tenant for life, the remainder for life, the remainder in fee; in this caſe the ſecond tenant for life cannot ſurrender to him in remainder in fee. *Perk Sect.* 605. *Dier.* 251. If a leaſe bee made for life or years to *A.* the remainder for life to *B.* the remainder in fee tail to *C.* and the firſt tenant for life or years doth ſurrender to *C.* or to the leſſor, *B.* being the next in remainder for life being then living; this is not a good ſurrender, neither can it take effect as a ſurrender in reſpect of the intervenient eſtate. And ſo ſome ſay the law is if the middle remainder be but for years only; as if a leaſe be made for years, the remainder for years, and the firſt termor ſurrender his intereſt to the leſſor; this is no good ſurrender. *Sed quere. Perk. Sect.* 588. For it ſhould ſeem that a future intereſt will no more hinder an actuall ſurrender of the firſt leſſee, then a ſurrender in law. And ſo alſo it ſeems the law is for a concurrent leaſe, which for the latter part of it is in the nature of a future intereſt. *Dier.* 112. *Plow.* 190. *Dier.* 93. *Plow.* 432, 433.

But

But if in this caſe it fall out the middle remainder be void; as where a leaſe is made to *A.* for life, or years the remainder to a monk (who is a perſon uncapable) for life or years, the remainder to *I. S.* in fee; in this caſe *A.* the firſt tenant may ſurrender to him in remainder in fee, and the ſurrender is good. If leſſee for 20. years make a leaſe for 5 years, and the leſſee for 5 years enter, and after the leſſee for 20. years ſurrender to him in reverſion or remainder; this is a good ſurrender. So alſo if the two leſſees join in the ſurrender. So alſo if the firſt leſſee ſurrender firſt, and the leſſee for 5 years ſurrender after. But if the leſſee for five years ſurrender to him in the reverſion or the remainder before the ſurrender of the leſſee for 20 years; this cannot take effect as a ſurrender for two cauſes. *Perk. Sect.* 604. 14 *H.* 7, 3. *Plow.* 541. *Bro. Sur.* 16.

1. Becauſe there is a remnant of the term as an intervenient eſtate to hinder the drowning of the term.

2. Becauſe there wants a privity betweeen the leſſee for five years, and him in reverſion.

If tenant in fee-ſimple ſurrender to the Lord Paramount of whom the land is held; this can never take effect as a ſurrender, unleſs it be in a ſpeciall caſe where the Lord hath cauſe to have a *Ceſſavit.* So if tenant in tail ſurrender to him in remainder or reverſion in fee-ſimple; this cannot take effect as a ſurrender: So if leſſee for life ſurrender to him in remainder for years: or tenant for the life of *B.* ſurrender to him that hath an eſtate for the life of *C.* theſe are void ſurrenders; for the eſtates of them to whom they are made, are not capable of ſuch ſurrenders, for they are not greater then the eſtates of the ſurrendrors, and therefore not able to drown the eſtates ſurrendred. And yet if leſſee for the life of another, or for his own life ſurrender his eſtate to him in remainder that is tenant for his own life, this is a good ſurrender, for an eſtate, for a mans own life is greater in judgement of law then an eſtate for another mans life. And hence it is that if a leaſe bee made to two for their lives, the remainder to a third perſon for his own life, and one of the firſt tenants for life ſurrender his eſtate unto him in remainder for life; this is a good ſurrender for a moity.

If leſſee for life or years ſurrender to him in remainder or reverſion that hath no good eſtate in the remainder or reverſion, as where the remainder or reverſion is granted by word only, or being granted by deed there is no atturnment of the tenant to the grant, or the like; this ſurrender is not good. And yet if tenant in taile make a leaſe for life whereby he gaineth a new reverſion (but defeaſible) and the tenant for life doth ſurrender to the tenant in tail, this ſhall be a good ſurrender. So if a woman inheritrix have a husband, and they have iſſue a ſon, and the husband dieth, and ſhe take another husband, and he letteth the land for life, and the wife dieth, and the tenant for life doth ſurrender his eſtate to the ſecond husband, this is a good ſurrender to moſt purpoſes. *Bro. ſur.* 9. *Fitz. ſur.* 10. *Perk. Sect.* 590. *Perk. Sect.* 589. *Co. ſuper. Litt.* 42. 3 61. *Perk. Sect.* 590. *Co.* 2. 66. *Co. ſuper Litt.* 338.

If a feme ſole be ſeiſed of land in fee, and ſhe make a leaſe thereof to a ſtranger for life, and then take a husband, and the leſſee ſurrender to the husband, this is no good ſurrender, neither can it enure ſo, becauſe he to whom it is made hath not the reverſion in his own but in his wives right. *Perk. Sect.* 622.

2. In reſpect of the place where it is made. And where the ſurrender of land in one County may be good for the lands that doe lie in another county. Or not.

It is further alſo required in every good ſurrender, that if it be made by word and without deed, that then it be made in the ſame County where the land to be ſurrendred doth lie, but by writing a man may make a ſurrender of lands that doe lie in any other County, and in what place ſo ever it doth lie. And a ſurrender may be by word or writing of lands lying within the ſame County in any place out of the land. And therefore if tenant for life ſurrender to him in reverſion in any place out of the land within the ſame County, and the ſurrendree agree to it, the freehold is in him preſently. *Bro. ſur.* 2. 8. *Fitz Partition.* 5. *Perk. Sect.* 583.

3. In reſpect of the matter or thing. And of what things a ſurrender may be made. Or not.

3. That it be made of ſuch things, of which a ſurrender may be made. For ſurrenders may not be made of eſtates in fee-ſimple, or fee-taile, nor yet of rights or titles onely of eſtates for life or years, nor yet of part of an eſtate for life or years, as if a man have a leaſe for ten years, he cannot ſurrender the laſt ſeven years, and keep to himſelf

himſelf the three years. But otherwiſe one may ſurrender any kinde of eſtate for life as by dower, by the curteſie, or as tenant in tail after poſſibility of iſſue extinct, or for years, or years determinable upon lives, and that of any meſuages, houſes, lands, commons, rents or the like, that are grantable from one to another, and ſuch ſurrenders are good. *See Brownlows Rep.* 1. *part.*40.41, 2. *part.* 155. *Bro. ſurrend. in toto. Per. chap. Sur. in toto. Co* 5. 11 *ſuper. Litt.* 338.

4. That there be words, or words and deeds ſufficient to make the mind of the ſurrendror to appear that he is willing and deſirous to part with & yield up the thing ſurrendred into the hands of the ſurrendree. And herein it is to be known that albeit the words ſurrender, Give or yeeld up, be the moſt ſignificant and proper words whereby to make a ſurrender, yet any other words, eſpecially if it be in the ſurrender of a leaſe for years that, do teſtifie and declare the will and aſſent of him that is the particular tenant, that he in the remainder or reverſion ſhall have the eſtate of the tenant, be ſufficient to paſs the eſtate by way of ſurrender. And therefore if leſſee for life or years doe by word or writing ſay, that he will hold the land no longer, and wiſh him in reverſion or remainder therefore to enter. Or that it is his deſire that he ſhall enter into the land, and have it and his eſtate therein: Or that he is content that he ſhall have his eſtate, or have his leaſe; ſuch, or any ſuch like declaration as this made to him in reverſion or remainder, will be a good ſurrender. *Perk. Sect.* 607 608, 609. *Dier.* 251. *Bro. ſur.* 1. 35. 37. 17. 21 *H.* 7. 7. So if leſſee for years deliver his Indenture to a ſtranger, to deliver it and all his eſtate up to him in reverſion, and doe appoint the ſtranger to deliver and ſurrender it to him in reverſion, and he doe ſo, and he in reverſion accept thereof, this is a good ſurrender; but otherwiſe it is of an eſtate for life.

4. In reſpect of the manner. And how and by what words a ſurrender may be made. And where it may be made without deed, and upon condition. Or not.

So if the particular Tenant doe by the words Give, Grant or Confirm, paſs his eſtate to him in reverſion, and he doe enter and agree to it; this is a good ſurrender.

And by all theſe ſurrenders the eſtates will paſs by way of ſurrender, except it be in ſome ſpeciall caſes where the intent of the parties doth plainly appear to be that the eſtate ſhall not paſs by way of ſurrender. *See Brownl.* 1. *part.* 208. *Hil.* 37 *El. B. R. Sleigh and Batemans caſe.* But if a leſſee for life or years doe only goe from the houſe or land; and carry away his goods and cattell, and ſo waive the poſſeſſion for a time, either becauſe the leſſor ſhall not diſtrain them for rent behind, or the like, and thereupon the leſſor doth enter and enjoy it; this is no ſurrender, neither is this a good yeelding up of his eſtate. And in ſuch a manner and by ſuch words as before, any thing that may be granted by word without writing, may be ſurrendred by word without writing, ſo as it be made within the ſame County where the thing ſurrendred doth lie.

And this holdeth true albeit the eſtate to bee ſurrendred were created by deed.

But ſuch things, as commons, rents, advowſons, reverſions, remainders, and the like, that cannot bee granted without deed cannot be ſurrendred without deed. And therefore if a leaſe be made for life, the remainder for life by word of mouth without any writing; he in the remainder for life cannot ſurrender his remainder for life without deed.

So where one hath a rent, advowſon or the like, as Tenant in Dower, or by the courteſie; this cannot be ſurrendred without Deed. And in caſe where there is any ſpeciall matter to be contained in the ſurrender, as reſervation of rent, condition, or the like, there for the moſt part it muſt be by deed; or it will not be good. And therefore if tenant for life declare himſelf by word of mouth to be contented and agreed that he in the reverſion ſhall have the land and his eſtate therein; rendring ten ſhillings a years Rent: or yaying ſuch a ſumme of money, or upon condition that if he ſurvive the leſſor he ſhall have it again &c. this is no good ſurrender. *Perk. Sect.* 581, 582, 583. *Fitz. Sur.* 1. *Co. ſuper Litt.* 338. *Dier.* 251. *Bro. Sur.* 16. And a ſurrender may be made alſo upon a condition precedent or ſubſequent, as if it be with reſervation of rent that if it be not paid it ſhall be void; but if it be an eſtate for life that is ſo ſurrendred, it ſeems it muſt be made by writing indented, and ſo likewiſe it ſhould

ſeem

ſeem the law is of the ſurrender of a leaſe for years upon a condition, or however it is moſt ſafe ſo to doe. *Perk. Sect.* 607, 608. 609, *Dier.* 251. *Bro. ſur.* 1, 35. 37. 17. 21 *H.* 7. 7. *Hil.* 37 *El. B. R. Sleigh and Batemans caſe. Perk. Sect.* 581, 582, 583. *Fitz. ſur.* 1. *Co. ſuper Litt.* 338 *Dier* 251. *Bro. ſur.* 16. *Perk. Sect.* 624. 623. *Co. ſup. Lit.* 218.

5. That the ſurrendree doe agree to, and accept of it for untill then the ſurrender is not perfect, but if the ſurrendree doe once agree to it, he cannot after diſagree, for his firſt agreement doth perfect the ſurrender. But the actuall entry of the ſurrendree into the land is not neceſſary. And therefore if tenant for life or years ſurrender to him in reverſion out of the land, and he agree to it, he hath the land in him preſently. And yet he may not bring any action of Treſpas againſt any man for any Treſpaſs done upon the land untill he have made his entry. *Perk. Sect.* 608. *Litt. Bro.* 163. *March. Rep.* 5.

5. In reſpect of the agreement of him to whom the ſurrender is made. And what agreement is neceſſary. Agreement. Treſpaſs.

If I make a leaſe to *I. S.* for ſo many years as *I. D.* ſhall name, *I. S.* cannot ſurrender this before *I. D.* name the time. *Goldsb.* 168. *by Judge Popham.*

But here note, that in the caſes before where things may not paſs by way of ſurrender, either becauſe of an intervenient eſtate, or the like; if there be ſufficient words in the deed, it may avail to other purpoſes, and may enure and paſs the thing by way of grant; but then if it be an eſtate for life that is intended to be ſurrendred, there muſt be livery of ſeiſin made upon the deed. And wherefore if there be leſſee for years, the remainder for life or years, the remainder in fee, and the leſſee for years in poſſeſſion doth ſurrender and grant all his eſtate to him in remainder in fee; howſoever this deed cannot enure as a ſurrender, yet it ſhall enure as a good grant of the eſtate of the leſſee for years unto him in remainder in fee. *Perk. Sect.* 588. 589.

6. How a ſurrender ſhall be conſtrued and taken.

A ſurrender in generall ſhall be taken moſt ſtrongly againſt the ſurrendror, and moſt beneficially for the ſurrendree. And therefore if I hold of the leaſe of *A.* one acre for life, and another acre for years, and I ſurrender to *A.* all my lands, or all my lands I hold of his leaſe; by this ſurrender both the acres are ſurrendred. But if the ſurrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the leaſe of *A. contra*. And if I hold one acre for life of the leaſe of the father of *I. S.* and I hold another acre for life or years of the leaſe of *I. S.* himſelf, and I ſurrender to *I. S.* all the land I hold of his leaſe; by this the land that I had by the leaſe of his father doth not paſs. A ſurrender to one jointenant ſhall be conſtrued to enure to them all. But if tenant for life or years grant his eſtate to one of the jointenants in reverſion, it ſeems this ſhall not enure as a ſurrender to them all, but as a grant to him alone. *Perk. Sect* 610. 611 *Perk. Sect.* 615. *Bro. Sur.* 54.

If the leſſor make, and the leſſee take a new leaſe upon condition, this ſurrender in law is abſolute, and albeit the condition be broken, yet the firſt leaſe is gone. But if the leſſee ſurrender or grant his eſtate to the leſſor upon condition; this condition if it be broken may reveſt the eſtate. *Co ſuper Litt.* 218.

See more in the next queſtion, and in *Expoſition of Deeds.*

7. Where a feoffment, leaſe, grant, or other act made, or done by the tenant for life or years, ſhall be a ſurrender or not. And how it ſhall enure or be conſtrued and taken.

1. When it is made to him in reverſion or remainder.

If any kind of tenant for life of land infeoff him in remainder or reverſion of the land, or grant his eſtate to him in remainder or reverſion; this ſhall enure as a ſurrender. And if leſſee for years before his term doe begin, make a feoffment to him in reverſion or remainder, or grant his eſtate to him, this ſhall enure as a ſurrender And if leſſee for life grant his eſtate to him in reverſion, the remainder in fee to another; this ſhall enure as a ſurrender, and this remainder is void. But if ſuch a tenant for life make a leaſe to him in remainder or reverſion for the terme of the life of him in remainder or reverſion; this ſhall not enure as a ſurrender becauſe it doth not give the whole eſtate, but it ſhal enure by way of grant. So if leſſee for life make a leaſe to him in remainder in tail for term of the life of him in remainder; this ſhall not enure as a ſurrender, but as a grant, and ſhall end with the life of the grantee. If leſſee for forty years make a leaſe for thirty ſeven years on condition, & after grant his eſtate to him in reverſion, and the ſecond leſſee atturn; this ſhall enure as a ſurrender. If there be tenant for life, the remainder in tail to a ſtranger, and the remainder in tail to another ſtranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the firſt tenant in tail, this ſhall enure as a ſurrender of the eſtate for life and as a grant of the reverſion in fee alſo. If tenant for life being a woman take a husband

Husband, and then her Husband and ſhe by Deed indented make a leaſe to him in reverſion for the life of the Husband; this ſhall not enure as a ſurrender, but as a grant. If there be Tenant for his own life, the remainder to *I S* for his life, and the firſt Tenant for life ſurrender to him in remainder for the life of him in remainder; it ſeems this ſhall enure as a ſurrender, and is no forfeiture; but if he grant it to him for the life of a ſtranger, and make livery of ſeiſin, this is a forfeiture. If Leſſee for life, the Reverſion being in jointenants, grant the Land to one or all of the jointenants for twenty years; this ſhall not enure as a ſurrender, but as a grant, for there remains an intereſt in the Leſſee ſtill as a mean eſtate. If Leſſee for years make him in Reverſion or Remainder his Executor; this ſhall not enure as a ſurrender, albeit it doe give him the whole eſtate. If Land be given to the Husband and Wife, the Remainder to *I, S*, and the Husband diſcontinue in Fee, and take back an eſtate to him and his Wife, the Remainder to *W N*, and die, and the Wife claim in by the ſecond eſtate, and ſurrender to *W N*; this ſhall not enure as a ſurrender, but as a grant: *Bro. ſur.* 3. 5. *Perk. ſect.* 616. 620. 623. *Co. ſuper Lit.* 42. *Bro. Sur.* 49. *Paſch.* 7. *Jac. B. R: Perk. ſect.* 621. *Co. ſuper Lit.* 42. *Bro. ſurrender* 17. *Perk. ſect.* 615. *Bro. ſurrender* 52. *Bro. ſurrender* 36.

Forfeiture.

2. When it is done or made to him and a ſtranger.

If Leſſee for life or years grant his eſtate to him in Remainder or Reverſion and a ſtranger; this ſhall enure as a ſurrender of the one half to him in Reverſion and as a grant of the other moity to the ſtranger. And yet it is ſaid, that if Leſſee for life of Land grant his eſtate to him in the Reverſion and two others, that hereby they have a joint eſtate, and the ſurvivor ſhall have the whole. If Leſſee for life make a leaſe for his own life to the Leſſor, the Remainder to the Leſſor and a ſtranger in Fee; this ſhall enure as a ſurrender of the one moity, and a forfeiture of the other moity.

Forfeiture.

If Tenant for life ſurrender to the Husband of a woman Tenant in Tail or in Fee; this ſhall enure as a grant, not as a ſurrender. And ſo alſo it ſeems is the Law when the ſurrender is to the Husband and Wife. And if *B* be Tenant for life, the remainder to *C* in Tail, the remainder to *D* in Tail, and *B* infeoff *C* and *S* his Wife in Fee; this ſhall not enure as a ſurrender, but it is a forfeiture: ſo that if *C* die without iſſue *D* may enter. If there be Leſſee for life, the reverſion to two Coparcenours, and one of them take a Husband, and the Leſſee doth grant his eſtate to her and her Husband; this ſhall not enure as a ſurrender, but as a grant. And yet if Tenant for life doe grant his eſtate to the Husband and Wife, ſhe having the reverſion if ſhe be an infant and within age at this time: it ſeems this ſhall enure as a ſurrender, not as a grant, *Bro. ſurrender* 11. *Co.* 2. 61. 3. 61. *Perk. ſect.* 619. *Co. ſuper Litt.* 335. *Perk. ſect.* 622. *Bro. ſurrender* 20. 34. 23. *Bro. ſurrender* 46 *Perk. ſect.* 623. 21 *H.* 7. 40. *Bro. ſurrender* 34.

3. When it is done with him in reverſion or remainder.

If Tenant for life, or years, and he in Reverſion or Remainder by word without Deed join in a Feoffment; it ſhall be ſaid the ſurrender of the eſtate for life or years to him in the reverſion, and the Feoffment of him in reverſion.

But if he in reverſion infeoff the Tenant for life without any Deed; this ſhall enure firſt as a ſurrender of the Leaſe for life, and then as a Feoffment, See more in *Deed Numb. and ſee Brownl.* 2 *part* 75. 156. *Plow.* 140. *Dier* 358.

8. Where a Deed or Rent may be ſurrendred. And how ſuch a ſurrender ſhall enure or be taken.

If I have a rent in Fee, for life, or years, iſſuing ont of another mans Manor, or other lands, I may ſurrender it, for if I deliver the Deed of the grant of the rent to be cancelled unto any one that hath any eſtate of the Manor or Land in Fee-ſimple, for life, or years, in poſſeſſion or remainder, either ſolely by himſelf, or jointly with others, this is a good ſurrender, and hereby the rent is extinct and gone.

But one that is Tenant in Tail of a Rent cannot ſurrender it, neither will the delivering up of the Deed in this caſe determine the rent.

And if one be ſeiſed of Land out of which a rent is iſſuing in Fee, and is diſſeiſed, and during the diſſeiſin the grantee of the rent ſurrender his rent, and give up his Deed; it ſeems this doth not extinguiſh the rent, yet hath the Grantee no remedy for his rent when he hath delivered up his Deed. And yet if one be ſeiſed of Land in Fee, out of which a rent is iſſuing in Fee, and he die without Heir, ſo that the Land Eſcheat, and before the Lord enter upon his Eſcheat, he that hath the Rent doth ſurrender the Deed of the Rent

to

to the Lord; it ſeems this is a good Surrender to extinguiſh the Rent. And if the Grantee of a Rent-charge in Fee, grant the ſame to him in Fee, that is ſeiſed of the Land in Fee; this ſhall enure to extinguiſh the Rent, but if he grant it to one that hath onely an Eſtate for life, *contrà*. 14 *H.*7.2. *Perk. Sect.* 585, 590, 591, 594, 595, 596, 597, 598, 606.

Of Tenants.

FOr all ſorts of Tenants holding Eſtates, theſe things are to be known.

Tenant in Fee-ſimple.

1. The Tenant in Fee-ſimple of Land hath the moſt abſolute Eſtate; and for him and his Eſtate, theſe things are to be known.

Firſt, He may diſpoſe this Land or Eſtate by Act executed, or his laſt Will at his pleaſure, or he may charge it at his pleaſure.

Secondly, He may make what waſte and deſtruction he will upon his Land.

Thirdly, His Wife ſhall have Dower of a thirds of it, her Husband ſhall be Tenant by the courteſie of it that hath it.

Fourthly, He may notwithſtanding forfeit it by committing Treaſon or Felony.

Fifthly, It will be liable to the Debts, the which he doth by Deed, engage his Heir to pay. See *Eſtates*.

Tenant in Tail.

2. The like may be ſaid of a Tenant in Tail, ſave onely in the Caſe of Forfeiture by committing of Felony: And if he will diſpoſe of, or charge his Land for longer time then his own life, he muſt do it by Fine or Recovery, otherwiſe by Deed he cannot do it.

Tenant in Tail after poſſibility of Iſſue Extinct.

3. But a Tenant in Tail after poſſibility of Iſſue Extinct, hath but an Eſtate for life: And this although, as to the quality of it, it hath more Privileges then other Eſtates for life, for this Tenant is not puniſhable for Waſte; yet not as to the quantity: Therefore if this Tenant make an Eſtate in Fee ſimple, Fee-tail, or for any other life then his own of his Land, he doth forfeit it no more then any other Tenant that holdeth for his own life, as Tenant in Dower, by the Courteſie, or for his own, or for anothers life.

Tenant by the Courteſie, in Dower, for his own, or for anothers life.

As touching all which Eſtates, theſe things are to be known.

1. That none of theſe, but the firſt, can commit Waſte, onely they may take and ſhall have reaſonable Eſtovers of Fire-boot, Plough-boot, Houſ-boot, Hay-boot, *&c.*

2. They cannot charge, or grant it, but for their own lives, and if they do ſo they will forfeit their Eſtates.

3. If they grant their Eſtates to another for their lives, or hold for anothers life, and they die that hold the Land, ſo there will be an Occupancy, if it be not carefully prevented.

4. There ſhall be no Tenancy in Dower, or by the Courteſie under ſuch a Tenant.

5. They cannot make it liable to their Debts, but for their own time.

6. It is forfeitable for Treaſon or Felony: But it ſhall not be forfeit by an Outlawry, as a Leaſe for years ſhall be.

7. The like is for a Leaſe for years; wherein theſe things are to be known.

Tenant for years.

1. That a Leaſe for years ſhall go to an Executor or Adminiſtrator as a Chattle, which a Leaſe for life cannot do.

2. The Tenant may grant or charge it, during the Leaſe onely, and if the Tenant make a Feoffment, Gift in Tail, or Leaſe for life of the Land, he forfeits it.

3. He may not do Waſte.

4. If the Tenant be out-lawed, though but in a Perſonal Action, he doth forfeit it.

5. The Tenant at Will, and at Sufferance, is the loweſt and leaſt Eſtate of all; this cannot be granted, nor charged, nor injoyed but at pleaſure.

See for theſe things in *Eſtates*.

CHAP. CLIV.

Of the Term-time, and Tame Beaſts.

Term, what.

Vacation.

THis word Term is ſometimes taken for the bounds and limits of time, as a Leaſe for Term of life, or for Term of years; or elſe for the time, when the Courts at *Weſtminſter*, are all open to hear all Complaints for Wrongs, and to ſeek Right by courſe of Law: To which, in this reſpect, is oppoſed the reſt of the year called Vacations. And of theſe Terms, are four in the year; but for them and their Retorns. See *Retorn.* 32 *H.*8.21. *Marlb ch.* 12. And the new Statute of 16, 17 *Car.*6. By which, *Michaelmas* Term is to begin at *Tres Michael*, for the keeping of Eſſoyns, Profers, Retorns, and other Ceremonies heretofore uſed, and the full Term ſhall be four days after, unleſs it hap on a Sunday, then it is to be the next day. And in this Term ſhall be but ſix Retorns, *viz. Tres Michael. Menſ. Michael. Craſt. Anim. Craſt. Mar. Oct. Martin.* and *Quind. Martin.*

Sect. 1. For Time, theſe things are to be known.

Temps or *Time.*

Inſtance.

1. The Law doth divide and apply Inſtance (a thing not dividable by Logicians) to ſeveral purpoſes, as if they were ſeveral times. And herein are two Rules or Fictions of Law. Firſt, Priority of time is imagined in things done together. Secondly, In things done in an inſtant, a Priority is ſuppoſed alſo. Hence it is, that he that killeth himſelf, is adjudged a Felon, albeit he be not a Felon, till he have done it, and then he is not in being. *Plow.*110. 540. 11 *H.*7.12. 7 *H.*4.16.

2. In divers caſes the Law doth reſtrain and limit men to a time, for the having or taking of ſome benefit, preventing ſome loſs, or doing of ſome thing, and herein the time is reaſonable, and according to the nature of the thing. As for the bringing of Actions, in divers Caſes there are divers Times; for which ſee 21 *Jac.* 16. and in *Actions.* So upon Penal Laws, the Sute muſt be according to the time ſet by the Law; for which ſee *Action Popular.* For the preventing of a Mans Bar to his Right in Land, by a Fine upon the Statute, he muſt enter or claim within five years; for which ſee *Fine.* To prevent the loſs of his Goods, as a Waiff, Eſtray, or Wreck, he muſt put in his Claim within a year. To prevent the Bar of a Fine at Common Law, or a Recovery in a Writ of Right, he muſt make his Claim within a year and a day: And if Goods be loſt in War, and recovered from the enemy, the owner muſt claim them before the Sun-ſet, or elſe the taker ſhall have them. *Co.* upon *Littl.* 254. 135, 136. 7 *Ed.*4.14. *Plow.*272. 16. And he that brings a Writ of Right, he muſt alleage himſelf or his Anceſtors, to have been ſeiſed of the Land, demanded within ſuch a time. *Weſtm.*138. *Co.* upon *Littl.*114, 115.

Limitation.

An jour & Waſt.

3. The Lord Protector by his Prerogative, is to have the Lands of Felons, that Eſcheat to other Lords, he is to have them firſt of all for a year and a day, and no longer to make ſpoil thereof, by Raſing, Earing, Cutting, and Subverting, Houſes, Trees, Meadows, *&c.* But this is to be underſtood when a Tenant in Fee-ſimple is attainted, for where a Tenant in Tail, or Tenant for life, is attainted of Felony, there the Lord Protector will have the profits of the Land, during the life of the Tenant in Tail, or of the Tenant for life. *Co.* 2 *part*, *Inſt.* 37.

Tame Beaſts. For Tame Beaſts. See 37 *H.*8.6. 3 *Ed.*1.20.

CHAP. CLV.

Of a Teſtament.

A Teſtament is the ful and compleat declaration of a mans mind or laſt will of that he would have to be done after his death: It is in Latin *Teſtamentum*, i. *Teſtatis mentis*, the witneſs of a mans mind; and to deviſe by Teſtament, is to ſpeak by a mans Will what his mind is to have done after his death: And this is ſometimes called a Will, or laſt Will; for theſe words are *Synonima*, and are as it ſeems promiſcuouſly uſed in our Law: yet moſt properly, a Will is of Land, and a Teſtament requires Executors. Howſoever by the Civill Law, it is then only ſaid to be a Teſtament when there is an Executor made and named in it; and when there is none but a Codicill only; for a Codicill is the ſame that a Teſtament is, but that it is without an Executor; and a man can make but one Teſtament that ſhall take effect, but he may make as many Codicills as he will. And by the Common Law where Lands or Tenements are deviſed in writing, albeit there be no Executor named, yet there is properly called a laſt Will, and where it doth concerne Chattels only, a Teſtament. He that doth make the Teſtament is called the Teſtator; and when a man dieth without Will, he is ſaid to die inteſtate. *Terms of the Law, Bro. ſect.* 300. *Co. ſuper Lit.* 111. *Swinb. of Wills* 24.

1. Teſtament. what.

Codicil. what.

Teſtator.

Inteſtate.

Of Teſtaments there be two ſorts, namely a Teſtament in writing or a written Teſtament, which is, where the minde of the Teſtator in his life time, by himſelf or ſome other, by his appointment, is put in writing. And a Teſtament by word or without writing, which is, where a man is ſick, and for fear leaſt death or want of memory, or ſpeech, ſhould ſurprize him, that he ſhould be prevented if he ſtayed the writing of his Teſtament, deſireth his neighbours and friends to bear witneſs of his laſt Will, and then declareth the ſame preſently by words before them; And this is called a *Nuncupative*, or *Nuncupatorie* Teſtament: And this being after his death proved by Witneſſes, and put in writing by the Ordinary, is of as great force for any other thing but Land, as when at the firſt in the life of the Teſtator it is put in writing. A Codicill alſo is in writing, or by word as a Teſtament is: The Civilians have other diviſions of Wills and Teſtaments, as ſolemn and unſolemn, priviledged and unpriviledged, whereof the Common Law maketh no mention. *Perk. ſect.* 476. *Co. ſuper Lit.* 111.

The kinds.

Nuncupative.

The parts of every compleat Teſtament whereof it doth conſiſt, are two.

1. The making of Deviſes, or giving of Legacies. 2. The making and Ordination of an Executor; for a Teſtament can be no more without, then a Codicill can be with an Executor. *Terms of the Law, tit. Deviſe. Co ſuper Litt.* 111. *Swinb. lib.* 1. *c.* 7.

2 The Parts of it.

Deviſe or Legacy, what.

A Deviſe or Legacy is where a man in his Teſtament doth give any thing to another; the firſt of theſe Terms is properly applied to the gift of Lands, and the laſt to the gift of goods or chattels: and therefore a Deviſe ſtrictly is ſaid to be where a man in his Teſtament doth give his lands to another after his deceaſe; and a Legacy is ſaid to be where a man in his Teſtament doth give any chattell to another to have after the death of the Teſtator; but the word is promiſcuouſly applied to the one and to the other. And he that gives by ſuch a Will is called the Deviſor, and he to whom the thing is given, the Deviſee or Legatee.

Deviſor, Deviſee, or Legatee.

Quotuplex.

And a deviſe is ſometimes ſimple and without condition, as where I give my land to another and his heires, or I give 20l. to another, without more words. And ſometimes it is with a condition, which is when there is a quality added to the deviſe or legacy, whereby the effect of it ſuſpended or hindred, and it is thereby made to depend on ſome future event.

Conditionall Deviſe.

And this condition in this caſe may be made almoſt by any words, as if I give to one

my land if he pay 20l. to my Daughter, or ſo as he pay 20l. to my Daughter, or paying 20l. to my Daughter, or I give one 20l. if he marry my Daughter, or when he ſhall marry my Daughter, or I give my Wife 20l. a year whiles ſhe ſhall live unmarried, or I give to him, or to whomſoever ſhall marry my Daughter 20l. or the like; in all theſe caſes the deviſe is conditionall. The firſt kind of deviſe is called by the *Civillians* a ſimple aſſignation, and the latter a conditionall aſſignation. *Dyer* 317. 74. *Co. ſuper Lit.* 217. *Swinb.* 132, 134. 136.

Executor what.

An Executor in a large ſenſe is taken for any one that is appointed to have the diſpoſition and ordering of the goods and chattels of a man that is dead. And ſo there are three kinds of Executors: the firſt is *à lege conſtitutus*, who is therefore called *legitimus*, and ſuch a one is the Ordinary of the Dioceſs who hath ordinary Iuriſdiction in matters Eccleſiaſticall: the ſecond is *à Teſtatore conſtitutus*, who is therefore called *Teſtamentarius*, and he is ſtrictly and properly called an Executor, and is defined to be one appointed by a mans laſt Will and Teſtament to have the diſpoſing and adminiſtration of all or part of a mans goods and chattels, and to perform a mans laſt Will and Teſtament according to the contents thereof: the third is *ab Epiſcopo conſtitutus* who is therefore ſaid to be *Dativus*. And ſuch a one is an Adminiſtrator, who is defined to be one that hath the goods and chattels of a man dying inteſtate committed to his charge by the Ordinary for want of an Executor. And his power, benefit and charge is in all things equall to the power, benefit, and charge of an Executor. *New Terms of the Law. Co.* 8. 135, *Plow.* 288. *Co. ſuper Litt.* 209. *Co.* 9. 40.

Ordinary.

Adminiſtrator

Quotuplex.

The Executor and Adminiſtrator alſo is ſometimes univerſall or totall, *i.* one that hath the power and diſpoſition of the whole perſonall eſtate committed to him. And ſometimes he is particular or partiall, *i* one that hath the power and diſpoſition of ſome part of the eſtate, or of all the eſtate for a time only committed to him. And ſometimes he is abſolute, *i.* ſuch a one that hath an abſolute power of the eſtate, as Executor or Adminiſtrator, and ſometimes he is conditionall, *i.* one that hath a limited and conditionall power of the eſtate only. And in both caſes he ſhall be charged and chargable for ſo much as is committed to him as the Teſtator or inteſtate himſelfe: for this cauſe the Executor is ſaid to repreſent the perſon of the Teſtator; for as to the eſtate committed to his truſt he may charge others, and be charged himſelf, ſue and be ſued, as the Teſtator himſelf might. And the eſtate he hath by his Executorſhip is ſaid to be in him to the uſe of the Teſtator and in his right: and that he doth in the diſpoſition of his eſtate is ſaid to be in the right and to the uſe of the Teſtator alſo; And the Adminiſtrator hath the ſame power and property over and in the goods and chattels, the ſame remedy by Suit, and ſo farr forth ſhall be charged as the Executor; for they differ not in nature, but in name only. And yet the Adminiſtrator is but the Ordinaries deputy, and he may revoke the Adminiſtration, or call the Adminiſtrator to an account. *Dyer* 4. *Bro. Executor* 155. *Co.* 6, 19, *Co. ſuper Lit.* 209: *Stat.* 31 *Ed.* 3. *c.* 11: *Co.* 9: 40. 8. 135.

Repreſent the perſon of the Teſtator.

3. The nature and effect of a Teſtament, and of a Codicill.

A Teſtament is of that nature that it doth much differ from other acts and deeds that men doe and execute in their life times: for albeit it be made, ſealed and publiſhed in never ſo ſolemn a manner, yet it hath no life nor vertue in it untill the Teſtators death; for it is a Maxime in Law, *Omne Teſtamentum morte conſummatum eſt, Et voluntas ambulatoria uſque ad extremum vitæ exitum*; it is therefore reſemved untill death to the interlocutory ſentence, and after death to the definitive ſentence of a Iudge. And hence it is ſaid, *Sed legum ſervanda fides, ſuprema voluntas. Quod mandat fierique jubet parere neceſſe eſt. Swinb.* 12, *Dyer* 143: *Co: ſuper Lit.* 112. *Litt ſect.* 168. *Co.* 4. 61. And for this cauſe a man may alter, or make void his will at his pleaſure, and he may make as many new Wills and Teſtaments as he will, and there is no means under the Sun to barr a man of this liberty, *Lit. Bro. Sect.* 300. And the latter Teſtament doth always revoke and overthrow the former; but otherwiſe it is of a Codicill; *Lit. Sect.* 168. *Perk ſect.* 478. for a man may make as many of theſe as he will, and make no Teſtament at all; *Swinb.* 13. 14, or if he make a Teſtament he may afterwards make as many Codicils as he will, and one of them will not overthrow the other; for in the firſt caſe they muſt all be annexed to the

the letters of Adminiſtration, and the Adminiſtrator muſt perform them, and in the latter caſe they muſt be all annexed to the Teſtament, and the Executor muſt take care to performe them. *Bro. Teſtament* 20.

A Teſtament therefore is ſaid to have three degrees.

1. An Inception, which is the making of it.
2. A Progreſſion, which is the publication of it.
3. A Conſummation, which is the death of the Teſtator, *Plow.* 343. 344.

In grants therefore, the firſt is of greateſt force, but in Teſtaments the laſt is of greateſt force.

But when a Teſtament is perfect by the death of the party, it doth as effectually give and transferr eſtates and alter the property of lands and goods, as acts executed by deed in the life time of the parties. *Co ſuper Litt.* 1. for hereby diſcents of lands are prevented, and a man may make eſtates in Fee-ſimple, Fee-tail, for life, or years, of Lands, Tenements, Rents, Reverſions, or ſervices as effectually as by Deed; and theſe eſtates alſo will be good without any Livery of Seiſin, or Attournement. And hereby alſo Rents, and power to diſtraine for them may be reſerved: conditions created and annexed to eſtates, or things deviſed. *Lit. Sect.* 167. 168.

And therefore they that take by deviſes of Lands, are ſaid to take in the nature of purchaſors. *Perk. Sect.* 505. And if therefore a Tenant in Tail make a Feoffment to the uſe of himſelf in Fee, and after deviſe the ſame land to his Wife in Fee, and die; the ſon is not remitted, though the Father die ſeiſed: for the deviſe doth prevent the diſcent. *Dyer* 221.

To the making of every good Teſtament, theſe things are requiſite. *Co.* 6. 3.

4. What ſhall be ſaid a good and a ſufficient Teſtament Or not. First, in reſpect of the perſon that doth make it, and the thing whereof it is made. And what Perſons may make a Teſtament, And of what things, or not And how. A Feme Covert,

1. That the Teſtator be a perſon able to make a Teſtament, and not diſabled for any ſpeciall cauſe, either in reſpect of his perſon, mind or condition, or in reſpect of the thing whereof the Teſtament is to be made. And for this it muſt be known.

That a Woman that hath a Husband, cannot make a Teſtament of her Land or Goods, except it be in ſome ſpeciall caſes; for of her Lands ſhe can make no Teſtament with, or without her Husbands conſent (*Stat.* 32. & 34 *H.* 8. *c.* 5. *Co.* 4 51. *Bro. Teſtament* 13) of the Goods and Chattels ſhe hath as Executrix to any other, ſhe may make an Executor without her Husbands conſent; for if ſhe do not ſo, the Adminiſtration of them muſt be granted to the next of kin to the deceaſed Teſtator, and ſhall not go to the Husband, (12 *H.* 7. 14. *Perk. ſect.* 501. *Fitz. Executor* 40.) but of them ſhe can make no deviſe with or without her Husbands leave, for they are not deviſable; and if ſhe do deviſe them, the deviſe is void. And of the things due to the wife whereof ſhe was not poſſeſſed during the marriage, as things in action and the like, it ſeemes ſhe may make her Teſtament, at leaſt ſhe may make her Husband Executor, of her Paraphonalia. *Plow.* 526. *Fitz. Executor* 109. *viz.* her neceſſary wearing apparell, being that which is fit for one of her rank: ſome ſay ſhe may make a Teſtament without her Husbands leave, others doubt of this, howbeit all agree that ſhe and not his Executor ſhall have this after her Husbands death, and that the Husband cannot give it away from her. And of the goods and chattels her Husband hath, either by her or otherwiſe, ſhe may not make a Teſtament without the licence and conſent of her Husband firſt had ſo to do. But with his leave and conſent ſhe may make a Teſtament of his goods, and make him her Executor if ſhe will. 12 *H.* 7. 24. 18 *Ed* 4. 11. *Perk. Sect.* 501. *Fitz Executor* 5. 28. 109. *Bro. Teſtament* 11.

And it is ſaid alſo, that if ſhe do make a Teſtament of his Goods (in truth without his leave and conſent) and he after her death ſuffer the Will to be proved, and deliver the goods accordingly; in this caſe the Teſtament is good.

And yet if the Husband give his Wife leave to make a Teſtament of his goods, and ſhe do ſo, he may revoke the ſame at any time in her life time, or after her death before the Will be proved.

But a Woman after contract with any man, may before the marriage make a Teſtament as well as any other, and is not at all diſabled hereby.

An

An Infant. An Infant untill he be of the age of 21 years can make no Teſtament of his lands by the Statutes of 32 & 34 *H.* 8. But by ſpeciall cuſtome in ſome places where land is deviſable by cuſtome he may deviſe it ſooner. And of his goods and chattels, if he be a boy, he may make a Teſtament at fourteen years of age and not before; and if a Maid, at twelve years of age and not before; and then they may do it without, and againſt the conſent of their Tutor, Father, or Guardian, *Stat.* 32 *Ed.* 34. *H.* 8. *cap.* 5. *Perk. Sect.* 503. 504. *Br. Cuſtome* 50. *Swin.* 37, 38. And yet ſome ſay an Infant cannot make a Teſtament of his goods and chattels untill he be eighteen years of age. *Co. ſuper Lit.* 89

A Lunaticks perſon. A mad or lunatick perſon during the time of his infanity of mind cannot make a Teſtament of Lands or goods; but ſuch a one as hath his *lucida intervalla*, cleer or calm intermiſſions, may during the time of ſuch quietneſs and freedom of mind make his Teſtament, and it will be good.

An Idiot. So alſo an Idiote i. ſuch a one as cannot number twenty, or tell what age he is, or the like, cannot make a Teſtament, or diſpoſe of his lands or goods; and albeit he doe make a wiſe, reaſonable, and ſenſible Teſtament, yet is the Teſtament void. *Perk. ſect.* 503, 504. 24. *Swinb.* 37. 40 *Swinb.* 39. 40. *Swinb.* 42. But ſuch a one as is of a meane underſtanding only, that hath *groſſum caput*, and is of the middle ſort between a wiſe man and a fool, is not prohibited to make a Teſtament.

An old man. So alſo an old man that by reaſon of his great age is childiſh againe, or ſo forgetfull that he doth forget his own name, cannot make a Teſtament; for a Teſtamant made by ſuch a one is void. So alſo it ſeemes a drunken man, that is ſo exceſſively drunk, that he is deprived of the uſe of reaſon and underſtanding, during that time, may not make a Teſtament, for it is requiſite when the Teſtator doth make his Will, that he be of ſound and perfect memory, *i. e.* that he have a reaſonable memory and underſtanding to diſpoſe of his eſtate with reaſon, *Co.* 6. 23. *Hill.* 3 *Car. per the Lord Keeper in the Chancery.*

A deafe and dumb man. A man that is both deaf and dumb, and that is ſo by nature, cannot make a Teſtament. But a man that is ſo by accident, may by writing or ſignes make a Teſtament. And ſo may a man that is deafe or dumb by nature or accident. And ſo alſo may a man that is blind. *Swinb.* 53.

An alien. An alien born cannot make a Teſtament of Lands or goods. A man that is entred into Religion, cannot make a Teſtament. *Curia. B. R.* 7 *Iac.*

A Traitor. A Traitor attainted from the time of the Treaſon committed can make no Teſtament of his Lands or Goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence, he may make a Teſtament of his Lands or Goods as another man.

A Felon. A man that is attainted or convict of Felony cannot make a Teſtament of his Lands or Goods, for they are forfeit; but if a man be only indicted, and die before attainder, his Teſtament is good for his Lands and goods both. And if he be indicted and will not anſwer upon his arraignment, but ſtandeth mute, &c. in this caſe his Lands are not forfeit, and therefore it ſeemes he may make a Teſtament of them. And if a man kill himſelf, his Teſtament as to his Goods and Chattels is void, but as to his Lands is good. *Stat.* 5. *&* 6. *Ed.* 6. *c.* 11. *Swinb* 54. *Prerogativa Regis. Plow.* 258. 259. *Plow.* 261.

A Felo *de ſe.* An outlawed perſon. A Corporation. A Villaine. A man that is outlawed in a perſonall action cannot make a Teſtament of his Goods and Chattels ſo long as the outlawry doth continue in force; but of his Lands he may make a Teſtament. The head, or any of the members of a corporation may not make a Teſtament of his Lands or Goods they have in Common, for they ſhall goe in ſucceſſion. A Villaine cannot make a Teſtament of his Lands or Goods after the Lord hath ſeiſed them. But here note, that howſoever the Teſtaments of Traitors, Aliens, Felons, Out-lawed perſons, and Villaines, be void as to the King, or Lord that hath right to the Lands or Goods by forfeiture or otherwiſe, yet it ſeems the Teſtament is good againſt the Teſtator himſelf, and all others but ſuch perſons only. And here note further alſo. By the Civill Law alſo the Teſtaments of divers others, as Excommunicate perſons, Hereticks, Uſurers, Inceſtuous perſons, Sodomites, Libellers, and the like, are void. But by our law, the Teſtaments of ſuch perſons, at leaſt as to their lands, are good by the Statutes that do enable men to deviſe their lands. *Fiz. Dec.* 16. *Fitz. Teſtament* 1. *Swinb.* 155, *&c.* 32. *&* 34 *H.* 8. *Perk. Sect.* 496.

But

But all other perſons whatſoever, Male or Female, old or young, lay or ſpirituall, Rich or Poor, at any time before their death whiles they are able to ſpeak ſo diſtinctly, or write ſo plainly as another may underſtand them, and underſtand that they underſtand themſelves, may make Teſtaments of their Lands, Goods, and Chattels, and that albeit they have ſworn to the contrary: and none are reſtrained of this liberty, but ſuch as are before named. See more *infra* to this matter, and *Capacitie*, *Abilitie*.

The ſecond thing required to the making of a good Teſtament is, that he that doth make it have at the time of the making of it, *Animum teſtandi*, a mind to diſpoſe, a firme reſolution and adviſed determination to make a Teſtament; otherwiſe the Teſtament will be void; for it is the mind not the words of the Teſtator that doth give life to the Teſtament, for if a man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly write or ſay that ſuch a one ſhall be his Executor, or have all his goods, or that he will give to ſuch a one ſuch a thing; this is no Teſtament, nor to be regarded. And the mind of the Teſtator herein is to be diſcovered by circumſtances; for if at the time he be ſick, or ſet himſelf ſeriouſly to make his Teſtament, or require witneſſes to bear witneſs of it, it ſhall be deemed in earneſt; but if it be by way of diſcourſe onely, or of ſome what he would do hereafter, or the like, it ſhall be taken for nothing, *See more infra at Numb.* 7. *Swin.* 9. 121. 324, 325. Secondly, in reſpect of the mind of him that doth make it.

The third thing required in a good Teſtament, is, that the minde of the Teſtator in the making of it bee free, and not moved by fear, fraud, or flattery, for when a Teſtator is moved to make his Teſtament by fear, or circumvented by fraud, or overcome by ſome immoderate flattery; the ſame is void, or at leaſt voidable by exception. And therefore if a man by occaſion of ſome preſent fear, or violence, or threatning of future evils do at the ſame time, or afterwards by the ſame motive make a Teſtament: this Teſtament is void, not only as to him that put him ſo in fear, but as to all others, albeit the Teſtator confirm it with an oath. But if the cauſe of fear be ſome vain matter, or being weighty is removed, and the Teſtator doth afterwards when the fear is paſt, confirm the Teſtament; in this caſe perhaps the Teſtament may be good. And if a man by occaſion of ſome fraud or deceit be moved to make a Teſtament, if the deceit be ſuch as may move a prudent man or woman, and if it be evill alſo, the Teſtament is void, or voidable at the leaſt; but if the deceit be light and ſmall, or if it be to a good end, as where a man is about to give all his eſtate to ſome lewd perſon from his wife and children, and they perſwade the Teſtator that the lewd fellow is dead, or the like, and thereby procure him to give his eſtate to them; this is a good Teſtament. And one may by honeſt interceſſions & modeſt perſwaſions procure another to make himſelf or a ſtranger Executor to him, or the like, and this will not hurt the Teſtament. Alſo a man may uſe fair and flattering ſpeeches to move the Teſtator to make his Teſtament, and to give his eſtate unto himſelf, or ſome friend of his, except it be in caſe where the flatterer doth firſt beate or threaten him, or put him in fear, or to his flattery joineth fraud and deceit, or the Teſtator is a perſon of weak judgement, or under the danger or government of the flatterer, as when the Phyſician ſhall perſwade his Patient under his hands to make his Teſtament, and give his eſtate to himſelf; or the wife attending on her Husband in his ſickneſs ſhall neglect him, and continually provoke him to give her all, or where the perſwader is importunate and will have no deniall, or when there is another Teſtament made before; for in all theſe caſes the Teſtament will be in danger to be avoided. And if I be much privie to another mans mind, and he tell me often in his health how he doth intend to ſettle his eſtate, and he being ſick, I doe of mine own head draw a will according to his mind, before declared to me, and bring it to him, and ask him whether this ſhall be his will or no, and he doth conſider of it, and then deliver him back to me, and ſay yea; this is a good Teſtament. But if otherwiſe, ſome friends of a ſick man of their own heads, ſhall make a Will and bring it to a man in extremity of ſickneſs, and read it to him, and ask him whether this ſhall be his Will, and he ſay yea, yea: Or if a man be in great extremity of ſickneſs; and read it to him, and ask him whether this ſhall be his Will, Thirdly, in reſpect of the occaſion or motive of it.

and

and he ſay yea, yea: Or if a man be in great extremity, and his friends preſs him much, and ſo wreſt words from him, eſpecially if it be in advantage of them, or ſome friends of theirs; in theſe caſes the Teſtaments are very ſuſpitious.

But as touching theſe two laſt things, *Quære* how they ſhall avail in the Wills of Lands which are not regulated ſo much by the Civill Law.

Fourthly, in reſpect of the manner and form of the diſpoſition.

The fourth thing required in the making of a good Teſtament, is, that that form and order that the Law preſcribeth be obſerved in the diſpoſition. *Swinb.* 112. *Bro. Teſt.* 20.

First, naming of an Executor

And therefore 1. that there be an Executor named in all Teſtaments of Goods and Chattels, and that that Executor named be capable of the Executorſhip; for this is ſaid to be the head and foundation of the Teſtament; for if there be never ſo many Legacies given, and no Executor made, this diſpoſitſon is but a Codicill, and cannot properly be called a Teſtament; for in this caſe the party dead, is ſaid to die inteſtate and the Adminiſtration of his goods muſt be granted to the Widdow, or next of kinn; whereas on the other ſide, if an Executor be appointed, albeit there be no Legacy given, yet this diſpoſition is, and is properly ſaid, to be a Teſtament.

Secondly, if it be of Lands, it muſt be in writing.

2. If the Teſtament be of Lands or Tenaments, it muſt be in writing, and it muſt be committed to writing at the time of the making thereof: And it is not ſufficient, that it be put in writing after the death of the Teſtator, being firſt made by word of mouth only, for then it is but *Nuncupative* ſtill.

But if the Teſtament be firſt made by word of mouth, and be afterwards written, and then brought to the Teſtator, and he approve it for his Teſtament: Or if the Teſtator, when he doth declare his mind, doth appoint that the ſame ſhall be written, and thereupon the ſame is written accordingly in the life time of the Teſtator; theſe are good Teſtaments of Land, and as good as if they be written, at the firſt. *Stat.* 32. & 34 *H.* 8. *Perk ſect.* 476. 477. *Dier* 72. *Plow.* 345. *Co.* 4. 60. *Dier* 53.

If therefore one be very ſick, and another come to him, and ask him whether his wife ſhall have his Land, and he ſay yea, and a Clerk being preſent doth put this in writing without any precedent commandement or ſubſequent allowance of the ſick man; this is no good Teſtament of the Land.

So if one declare his whole mind before Witneſſes, and ſend for a Notary to write it, and die before he come, and he write it after his death; this is no good Teſtament for his Lands, but a good *Nuncupative* Will for his Goods and Chattels, except he declare his mind to be that it ſhall not be his will unleſs it be put in, writing, for then perhaps it may not be a good wil for his goods and chattels.

So if he that doth write the will cannot hear the party ſpeak, and another that ſtands by the ſick man doth tell him what he doth ſay; in this caſe if there be none others preſent to prove that he reported the very words of the ſick man; this will be no good Teſtament of the Land.

But if a Notary take direction from the ſick man for his VVill, and after goe away and write it, and then doth bring it again and read it to the Teſtator and he approve it: Or if it be written from his mouth by the Notary according to his mind; and his mind were to have it written, albeit it be not ſhewed or read to him afterwards; theſe are good Teſtaments.

So if the Notary doe only take certaine rude notes or directions from the ſick man which he doth agree unto, and they be afterwards written faire in his life time, and not ſhewed to him againe, or not written faire untill after his death; theſe are good Teſtaments of Lands.

If a ſick man bid the Notary make a Teſtament of his Lands, but doth not tell him how, and the Notary make a deviſe of it after his own minde; this is no good Teſtament; and yet if it be after read unto, and approved by the Teſtator, it may be good.

And ſo if a Teſtament be found written in the Teſtators houſe, and not known by whom, and it be read unto, and approved by the Teſtator; this is now a good Teſtament in writing for Lands and goods. *Adjudged Trin.* 20. *Jac.*

3. Uſes

3. Uſes of lands before the Statute of uſes, might, and lands and tenements deviſable by Cuſtome, and goods and chattels may be diſpoſed by word without writing, and ſuch Teſtaments of ſuch things ſo made are good. 4. It is not material in what matter or ſtuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand, or letters, whether in Secretary hand, Roman hand, or Court hand, or in any other hand a Teſtament be written, ſo it be fair and legible, that it may be read and underſtood: Neither is it material whether the ſame be written at large, or by notes, or characters uſual or unuſual, as xx^{s} for twenty ſhillings, or when the figure (2) is uſed in ſtead of the letter *A*, if it be uſual in the Teſtators writing, or the like; for the Teſtament is good notwithſtanding. So alſo if ſome words be omitted, or ſentences improper uſed, when the intent and meaning is apparent, as where a man ſaith [I make my wife of this my laſt Will and Teſtament] leaving out the word [Executrix] yet the Teſtament is good, and this ſhall be underſtood: But if it be ſo done as it cannot be read, or by reading the minde of the Teſtator cannot be known, then is the Teſtament voyd and of no force. In like manner as a *Nuncupative* Will is, when the words ſpoken, are ſo ambiguous, obſcure, and uncertain, that thereby the meaning of the Teſtator cannot be known nor underſtood. *Swinb. part.* 4. *Sect.* 25, 26.

Thirdly, uſes and lands by cuſtome, and chattels deviſable without writing.

Fourthly, the matter or hand wherein and whereby it is written.

5. Where writing is needfull (as in the caſe of diſpoſition of land it is) there ſealing of the Teſtament, or ſubſcribing of the Teſtators name is not neceſſary. And therefore if a man by himſelf or another, do make a Teſtament of his land, and do not put his Seal or name to it, if he agree to it, this is a ſufficient Teſtament. *Perk.* 476, 477. *March. Rep. f.* 206. *pl.* 245.

Fifthly, ſealing and ſubſcribing the Teſtators name not needfull.

6. If whiles the Teſtator is making his Will, and whiles he intendeth to proceed further at that time either by adding, diminiſhing, or altering, he be ſuddenly ſtricken with ſickneſs or inſanity of minde whereby he cannot proceed, but gives it over in the midſt, and ſo he dye; it ſeems in this caſe the whole Will is voyd, *Swinb. 6. Lit. Broo. Sect.* 300. *Swinb. part.* 7. *Sect.* 10. *Coo.* 3, 31. And yet if a man begin his Will, and make perfect Deviſes to one, and then of himſelf give over untill another time: or if a man make a perfect Deviſe to one, and then dye before he can make any Deviſe to any others, it ſeems theſe are good Teſtaments for as much as is done. And therefore it is ſaid if one command another to make his Will, and by it to deviſe White Acre to *I S* and his heirs, and Black Acre to *I N* and his heirs, and he write the Deviſe to *I S* and his heirs, and the Teſtator dye before he can write the Deviſe to *I N* and his heirs; this is a good Deviſe to *I S*, but a voyd Deviſe to *I N* and his heirs. But if a man bid the Notary write a Deviſe of his land to *I S* upon condition, and the Notary write the Deviſe to *I S*, but the Teſtator dyeth before he can write the condition; in this caſe the whole Deviſe is voyd, *Brownlows Rep.* 1. *part.* 44. But a man may, if he pleaſe, make a Teſtament of part of his goods, and dye inteſtate for the reſt, and that diſpoſition he doth make is good for ſo much, *Swinb.* 188.

Sixthly, interruption in the making of the Will.

7. The laſt thing required to the perfection of a Teſtament, is, that it be proved; for if it be never ſo well made, and be in truth the Teſtament of the Teſtator, yet if it cannot be by proof made to appear ſo, it is but a voyd Teſtament, and of no force at all. And therefore herein theſe things are to be known:

Seventhly, in reſpect of the proof of it, and what ſhall be ſaid a ſufficient proof of a Teſtament, or not.

1. That a *Nuncupative* Teſtament muſt be proved by two Witneſſes at the leaſt, and thoſe muſt be ſuch as are without exception, *Swinb. part.* 7. *Sect.* 13. *part.* 4. *Sect.* 25.

2. A written Teſtament when it is written with the Teſtators own hand, doth prove and approve it ſelf, and therefore needs not the help of Witneſſes to prove it. And for this cauſe, if a mans Teſtament be found written fair and perfect with his own hand after his death, albeit it be not ſubſcribed with his name, ſealed with his Seal, or have any Witneſſes to it; if it be known or can be proved to be his hand, it is held to be a good Teſtament and a ſufficient proof of it ſelf; but if it be ſealed with the Seal, and ſubſcribed by the name of the Teſtator, and can be proved by Witneſſes, it is the more authentique. And when it is found

amongſt the choyce evidences of the Teſtator, or faſt locked up in a ſafe place, it is the more eſteemed; for if it be written in another hand, and the Teſtators hand and Seal, or one of them not to it, albeit it be found in ſuch a place as before, yet ſome proof will be expected of it further by Witneſſes in that caſe. And if a writing be found under the Teſtators own hand, yet if it be but a ſcribbled writing, written Copie-wiſe, with a great diſtance between every line without any date, in ſtrange characters, with many interlinings, and lying amongſt his voyd papers, or the like; this will not be eſteemed a ſufficient Teſtament, nor a good proof of it; but it ſhall be accounted rather a draught or image of the Teſtators Will for a direction to him after to make his Will by: And yet if it can be proved that the Teſtator did declare himſelf that this ſhould be his Will; this will be a good Teſtament, and a good proof of it.

3. If it be proved the Teſtator ſaid his Teſtament was in ſuch a Schedule in the hands of *I S*, and *I S* produce a writing depoſing it to be the ſame; it ſeems this is a ſufficient proof: but if he ſay withall, it is written with his own hand, then it ſeems ſome other proof, as by comparing hands, or the like, that it is his hand, wherein it is written, will be expected.

4. If the Witneſſes will prove the writing produced to be the laſt Will of the Teſtator, or that he ſaid it was, or it ſhould be his laſt Will, or that it is the ſame writing that was ſhewed unto them, and whereunto they are Witneſſes, albeit they never heard it read, or ſet their hands to it, it is a ſufficient proof. And a Will may be proved by Witneſſes for Goods though it be not to be ſhewed: but if any tampering were with the Witneſſes, it will be dangerous. 5. All perſons, male and female, rich and poor, are eſteemed competent Witneſſes to prove a Will, ſave onely ſuch as are infamous, as perjured perſons, and the like; and ſuch as want underſtanding and judgement, as children, infants, and the like; and ſuch as are preſumed to bear affection, as kindred, tenants, ſervants, and the like, *Swinb. part.* 4. *Sect.* 21. A Legatee is reputed a competent Witneſs to prove any other part of the Will but his own Legacy, or to prove any thing againſt himſelf touching his own Legacy, but not otherwiſe. And therefore, where there be but two Witneſſes of a Will, wherein either of them hath ſomewhat bequeathed unto himſelf, this Will cannot be ſufficiently proved for thoſe Legacies; but for the reſt of the Will it may be ſufficiently proved.

Witneſs competent to prove a Teſtament.

6. Where there is no queſtion nor oppoſition moved or had about, or againſt a Teſtament, there the Oath of the Executor alone is eſteemed a ſufficient proof of it, and in that caſe regularly no other proof is required. And where more proof is neceſſary, as in the caſes before, it is in the diſcretion of the Ordinary, what proof to admit and allow: And thoſe Witneſſes for number, nature, and quality; or that other proof that he doth deem and accept for ſufficient, is ſufficient; and the Teſtament ſo proved by ſuch Witneſſes, or other proof, is ſufficiently proved. And of this queſtion, ſee more *infra*, at *numb.* 7.

5. Where, and how a Teſtament good in his beginning, may become voyd by matter *ex poſt facto*, or not.

A Teſtament ſufficient and good in his creation and beginning, may afterwards become voyd by divers means; as 1. By Countermand or Revocation, and this is ſometimes by the party himſelf that made it, and ſometimes it is by another: And ſometimes it is expreſs, and ſometimes it is implyed; for it is a Rule, That any act or thing done, or words ſpoken by the Teſtator after the Teſtament made, that doth alter or croſs all or part of his Teſtament made before, is a Revocation of it, or of that part thereof that is ſo croſſed and altered, *Coo.* 4. 61. *Litt. Sect.* 168. *Plow.* 344, 341. *Swinb. part.* 7. *Sect.* 14, 15. *Perk. Sect.* 478. *Coo.* 3. 36. 8. 82, 83. And therefore if a Feme Covert make a Teſtament, and after take a husband, by this the Teſtament is revoked. And if a man make a Teſtament of land, and after make a Feoffment of the ſame land, which Feoffment is not good for ſome defect in the Livery of Seiſin or otherwiſe, ſo that the Feoffer dyeth ſeized of the land notwithſtanding; hereby the Teſtament as to this land is revoked. If ſeized of land, deviſeth it by VVill to *I. D.* and after makes a Feoffment of this land; and when he comes to ſeal it, he ſaith, will not this hurt my VVill? to which was anſwered, no: then ſaid he, I will ſeal it, and ſo he did, and a Letter

By Countermand or Revocation.

of

of Attorney to make Livery, which was made in part of the land; in this caſe it was agreed to be no Revocation of the VVill for the reſidue wherein no Livery was made, *Goldſ.* 33. *pl.* 7. If one had made a VVill in writing, and after ſay of it, it ſhall not be his VVill, this is a Revocation: But if one hath made a VVill, and another comes to him, and ſayes, have you made your VVill? and he ſaith, no; and he ſaith, will you make your VVill? and he ſaith, no; yet this is no Revocation, *Adjudge. Goldſ.* 33. *pl.* 7. So if a man make a latter Teſtament, and therein by expreſs words doth revoke the former Teſtament; or if a man by any writing, or by word of mouth (for one may by word of mouth revoke a Will in writing, albeit it be of land, *Dyer* 310. 34. *Eliz. B. R. Burton's* Caſe. *Goldſ.* 33. *pl.* 7.) do expreſly revoke a former Teſtament that he hath made, and make no new Teſtament (for ſo a man may do and dye inteſtate, if he will:) or if a man make a latter Teſtament, and make no mention of the former Teſtament; all theſe are Countermands of the former Teſtament. And the latter Teſtament doth alwayes revoke the former; and that albeit the Executor of the latter do refuſe the Executorſhip, or dye during the life of the Teſtator, or after his death; and albeit the King be made Executor of the former; and albeit the former be a written, and the latter but a *Nuncupative* Teſtament; and this holdeth true in a Teſtament of lands, as well as in a Teſtament of Goods and Chattels; but otherwiſe it is *è converſo*; for however a man may by word avoyd a VVill made in writing that is good, yet a man cannot by word make good and affirm a VVill made in writing that is voyd: And therefore if a man deviſe his land in writing to *I. S.* and his heirs, and *I. S.* dye before the Deviſor, and after the Deviſor ſay by word, That the heirs of *I. S.* ſhall have the land, as *I S* ſhould have had if he had lived; this verbal declaration will not affirm the diſpoſition. Alſo, the latter Teſtament doth infringe the former, albeit there be no mention made in the latter of revoking of the former; and albeit there be twenty VVitneſſes of the former, and but two or none of the latter; and albeit in the former, the Executor be appointed ſimply, and without condition; and in the latter, he be appointed conditionally, and the ſame condition be alſo broken, ſo that the condition be of ſomething then to come at the time when the condition was made: but if the Executor of the latter Teſtament be made upon ſome condition then preſent or paſt, the condition not exiſting, the former Teſtament is not revoked; and albeit the former Teſtament be made irrevocable, *i. e.* that the Teſtator ſay, I make this my laſt VVill and Teſtament irrevocable; and albeit the Teſtator hath ſworn not to revoke the former, the Oath being alſo revoked together with the Teſtament; and albeit the Teſtator enter into an Obligation, with condition not to revoke it, but then in this caſe he doth forfeit his Obligation. But the latter Teſtament doth not revoke the former in theſe caſes following, *i. e.* when the latter is imperfect in reſpect of VVill, *i. e.* when the Teſtator dyeth whiles he is making of it, and before he can finiſh it, or when it is vehemently ſuſpected that the Teſtator was compelled to make the latter by fear or violence, or induced to make it by fraud and deceit; or when the former was made by the Teſtator whiles he was in his good and perfect minde and memory; and the latter is made by him when he is *incompos mentis*, or when the latter is made by the perſwaſion and for the benefit of certain perſons; when the Teſtator is in extremity of ſickneſs, unleſs it appear plainly to be the expreſs Will of the Teſtator to revoke the former, or unleſs the Teſtator himſelf did dictate the latter, or in caſe the latter be in favour of the children of the Teſtator, or others who are to have the Adminiſtration of his goods if he dye inteſtate. 2. When the Teſtator doth make two Teſtaments, a former and a latter, both being written, and afterwards lying ſick upon his death-bed, they are both preſented unto him, and he is deſired to deliver to one of the ſtanders by, which of them he will have to ſtand for his laſt Will, and he deliver the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter Teſtament there is no Executor named, for then it is but a Codicil or

Condition.

addition to the former. 5. When the latter is made upon ſome ſudden diſcontent againſt the Executor of the former Teſtament, and afterwards he and the Executor are reconciled again; in theſe and ſuch like caſes, the latter Teſtament is no Revocation of the former. If the husband licenſe his wife to make a Teſtament, and after her death he forbid the Probate, this is a Countermand of the Teſtament, *Lit. Broo.* 55. But note here, that Revocations in general are not favoured in Law, and therefore he that will avoyd a former Will by Revocation, muſt ſee he prove it well.

Secondly, by cancelling of it.

2. A good Teſtament may become voyd by cancelling or other deſtruction of it, as where the Teſtator himſelf, or ſome other by his commandment, doth cut, or tear it in peices, deface it, or caſt it into the fire; by this means the Teſtament is made voyd, except it be in caſe where the Teſtator doth it unadviſedly, or it be done by ſome other without his conſent, or by ſome caſualty, or when he doth willingly pull away the Seals, and then he doth afterwards ſeal it again; or where the whole Teſtament is not cancelled or defaced, but ſome or the chief part thereof, as the naming of the Executor, or the like; for it is good ſtill for the reſidue; or where there be ſeveral papers, or writings, of one, ten, or each of them, containing the whole Teſtament, the cancelling or defacing of ſome of them doth not hurt the Teſtament, unleſs it can be proved that the Teſtators minde was to avoyd it all, or where the Teſtament is loſt in the life time of the Teſtator, or after; for in this caſe ſo much as can be proved by Witneſſes is ſtill in force, *Swinb. lib. 7. part. Sect. 16.*

Thirdly, by alteration of the eſtate of the Teſtator,

3. A good Teſtament may become voyd by alteration of the eſtate of the Teſtator; as when a man after the time of making the Teſtament, and before his death is convicted or condemned of ſome great crime, for the which the Law deprives him of the making of a Teſtament, as Treaſon, Felony, or the like. And yet if the crime be pardoned and purged before his death, the Teſtament may be good enough. And if a man of ſane and perfect memory make his Teſtament, and after become *inops mentis*, as every man for the moſt part is before his death, this doth not hurt the Teſtament. *Swinb. part. 7. Sect. 17. Coo. 4. 62.*

Fourthly, by intention to alter it.

4. A good Teſtament may become voyd by an intention onely to alter it when the Teſtator is hindred in his intention that it cannot take effect: And therefore if when the Teſtator intendeth to alter his Teſtament, or to make a new one, he be by fear or fraud forbidden or letten, that he dare not or cannot alter it, or the Notary or Witneſſes dare not, or may not be ſuffered to come to him; as when a wife or ſome other that is to have a benefit by the former Will, under pretence that ſhe hath a charge from the Phyſician that none ſhall come at him, or under pretence that he is aſleep, or the like, will not ſuffer any body to come at him; or when the Notary and Witneſſes are all preſent, and they make ſuch a noyſe or quarrelling, that they hinder the effect of his intent; or when the Teſtator is kept from doing it by importunate requeſts, and flattering perſwaſions; in all theſe caſes, and by theſe means the former Teſtament may become voyd, *Swinb. part. 7. Sect. 18.* But if it appear the Teſtator hath no purpoſe to alter the Teſtament when he is let, as aforeſaid; the fear is a vain fear, the Teſtator is prohibited at another time, and not the time when he doth intend to alter the Teſtament, but he hath ſundry opportunities after that time to do it, and doth it not, or he is drawn onely by the fair ſpeeches of a wife or friend, or by the weeping, or other trouble ariſing from the grief of the Legatary or Executor for the Teſtators ſickneſs, onely he is diſturbed; in theſe caſes perhaps it may not be voyd. And where it is voyd by the prohibition of a Legatary onely, it is voyd for ſo much as doth concern him onely, and not for the reſt of the Teſtament.

Fifthly, by making another of the ſame date.

5. A good Teſtament may become voyd by making another of the ſame date; for if two Teſtaments be found after the death of the Teſtator, and it cannot be diſcerned or proved which was made former or latter; the one of them doth overthrow the other, and both of them are become voyd; except they be both to the ſame purpoſe, or one of them be made in favour to wife and children,

children, &c. and the other to ſtrangers. *Swinb. part.* 7. *ſect.* 11. *Perk. Sect.* 479. And yet in the firſt caſe alſo the Teſtator by declaration of his minde, which of them he will have to take effect, may make either of them good.

6. A good Teſtament may be made void by the declaration of the Teſtators minde, as if a man have two Teſtaments lying by him, the one made after the other, and they are both ſhewed or delivered to the Teſtator when he lyeth ſick, and he by word or ſigne declare that he will have the former to ſtand; this declaration doth revoke the latter, and affirm the former. And where a man would revoke a Will for any of theſe cauſes, he muſt preſently after the death of the Teſtator put in a *Caveat* or exception in that Court where the Will is to be proved, and thereupon proceed to queſtion it, or by a prohibition in ſome caſes he may ſtay the Probate in the Spirituall Court. See more *infra* at *Numb.* 12. Sixthly, by the declaration of the Teſtator.

If a woman covert without the leave of her husband make a Teſtament of her husbands goods, and the husband doth after her death connive at the Probate, and deliver the goods accordingly, hereby the Teſtament of the wife is become good; but if an Infant or mad man make a Teſtament in the time of his Infancy or madneſs, and after the Infant or mad man become of full age, or ſober, before his death; it ſeemes theſe Teſtaments are void. *Perk. Sect.* 501. *Coo.* 1. 99. 2. 55. And yet if the Infant at his full age, or the mad man when he is ſober make a publication of this Teſtament, it may perhaps be good.

If a man make a former and a latter Will, and by this latter the former is revoked, and after the Teſtator declare himſelf that the former ſhall ſtand; by this the former that was void before, is now become good again. *Perk. Sect.* 479. *Coo.* 4. 61. *Plow.* 344. And yet if a man make a Will that is void, and it be proved after his death; this Probate will not make it good, but it doth remain void as it was before. 6. Where a Teſtament void or voidable in his Inception, may become good by ſome matter or accident *ex poſt facto*. And where not.

If a Feme ſole make a Will, and then take a husband whereby the Will is countermanded, and ſo become void; if her husband die, ſo that ſhe become ſole again: this accident will not make the Will good again, but it doth remaine void ſtill; but perhaps by a new publication after ſhe doth become ſole, it may become good again. See more *infra* at *Numb.* 11.

To the making of a good and ſufficient Deviſe, theſe things are requiſite. What ſhall be ſaid a good and ſufficient Deviſe or Legacy, or not.

1. That there be a deviſor, and he be a perſon able to deviſe, and that both in reſpect of the condition of his own perſon and of the thing whereof the Deviſe is made. See before at *Numb.* 4.

2. That there be a Deviſee, and that he be a Perſon capable and able to receive the thing deviſed, either at the time when the Deviſe is made, or at leaſt when the Deviſe is to take effect.

3. That the Deviſor have at the time of the deviſe made *animum teſtandi*, *i.* a mind to make a deviſe.

4. That the Will of the Deviſor be free, and not drawn or coacted by fraud, flattery, fear, or the like.

5. That the Deviſe be made in due manner and forme.

6. That the thing deviſed be a thing deviſable.

7. That it be deviſed upon lawfull termes and conditions.

8. That there be words ſufficient to make his mind known. Firſt, in repect of matter touching the Deviſor, and who may be a Deviſor.

9. That it be proved after the death of the Deviſor. *Perk. Sect.* 406. See before at *Numb.* 4. and after at *Numb.* 17.

10. And if it be a Deviſe of land, it is further required that the Deviſor be ſolely ſeiſed of the land, and not jointly ſeized with another; and that he be ſeiſed of an eſtate in Fee-ſimple: and that the Deviſe be in writing. And for the firſt of theſe it is to be known, that whoſoever may make a Teſtament, may make a deviſe of the ſame thing of which he may make a Teſtament. *Et ſic è converſo.* And whoſoever is diſabled to make a Teſtament, is diſabled to deviſe by ſuch a Teſtament. And therefore Infants may not deviſe their lands untill they be 21 years of age; nor their goods and chattels untill they be 14 years of age (or as ſome ſay untill they be 18 years of age.) Women that have husbands, cannot deviſe their lands to

their lands to their own husbands, or others, either by or without their husbands conſent, albeit there be a cuſtom to enable them thereunto; but all ſuch deviſes are void. *Coo. ſuper Litt.* 112. 4. 61. *Broo. Deviſe* 32. And Spirituall perſons, as Archbiſhops, Biſhops, Deanes, Archdeacons, Prebends, Parſons, Vicars, or any member of a Corporation may not deviſe the Lands or Goods they have in the right of their Churches and Corporations. *Perk. Sect.* 496. And for the ſecond thing, this is to be known.

Secondly, in reſpect of the matter touching the Deviſee. And who may be a Deviſee. And by what name.

1. That regularly whoſoever may be a Grantee, may be a Deviſee or Legatee. *Perk. Sect.* 505. 510. *Swinb.* 222. See *infra* at *Numb.* 18. And therefore a Deviſe made to any perſon or perſons, male or female, children or ſtrangers, bondmen or Freemen, Laymen or Clerks, Debtors or Creditors, Infants or men of full age, women ſole or covert, Colledges, Univerſities, Corporations, or the like, are good. But it is ſaid, that if any Legacy be given to an Heretick, Apoſtate, Traitor, Felon, Excommunicate perſon, Out-lawed perſon, Baſtard, unlawfull Colledge, Libeller, Sodomite, Uſurer, Recuſant convict, it is void by the Civill Law, except it be in ſome ſpeciall caſes. And yet it ſeems a Deviſe of lands to any ſuch perſon is good within the Statute of VVills. *Dyer* 303. 304. *B. R. Curia. Mic. 3 Ja.* A Deviſe to an Infant in the womb of its mother, at the time of the death of the Teſtator is void. New Termes of the Law *tit. Deviſe.* See *infra Numb.* 11. And yet if a man deviſe to ſuch an Infant, and he happen to be born before the death of the Teſtator, it ſeems in this caſe the Deviſe is good; for it is a rule. That the Deviſee muſt be capable of the thing deviſed at the time of the death of the Deviſor; if it be then to take effect in poſſeſſion, or if it be a remainder, he muſt be capable of it at the time when the remainder ſhall happen, or otherwiſe the Deviſe is void. *f. 9 Ja. B. R.* And a man may deviſe his lands, goods, or chattels, to his own wife, as well as to any other. *M. 19 Ja. Curia. B. R. Crumpe verſus Bodie.*

Incertainty.

Averment.

2. But he that may be thus a Deviſee, and is capable of a thing deviſed, muſt be certainly named and deſcribed; for if a Deviſe be to a perſon altogether incertaine, the Deviſe is altogether void. And therefore if I give my land to my beſt friend, or to my beſt friends, theſe are void Deviſes. *Coo. 6. 68.* If one have two ſonns of one name called *J. S.* and he deviſe to his ſon *J. S.* without any diſtinction; it ſeems this Deviſe is void for uncertainty; but in this caſe perhaps an averment which ſon is meant, may help. *Swimb.* 293, 294, 295, 296. So if one give to *J. S.* 20 l. and there be two or more of that name; this Deviſe is void, except it may be proved by ſo thing which of them he meant. So if one ſay in his Teſtament I give to one of the world 10 l. this Deviſe is void for incertainty. So if one give him 10 l. whoſe name is written in a Schedule in the cuſtody of ſuch a man; and in truth there is no ſuch Schedule in the cuſtody of ſuch a man to be found; or if there be no name written therein; it ſeems theſe Legacies are void for incertainty. So if a man give a Legacy to a man incertaine, and no ſuch man is to be found, and the meaning of the Teſtator cannot be known; this Deviſe is void. And yet if a man by his Will ſay thus, I deviſe to him that ſhall marry my daughter; this is a good Deviſe; and he that doth marry my daughter in my life-time, or after my death ſhall have it. And if a man deviſe any thing *ad pias cauſas*, as to the Church, or to the Poore, not expreſſing what Church or Poor; this perhaps may be a good Deviſe. So if a man gives 20 l. to his kindred; it is ſaid this is a Dood Deviſe, and that a reaſonable expoſition ſhall be made of it as neer the intent of the Teſtator as may be, *viz.* that thoſe in the next degree ſhall have it firſt, and then thoſe in the next degree to that ſhall have it afterwards; and if it be a Deviſe to the kindred of another man, that they ſhall have it equally. *Sed quære* of this Diviſe, for it ſeems altogether uncertain.) So if a man give to *J. S.* or *J. D.* 20 l. this is held to be a good Deviſe, albeit it be ſomewhat incertain, and the disjunctive ſhall be taken for a copulative, and ſo *J. S.* and *J. D.* ſhall take both by this Deviſe; but if in this caſe one of them be neerer of kin than the other, then it is ſaid, he ſhall have it for his life, and the other afterwards. *Swinb. part. 7. ſect. 9.* And if one deviſe 20 l. to *A.* or *B.* which of them *J. S.* will appoint; this is a good Deviſe, and he that *J. S.* ſhall appoint ſhall have it.

And

And if one deviſe to *J. S.* and his children; this is a good Deviſe and certain enough, and hereby he and his children ſhall take the thing deviſed together. *Plow.* 345. *Coo.* 1. 105. 155. *Perk. ſect.* 508.

3. And as the perſon to whom the Deviſe is made, muſt be capable, and certainly deſcribed and named, ſo muſt he be capable by that name by which the Deviſe is made to him, or otherwiſe the Deviſe is void, and therefore if a Deviſe be to the heirs of *J. S. J. S.* being living; this Deviſe is void. And yet if lands or Goods be deviſed to the Executors of *J. S.* and *J. S.* die before the Teſtator, and make Executors; this is a good Deviſe to the Executors. And if a man deviſe his land to *J. S.* for life, the remainder to the next of kin, [or next of blood] of *J. S.* this is a good Deviſe of the remainder. *Fitz. Deviſe* 27. *Plo.* 523. *Perk. ſect.* 509, 510 *Broo. Corporation.* 55. And if a man deviſe goods to the Pariſhioners of the Pariſh of *S*, to the uſe of the Church; this is a good Deviſe, and the Churchwardens may recover it. And if a man deviſe *Eccleſiæ ſanctæ Andreæ de Holborne*; it ſeems this is a good Deviſe to the Parſon of that Church. And if a man deviſe to the City of *London*, Univerſity of *Oxford*, or to Queens Colledge in *Oxford*, theſe are good Deviſes. But if one deviſe to the Commonalty of a Guild that is not incorporate, as to two of the middle men of the Guild of the Fraternity of Whiteacres in *London*, or the like; this deviſe is void.

4. And if the perſon be capable, well named, and capable by that name, if his name be truly ſet down, yet if his name be not ſo, but miſtaken, the Deviſe is void. And therefore if one intending to give 20 l. to *J. S.* deviſe to *J. N.* 20 l. this deviſe is void, both to *J. S.* and *J. N.* except the perſon be certainly denoted and deſcribed by ſome other circumſtance, as to *J. N.* the ſon of *J. S.* my Landlord, or the like. *Dyer.* 4. *Perk. ſect.* 505. *Swinb.* 289, 290. So if one deviſe to the Abbot of S. *Peter*, when the foundation is the Abbot of *S. Paul*; this Deviſe is void. And if one deviſe to a Corporation, and there be none of that name at the time of the Deviſe, nor during the life of the Teſtator, this Deviſe is void, and ſo alſo it ſeems the Law is, if there be a Colledge made after of that name. But if one deviſe a thing to the wife of *J. S.* and before the Deviſor die, *J. S.* dye, and ſhe take another husband, and is called by another name; yet this Deviſe is good. *Plow.* 344. So if one give a Legacy to *J. S.* Dean of *Pauls*, and the Chapter there and their Succeſſors, and after before the death of the Deviſor *J. S.* die, and another is made Dean; yet this Deviſe is good notwithſtanding this miſtake. For the third and fourth thing required in a good Deviſe, ſee before at *Numb.* 4. *Part.* 2. 3. *Brounl.* 1. *part* 13. Miſnaming.

And for the fifth thing, it is to be known,

1. That lands and tenements deviſable by cuſtome, may be deviſed by a Nuncupative Will without any writing for any time whatſoever, as Uſes at the Common-Law that are now withing the Statute might have been. *Coo. ſuper Litt.* 111. *Plow.* 345. *Swinb. part* 1. *ſect.* 12. Alſo thoſe Uſes that remaine at the Common-Law, and are not within the Statute, may be deviſed by word without any writing. But no eſtate can be made of lands by Deviſe upon the Statute, except the Deviſe be in writing; and ſo a man may deviſe his land, albeit he make no Executor; for an Executor hath nothing to do with the Free-hold of land. Alſo Goods and Chattells, leaſes for years of Lands, Wards, Villaines, and the like may be deviſed by word without any writing at all. *Plow.* 345. *Swinb. part.* 1. *Sect.* 12. *Dyer* 140. And yet it ſeems queſtionable whether a Leaſe for years of a Rent, Common, or ſuch like thing, be deviſable by word without writing. Fifthly, in reſpect of matter touching the manner and forme of the Deviſe. And how a Deviſe may be made.

2. The forme of words in a Deviſe is not at all regarded; and therefore if one ſay, I give, inſtitute, deſire, appoint, or will, that *J. S.* ſhall have my land, or that *J. S.* ſhall have 20 l. or let *J. S.* have my land or 20 l. all theſe Deviſes are as good as if he ſay, I deviſe to *J. S.* my land or 20 l. *Swinb. part.* 4. *ſect.* 4. *Plow.* 23. *Littl. Broo. ſect.* 316. *Dyer* 23. And therefore if one at this day ſince the Statute of Uſes deviſe that his Feoffees of the land ſhall be ſeized of the land to the uſe of *J. S.* and his heires, or to the uſe of *J. S.* and the heires of his body; or if ſuch a man deviſe that his Feoffees ſhall make an eſtate of the land to *J. S.* and

and his heirs; or to him and the heires of his body; this is a good Deviſe of the land in Fee-ſimple, or Fee-taile. And if a man make a Feoffment of his land to the uſe of his laſt Will, and then deviſe that his Feoffees ſhall be ſeized to the uſe of *J. S*; this is a good Deviſe of the land *per intentionem Paſche. 9. Jac. Newmans caſe.* And if I deviſe that *J. S.* ſhall have, hold, and occupy my land for his life; this is a good Deviſe of the land for his life. *Plow.* 546. *Coo.* 4. 66. 8. 95. If a man have a Leaſe for years for land, and he deviſe his Leaſe, or his Terme, or his Ferme, or the profits or occupation of the land; by either of theſe Deviſes his whole leaſe and all his intereſt in the land is given as well as by any other forme of words *Dyer* 122. 33. 128. *Coo.* 1. 83. 6. 42. *Dyer* 4. 33.

3. A man may deviſe lands, tenements, or hereditaments in poſſeſſion in Fee, for life or years; or he may deviſe it in reverſion, *viz.* to one for life, the remainder to another in Fee, or in taile, or in any other ſort, as a man may grant it by his Deed, and ſuch Deviſes are good. But if the Fee-ſimple of land be deviſed to one, the remainder cannot be deviſed to another, albeit the firſt Deviſe be but conditionall. And therefore if land be deviſed to *J. S.* and his heirs and if he dye without heirs, that it ſhall remain to *J. N.* & his heirs; this is a void remainder to *J. N.* So if a man deviſe his land to *J. S.* in Fee, *ita quod ſolvat J. N.* 20 l. and if he faile, that it ſhall remain to *J. N.* and his heirs, this remainder to *J. N.* is void; for if *J. S.* faile of payment, *J. N.* ſhall not enter and have the land, but the heir of the Deviſor. And yet perhaps a rent may be deviſed after this manner. Howbeit if another man have a Rent-charge of 20 l. a year, iſſuing out of my land for 20. years; and he deviſe this unto me untill I have levied 100 l. by way of retainder, to *J. S*; this remainder is not good. *Dyer* 139, 140.

Condition. 4. A Deviſe may be of Lands, Goods, or Chattels ſimply and abſolutely or conditionally; the ſimple Deviſe alſo may be *in præſenti*, or *in futuro*. And therefore as a Deviſe to one and his heirs *in præſenti*, is good, ſo a Deviſe to one and his heirs after the death of *J. S.* is good. *Plow.* 523. *Perk. ſect.* 163. See Condition *Coo.* 8. 95. If I deviſe land to *J. S.* and his heirs on condition, as ſo as, or *ita quod*, he pay 10 l. to *W. S.* or paying to *W. S.* 10 l. or *ad ſolvendum* 10 l. to *J. S*; the Deviſe in all theſe caſes is a good conditionall Deviſe; and if the condition be not performed or broken, the eſtate is ended, and the heir may take advantage of it. And therefore if lands be ſo given to the heir, the condition is idle, becauſe none can enter but him. And if I deviſe that, if *J. S.* pay my Executors 20 l. that he ſhall have White acre to him and his heirs for ever, or for life &c. this is a good Deviſe, and after the contingent ſhall take effect accordingly, and in this caſe and in ſuch like the heir of the Deviſor muſt keep the land untill till the contingent do happen. In like manner as if it be a chattell, the Executor ſhall keep the thing untill the condition be performed, and after a condition broken he ſhall take advantage of it.

Limitation. 5. A Deviſe may be alſo with a limitation, as in the caſes before; and as, where one gives land to another, and his heirs ſo long as *J. S.* ſhall have heirs of his body; or where one doth deviſe his land to *A* his ſon and his heirs for ever, paying to *B* his brother 20 l. when he ſhall come of age, and then that he ſhall enter and have it to him and his heirs, and if he die without heirs of his body, the ſaid *B.* then living then that *B* and his heirs ſhall have it in the ſame manner: And theſe and ſuch like Deviſes are good.

6. A man that is ſeiſed of land in Fee, may deviſe that his Executors ſhall ſell it; or may deviſe it to his Executors to ſell, or Deviſe it to his Executors, and that they ſhall ſell it; and theſe Deviſes are good. *Coo. ſuper Littl.* 112. 113. 236.

Clauſe of Diſtreſſe. *warrantiæ.* 7. A Deviſe may be of a rent, or of land reſerving a rent, with clauſe of Diſtreſſe. *Dyer* 348. 100. 8. 84, 85. *broken* 2. *part* 190. As if a man Deviſe land to *J. S*, paying 10 l. by the year to his wife, and if it be unpaid, that ſhe ſhall diſtraine for it; this is a good Deviſe: But a Warranty cannot be made by a Will. *Coo. ſuper Littl.* 386. And yet if a man deviſe land to another for life, or in Taile reſerving a rent; in this caſe the heirs of the Deviſor ſhall be bound to the Warranty

ranty in Law, and the Deviſee ſhall take advantage of it.

8. A man may deviſe his land to one, and deviſe a rent out of the ſame land to another, and theſe Deviſes are good. So a man may deviſe his land to one in Fee, and after deviſe the ſame land to another for life or years; and theſe are good Deviſes, and may ſtand together. *Plow.* 523. 540. *Dyer* 357. *Coo.* 8. 94. 83. So alſo if a man in the fore-part of his Will by generall words, deviſe all his lands to one in Fee, and in the latter part of his Will, deviſe ſome ſpeciall part of it to another in Fee; theſe Deviſes are good and ſhall ſtand together, as for example, if one have a Farm, and in the firſt part of his VVill, give this Farm to one, and in the latter part of his VVill give one Cloſe (a part of this Farm to another) or a man deviſe all his land in *B* (which is in the County of *Glouc.*) to *A* his daughter, and the latter part of his Will deviſeth all his land in the County of *Glouc.* in the poſſeſſion of *J.S.* to his ſon, and part of the land in *B.* is in the poſſeſſion of *J.S.* and in *Glouceſterſh.* theſe are good Deviſes & ſhall ſtand together. But otherwiſe, it is when the generall clauſe doth come laſt, as where one doth give his land to *A* his daughter and in the latter part of his Will, doth give all his land in *Hartfordſhire* in the poſſeſſion of *J.S.* to *W.* and the land given to *A*, is in *Hartfordſhire*, and in the poſſeſſion of *J. S.* in this caſe the Deviſes will not ſtand together, for the firſt Deviſe is void 38. *Eliz. Co. B.* Agreed divers times: and ſo alſo it is where both the Deviſes are particular, as, where firſt in a mans VVill, he doth give VVhite Acre to *A* and his heirs, and after in his VVill he doth give VVhite Acre to *B* and his heirs; in this caſe the firſt Deviſe to *A* is void. And yet in this laſt caſe, ſome have held the Deviſes ſhall be good, and that *A* and *B* ſhall be Joint-tenants *ideo Quære. Dyer* in his Lecture, 1. *& per Inſt. Dodr.* If one deviſe all his land to *J. S.* and his heirs excepting 20 l. for ſeven years, which he willeth ſhall be imployed for his children; this is a good Deviſe of this ſum of 20 l. a year. *Trin. 9. Ja. B. R.*

9. And a man may deviſe his land for ſo many years as *J.S.* ſhall name, and after, appoint that his ſon ſhall have it during the minority of his ſon, and both theſe Deviſes may ſtand together: And therefore, if *A* be poſſeſſed of the Mannor of *D* for years, and he deviſeth all his Term to his eldeſt ſon if he live ſo long, and if he die before he have any iſſue of his body, then to his younger ſon in the ſame manner, but withall, he doth appoint that his wife ſhall have the occupation of the land untill his eldeſt ſon be 21 years of age; theſe Deviſes ſhall ſtand together, and the wife ſhall enjoy the Mannour, for that time by this Deviſe. *Plow.* 523. 546.

10. A man may deviſe a term of years by way of remainder; as for example, A man that is poſſeſſed of a term of years of land, may deviſe it to *J. S.* for life, the remainder to *J. D.* or to *J. S.* for life, and that it ſhall after remain to *J. D.* or to *J. S.* for ſo many years as he ſhall live, and after to *J. D.* or in any ſuch like manner, theſe are good Deviſes both to the firſt, and to him in remainder alſo by way of Executory Deviſe, though not by way of remainder, and in this caſe the firſt Deviſee cannot hinder the ſecond Deviſee of the remnant of the terme. *Coo.* 8. 95. *Plow.* 519. 546. 516. 539. *Dyer* 277. But a man cannot by Deed in his life time grant his term in this manner. Nor if a man be poſſeſſed of a term can he entail it by his Will: And therefore, if a man poſſeſſed of his term of years of land Deviſe his term or his land to *J. S.* and his heirs, or to *J. S.* and the heirs of his body, or to *J. S.* and his iſſues, the remainder to *J. D.* this remainder is void, and it is a good deviſe of the whole term to *J. S.* and his Executors. *Coo.* 10. 87. 47. *Paſche* 17. *Jac. B. R. Child. verſus Baily.* Alſo a Chattell perſonall may (as it ſeems) be deviſed to one for life, and afterwards to another, but yet ſo as the one muſt have the property only, and the firſt but the occupation only, as if one deviſe that *J. D.* ſhall have the occupation of his plate for his life, and after that it ſhall remain to *J.S.* this is a good Deviſe of the plate to *J.S.* 37 *H.* 6. 30 *Littl. Broo. ſect.* 388. 314. 209. But if the thing it ſelf be deviſed to the firſt of them; then the Deviſe to the ſecond is void, for the gift of a chattell perſonall for one houre is the gift of it for ever. And ſo it did ſeem in the Lady *Daves* Caſe. *Hill. 9. Car. B. R.* Grant.

11. A Legacy of Goods or Chattels may be given to, or untill a certain time, or from or after a time certain or incertain; as for five years, or from, or untill the marriage of *A* or the like; and theſe Diſpoſitions are good. *Swinb. part.4. ſect.17.*

12. A man may deviſe his land for ſo many years as *J. S.* ſhall name, and if *J.S.* do name a certain number of years in the life-time of the Deviſor, this will be a good Deviſe. But if one deviſe his land for ſo many years, as his Executor ſhall name, it ſeems this Deviſe is not good. *Plow.* 524. 6. As touching the ſixth thing required in a good Deviſe, theſe things are to be known.

Sixthly, in reſpect of matter touching the thing deviſed, and what may be deviſed, and by what name.

Deviſe of land and tenements.

1. That Lands, Tenements, and Hereditaments for the nature and quality of them are deviſable as well as other things. *Dyer.* 371. *Coo.*8.83.6.16. *ſuper Littl.* 111. *Perk. ſect.* 496. 500. 497. 538. *Littl. ſect.* 167. *Dyer* 155. old *N. B.* And therefore by the cuſtome of ſome places, lands in poſſeſſion, reverſion, or remainder are deviſable in Fee for life, or years; and a man that hath a Leaſe for years of land, may deviſe the land at his pleaſure during his term. But by the ancient Common-Law in favour to heirs, the lands that a man had in Fee-ſimple were not deviſable by Teſtament, except only in ſome ſpeciall places by the cuſtome of the place, as Gavelkind-lands in *Kent*, and lands within certain Borrough-Townes, as *London, Oxford, &c.* and by the cuſtome of thoſe places ſuch lands are deviſable: And in ſome places the cuſtome is, that they may deviſe their purchaſed lands only; and in other places, that they may deviſe their lands deſcended alſo: And in ſome places the cuſtome is that they may deviſe for life only, and in other places, that they may deviſe in Fee-ſimple and Fee-taile alſo. And in all theſe places where ſuch cuſtomes are, they may deviſe their lands now as they might have done before the Statute; for the Statute hath not deſtroyed their cuſtome. And therefore at this day they that have ſuch lands in ſuch places, have their election either to deviſe according to the power the cuſtome doth give them, or according to the power the Statute doth give them, and in the firſt caſe the Deviſe is good againſt the heir for the whole; and in the laſt caſe, it is good againſt him for two parts in three only. Alſo by the Common Law, the Uſes of lands were deviſable, as Goods, and Chattels were at the pleaſure of him that had them. *Perk. ſect.* 496. 528. 538. But otherwiſe, and in other caſes, lands and tenements, might not be deviſed and diſpoſed by Will, untill 32 *H.* 8. at which time the owners of lands, tenements, rents, &c. were by Act of Parliament enabled to deviſe and diſpoſe their lands as followeth: He that hath any land in poſſeſſion, reverſion, or remainder by Socage Tenure, and hath no land held *in Capite*, or by Knights Service, may deviſe all his land, or any rent, Common, or other profit apprender out of it to any perſon in Fee-ſimple, Fee-taile, for life or years, at his pleaſure. *Stat.* 32 *H.* 8. *c.* 1. 34 *H.*8. *c.* 5. He that hath any ſuch land held of the King *in Capite* by Knights Service, or by Knights Service and not in Chief, or held of any common perſon by Knights Service, may deviſe two parts thereof in three, to be divided, or any rent &c. out of thoſe two parts at his pleaſure, and no more; for the third part muſt deſcend to the heir and come to ſatisfie the Lord his duties; and therefore the Deviſe of the whole land in this caſe is void for the third part. He that hath any ſuch land held by Knights Service *in Capite*, and other lands held by Socage Tenure may deviſe two parts of the whole, and no more, or any rent &c. out of it at his pleaſure. He that doth hold land of the King by Knights Service onely, and not *in Capite*; or of a meane Lord by Knights Service, and hath alſo other lands held by Socage Tenure, may deviſe two parts in three of all the land held by Knights Service or any rent &c. out of it, and all his Socage land at his pleaſure. So that now by theſe Statutes, a man that hath lands in Fee-ſimple, may deviſe them in Fee-ſimple, Fee-taile, for life, or years abſolutely, or conditionally at his pleaſure. And therefore if one deviſe his land to one for life, the remainder in Fee, or Fee-taile to another; or deviſe his land to *B.* the remainder to the next heir male of *B.* and the heirs males of the body of ſuch heir male or the like; theſe are good Deviſes. But for the more full underſtanding of theſe things, it is to be known in the next place.

2. That this Statute doth not enable men to deviſe land that are diſabled by Law

Law in reſpect of their perſons or minds, as Infants, women Covert, men, *de non ſana* memory, or the like; nor ſuch as are diſabled in reſpect either of the nature of their land, as Copi-holders (for Copi-hold-land is not deviſable) or of the eſtate they have in the land, as Tenants in Taile, or *pur autervie*, or Joynt-tenants; for theſe can no more deviſe the land they do ſo hold, than they could before the Statute. But ſuch as are ſeiſed of land in Common, or Coparcenary, may deviſe their land as well as thoſe that are ſole ſeized. See the Statute *Coo. ſuper Littl.* 111. *Perk. ſect.* 544. *Littl. ſect.* 287. *Dyer*, 210. old, *N. B.* 89. *Perk. ſect.* 500, 539, 540. 446, 497, 498. And if two be Joint-tenants for life, the Fee-ſimple to one of them; he that hath the Fee-ſimple, may deviſe his Fee-ſimple after the death of his companion. Neither doth this Statute enable thoſe that are ſeiſed of lands in Fee, in the right of their houſes and Churches to deviſe the ſame lands: And therefore, Biſhops, Deans, Parſons, Vicars, Maſters of Hoſpitals, or the like, can no more deviſe the lands belonging to their Biſhopricks, &c. than they could before the Statute, but the lands they are ſeized of in their own right, they may deviſe like other men.

3. Heriditaments that are not of any yearly value, are ſome of them deviſable, and ſome not; for if the King grant to one and his heirs *bona & catalla felonum & fugitivorum vel ut lagatorum*, Fines, and Amercements within ſuch a Mannour or Village; in this caſe, the owner can neither deviſe theſe things to another, as part of the two parts; nor leave them to deſcend for a third part. *Coo.* 10. 81. 3. 32. *ſuper Litt.* 111. And yet if one have a Mannour unto which a Leet, Waiſe, Eſtray, or the like is appendant or appurtenant; thereby the Deviſe of the Mannour with the appurtenances, theſe things may paſſe as incident to the Mannour: But if a man have a Hundred, with the goods of Felons, Outlawes, Fines, Amercements, *Retorna brevium*, and other ſuch caſuall Hereditaments within the ſame Hundred, and theſe have been uſually let to Farm for a rent; in this caſe, theſe things may be deviſed or left to deſcend for a third part.

4. Such uncertain Franchiſes as before that are Hereditaments of no yearly value, albeit they are not deviſable, yet may reſtraine the deviſe of a mans lands and tenements, and make it void for a third part, if they be held *in Capite*, for if it is not requiſite, that the thing held by the Tenure *in Capite* be deviſable; and ſuch things as may not be left to deſcend to the Lord for a third part, and to ſatisfie him, his duties, may notwithſtanding be deviſable, or reſtrain the Deviſe of other lands and tenements, and make it void for a third part. And therefore, a Reverſion upon an eſtate taile, which is dry and fruitleſs, if it be holden of the King by Knights Service *in Capite* will hinder the Deviſe of the third part of a mans lands and tenements: Alſo an eſtate taile of lands held *in Capite* may reſtrain the Deviſe of a third part of other lands. And therefore, if ſuch lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in Socage; if he have any iſſue, he can deviſe but two parts of his Socage land. And where the Statute ſpeaks of a remainder, it is to be intended of ſuch a remainder, only, as may draw Ward and Marriage by the Common-Law, and this is that remainder only, that doth hinder a Deviſe.

And therefore if *A* be ſeized of lands in Socage Tenure; and *B.* be ſeized of lands in Fee, held *in Capite* by Knights Service, and *B.* make a Leaſe for life or gift in Taile to *C.* the remainder to *A* in Taile or in Fee; in this caſe, *A.* during the eſtate for life or in Taile, may deviſe all his Socage-land, notwithſtanding this remainder. But if a man make a Leaſe for life or years, and after grant the reverſion for life, or in Taile, the remainder in Fee, and after the Grantee for life dyeth, or Donee in Taile dyeth without iſſue, in this caſe, this remainder which now is in point of reverſion, will reſtrain the Deviſe of other lands, and make it void for a third part. *Coo.* 10. 81, 82. *ſuper Littl.* 111. *Coo.* 3. 35. 30. 34.

5. In all caſes where a man is reſtrained to deviſe any part of his lands held

in Socage, he muſt have lands held *in Capite* at the ſame time, and therefore the time of having of lands to deviſe, and holding of other lands *in Capite*, and diſpoſing of the lands to be deviſed, muſt concurre. And therefore, if a man be ſeiſed of an Acre of land in Fee, held of the King in Chief by Knights Service, and of other two Acres in Fee held in Socage, and enfeffee his younger ſon of the Acre held *in Capite*, and of one of the other Acres, or convey it to the uſe of his wife, or for the payment of his debts, &c. and after purchaſe land held in Socage; in this caſe, he may deviſe all the new purchaſed land held in Socage without reſtraint. *Coo.* 10. 81. 11. 24. 3. 30. 34, 35. *ſuper Littl.* 111. *Dyer* 158. So if a man be ſeiſed of lands held by Knights ſervice *in Capite* in poſſeſſion, reverſion, or remainder, and of lands held in Socage, and by his Will in writing, doth deviſe all the ſaid lands, and after the land held *in Capite* is recovered from him, or aliened by him *bona fide*; in theſe caſes the Deviſe is good for all the land held in Socage: And hence it is, That if the King grant land to one in Fee Farm to hold in Socage at a rent, and after grant this rent to another and his heirs, to hold *in Capite*, and the Grantee of the rent doth grant it to him that hath the land; in this caſe, becauſe the rent is extinct, and he cannot be ſaid to hold lands *in Capite*, this ſhall not reſtraine the Deviſe of any of his lands.

And yet if a man hold ſome lands by Knights Service *in Capite*, and other lands in Socage, and be diſſeiſed of the lands held *in Capite*; he cannot deviſe all his Socage land, but the Deviſe will be void for a third part, for he is ſaid to have that land ſtill, whereof he hath the right. And albeit the Statute ſay [that he that hath lands held of the King *in Capite*, and other lands in Socage, may give two parts for the advancement of his wife, paiment of his debts, preferment of his children] whereby he is reſtrained to deviſe any more. And therefore, if by act, executed in his life time, he convey two parts to any ſuch uſes or intents, he cannot deviſe any more by his Will, but the reſidue muſt deſcend, yet this alſo is to be intended of the land he hath at the ſame time. For if a man be ſeiſed of land held in Socage of the yearly value of 20 l. *per annum*, and he hath not any land held *in Capite* by Knights Service, and he make his Will in writing, and by it, deviſe his Socage land to one in Fee, and then purchaſe land of the value of 20 s. *per annum* held *in Capite*, and die; this will make the Deviſe void for a part of the land that is held in Socage: But if a man ſeiſed of land in Fee of Socage Tenure, aſſure it to the uſe of his wife for her Jointure, and after purchaſe lands held *in Capite* by Knights Service; he may deviſe two parts in three of all this *Capite* land, and the King ſhall not have any thing out of, or for the Socage land: If a man ſeiſed of lands, part of which are held *in Capite*, and part in Socage make a Feoffment of the lands held *in Capite*, (being two parts in three of the whole) to the uſe of him and his wife for life, with divers remainders over; in this caſe, he may not deviſe any of the Socage land. And if a man have no Socage land but *Capite* land, and convey it away in Fee-ſimple, keeping no Rerverſion to any ſuch uſe, and after purchaſe Socage land; he may deviſe all the Socage land newly purchaſed. *Coo.* 34. 11. 24.

6. As the Teſtator enabled to deviſe by this Statute without reſtraint, is, and muſt be one that hath the land he doth deviſe at the time of the Deviſe made, and no other land then to be an impediment to his Deviſe, ſo he muſt have a ſole eſtate as well in the land he doth leave to deſcend to the heir, as in the land he doth Deviſe: And therefore, if lands held *in Capite* be conveyed to a man and his wife, and the heirs of their two bodyes; and this man hath other lands whereof he is ſole ſeiſed held of the King *in Capite* by Knights Service; in this caſe he may not deviſe two parts of the whole, ſuppoſing this may ſuffice for the Kings third part, for he may deviſe but two parts of the reſidue; *i. e.* of that whereof he is ſole ſeiſed, either at the time of making of the Will, or at the leaſt at the time of the death of the Teſtator. *Coo.* 3. 32.

7. The eſtate of the land that is held, muſt continue after the death of the Tenant

Tenant, otherwiſe it will be no reſtraint, *Coo.* 10. 84. And therefore, if a Tenant in Tail be to him and the heirs males of his body, the remainder in Fee to another of Lands held by Knights Service *in Capite*; and he is ſeized of other lands in Socage in Fee, and by his Will in writing deviſe all the Socage land, and dye without iſſue male; in this caſe, the Deviſe is good for all the Socage land. And ſo alſo it is, where the eſtate the Anceſtor had of the land held is defeated by condition. 8. That which a man cannot diſpoſe by any act in his life time, ſhall not be taken for any ſuch Mannours, *&c.* whereof a man may deviſe two parts by authority of this Statute at his death: And therefore in the caſe of an undivided eſtate of lands between husband and wife, where the husband can make no diſpoſition for longer time than during the Coverture; theſe lands are not to be eſteemed ſuch as are to be accounted amongſt the lands, whereof two parts in three are deviſable. *Coo.* 3. 32. 9. The Tenure by Knights Service muſt continue after the death of the Deviſor, otherwiſe the land ſo held will be no reſtraint. And therefore if the King grant land to one and his heirs, to hold during his life by Knights Service *in Capite*, and after in Socage; or to hold during his life in Socage, and after by Knights Service; in theſe caſes, the Grantee may deviſe all his land, notwithſtanding the Tenure of this land, *Coo.* 10. 84. 3. 34. 10. The King or other Lord muſt have a full and clear yearly value of the third part left to deſcend to him, and the value is to be eſteemed as it is, and doth happen to be at the time of the death of the Teſtator; for the King or other Lord muſt have the like and equal benefit for his third part, as the Deviſee hath for the two parts, without diminution or ſubſtraction; when therefore a man will have his Deviſe good for the reſidue, he muſt take care that the third part be ſo left; for if the third part be not valuable, or be charged with any rent, *&c.* or be upon any uncertainty, as if it be upon a poſſibility only, as where a man and his wife be ſeized of a joynt eſtate Tail made during the Coverture, and he Deviſe other lands to her on condition, that ſhe ſhall wave her eſtate made during the Coverture, and ſo intend that that part of his land ſhall be left for the Kings part, this Deviſe will not be good for the reſidue; and albeit the wife do wave the eſtate after the husbands death, yet this will not help the matter, or make the Deviſe good for that part for which it was voyd before: But it is not material by what Tenure the third part deſcending be held: For it is holden by the better opinion, That if a man be ſeized of 20 *l.* land held of the King *in Capite*, and 10 *l.* land held of a Subject by Socage, and he deviſe all the *Capite* land to a ſtranger; that this is a good Deviſe for the whole, and that the King ſhall be ſatisfied by the Socage land. And if be of the value of the third part, albeit it be but of an eſtate Tail whereof the Anceſtor was ſeized, or it be new purchaſed land, yet it is ſufficient: And therefore if ſome lands be given to a man and the heirs of his body of the value of 10 *l. per annum*, and he be ſeized of other lands in Fee-ſimple to the value of 20 *l. per annum*, and all or part of theſe are held *in Capite* by Knights Service; in this caſe he may deviſe the lands in Fee-ſimple, and leave the entailed land to deſcend for a 3d part: And if a man be ſeized of ſuch land, and convey it to the uſes within the Statute, or any of them, and after purchaſe new land, and leave that to deſcend, this is ſufficient, *Coo.* 3. 32. 31. *ſuper Litt.* 111. 10. 84. 11. The third part that is left to deſcend to ſatisfie the King or other Lord, muſt deſcend immediatly, and he muſt not ſtay for it. And therefore, if a man be ſeized of three Acres of land held by Knights Service *in Capite*, and make a Leaſe of one Acre for life, and after deviſe the other two Acres; this Deviſe is not good for the whole two Acres, but for two parts in three thereof onely; and albeit the Tenant for life dye afterwards, yet this will not help the matter. But if the Deviſor leave a full third part immediatly to deſcend in Fee-ſimple or in Fee-tail, he may deviſe the other two parts at his pleaſure. And if he do not leave a third part to the full, it muſt be made up and ſupplyed out of the other two parts, which in caſe of the King is done by Commiſſion out of the Court of Wards, and in caſe of a Subject by Commiſſion out of the Chancery, *Coo.* 3. 34. 12. As the third part left to deſcend, muſt be of as good value as either of the other two parts is at the time of the

death of the Teſtator, or otherwiſe the Deviſe of all the reſidue will not be good; ſo muſt it be taken out of the lands of the Teſtator indifferently: And therefore, if a man be ſeized in Fee of land held in Chief by Knights Service, and make a Feoffment of the one half of it to the uſe of himſelf for life, and after to the uſe of one he doth intend to marry, and after to the uſe of another in remainder, or to any other ſuch like uſes within the Statute, and after he doth marry the ſame woman, and after he deviſeth the other moity to his wife, children, or any other; in this caſe, albeit the wives eſtate have precedency, yet the King ſhall have his third part out of both the moities equally. So if one be ſeized of Gavel-kind land held *in Capite*, and his ſon being dead, deviſe part of it to one of his grand-children, and part of it to another, and part to a third Tail; in this caſe, the Kings third part ſhall come out of all the three parts equally, and accordingly the Deviſe will be voyd for ſo much to every one of them, *Coo. ſuper Litt.* 111. 9. 133. 3. 32. 30. So if one hold three ſeveral Mannours of three ſeveral Lords, he cannot deviſe two of theſe Mannours, leaving a third to deſcend, but he may deviſe two parts of every of the third Mannours, and a third part of each Mannour muſt deſcend to each Lord, for there muſt be an equality in theſe things. For further illuſtration of which things, the examples following are to be heeded. *W. B.* being ſeized of the Mannour of *Thoby in Capite*, and of lands in *Fobbing* held in Socage in Fee, and he and his wife being ſeized of the Mannour of *Hinton* held *in Capite* to them and the heirs of their two bodies begotten by an eſtate made to them during the Coverture for the joynture of the wife, the reverſion to *W.* in Fee, and *Thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W. B.* by his Will in writing doth deviſe *Thoby* to his wife for life, upon condition that ſhe ſhall not take her former Joynture, with divers remainders over, and dye, and ſhe refuſed her former Joynture in *Hinton*; in this caſe it was adjudged that the Deviſe was not good for the whole Mannour of *Thoby*, and that the Mannour of *Hinton* was not a ſufficient third part to deſcend, *Coo.* 3. *Butler* and *Bakers* Caſe. *L. L.* being ſeized of the Mannour of *Affaland*, *Heanton*, *Rillaton*, *Pengelley*, *Willeſworthy*, and *Triveſquite* (the laſt onely held *in Capite*) in Fee, and having iſſue *Thomas* his eldeſt ſon, *William*, *Humphrey*, and *Richard*, younger ſons, which *Richard* had iſſue *Leonard*, makes a Feoffment of theſe Mannours to divers uſes, *viz.* of the Mannours of *R*, *P*, *W*, and *A*, to the uſe of the Feoffer, for life, and after to the uſe of ſuch perſon as he ſhould appoint by his laſt Will, and after to the uſe of *W.* his ſecond ſonne in Taile, and after to his other ſonnes in Tail, and after to the uſe of the Feoffer and his wife in Taile, and after to the uſe of the Feoffer and his heirs for ever, *Coo.* 10. 78. *Leonard Lovels* Caſe. *Coo.* 11. 24. And of the Mannour of *H.* to ſuch like uſes, and of the Mannour of *T.* alſo to ſuch like uſes, and the ſame uſes were with power of Revocation: And after the Feoffor purchaſed eight Acres of other land held in Socage, and after did revoke the uſes of the Mannours of *R*, *P.W.* and *A.* and after deviſed ſome of the ſaid Mannours (excepting ſome peices) and the ſaid eight Acres of land to his eldeſt ſon and the heirs male of his body for 500 years on certain conditions, and if he dye without iſſue, that it ſhall go to *William*, *&c.* and afterwards he dyed ſeized of the ſaid eight Acres of land, and the lands deviſed by the Will at the time of the death of the Teſtator were of the yearly value of 24 *l.* 14 *s.* 10 *d.* *per annum*, *& non ultra*, and the lands whereof the Feoffment was made, and not revoked, were at the time of the death of the Teſtator of the value of 55 *l.* 6 *s.* 8 *d.* in this caſe, it was adjudged that the Deviſe of the eight Acres newly purchaſed was voyd, at leaſt for a third part, and reſtrained by the reverſion in Fee expectant upon the eſtate Tail made to the younger ſon of the Mannour held *in Capite*. And it was reſolved, That if a man be ſeized of three Acres of equal yearly value, one of them held of the King by Knights Service *in Capite*, and have iſſue two ſons, and give the Acre ſo held; and another of the Acres to his younger ſon, whereby he hath ſo executed his power by the Statute, that he cannot deviſe by his Will any part of the third Acre; and after he purchaſe three Acres of equal value held in Socage; that in this caſe, becauſe he hath the reverſion in

Fee

Fee upon the eſtate Tail made to the younger ſon, he can deviſe no more but two parts of the ſaid land ſo newly purchaſed. But if the reverſion be gone before the purchaſe, he may deviſe the whole; but if a man be ſeized of lands in Fee, part of which are held of the King *in Capite* by Knights Service, and he convey two parts of it unto any of his ſons, or to the uſe of his wife for life, or in Tail; in this caſe, albeit he may not deviſe any part of the reſidue, yet he may by his Will deviſe the reverſion of the two parts. And in caſe, where he hath not conveyed the full two parts, he may deviſe ſo much as to make up that he hath conveyed full two parts: And it was further reſolved in the ſame *Leonard Lovets* caſe, That whereas the Statute ſaith, All perſons, *&c.* having, *&c.* of any Mannours, *&c.* in poſſeſſion, reverſion, or remainder, *&c.* and the Feoffer *L. L.* in the caſe before had a remainder in Tail expectant upon the eſtates in Tail limited to the ſons; that this remainder was not within the Statute, nor would have reſtrained the Deviſe, but for the reverſion in Fee afterwards, *Coo. 6. 16. ſuper Litt.* 111. *A.B.* being ſeized in Fee of the Mannour of *Gracedin* held *in Capite*, and of the value of 30 *l. per an.* and of the Mannour of *Normanton* held *in Capite*, of the value of 18 *l. per an.* in conſideration of a marriage with *M*, did covenant to ſtand ſeized of the Mannor of *G*, to the uſe of himſelf and the heirs males of his body on the body of the ſaid *M*, and after to the uſe of *W. B.* his brother, and the heirs males of his body, and after to the uſe of another brother in Tail, and after to the uſe of his own right heirs, and of the Mannour of *N* to the uſe of himſelf and *M* he is to marry, and the heirs of his body, and after the remainders as before of the other Mannour, and after the marriage is had, and *A B* doth purchaſe other lands held in Socage of the value of 3 *l. per annum*, and then deviſed the ſame new purchaſed lands; in this caſe, it was adjudged that the Deviſe was voyd for a third part of the Socage land, in reſpect of the reverſion dependant upon the eſtate Tail, and yet that it was a good Deviſe for two parts of the new purchaſed land, albeit he had executed his power, and given more than two parts to the uſe of his wife, *Coo.* 11. 23. *Henry Harpur's* Caſe. And in theſe caſes where a man hath land held *in Capite*, and other land, and he convey the land held *in Capite* to any of the Uſes within the Statute, as to his younger children or the like, or convey it with power of revocation onely, ſo that he hath power of the land ſtill, and after he purchaſe land held in Socage; in this caſe it ſeems he may deviſe all the land newly purchaſed, as if the land were conveyed without any ſuch power of revocation, *Coo.* 10. 83. *A* being ſeized of land in Fee held of the King *in Capite*, made a Feoffment of two parts of it to the uſe of his wife, for her life, for her Joynture, and after made a Feoffment of the third part to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit and appoint by his laſt Will and Teſtament in writing, and afterwards he did by his laſt Will in writing deviſe this third part to one in Fee; in this caſe it was reſolved that the Deviſe was good for the whole third part, *Coo. 6.* 17. Sir *Edwards* Caſe. And yet if a man make a Feoffment in Fee of land held *in Capite* to the uſe of his laſt Will, albeit the Deviſe of the Land be with reference to the Feoffment, yet it is voyd for a third part. *E.B.* being ſeized of ſix Mannours, the one in Fee, and the reſt in Tail, with the reverſion expectant to him and his heirs, and hath iſſue *T. B.* divers of which Mannours are held of the King *in Capite* by Knights Service, and every of them of equal yearly value, by his laſt Will in writing did deviſe all the ſaid Mannours to divers perſons and their heirs for payment of his debts, and advancement of his children, and then died, and the eſtate in Tail that deſcended to his iſſue was more than a third part of all; in this caſe it was reſolved that the Deviſe was good for two parts of the reverſions, and for the entire Mannour in Poſſeſſion, and not voyd for a third part of the Mannour in Poſſeſſion, and for all the reverſions in Fee, *Coo.* 10. 81. *Tr.* 34. *Eliz. Bedinfield's* Caſe. A man being ſeized in fee of Gavelkind land in *Kent*, part whereof is held of the King *in Capite*, and part of Common perſons in Socage, hath iſſue *A*, who hath iſſue *B*, *C*, and *D*. and *A* deviſeth ſome of theſe lands to *B*, and ſome to *C*, and ſome to *D* his Grandchildren in Tail; in this caſe the Deviſe is voyd for a third part of the whole,

as

as well for the land held in Socage as the land held *in Capite*, *Coo. Rep. Stamf. Per.* 8. And yet if in this caſe no Will be made, the King ſhall have but a third part of that which doth deſcend to the eldeſt ſon, the heir at the Common Law, and not the third part of that which doth deſcend to the younger ſons by cuſtome. And if lands deviſable by cuſtome come into the Kings hands, and he grant them to hold of him *in Capite*, and the Patentee deviſe them to the uſe of his wife, children, or for payment of his debts, *&c.* in this caſe the Deviſe is voyd for a third part: And here note, that in all the caſes before, where a man is reſtrained to deviſe a third part of his land, if he deviſe the whole, the Deviſe is good notwithſtanding for ſo much as he hath power to deviſe. See more, *Brownl.* 2. *part.* 105, 106, 107. And enquire what alteration is made in the Law in theſe Caſes by the order of Parliament, whereby theſe Tenures and the Incidents thereof are taken away. And as touching the thing deviſed, it is further to be known. 13. That a man muſt have right to, and poſſeſſion of the land he deviſeth, or elſe the Deviſe is not good. And therefore if a Diſſeiſor deviſe the land he hath gotten by Diſſeiſin, this Deviſe as to the Diſſeiſee is voyd, *Plow.* 485. And if a man be diſſeiſed of his land, ſo that he hath nothing but a right thereof left, and then he deviſe this right, or deviſe the land, this Deviſe is voyd. And if one contract for land, and pay his money for it, but hath no aſſurance of the land, and he deviſe this land to another, this cannot be a good Deviſe of the land, but perhaps the Deviſee may in a Court of equity compell him that hath received the money to aſſure and ſettle the land according to the Deviſe. *Nevils* Caſe. And if one deviſe another mans land, this Deviſe is voyd; but if he after the Deviſe made purchaſe this land, now is the Deviſe good, *Plow.* 144. *Fitz. Deviſe* 7. If a man bargain and ſell land to me on condition to re-enter, if he pay me 10 *l.* and I covenant that I will not take the profits untill default of payment, and he make a Leaſe of ſix years of it to another, and after break the condition; in this caſe I may deviſe this land, and the Deviſe will be good, *Adjudged Powſley* and *Blakemans* Caſe. 14. A Seigniory, Rent, or the like thing is deviſable as land is, and will paſs without the Atturnement of the Tenant, *Perk. Sect.* 538. *Litt. Sect.* 585, 586. *Dyer* 253. 140. 5. 52. *F. N. B.* 121. *Coo. ſuper Litt.* 111. 8. 83. 3. 33. *Brownl.* 1. *part.* 75, 76. The like Law is of a reverſion alſo. And a man may deviſe a Rent *de novo* iſſuing out of land, or a Rent iſſuing out of land that is in *eſſe* before. And therefore if a man make a Leaſe for life or years, rendring Rent, the Leſſor may deviſe this Rent. So if a Rent be granted to one and his heirs, the Grantee may deviſe this Rent. So a man that is ſeized of land in Fee, may deviſe any Rent out of it at his pleaſure. And therefore if a man that holdeth his land by Knights Service in Chief, by his Will deviſe any Rent Common, or other profit out of it; this Deviſe is good, and that albeit the Rent or Profit doth amount to the value of the whole land; as if one have three Acres of land worth 3 *s.* by the year, and he deviſe 3 *s.* Rent out of it; this is a good Deviſe of the whole Rent; but in this caſe the Rent ſhall iſſue out of two parts of the land, and a third part ſhall be free and not charged with it, but he may charge 2 parts in 3 parts of ſuch land at his pleaſure. And ſo alſo it is if a man have lands holden by Knights Service, and not *in Capite*, and other lands in Socage, he may charge two parts of the Knights Service land, and all his Socage land at his pleaſure. And if a man have lands held in Socage, and no lands held *in Capite*, or by Knights Service, he may deviſe what Rent he will out of it. But a man cannot deviſe a Rent Common, or any ſuch like thing out of another mans land that is none of his own, nor out of that he hath not. And therefore if one deviſe 10 *l.* out of his Mannour of *Dale*, when in truth he hath no ſuch Mannour, this Deviſe is voyd. If a Rent be granted to me for the life of *I. S.* it ſeems I may not deviſe this Rent, but that the Terre-tenant ſhall hold it as an Occupant, *Dyer* 253. 15. Where a man is ſeized of a houſe in Fee, and may deviſe the houſe it ſelf, there it ſeems he may deviſe the doors, windows, wainſcot, or the like Incidents of the houſe. And where a man may deviſe the land it ſelf, it ſeems he may deviſe the trees or graſs growing upon the land, *Quando licet id quod majus, videtur & licere id quod minus.* But where the land it ſelf is not deviſable, there ſuch things incident or annexed to,

Deviſe of a right to Land, or of Land that is another mans.

Deviſe of Rent, Common, Seigniory, or the like.

Occupant.

Deviſe of houſes, doors, glaſs, wainſcot, *&c.*

or

or growing, or being upon it, are not deviſable. And therefore the Tenant in Tail for life or years of land, may not deviſe the houſes or windows, doors, or wainſcot of houſes, or trees or graſs being or growing thereupon, but this Deviſe is voyd, *Coo.4.63. Perk.Sect.*512,518. *Coo.*11. *Rich. Lifords* Caſe. *Kelw* 88. 16. Where a man hath a Uſe that is not executed by the Statute of Uſes, but remains at the Common Law, he may deviſe it as he may any other thing, *Perk. Sect.* 50. *Dyer.* And therefore if one be poſſeſſed of a Term of years, and grant it over to another to the uſe of the Grantor, he may diſpoſe this uſe by his Will, for it is in the nature of a Chattel. But if a man have ſuch a uſe in joynt-tenancy, he cannot deviſe it, *See Uſes.* 17. All manner of Goods and Chattels real and perſonal may be diviſed by Teſtament. And therefore Leaſes for years of lands, Grants for years of Rent, Common, or the like, Wardſhips of the bodies and lands of heirs of Tenants by tenure *in Capite*, and by Knights Service, Cattel, as Oxen, Sheep, Horſes, *&c.* Gold, Silver, Money, Plate, Houſhold-ſtuff, as Beds, Pots, Pans, Platters, *&c.* Corn, Wood, and Implements of Husbandry may be deviſed by Will; and not onely thoſe a man hath at the time of the Deviſe, but thoſe a man is to have or may have afterwards. And therefore it is held, a man may give his corn that ſhall grow in ſuch a ground the next year after his death, or the wool or lambs his flock of ſheep ſhall yeild the next year after his death; and that theſe Deviſes are good; but if in this caſe there ſhall be no ſuch corn growing in that ground, or any lambs or wool ariſing out of his flock that year, the Legacy is fruitleſs. And yet if the Teſtator devile to *I.S.* 20 quarters of corn, or 20 lambs, and both will that the ſame ſhall be paid out of his corn that ſhall grow, or out of his flock the next year, and there be not ſo much corn, or not ſo many lambs, or not any at all growing or ariſing, yet this is a good Deviſe, and the things muſt be paid. In like manner, if a man give to *I.S.* a horſe, or a yoke of oxen, in this caſe, albeit the Teſtator have neither horſe nor yoke of oxen, yet the Deviſe is good, and muſt be performed, *Swinb.part.*3. *Sect.*5. *Perk. Sect.* 511. 525. 18. Things in action, as debts, and the like, albeit they be not grantable by deed in the life time of the party, yet are they deviſable by Will. And therefore if the Teſtator doth by his Will give any debt due to him on an obligation, or on a contract, or the like; this Deviſe is good. And the thing deviſed may be had thus; the Teſtator may if he will make the Legatary Executor as to that debt, or if he do not, the Legatary may ſue the Executor in the Spiritual Court, or in ſome Court of equity, and thereby compell the Executor either to recover it himſelf, and ſo to pay it to the Legatary, or to give the Legatary power to ſue for and recover it himſelf in the Executors name. But if it be ſuch a cauſe of action as is altogether uncertain, as where a man may have an action againſt another for taking away his goods, or to compell him to make an account, or the like; this is ſuch a cauſe of action as is not deviſable. And yet poſſibilities and uncertainties are in divers caſes deviſable, *Perk. Sect.*527. *Litt. Broo. Sect.*437. *Dyer* 272. *Plow.*520. And therefore if one have money to be paid him on a Mortgage, he may deviſe this money when it comes; as if I enfeoff a ſtranger of land, upon condition that if he do not pay me 20 *l.* ſuch a day, that I may re-enter, in this caſe I may deviſe this 20 *l.* if it be paid, and the Deviſe is good, albeit it be made before the day of payment come. And if a man be poſſeſſed of a Term of years, and deviſe all the reſidue of that Term of years that ſhall be to come at the time of his death; this Deviſe is good, and yet ſuch a Grant by deed is voyd, *Childs* Caſe, 17. *Ja. B. R.* Rot. a meer poſſibility, and a thing altogether uncertain, is no more deviſable by will, than it is grantable by deed, *Perk. Sect.*520, 521, *&c. See in Grants.* 19. Emblements, *i. e.* the corn that is ſown and growing upon a mans ground at the time of his death, and which himſelf ſhould have reaped if he had lived to the harveſt (as in moſt caſes he ſhall where he doth ſow it) are deviſable. And therefore if a man have land in Fee-ſimple, Fee-tail, for life, or years, and ſow it with corn; he may deviſe the corn at his death to whom he pleaſe; and yet if the Leſſee for years ſow his land ſo little while before his Term expire that it cannot be ripe before the end of the Term, and he dye, it ſeems he cannot deviſe this corn, for if he had lived he could not have reaped it after the end of the Term.

Deviſe of a Uſe.

Deviſe of goods and chattels.

Deviſe of debts, and thing in action, poſſibilities, and uncertainties

Grant.

Deviſe of Emblements.

Deviſe of Obligations. Counterpanes of Leaſes, &c.

20. Obligations, Counterpanes of Leaſes, and ſuch like things alſo are deviſable; but in this caſe the Deviſee cannot ſue upon the Obligation in his own name, nor enter for the condition broken upon the Leaſe, if there be cauſe, but he may cancel, give, ſell, or deliver up the Obligation or Counterpane to the Obligor, or Leſſee, *Perk. Sect.* 527. And finally, whatſoever ſhall come to the Executor after the death of the Teſtator in the right of his Executorſhip, may be deviſed by the laſt Will and Teſtament of the Teſtator. *See infra in numb.*

Deviſe of the things a man hath in Joynture with another.

21. The Goods and Chattels that a man hath joyntly with another are not deviſable. And therefore if there be two Joynt-tenants of Goods or Chattels, as where ſuch things are given to two, or two do buy ſuch things together, and one of them deviſe his part of the things to a ſtranger, this Deviſe is voyd. Inſomuch, that if in this caſe the Teſtator make the other Joynt-tenant his Executor, the Will as to this is voyd, and he ſhall not be charged as Executor for thoſe Goods, but he ſhall have them altogether by right of ſurvivorſhip, *Perk. Sect.* 526. *Litt. Sect.* 287. *Doct. & St.* 167.

Deviſe of the things a man hath in anothers right.

22. The Goods and Chattels that a man hath in anothers right are not deviſable; and therefore an Executor or Adminiſtrator cannot deviſe the Goods and Chattels he hath as Executor or Adminiſtrator, for ſuch the Deviſe is voyd, *Plow.* 525. *Broo. Adminiſtrator* 7. *Fitz. Adm.* 3. Howbeit the Executor may appoint an Executor of the Goods of the firſt Teſtator, which the Adminiſtrator cannot do; and of the profits that do ariſe by the Goods and Chattels the Executor or Adminiſtrator hath during the time of his Adminiſtration, he may make diſpoſition. The Goods and Chattels belonging to Colledges and Hoſpitals may not be deviſed by the Teſtaments of the Maſters or Governours thereof, nor the Goods and Chattels belonging to other Corporations by the Mayors, Bayliffs, or Heads thereof. And the Goods & Chattels that Churchwardens have in the right of the Church are not deviſable, *Doct. & St. lib.* 2. *c.* 39. *Perk. Sect.* 496, 498, 499. All the Chattels real that a man hath in the right of his wife by her means, and all the Obligations that are made to her alone before, or during the time of the Coverture, and the Chattels real or perſonal that his wife hath as Executrix to any other, are not deviſable by the Teſtament of the husband. But all the Chattels perſonal that a man hath by his wife which ſhe hath in her own right, and the debts due upon Obligations made to the husband and wife both during the Coverture, are deviſable by the Teſtament of the husband, *Perk. Sect.* 560. *Doct. & St. c.* 7.

Husband and wife.

Deviſe of things that are incident and annexed to ſome other thing.

23. Such things as are annexed and incident to a Free-hold or inheritance, ſo that it cannot be ſevered from it by him that hath the property of them, as wainſcot, and glaſs to houſes, and the like, are not deviſable; but in ſuch caſes where the thing it ſelf to which it is annexed is deviſable, *Perk. Sect.* 526. *Relw.* 88. See before.

Deviſe of things that are not the Deviſors, or belong not unto his Executor.

24. The Goods and Chattels that are another mans, are not deviſable, and therefore if a man give another mans horſe, it is a voyd Deviſe. So if one deviſe the things that by ſpecial cuſtome of ſome places, as the heir-loomes do belong to the heir, this Deviſe is voyd, for it is not deviſable from him, *Plow. Granthams* Caſe. *Coo. ſuper Litt.* 185. *Coo. ſuper Litt.* 308.

Deviſe of a Preſentation to a Church.

25. If a Biſhop have a Ward belonging to his Biſhoprick fallen, he may deviſe it; but if a Church of his become voyd in his life time, he cannot deviſe the Preſentation. If a Parſon of a Church have the Advouſon in Fee, and he deviſe that his Executors two or three of them ſhall preſent at the next avoydance, this is a good Deviſe, *Trin.* 13. *Ja. Curia. B. R.*

Miſtake or errour in the thing deviſed.

26. All theſe things before that are deviſable, when they are deviſed muſt be named, and deviſed either by their proper name, or otherwiſe deſcribed by ſome other matter whereby the minde of the Teſtator may be known and diſcerned; for if he erre and miſtake in the name or ſubſtance of the thing deviſed, or it be ſo uncertainly deviſed and deſcribed that it cannot be perceived what he intendeth, the Deviſe is voyd, *Swinb. part.* 7. *c.* 5. *Plow.* 525. *Perk. Sect.* 500. *Brownl.* 1. *part.* 132. And therefore if one deviſe a peice of ground by the name of a Meſſuage, except it be ſo called, the Deviſe is voyd; and yet by the Deviſe of the uſe, profit, or occupation of land, the land it ſelf is well deviſed; and by the Deviſe

vne of land it ſelf, the reverſion thereof may be deviſed. But if one intending to deviſe a horſe, doth deviſe an oxe; or meaning to give gold, doth give apparel; theſe Legacies are voyd, unleſs his meaning may appear by ſome circumſtance to be otherwiſe; as if a man have but one horſe, and he be called *Arundell*, and he deviſe his horſe *Bucephall*; this Legacy is good enough. And if a man give all his money in ſuch a Cheſt, when in truth there is no money in that Cheſt; or give to another the 10 *l.* which *I. S.* doth owe him, when in truth *I. S.* doth not owe any ſuch money; this Deviſe is voyd. And yet if the Deviſe be thus, *viz.* I give to *A. B.* 10 *l.* and I will that the ſame be paid of the money I have in ſuch a Cheſt, or of the money which ſuch a man doth owe me; in this caſe the Deviſe is good, albeit there be not any money in the Cheſt, or owing. And if one give 10 *l.* remaining in ſuch a Cheſt, whereas in truth there is but 5 *l.* in the Cheſt, in this caſe the Legacy is good for the 5 *l.* But errour and miſtake in the quantity and quality of the thing deviſed, when the ſame for the ſubſtance of it is certain, doth not hurt: And therefore, if the Teſtator meaning to give the fourth part of his goods, give the one half, or meaning to give but 50 *l.* give 100 *l.* or *è converſo*, meaning to give a greater, doth give a leſs quantity or ſum; in theſe caſes, the Legacy is good, and the Legatary ſhall have as much as the Teſtator did mean. If a man give his white horſe, when in truth he hath but one horſe, and that is black; this is a good Deviſe of this horſe: And if the thing deviſed be under ſuch general words, that the minde of the Teſtator cannot be known by it, the Deviſe is voyd: and therefore, if the Teſtator ſay, I do bequeath ſomething, or I bequeath a ſubſtance, or I bequeath a body, or I bequeath, or the like; theſe Deviſes are voyd for uncertainty: So if he ſay, I do give lands, or I do give goods; theſe Deviſes are voyd: And yet if the Teſtator give a horſe, an oxe, a gold chain, or the like indefinitely; in theſe caſes, the Deviſe is good, albeit he have no ſuch thing. But if one deviſe thus, I give lead, money, wheat, oil, or the like; and ſay, not how much, or what quantity; this Legacy is voyd for uncertainty, or at leaſt the Executor may deliver what quantity thereof he will, and this ſhall ſatisfie the Legacy, *Swinb. part.* 7. *caſ.* 10.

Incertainty in the thing deviſed.

7. As touching the terms of a Deviſe, it muſt be known, That if one deviſe any thing to wicked ends, or upon wicked conditions, as to the end that the Deviſee ſhall kill a man, or becauſe he hath killed a man, or the like; theſe Deviſes are voyd in like manner, as it is when the cauſe or motive is falſe, as becauſe one is my Coſin, or hath lent me money, I deviſe to him 20 *l.* and he is not my Coſin, or did not lend me money; theſe Deviſes are voyd, *Swinb.* 289. And as touching the reſt of the properties of a good Deviſe, ſee them before in the properties of a good Teſtament, *Coo.* 3. 36. And here by the way, be adviſed if thou haſt land to ſettle, rather to do it by act executed by advice of learned Counſel in thy life and health-time, and therein adde ſuch conditions and proviſoes of revocation, and otherwiſe as thou wilt; or if thou wilt do it by Will, then do it in thy perfect memory, and by learned advice: Let the Will be indented, and of two parts, and leave one part with a friend, that it be not ſuppreſſed after thy death; Let there be credible Witneſſes to the publication thereof, and let their names be ſubſcribed to it: Let the whole Will be written with one hand, and in one peice of paper or parchment for fear of alteration, addition, or diminution: Let the hand and ſeal of the Deviſor be ſet to it: And if it be in ſeveral parts, let his hand and ſeal, and the hands of the Witneſſes be to every part: If there be any raſing or interlining, let there be a *Memorandum* of it. And if thou make any revocation of thy Will, do it by good advice, and by writing;

Seventhly, in reſpect of the tenures and conditions, cauſes and ends of the Deviſe.

A Caveat for making of Teſtaments.

Vox audita perit, Litera ſcripta manet.

8. The Expoſition of Teſtaments and Deviſes, and how they ſhall be conſtrued and taken. Deviſes of Land.

The general rules for the Expoſition of Wills, are theſe, That they muſt have a favourable and benign interpretation, and as near to the minde and intent of the Teſtator as may be; and yet ſo withall, as his intent may ſtand with the rules of Law, and be not repugnant thereunto, *Plow.* 540. *Coo. ſuper Litt.* 322. It is ſaid to be therefore a Maxim of Law, *Quod ultima voluntas teſtatoris perimplenda eſt ſecundùm veram intentionem ſuam*, according to theſe Verſes:

Sed legum ſervanda fides, ſuprema voluntas
Quod mandat fierique jubet parere neceſſe eſt.

First, in reſpect of the perſon that is to take by the Deviſe; and what, when, and how he ſhall ſo take by the Deviſe.

If a Deviſe be made of land to *I. S.* and the heirs males of his body; by this Deviſe the ſons and not the daughters of *I. S.* ſhall have the land. And if a Deviſe be made of land to *I. S.* and the heirs Females of his body; by this Deviſe the daughters and not the ſons of *I. S.* ſhall have the land. And yet it hath been ſaid in theſe caſes, that if in the firſt caſe the Deviſee hath iſſue a daughter, who hath iſſue a ſon; or in the laſt caſe, hath iſſue a ſon, who hath iſſue a daughter, that this ſon and daughter ſhall take by this Deviſe in theſe caſes; but it ſeems the Law is otherwiſe, *Terms of the Law, tit. Deviſe. Coo. ſuper Litt.* 25. *Plow.* 414.

Grant.

If a Deviſe be made of land to *I. S.* and his heirs males, by this Deviſe *I. S.* hath an eſtate Tail; but otherwiſe it is of ſuch a limitation by Deed; for if one by Deed give land to another and his heirs males, by this the Donee hath a Fee-ſimple, and his heirs general ſhall have it, 27. *H.* 8. 17.

If a Deviſe be of land to *I. S.* and to the eldeſt heirs females of his body; by this Deviſe all his daughters, and not one of them onely ſhall take it: So if one deviſe Gavelkind-land to a man and his eldeſt heirs; this doth not alter the cuſtome, but by this all the ſons ſhall take, *Coo. ſuper Litt.* 27.

If a man deviſe his land to his wife for life, the remainder to his ſon and the heirs males of his body engendred, and for default of ſuch iſſue the remainder to his next heir male, and the heirs males of the body of that heir male, and after his ſon dye without iſſue (his wife living) and the Deviſor hath iſſue a daughter, who hath iſſue a ſon; in this caſe and by this Deviſe it ſeems the daughter and not her ſon ſhall have the land, and that in Fee-ſimple, *Fitz. Deviſe* 2.

If a man deviſe his land to his wife for life, and after to his own right heirs males, and he hath iſſue three daughters, and after his death one of them hath a ſon; in this caſe, and by this Deviſe the next collateral heir male of the Deviſor, and not the ſon of the daughter ſhall have the land, *Trin.* 9. *Jac. Adjudged Curtes's* Caſe.

If a man have iſſue two ſons and a daughter, and deviſe his land to his wife for ten years, the remainder to his younger ſon and his heirs, and if either of the ſaid two ſons dye without iſſue of their bodies, the remainder to the daughter and her heirs, and the younger ſon dye in the life time of the father, and after the father dye; in this caſe, and by this Deviſe the daughter hath a good remainder, but it ſeems the elder ſon hath firſt an eſtate Tail by the intent of the Deviſor. *Dyer* 122.

If a man deviſe ſome land to *A* his eldeſt daughter and her heirs, & if ſhe dye without iſſue, to *T* his youngeſt daughter and her heirs, and if ſhe dye within 16 years, that *A* ſhall have her part to her and her heirs, and if *A* marry ſuch an one, that *T* ſhall have her part to her and her heirs; and if *T* dye having no iſſue, that all her part ſhall go to *M* and *E* his Neeces; and if *A* dye without iſſue, that *T* ſhall have her part to her and her heirs, and *T* after the 16 years doth dye without iſſue; in this caſe the Neeces *M* and *E*, and not *A* ſhall have her part that is dead. *Dyer* 330.

If land be deviſed to *A* for life, the remainder to a Monk for life, the remainder to *I S* in Fee; by this Deviſe he in the remainder in Fee ſhall take preſently after the firſt eſtate for life ended; and if the Deviſe be to a Monk for life, the remainder to *I S* in Fee; by this *I S* ſhall take preſently, *Perk. Sect.* 566, 567.

If a man deviſe his land to a woman and her brother, and the heirs of either of their two bodies, and for default of iſſue of the ſaid woman and her brother, the remainder to the right heirs of the Deviſor; and after the death of the Deviſor the brother dyeth without iſſue, and the ſiſter hath iſſue and dyeth; in this caſe, and by this Deviſe, her iſſue ſhall have a moity, and no more of the land, *Dyer* 326.

If one deviſe two parts of his Land to his four younger ſons in Tail; and that if the Infant in the wombe of his wife be a ſon, and that he ſhall have the fifth part as co-heir with the four, and if his five ſons dye without iſſue, that the

two

two parts ſhall revert, and then the Deviſor dyeth, and after a ſon is borne, and after he and three of the other ſons die; in this caſe and by this Deviſe, the Infant ſhall not take any thing, becauſe he is uncapable, and the two parts ſhall not revert to the heire untill the five ſons be dead without iſſue *Dyer* 304.

If one deviſe the Mannor of *Dale* to the eldeſt ſonne of *J. S.* in Fee, and the Mannor of *Sale* to *J. D.* for life, the remainder to ſuch of the children of *J. S.* as ſhall be then living, and ſhall have the Mannour of *Dale*, and the eldeſt ſon of *J. S.* after the Teſtators death doth ſell the Mannor of *Dale*, and after *J. D.* dyeth; in this caſe and by this Deviſe none of the children of *J. S.* ſhall have the Mannor of *Dale*, but it ſhall goe to the heirs of the Deviſer. Adjudged. *Coo. B. M.* 36, 37. *Eliz. Browns caſe.*

If one deviſe his land to the children of *J. S.* by this deviſe, the children that *J. S.* hath at the time of the Deviſe, or at the moſt, the Children that *J. S.* hath at the time of the death of the Teſtator, and not any of them that ſhall be borne after his death, ſhall take.

If one have two daughters by divers women, and deviſe a moity of his land to his wife for ſeven years, and that the elder daughter ſhall enter into the other moity at her day of marriage, and if his wife be with child of a daughter, that then ſhe ſhall have an equall portion with the other ſiſter, and the Deviſor dyeth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moity; the younger daughter dies without iſſue, and the ſeven years expire; in this caſe and by this deviſe, the collaterall heir of the younger daughter ſhall have the moity of the whole, and not the moity of a moity only, and that by deſcent. *Dyer* 342.

If a man have iſſue *B. C.* and *D.* ſons, and he deviſe his land to *D.* his ſon, the remainder *proximo de ſanguine*, or to the next of blood of the Teſtator; in this caſe and by this Deviſe *B.* ſhall take after the death of *D.* as the next of blood. In like manner, if the Teſtator have four daughters, and he deviſe his land to the youngeſt in Taile, the remainder to the next of blood; by this Deviſe the eldeſt daughter and not all the reſt ſhall have the land: And if the Teſtator have iſſue *B.* his elder ſon and *C.* his younger ſon, and *B.* have iſſue *D.* his his ſon, and *B.* is attainted and dyeth, and the Teſtator deviſeth his land to *J. S.* for life, the remainder to the next of blood of the Teſtator; by this Deviſe *D.* and not *C.* ſhall have the land. *Curia B. R. Mich.* 20 *Jac.* Next of blood.

If a man have iſſue *B.* and *C.* ſons, and *E.* a daughter, and deviſe his land to *C.* for life, and after that it ſhall remain to the next of blood to his children, to the next heirs of the blood of his children, and *C.* dyeth, and *B.* dyeth without iſſue, and *D.* hath iſſue a daughter; in this caſe, and by this Deviſe, the heirs of *A.* ſhall not take, but the next of blood to the children of *A.* which is the daughter of *D.* and his children themſelves are excluded, and if the ſons have any iſſues living, they ſhall take with her by this Deviſe. *Broo. Deſcent. Pl.* 19. 8. *Aſſ. Pl.* 6.

If the Teſtator have iſſue by *A.* his firſt wife, three daughters, *Joane*, *Elizabeth* and *Anne*; and by *B.* his ſecond wife, *Alice* and *Elizabeth*; and by *C.* his third wife, *William* a ſon, and three daughters, *Mary*, *Katherine* and *Johan*; and he deviſe his land to *Johan* his youngeſt daughter for life, paying 13 s. 4 d. to the ſon, and after her death to the ſon and the heirs of his body, and after his death without iſſue to *Elizabeth* the daughter of the ſecond wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the Deviſor for ever, and the elder *Joan* hath iſſue *J. P.* and dyeth, the ſon dyeth without iſſue; the younger *Joan* hath iſſue and dyeth, *Elizabeth* of the firſt wife hath iſſue and dyeth; *Anne* dyeth having iſſue, *Alice* dyeth without iſſue, *Mary* and *Elizabeth* born of the ſecond wife die without iſſue, *Katherine* dyeth without iſſue; in this caſe and by this Deviſe the ſon and heir of the elder daughter after the death of the ſon without iſſue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children ſhall have the land, becauſe *proximo* in Latin doth devote a perſon certain; and there be expreſſe Deviſes to others: But if in this caſe the remainder be limited in generall to the next of blood without any

other matter, all the daughters perhaps may have it as Joint-tenants. Adjudged *M.* 26 *Jac. perin. verſus Pearſe. B. R.*

If a man have two ſons and a daughter which hath two daughters, and he deviſe his land to a ſtranger for life, the reinainder to his ſecond ſon for life, the remainder in Fee to the next of blood to his ſon; in this caſe, if the eldeſt ſon die without iſſue, the daughter and her daughters ſhall have the land. *Fitz. Deviſe* 9. *Perk. ſect.* 508.

Secondly, in reſpect of the thing deviſed.

Whatſoever will paſſe by any words in a Deed, will paſs by the ſame words in a Will, and more alſo; for a Will is always more favourably interpreted than a Deed; See in the Expoſition of Deeds *ſupra.*

And therefore if a man deviſe the profits, uſe, or occupation of land; by this Deviſe the land it ſelf is deviſed. *Coo.* 8. 94. *Plow.* 525.

If a man deviſe the profits of his land, this is a Deviſe of the land it ſelf. *Brownlows* 80. 1. *part.*

If a man deviſe thus, I give all my lands to *J. S.* or I give all my tenements to *J. S.* or I give all my lands and tenements to *J. S.* by this Deviſe is given, and *J. S.* ſhall have not only all the lands whereof the Deviſor is ſole ſeiſed, but alſo all the lands whereof he is ſeiſed in common or co-parcinery with another, and not only the lands he hath in poſſeſſion, but alſo the lands he hath in reverſion of any eſtate in Fee-ſimple; but by this Deviſe regularly, Leaſes for years of lands will paſſe. *Mevils caſe. Fitz. Deviſe* 4. *Broo. Done.* 41.

If a man deviſe thus, I give all my land in poſſeſſion only; by this Deviſe there is given the lands he hath in poſſeſſion only, and none of the lands he hath in reverſion. *Plow.* 66.

If a man be ſeiſed of land in Fee-ſimple in *Dale*, and deviſe thus, I give all my lands in *Dale* to *J. S*; and after the Will made and publiſhed, he doth purchaſe other lands in *Dale*, and dyeth; in this caſe and by this deviſe *J. S.* ſhall not have the new purchaſed lands. *Plow.* 343, 344. *old N. B.* 89. *Fitz. Diviſe* 17. and in this caſe it hath been held further, That if the Teſtator do by word of mouth after the purchaſe of the ſame lands declare himſelf to be minded that *J. S.* ſhall have the ſame new purchaſed lands alſo by this Deviſe, that notwithſtanding *J. S.* ſhall not have them by this Deviſe. And yet it hath been adjudged, That if in this caſe one come to the Deviſor to buy his new purchaſed land, and he ſay nay, but *J. S.* ſhall have it as the reſt, that this is a new publication of the Will, and that *J. S.* by this deviſe ſhall have theſe new purchaſed lands; for a new publication of the Will in theſe caſes will make the land to paſs. *Trin.* 37 *Eliz. B. R. Breckford verſus Parincote.* But if a man deviſe the Mannor of *Dale*, and at the time of the deviſe he hath it not, or deviſe his lands in *Dale*, and at the time of the deviſe he hath no lands there, and afterwards he doth purchaſe the Mannor of *Dale*, or lands in *Dale*; by this deviſe, and in this caſe, the Mannor and the new purchaſed lands will paſs; for in this caſe it ſhall be intended he meant to purchaſe it. And yet the Statute enabling a man to deviſe lands ſaith, *Any perſon having, &c. Coo.* 3. 30. See before.

If one have an ancient Tenement, and lands belonging to it, and then purchaſe more lands, and occupy them altogether with the Tenement many years, and being all thus in his occupation, he doth make a deviſe after this manner, I give my Tenement in *Dale*, and all my lands belonging to it now in my occupation, to *J. S.* by this deviſe *J. S.* ſhall have the ancient land only, and none of the new purchaſed land; but if there be no ancient land belonging to the Tenement, but new purchaſed land only, there perhaps it may be otherwiſe; for in this caſe the words cannot elſe be ſatisfied. As in caſe where a man hath ſome lands in Fee-ſimple, and other lands for years only in *Dale*, and he deviſe all his lands and Tenements in *Dale*; by this deviſe the lands he hath for years doth not paſs; but if he have no other lands in *Dale*; but theſe lands, in this caſe perhaps this land will paſs. *Loftis verſus Baker. Hill.* 20 *Jac. B. R.*

If one have a moity of lands in *Eſſex*, and a moity of lands in *Kent*, and he deviſe thus, I give my moyties, and all my other lands in *Kent* to *J. S.* it ſeems by this deviſe the moyties in both Counties do paſs, and that *J. S.* ſhall have both the moyties. In *Mevils caſe.*

If

If a man be ſeiſed in Fee, in poſſeſſion of the moitie of a Farm called the Farm of *C.* and of the reverſion in Fee of the other moytie, expectant on a leaſe made to *A.* and *B.* for their lives, and he make his Will thus, I will that my wife ſhall have all my living which I now occupy, untill my ſon come to 21. years of age, and then I will have her have the thirds of all my living, and that my ſon ſhall have all my Farm of *C.* to him and his heirs; by this deviſe if *A.* and *B.* dye before the heire be 21. years of age, the wife ſhall have the thirds of the whole Farm, and not of the moytie in poſſeſſion onely. *Plich.* 20. *Ja. Adjudged Scatergood. caſe.*

If a man be ſeiſed of land in a Village, and in two Hamlets of the ſame Village, and he deviſe all his lands in that Village, and in one of the Hamlets; by this deviſe none of his land in the other Hamlet doth paſs. *Dyer* 261.

If a man make his Will the firſt day of *May*, and thereby give the Mannor of *Dale* to one in Fee, and the tenth of *May* one of the Tenancies eſcheat, and the 20. of *May* the Deviſor dyeth; in this caſe and by this deviſe, it ſeems the Deviſee ſhall have the Tenancie that doth eſcheat. *Plow.* 343.

If one deviſe his land thus, I give my land in *Dale* to *J. S.* and his heirs, or to *J. S.* in Fee, or to *J. S.* in Fee-ſimple, or to *J. S.* for ever, or to *J. S. Habendum ſibi & ſuis*, or to *J. S.* and his Aſſignes for ever; or thus, I give my land to *J. S.* to give, ſell, or do therewith at his pleaſure; by all theſe, and ſuch like deviſes, a Fee-ſimple eſtate is made of the thing deviſed, and *J. S.* ſhall have the ſame to him and his heirs for ever. *Littl. Broo. ſect.* 133. *Perk. ſect.* 1. 6. *Littl. ſect.* 586. *Kelw.* 43. *Coo. ſuper Littl.* 19. 20 *H.* 6. 35. *Littl. Broo. ſect.* 432. 19 *H.* 8. 10. 3. In reſpect of the eſtate and time that is deviſed. Fee-ſimple.

But if land be granted by Deed after this manner, *J. S.* by this grant in all theſe caſes, except only in the firſt caſe, hath only an eſtate for life. And if a man deviſe his land to *J. S.* and ſay not how long, nor for what time, by this deviſe *J. S.* hath an eſtate for life only in the land. *Fitz. Deviſe* 111. See *Gouldsb.* 183. Deed.

Deviſe of land let for 99. years thus: I give to *J. S.* my houſe with all the lands 99. years: and *J. S.* ſhall have all my inheritance, if the Law will allow it; this doth give the inheritance to *J. S. Hobb. Rep. ib.* 7. And if I give to my right heirs males and poſterity of my poſterity of my name part and part like, this is a Fee-ſimple. *Brownlows* 129. 1. *part.* See *Brownlows* 129. 1. *part* 147. 169. 2 *part.* 272. 277.

If a man deviſe his land to *J. S.* and his Aſſignes, without ſaying [for ever] it is ſaid by ſome, that by this deviſe *J. S.* hath onely an eſtate for life. *Coo. ſuper Littl.* 9. *Perk. ſect.* 57. 239. *New Terms of the Law tit. Deviſe.* But the contrary is affirmed elſewhere, and that it is a Fee-ſimple *Tr. in* 2. *C. B. R.* reply & *Daniels caſe.*

If one deviſe his land to his wife, to diſpoſe thereof at her will and pleaſure, and to give it to one of her ſonns; in this caſe, and by this deviſe, ſhe hath a Fee-ſimple; but it is qualified, for ſhe muſt convey it to one of her children, and cannot convey it to another. *Coo.* 6. 16. *Dyer* 126.

If one deviſe his land to *J. S.* paying 10 l. and uſe no other words, by this deviſe the Deviſee hath the Fee-ſimple of the land, albeit the 10 l. be not the hundreth part of the worth of the land. And yet if one deviſe his land to *J. S.* for his life, paying 10 l. by this deviſe *J. S.* ſhall have an eſtate for life only. *Adjudge Hill.* 36 *Eliz. Coo. B.*

If one deviſe land of the value of 50 l. *per annum* to *J. S.* for life, the remainder to *J. D.* paying 40 l. to *W.* by this deviſe *J. D.* ſhall have the Fee-ſimple of the remainder upon condition.

If one have two ſonns, and he deviſe his land firſt to his wife, and then he ſaith thus: In like manner, I will that my ſon *A.* ſhall, have it after my wives death; and if my wife dye before my ſon *B.* then that my ſon *A.* ſhall pay to *B.* 3 l. by the year during the life of *B.* and alſo 20 l. to *W. S.* by this deviſe *A.* ſhall have the Fee-ſimple of this land. *Hill.* 17 *Jac. B. R. adjudged Spicers caſe.*

If one deviſe his land thus, I will my land to my ſon *W.* for his life, and after his death to my ſon *T.* and if my ſon *W.* purchaſe land as good as that land for my

ſon

ſon *T.* then that my ſon *W.* ſhall ſell the land deviſed to my ſon *T.* as his own, and I will that my ſon *W.* ſhall pay to his ſiſters 10 l. by 20 s. a year; in this caſe, and by this deviſe *W.* hath a Fee-ſimple; for power to ſell giveth by implication an eſtate in Fee-ſimple, and it is paying alſo, &c. *Curia M.* 18. *Jac. B. R. Green verſus Dewell.*

If one deviſe land to his wife and her heirs, and if the heir put her out that ſhe ſhall have other land; by this deviſe ſhe hath the Fee-ſimple of the firſt land, and is not abridged by the latter words. *Paſch.* 14 *Jac. B. R. Curia.*

If one deviſe his land thus, I give White Acre to my eldeſt ſon and his heirs for his part: *Item*, Black Acre to my youngeſt ſon for his part; by this deviſe the younger ſon ſhall have the Fee-ſimple of Black Acre: So, if I give White Acre to *J. S. Item*, Black Acre to *J. S.* and his heirs; by this deviſe *J. S.* ſhall have the Fee-ſimple of White Acre alſo. *Trin.* 30. *Eliz.*

If one give land to his wife for life, the remainder to his ſon and the heirs males of his body, and for want of ſuch iſſue the remainder to the nex heir male of the Donor and the heirs males of his body; it ſeems by this deviſe, that the next heir male of the ſon hath a Fee-ſimple. *Perk. ſect.* 565.

Fee-taile. If one deviſe his land thus, I give my land in *Dale* to *J. S.* and to his, or [to the] heirs males, or heirs females of his body, [or of his body begotten] or to *J. S.* and his iſſues male, or his iſſues female; or to *J. S.* and the heirs males of his body begotten on *M.* or to *J. S.* and *E.* his wife; and the heirs males, or heirs females of their two bodies begotten; or to *J. S.* and his heirs, if he ſhall have any heirs of his body, elſe that the land ſhall revert; or to *J. S.* and his heirs, if he have any iſſue of his body; or to *J. S.* and the right heirs males of his body; or to *J. S.* and his heirs, provided that if he dye without heirs of his body, that the land ſhall revert; by all theſe and ſuch like deviſes an eſtate taile is made of the thing deviſed, and *J. S.* the Deviſee ſhall have the ſame accordingly. See *Brownlows Rep.* 1. *part.* 45. 2. *part.* 75.

Deed. If one deviſe his land thus, I give my land in *Dale* to *J. S. & ſemini ſuo*; by this deviſe *J. S.* hath an eſtate taile: But if he ſay, I give my land in *Dale* to *J. S. & ſanguini ſuo*; it is ſaid by this deviſe *J. S.* hath the Fee-ſimple of the land. If one deviſe his land to *J. S. & exitibus, vel prolibus de corpore ſuo*; by this deviſe of *J. S.* have no children at the time, it ſeems he hath an eſtate taile; but by ſuch a limitation by deed is made only an eſtate for life. If one deviſe his land thus, I give my land in *Dale* to *J. S.* for life, the remainder to *J. D.* and *E.* his wife and their children; or to *J. D.* and *E.* his wife and their men children; or to *J. D.* and *E.* his wife and their iſſues; by theſe deviſes, if the husband and wife have no children at the time of the deviſe, is created an eſtate taile; and if they have any children at the time of the deviſe, then hereby is created an eſtate for all their lives onely in joyntenancie. And if land be deviſed to *A.* for life, the remainder to *B.* and the heirs of this body, the remainder to *J. S.* and his wife, and after to their children; by this deviſe *J. S.* and his wife have eſtates for their lives onely, and their children after them eſtates for their lives joyntly: And albeit they have no children at the time, yet every child they ſhall have after, may take by way of remainder. And ſo alſo it ſeems is the law upon ſuch a limitation by Deed. *Coo. ſuper Littl.* 9. *Broo. tit. taile* 21. *Coo. ſuper Littl.* 20. 6. 16.

If one deviſe his land to his wife for life, the remainder to his ſon, and if the ſon dye without iſſue not having a ſon, that then it ſhall remain over; this is a good eſtate taile. *Bownl.* 2. *part* 270.

Deed. If lands be deviſed to *J. S.* and his heirs males, or his heirs females, without ſaying [of his body;] by this deviſe *J. S.* hath an eſtate taile. But if ſuch a limitation be by deed it is a Fee-ſimple. *Littl. ſect.* 31. *H.* 6. 25. 27. 9. *H.* 8. 27.

If one have two ſons, and deviſe White Acre to his eldeſt ſon and his heirs, and Black acre to his youngeſt ſon and his heirs, and if either of them dye without iſſue, then that the other ſhall be his heir; by this deviſe either of them hath an eſtate taile, and no Fee-ſimple. *Hill.* 22. *Jac. B. R. Daniels caſe.*

If one have land in *Kent* in [*W. S.* and *T.* and have one male-child and a daughter,

daughter, and his brother hath three children, *B*, *C*, and *D*, and he deviſe his land thus; *Item*, I give my land in *Kent* to my male child and his heirs, and if he dye without heirs of his body, that the land in *W.* ſhall go to *B.* and his heirs. *Item*, I will my land in S. to C. and his heirs, and my land in T. to D. and his heirs; in this caſe, and by this deviſe, the male chiſd of the Deviſor hath an eſtate taile in all the lands, and after his death without heirs it ſhall remain according to the Will; So that if one deviſe his land to his eldeſt ſon and his heirs, and if he dye without heirs of his body, that it ſhall remain to his youngeſt ſon and his heirs; by this deviſe, the eldeſt ſon hath an eſtate taile, and the youngeſt ſon the Fee-ſimple. *Adjudge M. 9 Jac. Wallops caſe.*

If one deviſe his land to his ſon *W*, and if he marry and have any iſſue male begotten of the body of his wife, then that iſſue to have it; and if he have no iſſue male, then to others in remainder; by this deviſe, it ſeems *W.* hath an eſtate taile to him and the iſſues male begotten on the body of his wife. *Coo. 9. 127.*

If one deviſe White Acre to J. S. and the heirs of his body, and then after ſaith thus, and I will that J. D. ſhall have Black Acre in the ſame manner that J. S. hath White Acre; by this deviſe J. D. hath an eſtate tail in Black Acre as J. S. hath in White Acre. *Perk. ſect. 561. 20 H. 6. 36. Et ſic de ſimilibus.* And if one deviſe White Acre to J. S. and then ſay, *Item*, Black Acre to J. S. and the heirs of his body; by this deviſe he hath an eſtate taile in both Acres. *Tr. 30 Eliz.*

If one deviſe his land to his wife for years, the remainder to his younger ſon and his heirs, and if either of his two ſons dye without iſſue, &c. that it ſhall remain to his daughter and her heirs, and the younger ſon dye in the life time of the Father, and after the Father dyeth; it ſeemeth by this deviſe the elder ſon ſhall have the land in taile. *Dyer. 122.*

If one deviſe his land to his wife for life, and after to his ſon, and if his ſon dye without iſſue, having no ſon [or having no male] then that it ſhall go to another; by this deviſe the ſon hath an Eſtate taile to him and the heirs males of his body. *Adjudg. Tri. 7. Jac. Coo. B. Robinſons caſe.*

If lands be given to a man and woman unmarried and the heirs of their two bodies, or to the husband of *A*, and wife of *B*, and the heirs of their two bodies; by theſe Deviſes are made eſtates in Taile. *Coo. ſuper Littl. 20. 26. Plow. 35.*

If a man deviſe White Acre to his three brothers, and Black acre to *C.* his brother, ſo as he pay 10 l. to J. S. and otherwiſe that it ſhall remain to the houſe, provided that the ſame lands be not ſold, but go unto the next of name and blood that are males, if it may be; it ſeems that by this deviſe C. hath an eſtate tail in black acre, and that if he die without iſſue, it ſhall go to the three other brothers and their heirs males in taile one after another: and that white acre alſo is ſo entailed in every of their parts. For the words [ſhall remain to the houſe] ſhall be conſtrued to the moſt worthy of the Family, and the words [that are males] ſhall be conſtrued in the future tenſe. *Dyer 333.*

If land be deviſed to J. S. and the heirs of his body, and that if he dye, that it ſhall remain to J. D. by this Deviſe J. S. hath an eſtate Taile, and the latter words do not qualify the former, but J. D. muſt attend his death without heirs of his body before he ſhall have the land. *Adjudg. 14. Eliz. Coo. B. & Trin. 9. Jac. B. R.*

If land be deviſed to J. S. and the heirs males of his body, and if it happen that he dye without heir of his body, that it ſhall go to H. and his heirs; by this Deviſe J. S. hath an eſtate to him and the heirs males of his body, and the ſubſequent words do not alter nor enlarge the eſtate. *Dyer 171.*

If land be deviſed to J. S. and E. his wife, and to the heirs of the body of the Survivor of them; by this Deviſe the Survivor ſhall have a generall eſtate Taile. *Coo. ſuper Littl. 26.*

If land be deviſed to J. S. and the heirs he ſhall have by *A.* his wife; by this Deviſe J. S. hath a Fee-Taile, and not a Fee-ſimple as he hath in caſe of ſuch a limitation by deed. *Coo. ſuper Littl. 26.* Deed.

If land be deviſed to J. S. and to the heirs of the body of ſuch a woman; by this Deviſe J. S. hath an eſtate Taile, and begotten ſhall be intended begotten by him. *Coo. ſuper Littl. 26.*

If one deviſe land to his ſon and his heirs, and that if his ſon dye within the age

of 21 years or without iſſue, that the land ſhall remain over: and the ſon dyeth within age having iſſue; in this caſe and by this Deviſe the ſon hath an eſtate Taile, and [or] in this place ſhall be taken for [and] *Adjudg. M.* 37, 38. *Eliz. Sale verſus Gerard.*

Deed. If land be deviſed to a man and his wife, and to one heir of their body, and the heir of the body of that heir; by this Deviſe an eſtate Taile is made in a Will as well as in a Deed. *Coo. ſuper Littl.* 22.

If a man deviſe his land thus, I give White acre to *A.* my ſon and his heirs, Black acre to *B.* my ſon and his heirs, and Green acre to *C.* my ſon and his heirs, provided that if all my ſaid ſons die without iſſue of their bodies, that then all my ſaid lands ſhall goe to *M.* my wife and her heirs; by this Deviſe they have all of them eſtates in Taile of their land, and as it ſeems croſſe remainders to either of them of the land of each other. *M.* 18. *Jac. B. R. Gilberts caſe.*

If one deviſe his land thus, I give my land in *Dale* to *J. S.* and if he die without iſſue male of his body, then that it ſhall remain over to *J. D.* by this Deviſe *J. S.* hath an eſtate Taile. *Coo.* 9. 128.

If a man hath iſſue three ſons, and deviſe his land thus, *viz.* one part to two of his ſons in Taile, and another part to his third ſon in Taile, and that neither of them ſhall ſell his part, but that either of them ſhall be heir to other; in this caſe caſe, and by this Deviſe, either of them hath an eſtate Taile, and if one of them die without iſſue, his part ſhall not revert to the eldeſt, but ſhall remain to the other ſon, for it is an implied remainder. *Littl. Broo. ſect.* 431. *Broo. Deviſe* 38. *Done.* 44.

If there be husband and wife, and they have iſſue a ſon and a daughter, and the husband die, and land is deviſed to the wife and the heirs of her late husband on her body begotten; in this caſe, and by this Deviſe the wife hath onely an eſtate for life, the ſon an eſtate in Taile, and ſo alſo the daughter in caſe he die without iſſue. *Coo. ſuper Littl.* 26.

For life. If one deviſe to *J. S.* that if he and his heirs of his body be not paid 20 l. rent yearly, he and they ſhall diſtraine, &c. by this Deviſe *J. S.* hath an eſtate taile of this rent. But if the Deviſe be that if *J. S.* be not paid 20 l. yearly, he ſhall diſtrain &c. by this Devile *J. S.* hath only an eſtate for life. So if one deviſe a rent of 10 l. out of his land to be paid quarterly, and ſay not how long the rent ſhall continue: this is but an eſtate for life. *Coo. ſuper Littl.* 147. 8. 85. *Brownl* 2. *part* 74. 75.

If one deviſe his land thus, I give my land in *Dale* to *J. S.* for his life, or to *J. S.* [without any more words] or *J. S.* & his heir, in the ſingular number; or *J. S.* and his children, and *J. S.* hath children at the time of the Deviſe; or to *J. S.* & his ſucceſſors, (*J. S.* being a naturall perſon;) by all theſe and ſuch like Deviſes *J. S.* hath only an eſtate for life in the thing deviſed. *Fitz. Deviſe* 16. *Coo.* 6. 16. *Perk. ſect.* 577. But if the Teſtator have only a Terme of years in the land whereof the Deviſe is made, and deviſe this land to *J. S.* and doth not ſay for what time; it ſeems that by this Deviſe the whole Terme is deviſed, unleſs the intent doth appear to be otherwiſe. And if one deviſe land (whereof a man is ſeiſed in Fee) to *J. S.* paying 10 l. to *J. D.* by this Deviſe, albeit there be no eſtate expreſſed, yet *J. S.* hath the Fee-ſimple of the land, in reſpect of the payment of the money. *Mich.* 13 *Jac. B. R. Dyer ſect.* 307. But if the intent of the Teſtator appear to be that J. S. ſhall have the land but for his life, *contra*; for there the conſideration will not alter the eſtate expreſſed upon the gift. See before *Littl. Broo. ſect.* 406. 125.

Deed. If land be deviſed thus, I give my land in *Dale* to J. S. and his aſſignes, [without more words] by this Deviſe is held to be given no more but an eſtate for life by conſtruction upon a Will, as it is upon a Deed. *Coo. ſuper Litt.* 9. 4. 29. And yet in the *New Termes of the Law tit. Deviſe*, the contrary is affirmed, *Ideo quære.*

If one deviſe thus, I will that J. S. ſhall have and occupy my land in *Dale*, and ſay not how long: by this Deviſe J. S. ſhall have the land for his life. *Paſch.* 9. *Jac. Newmans caſe.* But if I deviſe that J. S. ſhall enter into my land, and ſay no more; by this Deviſe J. S. hath no eſtate at all, but power to enter into the land only. *Dyer* 342.

If a man have a ſon and a daughter and dieth, and lands are deviſed to the daughter, and the heirs females of the body of the Father; by this Deviſe the daughter hath

hath only an eſtate for her life; for there is no ſuch perſon, for ſhe is not heir. *Coo. ſuper Littl.* 24.

If one deviſe his land thus, I give my land in *Dale* to J. S. for his life, and after to the next right heire of J. S. in the ſingular number, and to his right heirs for ever; by this deviſe J. S. hath only an eſtate for life. *Coo.* 1. 66.

So if one deviſe land to J. S. for life, and after to the next heir male of J. S. and to the heirs males of the body of ſuch next heir male; by this deviſe J. S. hath an eſtate for life only; but if it be thus, I give my land in *Dale* to J. S. for his life, and after to the heirs, or to the right heirs of J. S. by theſe deviſes J. S. hath the Fee-ſimple of the land; And if it be to J. S. for life, and after to the heirs males of J. S. by this *J. S.* hath an eſtate Taile.

If one deviſe land to J. S. and E. his wife, and after their deceaſe, [or the remainder] to their children; by this deviſe whether they have, or have not children at the time, J. S. and E. his wife have eſtates for their lives only. *Coo.* 6. 16. See *Goldsb.* 138. *Plow.* 47. 134. *Plow.* 33.

If one deviſe his land to his wife for her life, and if ſhe live till his ſon come to the age of 24. years, that then he ſhall have the land; And if ſhe dye before he come to that age, then that J. S. ſhall have it till his ſon come to that age, and J. S. dye before the wife, and after ſhe dye before the ſon come to 24. years, in this caſe the Executors of J. S. ſhall not have the land till the ſon come to 24. years of age. *Goldsb.* 64. *Plow.* 2.

If one deviſe a moity of his land to his wife for life, and the other moity to his ſecond ſon, and after by another clauſe doth deviſe it all to his ſon after the death of his wife: by this Deviſe the ſon hath only an eſtate for life after the wives death, and no more. *Curia* 7. *Ja. Coo. B.*

If one deviſe his land to *J. S.* in Fee after the death of *J. B.* (being his ſon and heir apparant;) by this Deviſe *J. B.* hath an eſtate for life by implication, and untill the Deviſe take effect, the Law gives it to him by deſcent. And ſo alſo it ſeems the law is where one doth deviſe his land to *J. S.* after the death of his wife: that by this Deviſe the wife hath an eſtate for life by implication. And therefore if a man deviſe thus, I give my goods to my wife, and that after her deceaſe, my ſon and heir ſhall have the houſe where the goods are; it is held by this Deviſe that the wife hath an eſtate for life in the houſe by implication; for a man is bound to provide for his own wife. But if a man deviſe his land to *J. S.* after the death of *J. W.* (a ſtranger to the Deviſor;) it ſeems that by this Deviſe *J. W.* hath no eſtate at all by implication, and that this doth but ſet forth when the eſtate of *J. S.* ſhall begin, and that the intent of the Teſtator is that his heir ſhall have it untill that time. *Broo. Deviſe* 48. 52. *Littl. Broo.* 107. 13. *H.* 7. 13. *New terms of the Law tit. Deviſe Plow.* 158. 414. 521. By Implication.

If one deviſe lands thus, I give my land in *Dale* to *J. S.* to the intent that with the profits thereof, he ſhall bring up a child, or to the intent, that with the profits thereof, he ſhall pay to *A* 10 l. or to the intent that he ſhall out of the profits thereof pay yearly 10 l. by theſe Deviſes *J. S.* hath only an eſtate for life, albeit the payments to be made be greater than the rent of the land: And therfore, it is not like to the caſe before, where a ſum of mony is to be paid preſently. *Coo.* 6. 16. 3. 20. *Broo. Eſtates* 78.

If one deviſe his land thus, I give my land to *A.* my coſin in Fee-ſimple, after her deceaſe to *W.* her ſon (who is her heir apparant;) by this Deviſe ſhe hath an eſtate for life firſt, the remainder to her ſon for his life, the remainder to the heirs of *A* in Fee-ſimple: And ſo alſo is the Law when the Deviſe is to any other after that manner. *Dyer* 357.

If my father be tenant for life of land, the remainder to me in Fee, and I deviſe this land to my wife, rendring for her naturall life 40 s. to the right heir of my father; by this Deviſe my wife hath an eſtate for life after the death of my father. *Dyer* 371.

If one deviſe his land unto his Executors, untill his ſon ſhall come unto 21. years of age, the profits to be imployed towards the performance of his Will, and when he ſhall come to that age, then that his ſon and his heirs ſhall have it; by this Deviſe the Executors ſhall have it untill he be 21. years of age, and if he die before that time, untill the time he ſhould have been 21. years of age, if he had lived ſo long; and [ſhall] in this caſe ſhall be taken for [ſhould.] *Coo.* 3. 20. For years.

If one deviſe his land to his Executors for the payment of his debts, and untill his debts be paid; by this Deviſe the Executors have but a chattell and an uncertain intereſt, and they and their Exeecutors ſhall hold it untill the debts be paid and no longer. *Coo. ſuper Littl.* 42.

If one deviſe his land to *J. S.* and the heirs males of his body for the term of fifty years; it ſeems that by this Deviſe, *J. S.* hath but a Leaſe for ſo many years, if the heirs males of his body ſhall ſo long continue, and that for want of iſſue male, the terme of years ſhall end: And in this caſe, the Executor or Adminiſtrator, not the heirs males of *J. S.* ſhall have it after his death. *Coo.* 10. *in Leonard Lovel's caſe*, 87. 46.

Executors.

Fourthly, in reſpect of other matters.

If one deviſe his land thus, I give to *J. S.* and *J. D.* and their heirs, my land in *Dale* equally; or my land in *Dale* to be equally divided; by theſe Deviſes *J. S.* and I D ſhall have and hold the land, not as Joint-tenants, but as Tenants in common, ſo that the heir and not the ſurvivor ſhall have his part that firſt dyeth: And yet in caſe of ſuch a limitation by Deed, it is otherwiſe: And if one deviſe his land to *J S.* and *J. D.* and their heirs [without more words;] it ſeems that by this Deviſe they ſhall take and hold as Joint-tenants. *Adjudged Lowen verſus Coxe. Mich.* 37. 38. *Eliz. Co. B. Dyer* 25. *Littl. Bro. ſect.* 133. *Littl.* 283. *Perk. ſect.* 170. *Dyer* 350.

And yet if one deviſe land to *J. S.* and *J. D.* and the heirs of either of their bodies lawfully engendred; it ſeems that by this Deviſe *J. S.* and *J. D.* ſhall take and hold as Tenants in common and not as Joint-tenants, *Dyer* 326. And if one deviſe his land to *J. S.* and *J. D.* thus, I will that *J. S.* and *J. D.* ſhall have my lands in *Dale*, and occupy them indifferently to them and their heirs. *Paſche 9. Ja. Newmans caſe.* See *Brownlows Rep. 1. part.* 131. 169.

If one that hath 2. daughters only give his land to them in Fee; they ſhall be in by deviſe as Joint-tenants, and not by deſcent as Partners. But if he have but one daughter, or a ſon and heir, and give it ſo, it is void, and they ſhall take by deſcent. *Goldsb.* 141. *Plow.* 53.

Deviſe of goods and chattels. Firſt, in reſpect of the perſon that ſhall take by the Deviſe.

If one be poſſeſſed of a terme of years of land, and deviſe the ſame to his wife during all the years, and if ſhe die within the years, then to *A* and *B* his two ſons, if they have no iſſue male; but if they or either of them have iſſue male, then that it ſhall go to the uſe of thoſe iſſues male; and ſhe die, and the two ſons die without iſſue born, one of their wives being privily with child of a ſon, which after his death is borne; in this caſe and by this deviſe this iſſue male ſhall have it aſſoone as he is born. *Hill.* 13 *Ja. B. R. Adjudged. Blandfords caſe.*

Executors.

Heire.

If one be poſſeſſed of a terme of years, and he deviſe it to another and his heirs, or his heirs males; by this Deviſe the Executors or Adminiſtrators, not the heirs of the Legatee ſhall have it. *Coo.* 10. 46. *Lampets caſe. Perk. ſect.* 558, 556. And therfore, if Leſſee for years of land deviſe all his intereſt therein to his wife, if ſhe live ſo long, and after her death, if any part of the term be to come, deviſe the ſame to *J. S.* his ſon and the heirs of his body; in this caſe and by this Deviſe, the Executors and Adminiſtrators of *J. S.* not his heirs ſhall have it, at leaſt, ſo long as he hath any heirs of his body: And yet if one poſſeſſed of a term of years, deviſe it to *J. S.* and after his death, that the heir of *J. S.* ſhall have it; in this caſe *J. S.* ſhall have ſo many years of the term as he ſhall live, and the heir of *J. S.* and the Executor of that heir ſhall have the reſidue of the term. See *Brown. Rep. 1. part.* 41. 131.

If one give 10 l. to the Children of *J. S.* and at the time of the Deviſe *J. S.* hath foure children, and after before the death of the Teſtator he happen to have two more; in this caſe and by this Deviſe, the two children he hath afterwards ſhall have no part of the 10 l. but thoſe four he had before ſhall have it all. *Swinb.* 316.

If one give 10 l. to his Pariſh-Church, and at the time of the Will made, he live in one Pariſh, and after he doth remove into another Pariſh, and die there; by this Deviſe the Pariſh where he lived before, and not where he died, ſhall have this 10 l. *Swinb.* 316.

Secondly, in reſpect of the thing.

If one deviſe a third part of all his goods and chattels; by this Deviſe, ſome ſay, doth paſſe, and is given no more but a clear third part after debts and Legacies paid: but it ſeems a third part of the whole is hereby deviſed, out of which the debts muſt firſt be paid by Law. *Dyer* 598. 164.

If

If one deviſe to another all his Goods and Chattels, or all his Plate, or all of any other thing in general; by this Deviſe doth paſs and is given not onely all the Teſtator hath of that thing at the time of the making of the Will, but alſo all he hath at the time of his death; and not onely what he hath in poſſeſſion, but alſo what he hath not in poſſeſſion: But if one deviſe all his goods, or all his plate, *&c.* in ſuch a place, or in the occupation of *I S*; by this Deviſe none other will paſs but what are in that place, and in the occupation of *I S*. *Plow.* 343. *Swinb.* 318.

If one have a term of years of a portion of Tithes in *Dale*, and have a term of years of land in *Dale*; and he deviſe all his lands and tenements in *Dale*, and all his eſtate therein to *I S*; by this Deviſe the portion of Tithes doth not paſs, for it is neither land, nor tenement: but by deviſe of all his hereditaments, perhaps it may paſs. *Sed Quære. By the opinion of divers Lawyers.*

If one deviſe to I S all his Goods and Chattels, by this deviſe doth paſs and is given all his eſtate active and paſſive (except land of inheritance, and free-hold eſtates, and ſuch things as depend thereupon) as Leaſes for years, Wardſhips by Tenure *in Capite*, or by Knights Service, gold, ſilver, plate, houſhold-ſtuff, cattel, corn, debts, and the like; and if one deviſe to I S all his goods, or all his Chattels, by either of theſe is deviſed as much as by both of them. *Portman verſus Willis. Paſche.* 36 *Eliz. Co. B. Coo. ſuper Litt.* 118. *Swinb. part.* 7. *c.* 10.

If one give his Goods by Will to his wife for life, and after her deceaſe to I S, this is not good to I S, for a Deviſe of a remainder of goods is not good. But where the Deviſe is of the uſe and occupation of goods onely, there it may be good by way of remainder, *March.* 106. *pl.* 183.

If one have goods worth 100 *l.* and owe 20 *l.* and giveth to his wife the one half of all his goods to be equally divided between him and his executors, in this caſe the wife ſhall have the one half of all the eſtate, and that without defalcation, *Goldſb.* 149. *pl.* 74.

If one deviſe to I S all his moveables, by this Deviſe doth paſs all his perſonal goods, both quick and dead, which either move themſelves, as horſes, ſheep, and the like; or may be moved by another, as plate, houſhold-ſtuff, corn in the garners and barns, or in the ſheaf, *&c.* *Swinb.* 305. 306, 307. alſo all Bonds and Eſpecialties; and by a Deviſe of Immovables doth paſs Leaſes, Rents, graſs, and the like; but not any of thoſe things that do paſs by the deviſe of moveables; but debts will not paſs by either of theſe Deviſes, *Agree Hill.* 9. *Car. Co. B.*

If one deviſe to another all his houſhold-ſtuff, hereby doth paſs his plate, coaches, tables, ſtools, forms, beds, veſſels of wood, braſs, pewter, earth, and the like; but not his apparel, books, weapons, tools for Artificers, cattel, victuals, corn, plow-geare, and the like; by a Deviſe of all utenſils, it is agreed that plate and jewels do not paſs, *Swinb.* 313. *part.* 7. *c.* 10. *Dyer* 59.

If a man deviſe to I S one of his horſes, or a horſe, by this deviſe I S ſhall have the election, if there be more than one, which horſe he will have: but if the deviſe be thus, I will that my Executor ſhall deliver to I S one of my horſes; in this caſe the Executor hath the election, and may deliver which of them he will, *Swinb.* 302. Election.

If one deviſe thus, I give to I S my corn growing in ſuch a ground this next year; or the lambs of my flock this next year; by theſe deviſes the Legatee ſhall have no more but what doth grow that year. But if he deviſe ſo many quarters of corn, or ſo many lambs; in theſe caſes ſo much muſt be paid howſoever, *Swinb.* 94.

If one have a Leaſe for years of land, and deviſe it to I S for life; by this deviſe the whole term is deviſed, and I S the Deviſee ſhall have the whole term if he live ſo long, and yet I S ſhall not have an eſtate for life by this deviſe; and ſo alſo it ſeems the Law is upon a Grant by deed after this manner, *Coo.* 4. 66. *Plow.* 520. *Coo.* 7. 23. And if a man poſſeſſed of a term of years of land, deviſe his term, or his Leaſe, or the land it ſelf by a deviſe, in either of theſe terms the whole term doth paſs, *Brownl. Rep.* 1. *part.* 41, 45. 2. *part.* 308, 309. Grandfather, father, and ſon; the grandfather was poſſeſſed of a term of 22 years to come, he deviſed the land to the ſon for 21 years, and makes the ſon his Executor, and dyes; the ſon being Thirdly, in reſpect of the time.

within the age of 21 years, the Father enters into the land, and makes a Leaſe for 7 years by Indenture, untill the ſon come to full age, the father makes the ſon his Executor, and dyes; the ſon enters by force of the Deviſe made by the Grandfather; in this caſe it was adjudged that the ſon ſhall avoyd the Leaſe made by his father, *Brownl. 2. part.* 308.

If a man be poſſeſſed of two houſes for years, and deviſe them to his wife for her life, if ſhe live ſole; the remainder to I S; and if ſhe marry, then that ſhe ſhall have one of them during the reſt of the term, [and then addeth theſe words] and alſo, I will that ſhe ſhall have 20 *l.* a year out of my other lands; in this caſe, and by this Deviſe, it ſeems the Annuity ſhall continue during the term. *Sed quære.* for the Judges were divided in this point, *Paſche* 14. *Jac. B. R. Gough* and *Haywards* Caſe.

If a Legacy be given, and no time is ſet for the payment or doing of it, if it be ſimple, it muſt be paid and done preſently; if it be conditional, and upon a condition precedent, it muſt be paid or done the time the condition is firſt extant: and if there be a time ſet for the payment or doing of it, it muſt be paid or done at the time appointed. See more in Expoſition of Deeds, numb. 15. *Plow.* 540. *Swinb.* 354.

9. Deviſe of lands to Executors or others to ſell; or that Executors or others ſhall ſell or otherwiſe diſpoſe them: how this ſhall be taken, and what ſale and diſpoſition ſhall be good, or not.

Deviſe of Lands to Executors to ſell, to pay debts, legacies, *&c.* are ſome of them after one manner, and ſome after another; for ſometimes the Deviſe is thus, I will that my Executors, or that *A B* and *C* my Executors ſhall ſell my land, *Coo. ſuper Litt.* 236. 112, 113. 15 *H.* 7. 12. *Dyer* 177. 219. *Kelw.* 107 108. *Perk. Sect.* 543. 542. *Litt. Broo. Sect.* 371. *Kelw.* 40 45. and ſometimes the Deviſe is thus, I give my land to my Executors to be ſold, or to the end that they ſhall ſell it; in the firſt caſe, the Executors have onely an authority and no intereſt, and therefore in that caſe the land doth deſcend in the interim to the heir of the Deviſor, and he ſhall have the profits of the land untill it be ſold; and if it be never ſold, he ſhall ever have the profits of it; and in this caſe, they may ſell it when they will, if they be not haſtned thereunto by order of Court; and when they do ſell, they muſt all joyn in the ſale by the Common Law, or otherwiſe the ſale had not been good; and therefore if one or more of them had dyed before the ſale, they that had ſurvived or their Executors could never have ſold it by this authority; ſo likewiſe if any of the Executors had refuſed the charge of the Will, the land could not have been ſold by the reſt, unleſs the words of the Will had been, that his Executors or ſome of them ſhould ſell it; for in that caſe, ſome of them even by the Common Law it ſelf might have ſold, and now alſo by the Statute of 21 *H.* 8. *cap.* 4. ſome of them may ſell it without the reſt; as if one give his land to *A* for life, and that after his deceaſe it ſhall be ſold by his Executors, and make four Executors, and one of them dye during the life of *A*, and then *A* dyeth; in this caſe the other three Executors may ſell. So if one give his land in Tail, and that if the Donee dye without iſſue, that the lands ſhall be ſold by his ſons-in-law, and he have then five ſons-in-law, and one of them dye in the life-time of the Donee, and after the Donee dye without iſſue; in this caſe, the other four may ſell the land, and the ſale made thereof is good: And yet if the words of the Will be, That it, ſhall be ſold by *A B* and *C* his Executors, or his ſons-in-law; in this caſe, if one of them dye, it cannot be ſold by the reſt: but in the laſt caſe before, where the Deviſe is, I give my land to my Executors to be ſold, *&c.* the Executors have an intereſt in the land, and an authority about the land alſo, and therefore in this caſe the deſcent is prevented, and the Executors ſhall keep it till the ſale; neither will any diſſeiſin, fine, recovery, or Feoffment by the heir prejudice their intereſt, but that they may ſell it when they will, but they muſt ſell it in time convenient, or otherwiſe the heir may enter and put them out by a condition in Law that is annexed to the intereſt, or perhaps the heir may tender to them the worth of the land, and if they refuſe to accept it, he may enter upon them, and out them: and it ſeems in this caſe, the mean profits untill the ſale is no Aſſets, but the money made upon the ſale ſhall be Aſſets in their hand: and in this caſe, albeit one or more of the Executors dye, or refuſe, yet the reſt may ſell it, even by the Common Law it ſelf, and ſo alſo by conſtruction upon

Aſſets.

upon the ſame Statute, for the eſtate ſurviveth. But it ſeems they may not ſell to him that doth refuſe; neither may they in either caſe transfer their power to ſell to any other, nor keep the land themſelves, and pay ſo much of their own money as the land is worth. A Deviſe was to *A* for life, the remainder to his ſon in Tail, and if his ſon dye without iſſue of his body, that then the land ſhall be ſold by his Executors, and maketh two Executors and dyeth, *A* dyeth; in this caſe it ſeems one of the Executors cannot ſell, *Goldib.* 2. *pl.* 4.

If the Deviſe be that the Executors ſhall ſell with the aſſent of I S; in this caſe if I S dye before he aſſent, the Executors cannot ſell, and in his life time they cannot ſell without his aſſent, *Brownl.* 2. *Rep.* 100.

If one deviſeth by his Will, that his land ſhall be ſold to pay his debts, and ſay not by whom; in this caſe it ſhall be ſold by his Executors; and if one deviſe all his land except one Acre which he doth appoint to pay his debts; by this Deviſe his Executors or the ſurvivor of them may ſell it: but if one ſay by his Will that I S ſhall have *ram gubernationem puerorum meorum quam*, the diſpoſing, letting, and ſetting of my lands; by this Deviſe I S hath not power given to him to ſell the land, *Perk. Sect.* 547. *Dyer* 371. 26.

If one deviſe that his land ſhall be ſold after the death of his wife by his Executors with the aſſent of *I S*. and make his wife and a ſtranger his Executors, and dye, and after *I S* dye; in this caſe, the land cannot be ſold, for the authority is determined, *Dyer* 219.

If one deviſe that his Executors ſhall ſell the land, and with the money coming or made of it, ſhall pay ſuch and ſuch Legacies or ſums of money, in particular to ſuch and ſuch perſons by name; this is not a Legacy for which a Suit lyeth in a Court Chriſtian, but for this, every one that is to have portion may have account againſt the Executors after the ſale, *Dyer* 151, 152.

If one give lands to another, to give them again to the children of the Teſtator, or to diſpoſe them at the Will of the Deviſees to ſome of the children of the Deviſor; in theſe caſes, the Deviſees muſt diſpoſe it accordingly, and cannot give it to any other, *Trin.* 2. *Car. B. R.* And if one give lands to others, to the intent that with the profits thereof they ſhall educate children, or pay ſuch ſums of money, or the, *&c.* in this caſe, the Deviſees muſt do accordingly, or they may be compelled thereunto, *Coo.* 6. 16.

And in all caſes of deviſes of lands to Executors to ſell, it is wiſdome to make it certain, *i.e.* that the Executors or the ſurvivor of them, or ſuch or ſo many of them as take upon them the probate of the Will (if his meaning be ſo) ſhall ſell it, *Coo. ſuper Litt.* 112, 113. And it is better to give an Authority than an eſtate, unleſs his meaning be that they ſhall take the profits of the land untill the ſale; and if he do ſo, then it is neceſſary that he appoint that the mean profits untill the ſale ſhall be Aſſets in their hands, for otherwiſe it ſhall not be ſo. *See more, Brownl.* 1. *part.* 34. 2. *part.* 47. 100.

10. Deviſe upon condition, and what words in a Will ſhall be conſtrued in the ſenſe of a condition, and what not.

The ſame words that in a Deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a Will, and the thing given thereby to be conditional, *Dyer* 33, 348. 126. *Coo. ſuper Litt.* 236. *See condition.* And therefore theſe words, *Provided on condition, So that, If*, and the like, will make a condition in a Will: So that if one deviſe land to I S on condition, or *So that*, or *If*, or provided that he do bring up his eldeſt ſon, or pay his wife 20 *l.* a year for her life, or the like; by theſe Deviſes, the eſtate is made conditional: Alſo other words that being uſed in a Deed will not make a condition, yet being uſed in a Will make a condition, and the eſtate made by the Deviſe to be conditional: And therefore, if a man deviſe his land to his Executors to be ſold; or deviſe his land to them or others to pay 20 *l.* to *I S*, or paying 20 *l.* to *I S*; in theſe caſes, and by theſe Deviſes, the eſtates are made conditional: and of theſe conditions regularly the heir, and not a ſtranger ſhall take advantake. So as if one deviſe land to another and his heirs, provided that he pay 10 *l.* to *I S*, otherwiſe that the land ſhall remain to *I D*, and his heirs; in this caſe, if the Deviſee do not pay the money, *I D* ſhall not take advantage of it, nor have the land according to the Deviſe,

viſe, but the heir of the Deviſor ſhall enter and have the land, and put out the Deviſee. And if one deviſe his land to *I S* for life, on condition to pay 20 *l.* to *I D*, and after to *I D* in Tail; in this caſe, if *I S* do not pay the 20 *l.* it ſeems the heir ſhall enter and hold the land during the life of *I S*, and that *I D* ſhall not have it till then, *Dyer* 33.348.126.128.

And in caſes of Deviſes of Goods or Chattels, other words will make a Deviſe conditional in divers caſes, as [when] as, I give to *I S* 10 *l.* when he ſhall be married; and [whiles] as, I give to *I S* 20 *l.* whiles he ſhall abide with my children, which is as much as if he abide with my children; and [which] as I give him 20 *l.* which ſhall marry my daughter; and the ablative caſe abſolute, as, my ſon being dead, I give to *I S* 20 *l.* And of all theſe conditions regularly, the Executor and no other ſhall take advantage. But if the condition be ſuch for the matter and ſubſtance of it, as is impoſſible, unlawfull, or the like; there perhaps theſe words may not make a condition, nor the thing deviſed conditional, but rather make the whole ſentence voyd. Whereof reade *Swinb. part.* 4. *Sect.* 5. at large. *Swinb.* 126.

11. Where a Deviſe voyd or voydable in his exception, may become good by matter *ex poſt facto*, or not.

If one deviſe his land to his daughter and heir apparent in Fee-ſimple, this Deviſe is voyd; yet if in this caſe the wife of the Deviſor be privily with child of a ſon which is born after his death, now is the Deviſe become good, for now ſhe is not heir to her father, *Fitz. tit. Aſſize.* 27.

If a woman that hath a husband, deviſe her land by Will during the Coverture, and after her husbands death when ſhe is ſole, ſhe do publiſh and approve it; in this caſe and by this means the Deviſe is become good: but if ſhe make and publiſh it during the Coverture, and after her husband dye and ſhe become ſole, this accident without any more will not make the Deviſe good; the ſame Law is of the Deviſe of goods and chattels, *Plow.* 344.

If an Infant within age deviſe his lands or goods, and publiſh his Will, and after he comes to be of full age, he doth publiſh and approve it again; in this caſe and by this means the Deviſe is become good: but if the Infant live to be of full age, and do not publiſh and approve it, *contra*, *Plow.* 344.

If a Legacy of goods or chattels be given on condition to a man uncapable; and before the condition is extant, he doth become capable; in this caſe, and by this means the Deviſe is become good. See before at numb. 6. more of this matter, *Swinb.* 340.

12. Where a Deviſe good in his inception, ſhall, or may become voyd by matter *ex poſt facto*, or not.

By a ſubſequent repugnant Will.

A Deviſe that hath a good beginning, is ſometimes avoyded and overthrown by ſubſequent matter in the ſame Will, and ſometimes by ſubſequent matter in another Will, and ſometimes by ſome other accident *ex poſt facto*: For if a man make a ſubſequent or latter Deviſe either in the ſame or in another Will, ſo contrary and repugnant to the former, that both cannot ſtand together, this doth overthrow the former, *Litt.* 168. *Coo. ſuper Litt.* 112. *Plow.* 540. 541. *Coo.* 8. 94 6. 33. And therefore if a man do give White Acre to I S in Fee, or his white horſe to I S, and after by the ſame or another Will doth give White Acre to I D in Fee, or his white horſe to I D, theſe latter Deviſes do overthrow the former, *cum duo inter ſe pugnantia reperiuntur in teſtamento, ultimum ratum eſt*: And as a latter Will doth overthrow the former, ſo the latter part of a Will doth overthrow the former part of the ſame Will. But if the Deviſees be ſuch as they may ſtand both together, and are not directly repugnant, nor do fight one againſt another, there the latter ſhall not overthrow the former, but both ſhall be received: And therefore if one deviſe his land to I S, and his heirs, and after by the ſame Will deviſe a Rent out of the ſame land to I D and his heirs, or *è contra*. So if one deviſe White Acre to *A* for life, and afterwards give the ſame Acre to *B* in Fee; in this caſe the one may have it for his life, and the other may have the Fee-ſimple afterwards. *See before.*

By a waving of the eſtate deviſed.

If one deviſe his land to his ſon and heir in Fee-ſimple, or deviſe it to a ſtranger for years, the remainder to his ſon and heir in Fee-ſimple, and the heir after the death of the Deviſor doth (as he may) wave the eſtate given him by the Deviſe, and claim the land by deſcent; in this caſe and by this means the Deviſe is become voyd. But if the Deviſe be to the ſon and heir in Tail, the remainder

mainder to a ſtranger, there he cannot wave the Deviſe, and take it in any other manner. And ſo if a man have onely two daughters (who are his heirs) and he deviſe his land to them; or have Gavelkind-land, and deviſe it to all his ſons: they may not wave theſe Deviſes and take by deſcent, for by Deviſe they ſhall take as joynt-tenants, who otherwiſe by deſcent ſhall take as Parceners, *Plow.* 545. *Perk. Sect.* 569. *Litt. Broo.* 453. *Kitchin* 127. *Dyer* 317, 350.

If one deviſe his land to another in Fee-ſimple, Fee-tail, for life, or years, and the Deviſee after the death of the Teſtator doth refuſe and wave the eſtate deviſed to him; in this caſe and by this means the Deviſe is become voyd. And it ſeems a verbal waver is ſufficient in this caſe. So if one give goods or chattels to another, and the Deviſee refuſe it; by this means the Deviſe is become voyd, and any waver or refuſal will ſuffice in this caſe; for a man ſhall not be compelled *Nolens volens* to take a thing deviſed to him, *Litt. Broo. Sect.* 482. *Perk. Sect.* 569. *Dyer* 61. *Coo.* 9. 140. *Plow.* 543, 544.

If a woman ſole deviſe her lands or goods by Will, and after take a husband and dye during the Coverture; by this means the Deviſe is become voyd. And yet if ſhe ſurvive her husband, and dye unmarried, now is the Deviſe become good again, *Plow.* 348.

If one deviſe his land to I S and his heirs, and afterwards I S dye the Teſtator living; by this means the Deviſe is become voyd. And in this caſe no verbal declaration of the Teſtator, that the heirs of I S ſhall have it will help; for albeit a Deviſe of land in writing may be revoked by a verbal ſubſequent declaration, or by any act croſſing or controuling that Deviſe, yet a Deviſe becoming voyd by that means cannot be made good by any ſuch verbal declaration ſubſequent to the ſame Countermand, *Plow.* 50. 346, 344, 341. So if one give any goods or chattels to I S, and he dye before the Teſtator; in this caſe and by this means the Deviſe is become voyd, and the Executor of I S ſhall not have it, *See infra at numb.* 14. And yet if a Deviſe be of land to *A* for life, the remainder to *B* in Tail, and *A* dye before the Teſtator; it ſeems the Deviſe of the remainder doth continue good notwithſtanding, *Perk. Sect.* 567, 568.

And if one deviſe lands or goods to the wife of I S, and afterwards her husband dyeth, and ſhe marry with another man, and then the Deviſor dyeth; this is a good deviſe notwithſtanding, and not avoyded by either of theſe Accidents, *Plow.* 344.

If one deviſe a Term that he hath to *A* for life, the remainder to ſuch perſons as ſhall be occupiers of White Acre at the death of *A*; this Deviſe albeit in his beginning it be good, yet if the Deviſor dye before *A*, it ſeems now to become voyd; for he that will take by way of Executory deviſe, muſt take as an immediate purchaſer, and be capable and known at the time of the death of the Teſtator, *Per* Juſtice *Jones*, *M.* 9. *Jac. Co. B.*

If I give to I S 20 *l.* if he marry my daughter, and ſhe dye before he marry her; in this caſe and by this means the Legacy is become voyd, *Swinb.* 356.

If I give a debt owing me to I S, and afterwards I receive or releaſe the debt; hereby the deviſe is become voyd, *Perk. Sect.*

If a man make a Will and give Legacies, and appoint one or more his Executor or Executors, and he or they after his death all refuſe to take upon them the Adminiſtration: yet in this caſe the Legacies remain good, and are not become voyd: And in this caſe the courſe is to grant the Adminiſtration of the goods to him to whom it doth belong, and to annex the Will to the Adminiſtration, and then the Adminiſtrator is to perform the Will as the Executor ought to do, *Litt. Broo. Sect.* 300.

It is held alſo that a Legacy of goods or chattels may become voyd by the injurious dealing of the Legatee againſt the Teſtator after the Legacy given: whereof reade *Swinb. part.* 7. *Sect.* 22.

And when the thing deviſed is dead, or ſpoyled, howſoever by this means the Deviſe is not become voyd, yet it loſeth his effect, and is as if it were voyd, *Swinb.* 357. A Legacy may be extinct and gone by a Contract alſo, as where the Execu-

tor gives the Legatee an obligation for the money, otherwiſe it is as if it were made to a ſtranger, *Brownl.* 2. *part.* 11. See more *ſupra* at *numb.* 5. *Brownl.* 2. *part.* 111.

13. Where a Legacy ſhall go to the Executor when the Legatee doth dye before he doth receive it; and where not.

In all theſe caſes, when the diſpoſition of the Legacy is pure, and no time is ſet for the performing of it; or there is a ſet time for the doing of it, and the Legatee dye before the time: and where the diſpoſition of the Legacy is conditional, and a time ſet for the doing of it, if the Legatee live till that time, or the condition be performed; in all theſe caſes the Executor or Adminiſtrator of the Legatee ſhall have the Legacy, and the ſame remedy to recover it that the Legatee himſelf had, *Swinb.* 350, 355, 356. But if the Legatee dye before the condition be performed, *contra*; And yet if in that caſe the Teſtators minde ſhall appear to be that the Executor or Adminiſtrator of the Legatee ſhall have it, or the condition be to be performed by another, and there be no default in the Legatee: or if the diſpoſition be modal: or the Legacy that was at firſt upon condition, be afterwards repeated without condition, or it be referred to a condition to be afterwards ſet down, and none is ſet down; in theſe caſes the Legacy is not loſt by the death of the Legatee, but ſhall go to his Executor or Adminiſtrator: As for Example; If one deviſe 20 *l.* to W S to be paid within 4 years after the death of the Teſtator, and the Legatee dye before the four years expired; in this caſe the Executor or Adminiſtrator after the 4 years expired ſhall recover the Legacy. If one give to W S 20 *l.* when he cometh to 21 years of age, and he dye before he come to the age of 21 years, in this caſe his Executor ſhall not have the Legacy. But if the Deviſe be thus, I give to W S 20 *l.* and I will that it ſhall be paid him at his age of 21 years, and he dye before he come to the age of 21 years; in this caſe his Executor ſhall recover the Legacy, *Broo. Deviſe* 27, 45. *Swinb.* 350, 355. *Dyer* 59. *Swinb.* 358 356. *Plow.* 345. So if one give to I S 20 *l.* when he ſhall be married, and he dye before marriage; in this caſe his Executor ſhall not have it. But if one deviſe thus, I give to W S 20 *l.* towards his marriage, and he dye unmarried; in this caſe the Executor ſhall have and recover the Legacy. So if one do give to W S 20 *l.* when the Executor of the Teſtator ſhall dye; in this caſe if W S dye before the Executor, the Executor or Adminiſtrator of W S ſhall not have the Legacy. If one deviſe goods or chattels to I S, and I S dye before the Teſtator, the Executor or Adminiſtrator of I S ſhall not have this Legacy. See more in *Brownl.* 1. *part.* 32.

14. Where an Executor upon a Deviſe to him hath an Election to have the thing deviſed as Executor or as Legatee. And when he ſhall have it in the one right or in the other; and what act ſhall make a declaration of his Election.

When any Chattel real or perſonal is given to an Executor by a Will, the Executor hath an election given him by the Law to have and take it in the one right or in the other, *viz.* as Executor, or as Legatee: and by his ſpecial entry, or ſeizing of the thing, or ſome ſpecial declaration, his election is to be made. And if the Executor do enter generally (as moſt do) and never make any declaration which way, or by which right he will have it (as moſt Executors uſe to do) he ſhall be ſaid to have it, and the Law ſhall adjudge it in him as Executor, and not as Legatee. But if by any ſubſequent words or deeds he ſhall declare his minde to be otherwiſe, he ſhall be in as a Legatee *ab initio*; And yet if once he do any ſuch act as is proper to an Executor, this is a diſagreement to the Legacy *ab initio*; and after that it ſeems he cannot take as Legatee, but muſt take as Executor. And if one Executor of many to whom a term of years of land is deviſed, occupy the ſame alone, and the reſt intermeddle not with the profits thereof, albeit he make no declaration, it is ſaid this is a good declaration of his election to have it as Legatee. But if a term of years be given to the wife of I S, and I S be made Executor, and he enter generally, and after makes his Teſtament and never ſpeaks of this term; this is no declaration of his Election to have it as Legatee, neither ſhall the term be ſo deemed in him but as Executor. But in theſe caſes this muſt be heeded, that howſoever the Executor hath power to take as Executor, or as Legatee, yet he cannot take as Legatee to prejudice Creditors in their debts; but the ſame things they ſo take as a Legacy, if there be not enough beſides, ſhall be ſaid to be Aſſets in their hands as to the Creditor for the ſatisfaction and payment of their debts, *Plow.* 519, 520, 543. *Coo.* 10. 47. 2. 37. 8. 96. *Dyer* 277. 367. *Perk. Sect.* 57. 4 573, 575. *Brownl. Goldsb.* 185. *pl.* 125.

Aſſets.

If

If a man deviſe that after his Debts and Legacies paid, his wife ſhall have all the reſidue of his goods and chattels to diſtribute for his Sarle, *&c.* and make his wife his Executor; in this caſe it is ſaid ſhe hath no election, but ſhe muſt take as Executor, and cannot take as Legatee, *Dyer* 331.

When a Deviſe of goods or chattels is well made, the aſſent of the Executor is neceſſary to the perfection thereof, for untill then the Legatee may not have or meddle with the thing deviſed. And this Aſſent is defined to be the agreement of an Executor or Adminiſtrator, that a Legatee ſhall have the thing bequeathed unto him. And it is either expreſs, *i.e.* when the Executor or Adminiſtrator doth by expreſs words agree to the Deviſe. Or implyed, *i.e.* when the Executor doth not by words, but by ſome overt act declare his aſſent that the Legatee ſhall have the thing deviſed unto him, *Coo.* 10.47,52. *March.* 137. *pl.* 209. 15. Aſſent *Quid*

This agreement of the Executor or Adminiſtrator is not needfull in the caſe of deviſe of land; for if a man be ſeized of land in Fee-ſimple, and deviſeth to another in Fee-ſimple, Fee-tail, for term of life, or years; in theſe caſes the Deviſee may enter into the land deviſed without any leave of the Executor or Adminiſtrator: and in truth in theſe caſes the Free-hold or eſtate is ſaid to be in the Deviſee before his entry: and therefore if the heir enter firſt, the Deviſee may enter upon him, and put him out, *Coo. ſuper Litt.* 111. *Perk. Sect.* 576,578,579. *Swinb.* 134, 135. *Brownl.* 1. *part.* 132. And in caſe where land is deviſed by the cuſtome of a place, if the heir enter firſt and keep the Deviſee out, the Deviſee may have a Writ of *Ex gravi querela* againſt him for his relief: and this Writ is incident to that cuſtome. But if a Deviſee enter firſt into the land deviſed unto him, and then the heir of the Deviſor enter upon him, then the Deviſee may take his remedy at the Common Law as in other caſes. And with theſe things the ordinary Executor or Adminiſtrator is not to intermeddle. But regularly a Deviſee cannot nor may not have or take any chattel real or perſonal deviſed to him without the agreement or delivery of the Executor or Adminiſtrator, *Perk. Sect.* 570. *Coo. ſuper Litt.* 211. *Plow.* 525. 20. *Ed.* 4.9. And by this aſſent if the Deviſe be good (for otherwiſe an aſſent will not make it good) the Deviſe is perfected, and the Legacy executed. And yet if the Legatee have the thing deviſed in his own hands; or if there be a ſpecial clauſe in the Will giving him authority to take it himſelf; or it be a Legacy to good and godly uſes; or the thing given be like to periſh on the ground, being corn or the like, and there be aſſets beſides to pay all the debts; in theſe caſes perhaps the aſſent of the Executor or Adminiſtrator may not be neceſſary, but the Legatee may take the thing deviſed without his agreement, otherwiſe not in any caſe, *Swinb.* 353. *Broo. tit. deviſe* 6.30. And if a Legacy be given to one of the Executors themſelves, he may take it without any aſſent of his Co-executors, and that before Adminiſtration alſo if he will, *Perk. Sect.* 572. 16. Where an Aſſent is neceſſary, or not. And where a man may enter into the lands, or take the goods or chattels deviſed unto him without the aſſent or delivery of the Executor. And what ſhall be ſaid a ſufficient Aſſent to execute a Legacy or not.

If there be many Executors, the aſſent of any one of them is ſufficient; and if there be but one, and he be dead, the aſſent of his Executor is ſufficient; or if he dye inteſtate, the aſſent of the Adminiſtrator *de bonis non adminiſtratis* of the firſt Teſtator is ſufficient; or the Legatee himſelf in this caſe where the Executor dyeth inteſtate, or where he doth refuſe to take upon him the Adminiſtration, may take Adminiſtration himſelf, and by publick declaration aſſent to his own Legacy. And if a man be Executor and Legatee both, he may aſſent to, and take the Legacy, and yet wave the Executorſhip, and this aſſent is good. And therefore if the Legatee of a term of years be made Executor, and he enter and claim and occupy the land by force of the Deviſe, and dye before Probate of the Wil: the Executor of the Legatee, and not the Ordinary, ſhall have this term; and yet it ſeems the Executor may not do this in prejudice of a Creditor to hinder him of his debt, *Dyer* 372. 367. *See Agreement.*

Any agreement in word or deed will ſuffice to make an aſſent, and execute a Deviſe, *Coo.* 4.28. Let Executors take heed therefore; for if an Executor do but agree that the Legatee of a term of years of land ſhall take the profits thereof, and that but for a time onely; or ſay to the Legatee, God ſend you joy of it: or I intend you ſhall have it according to the Deviſe, or the like; this is a good aſſent to exe- A Caveat for Executors.

a will amount to an Attornment may make an Aſſent to a Legacy

cute the Legacy. And if the Executor agree that the Legatee and a ſtranger together ſhall take the profits of the land, or the thing deviſed; this is a good aſſent. And it ſeems that whatſoever verbal agreement will amount to an Atturnment, may make an aſſent to a Legacy. *See Atturnment.* If therefore the Executor agree to the Legacy upon certain terms and conditions; this is agreed to be a good and abſolute aſſent to the Legacy, *Per 2 Juſtices, M.* 37, 38. *Eliz. B. R. Coo.* 4. 28. *Nichols* was poſſeſſed of a term of a 1000 years, he deviſed it to E for life, the remainder to I H, and made W husband to E Executor, and dyed; I H deviſed his intereſt to I S, and made O his Executor and dyed; after W ſpake theſe words, If E my wife were dead, my eſtate in the land were gone, and then it remains to I H; in this caſe theſe points were agreed by the Judges; 1. That the Deviſe to I H by way of Executorie remainder is good. 2. That the Deviſe by I H to I S is voyd, for it is but a poſſibility. 3. That an aſſent to the firſt Deviſe is an aſſent to him in remainder. 4. That if the Executor enter generally, he is in as Executor, and not as Deviſee. 5. That in this caſe W hath made his election to have it as a Legatee in right of his wife by thoſe words. 6. That the aſſent comes time enough after the death of I H to ſettle the remainder in O the Executor. 7. But they ſeemed to encline, that there where the Executor wanteth Aſſets, he ſhall not be concluded by an implyed without an expreſs aſſent, *March.* 137. *pl.* 209.

If a term of years be given to the wife of the Teſtator during the minority of his eldeſt ſon, to the intent that ſhe with the profits thereof ſhall breed up his children, the remainder of the ſame term to the ſame eldeſt ſon, and ſhe is made Executrix, and ſhe enter generally, but doth alwayes breed the children of the Teſtator; in this caſe it ſeems that this education of the children ſhall be taken for an aſſent againſt her to veſt the eſtate in the eldeſt ſon, *Plow.* 540. And if a man poſſeſſed of a term of years give it to his wife, if ſhe live ſo long, and after her deceaſe the remainder of years to I S, and make his wife Executrix, and ſhe enter, claiming to have it onely for her life, the remainder to I S according to the Deviſe; in this caſe this is a good aſſent for the execution of the remnant of the term in I S, *Plow.* 516. *Perk. Sect.* 574. And if a term be deviſed to *A* for life, the remainder to *B*, and the Executor aſſent to the Deviſe of *A*; in this caſe this is a good aſſent to the deviſe of *B*, and ſhall execute the ſame alſo, whether the Executor have aſſets or not, *Coo.* 8. 95. 4. 66. 10. 47. *Perk. Sect.* 574. So if a man poſſeſſed of a term of 20 years. deviſe it to one for 10 years, and after to another for the remnant of the term; or if the Deviſe be to one for ſo many years of the term as he ſhall live, and after to another for the reſt of the time: in all theſe caſes an aſſent to the firſt Deviſee is an aſſent to the ſecond alſo. And ſo alſo it ſeems is the Law of a chattel perſonal, when the occupation thereof is firſt deviſed to one, and then the thing to another, 37 *H.* 6. 30. And if one that hath a term of years give it to his wife for her life, the remainder to his ſon, and make her Executrix, and ſhe enter claiming by force of the Deviſe, and not as Executrix; in this caſe this is a good aſſent to execute the Deviſe to him in remainder, *Plow.* 519, 543. *Coo.* 3. 96. 10. 47.

If one be poſſeſſed of a term of years of land, and he deviſe it to one of his Executors alone for part of the time, and the remainder of the time after to a ſtranger: and that Executor alone, albeit he enter generally, doth occupy the land himſelf, and the other Executors do not intermeddle therewith; in this caſe it ſeems this is a good aſſent to execute the Legacy to him in remainder for the reſt of the term. And yet if one give goods to one of his Executors for life, and after to a ſtranger for life, and this Executor alone get the goods into his own hands, and occupy them alone all his life time; it ſeems this occupation without ſome aſſent, will not execute the gift in the ſecond Legatee, *Perk, Sect.* 574 575. *Fitz. Deviſe* 6.

If one poſſeſſed of a Leaſe for years, deviſe it to his Executors, and deviſe a rent out of it to I S, and the Executors pay the rent; this is a good aſſent to the whole Legacy. But if he deviſe a rent, or Common out of it for certain years to I S, and after deviſe the term to I D: and the Executor doth agree that I S ſhall put in his cattel, or doth pay the rent to I S, (which is a good aſſent to the Legacy of I S;) this is no aſſent nor execution of the Legacy of I D; And yet perhaps if he deviſe a rent at firſt to I D for part of the term, and another rent to I S

for

for the reſidue of the terme afterwards; in this care it ſeems, that an aſſent to the firſt is not ſufficient to perfect the Deviſe of the ſecond Legatee. And yet if a Termor, deviſe the occupation or profits of his land to *J S* for 10 years of his Terme, and after deviſe the land it ſelf to *J D* for the reſt of the term; in this caſe if the Executor aſſent to the Legacy of *J S*, this will be a good aſſent to, and execution of the Legacy of *J D*. *Plow.* 540. 544. *Coo.* 8. 96. *Plow.* 541, 542. 522.

If one poſſeſſed of a term deviſe it to *I S* for life, the remainder to *I W*, and make *I S* his Executor, and *I S* take a releaſe from *I W* of all his right to the land; this is an implicite aſſent to the Legacy of *I W*. *Coo.* 10. 52.

If a man deviſe the occupation of a book or any other chattell perſonall to *I S*, or that *I S* ſhall have the occupation of any ſuch like thing during his life, and that after his deceaſe it ſhall go to *I D* for ever, and the Executor deliver the thing to *I S*; it ſeems this is a good execution of the Legacy to the ſecond Deviſee *I D*; and therefore after the death of *I S* he may ſeiſe the goods and hold them according to the Deviſe. *Old N. B.* 80. 37 *H.* 6. 30.

17. How a Deviſee may attaine the thing deviſed: And what remedy he ſhall have to recover it, or damages for it.

If lands, or any rent, or other profit to be taken out of lands, be deviſed to a man in Fee-ſimple, Fee-tail, for life, or years; in theſe caſes the Deviſee may enter into, and have and take the thing deviſed without the leave or agreement of the Executor or Adminiſtrator: and ſo he may whether there be any Executor made or not, and whether the Will be proved or not, for the Ordinary and the Executor have nothing to do with theſe things. And if the Deviſee in any ſuch caſe be diſturbed in the having or taking of ſuch things, he may have the ſame remedy as men have in other caſes. And where the land is deviſed by cuſtome, if the heire enter before the Deviſee, the Deviſee may be relieved by a Writ called *Ex gravi Querela*; but if the Deviſee enter firſt, and then the heir enter upon him, the Deviſee may have his remedy at the Common-Law. *Perk. ſect.* 576, 577, 578, 579. *Coo. ſuper Littl.* 111.

If lands are given thus, I will that my Executors ſhall ſell my land, and with the money made thereof ſhall pay 10 l. to my daughter *A*, and 10 l. to my daughter *B*. in this caſe and for this gift *A* and *B* may either ſue the executors in a Court of equity, or have an action of Accompt againſt them in a Court of Common-Law. *Trin.* 9. *Jac. Lovets caſe Dyer* 151. 152.

If Leſſee for years deviſe his term to Executors for life, the remainder over to *J. S.* for the reſt of the term: and the executor entreth and doth aſſent to the Legacy and dye, and the executor of the executor doth take the profits of the land, and keep out the ſecond Legatee; in this caſe it ſeems he may have an Accompt againſt the executor of the executor for the profits of the land. *Dyer* 277. But if one deviſe his land to his ſon and his heirs (except 20 l. a yeare for ſeven years to be imployed as followeth) and doth appoint his ſon (being his executor alſo) to pay that money to his daughters for portions; in this caſe the daughters may not have an Accompt at the Common-Law, but they may ſue the executors in the Spirituall Court or in a Court of equity, and if the executor be dead, they may ſue his executor. *Trin.* 9. *Ja. Lovets caſe.*

If one deviſe a rent out of his land, and do charge the land with a diſtreſſe: the Deviſee may make uſe of that remedy and diſtrain for the rent: but unleſſe power be given him by the Will to diſtrain, he may not diſtrain for it. *Dyer* 348.

If one be poſſeſſed of a term of years of land, and deviſe it to his wife to the end that ſhe with the profits thereof ſhall breed up his children; in this caſe this is no Legacy to them, and therefore it ſeems they have no remedy but in Chancery or ſome other Court of equity againſt her, if ſhe refuſe to do it. *Plow.* 545.

And in caſes of Deviſes of goods and chattels, as Leaſes for years, rents out of ſuch Leaſes, and the like, the Legatee cannot take the thing deviſed before he have the Aſſent of the Executor or Adminiſtrator thereunto: And therefore, if in theſe caſes the Executor or Adminiſtrator refuſe to agree to, perform, and deliver the Legacy, the Legatee might have ſued him in the Spirituall Court, or in ſome Court of Equity to compell him thereunto: And the Legatee might not ſue for a Legacy in any of the Courts of Common-Law: But now by the new Ordinance he is to ſue at the Common-Law, and not in the Chancery. But enquire how he is to

ſue at Common-Law, and what the courſe of practiſe herein is: And in theſe Courts and by theſe means, the Deviſee may recover his Legacy againſt an Executor or Adminiſtrator, if he have Aſſets to pay the debts of the Teſtator; for otherwiſe a Legacy is not recoverable at all; but in caſe where the Executor or Adminiſtrator hath once agreed to the Legacy, ſo as it is executed, it is then ſo veſted in the Legatee, and he hath ſuch a property therein, that he may enter into, or ſeiſe and take the thing deviſed as his own, and if any man keep or take it from him, he may have reliefe as in other caſes. *Broo. Non-ability* 18. *Fitz. Excomengment* 13.

If another doth claime by Deed of gift the goods a Legatee doth ſue for; this may be tryed in the Eccleſiaſticall Court. 37 *H.* 6. 9

If a debt, obligation, or any ſuch like thing in action be deviſed to another, the Deviſee hath no means to recover it, but by a Suit in the Spirituall Court, or in ſome Court of Equity, to compell the Executor to ſue for it himſelf, or to make the Legatee a Letter of Atturney, to ſue for it in the Executors name; for the Legatee cannot ſue for it in his own name, unleſſe he be made Executor as to that debt, &c. (which is the beſt courſe in theſe caſes:) and yet if the Legatee have the Bond or Eſpecialty in his hands, he may deliver it up or cancell it. *Perk. ſect.* 527. *Swinb.*

If a man deviſe a term of years of land to *J. S.* and make another his Executor, and the Executor having enough beſides to pay the debts doth ſell this term; in this caſe, albeit the ſale be good, and *J. S.* have no remedy nor means to recover the term, yet he may ſue the Executor for it, and recover the worth of it in damages in Court of Equity. *Plow.* 543. 545. *And of this opinion were Sir* John Walter, *and Sir* John Bridgman, *upon deliberate adviſe.*

And now having done with the firſt part of a Teſtament, *viz.* a Deviſe; we come to that which doth concern the ſecond part, *viz.* an Executor.

18. What perſon may make or appoint an Executor, and what not, and how.

Any perſon that may make a Teſtament, and deviſe his goods and chattels, may make an executor. See before at *Numb.* 4. *part.* 1. And a woman that hath a husband, as to the goods and chattels ſhe hath as Executrix to another, and as to her own goods and things in action, *viz.* debts due unto her upon Obligations, and Eſpecialties made to her alone before, or after her marriage, may make an Executor. *Fitz. Executor* 28. And he that may make an Executor, may make either one, two, three, or more his Executors at his pleaſure. *Swinb.* 187. *Dyer* 4. *Broo. Executors* 155. 19 *H.* 8. *Littl. Broo. ſect.* 180. 3 *H.* 6, 7, *Swinb.* 200. 193.

And he may if he will make one man his Executor for one year, another man his Executor for another year; or one man his Executor untill ſuch a time, and then another his Executor; As one may make *A* & *B* his Executors, and that *B* ſhall not meddle during the life of *A*. And a man may make one man Executor for one part of his eſtate. and another man his Executor for the other part of his eſtate; or one may make one man Executor as to part of his eſtate, and die inteſtate, as to the reſidue of his eſtate: Alſo a man may appoint one to be his Executor, if he will accept it, and if he refuſe that, another ſhall be his Executor. And laſtly, a man may make another his Executor upon condition, *viz.* ſo as he give Bond to ſuch and ſuch men to perform his Will, or the like: And all theſe nominations and appointments of Executor are good. See *Brownl.* 2. *part.* 282.

19. What perſon may be made or appointed an Executor, and what not, and by what name.

Any perſon that may be a Legatee, and take by the Deviſe of goods and chattels, may be an Executor: And therefore it is ſaid, That any perſon or perſons, male or female, of the Clergy, or Laity, children or ſtrangers, friends or enemies, marryed, or unmarried, creditor or debtor, bond or free, may be an Executor. See at *Numb.* 4. *part.* 2. *Numb.* 7. *Swinb.* 222. *Fitz. Executors* 47. 87. *Deviſe* 3. And that a Baſtard, an Excommunicate, or an Out-lawed perſon, may be as able and as abſolute an Executor as any other. *Fitz. Executor*, 11, 88. *Non-ability*, 18. *Broo. Non-ability*, 38.

And an Infant or child *in utero matris* may be an Executor; but he cannot meddle with the Adminiſtration of the goods untill he be of the age of 17. years, and therefore the Ordinary muſt grant the Adminiſtration unto ſome other, untill that time in truſt, and for the benefit of the Infant. *Coo.* 6. 67.

And

And a woman that hath a husband, may be an Executrix to any other perſon. *Fitz. Executor* 24.

Alſo a woman may be Executrix to her own husband, and the husband may be Executor to his own wife, and by this means he may recover all the debts due to her upon Obligations, Recogniſances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage; all which the husband ſhall not have but by Executorſhip or an Adminiſtration of her goods and chattels. *Fitz. Executor* 24. *Broo. Conſultation*, 5. Husband and Wife.

And all theſe perſons that may be Executors, may be Executors by that name as they may be Deviſees: And yet if there be two of one name, and the Teſtator make one of that name his Executor, and doth not ſay, neither can it be diſcerned which of them he doth intend, in this caſe neither of them ſhall be Executor. See *Acts Capacitie*. See before at *Numb.* 7. *Swinb.* 292.

But it is ſaid, that an Heretick, Apoſtate, Traitor, Felon, Recuſant convict, Sodomite, Libeller, Baſtard begotten in Inceſt, or a notoriour Uſurer cannot be an Executor: *Swinb.* 222, 223. *Coo.* 9. 39.

And that if a man be for any of theſe cauſes uncapable at the time of the death of the Teſtator, when the Executor is to take upon him the Executorſhip, that he is for ever uncapable; but it hath been held by the Common-Law, that a perſon attaint, may be an Executor. *Broo. Nonability* 18. *Fitz. Excomengment*. 13.

20 By what words a man may be made an Executor, and what words in a Teſtament ſhall make a man full Executor, or not, but a Coadjutor or Supravi ſor; and who ſhall be an Executor by ſuch words.

The moſt apt and proper words whereby to conſtitute an Executor, are, I make *J. S.* my Executor, or, I make *J. S.* the Executor of my Will, &c. But an Executor may be conſtituted by other words equivalent or by implication: And therefore, if a man ſay in his Will, I will that *J. S.* ſhall be my generall Adminiſtrator, or I will that *J. S.* ſhall adminiſter all my goods, or I will that *J. S.* ſhall diſpoſe all my goods and chattels, or I commit all my goods to *J. S.* or I commit all my goods to the diſpoſition of *J. S.* or I make *J. S.* Lord of all my goods, or I make *J. S.* Legatary of all my goods, or I leave all my goods to *J. S.* or I give all my goods to *J. S.* and make no other Executor; in all theſe caſes, *J. S.* by intendment of Law is made Executor of all the goods and chattels of the deceaſed: So if a man ſay, Of all my goods I make *J. S.* and ſay no more, but omit the word [Executor,] by theſe words *J. S.* is made Executor: So if one ſay, I will that *J. S.* ſhall diſpoſe all the goods that are in his hands, by theſe words *J. S.* as to thoſe goods is made Executor: So if I deliver goods to *J. S.* to keep untill my death, and then to diſtribute *ad pios uſus*, or for my ſoul, hereby *J. S.* is made Executor of thoſe goods. So if one ſay, I will that *J. S.* ſhall be my Executor, if *J. D.* will not, by this *J. D.* is made Executor in the firſt place by implication, and if he refuſe, then *J. S.* ſhall be Executor. But if a man make *A.* and *B.* his Executors, and ſay, I will that *J. S.* ſhall be a Coadjutor, or helper to *A.* and *B.* *ad diſtribuendum* or *adminiſtandum bona mea*; or I will that *J. S.* ſhall be Surveyor, or Supraviſor of my Will; in theſe caſes and by theſe words, *J. S.* is not made Executor with *A.* and *B.* *Swinb. part.* 4. *ſect.* 17, 18, 19. *Dyer* 4. 19 *H.* 8. 8. 21 *H.* 6. 6. *Fitz. Executor* 43. *Broo. Executors*, 98. 73. *Fitz Executors*, 113. 121, *Brieſe* 999.

And yet if he ſay, I will that *J. S.* ſhall have Adminiſtration of my goods, or be Executor with *A.* and *B.* or be Adminiſtrator with *A.* and *B.* in theſe caſes and by theſe words, *JS.* is made joint Executor with *A* and *B.* And if one ſuppoſing *J. S.* to be dead, ſay, I will that *J. D.* ſhall be my Executor, becauſe *J. S.* is dead, in this caſe and by theſe words, *J. S.* if he be living is made Executor firſt; and if he refuſe, *J. D.* ſhall be Executor: If one make a *A. B.* and *C.* his Executors, and then ſaith afterwards: And I will that *B.* ſhall adminiſter my goods alone, or that *B.* only ſhall adminiſter my goods; it ſeems in theſe caſes, *B.* only is made Executor, and that *A* and *C* are not made joint Executors with him. 3 *H.* 6. 6, 7.

21. Where and in what caſe an Adminiſtration is grantable, or not: And to whom it doth belong to grant it, and to whom it muſt be granted.

In all Caſes where a man hath any goods or chattels to adminiſter, and he doth die a naturall or civill death, and dyeth inteſtate, either in deed *i. e.* doth make no Will at all, nor appoint any Executor, or in Law; *i. e.* that doth make one or more

more his Executor or Executors, and he or they ſo appointed, is, or are ſuch perſons, as are not in being; or if they be in being is, or are ſo uncertainly named, that it cannot be diſcerned whom the Teſtator doth intend; or if he is, or they be well named, he is, or they are all uncapable by reaſon of ſome legall impediment; or if otherwiſe, they be capable, they do all die before the Will be proved; of if they live, if being cited to come in before the Ordinary to prove the Will, they either refuſe to appear, or if they do appear, they refuſe to prove the Will, and to take upon them the Adminiſtration of the goods & chattels of the deceaſed; in all theſe caſes, the Ordinary may and ought to grant the Adminiſtration of all the goods and chattels of the deceaſed to him that of right it doth belong unto according to his diſcretion. *Coo.* 9. 39. *Plow.* 276. *Doct. & Stud.* 78. 132. *Dyer* 236. 4 *H.* 7.13.

And if a man make a Will and after the death of the Teſtator, the Executor prove it, and then dye inteſtate, the Ordinary muſt grant the Adminiſtration of the goods of the firſt Teſtator, not adminiſtred in the hands of the Executor to ſome competent perſon or perſons according to his diſcretion: but where a man hath no goods and chattels to adminiſter, *i. e.* either he hath none, or if he have, they are none of his, or if they are, there is an Executor named, *in rerum natura*, capable, and well named, and he doth accept, or at leaſt hath not refuſed the Executorſhip; in theſe caſes, the Adminiſtration ought not to be granted; or if it be granted, it will be void or voidable at the leaſt: And in caſes, where the Adminiſtration is grantable by the Ordinary and others as before, ſuch perſons having power to grant it, may not grant it to whom they pleaſe, but as they are bound to grant it, and cannot refuſe ſo to doe, ſo are they directed and appointed to whom they ſhall grant it; for it is appointed by a ſpeciall Law, That the Ordinary ſhall depute the next friends of the Inteſtate to adminiſter his goods if they deſire it: and the Adminiſtration is to be committed to the widow, or next of blood, or both to the Inteſtate, and where there be divers in equall degree, and they all ſue for it, the Ordinary may accept them all or refuſe ſome of them, and commit the Adminiſtration to the reſt only; and if ſome of them only ſue for it, he may grant it to them alone: So that now the Law and courſe is to grant the Adminiſtration to the neereſt of kin to the deceaſed: *Stat.* 31. *Ed.* 3. *c.* 11. 21. *H.* 8. *c.* 5. *Littl. Broo. ſect.* 233. 415. *Fitz. Excomengment.* 13. *Coo.* 9. 39. 40. 3. 40. *Dyer* 339. 4 *H.* 7. 14.

As 1. to the husband or wife; and if there be none ſuch, 2. to the children, ſons or daughters; and if there be none ſuch, 3. to the Parents, Father or Mother; and if there be none ſuch, 4. to the brothers or ſiſters of the whole blood; and if there be none ſuch, 5. to the brothers or ſiſters of the half blood; and if there be none ſuch, 6. to the next of kin, Uncles, &c. And if theſe come in time and deſire the Adminiſtration, the Ordinary may and muſt grant it to them, and cannot grant it to any other if they be capable of it as moſt men are: and if divers of theſe in equall degree deſire it, the Ordinary may grant to which of them he pleaſeth; howſoever in this caſe, it ſeemes moſt juſt and equall to grant it to them all unleſſe he have ſome ſpeciall reaſon to admit ſome, and to exclude the reſt: and if none of theſe that are next of kin ſhall deſire it, but ſuffer the time to ſlip; in this caſe, the Ordinary may grant it to whatſoever ſtranger he pleaſe: And yet then perhaps the next of kinne may by Suit get the ſame Adminiſtration revoked, and a new Adminiſtration granted to him. See *infra* at Numb. 41.

22. How an Adminiſtration may be granted, and what ſhall be ſaid a good Adminiſtration, or not.

An Adminiſtration may and muſt be granted in writing under Seal, for by word of mouth it may not be granted; and it may be granted as well upon condition as abſolute: and it may be granted, as well for a part of the eſtate as for the whole: And therefore, if a man have goods in two Provinces, and he make a Will of his goods in one of the Provinces, and die Inteſtate for the goods in the other Province, an Adminiſtration may be granted for the goods in this Province: Alſo an Adminiſtration may be granted during, or untill a certaine time, or continually. *Dyer*, 294. *Fitz. Admin.* 5. 34 *H.* 6. 14. *Plow.* 279.

And therefore, if a man make a Will and appoint an Executor for ſeven years after

after the ſeven years ended, the Ordinary may and muſt grant an Adminiſtration of the goods. So if one do appoint another to be his Executor a year after his death, the Ordinary may and muſt grant the Adminiſtration for that year, untill the power of the Executor doth take place: And all theſe Adminiſtrations are good. See *Brownl.* 1. *part* 5. 2. *part* 119.

23. Who ſhall adminiſter after the death of an Executor or Adminiſtrator, and who not, and how an Executor of an Executor ſhall charge and be charged.

If an Executor die after he hath proved the Will, and he hath made a Teſtament, and appointed an Executor therein; in this caſe, this Executor alſo ſhall be Executor to the firſt Teſtator, as he is to the ſecond, and he ſhall have all the benefit, and be ſubject to all the charge that the firſt Executor had and was ſubject unto; and yet the goods of one Teſtator ſhall not be ſubject to the debts of the other; but each of the Teſtators goods ſhall be ſubject to the payment of his own debts only. *Stat.* 25. *Ed.* 3. *c.* 4. *Coo.* 5. 9. *Plow.* 86. 34 *H.* 6. 14. And if in this caſe, the Executor of the Executor take upon him the Adminiſtration of the goods of the firſt Teſtator, he cannot refuſe the Adminiſtration of the goods of the latter: but he may take upon him the latter and refuſe the former. *Trin.* 17. *Jac. Co. B. Wolfe & Heidens caſe.* But if the Executor refuſe to adminiſter to the firſt Teſtator before the Ordinary, or dye before the Probate of the Will, and he hath made a Teſtament and appointed an Executor therein; in theſe caſes, it ſeemes the Executor of the Executor ſhall not adminiſter the goods of the firſt Teſtator, but the Ordinary muſt grant the Admiſtration thereof *Dyer* 372. And yet if all the reſidue of the goods of the firſt Teſtator be given by the Teſtament to the firſt Executor after the debts be paid; in this caſe albeit he die before Probate of the Will, yet his Executor ſhall be Executor alſo to the firſt Teſtator, or elſe he ſhall have the Adminiſtration of his goods and chattels granted unto him: And therefore, if *A* make his Will, and give Legacies to *B.* and *D.* and give all the reſt of his goods and chattels after debts and Legacies paid to *C.* his wife, and make her his ſole Executrix, and ſhe die before Probate of the VVill, or any election made, not knowing of the VVill; and *E.* ſue out Adminiſtration of the goods of *A.* and pay the Legacies to *B.* and *D.* and *F.* ſue out an Adminiſtration of the goods of *C.* in this caſe, the Adminiſtrator of *C.* and not of *A.* ſhall have the goods; for the Law doth judge them in *C.* after the debts and Legacies paid without any election. *Adjudged in Hill.* 9. *Car. in Dens caſe.* See *Brownl.* 1. *part.* 91.

If an Executor after he hath proved the Teſtators VVill, die Inteſtate; in this caſe, the Adminiſtration of the goods of the firſt Teſtator not adminiſtred in the hands of the Executor muſt be granted to whom the Ordinary ſhall think fit: And if the Ordinary pleaſe, he may grant the Adminiſtration, *de bonis non adminiſtratis* of the firſt deceaſed, and of the goods of the ſecond deceaſed to one and the ſame perſon: And herein the Adminiſtrator muſt take care that his Adminiſtration have ſpeciall words for the granting of an Adminiſtration of the goods of the firſt Teſtator, not adminiſtred; *Broo. Executor* 117. 26 *H.* 8. 7. *Coo.* 1. 96. *Dyer* 372. *Termes of the Law tit. Adminiſtration.* For howſoever ſome hold that by the generall Adminiſtration, the Adminiſtrator ſhall have not only the goods of the Executor, but the goods of his Teſtator alſo, yet it ſeems this is not taken to be Law at this day. *Fitz. Adminiſtrator.* 9.

If there be two Executors made, and one of them doth refuſe before the Ordinary, and the other doth prove the Will, and make a Will himſelf and appoint an Executor and then die; in this caſe, it ſeemes the Executor of the Executor that did prove the Will alone ſhall have the diſpoſition of all the Eſtate, and be Executor to the firſt Teſtator, and that the ſurviving Executor ſhall not meddle therewith, for that his Election by the death of his companion is gone. *Dyer* 160.

And if one make two Executors, and one of them doth make an Executor and dye, and the other that doth ſurvive hath accepted the Executorſhip; in this caſe, the ſurviving Executor ſhall have the ſole diſpoſing of the eſtate, and the Executor of the deceaſed Executor ſhall not intermeddle therewith: And if therfore the ſurviving Executor die Inteſtate, an Adminiſtration *de bonis non Adminiſtratis* of the firſt Teſtator ſhall be granted: And if the Executor of the deceaſed Executor have any of the eſtate in his hands, the ſurviving Executor may take or

recover it from him: And if two be made Executors, and one of them is uncapable; in this caſe, he that is capable ſhall adminiſter alone *Litt. Broo. ſect.* 169. *Broo. Executor* 179. 99. *Fitz. Executor* 12. 113. *Dyer* 187.

If one that is Adminiſtrator of another mans goods do make his Will and make an Executor and die; or do die Inteſtate, and the Adminiſtration of his goods is granted to ſome body; in the firſt of theſe caſes the Executor, and in the laſt the Adminiſtrator, unleſſe he be made Adminiſtrator of theſe goods alſo ſhall not meddle with theſe goods of the firſt deceaſed: but the adminiſtration of the goods of the firſt deceaſed in the hands of the Adminiſtrator not adminiſtred muſt be granted again. *Dyer* 372. 112. *Coo.* 5. 9. *Goldsb.* 182. *Plow.* 118.

And hence it is that if the Adminiſtrator of my goods have a judgement for a debt due to me, and he dye before execution, and make an Executor, or die inteſtate, that in this caſe his Executor or Adminiſtrator ſhall never have execution of this judgement. And the ſame law is of the Adminiſtrator of my Executor in this caſe. See *Brownlows Rep.* 57. 1. *part.*

24. Where an Executor or Adminiſtrator may accept or refuſe the Executorſhip or Adminiſtration, and how, and where he may be Executor after he hath refuſed or not. And what actor intermedling with the goods of the dead ſhall be ſaid an Adminiſtration, and what not.

An Executor or Adminiſtrator may accept or refuſe the executorſhip or the adminiſtration at his pleaſure; and therefore he may at any time before he hath intermedled with the eſtate as Executor or Adminiſtrator refuſe it; and if he be ſued by any as Executor or Adminiſtator, he may plead. *ne unques Executor*, *i. e.* he was never Executor or Adminiſtrator, and did never adminiſter: and if it be true, he ſhall by this means avoid the ſuite: for a man ſhall not be compelled to take ſuch a charge upon him whether he will or no. *Coo.* 9. 37. 37 *H.* 6. 27, 28. 20 *H.* 6. 1.

If therefore there be many Executors, or an adminiſtration be granted unto many; and one of the Executors prove the Will in the name of the reſt, or one accept the adminiſtration in the name of all the reſt, yet the reſt may refuſe to accept it, and plead in any Suite againſt them that they are not Executors or Adminiſtrators. But as an Executor or an Adminiſtrator after he hath once legally refuſed the Executorſhip or adminiſtration, can never after intermeddle therewith: ſo after he hath once legally accepted thereof, (that is) hath done any thing as Executor or adminiſtrator, and which is proper only for an executor or adminiſtrator to do, he can never after refuſe it. And his acceptance of part, in this caſe, will make him chargeable with all, except it be in the caſe before of an Executor who may accept of the laſt Executorſhip, and refuſe the firſt. *Brownlows Rep.* 1. *part.* 82. 2. *part.* 58, 59. 183, 184. *&c.*

If an Executor plead, he did never adminiſter as Executor, yet he may afterwards adminiſter as Executor if he pleaſe. *Goldsb.* 31. *Plow.* 2.

If the Executors being cited to come in and prove their Will, appear before the Ordinary, and refuſe to adminiſter and to prove the VVill, they cannot afterwards accept it or intermeddle with it. But herein this difference muſt be obſerved; That where there be many Executors named and made, and they being cited ſome of them only do appear and refuſe to accept it: (the reſt of the Executors being then living) and after ſome or one of the reſt of the Executors prove the VVill, or take upon him the Executorſhip; in this caſe and notwithſtanding this refuſall, they that doe refuſe may afterwards at any time, at leaſt during the life time of their Co-executors that did accept thereof and intermeddle therewith as far forth as either of the reſt. *Coo.* 9. 37. *Fitz. Adminiſtra-tion* 6. 11. *Broo. Adminiſtration* 32. *Executors.* 117. *Coo.* 5. 28. *Perk. ſect.* 485. *Dyer* 160. 21. *Ed.* 23.

And therefore in this caſe howſoever the Executors refuſing ſhall not be charged in any ſuite againſt, all the Executors for any thing due from the Teſtator, but they may by their plea avoid it: yet the Executors accepting cannot ſue for any thing due to the Teſtator, nor be ſued for any thing due from the Teſtator, but they muſt ſue and be ſued in the names of themſelves and their Co-executors that do refuſe alſo. And if there be three Executors, and two of them prove the Will, and the third refuſe; yet this third Executor alone may releaſe any debt due to the

the Teſtator. But if there be but one Executor made, and he alone, or if there be many made, and they do all together refuſe before the Ordinary to take upon him or them, the adminiſtration; in this caſe the Teſtator is ſo far forth ſaid to be dead inteſtate, and thereupon therefore the Ordinary may grant the adminiſtration of the goods of the deceaſed, and then the Executor or Executors can never after accept thereof, or intermeddle therewith.

And if one or more of the Executors refuſe, and the reſt accept, if he or they which accept die before he or they that refuſed accept; it ſeems in this caſe they can never afterwards accept it, but the Adminiſtration muſt be granted.

If one be ſued as Executor or Adminiſtrator, and he plead to the Suit *ne unques Executor*, *i. e.* he was never executor or adminiſtrator, if he have not in truth intermedled before; this plea is a refuſall of the executorſhip or adminiſtration, and therefore he can never afterwards accept or intermeddle with the executorſhip or adminiſtration. See the caſes before.

Every intermedling with the goods of the deceaſed, or with the office and work of an executor, ſhall not be ſaid to be ſuch an adminiſtration as to amount unto an acceptance of the executorſhip or adminiſtration, and ſo to make a man chargeable as executor or adminiſtrator. *Coo. 9. 37. 5. 34. Dyer* 105. *Kel.* 63. *Broo.*

And therefore if a man that is an executor or adminiſtrator do only lay up and preſerve the goods of the deceaſed; or command another to take away the goods of the deceaſed from one that hath them in his keeping; or ſee the deceaſed buried in a decent manner, and for that purpoſe uſe, and if need be ſell ſome of his goods to do it, or make an Inventory of the goods and chattels of the deceaſed; or prove the Teſtators Will with his own money; or take his own goods lying amongſt the goods of the deceaſed: or take and uſe ſome of the goods of the deceaſed onely by miſtake, or as a treſpaſſer, or by the delivery of another; or take and diſpoſe any of the goods of the deceaſed, when the executor or adminiſtrator doth challenge them as his own & in his own right: or if he redeem any of the goods of the deceaſed with his own money when they are pledged to the full value, and the day of redemption is paſt, as neither of theſe acts will make a ſtranger an executor of his own wrong: ſo neither will they amount to an acceptance of the executorſhip, and make the executor or adminiſtrator chargeable as executor or adminiſtrator. *Adminiſtrator* 35, 36. *Fitz Adminiſtrator* 7. *Broo. Executor* 165. 132 *H.* 6. 6. *Dyer* 135.

Executor of his own wrong.

But if a man that is an executor or adminiſtrator ſhall ſue by that name for any debt due to the deceaſed; or being ſued by that name for any debt or duty due from the deceaſed, ſhall imparle to the Suite, or plead any other plea beſides *ne unques Executor*; or ſhall take into his hands the goods of the deceaſed, and convert them to his own uſe, and alter the property by ſale, gift, or otherwiſe, and all this as the goods of the deceaſed, (and ſo it ſhall be intended againſt him if he do not declare the contrary, that he doth take and uſe them as his own &c.) or if he deliver the goods of the deceaſed to Creditors or Legataries in ſatisfaction of their debts or Legacies; or receive any debt due to the deceaſed, and give a releaſe for the ſame; or releaſe any debt due to him before it be paid; or pay any debt due from the deceaſed, except it be with his own money: any or either of theſe acts will amount unto an acceptance of the Executorſhip, and therefore after an Executor or Adminiſtrator hath done any ſuch act, he can never after refuſe the Executorſhip or Adminiſtration.

Two Executors be made joyntly by Will, one of them doth releaſe a debt, and after before the Ordinary refuſed to adminiſter; It was agreed by all the Judges it was too late, for he had made his Election by the releaſe. *Brownl.* 2. *part* 58. *ſect.* 25.

25. What things an Executor or Adminiſtrator ſhall have by vertue of his Executorſhip or Adminiſtration. And what not.

If a woman ſole be made an Executrix to another, and ſhe marry a husband before ſhe intermeddle with the eſtate, and then her husband doth adminiſter; this is ſuch an acceptance as will bind her, and ſhe can never afterwards refuſe it. *Broo. Executor* 147.

The Executor or Adminiſtrator ſhall have by vertue of his Executorſhip or Adminiſtration all the chattels reall and perſonall of the Teſtator, as well thoſe that are in poſſeſſion, as Leaſes for years of Land, Rent, Common, or the like, Grants

of next Advowſons, and Preſentations, Wardſhips of heirs by reaſon of tenures *in Capite*, or Knights Service, corn growing and cut, trees, and graſſe cut and ſevered, cattell, money, plate, houſhold-ſtuffe, and the like, as alſo thoſe that are in action, as right and intereſt of executions upon Judgements, Statutes, Obligations, Cauſes of action, and the like; He ſhall have alſo all other things that are of the nature of chattels. *Coo. ſuper Littl.* 209. 388. *Perk. ſect.* 69. *Plow.* 293. *Doct. & St.* 39. 76. *Perk. ſect.* 833. *Coo.* 4. 65. 63. 7. 17. *Kelw.* 118.

First in reſpect of the nature of the thing.

And therefore the Executor or Adminiſtrator ſhall have the two years of the heir female that is in Ward; a relief or an advowſon that is fallen; and yet if a Biſhop have title to preſent by the vacation of a Church, and then he dye; in this caſe the King and not the Executor or Adminiſtrator of the Biſhop ſhall preſent.) And if the Lord have a greater eſtate in the Seigniory than for life or years, it is ſaid the Executor or Adminiſtrator ſhall not have the relief. *Coo. ſuper Littl.* 79. *Dyer* 130. 283. *Dyer* 24. *Broo. Executor* 143.

And the Executor or Adminiſtrator of the Lord ſhall have Fines aſſeſſed upon the Tenants upon their admittances in the Lords time. And if I make a Feoffment in Fee, gift in tail, or leaſe for life, rendring Rent, and the Rent is behind, and then I dye; in this caſe the arrerages of Rent due to me in my life time ſhall go to my Executor or Adminiſtrator in the nature of a chattell. *Stat.* 32. *H.* 8. *cap.* 37. *Coo.* 4. 48. *Dyer* 573.

So if a Rent be granted out of land to me in Fee-ſimple, Fee-tail, for life, or years, and it be not paid to me in my life time; theſe arrerages ſhall go to my Executor or Adminiſtrator, and not to any other. And ſo alſo if a Parſon have an annuity in Fee in the right of his Church, and it be behind, and the Parſon dye; in this caſe the Executor or Adminiſtrator, not the ſucceſſor of the Parſon ſhall have the arrerages. *F. N. B.* 120. *L.*

And if I be ſeiſed of land and poſſeſſed of a ſtock of cattell, and let it to another for years, and he covenant by the Leaſe to pay me and my wife, our heirs and aſſignes 100 *l.* by the year, during the term; in this caſe after my death, and my wife ſurviving me, her Executor or Adminiſtrator, and not my heir ſhall have this payment. *Dyer* 275.

And if one ſeized of land in Fee make a Feoffment of it to me excepting the trees, and after grant me the trees for years; or if he make me a Leaſe of the land firſt for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land; in both theſe caſes I have the trees in the nature of a chattell, and if I dye my Executor or adminiſtrator ſhall have them. *Coo.* 4. 63.

And if a man grant to me the next Preſentation to the Church of *D.* in this caſe if I dy, my executor or adminiſtrator ſhall have it as a chattell. *Dyer* 283. 34 *H.* 6. 27.

And my wife ſhall have ſo much of her wearing apparell as is neceſſary and convenient for one in her eſtate and condition: and therefore that ſhall not go to my Executor. But ſo much of her wearing apparell as ſhe hath ſuperfluous and more than neceſſary for her, ſhall go to my executor or adminiſtrator after my death. See *ſupra* at Numb. 7.

And the charters and evidences that do concern any of my chattels which my executor or adminiſtrator is to have, ſhall go with the ſame chattels. So alſo any Charters whatſoever, if they be pledged to me for money, ſhall go to my executor or adminiſtrator untill the money be paid, *Broo. chattels* 12. But otherwiſe thoſe deeds and evidences that do belong to the heir as incident to the Inheritance, ſhall not go to my executor or adminiſtrator after my death. But matters of truſt, and ſuch things as are perſonall, as offices of truſt, wardſhips by reaſon of a Tenure in Socage, or *Jure naturæ*, or the like, ſhall not go to the executor or adminiſtrator after the death of him that hath them. So an Executor or Adminiſtrator ſhall not have the graſſe and trees growing on the ground no more than the ſoile or ground it ſelf whereon they grow. *Plow.* 293. *Coo.* 3. 39. 9. 99. So an Executor or Adminiſtrator ſhall not have the Incidents of a houſe, as glaſs, doors, wanſcot, and the like, no more than the houſe it ſelf, nor pales, wals, ſtauks, fiſh in Ponds, Deere, or Conies in Parks, Pigeons in Pigeon-houſes, or the like. *Kelw.* 118. See before at Numb. 7.

If

If a Leaſe for years of land be granted to me and my heirs, or to me and my ſucceſſors, and I dye, my Executor or Adminiſtrator, and not my heir ſhall have this term, *Coo.*10.87. *Litt.Sect.*740. *Fitz.Accompt.* 56. *F.N.B.*120. *Brownl.* 1. *part.*77.106. The ſame law is if a wardſhip, or the next advouſon of a Church be granted unto me and my heirs; or if a Covenant or an Obligation be made to me and my heirs: for in all theſe caſes this is ſtill a chattel in me that ſhall go to my Executor or Adminiſtrator, and he onely ſhall take advantage by it. And if my heir or ſucceſſor happen to get the Deed, the Executor or Adminiſtrator may recover it from him. And if a Leaſe be made to me for 20 years without naming my Executors or Adminiſtrators or Aſſigns in the Leaſe; in this caſe if I dye, my Executor or Adminiſtrator notwithſtanding ſhall have it during the term. And if a Leaſe for years be made to a Biſhop and his ſucceſſors, and he dye, his Executor or Adminiſtrator, not his ſucceſſor ſhall have it, *New terms of the Law tit. aſſigns: Coo.ſuper Litt* 46. And if a man be poſſeſſed of a term of years of land, and grant it by deed, or give it by Will to me and my heirs, or to me and my heirs males: or deviſe it by Will to *A* for life, the remainder to me and my heirs; in theſe caſes I ſhall have theſe terms of years as chattels, and after my death my Executor or Adminiſtrator ſhall have them, *Coo.*8.95.10.87. *Plow.*524. And if a man grant a rent out of his land to me and my heirs for 20 years, and I dye, my Executor or Adminiſtrator, not my heir, ſhall have this rent, *Litt. Sect.* 740. And if a rent be granted to me, my heirs and executors during the life of *I S*, and for one half year after, and I dye; in this caſe the half years rent ſhall go to my executor or adminiſtrator, and not to my heir, *M.7.Ja.Co.B.Wats* caſe. *Litt. Sect.* 739. And if I be ſeized of land in Fee, and make a Leaſe for years of it, rendring rent, and then deviſe this rent to a ſtranger, and the Deviſee dye; in this caſe his executor or adminiſtrator ſhall have it, *Dyer* 5. And if a Leſſee for life make a Leaſe for years abſolutely; this in Law is a Leaſe for ſo many years, if the life ſo long live, and ſhall to go the executor or adminiſtrator after his death. *See Brownl.*19.30.1 *part. Coo.*7.12.

Secondly, in reſpect of the caſe.

If I have a box, cheſt, or trunk wherein my writings that do concern my inheritance do lye, and the ſame is open, and not ſealed or locked; in this caſe my Executor ſhall have it: but if it be ſealed or locked, *contra*, for then it ſhall go to him that is to have the writings as incident thereto. And yet if there be any money, plate, or any other ſuch like thing in the cheſt alſo, my Executor ſhall have that thing, *Broo.Executors* 145.97 *Fitz.Executors* 111.

The Incidents of a houſe, as glaſs-windows annexed with nails or otherwiſe to the windows, the wainſcot fixed by nails, skrews, or irons put through the poſts or wals, tables dormant, furnaces of lead and braſs, and fats in a brew or die-houſe ſtanding and faſtned to the walls, or ſtanding in, or faſtned to the ground in the middle of the houſe, (though faſtned to no wall) a copper, or lead fixed to the houſe, the doors within and without that are hanging and ſerving to any part of the houſe, ſhall not go to the executor or adminiſtrator to be divided and ſold from the houſe, albeit the executor or adminiſtrator have a Leaſe for years of the houſe, and by that means hath the houſe alſo. But if the glaſs be from the windows, or there be wainſcot looſe, or doors more than are uſed that are not hanging, or the like: theſe things ſhall go to the executor or adminiſtrator, *Coo.*4.63. 21 *H.*7.26.

If I make a Feoffment to I S of land, on condition that if he pay me, my heirs or aſſigns, or my heirs, executors or adminiſtrators a 100 *l.* ſuch a day, that the Feoffment ſhall be voyd, and I dye before the time of payment; in this caſe, if this money be paid at the day, my executor or adminiſtrator, and not my heir, ſhall have it, *Coo.*5.96. *Fitz.Executor* 8.

If one be ſeized in Fee of lands whereon there are trees growing, and he make a Feoffment of the land to me, excepting the trees, and afterwards he doth ſell me trees for ever, and after I dye; in this caſe my executor or adminiſtrator ſhall not have theſe trees, as they ſhall in caſe where the Feoffor doth grant them to me for years. And if I be ſeized of land in Fee, and I make a Leaſe for life or years

of it, excepting the trees, and afterwards I dye; in this caſe my executor or adminiſtrator ſhall not have theſe trees, but they ſhall go in both caſes with the land, *Coo* 4.63.11.48.

If a Leaſe be made for life or years of land whereon a houſe is ſtanding, or timber is growing, and the houſe is proſtrate, or the timber is cut or fallen down (by whomſoever or what means ſoever it be) the materials of this houſe, and this timber is now become a chattel; and therefore if the Leaſe be without impeachment of waſte, it ſhall go to the Leſſee, and after his death to his Executor or Adminiſtrator; but if the Leaſe be otherwiſe, it ſhall go to the Leſſor, and after his death to his Executor or Adminiſtrator. But if the timber be cut for reparations onely, or the Leſſee will imploy the materials of the houſe to build it again, and the Leaſe do continue, it may be ſo imployed, and then the Executor or Adminiſtrator of the Leſſor may not take it, *Coo.*4.63.11.81.84.

If one be ſeized in Fee-ſimple of ground whereon trees do grow, and he ſell me theſe trees for money, and afterwards I dye before they be cut; in this caſe my Executor or Adminiſtrator ſhall have and may cut them, *Coo.* 11. 50. *Perk. Sect.* 58.

If the Kings tenant by Knights Service *in Capite* be ſeized of a Mannour whereunto an Advouſon is appendant, and the Church become voyd, and the tenant dyeth, his heir within age: in this caſe the King, and not the Executor or Adminiſtrator of the tenant ſhall have the Preſentation. And yet if in this caſe the land be held of a common perſon, the Executor or Adminiſtrator, and not the Guardian ſhall have it, *Coo. ſuper Litt.* 388.

In all caſes regularly where a man doth ſow land, whereof and wherein he hath ſuch an eſtate as may perhaps continue untill the corn be ripe, if he that doth ſow it dye before it be cut and ſevered, his Executor or Adminiſtrator ſhall have it; as if the husband ſow the land whereof he hath an eſtate in Fee-ſimple, Fee-tail, for life, or for a certain number of years in the right of his wife, and dye ere it be ripe; in this caſe the Executor or Adminiſtrator of the husband, and not the wife ſhall have it. And if one that holdeth land for the life of I S ſow the land, and I S dye ere it be ripe & cut; the executor or adminiſtrator of the tenant ſhall have this corn. And if tenant in Tail or in Dower ſow the land they do ſo hold, and dye ere it be cut; the executor or adminiſtrator, not the iſſue in tail, nor the heir, or him in reverſion ſhall have it. So if the husband make a Feoffment in Fee to the uſe of himſelf for life, and after of his wife, *&c.* and he ſow the land, and after dye; his executor or adminiſtrator, not his wife ſhall have the corn. But if a Feoffment be made to the uſe of the husband and wife together in Fee, or for life, and the husband ſow the land; in this caſe the wife, not the executor or adminiſtrator of the husband ſhall have the corn. So if a Leſſee for years certain ſow the land a little before the end of his term, and the term end before it be cut; in this caſe he that is to have the land, not the executor or adminiſtrator of the Leſſee for years ſhall have the corn, *Dyer.* 316. *Doct. & St.* 35. *Perk. Sect.* 59.

If there be Tenant for life, the remainder in Fee of a Tenancy, and the Lord grant his Seigniory for life, and after he in remainder in Fee of the Tenancy dye, his heir within age, and after the Lord dye, and after the Tenant for life dye; in this caſe the heir, and not the executor or adminiſtrator of the Lord, ſhall have the Wardſhip. *Coo.*2.93.

If one be ſeized of land in Fee, and make a Leaſe for years, rendring rent at Michaelmas, or within ten ten dayes after, and the Leſſor happen to dye during the term after Michaelmas, and before the ten dayes expired; in this caſe the heir of the Leſſor, and not his executor or adminiſtrator, ſhall have the laſt half years rent due at Michaelmas, *Hill.* 7. *Jac. B. R. per curiam.*

If one grant a Rent in Fee, and grant withall that if the Rent be behind, the Grantor ſhall forfeit 20 *s. nomine pœnæ* to the Grantee and his heirs, and the Rent is behind, and the Grantee dye; in this caſe his executor or adminiſtrator, not his heir ſhall have this money that is forfeit already, *F.N.B.*120. *Fitz. Covenant* 17.

Dyer

Dyer 24. So if one make a Feoffment in Fee of land, and the Feoffee doth covenant to do divers things to the Feoffor, *Et quoties defectus fuerit, &c.* that he ſhall forfeit to him and his heirs 5 *l.* and the Feoffee doth fail and break his covenant divers wayes, and the Feoffor dyeth; in this caſe his executor or adminiſtrator, not his heir ſhall have and recover all the forfeitures that are paſt.

If a Biſhop, Parſon, Vicar, Maſter of Hoſpital, or any body politick be poſſeſſed of any goods or chattels in their own right, and dye; theſe ſhall go to the executor or adminiſtrator, not the ſucceſſor of ſuch a perſon. And albeit ſuch things be granted to them and their ſucceſſors, yet their executors and adminiſtrators, and not their ſucceſſors ſhall have it. But if a Corporation aggregate, as Dean and Chapter, Mayor or Commonalty, and the like, have any goods or chattels in right of their Corporation, and any of the Heads or Members thereof dye; the executors or adminiſtrators of ſuch perſon ſhall not have them, but they ſhall continue in ſucceſſion with the Corporation, *Coo.* 4.65. *Perk. Sect* 58. *Coo. ſuper Litt.* 46.

An executor or adminiſtrator ſhall have the benefit of a pardon granted to the deceaſed, and ſhall have advantage of any errour in any outlawry againſt the deceaſed, and have reſtitution of the goods forfeit thereupon, *Coo.* 6.80. *Dyer* 201.

The executor or adminiſtrator of a woman that hath a husband, ſhall have by right of his executorſhip or adminiſtration, all Actions, Rights, and Titles to any chattels, and poſſibilities, and things of that nature which the wife had before the marriage, and which fell to her during the marriage; for theſe things the husband ſhall not have by the intermarriage after his wives death, as he ſhall have all the reſt of her goods and chattels, except he have them as executor or adminiſtrator to her, as he may be. And if ſuch a woman have any goods or chattels as executrix to another, her executor or adminiſtrator, not her husband ſhall have theſe alſo; for ſhe hath theſe goods in anothers, and not in her own right, *Coo. ſuper Littl.* 351. *Plow.* 294. 192. Husband and wife.

If I have any goods or chattels in joynt-tenancy with another, as if a Leaſe be made of lands to me and another for years, or a horſe or other chattel perſonal be given or granted to me and another; in theſe caſes if I dye, my executor or adminiſtrator ſhall not have any part of theſe goods or chattels, but the other ſurviving joynt-tenant ſhall have them all. But otherwiſe it is of the goods and chattels that I and another have in Common. And therefore if I and another have goods and chattels in that nature as before, and he or I grant that which doth belong unto us thereof unto a ſtranger; in this caſe the ſtranger, and him of us two that hath kept his part are Tenants in Common of the things; and therefore if either of us dye, the part of him that dyeth in the goods and chattels ſhall go to his executor or adminiſtrator, and not to the other Tenant in Common, *Litt. Sect.* 281. *Perk. Sect.* 525 526. *Litt. Sect.* 320, 321.

If I have a Judgement for land in a real or mixt action, and for damages recovered in the ſame Suit, and I dye; in this caſe my executor or adminiſtrator, not my heir, ſhall ſue execution for, and recover the damages, but not for the land. So if I recover damages againſt another for the detaining of my Charters, and dye; my executor or adminiſtrator ſhall recover the damages, but the heir ſhall have the Charters, and the heir muſt ſue his *Scire facias* for the Charters ere the executor can ſue for the damages, *Fitz. Executor* 53.84.117 Alſo if I recover any debt or damage in any perſonal action, my executor or adminiſtrator ſhall recover and have this. See more *infra* at numb. 39. But the Adminiſtrators of an Executor cannot have a *Scire facias* upon a Judgement given for the Teſtator, *March. Rep.* 9.

26. What an Executor may do by vertue of his Executorſhip. And the power of an Executor, Adminiſtrator, or Ordinary.

The power and intereſt which the Executor hath is wholly by the Will. And hence it is that an Executor, whether he be abſolute or conditional whiles he is Executor, may do any thing as Executor (except onely ſue for debts and duties due to the Teſtator) as well before the Probate of the Will as he may do after; for before the Probate he may enter into and ſeize the goods and chattels whatſoever they be, or give power to another ſo to do: and if any of them be taken or kept from him, he may have an action of treſpaſs, or a replevin to recover them; he may give or ſell any of the goods or chattels; he may pay any of the debts due from, and

and receive or releaſe anydebts due to the deceaſed,*Coo.*6.18.9.38.5.27,*Plow.*280. 9*Ed.*4.47.36*H.*6.7.*Fitz. Adminiſtrator* 2.6.*Brownl.*1.*part.*76.77.73.53.But it is otherwiſe in the caſe of an Adminiſtration;for inaſmuch as his power & intereſt is given to him wholly by the Adminiſtration, therefore he can do nothing untill the Adminiſtration be granted. And yet in this caſe as to the goods taken away before the Adminiſtration, the Adminiſtration ſhall have ſuch a relation as to give the Adminiſtrator an action for them. But otherwiſe after the Adminiſtration is granted, the intereſt and power of the Adminiſtrator is equal to and with the power and intereſt of the Executor. And yet it is otherwiſe of the power and intereſt of the Ordinary; For howſoever it ſeems by the antient Common Law he might ſeize, preſerve,give,grant,and diſpoſe the goods of the inteſtate to pious uſes, yet might he not ſue for the goods or debts due to the inteſtate, no more than he might be ſued for any debts due from the inteſtate; and at this day he may onely keep and preſerve the goods of the deceaſed untill adminiſtration be granted, and ſue him in the Court of the Ordinary that doth detain the goods from him, and perhaps may ſue him that ſhall take the goods out of his poſſeſſion; for he may not ſell or give the goods of the deceaſed, nor receive or releaſe any debts; for in caſe where there is an Executor made that is capable, *&c.* he is not to meddle at all with the eſtate untill the Executor refuſe: and where there is no Executor that the party is dead inteſtate,the Ordinary is preſently to commit the Adminiſtration to the neareſt of the kindred; which when he hath done, his power is at an end, for it is doubted of ſome whether he may repeal an Adminiſtration without cauſe or not; but it hath been clearly held by all, that he may not diſpoſe of the eſtate afterwards, and that he hath not power to enforce the Adminiſtrator to give portions to children out of the eſtate, and that if he do go about it,either before or after the granting of the Letters of Adminiſtration, the Adminiſtrator may have a Prohibition, *Coo.*8.135. 9.39.*Dyer* 255.*Weſtm.*2.*cap.*20. 31 *Ed.*3.*c.*11. And accordingly divers have been granted; And yet notwithſtanding it ſeems this courſe is uſual: and Prohibitions not often granted at this day, *Hil.*13.*Ja.Co.B. Henſlowes* caſe. *Trin.*3.*tac.Co.B. Davis* caſe. *Hill.*2.*Car.Co.*9.*Fotherlies* caſe. An Executor or Adminiſtrator may after the death of the deceaſed enter into the houſe where the deceaſed lived, and where he dyed,and where the goods are, and take them away, and juſtifie it; but he muſt do it within convenient and reaſonable time, as within 30 dayes after his death, or thereabouts, and in a quiet and fair manner when the door is open, *&c. Litt.Sect.* 69. *Plow.* 281. *Broo. Executor* 129. He may keep any of the goods of the deceaſed, ſo as he pay or lay out as much of his own money in and about the Adminiſtration of the ſame eſtate,*Dyer* 2. He may, if he want money to diſcharge Funerals, or pay debts, ſell any of the chattels real or perſonal whereof the deceaſed dyed poſſeſſed; and that albeit the thing in particular be deviſed: as if a man be poſſeſſed of a term of years *inter alia*, and deviſe the ſame term to I S, the Executor or Adminiſtrator notwithſtanding this deviſe may at any time before aſſent given to the Legacy, if he have not aſſets to pay the debts, ſell this term, and the Legatee is remedileſs. And ſo he may do alſo, albeit there be enough beſides to pay the debts, and he have no need; but then in this caſe the Legatee ſhall have ſome relief in a Court of Equity againſt the Executor or Adminiſtrator for damages, but the ſale is unavoydable, *Plow.*543,544. An Executor or Adminiſtrator may retain ſo much of the eſtate as to ſatisfie his own debt firſt, if any be due unto him. And if he hath enough to pay all the Debts and Legacies,he may pay them in what order he will without danger to himſelf, or wrong to Creditors or Legataries. And if he hath not enough, he may pay them in what order he will, but not without danger to himſelf. But if any thing be due to himſelf, he may pay that firſt of all, and for others that are in equal degree, he may pay which of them he will firſt, *Plow.* 184. 543. *Coo.* 5. 28. And for the Legataries, he may prefer which of them he will, or pay one of them his whole Legacy, and pay another a part of his, or not pay him any part of his Legacy if there be no aſſets to do it. But an Executor or an Adminiſtrator may not ſell any thing that is given in ſpecial to a Legatee to pay another Legacy given to another Legatee,

nor

not compell a Creditor or Legatee to take ſome of the Goods of the Deceaſed for his Debt or Legacy, whether he will or no, not deviſe the Goods he hath as Executor or as Adminiſtrator, neither can Executors or Adminiſtrators make deviſion of the Goods amongſt them. *The addition to Juſtice* Dodridge *Treatiſe* 93. *Kelw.* 62. 27 *H.*8. 22. *Plow.* 525.

Infant.

An Infant that is an Executor, after the time he is capable, hath as much power as another Executor of full age; for he may ſell the Goods, receive Debts, and make releaſes for the moneyes he doth receive, aſſent to a Legacy when debts are paid, ſue, and be ſued as another Executor. And he is only diſabled to do any thing to hurt himſelf; And therefore if he releaſe a debt before he receive it, the Releaſe is void; and if he aſſent to a Legacy before the debts are paid, the aſſent is void, and if he do any other act which will be a waſting of the Goods in an Executor that is of full age, it ſhall not bind him. *Coo.* 5. 28.

And it ſeems, that howſoever an Infant Executor after ſeventeen years of age, may ſell any of the Chattels perſonall he hath as Executor, yet that after his age of ſeventeen years, and before he is one and twenty years of age, that he cannot ſell a Leaſe for years he hath in the right of his Executorſhip, but that ſuch ſale is void *And ſo was it held by Juſtice* Hutton *at Sarum Aſſiſes*, 21 *Jac.*

Woman Covert.

A Woman covert that hath a Husband, and is an Executrix may do any lawfull act as another Executor may do, but ſhe may not do any thing to prejudice her Husband, as releaſe a debt before it be paid, aſſent to, or deliver a Legacy before the debts be paid, or the like, and yet the Husband himſelf may do ſo. *Broo. Executor* 178. 152. *Fitz. Executor* 55. *Coo.* 5. 28.

27. The office, duly, charge, of an Executor or Adminiſtrator, and of the Ordinary.

The Office and duty in generall of an Executor or Adminiſtrator is to diſpoſe of all the Eſtate of the deceaſed wherewith he hath to do: 1. Truly not to convert any of it to his own uſe, but to the uſe and beſt advantage of the deceaſed nor to labour by any undue practiſe or means to hinder any Creditor of his debt. 2. Lawfully to pay debts and Legacies in that order the Law preſcribeth. 3. Diligently, *Quia negligentia ſemper habet commitem infortunium*; but more particularly. *Coo* 8. 133.

First in the Funerals.

The firſt duty and care of an Executor or an Adminiſtrator after he had taken upon him the charge of the Adminiſtration of the Goods and Chattels of the deceaſed, after the Goods are laid up, is to ſee the body of the deceaſed laudably interred according to his rank and quality; wherein let the Executor or Adminiſtrator take this caution by the way, Not to exceed in Funerall Pomp, eſpecially if it be ſo that the Eſtate will ſcarcely reach to pay the Debts; for let his expences be what they will, the Iudges (who in this are to determine what ſhall be allowed) will allow what they pleaſe, and they are pleaſed in ſuch caſes to allow but a ſmall matter, and whatſoever the Executor or Adminiſtrator doth lay out more, he muſt bear out of his own Eſtate, if he have not enough beſides to pay the debts. *Doct. & St.* 75. *Plow.* 543. *Kelw.* 64.

Secondly, in making an Inventary.

The ſecond duty and care muſt be to make an Inventary, *i.e.* a Schedule containing a true and perfect deſcription of all the Goods and Chattels of the deceaſed at the time of his death, as of his Wares, Merchandizes, Emblements, and the like, with their appriſement and value, and of none elſe, and of all debts due to him and from him. *Doct. & St.* 35. *Stat.* 21 *H.*8. *c.*3. *Dyer* 166. *Swinb. part* 6. *Sect.* 6, 7, 8, 9, 10.

And this muſt be made by and before two of the Creditors ot Legataries of the deceaſed (if there be any ſuch and they will do it) and two others, or in caſe they refuſe, by and before two other men of the honeſt Neighbours. And herein let the Executor or Adminiſtrator take this caution by the way, not to intermeddle with the Goods before he hath done this; for howſoever he may do any act as Executor before the Inventary be made, yet the Ordinary may puniſh this upon him except it be done with the Ordinaries licenſe, who in this caſe may give what time he will for the doing of it; and untill the Inventary be made and put in, it ſhall be preſumed againſt the Executor or Adminiſtrator that he hath Aſſets in his hands to pay all men; and beſides, untill this be done, he cannot deduct to ſatisfie his own debt firſt, and bar other men by Plea. But of the other ſide when he hath made and exhibited a true and perfect Inventary of all the Goods and Chattels, it ſhall be

preſumed againſt him that he hath ſo much as is contained in the Inventory and no more, unleſſe more can be proved by Witneſſes.

Thirdly in Probate of the Will.

3. The third thing whereof the Executor or Adminiſtrator is to take care, is to prove the Will if there be any: and this the Ordinary will compell him to do, but otherwiſe he may do any thing as Executor, ſave onely ſue actions as well before Probate as after. *See Probate* infra *at Numb.*

Fourthly in payment of Debts and Legacies; and the order of Debts and Legacies.

4. The fourth thing whereof the Executor or Adminiſtrator muſt take care, is to ſell and make money of the goods and Chattels, and to receive the debts due to the deceaſed, and then to pay the Debts and Legacies due to the Creditors and Legataries, wherein the Executor or Adminiſtrator muſt be very cautious and wary. And for this purpoſe let him obſerve that all the Debts muſt be paid before any Legacies be paid or delivered, and if there be not enough beſides to pay the debts, any thing given by way of Legacy, may be ſold to make money to pay the Debts, and the Legataries muſt loſe their Legacies. And in payment of Debts this decorum muſt be obſerved.

Retainer.

1. Amongſt perſons that are Creditors, the Executor or Adminiſtrator himſelf ſhall be preferred, ſo that if any debt be due to him, he may deduct to ſatisfie himſelf firſt, albeit others loſe their whole Debt thereby, and eſpecially then when his Debt is in equall degree with other Debts.

2. After the Executor or Adminiſtrator is ſerved and ſatisfied his Debt, then the King is to be preferred, ſo that if there be any Debt due to him, and he begin his ſuit for it before any other man can get a Judgement for his Debt againſt the Executor or Adminiſtrator, his Debt ſhall be paid before any others.

3. After the King is ſerved and ſatisfied his Debt, then the debts of common perſons muſt be paid. *Coo.9* 88. *Plow.* 184.545. *Dyer* 80. *Doct. & St.*75,76,77,78. 132. *Stat.* 33 *H.8.cap.39.Coo.*5.28.4.54.59. 60.8.132. *Dyer* 232.32. 21 *Ed.*4.21. *Broo. Executors* 88.172. *Coo.*8. 132 *Dyer* 32. *Plow.*279.280. *Broo. Executors* 103. *Kelw.*74. *Brown.*1.*part* 53.73,76,77.80.104.103. 2*part* 51.82.37.

And theſe alſo muſt be paid in this order or manner.

1. The Debts due by Record, by any Judgement had againſt the Deceaſed in any judiciall proceeding in any Court of Record.

2. The Debts due by Statutes or Recognizances entred into by the Deceaſed; for the Debts due upon Judgements muſt be ſatisfied before theſe; *ſit judicium prius vel poſterius*

3. The Debts due by Obligations, and penall and ſingle Bils, for theſe are in equall degree, and theſe are to be paid after Statutes and Recognizances. And yet if the Statute or recognizance be only for performance of Covenants, & no Covenant is broken, an Obligation for the payment of preſent money ſhall be diſcharged before it.

4. The debts due for Rent upon Leaſes of Land, or grants of Rents; but ſome ſay, that Debts due for Rent in the Teſtators life time (be the Rent reſerved upon Leaſes made by, or without deed for years, or at will) are in equality of degree, with debts due upon Eſpecialties.

5. The Debts due for Servants Wages and Workmen.

6. The Debts due upon Shop-books and verbal Contracts, and yet it is ſaid by ſome, that Legacies are to be paid before Debts due by Shop books, Bills unſealed, or contracts by word, *Quod non credo, Addition to Juſt.* Dodridge 92.

And amongſt Debts alſo that are in equality of degree, thoſe that are due are to be paid before thoſe that are not due; and thoſe whoſe day of payment is already come, before thoſe whoſe day of payment is not yet come: and yet if the Creditor whoſe day of payment is already come, do not ſue for his Debt untill his Debt whoſe day of payment is at a day to come, become due, the Executor or Adminiſtrator may ſatisfie which of them he will firſt.

And amongſt Debts that are due, and already to be paid, thoſe that are firſt ſued for, are to be firſt paid: Or if the Creditors begin their Suits together, the Executor or Adminiſtrator may pay which he will of them firſt, and to pay Debts in any other order is dangerous: And therefore for the purpoſe, if the Deceaſed are two ſeverall Debts of 10 l. apiece to two ſeverall Creditors by

ſeverall

ſeverall Obligations, and the Executor or Admidiſtrator hath enough onely to pay one of them, he that can firſt get Judgment and Execution ſhall firſt be ſatisfied, and if the Executor or Adminiſtrator do afterwards pay the other his Debt, he muſt ſatisfie the firſt out of his own Eſtate.

If one that hath a Debt due to him from the Deceaſed upon a ſimple Contract, or the like, ſue the Executor or Adminiſtrator for it; and there be debts due to others upon Bonds and Bills unſatisfied; in this caſe the Executor or Adminiſtrator may not pay this debt, nor may he ſuffer the Plaintiff to recover in his Action, for if he do, and if he have not Aſſets beſides to ſatisfie the debts due upon Bills and Bonds, he muſt ſatisfie ſo much out of his own Eſtate as he hath ſo paid, or ſuffered to be recovered from him; for in the caſe of an Action brought, he is to plead and to ſet forth theſe debts upon eſpecialties, and to ſay, That he hath no more but what is ſufficient to ſatisfie them, *&c.* and thereby he ſhall bar the Plaintiff in his Action.

In like manner it is, if one that hath a debt due to him from the deceaſed upon an Obligation, ſue the Executor or Adminiſtrator thereupon, and there be debts due to others upon Judgments, Statutes, or Recognizances, and the Executor or Adminiſtrator ſuffer the Plaintiff to recover the debt due upon the Obligation for want of pleading the Judgments, *&c.* or doth voluntary pay that debt, and he hath not Aſſets beſides to pay the debts due upon Judgments, *&c.* In this caſe, he muſt pay ſo much out of his own Eſtate towards the ſatisfaction of the ſaid debts due upon Judgments, *&c.* as he hath paid of the debt due upon the Obligation.

But here it muſt be noted, that no Judgment or Statute that is diſcharged, or is left and ſuffered to lye by agreement to bar others of their Debts, ſhall be any bar to others that ſue for their due Debts upon Obligations, *&c.* And therefore if any Executor or Adminiſtrator ſhall plead any ſuch Judgment, *&c.* in bar of any other Debt ſued for by any other Creditor, the Creditor may by ſpeciall pleading ſet forth this matter of Covin, and avoid the Plea and Bar of the Executor or Adminiſtrator. Covin.

If one Creditor whoſe Debt is in equall degree, and preſently due and to be paid, begin a Suit againſt the Executor or Adminiſtrator for his Debt, and he hath notice that the Suit is begun againſt him, or the Action is laid in the County where the Executor or Adminiſtrator doth dwell, or (as ſome have ſaid) in *London* (in both which caſes, it ſeems he is bound to take notice thereof at his perill) and after this Suit begun he doth make voluntary payment of another Debt in equall degree in all reſpects, for which no Suit is begun, this is a *Devaſtavit* in the Executor or Adminiſtrator, and if he have not Aſſets to ſatisfie him who began his Suit firſt, he ſhall be compelled to ſatisfie ſo much thereof as he doth voluntarily pay to the other, and that out of his own Eſtate: And yet an Executor or Adminiſtrator may make voluntary payment of any Debt due by Record, as by Judgment, Statute, *&c.* after ſuch a Suit begun, and juſtifie it.

If two Creditors in equall degree to all purpoſes begin to ſue for their Debts at one time; In this caſe the Executor or Adminiſtrator cannot ſafely make voluntary payment to either of them, unleſſe he have enough to pay them both; but his ſafeſt way is to pay him firſt, that in a due and legall proceeding (for he may not covinouſly help one of them to a Judgment ſooner) can firſt recover it by Judgment and Execution: And yet if in this caſe no Suit be begun, the Executor or Adminiſtrator may make voluntary payment to either of them in equall degree of his whole Debt, albeit he have no Aſſets left to pay unto the other any part of his Debt.

If *A.* and *B.* be two Creditors in equall degree, and *A.* begin his Suit firſt; and after *B.* doth begin his Suit, and it hapneth that *B. bona fide* without any Covin or agreement between him and the Executor or Adminiſtrator, doth get Judgment and Execution firſt; in this caſe the Executor or Adminiſtrator may make payment to *B.* firſt of all. But if the Executor or Adminiſtrator doth by any Covin and agreement help *B.* to his Judgment and Execution firſt, and by this meanes he is firſt ſatisfied, if there be not enough left to ſatisfie *A.* he Covin.

muſt ſatisfie him out of his own Eſtate. If two Suits begin at, or about one time upon two ſeverall Obligations, and the Executor is forced to plead to them both before either of them hath a Judgment, ſo that he cannot plead the Judgment that the other hath againſt him, and he hath not Aſſets to ſatisfie both the debts ſued for, and after the Plaintiffs in both the Suits get Judgment and Execution. *Quære* what the Executor or Adminiſtrator may do in this caſe: And here note by the way, that it is policy for a Creditor that hath cauſe to ſue an Executor, or Adminiſtrator, to be doing betimes, and to get Judgment and Execution as ſoon as he may; for it falleth out in this caſe, That he that doth firſt come ſhall be firſt ſerved: After all the debts are paid in ſuch order and manner as before, then is the Executor or Adminiſtrator to pay and to deliver the Legacies: and herein the Executor may prefer himſelf ſo, that if any Legacy be given to him, he may detain and deduct it, albeit there be nothing left to diſcharge the Legacies given to others; and after he hath ſatisfied himſelf, he may ſatisfie and deliver what Legacies he will, albeit there be not enough to ſatisfie all the Legatees: or he may pay to each of of the Legatees a part of their Legacy, and deduct a part out of every Legacy where there is not enough to ſatisfie all the Legacies. : But if any particular thing, as a Leaſe, or a Horſe, or the like be given; this muſt be delivered accordingly, and may not be ſold by the Executor or Adminiſtrator to pay others all, or any part of their Legacies: and if there be enough to pay all the Legacies, they muſt be paid all according to the Will: And it is ſaid by ſome, that if an Executor or Adminiſtrator make no Inventary of the goods, that he muſt pay all the Legacies, whether he have Aſſets or not: *Doct: & St:* 34. *Plow:* 545. *& Wimb:* 110. 114.

Fifthly, in making an Account.

The laſt thing an Executor or Adminiſtrator is to take care of, is to make an account (for it is held that an Executor or Adminiſtrator is not bound in Law or Conſcience to make reſtitution for perſonall wrongs) wherin this is to be known, that the Ordinary may, if he wil, call the executor or adminiſtrator to account concerning the Goods and Chattels of the deceaſed, either generally or particularly, as the caſe requireth; and that with, or without the Creditors or Legataries inſtigation, within a year, or what time he will; unto which account he may call all the Creditors and Legataries; & therin the executor or adminiſtrator muſt ſhew what he hath received, and what he hath laid out, and prove it in ſuch ſort as the Ordinary ſhall like: And then if it be found he hath faithfully and fully adminiſtred, the Ordinary may acquit him of the burthen, and then he is diſcharged of all Suits in the Spirituall Court; but this account and diſcharge will not help nor avail him at all to diſcharge him of Suits at the Common Law. *Swinb: Part: 6. Sect:* 17.

The Office and duty of the Ordinary after the death of any perſon within his Dioceſſe, is if he hear of any Will made, and any Executor appointed, to cite the Executor, and to compell him to come in and prove the Wil, and to accept and take upon him the Adminiſtration of the Goods, or to refuſe it: and if the Executor refuſe, or if there be a Will made, and no Executor appointed, the Ordinary muſt commit the Adminiſtration *Cum teſtamento annexo* to whom he ſhall think fit, and take bond of the Adminiſtrator to perform the Will. And if there be no will made, he is to grant the Adminiſtration of the Goods to the next of kin, if he or they requiſe it; and if not ſo, to whomſoever beſides ſhall deſire it; or if no body ſeek it, he may grant Letters to whom he will *Ad colligendum bona defuncti*, and therby take the Goods of the deceaſed into his own hands: and then it ſeems he is to pay therwith the Debts and Legacies of the Deceaſed, ſo far as the ſame will reach, in ſuch order as the Executor or Adminiſtrator is to pay them. See more of this queſtion in Numb. 29. *infra. Co.* 5. 83. 5. 39. *Lit. Broo. Sect* 233. *F. N. B.* 220. *Dyer* 232. *Doct. & St.* 132. *Broo. Executor* 90. *Teſtament* 27. *Stat.* 31. *Ed.* 3. *c.* 11. 13 *Ed.* 1. *c.* 19. 21 *H.* 8. *c.* 5.

An Executor or Adminiſtator regularly ſhall charge all others for any Debt or duty due to the Deceaſed, as the Deceaſed himſelf might have done; and the ſame Actions

Actions the Deceaſed might have had, the ſame Actions for the moſt part the Executor or Adminiſtrator may have alſo: And therefore he may have an action of Account, an Action of Treſpaſſe *De bonis aſportatis in vita teſtatoris*, An Action of Debt againſt a Gaoler upon the eſcape of a Priſoner, a Writ of Error upon the Statute of 27 *Eliz.* an Attaint upon the Statute of 23 *H.* 8. A Writ of Reſtitution upon the Statute of 21 *H.*8. If an Action upon the Caſe upon the Aſſumpſit of the Teſtator, An *Indempnitate nominis* when the Deceaſed's Goods are taken upon an Out-lawry againſt another man of his name. An Action of Covenant for breach of a Covenant made to the Deceaſed. An Action upon the Caſe upon the Trover and Converſion of the Goods of the Teſtator. An *Ejectione firme* for an Ejectment of the Teſtator out of a Terme. An Action of Debt for the Rent behind in the life-time of the Deceaſed. An Action of Debt for the Arrearages of an Annuity due to the Teſtator in his life: And a Raviſhment, or Ejectment of Guard for a wrong done to the Deceaſed. But an Executor or Adminiſtrator ſhall not charge another, or have any Action againſt him for a perſonall wrong done to the Teſtator, when the wrong done to his perſon, or that which is his, is of that nature as for which Damages only are to be recovered: And therefore an Executor or Adminiſtrator cannot ſue another for the beating or wounding of the Deceaſed, or for a Treſpaſſe done to him in his Cattle, Graſſe, or Corne, or for a Waſte done by his Tenant in his Lands; for theſe are ſaid to be perſonall Actions, which dye with the perſon according to rule, *Actio perſonalis moritur cum perſona.* See for this *March.* 923. 13. *pl.* 33. *Plow.* 181. *Coo.* 11. 90. *Weſt.* 2. *c.* 22. *F. N. B.* 117. *Dyer* 322. *Coo.* 11. 41. *Coo.* 6. 80. *Coo.* 9. 86. *Stat.* 9 *H.* 6. *c.* 4. *Broo. Executor* 161. *Coo.* 5. 27. 7 *H.* 4. 6. *Coo.* 4. 50. *Broo. Executor* 169. *Broo. Executor* 122. *Coo.* 9. 85. See *Action Dyer* 114. 322. 69. 12 *H.* 8. 10. *Brownl.* 1. *part* 101.

28. Where and how an Executor or Adminiſtrator ſhall charge others in reſpect of the Eſtate of the Deceaſed, and what actions & remedy he may have againſt others and what not, and how.

Perſonall Actions.

If the Teſtament be kept from the Executor, he may have remedy to recover it in the Spirituall Court: So if the Goods of the Deceaſed be kept from him, he may ſue there for them if he will, or he may ſue in any Court of Common Law. And if there be a Will, and an Executor made, or two Adminiſtrations granted together, he that is right full Executor or Adminiſtrator may ſue the wrongfull Adminiſtrator for the Goods in his cuſtody. 36 *H.* 6, 7. *Coo.* 8. 135.

If one grant a Rent out of his Land for life, provided that it ſhall not charge his perſon, and the Rent is behind, and the Grantee dieth; in this caſe, the Executor or Adminiſtrator of the Grantee may have an Action of Debt for theſe Arrearages. *Coo. ſuper Litt.* 146.

If any Rent or Arrearages of Rent be due to me upon a grant of Rent out of any Land to me, or reſervation of Rent upon any Eſtate made by me of Land; in theſe caſes, my Executor or Adminiſtration may have an Action of Debt for this Rent, or he may diſtraine for it, ſo long as the Land chargable with the Rent, and out of which it doth iſſue, is in his poſſeſſion that ought to pay it, or in the poſſeſſion of any one that doth claime by or under him. *Coo.* 4. 50. *Stat.* 32 *H.* 8. *cap.* 37.

If any of my Houſhold Servants do convey away and cloyne or deſtroy any of my Goods, any Executor or Adminiſtrator may have a ſpeciall Commiſſion out of the Chancery, to enquire of, and to puniſh it. See *Stat.* 33. *H.* 6. *c.* 1.

And in caſe where a man doth ſue as Executor or Adminiſtrator, he muſt in his Action name himſelf as he is, *i. e.* if he be an Executor, he muſt name himſelf ſo; and if an Adminiſtrator, he muſt name himſelf ſo: And if there be many Executors, and ſome accept, and ſome refuſe, if they bring any Action, they muſt be all named in the Writ: And yet if one Executor have Goods in his poſſeſſion, and he alone ſell them, perhaps for this Contract he may bring an Action for the money in his own name: So alſo if the Goods be taken out of his poſſeſſion alone, it is ſaid he alone may ſue for them; but the ſafeſt way in theſe caſes, is to ſue in the names of all the Executors; for the poſſeſſion of one of them is ſaid to be the poſſeſſion of all of them. *Coo.* 5. 33. *Bro. Treſpaſſe* 346. *Fitz. Executor* 14.

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29. Where & how an Executor or Adminiſtrator ſhall be charged by others, and what Actions and remedy may be had againſt him, or not, See *Brownlo. Rep.* 18, 19. 22.53.2 *part.* 39. 81. 139.

An Executor or Adminiſtrator regularly ſhall be charged by others, for any debt or duty due from the Deceaſed, as the Deceaſed himſelf might have been charged in his life-time, ſo far forth as he hath any of the Eſtate of the Deceaſed to diſcharge the ſame. *Coo. ſuper Litt.* 209.5.17. *Dyer* 14.23. 112. *Doct. & St. Broo. Diſcent* 53.

And therefore if a man bind himſelf by Obligation or Covenant to pay money or do any ſuch like thing, and do not bind his Executors or Adminiſtrators by name; in this caſe the Executor or Adminiſtrator may be ſued and may be charged as far forth as if they were named. And yet where the Covenant is but perſonal, as where one doth make a Leaſe for years, and the Leſſor doth Covenant to pay the Quit-rents, but he doth not ſay during the terme; by this it ſeems the Executor or Adminiſtrator of the Leſſor ſhall not be charged. An action of the caſe lieth againſt him upon an Aſſumpſit, or the ſimple Contract of the Teſtator, eſpecially where the ground of the Aſſumpſit is a true debt, a *Rationabile parte bonorum* lieth againſt him; a *Detinue* lieth againſt him for the Goods delivered to the Deceaſed, if the Executor or Adminiſtrator do ſtill continue the poſſeſſion of them: Alſo an action of debt lieth againſt him for arrearages of account found upon the Deceaſed before Auditors. *Coo.* 9.86. *Plow.* 182. *F.N.B.* 121.3 *H.*6.35.11 *H.*4.45.

The Executor or Adminiſtrator of the Father that hath levied Aid of his Tenant for the marriage of his Daughter, ſhall be charged with it, and the Daughter may ſue for it. *Stat.* 25 *Ed.* 1. *c.* 11.

The Executor or Adminiſtrator of a Guardian in Chivalry that doth commit Waſte in the Wards Lands, ſhall be charged and may be ſued for the Heire for it. *F.N.B.* 56.

If a man poſſeſſed of a term of years, deviſe it to another, and the Executor or Adminiſtrator of the Deviſor before the aſſent to the Legacy, doth commit Waſte in the Land in Leaſe; in this caſe he ſhall be charged with, and may be ſued for this Waſte by him in Reverſion: But if the Executor dye, his Executor ſhall not be charged with it; for it is a perſonall wrong that dieth with the perſon. *Coo.* 5.12 *Coo* 8.94.

If a Biſhop grant an Annuity out of his Lands to *I. S.* for life, and dye; in this caſe it ſeems the Executor or Adminiſtrator of the Biſhop ſhall be charged with the Arrearages due in the Biſhops time. *Dyer* 370.

If a Leaſe for years be made rendring Rent, and the Rent is behind, and the Leſſee die; in this caſe the Executor or Adminiſtrator of the Leſſee ſhall be charged for this Rent. So alſo if Leſſee for years aſſigne over his Intereſt and dye, his Executor or Adminiſtrator ſhal be charged with the arrearages before the aſſignment, but not with any of the arrearages due after the aſſignment. *Broo. Executor* 127. *Coo* 3.24.22.

The Executor or Adminiſtrator of a Cuſtomer or Controller ſhall be charged upon a Taile of the Exchequer ſhewed to the Teſtator. *Broo. Executor* 157.

The Executor or Adminiſtrator ſhall be charged for a Raviſhment or Ejectment of Ward by the Deceaſed. *Weſt.* 2. *c.* 35.

The Executor or Adminiſtrator may be charged in the Spirituall Court for Tythes due from the Deceaſed: but he may not (as it ſeems) be ſued in any Temporall Court for them. *Trin.* 7 *Jac. B.R. F.N.B.* 51.

The Executor or Adminiſtrator of a man that recovereth a debt upon a Judgment had by the Deceaſed, ſhall be chargable with reſtitution, if the Judgment be reverſed for Error. *Curia* 21 *Jac. B.R.*

An Executor or Adminiſtrator ſhall not be charged for any perſonall wrong done by the Deceaſed, and therefore no action may be brought againſt him for any ſuch cauſe, as becauſe the Deceaſed did burn the Deed of the Plaintiff, ſuffer a Priſoner at his Suite to eſcape, cut down his Trees, eat up his Graſſe, beat or wound the body of the Plaintiff, defame him in his name, or the like; for all theſe are ſaid to be perſonall actions that dye with the perſon, neither is there any remedy to be had againſt the Executor or Adminiſtrator in equity in theſe caſes, neither ſhall he be charged in any action of Account for any Receit or Occupation by

by the Deceaſed. And yet perhaps an action of the Caſe may lie in this Caſe; neither will an action of Debt lie againſt him upon the ſimple contract of the Deceaſed, but an action of the caſe onely. Neither will an action lie againſt an Executor or Adminiſtrator upon an arbitrement made in the life time of the Deceaſed, albeit it be made in writing. Neither will any Action lie againſt any Executor or Adminiſtrator for coſts given in the Starchamber or Chancery againſt the Deceaſed in a Suit there, but when the party dieth the ſame is loſt; and where a man doth ſue an executor Adminiſtrator in a Suit, he muſt charge him as he is, *viz.* if he be an Executor he muſt ſue him by that name, if an Adminiſtrator, then by that name. And where there be many Executors and have all accepted they muſt be all ſued; but if ſome of them have refuſed, perhaps the ſuit may be good enough againſt the reſt. *Adjudge Hill* 40 Eliz. *B.R. Bowyers caſe, Hill* 7 *Ja. B.R. per* 3 *Juſtices. Coo.* 9. 39. 40 *Broo. executor* 78.136. 156. Fitz. *Brief* 341.

But otherwiſe one Executor cannot be charged without his companions, except it be in the caſe of Summons and ſeverance, and in ſome ſpecial caſe where one alone doth the wrong, and the like, as where one Executor alone doth detain the deeds from the heir; for in this caſe he alone may be charged. See more *infra* at *Numb.* 39. *Brown* 1. *part* 18,19.22.53. 2 *part* 39.81.139.

All the Executors where there be more then one, be they never ſo many, in the eye of the Law are but as one man; in which reſpect the Law doth eſteem moſt acts done by or to any of them, as acts done by or to all of them. And therefore the poſſeſſion of one of them of the goods and Chattels of the Deceaſed is eſteemed the poſſeſſion of them all; payment of Debts by or to one of them, is eſteemed a payment by or to them all; the Sale or Gift of one of them, of the goods and Chattels of the Deceaſed, the Sale and Gift of them all; a Releaſe made by or to one of them is a Releaſe made by or to them all; and the aſſent of one of them to a Legacy the aſſent of them all. 21.Ed.4.25. 4 *H.*7.4.16 *H.*7.4. *Broo. executors* 66.30. 65. 9 Ed.4.12. *Fitz. executors* 10. *Brownl.* 2. *part* 58.

30 What Act one Executor or Adminiſtrator alone may do; And where the act or laches of one may prejudice or barr his compan-on, and where not.

And therefore if there be two Executors and one of them deliver up the Obligation to the Debtor whereby he is bound, the other Executor ſhall not recover him in a detinue. So if two Executors have Lands or Goods in Execution, and one of them releaſe all his intereſt, this is a totall diſcharge of the Execution, *Adjudge M.* 39, 40. *Eliz. B R.*

And yet if in this Caſe there be any practice between the Executor and the Creditor in this matter, and there be not Aſſets beſides to pay all the Debts and Legacies, here perhaps the other Executor may have remedy in equity againſt his coexecutor and the creditor. But how the Law is of Adminiſtrators, *Quære*; for ſome think that one of them alſo may ſell Goods, releaſe Debts, plead to Actions, or the like without the other. *Goldsb.* 141. 54. Others of a contrary opinion, and that becauſe they have but one entire authority given them, that they muſt act together and not aſunder, but Adminiſtrators have by the Adminiſtration as much intereſt as an Executor hath, and therefore we conceive he hath as much power as an Executor hath. *Cromp. Jac.* 45, 4 *H.*7.4.

If one Executor atturn to the Grant of a Reverſion or a Rent, this is as good as if they did all atturn and bind all the reſt, as in caſe of aſſent to a Legacy; for in this caſe the aſſent will bind all the reſt, albeit there be not enough to pay the debts beſides the Legacy given away by aſſent, but his aſſent ſhall not hurt his coexecutors in a *Devaſtavit. Dyer* 210. *Coo.* 4.31. *Addition to Juſt. Dodridge* 4.

If one Executor appear to an action ſued againſt them all, or plead a Plea to it; this for the moſt part ſhall be ſaid to be the appearance and plea of them all, and ſhall bind the reſt. *Goldsb.* 141. *Pl.* 54. *Coo.* 9. 38. *Dyer* 1210.

If two Executors ſue together, and one of them is ſummoned and ſevered; in this caſe he that is ſummoned may before Judgement releaſe the duty, but if the other proſecute to Judgement firſt, and then he that is ſevered acknowledge ſatisfaction, this will not benefit the defendant, nor barr the reſt that are plaintiffs in the Judgement. And if 3 executors ſue, and 2 are ſummoned and ſevered, and the 3 recover

and

and dye; in this caſe the other two ſhall have Execution. *Dyer* 310.210.16 *H.*7.4. See more at *Numb*, 27. *ſupra* 1. *Brown.* 2 *part* 58.

31. What act one Executor may do to another, And what remedy or action one Executor or Adminiſtrator may have againſt another or not.

One Executor or adminiſtrator cannot give or ſell any of the Goods or chattels of the deceaſed to another Executor or Adminiſtrator; and therefore they may not make Diviſion of the goods amongſt themſelves; and regularly one of them cannot ſue another of them. And therefore if one keep, give, or ſell all the goods, releaſe debts, or the like, in the diſturbance of the Execution of the Will, or due Adminiſtration of the eſtate; it ſeems the other hath no remedy againſt him, except it be in the Caſe of Coven before; But if all the reſidue of the Goods and Chattels after Debts and Legacies paid be given to one of the Executors alone, and after the Debts and Legacies paid, the reſt do detain it or any part of it from him; in this caſe perhaps he may have ſome remedy againſt them. 27 *H.*8.21.6 *H.*7.5. *Plow.* 343. *Fitz. Executors* 6.

If the Debtor make his Creditor, and another his Executors, and the Creditor doth refuſe the Executorſhip, and the other doth accept it; in this caſe the creditor may ſue the Executor for this Debt: But if both prove the Will, and the Debtor die, the ſurviving coexecutor cannot ſue the Executor of the debtor for this debt. And if one make a woman and two others his Executors, and a creditor before ſhe doth accept of the Executorſhip doth marry her; in this caſe he may ſue the other Executors for this debt; but if ſhe have accepted of the Executorſhip firſt *contra*, 11 *H.*4.83.

32. Devaſtavit *Quid* What ſhall be ſaid a Devaſtavit and waſting of the goods of the deceaſed by an Executor, or adminiſtrator, and how he ſhall be charged thereupon.

A *Devaſtavit* or Waſte in an Executor or Adminiſtrator is, when he doth miſimploy the eſtate of the deceaſed, and miſdemean himſelf in the managing thereof againſt the truſt repoſed in him. And this may be done divers wayes, as

1. When the Executor or Adminiſtrator doth beſtow more upon the Funerals of the Deceaſed then is meet, having reſpect to his degree and Eſtate.

2. When he doth pay Legacies in money, or aſſent to Legacies given in other things before the debts are paid, and hath not enough beſides to pay the debts.

3. When he doth not pay the debts in that order & manner as is before ſet down, but doth pay them firſt he ſhould pay laſt, and he hath not enough to pay them all.

4. When he doth releaſe a debt or duty due to the Deceaſed before he doth receive it, or when the Goods of the Deceaſed being taken from him, he doth releaſe to him that doth take them the action whereby he may recover them.

5. When he doth ſell the Goods of the Deceaſed much under value, eſpecially if it be with covin, as to his near Friends, to his own uſe, to have money underhand, or the like, but otherwiſe to ſell them under value, eſpecially where he cannot conveniently make more of them, is no waſte. *Plow.* 543. *Coo.* 532. *Doct. and St.* 75 *Perk. ſe.* 488. 570 *Kelw.* 59.

All theſe and ſuch like acts as theſe are ſaid to be a waſte in an Executor or Adminiſtrator; and being diſcovered againſt him by the return of the Sheriff (or as ſome think by inqueſt of Office) it will produce this effect, to make the Executor or Adminiſtrator chargeable for ſo much as he hath miſimployed and waſted *de bonis propriis*, ſo that any creditor may charge him for the debt due to him from the Teſtator as for his own proper debt, and for ſo much the Execution ſhall be made againſt him upon his own body, Lands, and goods; And yet ſo, as one Executor or Adminiſtrator ſhall not be charged for the Waſte of another; for if there be many Executors, and one of them doth onely commit the Waſte, he onely ſhall be puniſhed for this Waſte. *Dyer* 185. *Coo.* 5.32 *Old* B. *of Entries* 11. *Dyer* 210. *Doct. & St.* 78.

And the Executor or Adminiſtrator if he do commit a Waſte in the gift or ſale of goods, ſhall anſwer it alone; for he to whom the goods are given or ſold ſhall not be puniſhed for it, neither ſhall the executor or adminiſtrator of the Executor or adminiſtator be puniſhed for it after his death. And howſoever the Husband ſhall be charged in a Devaſtavit for the Waſt of himſelf or his Wife where ſhe is an Executrix whiles they both live together; yet if a Woman Executrix take a Husband, and during the marriage he or ſhe doth commit a Waſte, and after ſhe die; in this caſe it ſeems the Husband ſhall not be charged for the Waſte himſelf or

his Wife did, *Sed quære* of this. For if a void adminiſtration be committed and the Adminiſtrator do waſte the goods, and after the Adminiſtration is committed to another; in this caſe the firſt Adminiſtrator may be charged by the creditors for the waſt done in his time. But an Executor or adminiſtrator may lawfully ſell or convert the goods of the deceaſed to his own uſe, ſo as he convert the money to the uſe of the deceaſed in payment of debts, or the like, and pay ſo much of his own money, as the goods ſo converted to his uſe are worth; and theſe acts are not eſteemed a waſt in him. Alſo he may ſell any ſpeciall Legacy that is given, and this is no waſt in him, howbeit it is a wrong to the Legatee if there be aſſets to pay Debts beſides. And when he hath enough to pay all the Debts and Legacies, then he may diſpoſe of the whole eſtate how he will without any prejudice to himſelf at all. *See more Brownl.* 1 *part* 24. 33. 116. 2. *part* 81.

An Executor of his own wrong is one that is neither lawfull Executor nor Adminiſtrator, and yet doth take upon him to do and act ſuch things as are onely fit for, and proper to an Executor or Adminiſtrator, as to take the goods of the deceaſed into his own poſſeſſion, give and ſell them, pay the Debts of the deceaſed therewith, releaſe the debts due to the deceaſed and the like. *Terms of the Law, Kelw.* 59. 93. *Dyer* 105. 157. 255. *Coo.* 5 32. *Broo. Executor* 162.

33. Executor of his own wrong who ſhall be ſaid to be ſo. And what act ſhall make him ſo to be accounted. And what act ſuch an executor may do, and how he ſhall be charged or not.

And a man may make himſelf ſuch an Executor by any ſuch intermedling with the office and work of an Executor as followeth; 1. By proving the Will with the money of the dead, but to prove another mans Will at my own charge, will no more make me chargeable, as Executor of mine own wrong, then to bury the deceaſed in a decent manner out of his own eſtate. 2. By a ſeiſing, gaining, keeping and uſing of the goods of the deceaſed as a mans own, eſpecially if he convert them to his own uſe, ſell or otherwiſe diſpoſe them, and every colour of Title will not help in this caſe, for if a man make a Deed of gift of all his goods and chattels to another, and dieth inteſtate, and this in truth is fraudulent and in truſt, and the Donee after the death of the Donor doth diſpoſe of theſe goods and Chattels, in this caſe and by this means, he ſhall be Executor of his own wrong. *Goldsb.* 116. *pl.* 12. *Brownl.* 1. *part* 103. 2. *part* 384. 185.

And yet if the Deed of gift be *bona fide* in ſatisfaction of a juſt debt, and the goods be no more then the Debt, it may be otherwiſe: but if the goods be much more then the debt, there it ſeems he ſhall be charged ſo for the overplus, and that whether he have them in poſſeſſion or not; and ſo was the opinion of Juſtice *Jones*, at *Glouceſt.* Aſſiſes. 9 *Car.* If the Ordinary grant Letters *ad colligendum & vendendum* the goods of the deceaſed that are like to periſh, and *I. S.* to whom the Letters are made, under colour thereof doth take and ſell the goods, hereby he may make himſelf chargeable as Executor of his own wrong: for the Ordinary hath no ſuch power himſelf, and therefore he may not give that power to another. If a man that is next of kin procure a beggar, or a ſtranger to take out an Adminiſtration, and then to make him a deed of gift of all the goods for a ſmall matter, he may be thus charged for the overplus of the worth of the goods more then he gave. So if a Debtor procure ſuch an adminiſtration to be taken out, and then get a Releaſe of his debt from the adminiſtrator, this may make him chargeable as Executor of his own wrong for ſo much as his debt doth come unto. *Stat.* 43. *Eliz. cap.* 8. *Plich.* 7 *Ja. Co. B per ch. Juſtice.*

And yet a man may take away his own goods that were in the hands of the deceaſed without danger. And every having and poſſeſſion of the goods of the deceaſed will not make a man executor of his own wrong: For if a man die in my houſe, and have goods there, and I keep them untill I can well be diſcharged of them, this will not make me chargeable, as executor of mine own wrong. *Trin.* 17 *Jac. per chief Juſt.*

So if I do onely lay up the goods of the deceaſed to preſerve them in ſafety for him that ſhall have right to them, this will make me no more chargeable then if I take an Inventory of all the goods of the deceaſed. *Coo.* 5. 34. *Kelw.* 63.

So if another man take the goods of the deceaſed and ſell them to me or give them to me, howſoever this will make him chargeable as executor of his own wrong,

yet this will not make me chargeable ſo, neither will every diſpoſition of the goods of the deceaſed make a man executor of his own wrong, for if a man ſell ſome of the goods of the deceaſed (where there is need) to help forward a decent Funerall of the body of the deceaſed: this is no ſuch diſpoſition as to make a man chargeable thus. So if I deliver the wife of the deceaſed her neceſſary wearing apparrel, or if I be wife to the deceaſed and take it my ſelf. So where I take any of the deceaſeds goods into my hands by miſtake, ſuppoſing them to be mine own, or under colour of Title, as when I have a good deed of gift or ſale of them without any fraud or coven: or under a good authority, as when I take them upon a a Warrant from the Sheriffe that hath proceſſe out of the Exchequer to take them, or as a Treſpaſſor onely, as when I kill or otherwiſe abuſe the Cattel; ſuch an intermedling with the goods of the Deceaſed will not make a man chargeable as Executor of his own wrong, neither may I be ſo charged in theſe caſes. *Kel.* 63 52. 33 *H.* 6. 21. 32 *H.* 6. 6. *Dyer* 167, *Coo.* 5. 34. 20 *Ed.* 4 17. *Fitz. Executor* 122.

The Third way by which a man may make himſelf chargeable as Executor of his own wrong, is by delivering of the goods of the deceaſed to creditors in ſatisfaction of their Debts, or by ſelling any of the goods of the deceaſed to pay the Debts of the deceaſed, and paying the ſame with the money made thereof; but to pay the deceaſeds Debt with a mans own money will not make him chargeable ſo. *See the caſes before.*

The fourth way by which a man may make himſelf ſo chargeable, is by receiving any of the Debts due to the deceaſed. *Dyer* 166.

The fifth way by which a man may make himſelf chargeable ſo, is by releaſing any Debts or duties due to the deceaſed.

The ſixth way, by delivering any Legacies given by the deceaſed in kind, or by paying any Legacies, except it be with a mans own money. *Dyer* 166.

The ſeventh way, by taking a mans Legacy given to him before the Executor have accepted of the executorſhip and aſſented to the Legacy.

The eighth way, by ſuing as Executor to the deceaſed, for any debt due to the deceaſed.

And the ninth way by taking upon him to ſell the Lands of the Deceaſed as his Executor. In all theſe caſes, and by all theſe and ſuch like means, a man may make himſelf an executor of his own wrong: ſo that if an Executor after he hath legally waived the Executorſhip, or an adminiſtrator after his Adminiſtration is repealed and revoked, intermeddle with the eſtate in any ſuch manner, he may be charged as executor of his own wrong: and if a woman take more of her wearing apparell then is neceſſary and convenient for one of her rank and condition, without Legacy of the husband and licence of the executor, ſhe may be charged thus. *Dyer* 105. *Dyer* 166. 33 *H.* 6. 31.

And if a man under colour of an Adminiſtration that is not good, or of a Commiſſion *ad colligendum bona defuncti* that is not good, or of a Will when in truth there is none at all, or no good Will, do take upon him to intermeddle with the goods and to diſpoſe of the eſtate in manner as aforeſaid, by this means he may make himſelf chargeable thus. And in theſe Caſes, and by theſe means, ſuch perſons that do ſo intermeddle, do make themſelves to be accounted in Law Executors; but Executors by wrong onely and not Executors by right. And therefore ſuch perſons have not the favour nor power of lawfull Executors, as to bring any action for Debt due to the Deceaſed, to deduct and pay themſelves any Debt due to themſelves firſt of all, and to bar other Creditors, and the like. And for ſo much as they have ſo diſpoſed and miſ-imployed, and no more, they make themſelves chargeable to any Creditor or Legatee of the Deceaſed that ſhall ſue them as far forth as a lawfull executor is chargeable. *Dyer* 255. 166. *Coo.* 5. 34. 9. 39. *Coo.* 5. 34. *Plow.* 148. 145. 33 *H.* 6. 31. *Dyer* 210. *Plow*, 184. *Coo.* 5. 33.

And albeit, he that doth thus be a Creditor, yet this will not help him; for a Creditor may not enter upon the Goods of the Deceaſed, and pay himſelf firſt, and if hee do ſo, if there bee a lawfull Executor or adminiſtrator made he may ſue the Creditor; and if there be no Executor or Adminiſtrator made

made, the Creditor may by this means make himſelf chargeable to other Creditors as Executor of his own wrong, for ſo much as he hath taken into his own hands: And then a man ſhall be charged the rather in theſe Caſes, and by this means when there is no Executor made; or if there be an Executor made, when he doth refuſe to take upon him the Executorſhip, nor any Adminiſtration granted; for when a man dyeth Inteſtate, and a ſtranger taketh and uſeth the goods of the deceaſed as his own, albeit he pay no Debt or Legacy, nor do any other act as Executor, yet when no other man taketh upon him the Adminiſtration, this intermedling ſhall make him chargeable as Executor of his own wrong; for in that caſe the Creditor hath no other remedy: But in caſe where there is an Executor made, and he doth prove the Teſtament, and doth take upon him the Adminiſtration of the goods, and then a ſtranger taketh out of the hands of this Executor, or getteth into his own hands all or ſome of the goods of the deceaſed, and uſeth them as his own; this will not make this ſtranger Executor of his own wrong, for now there is a lawfull Executor againſt whom the Creditor may have his remedy, and the Executor ſhall have his remedy for theſe goods againſt the ſtranger; for they are and ſhall be accounted Aſſets in the hands of the Executor ſtill, notwithſtanding the ſtranger hath the poſſeſſion of them: and yet in this caſe alſo where there is a rightfull Executor, if a ſtranger ſhall take the goods into his hands, claim to be Executor, pay debts and Legacies; and receive debts, and intermeddle as an Executor; in this caſe, perhaps, and by this expreſſe Adminiſtration as Executor, he may be charged as Executor of his own wrong, albeit there be a lawfull Executor: and if a man die inteſtate, and a ſtranger intermeddle with the eſtate as before, and then the Adminiſtration is granted to another; in this caſe the ſtranger may be charged by any creditor or Legatee as Executor of his own wrong for his intermedling before the Adminiſtration granted; for the rightfull Executor or Adminiſtrator ſhall be charged with no more then what doth come into his hands. And if an Adminiſtration be granted afterwards to any one that hath ſo intermedled with the goods before; this will not purge the wrong done before; and therefore in this Caſe a Creditor may charge him as Executor of his own wrong, or as a lawfull Adminiſtrator at his election, *Coo.* 5. 33 *Kelw.* 59. *Paſch.* 39 *Eliz. Coo. B. Bradbury verſus Reynolds.* See more, *Brownl.* 1. *part* 103. 2. *part* 184, 185.

34. Adminiſtrator *durante minori ætate*, what he is and his power and when it ſhall end.

The Adminiſtrator, *durante minori ætate*, is a ſpeciall kind of Adminiſtrator, and is in caſe where an Infant under the age of 17 years (for at that age an Infant is capable of an Executorſhip) is made an Executor, and the adminiſtration of the goods (as the manner is in that caſe) is committed to one or more of the next friend or friends of the Infant during his minority, which is untill he be of the age of ſeventeen years; he that hath ſuch an Adminiſtration granted unto him is ſuch an Adminiſtrator. And he is ſometimes generall, *i.e.* when his adminiſtration is granted to him *adopus & uuſm* of the Infant onely. In the firſt caſe, he hath as large a power as another Adminiſtrator, and therefore he may aſſent to a Legacy, albeit there be not Aſſets to pay Debts; he may ſell any of the goods and chattels of the deceaſed, or give them away or the like, as another Adminiſtrator may do. *Coo.* 5. 29. 6. 27. 9. 27.

But in the laſt caſe it is otherwiſe; for ſuch a ſpeciall Adminiſtrator can do little more then the Ordinary himſelf, and therefore he may not ſell any of the goods or chattels of the deceaſed, except it be in caſe where they are like to periſh, for funerall expences, or for payment of Debts, nor may he aſſent to a Legacy where there is not Aſſets to pay Debts &c. And this adminiſtration is *ipſo facto* determined when the executor doth come to the age of ſeventeen years: And therefore if it be granted during the minority of four Executors, and one of them die, or come to the age of ſeventeen years, now is the Adminiſtration determined: And if the Executor be a woman and ſhe take a husband that is ſeventeen years of age or upwards; in this caſe it ſeems the Adminiſtration is determined: and therefore alſo it is, that if ſuch an Adminiſtration *durante minori ætate* be granted after the Executor is ſeventeen years of age, the Adminiſtration is void; *See more of this Brownl.* 1 *part* 31. 46, 47, 80. 101. 2. *part* 83. 148.

35. Where an Adminiſtration once committed by the Ordinary may be afterwards revoked; and what ſhall be ſaid a Revocation of ſuch an Adminiſtration, or not: and what acts done before ſhall ſtand in force, or not.

It hath been held that the Ordinary after he hath granted Adminiſtration of the Goods of a man Inteſtate to another, may afterwards without cauſe revoke the ſame and grant it to another, at his pleaſure: and that if the Ordinary grant letters of Adminiſtration to one, and after grant Letters of Adminiſtration to another, of the Goods of the ſame man, that hereby the ſecond Letters of Adminiſtration are *Ipſo facto* countermanded, albeit there be no words of Revocation in them. 4 *H.*7.14. *Lit.Broo.Sect.*330.34 *H.*6.14.*Dyer* 339.*Broo.Adminiſtrator* 7.

But it ſeems the Law is otherwiſe, and that after the Ordinary hath granted the Adminiſtration according to the charge and direction given him by the Statutes, that he cannot afterwards revoke it, and grant it to another without cauſe; *i.e.* unleſſe the firſt Adminiſtration be illegally granted, as when it is granted to a ſtranger, and not to the next of kin, or the like; or unleſſe the firſt Adminiſtrator cannot, or will not adminiſter; for in theſe caſes he may without doubt grant the Adminiſtration to another. And yet in theſe caſes where there is a former Adminiſtration granted regularly, all acts that the firſt Adminiſtrator doth lawfully execute and do as Adminiſtrator, as ſale of Goods, payment or receit of Debts, making Releaſes, and the like, are good, and ſhall bind the next and ſucceeding Adminiſtrator. And therefore, if the Ordinary after the death of a man Inteſtate, doth grant the Adminiſtration of his Goods to a ſtranger, and the next of kin doth ſue by Citation to have it repealed, and the firſt Adminiſtrator hanging that Suit in the Spirituall Court, doth ſell the Goods of purpoſe to defeat the ſecond Adminiſtration, and after the firſt Letters of Adminiſtration are revoked by ſentence, and the firſt ſentence annulled, and the Adminiſtration is committed to another; in this caſe the ſecond Adminiſtrator cannot recover theſe Goods or have any remedy for them. And yet perhaps if there be any fraud in the caſe, an Executor may have relief upon the Statute of 13 *Eliz.* But if the firſt Suit and ſentence be by appeal avoided, then all that the firſt Adminiſtrator doth is void, and the ſecond Adminiſtrator may recover the Goods notwithſtanding the ſale: And if the firſt Adminiſtration be upon condition, all the acts of the Adminiſtrator doth before the condition broken, are good; and therefore if he give or ſell the Goods, the ſubſequent Adminiſtrator cannot avoid it See the *Stat.*21 *H.*8.*c.*5.*Coo.*6.18.*New Book of Entries* 38.*Plow.*281.*Coo.*6.18,19.*Dyer* 339.*Coo.*6.19.

If a man dye Inteſtate, and have not *Bona notabilia*, and the Biſhop of the Dioceſſe grant Letters of Adminiſtration to one, and after the Arch-biſhop doth grant Letters of Adminiſtration to another; in this caſe the effect of the firſt Adminiſtration is ſuſpended untill the other be repealed and declared by ſentence to be void. If there be a Will, and it is concealed, and thereupon an Adminiſtration is granted, and after the Will is produced and proved; in this caſe the Adminiſtration is *Ipſo facto* determined, and all the acts the Adminiſtrator hath done *ab initio*, are become void. See more in the next Queſtion. See more *Brownl.*2.*part* 83.*Coo.*8.135.*Plow.* 281.9 *H.*5.5.

36 What Acts done by one Executor or Adminiſtrator, may be avoided by the ſubſequent Executor or Adminiſtrator, and what not.

If a Will be made by an Ideot, and an Executor appointed therein, and the Executor take upon him the Adminiſtration, and after the Will is avoided for the weakneſſe of the Teſtator; in this caſe it ſeems that all the Acts the Executor doth before the avoidance of the Will are good and not to be avoided by the Adminiſtrator. *Dyer.*

If there be a Will made, and an Executor appointed, and the Ordinary cite the Executor to come in, and prove the Will, and he doth not come, and thereupon the Ordinary doth grant the Adminiſtration to another; in this caſe all acts done by the Adminiſtrator are good, and ſhall bind the Executor, if he may, and ſhall afterwards take upon him the Executorſhip. But otherwiſe it is where the Ordinary doth grant the Adminiſtration before the Executor be cited to appear, or before the time given him to take upon him the Adminiſtration; for in this caſe, nothing that he doth ſhall bind the Executor. 3 *H.*7.14.

When there is an Adminiſtration granted, and it is afterwards upon a Suit by condition only repealed; in this caſe all acts done by the firſt Adminiſtrator are good and ſhall bind the ſubſequent Adminiſtrator. *Coo.*6.18,19.*Plow.*282. *Coo.* 8. 143.139.

But

But in caſe where the firſt Adminiſtration is upon a Suit by appeal by ſentence annihilated and declared void, there all acts done by the firſt Adminiſtrator are void, and ſhall not bind the ſubſequent Adminiſtrator: And therefore if the Ordinary of the Dioceſſe grant an Adminiſtration that doth belong to the Metropolitan to grant (in which caſe the Adminiſtration is void) all acts done by the Adminiſtrator are void, and may be avoided by the ſucceeding Adminiſtrator. But when the Adminiſtration doth belong to the Ordinary of the Dioceſſe to grant, and the Metropolitan doth grant it (in which caſe it is only voidable) in that caſe, all acts upon and by vertue of the firſt Adminiſtration before the ſecond Adminiſtration, are good.

If an Adminiſtration be granted to a ſtranger, and afterwards it is revoked and granted to the next of kin; in this caſe all lawfull acts done by the firſt Adminiſtrator before, and hanging the Suit, are good and unavoidable by the ſubſequent Adminiſtrator; and yet perhaps if the firſt Adminiſtrator waſte the Goods, it may be he may be charged for this by the ſubſequent Adminiſtrator, or by a Creditor. *Wilſon verſus Packman. M.* 37,38 *Eliz B.R.*

Where the Executor by the Will is not to adminiſter untill a certain time; in this caſe the Adminiſtration of all the Goods is to be granted untill that time; and all acts done by ſuch an Adminiſtrator before that time are good, and ſhall bind the Executor. So where an Executor is made, or an Adminiſtration is granted upon condition, which is after broken, ſo that the Executorſhip or Adminiſtration is determined; yet in this caſe all acts done by him before this time are good. *Plow.* 281,282. *Coo.* 6.19. 34 H.6.14.

If there be a falſe and a true Will, and the Executor of the falſe will prove this Will firſt, and afterwards the Executor of the true Will doth diſprove and avoid the firſt Will; in this caſe alſo he may avoid all acts the firſt Executor doth. See more in *Bowwnl.* 2. *part* 80.91.2. *part* 147.4 H.7.13. *Plow* 282.

37. What ſhall be ſaid a good bar in Debt, or other Action brought by, or againſt an Executor or Adminiſtrator, and what not.

The ſame Bars and Pleas regularly, that a man may have to actions brought by the Deceaſed himſelf in his life, a man may have to bar the action and Suit of his Executor or Adminiſtrator after his death. But an Executor or Adminiſtrator may have beſides the ſame Pleas and Bars to Actions the Deceaſed might have had, as *Non eſt factum*; *Per Dureſſe*, *Non Aſſumpſit*, and the like; divers other Pleas and Bars to Actions in reſpect of his Eſtate and condition as Executor or Adminiſtrator: For if he never meddle with the Goods and Chattels of the Deceaſed, and yet he be ſued as Executor or Adminiſtrator; he may plead *Ne unque*; *i. e.* he did never intermeddle as Executor or Adminiſtrator; and if this be found for him, this will bar the Plaintiff: And if he do intermeddle and take upon him the Adminiſtration, he may plead if the caſe be ſo, that he cannot recover the Goods of the Deceaſed; for he ſhall be charged for no more then what he can get in his poſſeſſion. Or he may plead that he hath fully adminiſtred all the Goods and Chattels of the Deceaſed, and hath nothing left to adminiſter; or he may plead, that he hath paid ſo much of his own money as the Goods in his hands do amount unto. Or if he be ſued for Debts due by Obligations, or ſuch like Eſpecialties entred into by the Deceaſed, he may plead that there are Debts due, and yet to pay on Judgments had againſt the Deceaſed, or that there are Debts due, and yet to pay on Recognizances or Statutes entred into by the Deceaſed, and that he hath no more then enough to ſatisfie them: Or he may plead that there are Judgments had againſt him for other Debts of the Deceaſed in equall degree with the Debt ſued for, and that he has no more then enough to diſcharge them: ſo as theſe former Debts, on, and for which theſe Judgments were had and Statutes given, be *bona fide* due, and the Judgments, Recognizances, and Statutes in truth continued for the ſame; for if there be any fraud in the caſe, *viz.* that either the Judgments, Recognizances, or Statutes, were at firſt entred into, or are afterwards continued of purpoſe to deceive or delay others of their due Debts, when either the Debt is ſatisfied, or compounded for leſſe, or the like; in theſe caſes, this Plea will not ſerve; but in this matter being diſcloſed, by the Plaintiffs pleading he will avoid it. *Coo.* 5. 33. *Dyer* 30.80. *Coo.* 8 132.134.21 *H.*6. 19. *Dyer* 2. 27 *H.*8.6. *Coo.* 9. 108. 2 *H.* 4. 21. *Brownl.* 2. *part.* 118,19.

And

And if he be ſued for a Debt due upon a ſimple Contract or promiſe of the Teſtator, he may plead there are Debts to pay due by Obligations and other Eſpecialties entred into by the Deceaſed, and that he hath no more then enough to ſatiſfie thoſe Debts, and this will bar the Plaintiff in his action: And therefore if an Executor or Adminiſtrator plead a Judgment in Bar of an action of Debt upon an Obligation, he muſt ſhew alſo that the Suit whereupon the Judgment was had, was upon an Obligation; for if it were on a ſimple Contract, it is no Bar. And if the Executor be ſued for Debt on an Obligation, he may plead he made voluntary payment of other Debts due upon Obligations, or gave new ſecurity for them in his own name before the Suit began, and that he hath no more then enough to ſatisfie them. But to plead ſuch a voluntary payment or giving of new ſecurity after Suits begun upon this Obligation now in Suit is no good Plea.

If an Action be brought againſt an Executor or Adminiſtrator upon an Eſpecialty for money, it is no good Plea in Bar of this action to plead a Statute or Recognizance with Defeaſance to perform Covenants when there is no Covenant broken.

If a Suit be againſt an Executor or Adminiſtrator for a Legacy, it ſeems it is no good Plea to plead a Bond with Condition for performance of Covenants, or for the doing of any other collaterall thing that is contingent only, and not yet broken. It is no good Plea in an action for an Executor or Adminiſtrator to ſay, that the Deceaſed was Out-lawed. See more *Brownl.* 142. *pl.* 57. 141 *pl.* 54. 1. *part* 19. 75. 50. 80. 2. *part* 118, 119. 153. *Curia Trin.* 37 *Eliz. Trin.* 39 *Eliz. B. R.*

38. Where and in what caſe an Executor or Adminiſtrator ſhall be charged by his own act or pleading upon his owne Goods, and where execution ſhall be *de bonis propriis* & where not.

An Executor or Adminiſtrator may make himſelf chargable of his own Goods, either by omiſſion, as when he being ſued upon an Obligation, or the like, and there is a Judgment againſt him or the Deceaſed in force, and he hath but enough to ſatisfie that Judgment, and he doth not plead this in Bar of the preſent action, but doth ſuffer the Plaintiff to recover againſt him; in this caſe he muſt ſatisfie this ſecond Debt out of his own Eſtate; or by Commiſſion, and that either by doing, as when he doth any act that is a waſte in him, and thereupon a *Devaſtavit* is returned againſt him, for in this caſe he muſt anſwer ſo much as he hath waſted out of his own Eſtate; or by ſaying, as when a Suit is againſt, and he doth plead ſuch a falſe Plea therein as doth tend to the perpetuall Bar of the Plaintiff in the action, and yet it is of a thing that doth lye within his perfect knowledge, as when he doth plead he is not Executor, nor did ever adminiſter as Executor, and upon tryall of this Iſſue againſt him it be found he is a rightfull or wrongfull Executor; in this caſe he muſt ſatisfie this Debt out of his own Eſtate whether he have aſſets or not, and the Execution had upon the Judgment had in this Suit ſhall be *De bonis propriis.* 2 *H.* 6. 12. *Dyer* 185. 80. *Coc.* 9. 90. 94. 9 *H.* 6. 57. 34 *H.* 6. 45. *Broo. Executor* 141. 105. *Lit. Broo. Sect.* 29 *Kelw.* 61. *Broo. Executors* 164.

And if an Executor or Adminiſtrator be ſued, and he plead to the action *plenè adminiſtravit*, and upon tryall it is found againſt him; in this caſe if he have any of the Goods of the Deceaſed left in his hand, the execution ſhall be of them, but if he have none of the Goods of the Deceaſed left, the execution ſhall be, and he ſhall be charged for ſo much as is found to be in his hands *de bonis propriis.*

But where he is ſued upon a promiſe made by the Teſtator, and he plead *non aſſumpſit* to it; and where he ſued upon a Deed made by the Teſtator, and he plead *non eſt factum* to it, or the like; and theſe Iſſues upon tryall are found againſt him: or when he ſhall confeſſe the action, or ſuffer a Judgment to go by default againſt him, or plead any vaine Plea; in all theſe caſes he ſhall not be chargable of his own Eſtate, neither ſhall the Judgment and Execution in theſe caſes be *de bonis propriis*, but *de bonis Teſtatoris* only for the Debt, and *de bonis propriis* for the Coſts: And yet if an Executor or Adminiſtrator ſhall entreat a Creditor to forbeare his Debt untill a day, and then promiſe to pay him, by this promiſe he hath made himſelfe chargable as for his owne Debt, howbeit it ſhall be allowed him upon his Account.

But in all theſe caſes, and ſuch like, where a man ſhall be charged of his own Eſtate, and the execution ſhall be *de bonis propriis*, it ſeems the Judgment is alwaies *de bonis Teſtatoris*, and the courſe is this, the firſt Execution is againſt the Executor *de bonis Teſtatoris*, and not *de bonis propriis*: And after a *Devaſtavit* returned by the Sheriff againſt the Executor or Adminiſtrator, and not before, a new Execution is directed to the Sheriff to levy the Debt *de bonis Teſtatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis propriis*.

And therefore if an Executor or Adminiſtrator be ſued by a Creditor, and the Executor or Adminiſtrator plead a *Plenè adminiſtravit* generally, or plead ſpecially that he hath no more but to ſatisfie a Judgment or the like, and upon tryall this Iſſue is found againſt him, and it is found he hath in all or part enough to ſatisfie the Debt; in theſe caſes the Judgment is *de bonis Teſtatoris*, and thereupon an Execution is (as in other caſes) to levy the Debt *de bonis Teſtatoris* in the hands of the Executor or Adminiſtrator, and for the Coſts *de bonis propriis*. And upon the return of the Sheriff a ſpeciall Execution doth iſſue forth to levy the money *de bonis Teſtatoris*: *Et ſi conſtare poterit*, that he hath waſted the Goods, then that he ſhall make the Execution *de bonis propriis*. And hereupon alſo the Plaintiff may if he will have a *Capias* againſt the body, or an *Elegit* againſt the Lands of the Executor or Adminiſtrator, and no other courſe of proceeding can or may be had againſt the Executor or Adminiſtrator in this caſe. *Atworths caſe, Mich* 38,39 *Eliz.* 34 *H.* 6.45.46 *Ed.*3.9. *Fitz. Executor* 9. *Coo.*5.32.8.134. *Dyer* 185.32.

An action of Debt was brought againſt two Executors, and one of them did appeare and confeſſe the action, and the other made default, and thereupon Judgment was given to recover againſt them both *de bonis Teſtatoris* in their hands, and Execution accordingly: and upon this Execution the Sheriff did return a *Devaſtavit* againſt the Executor that made default only, and hereupon a *Scire facias* went out againſt him alone, and afterward an Execution againſt him alone *de bonis propriis*. See more in *Brownl.*2.*part.*24.33.50 76.78.116.2.*part* 187. *Dyer* 210.

Aſſets, *Quid.*

Aſſets in this caſe is ſaid to be where one dieth indebted, and maketh his Executor, or dieth inteſtate, and the Executor or Adminiſtrator hath ſufficient in Goods or Chattels, or other profits to pay the Debts or ſome part thereof; this is ſaid aſſets in his hands; and for ſo much he ſhall be be charged. *Termes of the Law. Coo. ſuper Lit.*374.

37 What ſhall be ſaid to be Aſſets in the hands of an Executor or Adminiſtrator to charge him or not.

All thoſe Goods, and Chattels, Actions, and Commodities which were the Deceaſeds in right of action or poſſeſſion as his own, and ſo continued to the time of his death, and which after his death the Executor or Adminiſtrator doth get into his hands, as duly belonging to him in the right of his Executorſhip and Adminiſtration, and all ſuch things as do come to the Executor and Adminiſtrator in liew or by reaſon of that, and nothing elſe ſhall be ſaid to be aſſets in the hands of the Executor or Adminiſtrator to make him chargable to a Creditor or Legatee. And herein theſe things are to be known.

1. That Aſſets in the hands of one of the Executors ſhall be ſaid to be aſſets in the hands of all the Executors. *Kelw.*51.

2. That Aſſets in any part of the World ſhall be ſaid to be Aſſets in every part of the World: and therefore if that point be in iſſue, and it appear that there is Aſſets in the hands of any one of the Executors, or in any County or place whatſoever, the Jury muſt find that there is Aſſets. *Coo.*6.47.

3. All Goods and Chattels of what nature or kind whatſoever that are valuable, as Oxen, Kine, Corne, *&c.* ſhall be eſteemed Aſſets. But ſuch things as are not valuable, as a Preſentation to a Church, and the like, ſhall not be accounted Aſſets. *Coo ſuper Lit.*388.

4. All the Goods and Chattels that come to the Executor or Adminiſtrator in the right of their Executorſhip or Adminiſtration, and that there are by Law given to them by vertue thereof in the right of the Deceaſed (for which, ſee before

before at *Numb.* 25.) and which are in poſſeſſion ſhall be eſteemed Aſſets in his hands. And therefore if a Feoffment be made to the uſe of the Feoffor for life, and after to the uſe of his Executors and Aſſignes for twenty years; in this caſe it ſeems this twenty years ſhall be ſaid to be Aſſets in the hands of the Executor of the Feoffor. And Goods pledged to the Deceaſed and not redeemed, or the money wherewith it is redeemed, when it is redeemed, ſhall be ſaid to be Aſſets in the hands of the Executor or Adminiſtrator. And if the Deceaſed doth appoint that the Executors ſhall ſell his Land to pay his Debts, the money that is made of the Land when it is ſold, ſhall be ſaid to be Aſſets in his hands. *Coo.ſuper Lit.*388.5.34. *Dyer* 362. *Kelw.*63.*Coo.ſuper Lit.*54.*Dyer* 362.20 *H.*7.4.*Broo. Aſſets* 12. *See before Numb.*

5. All the Goods and Chattels in action or in poſſibility at the time of the death of the Deceaſed that are afterwards recovered, and are gotten in poſſeſſion into the hands of the Executor or Adminiſtrator when they are ſo recovered, are eſteemed Aſſets in his hands. But they are never accounted Aſſets untill they are recovered and come in poſſeſſion; and therefore if there be Debts owing to the Deceaſed upon Statutes or Obligations, or otherwiſe, theſe are never eſteemed Aſſets in the hands of the Executor or Adminiſtrator untill he hath recovered them. *Coo. ſuper Lit.* 124,5.31.*Broo. Aſſets* 24. *Dyer* 264.121. 2 *H.*4.21. *Coo* 6.58 *Kelw.*63. *Dyer* 362.

So likewiſe if there be debt or damages recovered by a Judgment had by the Deceaſed, but no execution is done untill execution be made; this ſhall not be eſteemed Aſſets in the hands of the Executor or Adminiſtrator.

So if the Executor bring an action of Treſpaſſe againſt another *De bonis aſportatis in vita Teſtatoris*, and he have a Judgment for damages; in this caſe untill he hath recovered it by execution, it ſhall not be eſteemed Aſſets in his hands. And if the Judgment be erroneous, and the execution avoidable; in this caſe albeit it be recovered and gotten in poſſeſſion, yet it ſhall not be eſteemed Aſſets. And therefore if one ſue another and recover againſt him as Adminiſtrator of *I. S.* and after a Teſtament made by *I. S.* is produced and proved, and thereby an Executor is made; in this caſe the money recovered by the Adminiſtrator ſhall not be ſaid to be Aſſets in his hands as to any of the Creditors, becauſe the Executor may recover it from him, or the Debtor will have it again. And if the Executor or Adminiſtrator do never recover and get the thing into his poſſeſſion, he ſhall never be charged, eſpecially there where he hath done his beſt to get it and cannot. If one covenant to make a Leaſe for years to the Deceaſed his Executors or Adminiſtrators, and after his death the Leaſe is made to the Executor or Adminiſtrator accordingly; in this caſe this Leaſe ſhall be ſaid to be Aſſets in his hands, and he ſhall be chargable for ſo much to any Creditor. And whatſoever the Executor or Adminiſtrator muſt be forced to ſue for by the name of Executor or Adminiſtrator being recovered, ſhall be eſteemed Aſſets in his hands. *Curia Mich.*13.*B.R. Coo.* 1. 98.*Plow.*84.292.*Coo.*5.34.

6. Albeit the thing be extinct and gone as to the Executor and Adminiſtrator himſelf, yet it may have his being and be accounted Aſſets as to the Creditors and Legatees. And therefore if an Executor or an Adminiſtrator have a Leaſe for years of Land in the right of the Deceaſed, and afterwards he doth purchaſe the Fee-ſimple of the Land (whereby the Leaſe is drowned) yet in this caſe this Leaſe ſhall continue to be Aſſets as to the Creditors and Legatees ſtill. *Coo.*1.87. *Broo. Leaſes.*63.

And if the Debtee make the Debtor his Executor, or the Debtee dye Inteſtate, and the Adminiſtration is committed to the Debtor; in theſe caſes this Debt ſhall be ſaid to continue, and ſhall be eſteemed Aſſets for ſo much as to other Creditors. And if a Woman Executrix have Goods worth twenty pounds, and ſhe marry with one of the Creditors to whom twenty pounds is owing; in this caſe it ſeems the Husband may not retain the Goods to pay himſelf, but they ſhall be Aſſets to other Creditors. And yet if the Debtor make the Debtee his Executor, he may retain ſo much as to ſatisfie his own Debt, and that he doth ſo retain ſhall not be ſaid to be Aſſets in his hands as to any other Creditor.

And

And if *I. S.* have goods to the value of 20l. and he is bound to *B.* and *C.* in 20l. a peece, and he dieth inteſtate, and after *D.* doth adminiſter, and then *B.* dyeth and maketh *D.* his executor; in this caſe *D.* may retain this to ſatisfie his own debt, and it ſhall not be ſaid to be aſſets in his hands as to any other. *Barnets caſe, Hill.* 8. *Jac. Flow:* 184.

7. The goods and chattels of other men in the hands of the executor or adminiſtrator that were in poſſeſſion of the deceaſed, if he had no right to them, or if he had, and they do not belong to the executors, will not make the executor or adminiſtrator chargable; for theſe ſhall not bee eſteemed aſſets in his hands. And therefore if the goods of another man be amongſt the goods of the deceaſed, and theſe come all together into the hands of the executor or adminiſtrator; theſe goods that are the goods of another ſhall not be ſaid to be aſſets in the hands of the executor or adminiſtrator. And if the executor doth receive a rent that doth belong to the heir, this rent ſhall not be ſaid to be aſſets in his hands: and hence it is that if the deceaſed were outlawed at the time of his death, that his goods and chattels are not no be accounted aſſets, for they are none of his. *Kelw.* 63. *Co.* 6. 58. *Dier.* 362. *Doct. & St. lib.* 2: *cap.* 3.

8. If an executor of his own wrong, to whom 20l. is owing, doth enter upon ſo much of the goods of the deceaſed as is worth 20l. intending to pay himſelf; this ſhall be eſteemed aſſets in his hands to make him chargable for ſo much to any Creditor or Legatee. *Co.* 5. 30. *Dier* 2.

9. If the deceaſed have goods worth 20l. and owe 20l. to *A.* and 10l. to *B.* and he compound with *A.* for 10l. in this caſe he ſhall be ſaid to have aſſets, and be charged to pay the debt of *B.* alſo. 27 *H.* 8. 6.

10. If a man have a Leaſe for years worth 20l. *per annum* at the rent of 5l. and he die; in this caſe not the whole value of the land, but ſo much as is above the rent ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator. See more in *Brownlows: Rep.* 1. *parte* 33: 76. 2 *part.* 47.

If an executor have goods of 20l. value, and he take up an obligation of the teſtators of 20l. and pay the money; now the property of this is in him, and this is not aſſets to any other. So if he give his owne body, or another for him to the creditor of the Teſtator for 20l. But a promiſe to pay the 20l. will not diſcharge the Aſſets, *Goldsb.* 79. *Pl.* 15. If one deviſe his land to his Executors for years, this is Aſſets in their hands. But if he deviſe that they ſhall ſell his land; it is not aſſets till it be ſold, and the money received for it ſhall be Aſſets. *Brownl.* 2 *part.* 47.

The Probate of a Teſtament is the producting and inſinuating of it before the Eccleſiaſticall Iudge, Ordinary of the place where the party dyeth, or other that hath power to take the ſame. And this is done in two ſorts, either in common Form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity that the Will exhibited is the laſt will and Teſtament of the party deceaſed, which is the ordinary courſe; and this the Ordinary may accept if he will. Or *per teſtes*, *i. e.* Which is when over and beſides his oath he doth alſo produce witneſſes or maketh other proof to confirm the ſame, and that in the preſence of ſuch as may pretend any intereſt in the goods of the deceaſed, or at the leaſt in their abſence after they have been lawfully ſummoned to ſee ſuch a Will proved if they think good. And this courſe is uſed only where there is a ſuſpition of the Will, and the Caveat is entred, or where there is a feare of contention and ſtrife between the kindred & friends of the party deceaſed about his goods; for a Will proved in common form may be called into queſtion at any time thirty years after; and when the Will is thus exhibited into the Biſhops Court, the ſame is to be kept by his Officers, and the Copy thereof in parchment under the Biſhops Seale of his office to be certified and delivered, which parchment ſo ſealed is called the will proved. *Swinb.* 261. 264.

40. Probate *Quid.* *Quotuplex.*

41. Where the Probate of a Will is neceſſary, and by what Executor; & by and before whom.

The probate of the will (as having reſpect to the goods and chattels) is in ſome reſpect neceſſary; for howſoever as touching any free hold of lands deviſed it is not all material, and howſoever the Executor before Probate may receive and releaſe debts and do moſt other acts as Executor, yet he cannot ſue for any debt due to the Teſtator. *Co. ſuper Litt.* 292. *Perk. Sect.* 481.

And in what time it muſt be proved,

And if the Executor delay the Probate, the ordinary may by proceſs compell him to come in and accept or refuſe of the Executorſhip. And when it is proved it muſt be proved by the Executors or one of them at leaſt; and if all the goods of the deceaſed be within the ſame Dioceſs wherein he lived and dyed, the Executor muſt prove it before the ordinary of the Dioceſs, or before his lawfull Commiſſary or Deputy, or before the Archdeacon or his deputy or Commiſſary (as their compoſition is) or if the goods be in a Peculiar, then before him that is Iudge of that Peculiar; or if the goods be within two Peculiars then before the Ordinary of the Dioceſs wherein theſe two Peculiars lye. But if there be *bona notabilia* in the caſe, *viz.* that the Teſtator have goods or chattels at the time of his death of the value of 5l. or more lying in two or more Counties, or have good debts upon Eſpecialties (as ſome ſay) for otherwiſe they follow the perſon; or have any (Eſpecialties as other ſay) lying in other Counties for debt, ſo that there be of goods and chattels or good debts to the value of 5l. in any other Dioceſs then that wherein the Teſtator led his life and dyed, then the Probate doth belong to the Arch-biſhop of that Dioceſs wherein it is, unleſs the Ordinary of the ſame dioceſs have the Probate by compoſition between him and the Metropolitan; for otherwiſe there muſt be ſeverall Probates for the goods in every Dioceſs (as anciently was uſed in theſe caſes.) But if a man dye in his journey in another Dioceſs, and have more then 5l. goods about him, this ſhall not be ſaid to be *bona notabila*, but the Will may be proved before the Ordinary of the place where the deceaſed lived and his Eſtate doth lie. And except it be in caſes where men have *bona notabilia*, the Officers of the Courts of the Metropolitans are not to cite men out of their own Dioceſs; and to diſcover this matrer, it is the duty of the Ordinary of the Dioceſs, when any man comes to prove a Will, to give him an Oath, and examine him whether he know of, or doe believe, there are any goods to the value of 5l. lying in any other Dioceſs at the time of the Teſtators death, and if he hear of any to diſmiſs them to the Prerogative Court, and to give them notice of it. Alſo in ſome places, the Lords of mannors have the probate of all the Wills within their Mannor by cuſtome of the place; and in thoſe places it muſt be proved there, and not elſewhere. And when an Executor is bound to prove the Will before the ordinary as before, the ordinary may give him what time to doe it he doth think fit, and when he doth prove it, the Ordinary doth take an Oath of him to adminiſter the goods faithfully, and to take bond of him alſo if he pleaſe; but this ſome doe omit. For the Fees of Probate, See *Stat.* 31 *Ed.* 3, 4. 21 *H.*8. 5. *Perk. Sect.* 491, 492, 486. *Co.*9, 36. *Fitz. teſtament.* 5. 3. 5. *Plow.* 280. *Stat.* 23 *H.*8. *cap.* 9. 21 *H.*8 *c.*5. See before at num. 21. *Swinb, part.* 6. *Sect.* 11. *Stat.* 23 *H.*8. *cap.*9. *Fitz. Teſtament.* 4. 5.

The old Statutes concerning *Executors* are, *Weſtminſter.* 2. 23. 4 *Ed.* 3. 7. 9 *Ed.* 3. *Stat.* 1. 3. 25 *Ed.* 3 *Stat.* 5. 5. 33 *H.* 6. 1. 21 *H.* 8. 4. 43 *Eliz.*8.

See more in Chattels:

CHAP. CLVI.

Of Tillage and Tiles.

Tillage and husbandry. And Houſes decayed. Tiles.

FOr Tillage and Husbandry: See Statutes, 4 *H.*7. 12. 19. 21 *Jac.*28. 25 *H.*8. 13: 27 *H.*8. 22. 5 *Eliz.*2: 39 *Eliz.*1. 35 *El.* 7. *Co.*4. 38. 32 *H.*8. 18, 19: 33 *H.* 8. 26. 35 *H.* 8. 4. 39 *Eliz.* 13.

For Tiles how they are to be made, See 17 *Ed.* 4: 4.

CHAP.

CHAP. CLVII.

Of a Parſon and Vicar, his Parſonage or Vicarage, and the Profits belonging to them. Of Tithes, and their Kindes. Of the nature of Tithes, and how they are grantable. Who muſt pay Tithes at this day, and to whom, and who are capable of receiving and retaining of Tithes, and by what Title, and how. Of what things Tithe is to be paid, and of what not, and out of what Land, and how. When, where, and how Tithes payable muſt be paid and ſet forth, and when the Parſon, &c. may take them? Who muſt pay Tithe that is to be paid, and may be ſued for it? And to whom the Tithe muſt be paid? Which way the Owner of Tithes, and ſuch like things, may recover them being detained. In what caſe, and how a perſon or place may be quit and diſcharged of Tithes; and what ſhall be a good diſcharge, or not? Of other Profits which the Parſon and Vicar doth claim. What Tithes the Parſon, and what the Vicar ſhall have.

Of a Parſon and Vicar, his Parſonage or Vicarage, and the Profits belonging to them.

THe Parſon at firſt was he that had the Charge of a Pariſh Church, and was called the Rector of a Church; but he is moſt properly ſo called, that hath a Parſonage where there is a Vicarage endowed.

The Vicarage is a certain Portion of the Parſonage allowed to the Vicar for his Maintenance. And this Portion in ſome places is a ſum of money certain: In other places it is a part of the Tithes in kinde, and commonly the ſmaller Tithes; but in ſome few places the Vicar hath part of the great Tithes alſo: And he that hath the right to, and poſſeſſion of this, is called the Vicar; and he that hath the other part is called the Parſon, who in ſome Pariſhes is the Miniſter of the place, one they call a Clergy-man or Miniſter; and in other places he is a Lay-man, where it is an Impropriation.

The Profits and Fruits of a Parſonage or Vicarage, belonging to the Parſon or Vicar, are his Glebe Land, (if there be any) Oblations, Obventions, Offerings and Tithes.

The Glebe is that Portion of Land, Meadow, or Paſture, that is belonging to, and parcel of the Parſonage or Vicarage, over and above the Tithes.

Oblations, Obventions and Offerings ſeem to be but one thing, and that which was called meerly Spiritual. The Oblations were ſaid to be ſuch things Real or Perſonal as were offered to God and his Church, by Teſtament or otherwiſe; and Obventions did include Oblations, and other things now unknown and loſt amongſt us; and of this nature it ſeems the Mortuary is: And the other Profits are the Tithes.

Of Tithes, and their kinds

What they are.

Tithes are a certain part of the fruit or Lawful increaſe of the earth, Beaſts, or mens labours, which in moſt places, and of moſt things is the tenth part, and hath been by the Law given to the Miniſters of the Goſpel, in recompence of their labour in the execution of their Office.

Their kinds.

There are three ſorts of Tithes. Some of them are Predial, that is, ſuch as come in, and ariſe yearly of the fruit and profit of the earth; ſuch as are Wood, Corn, Grain, Hay, the ſeed of Rape, Parſley, Hops, Saffron, Wood, Flax, Hemp, darnel or cockle, Fenel, Anniſe, and the like. Such are the fruits of Trees, as Apples, Pears, Plums, Nuts, Cherries, Wardens, Grapes, Maſt, Acornes, and the like. Such alſo (as it ſeems,) are Herbs, as Rue, Sage, Mint, and the like.

Some of them are Perſonal, and they are ſuch as ariſe and grow due by the profits that come by mans honeſt labour and induſtry in ſome perſonal work, Artifice or Negotiation, as by buying, ſelling, Merchandizing; or by the labour of handicrafts men, ſuch as are Carpenters, Maſons, Fiſhers, Fowlers, Hunters, and the like. So offerings are ſaid to be perſonall Tithes.

And ſome Tithes are ſaid to be mixt, ſuch are the profits of ſome things that ariſe partly from the labour and care of men; and partly from the earth where the things are fed, of this ſort are Cattle, as their young Calves, Lambs, Kids, Roes, the Wool of Sheep, Milk and Cheeſe of Cowes; ſo the Eggs and Chickens of Hens, Geeſe, Ducks, and Swans, and the like.

Amongſt Predial Tithes, ſome of them are ſaid to be greater, as Wood, Corn, Hay, and the like. And ſome of them are leſſor, as the Tithe of Herbs, Flax, Hemp, and the like. And all theſe of the one ſort and of the other, the diſpute is under the names of Tithes of Harveſt Fruits; of Woods felled, and preſerved to grow again; of Wood not in uſe nor apt for Timber, but for Fire; of Trees planted for fencing of Grounds, in Fields, Paſtures, and Hedggrowes; of Turves growing in fenniſh and mooriſh Grounds; of paſture ground, of Hay, of Wool, of Lambs, of Calves, of Pigs, of Colts, of Milk, of Cheeſe, of Fruits, of Trees, of Seeds, Hemp, Flax, onions, Rape, of Pot-Herbs; of Maſt of Beech or Oak, of Mills driven by wind or water, of Parks, Warrens, Pools, ponds, of Wild Beaſts under cuſtody, &c. of Dove-Cotes or Dove-Houſes, of Bees, of Fowlings, of Huntings, of Fiſhings, of Swans, of Geeſe, of Eggs, of Crafts and Manual occupations, of Trade by wares, Merchandize, &c. And about all theſe things eſpecially are all the Queſtions and caſes that follow concerning this ſubject.

Portion of Tithes what.

A portion of Tithes are Tithes that were at the firſt ſeparated and given by the Devotion of a Pariſhoner, and were not derived out of the Parſonage. And therefore cannot be ſwallowed up againe by the Parſonage, as a vicarage may be, but it will be diſtinct ſtill.

Of the nature of Tithes, and how they are grantable.

Tithes by our Law were accounted an Eccleſiaſtical Inheritance, and collateral to the ſtate of the Land out of which they come, which of common right are to be paid out of all lands, Meadowes and Paſtures, and which of their proper nature originally were due only to Eccleſiaſtical perſons by Eccleſiaſticall Law, and till they were ſevered, were eſteemed meerly Eccleſiaſtical: for the ſubſtraction whereof, no remedy wsa given by the Common Law. Neither can any unity of poſſeſſion extinguiſh or ſuſpend them, but they remain ſtill in *eſſe*, and might be demiſed or let to any ſpiritual perſon. And if a Parſon impropriate had infeoffed another of part of his Glebe, or had made a Leaſe of it to him, yet he ſhould have had Tithe thereof ſtill, ſo that a man might have had Tithe againſt his own Feoffment, for they were not claimed in reſpect of any ownerſhip in the Land, but *ex debito*, by the Law of God. So if a Parſon purchaſe Land within his Rectory. And after leaſe the Parſonage, the Leſſee ſhall have Tithe of this new purchaſed Land. And a Lay-man by the Common Law,

Law, could not have had an Inheritance deſcendable and grantable of Tithes as of other Temporal poſſeſſions, neither will they paſs by the ſame words in Grants as other Temporal poſſeſſions will do. And therefore if one grant a ground *cum proficuis & commoditatibus eidem pertinentibus*, the Tithes will not paſs by this. But now the Law is changed herein, for they and other Eccleſiaſtical Duties, eſpecially ſuch as came to the Crown by the ſtatutes of 27 *H.* 8. 31 *H.* 1. 1. *Ed.* 6. are by thoſe Statutes, and the Statutes of 32 *H.*8. and 1. *&* 2 *Phil. & Mar.* in the hands of Lay-men Temporal Inheritances, and are of the nature of other Land; it ſhall be accounted Aſſets in the hands of an Heir. The wife ſhal be endowed of it, the husband tenant by the courteſie for them: real actions may be brought, and they have all other incidents of Lay-Inheritances. *Cook* 11. 14. *Dier.* 43. *Cook.* 1. 3. *Cook, upon Litt.* 5. 159.

By way of agreement Tithes may paſs for years without deed, but not by way of leaſe without a deed. But a leaſe may be for one year of Tithes without deed. *Hughes Rep.* 354. *See Grant.*

Who muſt pay Tithes at this day, and to whom, and who are capable of receiving and retaining of Tithes, and by what Title, and how.

TIthes by the Common Law are due of common right out of all things; and every man at this day Alien and Denizen, is bound to pay the ſame, that cannot ſhew a ſpecial exemption and freedome, by compoſition, cuſtome, preſcription, or ſome act of Parliament. So the Kings have paid no Tithes ſometimes for their Lands in their own hands. So neither the Lord Protector nor his Patentees are to pay Tithe for ſome of their ancient Forreſts-Lands that lye in no Pariſh, or between to pariſhes; this is not to pay Tithe. And ſo the Vicar in ſome places doth pay no Tithe to the Parſon, ſo long as his Vicarage Land is occupied by himſelf. *Cro. Jur.* 60. *Cook.* 2 44. *Broo. Diſmes.* 10. And it is ſaid, if a Biſhop had held Land diſcharged of Tithe, and made Feoffment or Leaſe of it, that his *Leſſee* or Feoffee ſhall not pay for it. *Cook.* 2. 44.

And as to the perſons to whom, and capable of receipt of Tithe, albeit by the common Law anciently, no Lay-perſon was capable of them, ſave only by way of diſcharge; as where a Pariſhioner had compounded with the Vicar or Parſon for his owne Tithe, yet at this day any man may have them as other Lay-Inheritances; and Lay-men (as they call them) as well as clergy men, have them. And to make Clergy men capable of them, there were heretofore many things required, as Examination and Allowance by the Biſhop, ſubſcription to the Articles of Religion, Inſtitution and induction into the parſonage or Vicarage, to which the Tithes belong. But in theſe things the Lawes are changed at this day. And therefore it ſeems ſuch a perſon once capable of Tithes, cannot be made uncapable afterwards, as heretofore, unleſs it be where he hath one Benefice of 8*l.* a year, and he take another; for in this caſe it ſeems he ſhall loſe the firſt. But for this, ſee the Statutes of 21 *H.* 8 13. 28 *H.* 8. 13. *Cook.* 4 79. *&* 6. 20. Pluralitie.

A Parſon or Vicar may have Tithe out of his Pariſh, by a ſpecial Preſcription. Or he may preſcribe to have a ſum of Money for tithes within his Pariſh of any certain man there in lieu of Tithes. And another man alſo may have Title to a portion of Tithes by Preſcription. *Bro.* 85. *Cook.* 11. 19. *Book of Entries. N. B. f.* 9. *Cook.* 2. 45. *Cook.* 4. 49. And a man may have his own Tithe of the Parſon by agreement between them, for the Parſons life; or how they pleaſe. Preſcription.

Of what things Tithe is to be paid, and of what not, and out of what Land, and how.

FOr Anſwer to this Queſtion take theſe Generall rules 1. A man ſhall pay Tithes of his ground whether he doe manure it or not. 2. When a *Parſon* doth any thing which by Law he is not compellable to doe, which doth turne to the benefit of the *Parſon*, there he ſhall not have Tithes of the thing in liew whereof this is done:

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32 *H.* 8 7. And ſo it is to be paid for, and out of all things within (not without) the Pariſh, that ariſe, grow, and happen from year to year by the Act of God alone, or by the Act of God and man together. But more particularly, all Lands are to pay Tithe of what nature ſoever it is, Errable Meadow, or Paſture.

Sect. 1. Of Trees and Woods.

All ſorts of Trees, but Timber Trees are to pay Tithe (that is) their tenth of increaſe, living or dead, uſed or ſold by the owner, for the body, Branches, Bark, Fruit, Root, and Branches that grow out of the Root. And within this Rule all Fruit-trees, as Apple-trees, Pear-trees, Nut-trees, Walnut-trees, and the like, are to yield the tenth of their increaſe of fruit yearly; and if they be cut down, the tenth of the body, whether ſold or kept; and if they be pared, the tenth of their parings, whether ſold or kept. So Tithe is to be paid of the fruit, body, bark and branches of all other Trees not apt to Timber, as Willows, Sallows, though they be above twenty years growth, or of any age whatſoever, and were never cut before. So alſo Tithe is to be paid of *Silva cædua*; that is, Under-woods, and Coppices felled and preſerved to grow again, and which by good Husbandry may grow again. And of all theſe things the Parſon is to have the tenth part, as the owner hath, and at the time when the owner doth receive his nine parts.

For Wood cut for his own uſe.

But of the Under-woods of Coppices, parings of Fruit-trees, or other Trees cut onely for Mounds, or for Plough-geer, for hedging and fencing of the Corn-fields or other grounds within the Pariſh, or for fuel for the maintenance of the Plough or Pale, no Tithe is to be paid for it, although the Vicar have the Tithe Wood, and the Parſon the Tithe of the places incloſed. Nor is Tithe to be paid of Under-woods, which are digged up by the Roots: Nor (as it ſeems) for the Wood of Coppices or Trees that a man doth cut or ſpend in his own houſe-keeping, though he ſpend much; by *Hobbard* Chief Juſtice. But if the Parſon can alledge a ſpecial cuſtome for it, he may have Tithe for this alſo, *M.* 4 *Jac. B. R. March* 58. *pl.* 89.

Timber.

But for Timber Trees, ſuch as are Oak, Aſh, and Elm, which are eſteemed Timber after they are twenty years old in all Countries; and Beech, Horſe-beech, Hornbeam, Maple, Aſpe, and Hazle, any of which may be, and are eſteemed Timber in ſome Countries, as the uſage of the Countrey, or the plenty or ſcarcity of other Timber there, is; for theſe, either living or dead, for their bodies, branches, bark, roots, or germines that grow out of them no Tithe is to be paid at all, in any caſe; but Tithe is to be paid for all this Timber-wood, if it be cut within twenty years after the firſt planting of it: No Tithe ſhall be paid of Aſpe in any Countrey, *Brownl.* 161.

For the opening whereof (in relation to Wood and Trees) further; theſe things are to be known.

1. If the Parſon have Tithe of the Fruit of a Tree, and the ſame year the owner doth fell the Tree, and make it into Billets or Faggots; in this caſe the Parſon ſhall not have Tithe for the Tree; for it is a Rule, That he muſt not have Tithe of one thing twice in one year. 2. Beech in a Countrey where there is abundance of it, is not to be accounted Timber, nor to be Tithe-free, 16 *Jac. Co. B. Pinders* caſe. 3. Cherry-trees in *Buckinghamſhire* have bin adjudged Timber and Tithe-free, *Paſche*, 17 *Jac. B. R.* 4. If a man lop a Tree under twenty years growth, and after ſuffer the body to grow paſt twenty years growth, and then lop it again; in this caſe no Tithe ſhall be paid for it, though it were not Tithe-free at the firſt cutting. *Co. B.* by the whole Court, *Brownl.* 1 *part.* 33. 5. If Wood be cut to make Hedges, which is not tithable, and there be a little remaining or left of it, no Tithe ſhall be paid for this remnant. 6. If Wood be cut down and imployed for Hop-poles, where the Parſon or Vicar hath Tithe Hops; in this caſe he ſhall not have Tithe of the Hop-poles. 7. If a great Wood doth conſiſt for the moſt part of Under-wood, which is tytheable, and ſome great Trees of Beeches or other Wood, grow ſcattering amongſt them; in this caſe Tithe may be paid, and muſt be, unleſs the uſage be otherwiſe of all both great and ſmall together. And ſo if a Wood do conſiſt for the moſt part of Timber-trees, and there is ſome ſmall parcel of Under-wood or Buſhes growing in the ſame Wood: No Tithe ſhall be paid for this Under-wood or Buſhes. *Trin.* 19. *Jac. B. R.* Adjudg. 16 *Jac.* in *C. B. Leonards* caſe. 8. No Tithe is to be paid of Common of Eſtovers, the Wood that he burns in his Houſe. For Wood cut for Houſe-

houſe-boote hedg-boote, plough-boote cart-boote, and fire-boote. *Goldsb. Pl.* 93.

See for all theſe matters, within this point of trees and wood, *Cook Rep.* 11, 48, 49 81 *Plow.* 170. *Brownlows Rep.* 1 *Part.* 94. 2 *Part.* 150. *D. & St.* 169. Where and how this is to be paid and delivered, See more in *Chap.* 5. *Sect.* 1.

Sect. 2. Of Mines and Quarries.

No Tithes are to be paid of Mines or Quarries, Iron, braſs, Tin, Lead, Coals, Stone, Tile, Brick, Lime, Gravel, Marle, Chalk, Clay, and the like, which a man doth find and make in his own Land, for they are parcel of the inheritance, and the Parſon or Vicar hath tithe of the graſs and corn upon the ground; and it is a rule, the Land muſt not pay a double Tithe; and beſides it is not a yearly profit. *Regiſter* 51. *Fitz. Nat Brev.* 53. 9 *Broo. Diſmes.* 18.

Of Houſes.

No Tithes regularly are to be paid for houſes of habitation, nor of any rent, reſerved upon any demiſe of them, for tithes are to be paid of things that renew yearly by the Act of God.

But by a ſpecial cuſtome, , or by an act of Parliament, as in *London*, where the Parſons have 2s. 6d. out of every pound rent in lieu of Tithe, there it is good enough, *Cook*, 11. 16. *Fitz. Nat. Brev.* 53. 37 *Hen.* 8. *Ch.* 12

Of barren heath & waſt ground.

If any barren heath, or waſte ground, that is barren in his own Nature, and that cannot be fitted for husbandry without an extraordinary charge, although it may pay Tithe of wool, or Lamb, or other things, or the Tithe that it formerly paid, yet it ſhall pay no Tithe of corn for ſeven years after they have by their Husbandry improved it, and made it fit for tillage. But if a wood be grubbed up, and made fit to plough, this muſt pay Tithe preſently. So if it become barren by a ſudden accident, of inundation, or the like, or by being overgrowne with buſhes or the like, and it be reduced, this muſt pay Tithe preſently. *M.* 11. *Jac. C. B. Sharringtons Caſe. Dier.* 170. 2 *Ed.* 6. *Ch.* 13.

Of Mills:

Tithes are to be paid for all new Corn-mills, be they wind or water Mills; and for fulling, Paper, or Apple-mils that are common and publick mills; and whether they be driven by wind or water, ſome Tithe or other is to be paid for them. But for an old corn mill, that no tithe was ever paid for, no Tithe is to be paid, except perſonal tithe, as for a trade of profit, and ſo it will be for the other Mils. But ſee how it is to be paid *Chap.* 5. *Sect.* 1.

Of Turves.

Tithes are to be paid of turves that grow in fenniſh and mooriſh grounds, when they are uſed for firing

Of heath, furs, and broom.

Tithes ſhall be paid of heath, furrs and broom, unleſs the owner can preſcribe, or make good a ſpecial cuſtome of payment of milk and calves, *&c.* of the cattel kept upon the ground, *M.* 29 *El. B. R. Adjudge.*

Sect. 3. Of graſs, cut or eaten.

Tithe is to be paid of the graſs growing on the ground whether it be cut for hay or eat by cattle, to be ſet out according to the cuſtome of the place. And as to this kind of Tithe theſe things are to be known.

Rate-Tithe.

1. A Rate-Tithe is to be paid according to the cuſtome of the place for the feeding of Sheep and all other Cattel, (ſave only Oxen that labour, and the young cattel that are bred for Oxen or Cowes) as for horſes and Cattel that are fatted; for tithe muſt be paid for theſe, for the paſture and profit of the cattel, whether they go on the Common or elſewhere.

2. If two Pariſhes together have Common becauſe of vicinage, and the cattel of the one ſide do ſtray to the other ſide, and there abide; in this caſe no tithe ſhall bee paid for this to the Parſon of the pariſh where the Cattel do ſtray, but to the Parſon of the other pariſh. So if ſheep ſtray out of one into another pariſh, and there Eane, no tithe is to be paid for this to the Parſon of that place; but if they go there by the ſpace of one Month or more, for this a rate-tithe muſt be paid to that place where they are for a month together. And ſo in all caſes where ſheep go awhile in one, and another while in another pariſh. *Trin.* 7 *Jac. B. R. Broo. Diſmes.* 16.

3. If ſheep after they be ſhorn dye before Eaſter next following, it is ſaid no tithe ſhall be paid for their wooll unleſs the parſon or vicar that claimes it, can alledge a ſpeciall preſcription for it. So no tithes are to be paid of the pelts or fells of ſheep which die of the rot without a ſpecial preſcription for it. *Trin.* 3 *Car. B. R. Aſhton's Caſe.*

4. Tithe

Grounds let. 4. Tithe muſt be paid for all the grounds within the pariſh; and therefore if the grounds within the pariſh be let, or the herbage there be ſold to a ſtranger out of the pariſh, the Tithe muſt be paid to the Parſon, and that by the Owner of the Cattle, unleſs the courſe there be otherwiſe.

Agiſtment or tack of cattel. 5. It ſeems tithe is to be paid for the Agiſtment, that is, tacking in of cattel of ſtrangers in the pariſh. And that to be paid by the owner of the land that tack them in, and not by the owner of the cattel; for the Parſon may not know the owner of the cattel, 17. *Jac. B. R.* But if there be any cuſtome againſt it, this may prevent it, and make it payable by the ſtranger.

Horſes. 6. No tithe is to be paid for the herbage or feeding of riding horſes, that the Pariſhoner doth uſe for his own riding. And if a man let out his paſture Lands, reſerving the paſture for one horſe to ride about his own affairs, or for husbandry, no tithe ſhall be paid for the paſture for this horſe. But if a man keep or breed a horſe or horſes in his paſture to ſell them, there a tithe ſhall be paid for the horſes paſture. *H.* 15 *Jac. B. R. Hides Caſe.*

Plough cattel. 7. no tithe is to be paid for the graſs eaten by the working Oxen or Horſes about Husbandry, that are uſed in the pariſh about Husbandry. But if the Pariſhoner uſe them to other purpoſes within the pariſh, or for husbandry without the pariſh, it may be otherwiſe. *M.* 8. *Jac. Co. B. in Baxters caſe.*

Sect. 4. Cowes and barren cattel. 8. No tithe ſhall be paid for the feeding of Cowes that give Milk, nor for barren and dry cattel that are bred for the plough or paile, whether they feed in the incloſed or in the common grounds of the pariſh. But if a man keep cattel until they are ready for the pail or the plough, and then ſel them, and make profit of them, in this caſe he is to pay Tithe for them; for if the owner feed his ground with cattel that bring no profit to the Parſon, he muſt pay tithes for them. *M.* 8. *Jac. Co. B. Baxters Caſe. Trin.* 9 *Jac. B. R. The whole Court.*

Strangers renting within the pariſh. 9. If a ſtranger feed a ground within the pariſh with his cattel that do bring no profit to the Parſon or Vicar, he is to pay tithe for it. And therefore it ſeems reaſonable, that though it be his own ground that is the ſtranger, and he feed them with his own cattel that do work in another pariſh, that he ſhould pay as a ſtranger that doth rent a ground within the pariſh.

Eamouth or after-paſture. 10. No tithe is to be paid of the Eamouth or after-paſture, after the graſs is mowed and tithe hath been paid of it, unleſs by cuſtom there hath been more graſs left then is uſual. Nor is there any tithe to be paid for the herbage of the cattel that eat up the ſame graſs, unleſs there be ſome Fraud in the caſe. *Paſch.* 17. *Jac. Co. B. Adjudg. M.* 6 *Jac. Co. B. Smiths Caſe.*

11. No tithe is to be paid for the graſs or herbage of the ſtuds, or meers of ground at the lands end, and adjoining to the errable Land, where the land it ſelfe doth pay tithe.

And ſo if lands lye fallow every ſecond or third year, the owner ſhall pay no tithe for the paſture of this land, nor for feeding upon the ſtubble, albeit it bee fed with barren cattel. *Paſch.* 7. *Jac. Co. B. Adjudg.* And yet if he keep it lay beyond the courſe of Husbandry, in this caſe he is to pay tithe again.

Rakings of ſtubble. 12. No tithe is to be paid for the herbage of the ground whereon corn hath been ſowen that hath paid tithe, no more then for the rakings of the ſtubble, *Paſch.* 7. *Jac. Co. B. Adjudg.*

13. If a man bring in a flock of Sheep to dung the land, and they come by night only and lye there, no tithe is to be paid for this; but if they feed there half their time, they will be tytheable.

For the time when and how theſe tithes are to be paid and done, ſee in *Chap.* 5. *Sect.* 1.

Sect. 5. Of corn ſown. Tithes alſo are to be paid of all ſuch things as come in yearly by the bleſſing of God, and the induſtry of the party together. And therefore Tithes muſt be paid of all kind of corn ſowen upon the ground; as Wheat, Rye, Barly, Beans, Peaſe, and the like, to be ſet out after the cuſtome of the place. So alſo tithe muſt be paid of Plants, Herbs, and ſeeds of Woad, Saffron, Flax, Hemp, and the like. *Brownl.* 1 *part.* 149. *Pl.* 75.

And

And as to this, theſe things are to be known.

1. No Tithe is to be paid for the after-rakings, or ſtubble of corn, when Tithe hath been paid for the corn it ſelf, unleſs it be where there hath been fraud in cutting it over long.

2. No Tithe is to be paid for the courſe corn, as Vetches, Tares and the like, which is eaten up by the cattel that do the husbandry there, whether it be eaten green or ripe, or eaten upon the ground where it groweth or elſewhere, unleſs the Parſon have a ſpeciall cuſtom for it.

3. If corne be ſowed where woad was ſowen, or where other things grew, the tithe ſhall be paid of this, and in its own kind alſo. So if Woad or other things bee ſowed where corne had been ſowed, the owner of the Soile muſt pay his Tithe, and pay it in kind of that which groweth there, as he doth in the change of wheat, beans, barly, &c. Change of grain.

4. If the Soile of an Orchard be ſowen with any kind of grain, the parſon will have tithe of it; although hee have tithe of the fruit of the trees, for they are of ſeveral kinds.

Tithes alſo muſt be paid of the calves of Kine, Lambs of Sheep, young Pigs of Sowes, Colts of Mares, Kids of Goats, &c. Alſo of the Cheeſe and Milk of Cowes, Sheep, and Goats, and of the Wool of Sheep, & of the Eggs and young of Hens, geeſe, Ducks, &c. and of the Honey and Wax of Bees, and for dry Cattel, and fat Beaſts ſold and killed, and according to the courſe of the place. *Sect. 9.* Of cattel and fowle.

But for the further opening hereof theſe things are to bee knowne.

1. If the Pariſhioner have but nine Pigs, or ſix calves, the Parſon can have no tithe in kind that year, without a ſpecial cuſtome to warrant it, as in many places there is; for theſe things are intire, and not divideable as wool is. And therefore the Parſon muſt have his Tithe *pro rata*, either in money the ſame year, if there be any cuſtome for it, or in kind the next year, and ſo reckon both the years together. *M. 7. Jac. Co. B.* And if a pariſhioner have but one Cow, or milk his Cow every ſecond day; ſo that he can make no cheeſe, in this caſe the cuſtome of the place is to be obſerved, ſo that ſomething be paid; otherwiſe no cuſtom in this caſe will bind, ſo for calves, colts, and kids when they are under the number of Tithe in kind; and if there be no cuſtome in it, the Parſon muſt have the tenth when ever it comes.

2. It hath been ſaid that no tithe is to be paid for dry cattel bred for the plough or paile, unleſs they be ſold away before they be put to that uſe; for tithe muſt be paid for ſuch cattel, and for fatting cattel ſold or killed after the cuſtome of the place. *M. 17. Jac. B. R. curia, M. 2 Jac. B. R. Webs* Caſe. And though at firſt they were bread for the plough or pail, yet if after fatted and kild, or ſold, Tithe muſt be paid for them. *M. 8. Caroli, by three Juſtices.* Dry cattel.

3. Tithe muſt be paid of the locks and flocks of Wool, after the Wool made up, if they be more then ordinary, and left deceitfully, otherwiſe not. Locks of wool

4. Where ſheep be removed from one Pariſh to another, each Parſon muſt have *pro rata*, but under three dayes no rate is to be paid, as for example, If forty ſheep yeild eighty pound of Wooll, and theſe have been fed and lyen all the year in one place; in this caſe the parſon of that place muſt have all the tithe; if the ſheep were there but half the year, then he is to have but forty pound of the Wool; if three months only, then but twenty pound of the Wool; and ſo ratably for four or five months more or leſs. And the Parſon in whoſe Pariſh the ſheep lay and fed but one month he ſhall have only the tithe of the twelfth part of the Wool: and if the ſheep feed all the year in one pariſh, and lye in another pariſh, the tithe ſhall be devided betwixt the parſons. And if ſheep come from one place, and be ſhorne in a place where they were not before, it ſeems the tithe muſt be paid where the ſheering is, unleſs it appear to bee paid to the Parſon of the place from whence they came And ſo of the young of cattel, lambs, calves, pigs, colts and the like, where the dam was removed from one place to another, a rate tithe muſt be paid to the Parſon according to the times of their abode in the ſeveral places, from the times of their engendring by the month rate. *Broo. Diſmes* 16. Rate tithe for wool of ſheep, and of young cattel.

5. If any have cattel titheable feeding in any waſt place, not commonly knowne to be in any Pariſh, yet the tithe thereof is to be paid, and to be paid to the Parſon of

the place where the owner of the cattel doth dwel.

6. When the tenth part of the milk is paid, there muſt be no tithe paid of the cheeſe which is made of the other nine parts of the milk. And ſo where tithe is paid for the cheeſe, no Tithe is paid for the milk.

No Tithe is to be paid for Cattel fed for the uſe of the houſe, but if he feed to ſel he muſt pay for them. *Goldsb.* 147. *Pl.* 66.

But ſee more of this, and when, and how this is to be paid and delivered in *Chap.* 5. *Sect.* 2.

Sect. 7. Of Parks, warrens, pools and Dove-houſes.

Some tithe is to be paid of Parks, Warrens, Pools, Ponds, and Dove-Houſes, and for Coneys, Pigeons, and Fiſh. And ſome would have Coneys in a Coniger, fiſh in a pond, or ſeveral fiſhing in the nature of Predial Tithes, and that the tenth of the profit is to be allowed.

But for the opening of this, take theſe things.

Coneys, Fiſh, Pigeons.

1. That where the things bring in a certain profit, and without much charge, as Coneys, fiſh, and Pigeons, there is great reaſon the Parſon or Vicar ſhould have the full tithe of them; and in theſe caſes a diviſion may be eaſily made. But Fiſh in a River are not titheable but by cuſtome.

2. the Pigeons are a ſenſible loſs to the Parſon in the deſtruction of Corn, and good reaſon then the Parſon ſhould have ſome profit by them.

3. In ſome caſes, as where Gentlemen have turned their fields into Conigers, and laid down their tillage, the loſs of the Parſon hath been notorious, and the caſe grievous hurtful to the Parſon and Commonwealth, profitable to none but the owner of the Land; theſe caſes deſerve no favour.

4. We conceive the Parſon will have no remedy in this caſe by Law; and that in all theſe caſes there is no thing to be had but what the cuſtom or uſage yeilds; for Dear and Coneys being wild, are not reckoned a mans own till they are catched. It is held for law, that Conies are not Titheable but by Cuſtome. And therefore where Parſons have ſued for them the Judges were wont to grant a prohibition: *March. f.* 56. *Pl.* 87. And a man is to pay Tithe of nothing whereof he hath not a property, except only the perſonal Tithe which is a ſmall matter. When Pheaſants Partriges, Swans and ſuch like wild things of profit become tame, it ſeems they muſt pay tithe, but not otherwiſe. And for ſuch things of pleaſure as are of no profit, as Hawks, Hounds, Apes, Thruſhes, Poppingjayes and the like, no Tithe ſhall be paid of theſe.

Feræ Naturæ.

Matters of pleaſure.

Perſonal tithe. Trades and labours.

Some Tithe hath been by uſage paid in the nature of perſonal Tithe for mens Trades and labours. So Fiſhers, Fowlers, Hawkers, and the like, not ſuch as Fiſh, Hunt, and Fowle for pleaſure, but ſuch as make a Trade of, and get by Fiſhing, Hunting, and Fowling, have paid. So Carpenters, Maſons, and all handicrafts men have paid; ſo Merchants, Mercers, Drapers, and all Tradeſmen; ſo men-ſervants and maid-ſervants have paid ſome ſmall matter in the nature of an offering, as the tenth of their clear gain once a year to the Parſon: and this to be paid ſtill according to the cuſtome of the place.

And for any other things or for things titheable out of any Land, which by the Lawes, by any Priviledg, Preſcription or compoſition ought to be diſcharged, no tithe is to be paid. But Cuſtome may make a thing Titheable that otherwiſe is not Titheable. *March.* 65.

See more of this, and how theſe Tithes ſhall be paid, *Chap.* 5. *Sect.* 3.

When, where, and how Tithes payable muſt be paid and ſet forth, and when the Parſon, &c. may take them?

FOR anſwer to this Queſtion in the general, the Law ſaith, that all Tithes and Church duties are to be yeilded and paid according to the uſage and cuſtome of the place where they are to be paid. *Stat.* 27. *H.* 8. 20. 32 *H.* 8. 7 And for predial Tithes, the tenth part of the profits are to be ſet forth and divided from the nine parts in the place where they grow, before the owner taketh away his part thereof: and the owner is to ſend to the Parſon, who is to ſend his ſervant when the tithe is to be ſevered, and ſee that it be juſtly done; and then the law doth give him a reaſonable time

time to take it away. But the Parſon cannot Tithe himſelfe or take his owne Tithe without leave of the owner, and if he doe ſo, an Action of Treſpas will lye againſt him by the owner of the land. And if Tithe be once ſet out and divided, the Parſon not the Pariſhioner muſt look to it, for he muſt bear the loſs of it, if any come to it. And this ſetting out of the Tithe the Law ſaith muſt be effectual; and therefore if the owner ſet out his tithe, and then take it away again, this is not a good payment of his Tithe: and if the owner ſell the whole to another before the tithe be ſet out, with an agreement to deceive the Parſon; this is fraud, and not allowed for a good payment in Law. And this muſt be heeded as to the manner of Tithing, that the cuſtom of the place is to be obſerved; for in ſome places the cuſtome is to leave the Tithe in graſs in ſwathes, in other places in windrowes, in other places in graſs-cocks, in other places in hay-cocks, and either way it is good. So for the time when, and place where, the cuſtome of the place muſt be followed, but the parſon ſhall have reaſonable time to take it away. *Broo. Treſpaſs* 125. *Cook.* 2 *Part Inſtit.* 610. *Brownl* 2 *part.* 9.

To give to the Parſon the Tenth Acre of wood in a Coppice, or the tenth coard (if the coards be equal) is a good payment and ſetting forth of this Tithe, eſpecially if it be the cuſtome of Tithing wood in the Countrey. Of trees and wood.

The Tithe of the Maſt of Oak and Beech, if it be ſold, muſt be anſwered by the tenth penny; if it be eaten by Pigs, the tenth of the worth thereof muſt be anſwered. And the moſt reaſonable way of payment for any thing ſold, is to pay the Parſon the tenth penny of the money made thereof.

The payment of Tithes and Church duties in the City of *London*, which is 2 s. 9 d. in the pound of the rent of their Houſes, is to be made according to the uſage there. *Stat.* 27. *H.* 8. 20. and 32. *H.* 8. 7. 37. *H.* 8. 12. *Cook.* 11. 16. Of houſes in *London.*

The Tithe of the new corn-mil muſt not be the tenth penny of the rent, But the tenth meaſure of the Corn, or the tenth tole diſh, if there be not cuſtome in it. But the Millard for his Fulling Mil, Rape-Mil, Paper-Mil, Iron, Powder, Lead, Edge, Copper, and Tin Mils; and ſo for an ancient Corn-Mil, is to pay only perſonal Tithe as for a Handicraft or Faculty. *Paſch.* 17. *Jac. Johnſons Caſe. Fitz. Nat. Brev.* 41. *G. Coo.* 2. 44. And if a rate tithe be paid for two Mils in one houſe, and one of them is made a Corn-Mill; in this caſe Tithe ſhall be paid in kind for this Mill. And if one pair of Mill-ſtones be turned into two pair of Mill-ſtones, now both of them muſt pay Tithe, and the priviledge is loſt. *Brownl. Rep.* 1. *Part.* 31. *Sect.* 1. Of Mils.

The Tithe of the Hay, may be ſet out and delivered in ſwathes, windrowes, or cocks as the cuſtome of the place is. Of graſs, cut, or caren.

The Tithe fruit of Apple-trees, Pear-trees and the like trees are to be ſet out and delivered when they are newly gathered, and if then the Owner do not give the Parſon notice and ſet them out, and they be by his means loſt or impaired, the Owner is chargeable to the Parſon in treble damages. Fruits of trees as Apples, &c.

The common courſe of ſetting out and delivering corne by the common Law, is by the tenth ſhock, cock, or ſheaf; but if the cuſtome of the place be otherwiſe, the Parſon muſt ſit down by it; and if there be a cuſtom to put the corn into ſhocks, and that every ſhock be ten ſheaves, and that the Parſon muſt have the tenth ſhock; it muſt be done by two Juſtices, *B. R.* But without a ſpecial cuſtom binding the owner of the Land, he is not bound to ſet the Parſons part of the corn up an end in ſhocks. *Smiths Caſe. Co. B. the Court.* Of corn ſown

The tithe ſeeds and herbs of gardens and fields, as Rape, Hemp, Flax, Parſley, Fennel, and the like, and of Sage, Mints, Onions, Leeks, and the like, either of the ſeed, or of the Herb before the ſeed time; this muſt bee paid at the time when the owner doth receive in his nine parts thereof. Of ſeeds and herbs.

The time when the calves and Lambs are to be paid and delivered, is when they are weanable, and able to live without the Dam, and unleſs there be any cuſtom herein againſt the Parſon, at this time all theſe young things are to be delivered. And if the owner ſell any calf or lamb, in moſt places the Parſon is to have the tenth penny of the money and ſo he muſt, if there be nothing in the cuſtom againſt it. *Sect.* 1. Of calves and lambs.

And if the owner kill a calf in ſome places, the Parſon hath the right ſhoulder,

And the cuſtome muſt be yielded to as reaſonable, if any thing though never ſo little, be paid for it, otherwiſe not.

Of milk and cheeſe. The Tithe of Milk and Cheeſe is to be paid in the ſeaſon thereof, and ſo long, and ſo ſoon as either of them is taken by the pariſhioner.

Bees. The tenth meaſure of Honey and the tenth weight of Wax, not the tenth Bee, nor the tenth Swarm of Bees is to be paid for Bees.

Of hens, ducks wild and tame The Tithe of Chicken and Eggs, of all kind of tame Birds or Fowle, as Swans, Hens, Ducks, Geeſe, they are to be delivered and paid, or that which is paid for them, according to the cuſtome of the place. But for wild Swans, Geeſe and Ducks, if they be taken in, and from a certain and known place, they are ſaid to be titheable as Predial Tithes; but if from incertain and unknowne places, they are ſaid to be as perſonal Tithes. But I ſuppoſe no Tithe is to be paid in either caſe.

Sect. 3. Perſonal tithes. For perſonal Tithes, which is for Trades, Crafts, and manual Occupations, and the profit made thereby. It is provided by a ſpecial Law, that all ſuch as uſe trading, buying and ſelling, handicrafts (except common Labourers) ſhall pay their Tithes, as they were uſed to be paid forty years before the Statute of 2 *Ed.* 6. and as of right they ought to be paid. And for this the Pariſhioner doth uſe at or about Eaſter (in moſt places the uſual time of payment for ſmal Tithes) to pay a ſmall ſum of money to the Parſon or Vicar. And according to the cuſtome of that place men are to pay, for without a cuſtom for it nothing at this day is to be paid for this: by three Judges *Co. B.* 17. *Jac.*

And for all, or any of theſe things, in caſe where the Owner may let or ſell the thing of which the Tithe is to be had, the beſt way is to let the Parſon or Vicar to have the tenth penny made by the ſale, as they have generally of grounds let to ſtrangers out of the Pariſh; in which caſe the Parſon hath commonly, and muſt have, if there be no cuſtome againſt it, the tenth penny of the Rent.

But in no caſe the Parſon or Vicar may take his Tithe before the ſame be ſevered from the nine parts and Tithed. And if the owner will not cut his corn till it be ſpoiled, the Parſon is remedileſs. 12 *Ed.* 4 *D. & St.* 169.

Who muſt pay the Tithe that is to be paid, and may be ſued for it? and to whom the Tithe muſt be paid?

Sect. 1. FOR anſwer to the firſt part of this Queſtion, take theſe things.

1. That generally he that receiveth the nine parts, is to pay the tenth part to the Parſon. And yet if a man that is owner of a Coppice, or other ſuch like thing, and he cut it and ſell it all; in this caſe the Seller muſt anſwer the Parſon for his tithe and not the buyer. And therefore if *A.* cut the graſs of his ground, and put it all (not ſetting out Tithe) in a rick in the ground, and three months after he ſell it away to *B* in this caſe *B* cannot be ſued for this tithe. *Hill.* 16. *Jac.* by chief Juſtice, in *Aſh-fields Caſe*. And if one ſell Uuderwoods ſtanding, the buyer, not the ſeller muſt anſwer the Tithe. But the Tithe due for fellets before the ſale, the ſeller muſt anſwer for this.

Executor. 2. If a Pariſhoner dye before he pay his tithe, his Executor, if he have Aſſets, muſt pay it.

3. If a Pariſhoner let or ſell his ground or herbage, it is ſaid the Parſon may ſue the owner of the ground, or the owner of the Cattel, at his choiſe, which is reaſonable, if the uſage be not againſt it.

4. If Cattel be pawned or pledged, the Gagee muſt pay tithe for them. But if I deliver my goods to *H.* to be redelivered to me I muſt pay Tithe for them.

And for anſwer to the ſecond part of this Queſtion, theſe things are to be known.

1. The Tithes muſt be paid to him that hath right to them, be he Lay-man, as an Impropriator, or a Clergy man (as we have called them and) be he parſon or Vicar of the place.

2. The rule generally is this, that the Tithe muſt be paid to the parſon or Vicar of the Pariſh wherein it ariſeth, and not to the Parſon or Vicar of another Pariſh.

3. The Tithe hapning in the time of the vacation, the ſucceeding Parſon is to have it; but they that gather it in may keep up ſo much thereof, as to pay them their charge

in

in the collection thereof, and to Miniſters that did ſerve the Cure there. And if one be put into a place, and then he is removed, and another is put in, the firſt of theſe ſhall have the Tythes that hapned in the vacation time, *Hil.* 18. *Jac. Woods* Caſe.

4. If any man have Cattel Tytheable feeding in any waſte, or place which is not certainly known to be in a Pariſh, the Tythe thereof ſhal be paid to the Parſon of the place where the Owner of the Cattel doth dwell.

5. If a man living in the Pariſh of *A*, being a common Fiſher, Fowler, or Hunter, and Fiſh, Fowle, or hunt in the grounds of *H* in *B*, and take fiſh there, if this were free and without reward in *H* then it is a perſonal Tythe that muſt be paid to the Parſon of *A*. But if *H* had money or reward for this, then it is ſaid *H* muſt pay the Parſon of *B*. as for a predial Tythe.

6. Perſonal Tythes are alwaies to be paid to the Parſon or Vicar of that place where the perſon that is to pay the Tythes doth dwel.

Which way the Owner of Tythes, and ſuch like things, may recover them being detained.

FOr anſwer to this, we are to know, that by the ancient Law of the Nation, Tythes were not recoverable by any man in any place but in the Spiritual Court, and thereby no perſon but ſuch as they called Spiritual perſons, or Clergy men, and this Eccleſiaſtical Court is gone, But they are now recoverable by all ſorts of men alike, and in theſe waies, Firſt for Predial Tithes, ſuch as are the Tythe of Wood, Graſs, Fruit, Hay, and the like divideable things; if theſe be not duly and truly divided and ſet forth, as before is ſhewed they ought to be, the Parſon or Vicar may ſue for them in any of the Courts by an Action of Debt, wherein he ſhall recover treble damages upon the Statute of *Ed.* 6.

But for leſſer Tithes of Wool and Lamb, and the like, no Action will lye upon this Statute, nor for money given to the Parſon in lieu of them. But for the one and the other, the party grieved may at this day ſue in the Chancery, or in the Exchequer, or before two Juſtices of the Peace, who in moſt caſes for all Tythe, Offerings, Oblations, Obventions, rates for Tythes, and all Arears thereof, are to give relief. *Stat.* 27. *H.* 8. 20. 2. *Ed.* 6. 13. 32. *H.* 8. 7. *Cook upon Litt.* 159.

And if the Tythe be once ſevered and ſet forth, and they be after taken away by the owner of the Land or a ſtranger; in this caſe the Parſon may have an Action of Treſpaſs againſt him. *Bro. Diſmes* 6. *Brownl.* 2 *Part* 30. Miniſters put in by Authoritie of Parlament and now put out by the death of him that was ejected, And ſuch who having been preſented ſince the firſt of *Aprill* 16 3. and are not approved by the Commiſſioners for Approbation, and are therefore put out, may be releived for their Areares by the Commiſſioners for putting out of Scandalous Miniſters by the new Ordinance. *Auguſt.* 29. 1654. Alſo all ſuch as thoſe Commiſſioners doe put in, they may helpe them to their dues.

In what caſe, and how a perſon or place may be quit and diſcharged of Tythes: and what ſhall be a good diſcharge, or not.

SPiritual perſons were ſome of them formerly diſcharged of Tythe by their Order but there are no ſuch diſcharges now; but a diſcharge of Tythes may be at this day by the cuſtome of a County, or by a Preſcription, or by a Compoſition, which at firſt was made by and between the Parſon, Patron, and Ordinary, and another, or by an alteration of the place out of which the Tythe doth come, or by an Act of Parliament, and by a unity of poſſeſſion *Coo.* 1 *part* 33. 2 *&* 3 *Ed.* 6. 13. 32 *H.* 8. 7. *Cook* 44 *Brownl.* 2 *part* 20. Or by priviledg, as certain Religious Orders, Templers, and others of which there are none with us. And therefore no ſuch diſcharge can be amongſt us at this day. *Brownlow's* 2 *part* 33. Or they may be ſuſpended for a certain time, and revived again. Of all which ſee examples in the caſes that follow. *Sect.* 1.

A man may be diſcharged of payment of Tythe by a cuſtom or preſcription: Wherein theſe things are to be known.

1. Cuſtom

By Cuſtome or preſcription.

1. Cuſtom and Preſcription do differ but little; cuſtom goes to a place or County, and preſcription to a perſon.

And what is good or not.

2. A Cuſtom applyed to a Country to pay no Tythe in ſome caſes, as the Cuſtom for the Wild, being forty Pariſhes in *Suſſex*, to pay no Tythe, is good. But generally ſuch a Cuſtom is not good, and a preſcription to pay no Tythe, nor any thing in lieu of it, is not good, nor will it diſcharge, though nothing can be proved to be paid within the time of memory. *D. & St.* 171. 167. *Bro. Preſcrip.* 92. *Cook.* 244. And yet one may ſhew a diſcharge of his Land another way which will amount to the payment of no Tythe, nor nothing for it.

3. But any man may preſcribe *de modo decimandi*; *i. e.* to pay money or other thing in lieu of the Tythe in kind for a Manor, Farm, or piece of Land; and if he can prove this time out of mind, this will diſcharge him. *Cook* 1. 44. 45. And therefore a Preſcription to pay 4 d, or any other ſum of money for all his Tythe whatſoever, or all his Tythe Hay, or all his Tythe Corn in ſuch a Farm or ſuch a Cloſe, is good. If one Preſcribe that he is to put the Corn of the ground in Hillocks or Cocks, &c. and that for this the Parſon is to have no Tythe Corn every ſecond year, or is to have no Tythe in ſome part of the ground, this is good. So if he preſcribe to pay the tenth fleece of Wool, and for this to be diſcharged of the Tythe of the locks; this is a good preſcription. 36. 37. *Eliz. Co. B, Jeſops* caſe. But if one preſcribe becauſe he doth pay Tythe Hay, he is to pay no Tythe Corn; or becauſe he payeth Tythe Corn, he is to pay no Tythe of his Cattel; this is not good. *Smiths* caſe *Hill* 8. *Jac. B. R.* So if one preſcribe to be diſcharged of Tythes in one place, becauſe he payeth Tythes in another place; or to be diſcharged of Tythes of Lambs, becauſe he payeth Tythe of Wool; or to be diſcharged of Tythes of other Cattel, becauſe he payeth 12 d. for a Cow; theſe are not good preſcriptions. *Fleetwoods* caſe, 7 *Jac. Co. B.* If a cuſtom be alledged, that the Parſon ſhall have but the tenth ſheaf of Wheat for the Tythe of all manner of Corn and Grain; this is not a good cuſtome. *Mich.* 11. *Jac. Co. B. Jacks* caſe. 38 *Eliz. Co. B. Adjudged.* So a Cuſtom was alledged, that the owners of a Farm had been uſed time out of mind to take back 30 ſheafs of their Tythe Corn again after it was ſet out, to their own uſe; This was diſallowed. Cuſtom to pay Tythes in kind for ſheep, if they continue in the pariſh all the year, but if ſold before their time, but a halfe penny for every ſheep ſo ſold, it was held no good Cuſtom. But a Cuſtom to pay no Tythes of lopping or wood for fire, Hedges, *&c.* is a good Cuſtom, *B. R. March* 79. *pl.* 128.

4. A Preſcription to pay a ſhoulder of a Buck or Doe, when they are killed, in lieu of all the Tythe of a Park, is good, and will diſcharge the Park. 3. 7 & 37. *Eliz. Shipdams* caſe. And although after the Park be diſcharged, and converted into tillage or hop round, yet it is held that the Parſon ſhall not have Tithes in kind, but the diſcharge ſhall continue. *M.* 5. *Jac. Co. B. Adjudg. M.* 11. *Jac. Co. B. Cowpers* Caſe.

5. A Preſcription to pay a leſs part then the tenth part, may be good and binding.

Sect. 2.

6. A Preſcription that if one have leſs then ſeven Lambs, he ſhal pay but 1 d. a piece for them, is good *Curia* 7. *Jac. B. R. Patches* caſe.

7. A Preſcription to be diſcharged of Tithes for every houſe in *London*, in lieu of 12 *d.* of the rent made of the houſe, is good. *Cook* 11. 16. And ſo for any other thing that may be conceived to have a reaſonable Commencement, the Law will admit it.

8. One may preſcribe, that he, and all thoſe whoſe eſtates he hath in the Mannor of *Dale* in *Dale*, time out of mind, have paid to the Parſon of *Dale* for the time being a certain Penſion yearly for the maintenance of Divine Service there, in ſatisfaction of all the Tithes ariſing and growing within the Manor of *Dale*; and preſcribes further, that he and all thoſe whoſe Eſtates he hath in the ſaid Manor, time out of mind, have been uſed in regard of the ſaid penſion ſo paid to the Parſon, to have all the Tythes happening and ariſing within the ſaid Manor or any part of it; *viz.* of all the Lands held of the ſaid Manor or any parcel of it; this is a good Preſcription, and may have a reaſonable beginning thus, That the Lord was ſeized of all the Manor before the Tenancies derived out of it, and by ſome good Compoſition or Grant between him, the Parſon, Patron, and Ordinary, it was granted to him in lieu of this money, which muſt be intended becauſe time out of mind it hath been ſo paid. *Cook* 7. 45.

7.45. But without ſome ſpecial matter alledged, a Lord cannot preſcribe after this manner in him and all thoſe, *&c.* generally.

9. A Preſcription to pay money for the Tythe of Milche beaſts is good. But a Preſcription that for the paiment of Mony for Milche beaſts, he ſhould be diſcharged from the payment of money for other beaſts, or to be diſcharged of Tithes for all Agiſtments in the Land is not good. *Goldsb.* 147. *pl.* 66

10. *A modus decimandi*, cannot be laid as to offerings and ſuch like perſonal things *March* 81. *pl.* 131. Alſo a Pariſhioner may be diſcharged of Tithe by Grant or an agreement with the Parſon; if he be a Spiritual Perſon, he may diſcharge it for his life; if he be an Impropriator, he may diſcharge it for all the time he hath the Parſonage. But a ſpirituall Perſon cannot by his agreement bind his ſucceſſors. And payment of a ſum of money in lieu and recompence of Tithes for ſixty yeers, or thereabouts is held a reaſonable time to make a preſcription. *Cook upon Litt.* 14. *Crompt. Jur.* 77. *Dyer* 7. 9. Tythe may be diſcharged by the alteration of the place or thing out of which the Tithe is to come. For the opening of which take theſe things.

Sect. 3. By an alteration of the place or thing out of which the Tithe doth come, or by other alteration. Whether gone or not.

1. If one preſcribe to be diſcharged of paiment of Tithe Hay for ſuch a ground, or the Tithe Corn of ſuch a ground; and the owner change the nature of the ground, the Paſture into Tillage, or Tillage into paſture; in theſe caſes the preſcription is gone. *Hill.* 7. *Jac. B. R. Shiptons* caſe *Adjudged.* But if the preſcription be general, 4 d. for all manner of Tithe ariſing in ſuch a ground, there the alteration will not hurt the preſcription. So it is if one preſcribe to pay the ſhoulder of every Buck and Deer of his Park for all manner of Tithe of the Park, and the whole Park be after diſparked and ſown to Corn, it is ſaid the Preſcription is gone, and that Tythes muſt now be paid in kind; but if any part of it remain a Park, and the reſt only be ſowed, it is otherwiſe. 36, 37 *Eliz, Shipdams Park in Norfolk.* So it is ſaid, If all the Parks be ſuffered to fall down, which is a diſparking in Law of the Park. yet the ſame doth not deſtroy the manner of Tithing, for the ſame may be a Park, again. But ſome doubt of this. And a difference hath been taken, where a Preſcription runs to ſo many Acres of Land certain for in that caſe the *modus* continueth: and where to the Park in the name of a Park, in which caſe it is gone if it be diſparked. *Paſch.* 19. *Jac. Co. B. Pools* caſe, and in *Brownl. Rep.* 1 *Part Paſch.* 10. *Jac. Co. B.* 35. It is doubted whether the Tithes be not gone in both caſes; and held, that if a man can preſcribe for ſo many Bucks, that this Park is diſcharged, and if it be diſparked, that the preſcription is not gone. If a man have a *modus decimandi* for Hay in Black-acre, and he ſow the ſame acre 7 years together with Corn, this doth not deſtroy the *modus decimandi*, but the ſame ſhall continue when the ſame is made into Hay again. *Hughes Rep.* 194; *pl.* 278. But the Parſon will have Tythe in kind when it is ſowed with Corn, *&c.*

2. And if two Fulling Mils be under one roof, and a rate-Tithe be paid for the Mils (which is a kind of preſcription) and after the Mils are altered, and made into one Corn-Mil, in this caſe the preſcription is gone, and Titbe ſhall now be paid in kind. So if there be but one pair of ſtones in the Mil, and after there is another pair of ſtones put in the Mil; now Tithe muſt be paid in kind, and the manner of Tithing is gone. *Brownl. Rep.* 1 *Part. Paſch.* 10. *Jac.* 31.

3. If I have the Tithe of the Hay of a cloſe, or all manner of Tithe there, and the owner of the ground turn it from Meadow, to Tillage, or to hops, or the like, or turne it from Tillage to paſture, the Tithe is not gone, but ſhall be paid in kind as it falleth. So if one turne wood-ground into Meadow or Tillage, the owner ſhall pay Tithe in kind, and Tithe is not loſt hereby; only if it fall out to be within the caſe of barren heath, he ſhall pay for ſeven years no more then was paid formerly for it, See it before. *Paſch.* 18. *Jac. B. R. Court in Baxters* Caſe.

4. If one be to day a ſum of money for the Tithe of a piece of ground, and the ground be after turned to houſes and gardens; in this caſe the manner of Tithing doth continue. *Cook* 11. 16.

5. If one turn his paſture into a Coniger, and make coney-borrowes in it, the Tithe will not be gone. But I conceive, it doth continue as it did for the manner of Tithing as before, and no new manner of Tithing, See before Tithe of Coneys. *M.* 13. *Car. B. R.*

6 If

6 If the Vicar keep the Glebe in his own hands, it is ſaid, That ſo long he is to pay no Tithe to the Parſon impropriate. But if he leaſe it to another, then the Leſſee muſt pay Tithe to him, and if he ſow the Land, that he muſt pay Tithe as other men. *Brownl. Rep.* 69.

Suſpenſion. 7. If a Parſon impropriate keep his Glebe in his own hands, he cannot pay Tithe to himſelf. But if he ſell or let it to another he ſhall pay Tithe as other men. And if a Parſon purchaſe Land within his Rectory, no Tithe is to be payed for this whiles it is in his own hands. But if he after leaſe the Parſonage; his Leſſee ſhall have Tithe of this new purchaſed Land. And if he make a Feoffment or Leaſe of the purchaſed Land, his Feoffee or Leſſee muſt pay Tithe again. *Cook upon Litt.* 139, 11. 14. *Bro. Diſmes* 17. *Dyer* 43.

And if one purchaſe a Parſonage and a Manor in the pariſh diſcharged of Tithes, and then leaſe part of the demeſnes of the Manor; it is ſaid the Leſſor ſhall have Tithe of this part. *Bro. Diſmes* 17. *Sed quære* of this.

8. If Land lye in a Forreſt in any pariſh, and is Tithe-free, and the Forreſt bed is Forrefted, now it ſhall pay Tithe in kind. *Crompt. Jur.* 52. *Lord Ch. Baron at Sarum Aſſizes.*

The alteration of payment (as if in ſtead of the money to be paid, another ſum, or Tithes in kind have been paid for twenty years paſt) will not deſtroy the preſcription. *Cook upon Lit.* 14 *Dyer* 7.

Sect. 4. By Act of Parliament and nnity of poſſeſſion together Whether gone or not.

Lands may be diſcharged from paiment of Tithes by Act of Parliament, as by a unity of poſſeſſion of the parſonage, and Lands which did pay Tithes, or by an appropriation or otherwiſe, in the hand of Religious and Eccleſiaſtical perſons, (as they were called.) So that now at this day by the Statute of 31 *H.* 8. 13. Such a unity in the ſaid Religious houſes and perſons will be a diſcharge to all Patentees from the payment of Tithes of Lands that came to the Crown by the ſame Statute. But then this unity in the ſaid Religious perſons muſt have been *juſta*, obtained by Right; for if either the Parſonage, Vicarage, Tithes or Lands had come or been united to their houſes by diſſeiſins, or other tortious and unlawful Acts, this had not been a good diſcharge within the Statute.

2. It muſt have been *æqualis*, there muſt have been a Fee-ſimple both in the Lands out of which the Tithes were to be paid, and in the Parſonage or Vicarage in them; for if the Abbots, Pryors. or other religious perſons had held but by Leaſe, that had not been ſuch a unity as the Statute intended.

3. It muſt have been *libera*, free from the payment of any Tithes, for if their Farmers or Tenants, at wil or years had paid Tithes, that had not been a ſufficient unity to have diſcharged the Land 4. And laſtly, It muſt have been *perpetua*, time out of mind. And then for the infinite impoſſibility, and impoſſible infiniteneſs that ſuch Immunities and diſcharges, that ſuch religious perſons and houſes had before time of memory could not be known; ſuch unity had been a good diſcharge of the Lands in their own hands. And if the Monaſtery were built in the time of memory, or appropriated within the time of memory, and Tithe were paid before this, it will not ſerve turne to diſcharge it.

And at this day ſuch an unity is a good diſcharge for the Kings patentees, with the Statute of 31 *H.* 8. But ſuch Lands as came to the Crown by the Statute of 27. *H.* 8. of diſſolution, muſt at this day pay Tithes, although the Lands in the hands of ſuch religious perſons or houſes were diſcharged from the payment of Tithe; for the priviledges being perſonal priviledges, were extinguiſhed by the Statute of Diſſolution, and, there are no words in that Statute to ſave them. *Stat.* 31 *H.* 8, 13 7 *H.* 4. 6. 32 *H.* 8. 7. *Cook* 11. 14. 2. 42. *Dyer* 278. 349. 277.

Of other Profits which the Parſon and Vicar doth claim.

THere are ſome other ſmall profits which Parſons and Vicars claim as belonging to their Parſonages and Vicarages beſide Tythe, and money in lieu of Tithe, as Mortuaries, Oblations, Obventions, *&c.* And as to Mortuaries theſe things are to be known 1 That no Mortuary is to be paid, but where it hath been uſed to be paid.

2 There

2. There ſhall be but one Mortuary paid, and no more.
3. No perſon that doth keep houſe muſt pay them.
4. No Woman that hath a Husband ſhall pay them:
5. No children muſt pay them.
6. Where they are to be paid, they muſt be paid after this proportion, *viz.* He that dieth having goods under ten marks ſhall pay nothing; for Goods above that value, and under thirty pound, but three ſhillings four pence; for Goods above thirty pound, and under forty pound, ſix ſhillings eight pence; for goods above forty pound, how much ever it be, but ten ſhillings:
7. All this account muſt be made onely out of the Goods remaining after debts paid.
8. The Parſon of the place where the party dwells, not of the place where he dieth, muſt have it. 21 *H.*8.6. 26 *H.*8.15.

Oblations, Obventions, and Offerings.

There is no more to be ſaid for Obventions, Oblations, and Offerings, which ſeem to be all one, but that they by the Law now in force are to be paid as formerly they have been. 32 *H.*8.7. 27 *H.*8.20. 2, 3 *Ed.*6. 13. *Co.*11. 16.

What Tithes the Parſon, and what the Vicar ſhall have.

IN this, theſe things are to be known.
1. Of meer Right the Parſon is to have all the Tithes if there be no Endowment of the Viccarage. *Hughs Rep.*64.
2. In this, Cuſtom is much regarded, for albeit the Compoſition be, that he ſhall have *Garba*, yet if he never had any more but Hay, he ſhall have no more now, Adjudge.
3. The Vicar cannot have Tithes, but by Donation, Compoſition, or Preſcription, for all the Tithes *de jure* appertain to the Parſon. *March* 11. *pl.*29.
4. If the Compoſition be, that the Parſon ſhall have all the Tithe-corn, and the Vicar all other Tithes; and one ſow his errable with Saffron, the Vicar not the Parſon will have it. Vicar of *Farnhams* caſe, *Co. B.*
5. That which the Vicar and his Predeceſſors have received time out of minde, that he ſhall have.
6. The Vicar will have Tithe of Saffron, of Land newly ſown with Saffron, albeit the Land were ſowed before with Corn forty years together. By Juſtice *Popham. Goldsb.* 150.
7. It is commonly held, That if the Vicar be to have the Tithes of all the Crofts in ſuch a place, that yet he ſhall not have the Tithes of the Crofts, parcel of the Parſonage; and if he be to have the Tithes of all the Dove-houſes of the place, yet he ſhall not have the Tithes of the Dove-houſes belonging to the Parſonage.
8. If the Vicar by the Endowment, be to have the Tithe-hay of all the Meadows in ſuch a place, yet he ſhall not hereby have any more but the Tithes of thoſe that were Meadows at the time of the Endowment, and not of thoſe grounds that were made Meadow ſince the Endowment. By Baron *Denham* a difference was taken where an Endowment is Local, as where the Vicar doth claim to have all the Tithes in ſuch grounds, and he hath always had the Tithe of that place, and it hath never been ſowed, and he hath no Tithes, but the ſmall Tithes of the reſt of the Pariſh by the Endowment, yet if it be new ſowed, he ſhall have the Tithe of the Corn: But if he be to have the ſmall Tithes generally, and he hath always had Tithes in ſuch a place, and it was never ſowed, and now it is ſowed to Corn; in this caſe he ſhall not have the Corn. 8 *Car.* at *Sarum* Aſſiſes.
9. If a man hath a *Modus decimandi* for Hay in *Black-acre*, and he ſow it ſeven years together with Corn, the Parſon will have the Corn ſo long. And the Vicar the Hay, or the *Modus decimandi*, or Hay in kinde, if he be endowed of it. *Hughs Rep.* 194. *pl.*274.

See more of this in Service of God, and the old Statutes for *Tithes*. *Pro Clero* 7. 1 *Rich.*2.14. 5 *Hen.*4.11. 27 *Hen.*8. 20. 28 *Hen.*8.11. 32 *H.*8.7. 37 *H.*8. 12. 2, 3 *Ed.*6.13.

CHAP. CLVIII.

Of Title and Toll, of Counties and Towns.

Title of Entry, what.

TItle of Entry is properly where a man hath a lawful cauſe to come upon, and enter into a thing which another hath, but hath no Action to recover it. As when an Eſtate is made upon Condition, and the Condition broken, or one hath aliened in Mortmain, or die without any Heir ſo that the Land Eſcheat; in theſe caſes, the party that is to enter for the Condition broken, or the Lord of whom the Lands are held which are aliened, or in which the Tenant died, is ſaid to have a Title of Entry. But this word is ſometimes taken more largely and applied to the Right or Title a man hath to Land by any means whatſoever; and then it is ſaid to be a juſt cauſe of poſſeſſing that which is our own: For the Law doth put a difference between Title of Entry, and Right of Entry; for Title of Entry is ſaid to be where no wrong is done, as in the caſes before. But Right of Entry is where a wrong was done before, as where a man hath wrongfully entred into my Lands, or taken away my Goods, by Diſſeiſin, or the like; in this caſe I may have an Action, and ſometimes an Entry alſo; but in the other, there is onely an Entry given. And where the Law gives an Action onely, as the onely Remedy to reduce the poſſeſſion, there it is called a Right of Action, but where an Entry, there a Right of Entry. *Plow.*555. *Finches Ley* 105. *Co.*10.48.

Of Toll.

Sect. 1. *Toll, what.*

THis word Toll in a general ſenſe, doth ſignifie any manner of Cuſtom, Subſidy, Preſtation, Impoſition, or ſum of money, demanded for carrying out or bringing in of Wares, to be taken of the buyer; and is ſometimes uſed for a liberty to buy and ſell within the Precincts of a Manor; and ſo it ſeems to be but as a Fair or Market: Sometimes it is uſed for a Tribute or Cuſtom, to pay a little ſum of money for a conveniency of paſſage, or ſome other thing. As where it is claimed for the ſetting up of Stalls in Fairs or Markets, which is called Stallage, or for the digging of the ground there for that purpoſe, which is called Pickage, or for drawing up of Veſſels out of a Ship into a Wharf, which is called Cranage, or for going over ſuch a place on foot, called Pedage, or for paſſing over a Ferry with Man or Beaſts, which is called a Paſſage, or for paſſing over a Bridg, which is called Pontage, or for the paving of a City or Cauſway, which is called Pavage, or for the making of a Wall in time of War, for defence of the Nation, which is called Murage, or for the weighing of Wool, which is called Tronage, or for a Paſſage with Wares, which is called Peſſage: But this word is moſt properly taken for a payment uſed in Cities, Towns, Markets, and Fairs, for Goods and Cattles brought thither to be bought and ſold. *Co.*8. 46,47. 11 *H.*6.19. 9 *H.*6.45. *Kelw.*138. 145. *Fitz Toll.* 138. 7 *H.*4.4.

Stallage. *Pickage.* *Cranage.* *Pedage.* *Paſſage.* *Pontage.* *Pavage.* *Murage.* *Tronage.* *Peſſage.*

As touching all theſe things, this is to be known.

Property.

1. That theſe payments are not incident to Fairs or Markets, but they may be without them; for the ſale is good there without payment of Toll, and the Property altered. *Curia. B.R. Hill.* 17 *Jac.*

Preſcription.

2. They were at the firſt by the Kings Grant, and now are claimed, and may be had by Preſcription.

3. It is held the Lord Protector may by his Prerogative create ſuch a Toll, a ſmall ſum of money to be paid for this.

4. But by Cuſtom or Preſcription, it may be claimed not onely for ſale of Goods, but for a ſtanding in the Fair or Market.

5. The ſum demanded muſt be a ſum Incertain.

6. It

6. It is ſaid it hath been adjudged, That he that hath a Toll in a Market or Fair, by Preſcription or Grant of the King may diſtrain for it. *Trin.* 38 *Eliz. B.R. Heddy* and *Wheel-houſe*. *Diſtreſs.*

7. This Toll for ſale in a Fair or Market, is to be paid always by the buyer, unleſs there be a Cuſtom to the contrary, for then it muſt be paid as the Cuſtom hath been.

8. Toll is not to be paid for the things a man doth buy for his own expences, unleſs the Cuſtom be otherwiſe.

9. Nor is it to be paid for Goods brought into the Market or Fair, unleſs he ſell it, without a ſpecial Cuſtom. See for all theſe things, 9 *Hen.*6. 45. 28 *Aſſ pl.*53. 2, 3 *Ph. & Ma.*7. 31 *Eliz.*12. *Weſt.*1. 30 *Fitz Toll.* 138. 7 *H.*4.44. 13 *H.*4.14. See *Fair* and *Co.* 2 *part. Inſt.*220, 221. Where moſt of theſe points are agreed to be Law.

10. Murage, which is a reaſonable ſum taken for Toll of every Cart, Wain, Horſe laden coming to that Town, for the incloſing of the Town with Walls of defence for the ſafeguard of the people, in time of War, from Inſurrection, Uproar or Tumults. This Pontage, Pavage, Keyage, and the like payments are due, either by Grant or Preſcription *Murage.*

11. But if a Wall be made, which is not defenſible, nor for ſafeguard of the people, then ought not this Toll to be paid. *Co.* 2 *part. Inſt.* 122.

Of Towns and Counties.

FOr Towns, there are theſe Statutes following.

For *Barwick*, 22 *Ed.*4.8. 1 *Jac.* 28. *Barwick.*

For *Stanes*, 1 *H.*8.9. *Stanes.*

For *Cambridge*, 34, 35 *H.*8. 24. *Cambridge.*

For *Briſtow*. See 1 *April.* 1650. *Briſtow.*

For *Newcaſtle*. See 9 *H.*5.10. 21 *H.*8.18. *Newcaſtle.*

For *London*. See *De Gavelet*, 28 *Ed.*3.10. 1 *H.*4.15. 35 *H.*8.10. 14 *Decemb.* 1649. 4 *May*, 1649. *London.*

For *Norwich*. See 33 *H.*8.16. 1 *Ed.*6.6. 5, 6 *Ed.*6.24. 1, 2 *Ph. & Ma.*14. *Norwich.*

For *Durham*. See 5 *Eliz.* 27. 21 *Eliz.* 29. *Durham.*

For *Lancaſter*. See *Act*, 25 *June.* 1649. *Lancaſter.*

For the County and Sheriff of *Northumberland*. See 23 *H.*6. 7. *Northumberland.*

CHAP. CLIX.

Of Tranſportation, and Importation.

Sect. 1. *Tranſportation and Importation.*

FOr Tranſportation of Gold, Silver, Money, *&c.* See 9 *Ed.*3. 1, 3. 38 *Ed.*3. 3. 3 *R.*2.3. 5 *R* 2.2. 2 *H.*4.5. 1 *H.*6.6. 2 *H* 6. 2. Of Iron, ſee 28 *Ed.*3.5. 19 *H.*7.5. *Crompt. Jur.* 111. Of Braſs, ſee 33 *H.*8.7. Of Cloath, ſee 50 *Edw.*3. 7. 17 *R.*2. 3. 4 *Ed.*4.1. 3 *H.*7.1. 5 *H.*8.3. 33 *H.*8.19. 8 *Eliz.*6. Of Corn, ſee 17 *R.*2.7. 4 *H.*6.5. 1, 2 *Phil. & Ma.*5. 21 *Jac.*15. 4 *H.*6. 5. 3 *Ed.*4. 2. 5, 6 *Ed.*6.14. 1, 2 *Ph. & Ma.*4. 5 *Eliz.*5. 13 *Eliz.*13. 35 *Eliz.*2.7. 21 *Jac.*21. 3 *Car.*4. 34, 35 *H.*8. 9. Of Wool, Lead, Tin, Leather, and Fullers Earth. See 14 *R.*2. 2,5,6,7. 38 *Ed.*3. *Stat.*1. 6. 2 *H.*5.2. 14 *H.*6.5. 7 *Ed.*4.3. 3 *H.*7.1. 8 *H.*6. 22. 20 *H.*6.4. 5 *Eliz.*22. 8 *Eliz.*14. 18 *Eliz.*8. *Act*, 8 *Auguſt*, 1651. and 19 *Jan.* 1647. 1 *Jac.*22. 28 *Ed.*3. *Stat.*2.3. 31 *Ed.*3.9. 36 *Ed.*3.11. Of Sheep, ſee 3 *H.*6.2. 8 *Eliz.*3. Of Butter and Cheeſe, ſee 3 *H.*6. 4. 18 *H.*6.3. Of Victuals, ſee 25 *H.*8.2. 1, 2 *Ph. & Ma.*5. Of Bell-Mettal, ſee 2,3 *Ed.*6.37. Of Thrums or Woollen-yarn, ſee 3 *H.*6. 23. 33 *H.* 8. 16. 13 *Eliz.* 11. Of Horſes, ſee 5 *Eliz.*19. 11 *H.*7. 13. 1 *Ed.*6.5. Of White Aſhes, ſee 2, 3 *Ed.*6.27.

Of Beer, 3 *Jac.* 11. Of Fiſh, 5 *Eliz.* 5. 13 *Eliz.* 11. 39 *Eliz.* 9. Of other things, 35 *Eliz.* 11. 39 *Eliz.* 14. 6 *H.* 4. 4. 3 *Ed.* 4. 4. 22 *Ed.* 4. 8. 1 *R.* 3. 12. 2, 3 *Ed.* 6. 26, 37. 5, 6 *Ed.* 6. 15. 1 *Eliz.* 13. 5 *Eliz.* 7. 22, 33. *Act, 9 October* 1651.

For Importation. See 4 *Ed.* 4. 14. 1 *R.* 2. 12. 19 *H.* 7. 21. 28 *H.* 8. 4. 5 *Eliz.* 7. 35 *Eliz.* 11. 39 *Eliz.* 10, 13. 11 *Ed.* 3. 37. 38 *Ed.* 3. 11. 27 *Ed.* 3. 1, 5. *Act,* 20 *Auguſt,* 1649. 20 *September,* 1649. *Act, 9 October,* 1651.

See Ships and Shipping.

CHAP. CLX.

Of Treſpaſs.

Sect. 1. 1. *Treſpaſs,* what it is.

How many kindes of it there are.

THE word Treſpaſs in our Law is commonly taken for a wrong or offence done by one man to another. And ſo it is ſometimes againſt the perſon of a man, and ſometimes againſt that which is his: And both theſe kinde of wrongs do ſometimes lie in not doing ſomewhat a man ought to do, and ſometimes in doing what a man ought not to do. Theſe wrongs are alſo ſome of them accompanied with a kinde, or at leaſt with a colour of violence, and ſome of them are done without any violence, and conſiſt rather of matter of fraud or negligence: For remedy againſt the laſt kinde of offences the Action of the Caſe is provided; and of this we have written largely in *Chap.* 13, *&c.* But the remedy that is given for injuries done with force, or colour of force, is by this kinde of Action, of which we are now to treat in this place. And ſo Treſpaſſes are either extraordinary and greater or ordinary and leſs: The great Treſpaſſes are killing or wounding a man, pulling down or firing of Houſes or Mills, or throwing down of Park-walls or Pales, the burning or deſtroying of a Frame of Timber prepared for a Houſe, or burning a Cart loaden with Goods, or burning of a heap of Wood prepared for Coal, cutting out the Tongue of a Beaſt, cutting off the Ears of a Man, barking of Fruit-trees, breaking and cutting down, or deſtroying the Heads or Dams of Ponds or Pool where are Fiſh, and ſuch like. The leſſer are the beating of a man, entring into his Cloſe, taking away his Goods, or the like. Both theſe are alſo either to the perſon of a man, or to that which is his. Of the leſſer wrongs done to the perſon of a man; there are four kindes, or five degrees, whereof we ſhall ſpeak in this place.

Sect. 2. *Menacing,* what it is. *Aſſault,* what is it is. *Battery,* what it is. *Maim,* what it is. *Impriſonment,* what it is.

Menacing or threatning (which is) where one doth threaten to do another any hurt. Aſſault (which is) where one doth unlawfully ſet upon and attempt to beat another, but doth it not. Battery (which is) when one doth unlawfully beat another. Maim (which is) where one doth by any violent act offered to another, take from him the uſe of any of his principal members of his body, whereby his ſtrength is impaired, and he made more unfit to ſerve the Commonwealth. Impriſonment (which is) where a man is reſtrained of his ordinary and lawful liberty, that he cannot go about his buſineſs, as at other times. The wrongs that are done to that which is a mans (that is) his Goods, they are to his Goods animate or inanimate. Animate, either reaſonable, as Wife, Childe, Servant, Tenant, Ward, or the like; unreaſonable, as Beaſts, Fiſh, or the like. His inanimate good is either his Land or Plate, Houſhold-ſtuff or the like.

Property. Theſe Treſpaſſes are alſo done either with pretence of Title, by which the Property is altered, or without pretence of Title. They are alſo ſaid to be Local (that is) annexed to a place, as cutting of Trees, Graſs, digging of ground, or the like; or elſe they are tranſitory, as the beating of a man, carrying away his Goods, ſpoiling of Writings, or the like. And for remedy againſt theſe kinde of wrongs, this Action or Writ is appointed. *Finches Ley* 203. 198. *Co. 1 part, Inſt.* 57. 126. *Old N. B.* 48. *Cromp. Jur.* 33.

2. *Writ of Treſpaſs,* what it is.

The word Treſpaſs is ſometimes uſed for the Writ of Treſpaſs, which is where any Treſpaſs is done by one to another, which is ſuppoſed to be done with force and arms; and

and by this the Plaintiff ſhall recover damages, according to the wrong done to him; and the Defendant found guilty of this offence, is (*rigore juris*) to pay a Fine to the Keepers of the Liberty, and to be impriſoned till he pay or compound it. And this Writ muſt always ſuppoſe the wrong to be done, *Vi & armis*, *Finches Ley* 198. *Old N. B.* 48.

All perſons, men, women, and children, not diſabled to ſue in any Action, may, having ſuch a wrong done unto them, as for which this Action lieth, have this Action for their relief. 3. Where, and in what caſe this Action lieth, or not. *Sect.* 3.

The Church-wardens of a Pariſh may have this Action againſt him that doth break or take away any of the Pariſh Goods, belonging to the Church, as the Communion Cup, Table-cloth, or the like, in the cuſtody of the preſent or former Church-wardens: But no Pariſhioner can have this Action for theſe Goods. And for a wrong done to the Church, by breaking the Bells, Walls, or the like, or to the Church-yard, by cutting of Trees, eating of Graſs, or the like, he that is Parſon of the Church by Inſtitution and Induction, not the Church-wardens, muſt have this Action. *Broo. Treſp.* 289. *F.N.B* 90. 21 *H.*7.2. 1. In reſpect of the party wronged, and who may have this Action, or not, and how. *Church-wardens.*

The Maſter of an Hoſpital may have this Action for the Goods of the Houſe, taken away in his own, or in his Predeceſſors time. *F.N.B.* 89. *Maſter* of an *Hoſpital.*

Executors may have this Action for the Goods of the Teſtator, taken out of their poſſeſſion; and ſo may the Ordinary for the Goods he hath as Ordinary, and are taken out of his poſſeſſion. But otherwiſe it is for the Goods taken away from the deceaſed; and yet the Executor ſhall have an Action of Treſpaſs, *De bonis aſportatis in vita teſtatoris*. *F.N.B.* 92. 117. *Executors.*

For any the leaſt beating or impriſonment of my Wife, we together may have this Action: But if it be ſuch a beating, as whereby I loſe her company or ſervice, I alone without her may have this Action. So for any the leaſt hurt done to my ſervant, he may bring this Action; but unleſs it be ſuch a hurt as thereby I loſe his ſervice, I cannot bring this Action. 20 *H.*7.5. 22 *Aſſ.* 16 *H.*7.11. *Co* 3.113. 10. 130. 5.108. *Old Book of Entries*, 555. *Husband* and *Wife.* *Maſter* and *Servant.*

If two men hold Land joyntly, and Treſpaſs be done upon the Land, one of them alone without his companion cannot ſue, for the Defendant will avoid the Sute by Plea. *Old Book of Entries*, 557, 587. *Joyntenants.*

One that hath but a bare poſſeſſion of, and no good Title to Land, may have this Action for a Treſpaſs done upon the Land againſt any one that hath no right, but not againſt him that hath right. *Plow.* 431. 546. 3 *H* 6. 32. 12 *Ed.*4. 8. 4 *Ed.* 4. 73. And yet he that hath a Right or Title to Land onely, either by Deſcent, Condition broken, or a Leaſe made to him, and he hath not made his actual Entry into the Land; in this caſe he may not bring this Action for any Treſpaſs done upon the Land. *Kelw.* 163. *Plow.* 144. He that hath the poſſeſſion onely.

He that hath but the Herbage of a ground, may bring this Action for wrong done to him in the Graſs of the ground, but not for cutting or ſpoiling the Trees of the ground. *Dyer* 285. 5 *H.*7.10. *Herbage.*

It hath been ſaid, That the Leſſee for years cannot have this Action againſt his Leſſor, for taking his Cattle by way of Diſtreſs upon the Land, though there be no cauſe of their taking. *Finches Ley* 199. 5 *H.*7.10. *Bro. Treſ.* 220. But I doubt of this. *Leſſee* for years.

All perſons, Male or Female, Lunatick, perſons under age, and others that do any ſuch wrong, for relief againſt which this Action is given, may be ſued in this Action. *D. & St.*25. *Hob. Reb.*176. Not onely he that doth the wrong, but he that is acceſſary to it before or after the thing done, may be charged as principal by this Action; inſomuch as he that doth command, perſwade, procure or incite another to do a Treſpaſs, before it be done, eſpecially if he be preſent at the doing of it, or doth participate with it after it is done, is a Treſpaſſor, and the party grieved may have this Action againſt them all, or any of them for it. *Co.* upon *Littl.*57. *Broo. Treſp.* 113. *D. & St.*25. 12 *H.*7.15. *Dyer* 244. 2. In reſpect of the perſon that doth the wrong, and who may be ſued in this Action, or not.

And therefore if a man do a Treſpaſs to my uſe, and I do afterwards agree to it, in this caſe I am a Treſpaſſor, and may be ſued for it. *Broo. Treſp.* 256. So if I without authority had in the time of the War, as a Commiſſioner with others joyned to ſummon

ſummon a man to appear before us, and then the other Commiſſioners without me had impriſoned, and made him pay a Fine. It ſeems I ſhall be accounted a Treſpaſſor in all this. By Juſtice *Jermine* at *Gloceſter* Aſſiſes, 1649. If the Maſter lock a man up in a Chamber, and give his man the Key, and charge him to keep it, and he knowing of the unjuſt impriſonment, keep him there, he and his Maſter both may be ſued in this Action for this; and yet if the ſervant knew not of it, he ſhall not be charged, 22 *Ed.* 4. 45. And if a ſervant do a Treſpaſs by the Maſters command, both of them may be ſued in this Action. But if the ſervant do more then he is commanded, as if his Maſter ſend him to diſtrain, and he after he hath taken the Diſtreſs doth abuſe it, or the like; in theſe caſes the Maſter ſhall not be charged for any more then what he gave command to do, but the ſervant ſhall be charged with the whole. 21 *H.* 7. 21. *Dyer* 365. And if my ſervant of his own head, without any knowledge or command of mine, doth a Treſpaſs to another man, I ſhall not be chargable with it. 13 *H* 7. 15. *Kelw.* 3. As if the Sheriff make a Warrant to his Bailiff to arreſt the body, or attach the Goods of *J. S.* and the Bailiff attach the Goods, or arreſt the body of *J. N.* In this caſe no Action will lie againſt the Sheriff, but againſt his Bailiff for this. *Mich.* 7 *Jac. Co. B.* If many come to do a Treſpaſs, and they are all preſent when the Treſpaſs is done, and ſome of them do onely look on, and do nothing, yet they be all charged as Treſpaſſors, if they do not declare their diſaſſent to it. But if ſome of them fall into the company accidentally, *contrà*; for they may not be ſued. *Hob. Rep. pl.* 69.

Maſter and Servant.

If one command his ſervant to do a Treſpaſs which he doth, and then dieth before Action brought; in this caſe the Maſter may be ſued notwithſtanding. 17 *H.* 4. 19.

If a Court, or Judge of a Court meddle with, and admit of Sutes in Matters wherewith they have nothing to do, nor have colour of Juriſdiction; as if the Court of *Common Pleas* meddle with matters of the Crown, the Leet or Juſtice of Peace with Actions between party and party, or the Court of a Manor with Land without the Manor; in theſe and ſuch like caſes where the Court, or Judge, or Juſtice of Peace, ſhall ſend out any Proces or Warrant to arreſt, or do any execution, and the party is thereupon arreſted, or any execution is done, he may have this Action, not onely againſt the party, or Miniſterial officers that do make the arreſt, and do execution, but alſo againſt the Judicial officer that doth ſend the Warrant or Proces: But if the Judge or Judicial officer have Juriſdiction of the cauſe, and do onely miſtake in the manner and order of proceeding; as if in the Court of a Manor where they ſhould hold Plea by Plaint, if they do hold Plea by Writ, or a *Capias* is awarded in the *Common Pleas* without an Original, or a *Capias* is awarded againſt a Duke, or ſuch a perſon againſt whom a *Capias* doth not lie, or Proces doth iſſue out in an unjuſt Sute, and the Sheriff or Officer doth execute this, or a Juſtice of Peace doth ſend a Warrant to carry a man to Gaol for Felony, without any Information or Examination; in theſe and ſuch like caſes the party grieved may not have this Action, either againſt him that doth execute, or him that ſent the Warrant; And yet it is ſaid, That if a Juſtice ſend a man to Gaol without Examination, that he may have this Action againſt the Juſtice *Mich* 8 *Jac. B. R.* And yet if in this caſe the Proces or Warrant come from a Court of Juſtice, it ſeems no Action will lie againſt the Judges of the Court, for a Court cannot be ſued: But if a Juſtice of Peace ſhall ſend his Warrant to an inferior officer to carry *J. S.* to Gaol, becauſe he doth not pay him a Debt of ten pound he oweth to him, or to *J. O.* and the officer doth execute this Warrant; in this caſe *J. S.* may have this Action againſt the Juſtice of Peace and Officer both. *Co.* 10. The caſe of the *Marſhalſey.* 8. 6. 22 *Aſſ.* 64. *Plow.* 394. *Kelw.* 129. 98.

If a Juſtice of Peace ſend a general Warrant to arreſt a man, and expreſs no cauſe in it, and the Officer execute it; it is ſaid this Action will lie againſt the Juſtice onely, and not againſt the Officer, *M.* 8 *Jac. B. R.*

If the Sheriff have a *Capias ad reſpondendum* againſt me, and make a Warrant to his ordinary Bailiff to arreſt me, and he doth ſo, and the Sheriff doth not return the Writ this Action will lie againſt the Sheriff, not againſt the Bailiff for this. But if the Bailiff which

which made the arreſt, were the Bailiff of a Franchiſe, *contrà.* 20 *H.*7. 1. 2 *H* 7. 22. If a Plaintiff in any Sute bring an unlawful Warrant to the Sheriff, and ſhew him the party, and require him to arreſt him; or bring him a good Warrant, and ſhew him the wrong party, and require him to arreſt him; in both theſe caſes the party grieved may have this Action againſt them both. So alſo for any thing done againſt the Goods of the Defendant by the Plaintiffs miſ-information, *Broo. Treſp.* 307. 99. *Officer.*8. No Action will lie againſt an Heir, Executor, or Adminiſtrator for a Treſpaſs done by the Anceſtor or Teſtator, *Actio perſonalis moritur cum perſona.* See *Impriſonment.*

A Servant or Ward may have this Action againſt their Maſter or Guardian if they do abuſe them. 28 *H.*6. 25. If many men do a Treſpaſs to me, I may ſue all, ſome, or any one of them at my pleaſure, *Co.*8. 159. If a man force another man to ſtrike me, or thruſt him upon my ground, for this wrong I may have this Action againſt him that did force, but not againſt him that was forced. *Hob. Rep. pl.* 176. *Motes* caſe. 2 *Car.* By Chief Baron at *Sarum* Aſſiſes. If I deliver another my Goods to keep to my uſe, and he give or ſell them to a ſtranger; in this caſe, though I may have this Action, or an Action of the Caſe againſt him, yet I may not have either of them againſt the ſtranger, *Lit. ſect.* 70. *Co.* upon it. And yet if my ſervant ſhall ſell or give away my Goods to a ſtranger, and he take them away without delivery of my ſervant; it is ſaid in this caſe I may have this Action againſt the ſtranger. *Noy* 111. 21 *H.*7. 39. But if one man take away my Goods by wrong (that is) ſo take them from me, as by his taking he gets a property in them, and then he doth deliver them over to another ſtranger; or another ſtranger doth take them away from him by wrong, ſo that he gets a property in them; in this caſe it ſeems I may not have this Action againſt the ſecond taker. *Broo. Treſp.* 329. 21 *H.*7. 39. And yet it is ſaid, That if a ſtranger buy my Goods of one that hath ſtoln them from me in a Market or Fair, knowing them to be ſtoln; in this caſe I may have this Action againſt him, as well as againſt the thief, *D. & St.* 149. If one diſſeiſe me of my Land, and afterwards another diſſeiſe him, or he make a Feoffment or Leaſe of it to another, and the ſecond Diſſeiſee, Feoffee or Leſſee do Treſpaſs upon the Land; in theſe caſes I may not have this Action againſt the ſecond Diſſeiſor, Feoffee or Leſſee, as I may againſt the firſt Diſſeiſor, who muſt anſwer me all the Damages done by the reſt. *Co.* 11. 51. 6. 7, 9. 13 *H.*7. 15. 10 *H.*7. 27.

If I have a free Warren or Feeding in another mans ground, and the owner of the ground diſturb me, I may have this Action as well againſt him, as I might have had it againſt another that did me Treſpaſs. 5 *H.* 7. 10. *Dyer* 285. So the Leſſee for life or years may have this Action as well againſt the Leſſor for a Treſpaſs done by him upon the Land, as againſt any other man. 5 *H.*7. 10. So if a Feoffer having made a Feoffment to me upon Condition, enter before the Condition broken, and after the Condition is broken, and then he enter again; in this caſe, for his firſt Entry, I may have this Action againſt him. 10 *H.*7. 22. If a Hue and Cry be levied without cauſe, and an Officer having ſome cauſe of ſuſpition, arreſt me; in this caſe I may not have this Action againſt him, but againſt him that firſt levied it. 21 *H.* 7. 27. If a Lord diſtrain upon his very Tenant wrongfully, and the Beaſts return to his Tenant, it ſeems he cannot have this Action againſt the Lord for the wrong, but he might have replieved them had they been impounded. *F. N. B.* 96.

This Action will lie for a Maim, Impriſonment, Battery, or Aſſault done to the perſon of another: For if another man ſhall by any violent act, maim me, *viz.* deprive me of the uſe of any of my principal Members of my Body, as my Hand, Leg, Finger, Eye, one of my Fore-teeth, or the like, whereby my ſtrength is impaired, and I am made the more unfit for publick ſervice; in this caſe I may either have this Action, or an Appeal of Maim, which I will; and by either of theſe I ſhall recover Damages according to my hurt. But if the hurt be ſmall onely, making a deformity in the Body, as when the Ear or Noſe is cut off, or the grinding Teeth put out; in theſe caſes the party hurt, hath no remedy but by this Action. *Finches Ley* 204. *Stamf. lib* 1. *cap.*44. See *Exod.*21. 18, 19. *&* 22. 5. If another man do unjuſtly impriſon me, or keep my Wife or Ward from me, I may have this Action.

Sect. 5.
3. In reſpect of the thing done, and for what cauſe this Action will lie or not, but ſome other, or no Action at all. Wrong to perſon.
Maim.
Impriſonment,

But

But for the further opening of this point of Treſpaſs for an unjuſt impriſonment, that we may ſet forth where an Action of Treſpaſs will lie for a falſe impriſonment, theſe things are to be known.

Arreſt.

1. If a man ſhall lay hands upon me, and hold me in his arms, keep me in mine own or another mans houſe, tie me to a Tree or poſt, put me in a Priſon or Stocks, or any other way reſtrain me of my liberty againſt my will; all theſe are Arreſts and falſe Impriſonments for which this Action lieth. So if a known Officer had but ſaid, I arreſt you in the Kings name, and had laid no hands on him, this had been an Arreſt. But if one do onely bid me ſtand or ſtay, and ſay that he doth intend or mean to arreſt me, but doth not lay hands upon me; or if one carry or detain me with my conſent, as a Boat-man in a Boat, Coach-man in a Coach, or the like; this is no Arreſt, nor will this Action lie for this. And yet if a Coach-man carry me further then I am willing, for this I may have this Action. *Co. 9. 66. 69. Broo. F. Impriſ.* 37. 10. 43 *Ed.* 3. 20. But to thruſt another in a great throng or a croud, is not an aſſault nor actionable. By Baron *Thorp* at *Gloceſter* Aſſiſes. 1654.

Falſe Impriſonment.

2. The liberty of a man is much favored in Law, and therefore if any man reſtrain me thereof without good warrant, and againſt Law, I may have an Action of falſe Impriſonment againſt him, which is in the nature of an Action of Treſpaſs, *F. N. B. Treſpaſs, in toto.*

Where an Impriſonment ſhall be ſaid to be unlawful, upon which this Action will lie or not, but it is juſtifiable.

Sect. 6.

In reſpect of the cauſe or end, & where, and why one may be impriſoned, or not.

For Debt, *&c.*

3. Then a man is ſaid to be unlawfully impriſoned, when either there is no good cauſe for his Impriſonment, or he that doth impriſon, hath no good Authority to do it, or having good Authority, he doth not purſue it, or he doth arreſt at a forbidden time, or in a forbidden place, or the like. But we ſhall handle this point apart, and ſhew at large where an Arreſt or Impriſonment ſhall be ſaid to be unlawful or not, in theſe following caſes.

If I ow another man money, or have done him a Treſpaſs, and he of his own head without any Writ, impriſon me, till I pay him his debt, or till I give him a recompence for the Treſpaſs; or if a man impriſon me till I pay him money, enter into a Bond or Statute, or make a Releaſe, or the like; in all theſe caſes this Action is given for my Relief, *Old Book of Entries*, 587. *F. N. B.* 88. And yet in caſe where I am duly impriſoned by ſome legal Warrant, but in a falſe or feigned Sute, where no money is due, or the money is paid, or the like; in theſe caſes the Impriſonment is lawful, and I may not have this Action for the Impriſonment, 43 *Ed.* 3. 35. If a man be wounded and like to die, any man may arreſt him that gave the wound, and he may be kept till it be ſeen that the danger is paſt. But if he be kept after, an Action will lie for this. 16 *H.* 7. 28. *Broo. F. Imp.* 6. *Brownl.* 1 *part.* 198.

For ſuſpition of Felony.

If one arreſt me upon a ſuſpition of Felony, when in truth no Felony is done; or if there be any Felony done, there is no more cauſe to ſuſpect me then any other man in the world; in this caſe, and for this wrong I may have this Action. But on the other ſide, If a Felony be done, or noiſed abroad to be done, and there be ſome cauſe to ſuſpect me more then another, and he that doth ſuſpect me doth arreſt me, he may juſtifie it, and if I ſue him for it, he will avoid the Sute: But for the opening hereof, take theſe things.

1. One man may be juſtly ſuſpected more then another of a Felony, if either he be a ſuſpitious perſon, and generally thought to be a thief, and doth live neer the place where the Felony was done, or the goods ſtoln be found in his hands, or there be Hue and Cry after ſuch a kinde of man, or if upon the Hue and Cry he flie, or if he were ſeen neer about the time or place, where and when the Felony was done, or if a Felony be done, and the common report is that *J. S.* did it; this is ſufficient to ground an Arreſt upon. *Brownl.* 1 *part* 3. For theſe and many ſuch like cauſes, one may be ſuſpected before another.

2. In this caſe, he that hath cauſe to ſuſpect, not another, may arreſt the party ſuſpected; for if I ſuſpect another man for the Felony done, and tell a third perſon of it; in this caſe this third perſon, albeit he be an Officer, may not arreſt him upon my ſuſpition. And yet if haply upon my relation, he alſo do ſuſpect him, then he may arreſt him upon his own ſuſpition, for it is a principle of Law, That one man cannot arreſt for Felony upon another mans ſuſpition.

3. He

3. He that doth ſuſpect, be he officer or other man, may arreſt the party ſuſpect of his own head, and without any Warrant from a Juſtice of Peace. But the common courſe is at this day to do it by the Warrant of a Juſtice of Peace, and this now in reſpect of the common uſage may be lawful and juſtifiable, *Communis error facit jus.*

4. If the party ſuſpected will not ſubmit and yield himſelf, but reſiſt, the party that doth arreſt may juſtifie the beating of him; and if it cannot be avoided in the apprehending of him, but that he muſt kill him, he ſhall not be puniſhed for it. Murder juſtifiable.

5. The party that doth arreſt may juſtifie the breaking of any houſe to take him, after demand of the opening of the doors. Breaking a Houſe.

6. The party arreſting after the arreſt made, may bring the priſoner to a Juſtice of peace, Conſtable, or to priſon, at his choice.

7. If he bring him and deliver him to a Conſtable, the Conſtable may juſtifie the detainment of him.

8. If the Conſtable after he is delivered to him, let him go, yet the arreſt of the party was juſtifiable.

9. If it be an Officer that doth bring the priſoner to the Goal, the Goaler is bound to receive him, but if it be not an Officer it is ſaid the Goaler may chuſe whether he will receive him without the *Mittimus* of the Juſtice of peace: however (in my opinion) as he may lawfully, ſo he ſhall do well to receive him in this caſe.

10. If the Officer let the priſoner go after he is delivered to him, it ſeems he that did firſt arreſt him, may arreſt him again.

11. If the Goaler will not receive the perſon ſuſpect becauſe he is not brought by the Juſtice Warrant, the party arreſting may carry him back, and take courſe to ſecure him.

12. If the priſoner be ſick he may keep him in his houſe a while, till he be fit to be carried, and if he be dangerous or deſperate, he may ſecure him a while in the Stocks, or manacle him, if need be.

13. If the Conſtable arreſt a man for Felony and he flie, and another man without command of the Conſtable arreſt him, it hath been ſaid that this arreſt is unlawfull, *Sed quære*, for I doubt it, *Broo. F. Impr.* 24. 27. *Treſpas.* 9. 207. 335. 13 *Ed.* 4. 9. 7 *H.* 4. 3. 14 *H.* 8. 1. 27 *H.* 8. 23; *Pl.* 40: 13 *H.* 7: 10: 5 *H.* 7: 4: 19 *Ed.* 49: 22 *Ed.* 4. 25.

Watchmen and Conſtables, and ſuch like Officers may arreſt night-walkers that are ſuſpitious, and keep them all night, and if there be cauſe, as if they be dangerous, the Officers want help, or the like, put them into the Stocks till the morning, and then bring them to a Juſtice of peace to be examined. But if ſuch Officer ſhall arreſt and uſe me ſo without any cauſe of ſuſpition at all, I may have remedy by this action, *St.* 5 *Ed.* 3. *Ch.* 14. 4 *H.* 7. 15. *Co.* 9 68. Night-walkers.

If I binde my ſelf to pay money, and agree that if I pay it not the Debtee himſelf ſhall take and impriſon me till I pay it, if he do ſo I may have this Action for it, 28 *Ed.* 3. 3. So if a keeper ſuffer me (being his priſoner) voluntarily to eſcape, upon my promiſe that if I render not my ſelf again by a day, that he ſhall arreſt me, and I do not, and thereupon he do arreſt me, I may have this Action againſt him, *Co.* 3. 44. By agreement.

If I be a Ward to one by Tenure, and he by himſelf or ſome other ſeiſe me, and keep me, no Action lieth for this, *Plow.* 294. *Broo Impr.* 13. 21 *H.* 6. 5. *Old B. entries.* 584. Ward.

If one Impriſon me for a Fine impoſed upon me in a Leet, except it be in caſe where the Lord can preſcribe to impriſon for a Fine; in this Caſe I may have this Action. And yet regularly whereſoever a man is fined in a Court of Record, he may be impriſoned, for impriſonment is incident to a Fine till it be paid, *Broo. Impr.* 97. *Co.* 8. *Godfreys Caſe.* Fine.

If a man be mad, and like in his fury to do miſchief to himſelf or others; in this caſe his Friends may binde or ſhut him up to prevent it, or if one be like to be drowned or burned, any man may pull him up out of the fire or water with violence to ſave him, no action will lie for this, *Plow.* 18. *Br. F. Impr.* 35 *Old B. Entries* 555. To ptevent hurt. Mad-man.

If men be fighting, or about to fight, and like to kill one another, any one may take and keep away one of them from the othe, and if need be lock him up in a houſe for a reaſonable time, till the heat be paſt, to the end that he may not kill nor be killed, & no action will lie for this, for it is iuſtifiable. For the better underſtanding of this, take theſe caſes. 1. If two men be fighting, any man may ſtand between them to part them. To keep peace and prevent murder.

2. And yet if in this caſe a man ſhall uſe them more extremely then he need, or do any thing before there is need; for this he may perhaps be liable to this Action. And therefore if an Officer ſhall, upon a few hot words, take one of the parties and put him in the Stocks; or if an Officer after an affray is paſt, and when no hurt is done, ſhall carry one of the Affrayers to priſon, or when there is cauſe ſhall keep the Affrayer longer then is needful, he may be liable to this Action, *Bro. Imp.* 3.

3. If one be about to do a Robbery, threaten to kill another, abuſe an Officer, or be taken in incontinencie, or the like, the Officer may arreſt him, and carry him to a Juſtice to put in Bail, or be ordered according to Law.

4. If the Juſtice do nothing with him, yet the Arreſt is lawful by the Officer, 5 *H.*7.6. *Bro.F.Impr.*20. 13 *H.* 7. 10. *Old B. Entries*, 554.

If any men ride armed terribly, or any Inſurrection be, all Officers of the Peace, and others in their aſſiſtance, may arreſt, impriſon and diſarm them, *Bro.Treſp.*184.

Eſcape. If one arreſt me on a Juſtice of Peace's Warrant, and I get away from him againſt his will, he may take me again where-ever he can find me, and juſtifie it. So likewiſe may a Sheriff his Priſoner in Execution for Debt. And yet if the Sheriff ſhall ſuffer him voluntarily to eſcape, and after arreſt him again; this ſecond Arreſt is unlawful, and this Action may be had for it. Otherwiſe it is (as it ſeems) upon a ſecond Arreſt by a Juſtice of Peace's Warrant, *Bro. Impr.* 8. *Co.*3.44.

Sureties of the Peace. A Juſtice of Peace may require any man to give Sureties of the Peace or Good-behaviour; and if he refuſe to do it, may cauſe him to be impriſoned. And if a man arreſted by the Warrant of a Juſtice of Peace to bring a man to give Sureties for the Peace or Good-behaviour, ſhall refuſe to put in Bail, the Officer without any new Warrant may carry him to Gaol. And if the Warrant from the Juſtice be, to bring him before him, or ſome other Juſtice of Peace of the County, the Officer, not the Priſoner, ſhall have the choice to what Juſtice of Peace to bring him: It therefore he bring him to one he is not willing to go to, or if he refuſe, carry him to Gaol, he may not have this Action againſt him for this, *Co.*5.59. *Old B. Entries*, 598,599, 560. *Bro.Treſp.*177. 5 *H.*7.6.

Officers. A man may be impriſoned for divers other cauſes, and in divers other caſes; as for divers offences done againſt the Common-Law; as an Officer for neglect of his duty, an Officer or any other for diſobedience or contempt to a Court, an Officer for making of a falſe Retorn, and the like. And therefore if a man be duly impriſoned for any ſuch cauſe, he may not have this Action for this Impriſonment. But if one be impriſoned for any other cauſe for which Impriſonment doth not lie, the party grieved may have this Action, *Bro. Impr.* 2.7. Alſo a man may be impriſoned for divers cauſes, and in divers caſes, by authority of divers Acts of Parliament; as for Arrearages of Account before Auditors, in caſes of Witchcraft, Forgery of Deeds, Forcible Entry, Riot, Rout, unlawful Aſſembly, for lack of Diſtreſs ſufficient, or refuſing to pay a Rate or a penalty for an offence done, Officers for refuſing to execute their Office, or to account, Alehouſe-keepers for ſelling Ale after they are ſuppreſſed, Officers or others for not obeying the Orders and Warrants of Juſtices of Peace in or out of Seſſions, Foreſtallers, Regrators, Ingroſſers, Rogues, and many others. And therefore in all theſe caſes where the Law doth warrant an Impriſonment, and the party is duly impriſoned according to that Law, he may not have an Action of Falſe Impriſonment againſt him that doth arreſt him, or for this Impriſonment. But for any threatening of a hurtful blow, as to hold up his fiſt in anger, and ſaying, *I could find in my heart, &c.* or, *I will fell thee to the ground*, if the man threatened be within his reach: Or for puſhing or ſtriking at, though he miſs the man, or thruſting a man, as for menaces and aſſaults, this Action doth lie. By Baron *Thorp*, at *Glouceſter*, 1654.

Sect. 7. Then an Impriſonment is ſaid to be unlawful, and gives this Action, when albeit the cauſe may be good, yet,

In reſpect of the authority by which it is done. 1. He that makes the Arreſt doth it without any colour of authority at all; as when a Creditor of his own head without authority from any Court ſhall arreſt the Debtor for his Debt. Or,

2. If he have a colour of authority, yet he hath no good authority; as when a Court

Court or Officer ſhall give a power, not having it, to arreſt a mans body, or a Corporation, without a cuſtome, ſhall make a Law of Impriſonment, and under this is authority a man doth arreſt, or a Conſtable ſhall arreſt a Scold, and put her in the Cucking-ſtool before ſhe is preſented in a Court, and he have a Warrant to do it. Or 3. When a Court or Officer hath a good power, but doth not well make it out; as if the Judges of the Common-pleas by word, without a Writ, command the arreſt of a Debtor, or ſend a Writ without a ſeale, and the Sheriff doth execute it; and yet a known Officer in a Corporation may Arreſt by his Mace without any precept. Or 4. When the Authority is well made forth, but it is not well purſued and executed; as when a warrant is made to three *Conjunctim & Diviſim*, and two of them do it, it ſeems this is not good, but all or one of them may do it, and this is good; or if the Warrant be to cauſe one to finde ſureties of the Peace, or to arreſt him, and the Officer do arreſt him before he require ſureties, and he refuſe it. So if the Warrant be to arreſt him if he doth not give ſureties; and he doe give ſureties, and yet the Officer doth arreſt him afterwards. And yet it doth not help in theſe caſes, if when the arreſt is made, it be done without Warrant, or without a good Warrant. If the party arreſting do afterwards procure a good Warrant, this will not make the arreſt Lawful. *Co.* 4. 64 8. 67. 10 *H.* 7. 17. 26. *Broo. Treſp.* 339. 5 *Ed.* 4. 12. *Broo. F. Impr.* 17. *Dier.* 242. 244. 14 *H.* 8. 16. *Co.* 9. 66. 344. *Ludlowes Caſe. B. R. Brownl.* 1 *part.* 205. 211. 2 *part.* 16.

1. Any other man as well as a Conſtable may arreſt a man out-lawed, or ſuſpect of felony, and no Action will lie for this, *Plow.* 49. *Dier* 120. *Sect.* 8. In reſpect of the party arreſting.

2. A Watchman or Conſtable *Ex Officio*, may arreſt ſuſpitious perſons walking by night, and ſecure them. But other perſons that are not Officers it ſeems may not do ſo; if therefore ſuch perſons ſhall do ſo, the party arreſted may have this action, *Co.* 9. 68. 4 *H.* 7. 5. 18. *Stat.* 5 *Ed.* 3. 14.

3. Conſtables and ſuch like Officers, may *Ex Officio* arreſt Perſons breaking the Peace, or committing lewdneſs together. But other men cannot do ſo, unleſs it be in caſe of an affray and danger of murder, to part them, and keep them aſunder only till the heat be paſt. And therefore if I and another be fighting, and one that is no officer take me and put me in the ſtocks; I may have this action againſt him, *Finchesley.* 336. *Fitz. Barre.* 202. 12 *H.* 7. 18. *Broo. F. Imp.* 28.

4. If a Conſtable make a Deputy, and the Deputy arreſt me in caſe where the Conſtable may arreſt me; it ſeems this is lawfull and not Actionable, *M.* 13. *Jac. B. R. Phelps Caſe.*

5. If a Sheriff, Conſtable, or any ſuch like officer, in the execution of his office (being to arreſt me) require others to aid him, and they do ſo, I may have this action no more againſt them then againſt the officer himſelf, for men are bound in theſe caſes to aſſiſt, *Co.* 8. 66. 5. *H.* 7. 15. *Broo. Treſpas.* 335.

6. A Juſtice of peace himſelf may require any man to give ſureties of the peace or good behaviour when he hath cauſe, and if the party refuſe, he may himſelf arreſt and impriſon him, *Broo. Treſ.* 177.

Any perſon, Lay or Eccleſiaſtick, but Barons and Peers (who are priviledged perſons) may be arreſted: and for theſe alſo; if a Sheriff have a *Capias* out of the Common-pleas to arreſt ſuch a perſon, and he do arreſt his body, hereby the Sheriff may not be charged in this Action. *Fieri non debet, ſed factum valet, Co.* 8. 67. *Broo. F. Impris.* 19. If an officer having Warrant to arreſt another man, by miſtake arreſt me; in this caſe I may have this action againſt him; and albeit the officer be led into this error by the miſinformation of the plaintiff or any other, yet this will not excuſe him, *Trin* 38 *Eliz. B. R. Cookes Caſe, Kelw.* 129. *M.* 5 *Jac. Goldſmiths Caſe.* And if the Sheriff have a Writ againſt *I. S.* and he come to me and ask me if my name be *I. S.* and I ſay Yes, and then he ſay, If your name be *I. S.* I arreſt you at the ſuit of *I. W.* and he doe arreſt me, this arreſt is unlawfull, and I may have this Action againſt him for it. *Trin.* 7 *Jac. B. R.* And yet if the Sheriff have a Proceſs againſt one of my name, and there is no diſtinguiſhing addition in the proceſs whereby we may know which of us is intended, and the Sheriff arreſt me inſtead of the right man, I may not have this action in this caſe againſt the Sheriff, nor have I any *Sect.* 9. In reſpect of the party arreſted.

remedy but by an *Indempnitate nominis*, *Broo. F. Impr.* 19. If a warrant be intended againſt me, but my name is miſtaken, and another name inſerted in the warrant, and by this Warrant the Officer doth arreſt me; in this caſe I may have this action for this arreſt, *Broo. F. Impr.* 38. *Brownl.* 1. *part.* 210. 2 *part.* 48, 49.

An arreſt of a Miniſter going to, or returning from the Church is held to be unlawfull, *Brownl.* 2 part. 301.

Sect. 10. In reſpect of the time of the Arreſt.

If a Sheriff or any of his Officers arreſt a man upon a Writ after the day of the return thereof is paſt, this is unlawful, and the party arreſted may have this action. And ſo ſome ſay the Law is, if he do arreſt before the day of the Teſt of the Writ, *Co.* 8. 66. *Dier* 242. And yet if a man be arreſted on a *Capias* or a *Latitat* the morning of the ſame day whereon the Writ is retornable; it ſeems this is a good and juſtifiable arreſt, *Trin* 3. *Jac. per two Judges.*

2. If a Warrant of a Juſtice be to arreſt and bring a man to the next Seſſions, and the Officer do thereupon arreſt him after the Seſſions, this is an unlawfull arreſt, *Trin.* 9. *Car. B. R.*

3. If one have a Warrant to arreſt me from a Juſtice of Peace or the Sheriff, and before the Warrant is executed the Sheriff or Juſtice of Peace is diſcharged of his Office, and the Officer hath notice of it, and yet he do afterwards arreſt me upon this Warrant, in this caſe I may have this Action, *Dier* 41.

By the new Act of Parliament, 19 *April* 1650. all Arreſts on that day, ſave only for Felony, breach of the Peace, and profanation of the day, are made unlawfull, and the Arreſters to be puniſhed

4. An arreſt may be upon any day of the week, and upon any part of the day or night; and yet let the Officer ſee to it, for if he uſe to make arreſts on the Lords day, or if he arreſt a Miniſter going to, or returning from the Church, or in the Church, eſpecially whiles he is about the ſervice of God; this is an offence that was puniſhable in the Starchamber, and is puniſhable by binding the offender to the good behaviour, *Co.* 9. 66. *Trin.* 3 *Jac. per.* 3 *Juſtices. Stat.* 1. *R.* 2. *Ch.* 15. 50 *Ed.* 3. 5.

5. If a Warrant be from a Juſtice of Peace directed to an Officer to cauſe me to finde ſureties of the Peace, and I hearing of it, do voluntarily binde my ſelf before a Juſtice of Peace, and have a *Superſedeas* from him, and give notice hereof to the Officer, and yet he do afterwards arreſt me, I may have this action againſt him, *Polton de pace.* 20.

Sect. 11. In reſpect of the place.

1. An arreſt may be in any place, Church, Houſe or Field, only let the Officer ſee to it, that he do it not in the Church, eſpecially that he diſturb not the ſervice of God; for however the arreſt be good, yet the thing done is a miſdemeanor puniſhable, ſo alſo let him take heed that he enter not into another mans houſe to make his arreſt, when it is in a ſuit brought by a private perſon, and not in caſe of the Commonwealth, wherein one may juſtifie the entering into and breaking of a houſe, if a man cannot otherwiſe do it. And let him ſee he do it within his own Precinct, for in theſe caſes he may make himſelf liable to this action. And yet in caſe of arreſt in another mans houſe, the Arreſt is good, and the Officer not puniſhable for this by any Action of the party arreſted, but the Owner of the houſe may bring this Action for his entry into the houſe, *Co.* 9. 66. 14 *Jac. B. R. per Ch. Juſtice.*

2. If the officer arreſt a man in a franchiſe or priviledged place, (within his Precinct otherwiſe) this arreſt is good. And yet the Lord of the Franchiſe may have an Action of the caſe againſt the Officer for intruding into his Franchiſe, *Co.* 9. 66. *Ch. Juſt. B. R.* in 15 *Jac.*

Eſcape.

3. In ſome caſes the Sheriff or other Officer may go out of his County or Precincts as the Sheriff upon the eſcape of a priſoner, or a ſpeciall Writ to remove a priſoner. But if a priſoner be with his Keeper only in another County where the Sheriff hath not to do, and unleſs it be in the caſes before; this is an eſcape, and the priſoner may have this action againſt the Sheriff, *Dier* 66. Alſo the Juſtice of Peace may ſpecially command an Officer out of his Precinct, and by ſuch ſpeciall command an officer may Arreſt out of his precinct, *Broo. F. Impr.* 26. *Weſtm. ch.* 1. 34.

Sect. 12. In reſpect of matter ſubſequent to the Arreſt. Falſe retorn. Refuſe bail.

If a Sheriff or a Bailiff of a Franchiſe Arreſt me upon a *Capias ad Reſpondendum*, and afterward he do not retorn the Writ, or do retorn him *Non eſt inventus*; in theſe caſes I may have this Action, *Co.* 5. 90 *Kelw.* 3, 66. 89. 3 *H.* 7. 11.

If the Sheriff or his Bailiffs Arreſt me, and I am bailable, and offer them ſufficient bail, and they refuſe it, for the impriſonment afterwards this action lieth, *Dier* 25. *Pl.* 60. *F. N. B.* 152.

If

If any Officer after I am to be diſcharged, having put in bail or otherwiſe, Keep me, or having let me go, Arreſt me again for undue Fees; I may have this Action for the detainment afterwards. But for due Fees it ſeems the Officer may keep the priſoner till he pay them. For Fees.

If one after he hath arreſted me, when he ſhould carry me to a Juſtice, or to a Goal that I may be in a way of Triall or delivery, he keep me at his houſe, or in another place, unleſs it be in a caſe of neceſſity, and ſo long as the neceſſity ſhall continue; I may have this Action againſt him, *Kewl.* 45. *Plow.* 38. *Bro. F. Impr.* 25. *Brownl.* 2 *part.* 41. *Stat.* 5. *H.* 4. *ch.* 10. Keep the priſoner from trial.

If a known ſworn common Baily Arreſt me by a Warrant from the Sheriff, and I ſubmit to the Arreſt, and deſire ſight of the Warrant, and he will not ſhew it, nor declare the contents of it (that is) ſhew the cauſe, at whoſe ſuit, and for what ſumm, and in what Court, &c. I may have this Action againſt him, and if it be another Bailiff, he muſt ſhew the Warrant it ſelf, otherwiſe the party arreſted may have this Action againſt him. But in caſe where I do not deſire the ſight of the Warrant, or do not ſubmit to the Arreſt but ſtrive to eſcape, in this caſe the Bailiff is not bound to ſhew the Warrant, or declare the contents of it, *Cook.* 9. 69. 6. 55. 21 *H.* 7. 23. 14 *H.* 7. 9. Refuſe to ſhew his Authority.

If a Juſtice of Peace ſend for a man about a Felony, and then preſently ſend him to Goal without any examination; it ſeems this Action will lie for him againſt the Juſtice of Peace, *M.* 8. *Jac. B. R.* If the Sheriffs Baily having Arreſted me upon an Execution, I pay the money and get a *Superſedeas* from the Sheriff to diſcharge me, and the Bailiff pretending he cannot reade the *Superſedeas* or the like, refuſe to deliver me; I may have this Action againſt him, *Trin.* 37 *Eliz. Co. B. Stringers* Caſe. And by *Juſt. Whitlock at Glouc. Aſſiſes.* 6. *Car.* 13 *H.* 7. 16. 1 *H.* 7. 28. So if the Sheriff himſelf after he hath arreſted me, and I get and ſhew him a Legall diſcharge, as a *Superſedeas* from above, the Plaintiffs Releaſe, and a power from him to deliver me; he ſhall notwithſtanding keep me priſoner ſtill, in this caſe I may have this Action againſt him. *M.* 13 *Jac. B. R. Withers* Caſe. *Fitz Barr* 253. Not examination of a Felon.

If one do wrongfully beat or hurt me, or cauſe me to be hurt by ſetting his dog upon me, or the like; I may have this Action againſt him, *Fincheſley* 263. But for the further opening of this point take theſe following caſes. *Sect.* 13. Battery and Aſſault.

1. If one hurt me againſt his will, or by accident, as at a Training, Tilt, Foot-ball, Fence, or other play, by the glance of an Arrow, caſt of a Stone or the like, I may have this Action againſt him: and yet if the thing done, be done by an unavoidable neceſſity, wherein he that doth it is no waies faulty, as if he run upon my Sword, or Musket as I am about to diſcharge it, and thereby hurt himſelf, or the like; for theſe things no Action will lie. *Hob. Rep pl.* 176 *Bro. Treſp.* 178. 294. 6 *Ed.* 4. 7. 10 *Ed.* 4. 6. So if one be forced to ſtrike me, or thruſt upon me, I may not ſue him that was forced for this, 9 *Ed.* 4. 37. 21 *H.* 7. 27. Accidents. Neceſſity unavoidable.

2. If one make but an Aſſault upon me firſt (and what an aſſault is we have ſhewed before, and ſhall do after) I may then beat him and juſtifie it, but I may not wound him, and it is not materiall in this caſe whether I be in any imminent danger or not, *Old B. Entries* 644. Of his own wrong.

3. If one go about to enter into my houſe, or to take away my goods againſt my will, I may in defence thereof gently put him back, and if that will not do, I may beat him and juſtifie it. So it ſeems if a man have taken my goods I may preſently retake them, and if he will not deliver them, do as before. But if a man go about to ſtop or turn my water-courſe, or enter into my Cloſe againſt my will, I may not make this reſiſtance. And yet in theſe caſes I may *molliter manus imponere* upon the Treſpaſſor to keep him off, and juſtifie this, *Curia Paſ.* 7 *Jac. B. R. Old B. entries.* 554. 553. 14 *H.* 7. *Baron Henden at Glouc. Aſſiſes.* 17 *Car. Brownl.* 1 *part.* 218. In defence of ones Houſe and Goods.

4 A friend alſo may juſtifie the beating of a ſtranger in the defence of the life and perſon of his friend, as a Wife for a Husband, a Husband for a Wife, a Father for a Childe, a Childe for a Father, a Servant for a Maſter or Miſtreſs, but not a Maſter for a Servant; and in theſe caſes they may diſarm him that doth make the aſſault, till the heat be paſt, *Bro. Treſp.* 37. *Old B. entries* 553. 554.

5 Albeit

Wound, what. 5 Albeit in theſe caſes the beating of another is juſtifiable, yet the wounding, that is, the breaking of the fleſh and letting out the bloud is not juſtifiable, 16 *Ed.* 4. 11. 21 *H.* 8. 39. 27. *Kelw.* 92. 9 *Ed.* 4. 28. *Bro. Treſp.* 37.

Rogue. 6. Moderate correction may be given to a Rogue according to the Statute, and no Action will lie for this battery.

Correction of Children, Scholars, *&c.* 7. A Maſter may give moderate correction to his Apprentiſe, Scholar, or Servant, and no Action will lie againſt the Maſter for this; but if the correction be exceſſive, this Action will lie, *Bro. Treſpas.* 353. 349. *Old B. entries.* 555.

Oppoſers of Authority. 8. If any man arreſted upon a Writ, or for felony, ſhall not ſubmit to the Arreſt but reſiſt, and there be no other remedy, they that Arreſt may beat or wound him; and if any others ſhall goe about to prevent the Arreſt, or after Arreſt to reſcue the priſoner, they that make the Arreſt may juſtifie the beating of the oppoſers, 5 *H.* 7. 5. 4 *H.* 7. 18. 21 *H.* 7. 39. 2 *Ed.* 4. 6. *Fitz. Corone* 263.

9. If two be fighting together, any man that ſtands by may go between them and do his beſt to part them, and juſtifie this; but he may not juſtifie the beating or hurting of either of them, unleſs he do firſt beat or ſtrike at him, *Per Juſtice Jones, Lent Aſſiſes at Glouc. 5. Car.*

10. If a man trouble a Congregation at Divine Service, the Miniſter or any other for him may as it ſeems lay hands upon him, and put him out of the Church and juſtifie it, *Old B. entries* 554.

Sect. 14. Aſſault, what. If another man do unlawfully ſet upon me, attempt to beat me, ſtrike at me though he do not hit me, or hold up his weapon to ſtrike at me being within his reach, thruſt or puſh me, caſt ſtones at me, though he do not hit me caſt, drink in my face or upon my clothes, beſet my houſe, tear my clothes or the like, this is an aſſault for which I may have this Action. So if one Raviſh me being a Woman, this

Rape. is a foul aſſault and an Impriſonment alſo, for which I may be relieved by this Action. But if one offer to take away my hunting dog from me by force, or ſtrike at me at a great diſtance, ſo that he could neither hit me nor put me in fear of being hit or ſtricken, or if one ſtrike at me, hurl ſtones at me, or do any ſuch like act as before, merrily or accidentally, and not purpoſely and ſeriouſly, in theſe caſes and for theſe cauſes it ſeems no Action will lie, *Fincheſley* 29. 40 *Ed.* 3. 40. *Bro. Treſpas* 336. 236. 9 *Ed.* 4. 26. 22 *Aſſ.* 60: *Old B. entries* 552.

Menace and lying in wait. If one do threaten me to my face or behind my back, to kill or beat me, or lie in wait and watch to do ſo, inſomuch that I dare not follow my buſineſs as at other times, and I have any ſpeciall loſs by this, I may have this Action for my remedy. But if he threaten only to ſue me or the like, or if I have no ſpeciall loſs by the threatening; no Action will lie for this, 18 *Ed.* 4. 28. 10 *Ed.* 4. 28. 7 *Ed.* 4. 24. 3 *H.* 6. 18. And yet if a man furiouſly purſue me, that I cannot avoid him, having fled from him as far as I can; I may then threaten to kill him, if he will not depart, and juſtifie it, *Bro. Treſpas* 28.

Thus we have done with the Treſpaſſes that are done to a mans own perſon; now we are to ſpeak to the Treſpaſſes that are done to him in that which is his, that is, his Wife, Childe, Servant, Tenant, Ward, Houſe, Land, Goods or Cattel.

Violence offered to a man in his Wife, Childe, Servant, *&c.* If one carry or keep away my Wife from me againſt my will, I may have this Action; and yet if my Wife be like to be drowned or be ſick, or otherwiſe in imminent danger, and another take her up and bring her home to my houſe, or any ſafe place to ſuccour and preſerve her, or if one at her requeſt take her up and carry her from a Fair, to eaſe her; no Action will lie for either of theſe things. So it is ſaid if I abuſe my Wife, and a friend take her and carry her to ſue out a Divorce, or to have a Warrant of the Peace againſt the Husband when there is cauſe, that for this I may not have this Action, *ſed Quære* of this, 21 *H.* 7. 27. 9 *Ed.* 4. 33. *F. N. B.* 91. *Old B. entries* 593. 20 *H.* 7. 2. So if one take or keep away my Ward from me being his Guardian or my Son and Heir, knowing it to be ſo, I may have this Action. So if one take away my Son or Daughter: So if one threaten or lie in wait for my Servants to kill or maim them, that they dare not follow their buſineſs, or maim or hurt my ſervant that he doth not, nor can do me the ſervice he did formerly, whereby I have any ſpeciall loſs, I may have this Action for remedy againſt this loſs. But

if

if the threatening be only to ſue my Servants, or the like, or whatever it be, if I have no ſpecial loſs by it, no Action will lie for it, *Old B. Entr.* 552. 20 *H.*7.5. 9 *H.*7.7. *Bro.Treſp.*388.609. So if one take or keep away my Servant from me, knowing him to be my Servant. And ſo likewiſe it is if one threaten my Tenants at will, ſo that they depart from my Lands, and I have any ſpecial loſs thereby, I may have relief by this Action. But if my Leſſees for life or years be ſo threatened, no Action will lie by me for this threatening, *Old B.Entr* 569.593.582.583. So if I be a Gaoler, and one take away my Priſoner from me; or I be a Lord, and one take away my Villain from me; or I be a Soldier and have taken a Priſe in War, and another take it from me, I muſt have this Action.

Wrong done to a man in his Houſe or Lands, or Goods or Cattel.

If any man enter into, burn or break my Houſe, pull down or break down my Walls, or break or carry away my Wainſcot, Doors, Furnaces or Windows of my Houſe, enter into my Orchard, Garden, Cloſe or Lands, and tread, eat, plow, root up, cut or ſpoil the Corn, Graſs, Wood, Hedges or Trees thereon growing, or rob me of the Fruit of my Garden or Orchard, ſet up Pales or a Fold in my Ground, dig or carry away my Land, Coals, Mines or Stones, fill my Ditches: If one dig, root up, break or take away my Poles, Hedges, Gates, Pales, Fences; or if one break, ſpoil, or take away my Money, Plate, Corn, Grain, Cheſt, Houſholdſtuff, Wood cut, Weapons, Ship, Boat, Wain, Writings, Bottles, Wooll ſhorne, or the like Goods, or unlawfully diſtrain any ſuch thing of mine, or abuſe it after it is taken as a Diſtreſs, or ſuffer his Goods to lie in my Houſe, or upon my Ground Damage-feſant: If one kill, beat, hurt, chaſe or take away my Cattel, Hound, Hawk, Maſtiff, Pheſants, Partridges, Poppinjays, Thruſhes, or the like, being tamed and uſing my Houſe, pull o rſheer my Sheep, ſtrike my Horſe in travel, and by that means it throw me down, take away Goods waived, or an Eſtray or Felons goods belonging to me, or unlawfully arreſt or diſtrain my Cattel, or abuſe them being diſtrained, or ſuffer his Cattel to be upon my Ground Damage-feſant: If one kill, hurt, or take away my Deer, or any ſuch like Beaſt, my Cocks, Hens, or my Partridges, or any ſuch like Fowl, whiles it is tame and uſing about my Houſe, my young Pidgeons or Hawks out of their neſts or boxes: If one hunt in my free Warren, deſtroy my Fiſh, or diſturb my Fiſhing, hinder me in my Fold of my Cattel, put any thing in the water I uſe for my ſelf or my Cattel to infect it: If one do ſtop Ditches, and thereby or otherwiſe cauſe the water to overflow or run over my Ground, take Wine out of my Bottles and put water in the room, dig Trenches overthwart the way to hinder my going to my Ground, or let out the water out of my Mill-pond that I cannot grinde, break or cut my Sluces or the head of my Pond, and let out my Fiſh; or break the head of another Pool, and let ſo much water into my Pond, that it doth overflow, and the Fiſh do go out: If any man take away my Tythes, being Parſon: In all theſe caſes before, and ſuch like caſes, I may have this Action for my remedy, *Brownl.* 1 *par.* 30.

It is ſaid alſo, that for taking exceſſive Toll of me by a Millard, I may have this Action; and that if one diſturb me in a Market or Fair where it is due, I may have this remedy, *Bro. Treſp.* 41, and *F. N. B. Treſp. in toto. Old N. B. Treſp. in toto. Co.*9.112. But for this ſee more afterwards. If a Deviſee of a Term or Goods, enter into the Lands or take the Goods before the aſſent of the Executor, he may have this Action againſt him, *Bro.Treſp.*25.

Sect. 15. In reſpect of the caſe, and where this Action will lie for ſuch a thing done, or not.

If I have a Fiſhing or a Warren in another mans Ground, and the Owner of the Ground or another take, hunt, kill or deſtroy my Fiſh or my Game, I may have this Action for my relief, 12 *H.*8.3. *Kelw.*30. If I have Fiſh in a Trunk or Pond, and a ſtranger take them away, I may have this Action againſt him. If I have Hounds, Spaniels, Maſtiffs, Greyhounds, or ſuch like uſeful Dogs, and any man take them from me, or hurt them with me, I may have this Action againſt him, *Hob.Rep pl.*363. 12 *H.*8.3. 18 *H.*8.2. And yet if one have a Dog that doth uſe to kill my Conies in my Warren, or a Hawk that doth uſe to kill my Pidgeons about my Pidgeon-houſe, and I kill him; no Action will lie againſt me for this. Sir *Perſival Willoughbies* Caſe. *Bro Treſp.*387. *Madhurſts* Caſe, *M.* 2 *Jac.*

Matters of pleaſure.

Wild Beaſts and Birds.

If I have a Deer, Hare or Cony, or any ſuch like beaſt; a Pidgeon, Swan, Hawk, Pheſant, Partridg, Parret, Black-bird, Thruſh, Popinjay, or the like Bird that is tame and

and doth uſe my houſe, and any man do take them from me, and hurt them with me, I may have this action. But if any man take any ſuch creature whiles it is wilde, no Action will lie for this, nor if once they were tame and after become wilde again. If one take away my Hawk in flight, or my Deer out of my Warren whiles I am in hunting of him, I may have this action, 12 *H.*8.3. 3 *H.*6.5. 18 *H.*8.2. *Broo. Treſpas.* 407. 215. *Hob. Rep. pl.*363.

If one come into my Warren or priviledged place, though it be not my Ground, and there hunt, kill or take away my game of Fiſh, Beaſts or Fowl, or kill my Cones in my own ground that is no Warren; I may have this action againſt him. And if a man ſpring a Feſant in his own Warren, and it flie into another mans Ground which is no Warren; he may enter the ground and take the Hawk and Feſant; but if they flie into another mans Warren, there his entry is a treſpaſs. But if one kill my wilde hares or conies out of my free Warren and out of my Ground, I can have no action for this. 12 *H.*8.3. *Kelw.* 30. *F. N. B.* 87. 38 *Ed.*3. 10 *Broo. Treſp.*111.

Damag feſant. If a mans goods or Cattel be in my houſe or ground Damage Feſant, albeit it be againſt the Owners will and without his knowledge, yet I may have this Action for the treſpaſs, or Diſtraine them Damage feſant at my choiſe, *Kelw.*3. 13 *H.*7. 10. *Old B. entries.*570, 571. As if a leſſee of my houſe ſuffer his Goods a longer time then is reaſonable, after his leaſe ended, I may Diſtrain them, ſome ſay I may alſo bring this Action againſt him: but it is beſt to make an entry firſt, 13 *H.*7 9. And if the owner of the Cattel enter and take them away before he have tendred amends to me for the Treſpaſs, this is a ſecond Treſpaſs for which I may have this Action alſo, 21 *H.*7.27. If a ſtranger put in his beaſts into the Common where I have common, I may not have this action againſt him, but I may Diſtrain them Damage Feſant, *Co.*9. 112. 15 *H.*7.13.

Chaſing of Cattel. If a man himſelf or with dogs chaſe or hunt my Cattel in mine or another mans Ground, I may have this action; and yet the owner of the ground wherein my Cattel are doing Treſpaſs, may gently by himſelf or his Dogs chaſe them out, and juſtifie it. But if he do them hurt thereby, this Action will lie, *Hill.*16 *Jac. B. R. Per.* 3. *Juſtices in Burges Caſe. M.*5 *Jac. B. R. Glovers Caſe. Co.* 4. *in Terringtons Caſe. Broo. Treſp.* 421. *Co.*8.67. And if ones Pigs be in my ground, I may chaſe them out with a Dog, if I do not hurt them, *Hill.* 16 *Jac. B. R.*

If a mans Cattel be in anothers ground doing treſpaſs, the owner of the ground is not bound to put them into the pound, but may put them out, and if they be thereby loſt he ſhall not anſwer them, *M.*5, *Jac.* Sr *Chr. Hudſons Caſe.*

Goods confounded that cannot be known. If a man take my Corn and put to his, ſo that it cannot be diſtinguiſhed which is his and which is mine, and then I carry away all, it ſeems this Action will not lie againſt me for this, 22 *Car. at Glouc. Aſſiſes, per Serjant Wilde.*

Tenant at will. Waſte. If my tenant at will of my Land do commit any voluntary waſte, as burn the houſes or the like, I may have this action againſt him. But otherwiſe it is of a negligent or permiſſive waſte, *Co.*5. 31. *Dier* 171. *Lit. Sect.* 71 *Broo. Treſp.* 362. And if ſuch a Tenant cut under-wood, not timber, at ſeaſonable times, or having a Mine, dig and ſell there, no Action will lie for either of theſe things againſt him, *Broo. Treſp.* 327. But for cutting Trees this Action, not waſt lyeth. Alſo this action will lye againſt my ſervant for taking away or ſpoiling my goods in his hands and poſſeſſion. *Goldsb.* 72. *Pl.*18.66. *Pl.* 10.

Goods delivered upon truſt, or come without taking into a mans hands. Regularly where a man hath my goods by my delivery upon a truſt, as when I deliver to another my goods to keep, or I deliver Goods to a Carrier to carry, or the like; if he convey or keep them from me, or ſpoil, or ſell them, or negligently ſuffer them to be ſpoiled, I cannot have this action for my remedy, but ſome other action, *Co.*5.14. 2 *H.*7.11, 16 *H.*7.3. And yet if my ſhepherd willfully deſtroy my ſheep, or my Butler willfully ſpoil my plate, or I deliver my Cattel to one to plow or compaſs his land, and he kil them; in theſe caſes I may have this Action againſt him, *Co.*5, 14.31. 2 *H.*7.11. *Broo. Treſp.* 343. 327. 295. 72. *Litt. Sect.*72. So if another do it by the Licence of ſuch a perſon. And by theſe caſes it ſeems this Action ſhould lie againſt the Carrier in the firſt caſe, *Sed quære.* If I be a Taverner, Mercer or Draper, and my ſervant uſing to ſell my goods give away my Goods, it is ſaid I may not

ſaid, I may not have this Action, nor any other againſt the taker, but muſt take my remedy againſt my ſervant, *Broo. Treſp.* 205. *Sed quære.* If my Wife convey away my Goods, and I die, my Executor may not have this Action, but muſt have ſome other remedy, *M.* 8 *Jac. C. B.* If one give me leave to put my Corn in his Barn, and I agree that he ſhall keep the Key, and he ſell the Corn; it is ſaid, I cannot have this Action againſt him, but ſome other. By Serjeant *Wilde*, 22 *Car.* at *Gloceſter* Aſſiſes. If my Goods happen to be in an Executors hands amongſt the Teſtators Goods, unawares of the Executor, no Action of Treſpaſs will lie againſt him for this. But after notice given to the Executor, and a Demand of the Goods, and Refuſal, ſome other Action will lie. 21 *H.* 7. 27. *Broo. Treſp.* 311.

Incidents of Houſe.

We have ſhewed before, that this Action will lie for the owner of a Houſe, againſt him that ſhall take away or ſpoil any of the Incidents of his houſe, as Furnaces, Doors, Wainſcots, Pale, Glaſs, or the like: And for this it is to be known, That all things that are annexed and faſtned to a Houſe by Nails, Screws or Pins, or by Morter or Stones, as Glaſs, Wainſcot, Tables, Shelfs, Vaults, Furnaces, Doors, Locks and Keys, and the like, are ſo inſeparably incident to the Houſe, that be they put on by whomſoever, they cannot be taken away by the Leſſee for life or years, before or after the end of his Term, but he muſt ſubject himſelf to this Action; but he that hath any Eſtate in Fee-ſimple or Fee-tail of ſuch a houſe, may pluck it down if he will, and ſo may a Leſſee that holds it for life or years, without Impeachment of Waſte, 21 *H.* 7. 26. *Co.* 4. 63. 21 *H.* 7. 13. See more in *Property, cap.* 17.

Sect. 16. About taking away Cattel or Goods, and where a man may take his Cattel or Goods from another man, or not.

If a Man do voluntarily take away my Goods or Cattle, and keep them till I pay him money, either without colour or with colour, as under pretence that it is his Herriot, Waiff, or Eſtray, when it is not ſo, this Action lieth; and if he will not reſtore them till I pay Money or Bond, I ſhall have a Recompence for it all in Damages in this Action, *Broo. Treſp.* 354. *M.* 8 *Car. B R. Cannons* caſe. So if a man ſhall any way take away or ſpoil my Goods. If a man drive my Cattel into another mans ground, I may go into the ground and fetch out my Cattel, and yet by this I am a Treſpaſſor to the owner of the ground, and for this he may bring this Action againſt me, and I muſt take my Counter-remedy againſt him that drave them in, *Dodridge* in his Treatiſe, 21 *H.* 7. 27. *D. & St.* 34. *Co.* 1 *part.* 54. But if the owner of the ground drive my Cattel, or carry my Goods without Authority into his ground, I may (eſpecially in a freſh purſuit) go into his ground and fetch them out, and for this he can have no Action againſt me, and yet in this caſe I may not go into his dwelling-houſe to take my Goods again, nor had the Goods been delivered by me, could I have entred into his Cloſe to take them again. 21 *H.* 6. 39. 9 *Ed* 4. 35. *Trin.* 18 *Jac. B. R. Old B. of Entries*, 561. If ones Cattel in drift break a way into my ground, where the Incloſure is good, or into my houſe, the door being open, the Driver may fetch them out, but I may have this Action for the Entry, being a Treſpaſs, *Broo. Treſp.* 321. If I be driving Cattel to Pound, and they eſcape into another Pariſh, or another mans ground againſt my will, and I do preſently fetch them out, no Action will lie againſt me for this, *Broo. Treſp.* 335.

Note.

Whereſoever I may juſtifie the taking of my Cattel, I may juſtifie the taking of their yong ones, if they have any. *Broo. Treſp.* 323. If one take away my Goods from me, I may then preſently take them from him, and juſtifie it, *Kelw.* 62. *Broo. Treſp.* 185. And if I deliver to one Goods to deliver to me on Requeſt, and he deliver them to another, it is ſaid, I may take them away from him, 21 *H.* 7. 13. *Broo. Treſp.* 118. 186.

Acts of kindneſs.

If my dead Goods be in danger of ſpoiling, as my Corn in the Harveſt, and my Neighbor out of his good will doth take it up, or bring it to his own, or my Barn; or if he trench my Meadow where need is, and doth mend it, or if a ſtrangers Cattel be in my Corn, and he drive them out: In all theſe caſes, and for theſe things, done without my leave, I may have this Action. And yet if my own Cattel be in my Corn, and another man drive them out, no Action will lie for this. If a houſe be on fire, I may take any mans Goods out of the houſe, or fire, to preſerve them, and no Action will lie for this. And if my Horſe be faln in a Pit, and in danger, any man may juſtifie the pulling of him out of the Pit, *Kelw.* 88. 2 *H.* 6. 37. 21 *H.* 7. 27. 12 *H.* 8. 2, 15. 8 *Ed.* 4. 35. 13 *H.* 8. 16.

For Publick good.

If a Ship be in danger of drowning, the Marriners may caſt out the Goods to ſave men and juſtifie it. So when a Houſe is on fire, the Neighbors may take out the Goods to preſerve them, *Daffins* caſe. 6 *Jac.* 21 *H.*7.27. If one aſſault me with a weapon, I may (it ſeems) take away his weapon and deliver it to a Conſtable to keep the peace, and juſtifie it, *N. B. of Entries* 651.

Sect. 19. About Entry into, or breaking of another Mans Houſe or Ground, and where it is lawful, or not.

It is a rule that no man may enter into my Houſe or Ground without my authority or licence, or authority of Law. And if he doth, he is a Treſpaſſor to me, and I may have this Action againſt him, 12 *H.*8.2. But in many caſes a man may enter into my Houſe or Cloſe, and be blameleſs. For the opening hereof, therefore take theſe caſes.

View or to fetch Goods.

1. If another man have a Horſe, Timber, or other Goods in my Houſe or Ground, and he enter into it, to ſee or take it away without my leave, I may have this Action againſt him; and albeit he had a Leaſe of the Land a little before, yet if it be now ended, this will not help him, 21 *H.*7.13. 19 *H.*7.9. 14 *H.*8.1. 9 *Ed.*4.35. And albeit I did command my ſervant to deliver the thing to him, yet this will not excuſe the Entry, 18 *Ed.*4.25. If I be an Executor, I ſhall have a reaſonable time to fetch away my Goods out of the Houſe wherein I may enter and take them. And yet if I be a Leſſee of a houſe for the life of *J. S.* or *J. S.* Leſſee for life make me a Leaſe for years, and *J. S.* die; in theſe caſes, if I have Goods in the houſe, and take them away in convenient time, no Action will lie againſt me; otherwiſe it is if I ſuffer them to ſtay too long; and the Judges ſhall ſet down what time is reaſonable, not the Jury, 22 *Ed.*4.27. By Juſtice *Haughton*, 2 *H.*6.15,16. *Brownl.* 1 *part.*224.

2. If a man take away my Cattel or Goods, and put them into his ground, I may follow them and take them again; otherwiſe it is if they were taken away by a ſtranger, or I deliver them to him, or they be in his dwelling-houſe, ſee before. And yet it is ſaid, if a man have my Goods in his houſe, and his door be open, that I may go in and fetch them out. *Howes* caſe, *M.* 9 *Jac. B.R. Broo. Treſp.* 118.186. 21 *H.*7.13.

Flight to ſave life.

3. If a man be aſſaulted and like to be killed, and he flie through my ground to ſave his life, I cannot ſue him for this, 37 *H.*6. 37.

To fetch out lops of Trees.

4. If a man lop a Tree, and ſome of the Lops unavoidably fall into my ground, and he go into my ground, and fetch them out, I cannot have an Action for this, either for the fall or entry; but the neceſſity muſt be unavoidable, elſe an Action will lie for both, *Broo. Treſp.*310. *Hill.* 8 *Jac.* By Juſtice *Dodridge*. And yet if there be two Tenants in Common of a Tree that doth grow between two men, and one of them doth cut and ſeiſe it all; in this caſe the other cannot go into the others houſe or ground to ſeiſe it.

To Repair.

5. If one be bound to repair a Bridg which cannot be done without his coming upon my ground do it; in this caſe he may do ſo at a ſeaſonable time without danger of this Action, *Broo. Treſp.*260. So if one grant me to dig a trench in his ground to lead water to my houſe, if it be ſtopped, I may go into his ground to amend it, 13 *H.*8.15. 9 *Ed.*4.25.

Upon a Licence.

6. If I do licenſe *J. S.* to deliver Wood to *J. D.* in ſuch a Cloſe, and *J. D.* come into the Cloſe to take it, it ſeems this is juſtifiable, *Broo. Treſp.*242.

To take Tithes

7. The Parſon may come into my ground, being a Pariſhioner, and ſhall have a reaſonable time to order and fetch his Tithes, *Bro. Treſp.*345. 325. 49.

To remove a Nuſance.

8. If I have a Mill, and the water that drives it, runs through another mans ground, and ſomething is done there to obſtruct my water; in this caſe I may go into his ground to ſee, and if any be, to remove it, and if it be a houſe, I may abate it, and juſtifie it, 9 *Ed.*4.35.

To Diſtrain.

9. If my Tenant when I am coming to diſtrain, drive his Cattel into another mans ground, or into ſome other ground of his own, held of another man; in theſe caſes I may enter into the ground and take them.

To prevant a common miſchief, and for Publick good.

10. In caſe of a common danger, as if water that runs by a Town be ſtopped, that it may endanger the drowning of the Town, I may go into any mans ground to give it a paſſage, and if a Houſe be on fire, any man may pull down part of it to ſave the reſt; or pull down it, or perhaps other houſes to prevent the burning of many others. So in caſe of Enemies, Soldiers may juſtifie the making of Bulwarks. So Fiſhers may juſtifie the going into any mans ground to amend or dry their Nets. So men may go

into any mans ground to hunt or kill Foxes, Otters, Grayes, and the like Vermin, and all this without the Licenſe of the owner, *Dyer* 36. 12 *H.*8. 2. *Brow. Treſpaſs* 40. 21 *H* 7. 27. 13 *H.*8. 16. 8 *Ed.*4. 35, 18. But a man may not do ſo to kill Hares: Alſo to keep the peace and prevent miſchief, any man may enter into anothers ground, or (as it ſeems) his houſe either. So alſo to apprehend Felons, any man may enter into another mans ground or houſe, and break the houſe alſo if need be: Alſo a man may turn his Plough upon his Neighbors Land in the Field, if it cannot be avoided in Plowing, *Broo. Treſp.* 354. 327. So to make a perambulation, the Miniſter and Pariſhioners may after their uſual manner go into mens grounds. *N. B. Entries* 652. *Old B. Entries* 558. See more after where this Action will lie againſt an Officer.

11. If a Mans Horſe or Beaſt be like to be drowned, I may go into any mans ground to ſave him, and if he be like to be killed, I may go into into his houſe to preſerve him, 12 *H.*8. 2. 13 *H.*8. 5. And yet if I go into another mans ground to ſave his horſe from ſtealing, or his Tithes from being ſpoiled by weather or Pigs, he may have this Action againſt me, 21 *H.*7. 27. 9 *Ed.*4. 35. To ſave Men or Cattel in danger.

12. If one be unlawfully impriſoned in my houſe, and he break the houſe, and get out, I cannot have this Action againſt him, 9 *Ed.*4. 35. 21 *H.*7. 37.

13. If one have ſheep ſtoln, he may go into any mans ground where he doth ſuſpect the ſheep are, to ſee the ſheep whether they be his or not. By Juſtice *Berkley*, *M.* 8 *Car.* To look for ſtoln Goods.

14. If the Sheriff have a Replevin againſt my Goods, the Plaintiff may come with him into my Cloſe to ſhew him my Goods, 3 *H.*6. 37.

15. If I have Cloth in a Tailors or Sheremans ſhop, and the door be open, I may go in to ſee it, *Howes* caſe. *M.* 9 *Jac. B. R.* To ſee a Mans Goods.

16. If I make a Leaſe of my dwelling-houſe, rendring Rent, or one is bound to pay me money on an Obligation in my dwelling-houſe; in this caſe he may come into my houſe to do it, when I am there to tender. But if it be to be done in another mans houſe. *Contra. Plow.* 71. 18 *Ed.*4. 25. 9 *Ed.*4. 25. To pay Mony.

17. If I or the Commonwealth have a way through anothers ground, or title of Common there, or cauſe to diſtrain there; in theſe caſes I may come into the ground to uſe or do it, and no Action will lie againſt me for this in any of the caſes before, *M.* 7 *Jac. B. R. Old B. of Entries* 559, 560. And yet if I be beſides the way, or take more common then my due, this Action will lie for this exceeding. To take his Way, Common, &c.

18. If a man have buſineſs with me to ſhew me a deed for preventing a difference, or the like, and I being in my houſe or ground, he come in to ſpeak of the matter; it is ſaid this is not actionable, *Broo. Treſp.* 23. *Sed Quere.* For if he do it without licence or invitation, it ſeems to me actionable.

19. In many other caſes the Law gives power to enter into Houſe or Land, as Travellers or others, may go into a common Inn or Hoſtry, a man may Diſtrain for his Rent or Damage-feſant, a man that hath right to an Eſtray, may ſeiſe him, a man that hath a Reverſion of Land may go into it to view it, a man that hath power to ſell Land, hath power to view it and value it; a Commoner may go on the Common to ſee his Cattel: The Kings Purveyor might have taken up Cattel for the King, and no Action will lie againſt theſe men for any of theſe things.

But in all theſe, and ſuch like caſes, where a man may juſtifie his Entry into another mans houſe or ground, for ſome ſpecial purpoſe, he muſt ſee he do not abuſe his power there. And therefore in all the caſes before of power given to enter into Lands, if he ſhall break the Hedges, leave open the Gates, or otherwiſe abuſe his power, he ſhall be puniſhed as a Treſpaſſor from the beginning. And in the laſt caſes, if a Traveller or other, ſhall ſtay in the Inn over-long, break or take away any of the Houſhold-goods, break the Windows of the Inn, or the like, or the party diſtraining in the next caſe ſhall work, kill, or otherwiſe abuſe the Diſtreſs, or in the next caſe he ſhall hurt, ſell, or kill the Eſtray, or in the next caſe, if he in Reverſion ſhall break the houſe to come in, or being come in at the doors, ſtay all night, cut down Trees, or dig the ground, or the Purveyor ſell the Cattel or Goods taken up; in all theſe, and the like caſes before, the Law doth reckon all that is done unlawful, and the party grieved may have this Action for his relief.

Debt. And yet if one enter into an Inn, and do not pay for his victuals he calleth for, or being diſtrained, and he offer the Rent, for which he was diſtrained, and the Diſtrainer will not deliver the Diſtreſs; in theſe caſes, and for theſe cauſes the offender is not reputed a Treſpaſſor *ab initio*, but in that thing onely.

Action of the *Caſe.* And in the firſt caſe the In-keeper ſhall have an Action of Debt, or on the Caſe, for his money; in the latter, an Action of Treſpaſs, or Treſpaſe on the Caſe for his Relief. *Co.* 8. 146. 5. 76. *D. & St.* 112. *Dyer* 36. 134. 5 *H.*7. 11. 16 *H.*7. 14. 21 *H.*7. 22. 9 *H.*6. 29. 11 *H.*4. 75.

In like manner it is of an authority given by one man to another, if he to whom it is given, exceed and abuſe it, as I give one leave to enter into my houſe or cloſe, and he break the Houſe, or cut down Trees, or I give one power to take one, and he take two of my Horſes, or I give one power to ride my Horſe to *Dover*, and he ride him further; in theſe, and ſuch like caſe, he is a Treſpaſſor onely in the exceſs. And if there be violence, or colour of violence in the Act, it is puniſhable by this Action. But if the injury be rather in matter of Fraud, it is puniſhable by an Action of the Caſe. *Broo Treſp.* 327. 295. 72. And in all theſe and ſuch like caſes before ſet forth, the Action may be avoided by ſetting forth the matter in a ſpecial Plea.

Action of the *Caſe.*

By inevitable neceſſity or accident. If one do me a Treſpaſs againſt his will; as if his Cattel come unawares into my ground, yet I may have this Action againſt him; and yet if my Dog of his own accord without any provocation of mine, kill or chaſe a mans Cattel, I ſhall not be charged with this, unleſs it be ſheep, and the Dog have been uſed to chaſe and kill them, and I have had notice of it. *Dyer* 29.

By Cattle in Corn. If all the Neighbors in a Village take their Corn out of their Field, aed one perverſe fellow leave his Corn there of purpoſe, and the Neighbors put their Cattel in the Field, and the Cattel eat his Corn, he may not have this Action for this. *Bro. Treſp.* 352.

By the fall of Lops. If a man lop a Tree, and ſome of the lops by chance, and againſt his will, that doth lop, fall into my ground, or on my hedg, and he fetch it out again preſently; yet in this caſe, and for this I may have this Action for one and other: But if there be an inevitable neceſſity, or it fall out by the Act of God onely, or by a ſtrange wind, or the like, no Action will lie for this, *Broo. Treſp.* 310. 10 *Ed* 4. 2. 20 *Ed.* 4. 6, 37.

To catch a bit in paſſing on the way. If one have a way through my ground where no incloſure is, and he drive his Cattle there, or through the Corn field, where the way is, and they catch a bit as they go againſt the drivers will, being as careful as he can, no Action will lie for this: But if the driver bait, or keep the Cattle there, I may have this Action againſt him, or the owner of the Cattle, *Broo. Treſp.* 321. 351.

To part Cattle. If my Cattle be with another bodies ſo together that I cannot part them, and I drive them to a convenient place to ſhift and part them: No Action will lie againſt me for this, *Broo. Treſp.* 354. 327.

To Plough Land. If a man in Earing be neceſſitated to turn his Plough upon my Land according to the faſhion of the Countrey, and the Sullow hap thereby to turn up ſome of my Land, or the Cattle hap to catch a bit of my Graſs or Corn on my Land, no Action will lie for this. *Broo. Treſp.* 354. 327.

Upon an Eſtate made by an Infant, Feme-covert, *&c.* If an Infant make a Feoffment, and make a Letter of Attorney to give Livery of Seiſin, and the Attorney do enter; he is a Treſpaſſor, and for this the Infant may have this Action. But if the Infant give Livery of Seiſin with his own hands, he cannot then have this Action againſt the Feoffee. So if he ſell Goods, and the Vendee take them without his Delivery, by this he is a Treſpaſſor: But if the Infant deliver the Goods with his own hand to the Vendee, *contrà*. *Bro Treſp.* 16. 338. *Perk. Sect.* 16, 17.

If an Infant, Feme-covert, or Man *per dureſſe* grant a Rent-charge out of his Land, and the Grantee by colour thereof diſtrain upon the Land, the Cattle of the Infant, Husband that hath in right of his Wife, or him that granted by *dureſſe*; in all theſe caſes this Action lieth againſt him that diſtraineth, 21 *H.*7. 39. *Broo. Treſp.* 151.

To skour a Ditch. If a man have an ancient Ditch in my ground, and he come at ſeaſonable times to skour it, and doth skour it, keeping the old breadth, I cannot bring an Action againſt him for this. By Baron *Henden* at *Gloceſter* Aſſiſes, 17 *Car.*

Treſpaſs diſpuniſhable. In Hay. If a man give me leave to ſet a Rick of Hay in his ground, till I can conveniently ſell it, and after two years time he makes a Leaſe of the ground to another, and he

turns

turns in his Cattle, and doth eat up my Hay; in this caſe I can have no Action againſt him, for by making the Leaſe, it ſeems the Licenſe is determined, *Hill.* 17 *Jac. B.R.* Sir *William Webs* caſe.

In Tithe.

The Parſon ſhall have a reaſonable time to prepare and fetch his Tithe on my Land: But if he leave it on my Land any long time after my Corn is gone, and my Cattle ſpoil it, he hath no Remedy, 12 *Ed.*4.6.

In Gates. Nuſance.

If a new Gate be ſet up in the High-way, where none was before, and I being a Traveller break it to peeces; this is juſtifiable, and no Action will lie againſt me for this, Adjudged. *Car. B.R. James* and *Haywoods* caſe. So for any other Nuſance.

Sect. 18. The Ownerſhip and Poſſeſſion of the thing wherein the Treſpaſs is done.

A man that will maintain this Action for any wrong done to, or in his Lands or Goods, muſt have a good Ownerſhip and Property, or at the leaſt a good and lawful Poſſeſſion in the thing wherein the Treſpaſs is ſuppoſed to be done: And for this, take theſe things.

1. A man may gain a Property into Goods, two ways. Firſt, Either by Act of the Party, as by Gift, Sale, Legacy, and the like: Secondly, Or by Act of Law, as by Waiving, Straying, Shipwrack, Forfeiture, Executorſhip, Adminiſtration, Treſpaſs, and Recovery of damage, Stealing and open Sale, by Tenure, Cuſtom, as Herriot, and the like. Juſtice *Dodridge*, 2 *part. f.*72, *&c.*

2. A Leſſee for years after his Leaſe is ended, may have this Action for a Treſpaſs done upon the Land before the Leaſe was ended. *Plow.* 431. *Broo.*456.

3. Any man that hath but a bare poſſeſſion of, and no Title to Land, may have this Action againſt him that hath no right. *Plow.*431. 546. *Broo.*456. *Co* 5. 85.

4. No man can have this Action for a Treſpaſs done upon his Land, until he be poſſeſſed of the ſame by Entry: And therefore if Land deſcend to an Heir, or a Leaſe to begin at *Michaelmas*, or one hath a title of Entry for a Condition broken, or the like, and a Treſpaſs is done upon the Land before the Entry of the Heir in the firſt, the Leſſee in the ſecond, or him that hath title to enter in the third caſe; in theſe caſes the party grieved, may not have this Action. 11 *H* 7.22. *Plo.*142. 22 *Ed.*4.37.

5. If Leſſee *pur auter vie* or Leſſee for years keep himſelf in poſſeſſion of the Land after the Term and Eſtate ended, the party that is to have the Land, cannot maintain this Action till he have made his actual Entry, and then onely for the Treſpaſs done after, and not before his Entry. *Plow.*133. 136. *Broo. Treſ.*365. *Co.*1.57. 11 *H.*7.22.

6. If an Office finde Land in a Subjects hands to Eſcheat, he that is in poſſeſſion of the Land, cannot afterwards bring this Action for Treſpaſs done in the Land. *Plow.* 489. 19 *Ed.*4. 2.

7. If one give or ſell me Goods, and before I get the poſſeſſion of them, another man doth take them away or hurt them; in this caſe I may have this Action for my Remedy. *Broo. Treſp.*303.

8. If I borrow a Horſe to ride a journey, and the owner or a ſtranger take away the Horſe from me before I have done my journey, it ſeems I may have this Action; and albeit I abuſe him, or ride him out of the way, yet he cannot take him from me till I have done my journey. *Lees* caſe.

9. A man may have this Action for a Treſpaſs done in Goods, wherein he hath onely a poſſeſſion and no property. And therefore it is no good Plea to this Action, that the goods be the goods of a ſtranger, and not of the Plaintiff. 4 *Ed.*4.75. 3 *H.*6.32.

By cutting off, or taking away Trees.

If a man cut or carry away my Trees, I may have this Action againſt him. And for this, take theſe things.

1. If a Tenant in Tail ſell his Trees growing upon the Land, and die before they be cut, in this caſe the Vendee may not cut and take them away, but he will be liable to this Action, by the Heir, or by him in Reverſion. But otherwiſe it is of Trees ſold by Tenant in Fee-ſimple. *Perk. Sect.* 58, 59.

2. If I grant to another Eſtovers in my Wood, by the view and delivery of the Baily, and he take them without leave of the Baily: Or if he have power to take in my Wood to any uſe without asking, and he take more then he doth put to that uſe, I may have this Action. *Broo. Treſp.*327. And yet if he cut it before he do uſe it, to the end it may be more ſeaſonable and fit for uſe, no Action will lie for this, 10 *Ed* 4.3. *Brownl.* 1 *part.* 44.

3. If

3. If I be a Leſſee for life or years of Land, and a ſtranger cut down Timber, or do any other waſte, I may bring this Action againſt him, and ſhall recover treble damages, becauſe I muſt be charged ſo much in the Action of Waſte againſt me.

4. If one ſell me all his Trees in ſuch a Cloſe, and after he cut them down himſelf, and then I fetch them away, no Action will lie for this, *Dyer* 305. So if after this ſale he ſelleth his Cloſe to another, and I do then cut and carry away the Trees, I may juſtifie it. *Broo. Treſp.* 400.

5. If I ſell a Wood, except forty Oaks, to be taken away by me in two years, and I do not cut them within the time, and then he do cut all, and do not leave me forty Oaks; in this caſe I am without Remedy. *Broo. Treſp.* 50. 399.

Waſte.

6. If my Leſſee for life or years do a Waſte in the Lands leaſed, I may not have this Action, but muſt have Remedy by an Action of Waſte. And yet if I make a Leaſe for life or years of a Cloſe, excepting the Trees, and the Leſſee or a ſtranger do Treſpaſs in the Trees, Acorn or Fruit thereof, which in this caſe I am alſo to have; for this, this Action and not an Action of Waſte lieth, *Co.* 5. Sir *Thomas Palmers* caſe. See more in *Property, cap* 17.

By cutting, taking away of Corn or Grais.

If a man cut or carry away my Emblements, *viz.* my Corn or Graſs, I may have this Action againſt him. But for the further knowledge hereof, take theſe things.

Executor.

1. If a Tenant in Fee-ſimple, Fee-tail, for life, or at will, ſow his Land, and die before he reap it, his Executor ſhall reap it: So where-ever an Eſtate dependeth on a life. If a Leaſe be made for life, the Remainder in Fee, and the Leſſee for life make a Leaſe for years, the Leſſee for years ſow the Land, and after the Leſſee for life die; in this caſe the Leſſees Executor, not he in Remainder, ſhall have the Corn, *Co.* 5. 85. So if Tenant in Dower ſow her Land and die, her Executor ſhall reap it. 20 *H.* 3. 2. *Perk* 522.

Husband and Wife.

But if ſhe ſow her Land, and then take a Husband, and he die before it be cut; in this caſe ſhe, not her Husbands Executor, ſhall have it. *Broo. Emblements* 26. *Co.* 5. 116. *Co.* upon *Littl.* 55. And if the Leſſor of a Tenant at will, determine the will himſelf after the Corn is ſowed, the Tenant at will, not the Leſſor, ſhall have the Corn, *Co.* upon *Littl.* 55. But if the Tenant at will, himſelf determine the will, *contrà*. And if ſuch a Tenant after he is diſcharged ſhall enter again, and then ſow the Land; in this caſe the Lord, and not the Tenant, ſhall have it. *Co.* 5. 116. *Dyer* 173. And if any Tenant do onely ear and dung the Land, and it be not ſowed before his death, he loſeth the Corn. *Littl* 68. *Co.* 5. 116. *Perk* 512. 37 *H.* 6. 25. And albeit the Corn be cut, yet he that hath right to it ſhall have it.

2. If a Tenant for years in Certain, who knoweth the end of his Term, ſow the Land, and his Term end before the Corn be ripe and cut; he that hath right to the Land, not the Tenant, ſhall have the Corn. *Littl* 68. *Co.* upon it.

3. If a man under colour of a Leaſe, or other Conveyance, ſuppoſing him to be good, when he is not, doth ſow the Land; not the owner nor his Executor, if he die, but he that right hath to the Land, if he ſhall enter, muſt have the Corn. *Lees* caſe. 9 *Jac.*

4. If two be Tenants in Common, and one die, and his Wife hold in Common, and ſow the Land, and die; in this caſe, neither the other Tenant in Common, nor the Heir, but the Executor of the Woman, ſhall have the Corn, *Perk.* 523.

5. If a Parſon die before the Corn is reaped, when the Glebe-Land is ſowed, and another Parſon made; in this caſe, not the Succeſſor, but the Executors or Adminiſtrators of the firſt Parſon dead, ſhall have the Corn: But the Tithes accrewing, during the Vacation, muſt go all to the Succeſſor. 21 *H.* 6. 30. 34 *H.* 6. 33.

Property.
Executor.

6. If a Diſſeiſor, or a Diſſeiſor of a Diſſeiſor, or a Feoffee, Donee or Leſſee of the firſt or ſecond Diſſeiſor, ſow the Land, and cut and carry away the Corn, or cut and carry away the Graſs or Trees; or gather and carry away the Fruits, Apples, Nuts, *&c.* or give or ſell, either the one or the other; in theſe caſes after the Regreſs of the Diſſeiſee, the Property of it all is in him, and he may take it where ever he finde it; and if he die his Executor ſhall have it: And ſo it ſeems is the Law for Flax or Hemp, or any other Annual profit; and if it be gone he ſhall recover damages in Treſpaſs. *Co. Inſt.* 1 *part* 55. 11. 51. *Dyer* 31. *Perk.* 519. *Co.* 5. 85.

Husband and Wife.

7. If one be ſeiſed of Land in the right of his Wife, in fee or for life, and he ſow the Land,

Land, or he make a Leaſe for years, and the Leſſee ſow the Land, and after before the end of the Tearm the Husband or Wife die, his Executors, or the Leſſee, or his Executors, ſhall have the Emblements, 7 *H.* 4. 17. So if a Joint eſtate be made to the Husband and Wife, and the Husband ſow the Land and die, his Executor ſhall have it, *Co.* 1 *part* 55: *Dyer* 316. If Land be leaſed to a Husband and Wife at will and after they be divorced *Cauſa præcontractus*, and the Land be ſowed before the Divorce; in this caſe the Husband, not the Lord, ſhall have the Corn, *Co.* 5. 116. If the Wife of a Copie-holder that holdeth *Durante viduitate*, according to the cuſtom ſow the Land, or make a Leaſe, and the Leſſee ſow the Land, and before it be cut ſhe take a Husband; in this caſe the Lord or his Executors, not the Husband ſhall have the Corn, *Co.* 5. 116. Executors.

8. If one ſeiſed of Land in Fee have iſſue a daughter, and die, his Wife being privily with childe of a ſon, and the daughter ſoweth, and after the ſon is born, the daughter in this caſe ſhall reap it, though the ſon enter before the Corn be ripe, *Co.* 1. 55.

9. If a Tenant by Statute ſow the Land, and after ſome extraordinary increaſe happneth that he is ſatisfied; in this caſe the Tenant ſhall notwithſtanding reap it, *Co.* 1. *part* 55.

10 If the eſtate of the Tenant, though incertain, be upon a defeaſible Title by a right paramount, or if the eſtate of the Tenant determine by his Act, he that hath right or entreth, not the Tenant, ſhall have the Corn. And therefore if one enter upon Land on a Condition in Deed, or al Condition in Law, as if Leſſee for life or or years of Land, alien it in Fee, or do waſte; or if a Feoffment or Leaſe be made on Condition, and the Condition be broken: or the Lord of a Copy-holder enter for a Forfeiture on his Tenant. So where one commits Felony and forfeit, and an entry is made for the Common-wealth; in all theſe caſes the Feoffor, Leſſor, Lord, or Keepers of the Liberties ſhall have all the Emblements that are growing, and not cut upon the Land at the time of his Entry upon, or recovery of the Land. But if it be cut and ſo ſevered from the Land before the entry, *contra*. So where ever one doth recover Land in an Action, he ſhall have the Corn upon it, *Co.* 5. 115. 4. 21. *Perk. ſect.* 515. *Co. upon Lit:* 55. 5 *H.* 7: 16 *See more in Property, ch.* 17. And in all or moſt of theſe Caſes where any man doth cut or take away the Emblements that doth belong to me; I may have this remedie by this Action of Treſpaſs. *Brownl.* 1. *part* 221.

This Action wil lie againſt a Sheriff his Bailiffs or under-Officers, or any other ſuch like Officers. But for the further opening of this point, take theſe caſes following. Againſt an Officer.

1. If a Sheriff have a Writ againſt the Lands or Goods of another man, and he miſtake and execute it upon my Lands or Goods; as if he take my Horſe under my ſervant in a ſute againſt him; or repleive my Goods for another mans, I may have this Action againſt him. And it will not excuſe the Officer in this caſe to ſay, that the Plaintiff in the ſuite, or any other man did affirm, that the Lands or Goods were the Lands or Goods of the Defendant, *Dyer* 295. *Kelw.* 129 119. *D. & St.* 149: 150. *Brownl.* 1 *part* 210. 226. *Sect.* 19. For miſtaking the Goods.

2. If another mans Lands or Goods be leaſed or pledged to me, and the Sheriff take them as his Lands or Goods, I may have this Action againſt the Sheriff, *Bro. Treſpas* 364.

3. If the Sheriff or any of his Officers having Proces againſt my Land or Goods, exceed his Authority, as upon a common Proces, *Capias ad reſpondendum, Latitat*, or the like Proces, or a *Capias ad Satisfaciendum, Fieri facias*, or the like Execution againſt me; if in the Executing of theſe Writs he brake open my Houſe, Doors or Cheſts, which is more then he can juſtifie, for he may not (as it ſeems) in this caſe do more then come in when the Door is open, and cannot pull the latch or open it; in theſe caſes I may have this Action againſt him, *Co.* 5. 93. 8 *Ed.* 4, 4. 18. *Ed.* 4. 41. *Hob. Rep. pl.* 62. *Brownlow.* 1 *part* 117. For breaking my Houſe.

4. If upon ſuch a Writ, Proces or Warrant againſt my Lands or Goods, in Executing whereof or otherwiſe, where an Officer may break my houſe, as upon an *Habere facias Seiſinam*, or *Poſſeſſionem*, or *Capias utlegatum*, or to apprehend Felons or Adulterers, or to ſearch for ſtolen Goods, or upon a *Capias ad Satisfaciendum*, to take another man in my houſe; in theſe and ſuch like caſes, if he break open Where one may break a Houſe.

my

my houſe or Doors before he hath firſt demanded the opening of the Doors, I may have this Action againſt him, 1 *H.* 7. 6. 13 *Ed.* 4. 9, *Co.* 5. 90. 63. *Bro. Treſpas* 248. *Brown l.* 1 *part.* 50. 221.

5. If in all theſe and ſuch like caſes the Officer do but his duty, no action will lie againſt him; & therefore if the Offcers of the County-Court within their Juriſdiction, attach mens Goods by Warrant of the Court, and take them with them, or leave them with the owners, or others in their places do according to their duties, they may juſtifie it, 9 *H* 7. 6:

If a Sheriff execute a writ the retorne day it is a good Execution. *Goldsb.* 142. *pl.* 56. *See Diſtreſs.* If a writ come to him to doe Execution of the goods of *I S* and he make Execution of the goods of *I N*, he is a Treſpaſſor, and albeit the Plaintiff, himſelf did direct him to theſe goods; this will not helpe him unleſs there be practiſe between him and *I N.* and ſo in caſe of Replevin upon the goods of a wrong man. Alſo the party grieved may have this action againſt him that did miſguide him. *Brownl.* 1 *part.* 211. So if a Bayliff execute Proces made to him by the Steward of a Court where the Court had not Juriſdiction. *Brownl.* 1 *part.* 210.

6. If one inform a Conſtable that *A* hath robbed *B*, and he doth thereupon enter into the houſe of *A* to ſearch for the Goods ſtolen, and in truth no Robbery is done; in this caſe the Lord-Keeper held, That this Action will lie againſt the Conſtable; but the two chief Juſtices held the contrary, *Hill.* 3 *Jac. in the Star Chamber. See Authoritie. Licence.*

7. If a man have taken my Goods, and impounded them in his own Cloſe, and a Replevin come, and the owner of the Ground reſiſt it, if then the Officer break the Cloſe to do it, this is not Actionable, 21 *H.* 7 27. 4 *Ed.* 4. 35.

8. If an Officer do any ſuch Act as belongs to his Office without the precinct of his command, as a Conſtable without his Pariſh, regularly he is by this a Treſpaſſor, and this is actionable; and yet if an Officer attach my Goods within his Juriſdiction, and I reſcue them, and cary them without his precinct; in this caſe it ſeems upon a freſh purſuite, I may go after them, and take them again, *Bro. Treſp.* 23.

About a Diſtreſs.

If one diſtrain my Cattel or Goods without any cauſe or colour, or for a Debt on a Bond, or Fine, or a Amearcement in an Court-Leet that is not legally ſet, or any ſuch like cauſe that is not good or Juſt. Or if a man having diſtrained my Goods, will not tell me requiring it, and offering to give ſatisfaction, for what cauſe he diſtrained, or if having cauſe to diſtrain, he do diſtrain beaſts not diſtrainable, as beaſts of the Plough, or ſheep of the Fold. Or if having diſtrained beaſts diſtrainable, he after abuſe them, as if being a Horſe or Ox he work it, or being unruly he fetter it, or tie it to the Pound, ſo as it be thereby hurt, or if he put the diſtreſs in an unknown place that I cannot tell how to replieve it. Or if he take them out of one County and put them in a pound in another County; or if he diſtrain them in the high-way, or a place not diſtrainable; in all theſe caſes I may have this Action, *Co.* 8. 147. *D. & St.* 112. *F.N.B.* 47, 48. And yet it is ſaid, if a Lord diſtrain upon his very Tenant without any juſt cauſe, that he may not have this Action for this wrong. And it is ſaid, if the Lord diſtrain for Rent, and the Tenant offer the Rent, that no Action but Detinue lieth. *Bro. Treſpas* 29. *H.* 7. 11. *Bro.* 344. 220. If my ſervant take a diſtreſs for me, and the owner of the Cattel deſire me to deliver them, and if he pay not the money by a day, that he ſhall have them again; in this caſe it is ſaid, if he pay not the monie, that my man may take them again, *Bro. Treſpas* 29.

5. Severall Treſpaſſes for which the Treſpaſſor is to be further puniſhed then to give ſingle damage to the partie wronged. Deſtroying Fiſh-ponds taking away Fiſh.

If I be about to diſtrain for a Rent, and the Tenant ſeeing me coming to diſtrain, drive his Cattel into another mans ground, not held of me, and I diſtrain them there, no Action will lie againſt me for this, *Old B. entries*, 570. If a Diſtreſs be taken from me after I have diſtrained, I cannot for this have this Action. But I may have a Reſcous, *M.* 7 *Jac. Co. B. Brownl.* 1 *part.* 12. 221. 224. There are divers Treſpaſſes which by certain Statutes are to be further puniſhed, then by ſingle Damage. As

1. For breaking cutting or deſtroying the Head or Damme of any Poole, Mote, Stews, or Pits wherein are Fiſh, and for fiſhing in any ſuch Place againſt the owners will, a man is to be impriſoned 3 months, and then put in ſureties for his good behaviour 7 yeares, or elſe to continue in priſon till he ſo doe; and he is to pay to the partie grieved treble damages.

2 For

2. For breaking into, and hunting in any Park, or incloſed ground to hunt and kill the Deer there, or Coneys there, or to take away any Hawk, or any Hawk Egges out of any mans Woods, a man is to be puniſhed in the ſame manner and meaſure. 5 *Eliz.* 21. Robbing Parks of Deer and Coneys.

3. If it be for killing Deer, he is to be bound with two good Sureties, or in ſtead of trebble damages, the party grieved may recover of him ten pound for his ſatisfaction. And when he is ſatisfied for the wrong, he may, if he will, releaſe him of the Good-behavior. 7 *Jac.* 13. 3 *Jac.* 13. Taking Hawks and Hawks Eggs.

4. For wilful cutting of the head, or dam of any Pool, Mote, or Stew, or the head, or pipe of any Conduit, or burning of any Cart or Wain load of Coals, or other Goods, or burning of any heaps of Wood prepared for Coals, Billet, or Talwood. And for cutting out the Tongue of any tame Beaſts; and for cutting of a mans Ear (except it be by an affray, *&c.*) And for barking of a mans Fruit-trees. For any of theſe offences, the offender muſt pay to the party wronged trebble damages for his amends, and pay ten pound penalty to the Lord Protector. 37 *H.* 8. 6.

5. For cutting and taking away Corn growing, robbing an Orchard or Garden, digging up or taking away any Fruit-trees, breaking any Hedges, Pales, or other Fences, cutting or ſpoiling any Woods, or Under-woods ſtanding and growing, or the like, the offender is (and ſuch as receive the things, are) to give ſuch amends to the party wronged, as any Juſtice of Peace ſhall ſet down: And if he do not perform the Order of the Juſtice of Peace; or the Juſtice think him unable to make amends by money, he is to be whipped. 43 *Eliz.* 7.

Sect. 20. 6. What ſhall be ſaid to be a good Plea in Bar, and avoidance of this Action, or not.

There are divers things to be pleaded in avoidance of this Action: There is the general Plea, which is Not guilty, and there are divers ſpecial Pleas; and the ſpecial Pleas are ſome of them of one nature, and ſome of another, for ſome of them found in a way of juſtification, when the matter doth contain a good Reaſon to maintain the lawfulneſs of that he did, for which he is now queſtioned: Some of them found in a way of excuſe onely, and will free a man from any puniſhment for the thing ſo done at that time: And ſome of them found in acquital of a man altogether, and contain ſo much, that he is not guilty at all: And ſome of them found in diſcharge of him of the Action whereto he was once chargable and liable. And the Defendant muſt be very careful, for if he have matter of juſtification or excuſe to plead, he muſt be ſure to plead it ſpecially; for in thoſe caſes if he plead Not guilty, it will be found againſt him, *Co.* 5. 85. upon *Littl.* 282, 283. *Brownl.* 1 *part.* 224.

Sect. 21. Matter of Juſtification.

Special Pleas by way of Juſtification, are ſuch as ſet forth ſome ſpecial thing, by which he doth juſtifie the thing he doth with another mans Lands or Goods; as that he did it by authority. And this may be given either by the Law, or by the party: Wherein to make it good, there muſt be two things. Firſt, A good Authority: Secondly, It muſt be well perſued.

In Treſpaſs for Entry into Land, it is a good Plea to make a good Title to the Land or Common in it, and ſo for Goods. *N. B. E. in toto. O. B. E.* 566, 567, 565, 590, 580.

For Aſſault.

It is a good Plea to a Treſpaſs for an Aſſault and Battery, to ſay that the Plaintiff began, *&c. N. B. of Entries* 644. And to this Action for Impriſonment, Aſſault or Battery, That he did it by neceſſity, in an Arreſt to inforce obedience, or the like, *Old Book of Entries*, 599. 598. 560. It is a good Plea in Treſpaſs for taking a Horſe, to ſay, he borrowed it for a time, or a purpoſe which is not yet out or done. *Broo. Treſpaſs* 337. In Treſpaſs for cutting Trees, it is a good Plea, That the Plaintiff hired him to do it, *Broo. Treſp.* 383. In Treſpaſs for taking of Goods, it is a good Plea to ſay, That the Plaintiff left them in the Defendants houſe, and after there was an Agreement between them, that he ſhould keep them till the Plaintiff had paid him ten pound, which he hath not paid him, 21 *H.* 7. 13. But it is no good Plea to ſay, That the Goods were the Goods of a ſtranger, and not the Goods of the Plaintiff, 4 *Ed.* 4. 75. 3 *H.* 6. 32. In Treſpaſs for Entry into a Houſe, it is a good Plea to ſay, He entred to apprehend a Felon, and took his Goods that were there, *Old Book of Entries* 580. In Treſpaſs for taking of Goods, it is a good Plea to ſay, He did it by Warrant, as Bailiff of a Court-Leet for a Forfeiture, *&c. N. B. of Entries*, 665.

or be diſtrained for rent ſervices, *Old B. of entries* 604. 605. 603 That he diſtrained for Subſidie, Fifteens or the like, *Old B of entries* 601. So that he took them by vertue of any Proces out of a Court enabled with power to make out ſuch Proces, *Old B. of entries*, 598. 599. 600. That he took the goods for Hariot, Waif, Eſtray, Wreck, or the like. *Old B. of entries, in toto* 584. Or that he diſtrained them for pownage, or the like; or for levying of expences for Knights of the Parliament, or the like, *Old B of entries* 599. *See Authoritie.*

His Freehold. In Treſpaſs for entry into Land, it is a good plea to ſay, That it was his Free-hold or the Free-hold of another from whom he had Authority to do what he did. *Br. ch.* 47. 23. *New B. of entries*, 645. 582. So if it be for putting in of Cattel, it is a good Plea to ſhew he hath right of Common there, and under colour therof he put in his Cattel, *Bro. Treſp.* 30.

If one have Corn upon anothers Land, and he take it, and the Owner of the Land ſue him; he muſt juſtifie, and may not plead Not guilty, *Co.* 5. 85.

In Treſpaſs for taking Cattel, it is a good bar to ſet forth a good ſale to the Defendant, and that he thereby took them *Bro. Treſp.* 328. For cutting Trees, it is a good plea to ſay that the Plaintiff gave them to the Defendant, *Bro. Treſp.* 42.

There are divers other Pleas that enure by way of bar, as a Judgement had and Damages recovered againſt the defendant for the ſame Treſpaſs, in another Action of the ſame or another nature, *Fitz. Corona.* 110. And if an Action be brought againſt a man for a Treſpaſs by aſſault and battery done by him, it is a good plea to ſay it was done by him and another, and the plaintiff hath recovered Damages of the other. But if the beaſts of *A* and *B* come together into my Ground; in this caſe I may recover ſeverally, and this plea will not hold. *Hill.* 18 *Jac. B. R. Hunneyes* Caſe.

Arbitrement. Arbitrement may be alſo pleaded in bar of this Action.

Accord. Alſo Accord with ſatisfaction may be pleaded in bar of this Action. For the clearing whereof take theſe things.

1. The thing given and received muſt be valuable and ſatisfactory, a charge to the giver, and a benefit to the receiver. And therefore if one plead, that whereas there were divers Treſpaſſes committed by each of them, one upon another, and by mediation of friends they agreed one ſhould go quit againſt the other, this is no plea, neither will it bar in the Suit. So in an entry on the Statute of *Rich.* That the Plaintiff ſhall reenter and have his Land in peace, and that he ſhall deliver in the Writings that he hath that do concern the Land, *Dyer* 356. 16 *Ed.* 4. 8. 9 *Ed.* 4. 19. *Fitz. Accord.* 3. 4. So if it be in Treſpaſs for Goods taken, and the Defendant plead an Accord made that he ſhould have his goods again, 9 *Ed.* 4. 19. 30 *H.* 6. 4. So if it be that the Defendant ſhould do his endeavor to make the Plaintiff and another (who was at ods with him) agreed, or (as it ſeems) to ſhew that he did make an Accord between him and the ſtranger, unleſs he ſhew withall that he is at ſome charge to do it. And yet if the Defendant give the Plaintiff a pottle of Wine in ſatisfaction of the Treſpaſs, and he agree to it, this is a good accord and a bar in the Action, *Fitz. Accord.* 1. 19, *H.* 6. 29. *Fitz. bar* 26.

2. It muſt be perfectly and compleatly finiſhed and Executed, and ſatisfaction made according to the agreement before any Action brought: and therefore if the Defendant plead an Accord that he muſt make Windows, and pay 10 l. at a day to come, and he ſet forth that he hath made the Windows, but he hath not ſet forth he hath paid the 10 l. this is no bar, 17 *Ed.* 4. 2. 6 *H.* 7. 10. In Treſpaſs the Defendant pleaded an Accord to pay 6 d. to the Plaintiff, and to give him counſel when he ſhall require it; this is no good Plea, 17 *Ed.* 4. 2. *Old N. B. f.* 122. Tender of money without paiment is no good plea in bar of this Action.

3. It muſt be in the life-time of him that did the wrong; and therefore if the Accord be between the parties, and be executed by the Heir or Executor of the Treſpaſſor, this is no bar where this Action may lie againſt the Executor, *Dyer* 356.

4. The Party to whom the wrong is done muſt accept the amends according to the agreement, for it ſeems notwithſtanding the Accord, he may refuſe it; and tender of amends without an acceptance thereof, is no plea to this Action, but being accepted

accepted, is, For as wrongs and injuries cauſe diſcord and variance, and beget Suits; ſo by an Accord between the parties this may be recompenced, and this recompence begetteth Peace, *Co.* 9. 79. 5 *Ed.* 4. 7. *Dyer* 356.

5. If divers do a Treſpaſs, and one make a good Accord, this will diſcharge and be a bar to all the reſt, *Co.* 9. 79.

6. If a ſtranger, as one of the Parents or Friends of the Treſpaſſor, give the amends in recompence; it ſeems this is as good as if the party himſelf did give it. In Detinue for a Cheſt and Charters therein, by the delivery of the Plaintiff, the Defendant plead an Accord, that he ſhould keep the Cheſt untill the Plaintiff come to *Briſtoll*, and there it ſhall be opened, and if any Deeds be there that do concern a Houſe of which the Plaintiff had enfeoffed the Defendant, that he ſhall keep it ſtill, and ſaith that he never came to *Briſtoll*; and it was awarded a good concord. But *quere Fitz. Bar* 166. *Accord.* 2. 7 *Ed.* 4. 23.

7 If one be Amearced for a private Nuſance or Treſpaſs done to the Lord in his Leet, and he receive the Amearcement, though it be Extortion, and he could not have recovered it; yet it ſeems if he after bring an Action for this Nuſance, this acceptance of the Amearcement may be pleaded in bar. *Fitz. Bar.* 187. 222. *Broo: Treſp.* 195. 61. 66.

8. In a writ of falſe impriſonment, the Defendant ſaith it was agreed between the Plaintiff and him that he ſhould bring the Defendant to ſuch a place which is the ſame impriſonment, and it ſeems this was no good Plea. *Fitz. Bar.* 14. *Brownlows* 1 *part.* 133. 2 *part* 130. 131. 132.

That the Plaintiff hath a Replevin depending in another Court for the ſame Treſpaſs, is a good Plea, *Bro. Treſp.* 357. But it is not a good Plea that he hath been indicted for the ſame thing, and paid a Fine to the King. And yet that he hath been Indicted, Arrained and Acquitted, is ſaid to be a good Plea, *ſed quere.* So, tha he hath been (being a Tenant) Amearced for the Treſpaſs at the Lords Court already, and paid the Amearcement, is ſaid to be a good Plea, *Co.* 4. 43. 9. *H.* 6: 5 c. *Bro. Treſp.* 405. 17 *Ed* 4. 8. But I doubt this caſe.

If it be be for Cattel Damage-feaſant in his Ground, it is a good Plea to ſay the Plaintiff did drive the Cattel into his ground, *Bro. Treſp* 148. *Kelw.* 30.

A Licenſe may be pleaded in avoidance of this Action, as if it be for an entry into Houſe or Lands, taking of Goods or the like, he may plead a Licenſe ſo to do from the Owner, as that he invited me into his houſe, gave me leave to go through his Cloſe, *&c. Bro. Treſp.* 533. *Co.* upon *Lit.* 368. But then there muſt be theſe things in the caſe

Matter of excuſe and diſcharge. *Sect.* 22. Licenſe.

1. A good Licenſe, for if a Tenant at will ſhall Licenſe me to cut down Trees upon the Land, or a Shepherd that hath Sheep to keep ſhall Licenſe me to kill them; this will not excuſe me in a ſuit for this, *Bro. Treſp.* 295.

2. This Licenſe muſt be purſued. 11 *H.* 7. 21. *Old B. entries.* 596. 597. 505. *Bro: Treſp.* 194. 19 *H.* 6. 65.

To an Action for a Battery, it is a good plea to ſay that he did it of his own wrong, that is, that the Plaintiff did begin the Affray firſt, *&c.* 34 *H.* 6. 16. 41: *Aſſ. pl.* 21. *Books of Entries in toto.*

If the Action be for ſuffering a mans Goods to lie in his houſe Damage feaſant, it is a good excuſe for the Defendant to ſay that he was Tenant to a Leſſee for life, that lived far from him, that he could not hear of his death in a long time after he was dead, and therefore the Goods were not removed ſo quickly. In Treſpaſs for a hurt, It is a good Plea to ſay that the Plaintiff and Defendant agreed to run at Tilt, Barriers, or to play at Backſword, Foot-ball or the like, and by that means the hurt came, *Fitz. Bar.* 244. In Treſpaſs for Damage by Cattel, it is a good Plea to ſay that the mounds of the cloſe adjacent were the Plaintiffs, and for lack of repair thereof they came into the Plaintiffs Ground, *Old N. B.* 561. 562. 563.

But if the beaſts were turned in, the Plaintiff may ſhew it by his reply, *Old N. B,* 503. 563. It is a good plea to ſhew a pardon by Act of Parliament, *Old B. Entries* 596. In an Action for Toll, it is a good plea to ſay, time out of Mind ſuch men have

been diſcharged and ought to be diſcharged of Toll in Fairs or for paſſages, *&c. Old B. Entries* 605.

In treſpaſs for beating a ſervant, it is a good Plea that he was not his ſervant at that time, *Old B. Entries* 605. For entring into a Cloſe, that the Defendant being Leſſee for life, made a Feoffment in Fee, and ſo a Forfeiture or an Eſcheat. *Old B. Entries* 577. 581. That the Goods were pledged to him, or him that delivered them to him for money not yet paid, *Old B. Entries* 598. For Fiſhing it is a good Plea to ſay he hath a fiſhing there, and under colour thereof he doth fiſh, *Old B. Entries* 596.

The Defendant in this Action hath many Pleas to plead in avoidance of this Action by way of excuſe. As to an Action of Treſpaſs for the Defendants Cattel breaking into the Plaintiffs Cloſe, it is a good Plea to ſay that they came in through the mounds of the Plaintiff, for want of Sufficient repair. For further knowledge of which point, theſe things are to be known,

1. This is not a good Plea for any but for him that hath ſome intereſt into the adjoining Ground, as having Title of Common there, or being Leſſee for years, or at will of it, having his Cattel there at Tack, or having leave to put in his Cattel there; and therefore this will not bar the Action of the caſe of a ſtranger where his Cattel had nothing to do in the next Ground towards which the Incloſure was ſo bad.

2. Neither is this any good Plea for him that hath ſome intereſt in the Ground adjoining, where he did put in his Cattel firſt of all into the Plaintiffs Ground, and not into his own, for the Cattel muſt goe in of themſelves.

3. It is no Plea that there is no good Incloſure, unleſs he ſay that the Owner of the Gronnd time out of mind did uſe to incloſe it.

4. It is ſufficient proof to maintain this Plea, that the mounds were bad at the time, though it cannot be proved that the Cattel went in through thoſe bad mounds, for that ſhall be preſumed unleſs the contrary appear, *Dyer* 365. *Bro. Treſp.* 192. 255. 148. 145. 136. 345. In Treſpaſs for breaking pales, that they were ſet up in his Chaſe, and kept his Deer from feeding, *&c. Old B. Entries* 594. If a man that ought to make the Hedge between him and me, go over it and break it down, ſo as my Cattel get in his Ground, I may plead this in avoidance of his Action. *Juſt. Dodridg. Trin.* 18. *Jac. B. R.* If the Action be for taking my Cattel, I may juſtifie that the Ground was a Free-hold, and the Cattel were in my Ground Damage-feaſant, and therefore that I Diſtrained them, *Old N. B.* 570. 569. 571. In an Action for cutting Timber that *I S* was ſeiſed of the place and Timber, and ſold the Timber to the Defendant, and he took it. *Old B. Entries* 606. For taking Goods it is a good Plea to ſay that the Defendant being poſſeſſed thereof, delivered them to a ſtranger from whom the Plaintiff took them, and the Defendant took them from the Plaintiff, *Old B. Entries* 573. or to ſay that he did lawfully Diſtrain them for Rent or the like, *Old N. B. Entries* 608.

That I am Parſon of *A* and a Pariſhoner ſet out his Tithes, and the Plaintiff took them away, and I took them from him, this is juſtifiable, *Old B. Entries* 374. To ſay that the Plaintiff gave him the Goods, *Old B. Entries* 376. or to ſay he took them as Waif, Eſtray, or as Wreck for the Lord, *&c. Old B. Entries* 612. 611. 577. Sale in Market overt to the Defendant by the Plaintiff or a ſtranger *Old B. Entries* 606. 605. A Releaſe of the Party Treſpaſſed to the Treſpaſſor, is a diſcharge in Law, and may be pleaded in bar of this Action.

Releaſe.

If divers do a Treſpaſs together, and the party to whom it is done releaſe it by generall or ſpeciall words to one of them, this is a diſcharge of all the Treſpaſſors, and every one of them may plead it in bar if he can get and ſhew it, for they are but one Treſpaſſor, and each of them is anſwerable for the whole fact, but a releaſe is a good ſatisfaction in Law as a ſatisfaction in Deed. *Hob. Rep. pl.* 96 But ſee more of this in *Releaſe chap.* 19. *in my Book of Common Aſſurance. Old B. of Entries* 602.

Sect. 23. Matter of diſcharge. Releaſe of one.

Authoritie. Licence. Tender of amends, that is, offer of a recompence for a Treſpaſs done, is a good plea in this Action. But therein theſe things are to be done.

1 That if one diſtrain my Beaſts Damage-feaſant, and I offer him a competent recompence before the Beaſts be taken, or before they be Impounded, this is a good bar, and ſo may be pleaded in the Action of Treſpaſs: but ſuch a tender after the Impounding of the Beaſts is not ſo. *Co.* 5. 76.

Amends.

2 And

2. And yet in all Actions *Quare Clauſum fregit*, if the Defendant do tender ſufficient amends before the Action brought, and in his Plea to the Action diſclaim to make any Title or claim to the land, and the Treſpaſs be by negligence or involuntary, by this (being proved) the Plaintiff ſhall be barr'd, *Stat.* 21. *Jac. chap.* 16. And it was the opinion of two Juſtices, *Popham & Williams, Trin.* 3. *Jac. B.R.* that the common Law was ſo before this Statute.

The Defendant in this Action may plead Not guilty in all theſe following caſes.

Sect. 24. Where one may plead *Non* guilty or not, but he muſt plead Specially.

1. VVhen the thing ſuppoſed to be done for matter of Fact, is not true.

2. VVhen the matter as it is, is not a Treſpaſs, but ſome other offence, nor is this Action of Treſpaſs given for it, but ſome other Action.

3. VVhen the Lands or Goods is mine for which the Action is brought, not the Plaintiffs. But in all other caſes the Defendant may not pleade Not guilty, but muſt pleade ſpecially, and ſhew the ſpeciall matter by way of excuſe or juſtification, as the caſe is. And therefore he muſt pleade and juſtifie ſpecially in all theſe following caſes; as where an Impriſonment or entry is given by authority of Law, or by authority from any party, as for an Impriſonment by the Statute of Treſpaſſors in Parks putting a man off his ground, arreſting a man as Conſtable to keep the peace, thruſting a man out of a Church that doth trouble the Congregation in Service: That he parted an affray, and keept the quareller apart, during the heat. *Old B. Entries.* 555. *N. B. of Entries*; 643. For an Aſſault or Battery *de ſon aſſault demeſne*, in defence of himſelf or his. For a Treſpaſs by entry into Land, that it is his own Free-hold, or anothers Freehold, and he did it by VVarrant from him, *N. B. Entries in toto. Old. B. Entries in toto.* That they entred in their perambulation. *N. B. Entries* 651. 558. That the Cattell came into his Cloſe by the default of the Plaintiffs cloſing, *Co.* upon *Lit.* 282. That it is a common High-way, *Old B. Entries* 559, That he entred to amend his gutter leading to his houſe, as of ancient time they had been uſed to doe. *Old B. Entries* 561.

Impriſonment.

For Entry into a houſe that it was a common Inne, *&c. Old B. of Entries* 549. So if the Defendant juſtifie by reaſon of a Rent-charge, he muſt plead it eſpecially, and cannot juſtifie it upon a Not-guilty, *Old B. Entries* 549. So if one put in his Cattel by agreement with the Plaintiff *Idem.* And yet it ſeems if he be to juſtifie by reaſon of a Title to the Land, he may plead not guilty, and give the ſpeciall matter in Evidence, as in Detinue, *Non Detinet*, , when the goods are the Defendants, 22 *H.* 6. 33. *Co.* upon *Lit* 283: For Entry into a houſe and taking money away; That the Plaintiff owed him the money, and he went into his houſe to receive it, being invited by the Plaintiff, *Old B. of Entries* 561. And if the Action be for taking goods, and the Defendant juſtifie the taking, as a Harriot, VVaif, Eſtray or VVreck, *N. B. Entries*, 666 Or that the Plaintiff took away the Defendants Cattel, and he entred into the Cloſe where they were, and took them again, *Old B. Entries.* 562. 561. 612. 611 That he took the Cattel damage feaſant in his ground *Old N. B.* 571, Or for an Amearcement in a Leet, or the like, *Old B. Entries*, 450. That the goods were the goods of *I S* delivered to the Plaintiff to keep, and *I S* commanded the Defendant to take them, *Old B. Entries*, 557. 556. Or excuſe it that the Plaintiff delivered them to him, *Old B. of Entries.* 556. That the Plaintiff was in Debt to the Defendant, and gave him the goods in ſatisfaction of his Debt. *Old B. Entries*, 556, 557. That he took them by a VVrit. *Old B. Entries* 671.

Entry into Land or a Houſe.

The Action is for a Battery, and he juſtifies, as Schoolmaſter giving moderate correction, *Old N. B.* 555.

Battery.

In Treſpaſs for taking away goods, That a ſtranger took them away, and gave them to *I S* and the right owner commanded the Defendant to take them as he did, *Old B. Entries* 562. In an Action of Treſpaſs for taking away a box of VVritings it is no good juſtification to ſay, there was but one writing in it, which was the Defendants, for a man cannot juſtifie the breaking or taking away of anothers box to fetch or take out his own goods, *Fitz. Treſpas* 73.

And in theſe caſes where the Defendant hath cauſe of Excuſe or Juſtification, and ſhould plead ſpecially, he pleade the generall plea of Not guilty, it will upon the evidence (the caſe appearing ſo) paſs againſt him: for he may not give the

ſpecial

ſpeciall matter in Evidence. But this muſt be underſtood with two cautions.

1. That whenſoever a man cannot have advantage of the ſpeciall matter by way of pleading, there he ſhall take advantage of it in the Evidence. For example, the rule of Law is, that a man cannot juſtifie in the killing or death of a man, and therefore in that caſe he ſhall be received to give the ſpecial matter in evidence, as that it was *de defendendo*, or in defence of his houſe in the night againſt thieves and robbers, or the like.

2 That in any Action upon the Caſe, Treſpaſs, Battery, or of falſe impriſonment againſt any juſtice of peace, Major or Bayliff of City or Town corporate, Headborough, Portreve, Conſtable, Tythingman, Collector of ſubſidie or fifteen in any of the Courts at *Weſtminſter*, or elſewhere, concerning any thing by any of them done by reaſon of any of their Offices aforeſaid, and all other in their aid or aſſiſtance or by their commandment, *&c.* they may plead the generall iſſue, and give the ſpeciall matter for their Excuſe or juſtification sn Evidence.

In an action of Treſpaſs or other ſuit againſt any perſon, for taking of any Diſtreſs or other Act doing, by force of the Commiſſion of Sewers, the defendant in any ſuch Action ſhall and may make Avowry Conuſance, or Juſtification generally, that it was done by Authority of the Commiſſion of Sewers for Lot or Tax aſſeſſed by that Commiſſion, *&c.* And the Plaintiff ſhall reply he did it of his own wrong without ſuch cauſe, and both theſe Acts were made for avoiding of prolixity and captiouſneſs of pleading, tending to the great charge and danger of Officers and Miniſters of Juſtice, *&c. Co.* upon *Lit.* 282. 283.

If any Action be brought againſt any perſon for doing any thing by vertue of an Ordinance of Parliament by the perſons enabled to do it, or others by their command or in their aid, it muſt be laid where the fact was done, not elſewhere, and the Defendant may plead not guilty, and give in evidence the Ordinance of Parliament: and if it appear not to be done in the ſame Country where it is laid, the Jury ſhall finde for the Defendant; and if the verdict paſs with the Defendant, or the Plaintiff be Nonſuit, or ſuffer a diſcontinuance, the Judges ſhall give to the Defendant double coſts, *Ord.* 2. *Dec.* 1646. If any Officer or their aſſiſtants be ſued for any thing done by Authority of the Ordinance of 9 *February* 1647. he muſt be ſued in the Country where it was done, he may plead the generall iſſue, and he ſhall recover double coſts. *See the Ordinance.* The like remedy is given in divers other caſes by divers other Ordinances of Parliament.

And now by the late Act made, 23 *Octob.* 1650. The Defendant may plead the generall iſſue of Not guilty, or ſome ſuch like generall Plea, and give the ſpeciall matter in evidence.

CHAP.

CHAP. CLXI.

Of Trial.

THis word *Trial* ſeems to be taken two ways in our Law: 1. For the manner and order of Proceeding in the hearing and determinidg of matters in difference. 2. For the manner of finding out and diſcovery of a thing doubtful and in queſtion; or to find out by due examination the truth of the point in iſſue between the parties, whereupon Judgment may be given, *Co. ſup. Lit.* 125. 1. *Trial*, what.

And as the Queſtion between the parties is always twofold, ſo is the Trial thereof. For it is either *quæſtio Juris*, as upon general Cuſtoms of *England*, which is Common-Law, or the ſenſe of a Statute; and that is always tried by the Judges, either upon a Demurrer, ſpecial Verdict, or Exception: For, *Cuilibet in arte ſua perito eſt credendum, & quod quiſque norit in hoc ſe exerceat.* Or it is *quæſtio Facti*: Or it is matter of Record, and then it is tried by the Record it ſelf. And for this, as there are diverſity of matters and things to be tried, ſo there are divers manner of Trials, and the Trial is always to be according to the nature of the thing to be tried. 2. The kinds of it.

There are divers ways and means of Trial of matters of Fact, when they are pleaded and come in iſſue. *Sect.* 1.

1. By Peers: For the Trial of a Peer of the Realm, in Treaſon, is by Peers upon their Honor, without oath. By *Peers.*

2. By Judges: For, the Cuſtoms and Uſages of Courts by the Judges of the ſame Court, if they be there pleaded; and the Nonage of an Infant and Maihme by Inſpection, and the reaſonableneſs of a Fine of an Offender, or upon Surrender of a Copihold-eſtate, the reaſonableneſs of a Cuſtom, and ſuch like things, ſhall be tried by the Judges. By the *Judges.* *Inſpection*, what

3. By Witneſſes: And then it is uſually done by two Witneſſes. In Dower, and Appeal of the death of the Husband, if his death be in queſtion, it ſhall be tried by proof of Witneſſes before the Judges. So the proof of a Summons, or the Challenge of a Juror muſt be tried by proof of Witneſſes; and divers other things muſt be tried by the examination of parties and Witneſſes. And of this nature is the Trial by Wager of Law: which ſee in *Law*. By *Witneſſes.* *Wager of Law.* *Examination.*

Alſo ſome Trials have been by Parliament; and ſometimes by Battel, now out of uſe. Many things alſo are tried by Certificate; as the doing of Service by him that holdeth by Eſcuage in *Scotland*, was to be tried by the Kings Marſhal of his Army, Baſtardy, Excommunication, Entry into Religion, Marriage, and the like, were tried by the Certificate of the Ordinary: But theſe muſt now be tried the ordinary way, and ſo muſt Wills and Adminiſtrations. The Priviledges and Liberties of Courts of Record, Cities and Burroughs, muſt be tried by their Charters and Records. But the moſt common and frequent way of Trial of all matters of Fact, is by a Jury of twelve men; and ſometimes greater, called a Grand Aſſiſe; or leſſer, called a Petit Aſſiſe. For all theſe things, ſee at large, *Co.* upon *Lit.* 125. 6. *Plow.* 230. *Co.* 9. 30. 31. 35. 40. & 11. 10. 44. *Plow.* 82. *D. & S.* 20. *Cromp Jur.* 65, 66, *&c. Stat.* 28 *Ed.* 3. 13. *Bro. ch.* 397. *Co.* 10. 104. *Dyer* 28. 304. *F. N. B.* 47. *Stamf. lib.* 3. *ch.* 7. *Kelw.* 70. *Finches ley*, 403. *Stat.* 33 *H.* 8. *ch.* 20. 23. 28 *H.* 8. 13. 27 *H.* 8. 4. 35 *H.* 8. 2. *Co.* 7. 14. 11 *Ed.* 4. 3. 21 *Ed.* 4. 46. *Co.* 8. 62. *Brownl. Rep.* 1 *par.* 36. By *Parliament.* By *Battel.* By *Certificate.*

The Trial of all Criminal matters is by the Country; and the party accuſed hath this benefit to be tried by his neighbors, and cannot be denied it unleſs it be his own fault, as where he is mute, and will not put himſelf upon the Country; for then without further Trial, Judgment *de pain fort & dure* is paſſed by the Judges upon him. See *Action. Stamf. pl. Cor.* 150. *Mute.*

For

Sect. 2. 3 In what place a Trial by Jury ſhall be.

For the places of Trial of matters, theſe things are to be known.

1. This is a general Rule; That the Trial muſt be always in that County and place where the Jury may have the beſt knowledg of the matter. And therefore if the thing lie in the notice of two Counties, the Jury ſhall be made equally out of both Counties. But out of more then two Counties it cannot be made.

2. Queſtions of Title of Land (except it be in ſome ſpecial caſes, and by ſpecial order of the Judges) are to be tried in the County where the Land doth lie. For the Law is, That all real and mixt Actions, as Waſte, *Ejectione Firme*, and the like, muſt be brought in the County where the Land lieth. But for Debt, Detinue, Account, Actions of the Caſe, Treſpaſs for Battery, and the like, they uſe to lay it in any County, and accordingly it may be tried.

3. The Judges of the Court wherein the Action is depending, may order the Trial of all Actions to be where they pleaſe.

4. All Criminal matters are to be tried where the offence is done. See for this more, 49 *Aſſ. p.* 11. 21 *H.* 6. 3. 7 *R.* 2. 10. 26 *H.* 8. 12. 27 *H.* 8. 4. 28 *H.* 8. 15. 33 *H.* 8. 12. 33. 2 *&* 3 *Ed.* 6. 24. 14. 18 *Eliz.* 11. 7 *Jac.* 1. 21 *Jac.* 12. *Co.* upon *Lit.* 124. 7. 1. 9. 19. 9 *Ed* 3 *ſt.* 1. *c.* 4.

5. If done beyond Sea, it may now be tried in *England*. See *Act, Sept.* 20. 1649.

Iſſue, what.

This word hath divers uſes. It ſignifieth ſometimes the Children begotten between a man and his wife: Sometimes profits by Fines, Amerciaments, &c. Sometimes profit of Land; and ſometimes the Point of matter depending in Suit, whereupon the parties join and put their Cauſe to the Trial of the Judg or Jury, to make an end of the Suit. And this is ſometimes upon a Point in Law, and then it is called a Demurrer; and ſometimes it is upon a matter in Fact, when a thing alleadged by one is denied by the other. And then alſo it is either general, as *Not guilty*, or the like: Or ſpecial, when it is joined upon ſome ſpecial matter; ſometimes about matter of Record, ſometimes about matter of Writing, and ſometimes about matter of Fact, as about a Perſon, Time, Place, or the like. Sometimes alſo it is in the Affirmative; ſometimes in the Negative. And for all this, ſee *Finches ley*, 397. *Co.* 11. 10. 13 *Ed.* 1. 39.

Enqueſt or *Inqueſt*, what. *Jurors*, what.

An Inqueſt is the Enquiry that is made by a Jury of men ſworne to that purpoſe. And ſome do divide it into an Inqueſt of Jury, and Inqueſt of Office. The Jurors are the men that are ſworne in this Jury, which ſometimes are twelve, and ſometimes twenty four; who are ſworne to deliver and find the Truth upon ſuch Evidence as ſhall be given in to them touching the matter in queſtion.

Sect. 3. 4. The proceedings in Civil cauſes.

And by ſuch men are matters of Fact (for the moſt part) tried with us in *England*, in cauſes both Criminal and Civil. For in cauſes Civil, after each party hath ſaid what they can one againſt another in pleading, if there ariſe any Doubt about any matter of Fact, it is to be referred to the diſcretion of twelve indifferent men to be impannelled by the Sheriff for the purpoſe; and as they bring in their Verdict, ſo Judgment paſſeth. And this the Judg is to declare as the Law is, upon the matter of Fact: For the Judg ſaith, the Jury finds the Fact thus, then the Law is thus, and ſo we judg. For the Rule is, *Ad quæſtionem Facti reſpondent Juratores, & ad quæſtionem Legis reſpondent Judices.*

5. The proceedings in Criminal cauſes.

And for Criminal cauſes, the courſe in that is, That at the great and general Aſſiſes, and at the general Seſſions of the Peace, where are many Cauſes, there is (amongſt the reſt) one Jury called the Grand Jury, that commonly is of twenty four of the moſt ſubſtantial men out of every Hundred within the County returned by the Sheriff, and they are to conſider of all Bills of Indictment preferred to the Court: which they do either approve by writing theſe words upon them, [*A true Bill*;] or diſapprove, by writing upon them, [*We are ignorant.*] And ſuch as they do approve, if they be proceeded upon, are then further to be referred to another Jury. They may alſo upon their own Preſentment without Indictment charge any man with any crime; and this will be of the force of an Indictment, and the ſame Proceeding in this as upon an Indictment: For the party accuſed may traverſe the offence, and bring it to be tried by a Petit Jury. Other leſſer matters there in theſe Courts are proceeded upon without a Jury. And there ſome things are challenged for

for insufficiencie, that must be tried by the Court: Some things are removed by *Certiorari* into a higher Court, and then there it must be tried. And that thing to which there is a Traverse put in, must be tried and ended by a Petit Jury: which (for the most part) in all Civil and Criminal causes, are but twelve. And these ought to be Free-men, not Vilains or Aliens; and lawful men, not outlawed men, and also men of worth and honesty. *What Jurors ought to be.*

But if the Suit be between an Alien and Denizen, in this case the Jury must be the one half of Aliens, and the other half of Denizens, which is called Trial *medietate linguæ*. The Disseisin of an Office in any Court, or rasing a Record in any Court, by the Filizers and Attornies of the Court. *Medietate linguæ, what.*

And the Answer of such a Jury in any Criminal or Civil matter referred to them, is called their Verdict. See for all these things, *Finches ley* 399. *Westm.* 2: 38. *Stat.* 28 *Ed* 3.9.11. 26 *Ed* 3.13. 11 *H.* 4.9. 34 *Ed* 3.8. 27 *Ed.* 1.2. *Co.* 6.47: 7.14. upon *Lit.* 155.271. with many others. *Verdict, what.*

And these Jurors in Civil matters are to see that they be not corrupted. For if they be, they may be severely punished by a Writ called a *Decies tantum*, which is a Writ lying against a Juror in any Inquest, when he taketh money or other reward of the one party or the other, to say or give his Verdict upon his side. And this any man that will, may sue against the Juror in the *Lord Protector's* and his own name; and if it be found, he is to lose ten times so much as he took, to be divided between the *Lord Protector* and Informer. And so it lieth against an Embraceror, one that doth procure another to be so perjured. See for this, *Cromp. Jur.* 208. 38 *Ed* 3.13. 39 *Ed.* 3.8. *F.N.B.* 171. *Co.* 7.14. And if the Jury give a false Verdict, and Judgment be given upon it, the party grieved may have a Writ of Attaint against them. But for this see my Second Part of the *Marrow of the Law*, *f.* 169, *&c.* *Decies tantum, what.* *Attaint, what.*

Visne is a neighbour-place neer at hand, out of which the Jury must come for the Trial of the thing in question committed or done neer thereabouts. For every Trial must be out of that Town, Parish, Hamlet, or place known out of the Town, &c. within the Record within which the matter of Fact issuable is alleadged, which is most certain and neerest thereunto, the Inhabitants whereof may have the more certain knowledg of the Fact. As if the Fact be alleadged to be done in a certain street called *Kings-street* in the City of *Westminster* in the County of *Middlesex*; in this case the Visne cannot come out of the street, for it is neither Town, Parish, nor Hamlet nor place, out of the neighbourhood whereof a Jury may come by Law, nor shall it come out of *Westminster*, but out of the Parish of S. *Margaret*, because that is most certain. See for this, *Co.* upon *Lit.* 125. 158. *Hob. Rep. f.* 8, 9. *Stat.* 25 *H.* 8: *chap.* 26. *Sect.* 4. *Visne*, or *Venew* what.

This word *Issues* is sometimes taken for the Forfeiture for not appearing upon a Distress infinite, which is the value of the Land from the Test of the Writ to the day of the Retorn. But it is also taken for the Forfeitures of those Jurors, that being duly summoned to appear, do make a default, which is more or less, as please the Judges of the Court. And these Issues being returned upon a Tenant in Fee-simple, in tail, or for life of another or himself, or in the right of his way; the Land he then hath will be chargeable for it, and any mans Cattel upon this Land may be distrained for it. See for this, *Co.* upon *Lit* 102. 22 *H.* 6.4. 35 *H.* 8.6. 2 *Ed* 6.22. 8 *H.* 6 9. 27 *Eliz.* 6.7. 1 *Jac.* 26. 4 *H.* 8.7. *Issues*, what.

Exemption of Juries, is a privilege that some men have to be exempted from the service in Juries. And this some have by dignity, as Barons, and such as are above them in degree, who are not to serve in ordinary Juries, but for Trial of a Peer, or the like. Others by a Writ, when they are very old, then they may have a Writ of Exemption or of Ease to be quit of all such publike service, as *De non ponendis in Assisis*, and the like. Or it may be by the Kings Grant: Or it may be by Custom, as Tenants in antient Demesn. But which way soever this notwithstanding, in case of a Grand Assise, Perambulation, Attaint, and some other special cases, such men as common persons, in the three last cases may be forced to serve. See for this, 12 *Ed.* 4. 18. *Co.* 6.53. *Cromp. Jur.* 20. *Brownl. Rep.* 1 *par. f.* 30. *Marlb. ch.* 14. 5 *H.* 8. *ch.* 6. *Exemption of Juries, what.* *Writ of Ease: De non ponendis in Assisis & Juratis, what.*

Sect. 5: *Tales*, what.

A *Tales* is a ſupply of men impannelled upon a Jury or an Inqueſt, when they do not appear, or when upon their appearance they are challenged for the Plaintiff or Defendant. Which ſupply, as it ſeems, was heretofore uſed to be made by Writs of *Decem tales*, *Octo tales*, *&c.* one of them after another as there was need, until the full Jury did appear. But now by a new Statute, the Judg upon motion made to him may (in caſe but one of the principal Pannel do appear) preſently cauſe a ſupply to be made of ſo many men as are wanting, of them that are there preſent ſtanding about the Court. And hereupon the very Act of Supply is called, A *Tales de circumſtantibus*. 35 *H.*8.6. 14 *Eliz.*9. 4 *&* 5 *P.& M.*7.9. *Co.*10.99. 20 *Ed.*4.11. *Stamf.*155. 37 *H.*6.12. 14 *H.*7.2.

Triers, what.

Triers be ſuch as be choſen to examine whether a Challenge made to the whole Pannel, or any one of the Pannel or Jury, be juſt, or not. For the courſe is, ſometimes to try a man by his Oath, and ſometimes by others of the Jury. If any of the Jury, after ſome of them be ſworne, be challenged; thoſe that are ſworne, are to ſay whether he that is challenged be indifferent, or not. But if the firſt or ſecond man be challenged, then the Court doth uſe to appoint ſome of them (who it pleaſeth) that ſhall be afterward ſworne, to try the indifferencie of the perſon challenged. 27 *H.*8. 28. 49 *Ed.*3.1. 3 *H.*6.36. 21 *H.*7.29. 28 *H.*8.26. *Finches ley* 112.

Hundredors, what.

Hundredors are men dwelling within the Hundred where the Land lieth, fit to be returned of a Jury upon any controverſie, *Cromp. Jur.* 217.

Pannel or *Array*, what. *Array the Pannel.*

The Pannel or Array, is nothing elſe but a Schedule or Roll containing the names of the Jurors that are returned in the Jury by the Sheriff to paſs upon the Trial of the matter. And to array the Pannel, is nothing elſe but to ſet forth one by one the men that are impannelled. For this, ſee *Plow.* 177. *St.* 18 *H.* 6. 14. 42 *Ed.* 3. 11. *Co.* upon *Lit.* 158.

Sect. 6. *Venire facias*, what.

Venire facias is a Writ Judicial going out of a Record, and lieth where two parties plead and come to iſſue upon the ſaying of the Country: For then the party, Plaintiff or Defendant, ſhall have this Writ directed to the Sheriff to cauſe to come twenty four lawful men of the County to ſay the truth upon the Iſſue taken. And if they come not at the day of the Writ returned, then ſhall go forth againſt them a *Habeas corpora*, and then a *Diſtringas* and other Writs, to bring them in to try the matter. The which two laſt Writs are uſually made with this clauſe, *Niſi prius juſticiarii venerint*, *&c.* and is returnable after the time of the Judges coming in their Circuit, and then it is uſually diſpatched by their Commiſſion of *Niſi prius*. *Old N. B. f.* 157.

Habeas Corpora what. *Diſtringas*, what.

Niſi prius, what.

Niſi prius, is a Writ Judicial lying where the Inqueſt is pannelled and returned before the Juſtices, upon requeſt of either party to the Sheriff, to cauſe the Jury to come before the Juſtices in the ſame County for the eaſe of the Country. 14 *Ed.*3.15. *F.N.B.* 120.

Challenge, what. The kinds of it. *Array. Polls.*

Challenge is an exception to things or perſons. To things, as Declarations, Pleadings, &c. For which ſee *Pleadings*. To perſons, when in an Aſſiſe or Jury the Plaintiff or Defendant doth except againſt all, or ſome, or one of them. And this laſt Challenge is ſometimes to the whole Array or Pannel, and ſometimes it is the Polls only, (*i.*) to ſome, or one, or more of the Jurors. And this Challenge alſo is ſometimes peremptory, (*i.*) without cauſe, which the Law doth give in ſome ſpecial caſe as an advantage: As a Priſoner arraigned for Felony (in favour of life) may challenge twenty of the Jury that are to try him for his life, which he may do without ſhewing any cauſe; and then theſe twenty muſt be put out, and others put in their room. Or elſe it is upon Cauſe. And amongſt Cauſes ſome are principal, and ſome inferior. A principal Challenge is, where it is apparent the Pannel or Perſon challenged is partial, being made in favour to one ſide, or in malice to the other, and ſo not indifferent. As if a Sheriff or Juror be a Brother, Son, Son-in-law, or Tenant of the one party, or be of kin in the ninth degree, though he cannot be Heir to the Land in queſtion. And if a Juror be of kin neerer or further off, and of the whole or half blood, ſo the pedigree can be conveyed in a certainty, it is a good Challenge. And ſo it is if the Juror were put in at the parties naming to the Sheriff, or the Sheriff or Juror be within the parties Fee, or his Servant, or within his Diſtreſs; whether

whether a mediate, as holding of *J. S.* who holdeth of the party, or immediate Tenant, or not his Tenant, but he is to come to his Hundred, or the party hath a Rent-charge going out of his Land, or the party is to be Heir to him of other Land: All these are good Causes of Challenge, and are (as it seems) principal Challenges. So in personal Suits, That the party hath been Arbitrator of his side, and in that matter; That he hath an Action of Battery depending against the party; That there is an Action of Debt depending by the party against him; That he hath taken money to give his Verdict for the one party; That he hath given his Verdict beforehand, or that he hath given his Verdict formerly in the same matter: These are said to be principal Challenges. So it is said of those things that do only induce it; as that he is the parties Servant, Attorney, or Counsellor, Steward of his Manor, of the same Society, or hath given his Verdict before in a like matter. In all these and the like cases the other party may challenge him for this: And this being found by his own confession, upon his oath or otherwise, or by the Triers to be true, he will be laid aside. The inferior causes are such, as though they be found to be true, are more questionable. But in all Challenges, these Rules must be kept.

Rules concerning it.

1. All Challenges must be taken before the Jurors be sworn.

2. If one challenge a Juror, and it be found against the Challenger, he may not now challenge the Juror for a second cause.

3. If one challenge the Array, and it be found against him, he may not afterwards challenge any of the Polls without shewing cause presently, and this shall be tried presently.

4. No Challenge shall be admitted against the Triers appointed by the Court. See for all this, *Co.* upon *Lit.* 6. 156, 157, 158. *Plow.* 124, 125. *Co.* 1. 6. *Finches ley* 400. 7 *H.* 4. 10. 18 *Ass. pl.* 22. 21 *Ed.* 4. 61, 67. *Stat.* 27 *H.* 8. 26. 25 *H.* 8. 3. 22 *H.* 8. 14. 33 *Ed.* 1. *Cromp. Jur. f.* 81. 97. 25 *Ed.* 3. 3.

Treat, what.

Treat doth signifie as much as taken out or withdrawn; and is applied to a Juror, as a Juror is challenged for any cause, and for that cause he is Treat, that is, withdrawn, removed or discharged. *Old N. B.* 159.

Sect. 7. *Certificate of Assise*, what.

This is (as it seems) where the Bailiff of a Tenant in an Assise pleadeth, &c. and loseth by the Assise, and the Tenant himself hath a Release or some other Discharge to plead, then he may by this means have the Parties and first Jurors to appear again; and if it be found, he that recovered before shall lose the Land and yield double damages. *Terms of the Law.*

Evidence or Proof, what.

This *Evidence* sometimes signifieth authentical writings of Contracts. And sometimes any Proof, be it by testimony of Witnesses, Writings, Records, or otherwise offered to a Jury for proof of a matter in question and at issue, *Co.* 9. 9. And Proofs for to determine matter of fact, and to be offered to a Judg and Jury, are of two sorts. First, living, as by Witnesses; and to a Jury one Witnes is sufficient: And dead as matters of Record, as Letters-Patents, Fines, Recoveries, Inrollments, and the like; Writings sealed and delivered, as Feoffments, Leases, Releases, &c. and without Seal, as Courts-Rolls, Accounts, and the like. *Co.* upon *Lit* 283. 115. 6. For when a cause or suit in a mans proceeding comes hitherto, as that the contrary part denieth any deed or thing as not done, or not to be so as is alleadged on the other side, and then he joineth in the affirmative and offereth to prove the same, each of them are to give the best Evidence that they can to make his own saying good and true. And if the case be between the King and a Prisoner, he is first to say what he can himself; and then all that can say any thing against him, are to be heard upon oath; and then others may be heard for him, but not upon oath: And according to this Evidence on both sides, or without any Evidence at all, the Jury are to give their Verdict according to their oaths. *Co.* 9. 9. *Dyer* 2. *Cromp. Jurisd.* 218.

Witnesses.

For answer hereunto, these things must be known.

What Witnesses are good Witnesses to give in Evidence, or not.

1. Such persons as are infamous, as are persons attainted of Felony, or of a false Verdict, or of a Conspiracie, or of Perjury, or in a *Præmunire*, or of Forgery upon the Statute of 5 *Eliz. chap.* 14. and not upon the Statute of 1 *H.* 5. 3.

and ſuch as have had Judgment to loſe their ears, or ſtand on the Pillory or Tumbrel, or have been ſtigmatized or branded; and Infidels, men not of ſound memory, or not of diſcretion, or ſuch as are intereſſed in the cauſe, and may have benefit by the thing in queſtion, are not competent Witneſſes, but may be excepted againſt; and a Wife cannot be a Witneſs for or againſt her Husband. But all other perſons, albeit they be Kinſmen never ſo neer, Tenants, Servants, Maſters, Counſellors and Attornies, are allowed for competent Witneſſes, *Co.* upon *Lit. f.* 6. *Plow.* 8. 12. And theſe being required muſt come in to give Evidence, or they forfeit Ten pounds to the party damnified, and muſt give him coſts and damages, *St.* 5 *Eliz. c.*9.

What ſhall be ſaid to be good Evidence, and what things may be given in Evidence and proved, and how, and by whom.

For Anſwer to this, take theſe things.

1. Some things ought to be pleaded, and may not be given in Evidence. And for this, ſee *Co.* upon *Lit.* 282,283.

2. Records may prove themſelves and other things, but may not be proved by Witneſſes. But any thing done in the County-Court, Court-Baron, or Hundred-Court, may be proved by Witneſſes.

3. A Fine or Common-Recovery may be given in Evidence without being under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery. And yet the Jury (as it ſeems) may chooſe whether they will find it upon this Evidence, or not, *Plow.* 410.

4. In a *Plene Adminiſtravit*, an Account given to, and allowed by the Ordinary, was not allowed for a good Evidence, nor is it to be received. *The Court*, *Paſche* 7 *Jac. Co. B.* So a Pedigree by a Herald of Arms is not to be admitted for proof of an Heir; but it muſt be proved by Deeds, Records, or Witneſſes. *The Court*, *Paſche* 8 *Jac.*

5. Depoſitions taken in the Eccleſiaſtical Court, cannot be given in Evidence, though the parties be dead *March Rep. f.* 120.

6. A Church-book is not to be given in Evidence. *Brownl.* 1 *par.* 207.

Shop-book. 7. None that keep a Shop-book, his Executors or Adminiſtrators, may give it in Evidence for Wares or Work, for above a year before the Action brought, unleſs they have a Bond or Bill for the Debt, or brought an Action thereupon within a year after the Wares delivered, or Work done. But this is to be obſerved amongſt others, and not between Merchant and Merchant, Tradeſman and Tradeſman, or Merchant or Tradeſman, *St.* 7 *Jac.* 12.

8. By the new Statute, 23 *Octob.* 1650. one may give in Evidence upon a general Iſſue, any matter ſpecial that he might have pleaded in the Action.

9. Juſtices of Peace, Conſtables, Bailiffs, Churchwardens, Surveyors of Highways, and ſuch like Officers, may plead the general Iſſue, and give the ſpecial matter in Evidence, *St.* 7 *Jac.* 5. 21 *Jac.* 12. *Ord.* 31 *March*, 1654.

Sect. 8. What ſhall be ſaid a good Evidence or proof to maintain a point in iſſue, or not.

For Anſwer to this, take theſe Caſes.

If in a *Plene Adminiſtravit* the Defendant give in Evidence, that part of the goods were pledged, and he redeemed them with his own money, and paid as much of his own money towards the Teſtators debts; this was held good. *Co. ſuper Lit.* 283. *Dyer* 2.

If the Iſſue be a Recogniſance or not, and a Recogniſance with a Defeaſance is given in Evidence; this is a good proof. *Plow.* 14.

If the point in Iſſue be, That he was never Executor, and the other prove an Adminiſtration committed to him; this is a good Evidence. *Dyer* 305.

If in a Detinue the Defendant plead he doth not detain, and he prove a Gift of the thing from the Plaintiff, this is a good Evidence. But otherwiſe it was, if he had ſhewed that they were pledged for money, and the money not paid; for this muſt have been ſpecially pleaded. But now this will be good alſo upon the new Act for general pleading. *Co. ſuper Lit.* 283.

If in Waſte the Defendant ſhew the thing done was by a Tempeſt, or by Lightening; this is a good Evidence. And ſo now to ſay, That he did repair it before the Action brought: But this heretofore muſt have been ſpecially pleaded, *Co. ſup. Lit.* 282.

If

If in debt upon a Bond, the Defendant plead, *Non eſt factum*, it is not his Deed; and the Defendant prove the Seal was broken off and put on again, or prove a Raſure of the Deed; either of theſe is a good Evidence, and will bar the Plaintiff. *Co.* 5. 119. 11. 27.

If the point be upon a tranſitory Treſpaſs done at a day or place certain, and the proof is that it was done at another day before, or at another place; this is good enough. But otherwiſe it is, if the proof be that it was done at a time after the time laid in the Action, *Co. ſuper Lit.* 283.

If the Iſſue be an Agreement, a ſpecial Agreement proved will maintain it. So of a Feoffment, a Feoffment on Condition will maintain it. *Plow.* 8.

If the Iſſue be in a Suit againſt an Executor or Adminiſtrator, Aſſets in *London*; proof of Aſſets in any place in the world is good to maintain it, *Co.* 6. 47. And if it be in caſe of an Heir on a Suit grounded on a Specialty againſt him, the Iſſue is Aſſets by deſcent; it will make it good to prove Aſſets in any place in *England*. And if Aſſets in one County be the point, it is good enough to prove Aſſets in any County, *Dyer* 271. *Cromp. Jur.* 12.

If the Defendant plead paiment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any Uſe paid for it for many years, nor is there any badg of the continuance of it; in this caſe it is, upon the common preſumption that it is paid, held a good Evidence, and the Juries do uſe to find for the Defendants. (*Experience.*)

In Trover and Converſion of Goods, and Not guilty pleaded, it is good Evidence for the Plaintiff as to the point of Converſion of the Goods, that the Plaintiff demanded them, and the other denied or refuſed to deliver them. *Plow.* 14.

A Licence to alien Land, or a Pardon for an Alienation of Land, was held by a common preſumption, a good proof that the Land was held *in Capite*. *M.* 7 *Car. B. R.* Sir *Jo Conſtables* Caſe. But if a Leaſe for life be the point, and it is proved, and no Livery of Seiſin given upon it; this is no good Evidence, *Co. ſup. Lit.* 283. So if the point be a Gift in Tail made by *J. S.* and the proof is of a Deed made by *J. D.* this is not a good Evidence. So if the point be a Leaſe parol, and a Leaſe in writing is given in Evidence; theſe are not good. *Bro. Gen. Iſſue*, 81. *Plow.* 14.

If in Debt on a Bond, and not his Deed pleaded, he ſhew that the Bond was joint, this is not good, *Co. ſup. Lit.* 283. And yet perhaps now by the new Act, this ſpecial matter may be given in Evidence; for he may give in Evidence any thing that he may plead eſpecially; and this pleaded ſpecially would have barred. So in an Aſſiſe, and no wrong pleaded, and a Releaſe after the Diſſeiſin is given in Evidence. So where the Iſſue in Treſpaſs is *Not guilty*, and the Defendant give in Evidence a Licence, *Kelw.* 55. 59 Or give in Evidence *ſon aſſault demeſne*, that the Defendant began. But if he plead *de ſon aſſault demeſne*, he may not give in Evidence, Not guilty. *Idem.*

To prove the ſealing and delivery of a Deed, and not know the party that did it, is not a good Evidence; and yet if they know him when they ſee him again, it is well enough, *Kelw.* 59.

If Executors in a *Plene Adminiſtravit* had given a Judgment in Evidence; this was not good, but muſt have been pleaded ſpecially; but it ſeems is good now. *Kelw.* 59.

If the Action of Waſte be laid in cutting and felling Trees, and the Evidence in mooting or rooting up of Trees; it ſeems not good. *M.* 7 *Jac. Co B.*

If a Feoffment be the Iſſue, and a Deed is ſhewed with this Indorſment, That *J. S.* Attorney of the Feoffor did give Livery according to the Deed, and no Letter of Attorney proved or inſerted in the Deed, but the Feoffor recites in his Will that he had conveyed his Land; this (it ſeems) is not good. *Gibbins* Caſe, *P* 7 *Jac. B. R.*

In an Action of the Caſe upon a Promiſe, and *Non aſſumpſit* pleaded, Paiment could not have been given in Evidence, as now it ſeems it may. (*Three Judges.*) So in Debt for Rent, That the Leſſor had entred into part of the Land, *Goldsb. f.* 81.

One brings an Action of Treſpaſs in a Cloſe abutting on a certain Mill, &c. If he prove not the Buttals, he is gone. *The Court*, *Goldsb.* 125.

If there be two Batteries made between the Plaintiff and Defendant at divers times;

the Plaintiff to maintain the Iſſue, muſt prove the Battery made the ſame day he hath laid in his Declaration, and may not be admitted to give another day in Evidence, *Brownl.* 1 *par.* 233.

Sect. 9. Verdict, what.

Verdict is the Anſwer of the Jury made upon any cauſe Civil or Criminal, committed by the Court to their conſideration or Trial: which is general, as Not guilty, or Guilty; or ſpecial, when they find Special, and for the doubtfulneſs of it refer it to the Judges for their advice. *Co.* 9.12.119.6.46.

What ſhall be ſaid to be a good Verdict, or not.

If a Verdict find the matter or ſubſtance of the Iſſue, it is good enough, though it vary in circumſtance. See *Co.* upon *Lit. & Dyer* 55. *March* 9.

Notwithſtanding a Jury, after they be agreed, do eat or drink at their own charge, or at his charge for whom they do find; this is not Finable, and the Verdict is good. But if it were before they were agreed, at the charge of him for whom they find; this would make the Verdict void. But if it were at their own charge, or his againſt whom they find, it is Fineable, but the Verdict is good, *Co.* upon *Lit.* 227. And yet if they eat and drink at their own charge before they be agreed, it is ſaid the Verdict is naught, *Dyer* 3. 20 *H.*7.3. *Hughs* 1 *Rep.* 353.

If the Action be againſt a Leſſee for cutting of Trees on a Covenant, and he ſay he cut twenty Trees, and the Jury find ten, it is a good Verdict: For if the matter of the Iſſue be found, it is well enough. As if one be indicted, that he of malice prepenſed killed *J. S.* and the Jury find him guilty of manſlaughter; this is a good Verdict. So if a Plaintiff alleadg the avoidance of a Church by privation, and the Jury find it to be by death, it is good. *Co.* upon *Lit.* 282.

The Jury muſt not find any thing contrary to what is agreed in pleading between the parties, either expreſly or implicitely; and if they do, the Judges may reject it. As in Waſte ſuppoſed in *A.* if the Defendant plead that *A.* is a Hamlet in *B.* and not a Town of it ſelf; in this he confeſſeth the Waſte: The Jury that are to try this Iſſue, whether it be in *B.* &c. ſhall not be admitted to find no Waſte done, for that were againſt the Record. 9 *H.* 6. 56. *Co.* upon *Lit.* 22.

If upon a Treſpaſs local, as Graſs cut down in the County of *S.* where the Treſpaſs was in the County of *D.* and the Defendant plead Not guilty (as he may) and the Jury find him guilty in the County of *S.* this Verdict is void, and no Judgment ſhall be given upon it. 9 *H.*6.63.

If they find a matter in certainty or ambiguouſly, it is void: As in a *Plene Adminiſtravit*, if they find the Executor have Goods in his hands, and find not to what value: So if they find part of the Iſſue, and find nothing for the reſidue, it is void. But if they give a Verdict of the whole Iſſue and more, it is good enough. *Utile per inutile non vitiatur*, *Co.* on *Lit.* 227.

If the Plaintiff after Evidence given, and the Jury departed from the Bar, deliver any Letter, Evidence, or Eſcrow to the Jury, not before given in Evidence at the Bar: if it paſs with him, this will avoid the Verdict; but if it paſs againſt him, *contra, &c.* So if they carry away any Writing unſealed, this will not avoid it, though this be a Miſdemeaſance, *Co.* upon *Lit. f.* 227, 281. See more, *Brownl. Rep.* 1 *par.* 49. 2 *par.* 150.190. 9 *H* 6.57. 20 *H.*7.3. *Dyer* 3.

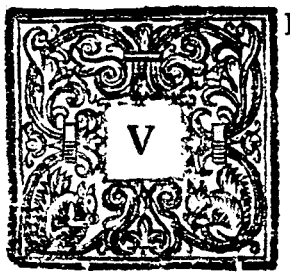
Witneſſes.

As to Witneſſes, theſe things are to be known. Firſt, Thoſe that are ſerved by Proceſs out of any Court of Record to come in as Witneſſes, and are tendred reaſonable charges, muſt appear if they have no let, under pain of Ten pounds, and to give recompence to the party grieved according to his damage, 5 *Eliz.* 9. Wherein this is to be known, 1. It ſufficeth to leave a Note of the Proceſs at the houſe of the Witneſs. 2. If the charges tendred be not enough, if the Witneſſes accept it, he is bound to appear: But otherwiſe not, if he do not leave ſufficient to bear his charges. 3. He that ſues upon this Statute, muſt aver that he is damnified, *March Rep.* 43. 4. A Lawyer that was of Counſel, may be examined upon oath as a Witneſs to the matter of the Agreement, not to the validity of an Aſſurance, nor to his Counſel that he gave, *Mar. R.* 83. Secondly, If a Witneſs commit wilful Perjury, he loſeth Twenty pounds, ſhall be impriſoned ſix moneths without Bail, ſtand in the Pillory, and be diſabled to be a Witneſs, 5 *Eliz.* 9. Thirdly, The penalty of him that ſhall procure ſuch Perjury, *Idem.* Fourthly, How Witneſſes to prove a Deed were called in before 5 *Eliz.* ſee *St.* 12 *Ed.* 2. 2.

CHAP.

CHAP. CLXII.

Of Upholſters, View, Victuallers, Univerſities, and Vilains.



View is, where an Action is brought for Land, and the Defendant doth not well know what Land it is that the Demandant asketh; then the Tenant ſhall pray the View, (that is) that he may ſee the Land which he claimeth. *View, what.*

Then the Court will ſend Veyors to view the place in queſtion, for the better deciſion of the Right. And if the Defendant deny, this is called a Counterplea of the View. *Veyors, what. Counterplea of the View.*

For matters relating to the Univerſities, ſee *Stat.* 2 & 3 *P. & M.* 15. 13 *Eliz.* 21. *Univerſities.*

How Upholſters muſt prepare, make and ſell Featherbeds, Bolſters, Pillows, Quilts, Matreſſes, and Cuſhions, ſee *Stat.* 11. *H.*7. 18. 5 & 6 *Ed.*6.23. *Upholſters.*

For Victuallers, Victuals, and Hoſtlers, theſe things are to be known. *Sect.* 1. *Victuallers, Inholders, and Hoſtlers.*

1. Victuallers muſt ſell their victuals at the prices the Juſtices of Peace ſhall ſet down in their Seſſions, *Stat.* 13 *R.*2. 8. 25 *H.*8. 2.

2. If they do not aſſeſs, they muſt ſell at reaſonable rates, reſpecting the times.

3. They may not make Agreement to ſell their Victuals at a certain price, *Stat.* 2 & 3 *Ed.* 6. 15.

4. No Victualler, whilſt he is a Victualler, may exerciſe any Judicial office in that place.

5. The Inholder may keep his Gueſts horſe, till he be paid for the meat of him and his horſe. And if he ſtay ſo long till it come to the worth of the horſe, he may ſell the horſe and pay himſelf, by a Cuſtom in *London*, *Brownl.* 2 *par.* 254. But out of *London* it ſeems he cannot ſell the horſe, nor do more then keep him as a Pledg; nor can he work him. *Brownl.* 2 *par.* 254.

No Inholder or Hoſtler may take any thing for Litter for horſes; nor may they take of any man more then what is reaſonable, having reſpect to the Markets, for any kind of proviſion for man or beaſt. Nor if he live where a Baker is, may he make his Horſe-bread himſelf; and if he do, he muſt make it of the due aſſiſe and weight. See for all this, *St.* 13 *R.*2. 8. 23 *Ed.* 3. 6. 21 *Jac.* 22. 5 *Eliz.* 5. 27 *Eliz.* 11. 28 *H.*8. 14. 37 *H.*8. 13. 34 *H.*8. 7. 4 *H.*4. 25. 12 *Ed.*4. 8. 25 *H.*8. 1. 23 *H.*8. 4. 32 *H.* 8. 41.

7. The Inholder is to look to the goods of his Gueſt, whiles they are in his houſe. And for this theſe things are to be known. 1. He is not to be charged with the goods of any one that doth not lodg in the Inne: And therefore if a Neighbor come to dinner there, he ſhall not anſwer for his goods; ſo if any Neighbor come in to tipple there. 2. He ſhall not anſwer for any goods, but what are loſt by his default. 3. He ſhall not be charged for the goods of any but ſuch as lodg in the Inne: And therefore if a Haberdaſher come to an Inne and there ſell divers Hats, and then go to a Fair and leave divers Hats there, and they be loſt; the Inn-keeper ſhall not be charged. And yet one lodged there and left a Trunk a while, and went away and did not lie there; the Trunk was ſtollen, and the Inn-keeper charged with it. 4. If the Owner deſire his horſe may go to graſs, and it be loſt, the Inn-keeper ſhall not anſwer it; but if the Inn-keeper put him to graſs of his own head, it is otherwiſe. 5. Albeit the Inn-keeper deliver the key of his chamber to his Gueſt, yet he ſhall be charged if the goods be loſt, *Brownl.* 1 *par.* 244, 245. 6. An Inn-keeper muſt receive a Traveller, or elſe the Traveller may ſue him. 7. The Inn-keeper is not bound to receive his horſe or goods, unleſs he receive the Maſter alſo. See *Action upon the Caſe.*

As

Villains, Villenage, what. *Neife, what.* *Liber ate probanda* *Nativo habend.* *Manumiſſion, what.*

As for Villains, which were Bondmen, and Villenage, which was a ſervile Tenure long ſince gone: Therefore of them, and of a Neif, which was a Bondwoman; *Libertate probanda*, to prove freedom and diſcharge from bondage; *Nativo habendo*, to fetch a Villain again, being run away; Infranchiſement or Manumiſſion, the freeing of a Slave out of Bondage, we ſhall ſay nothing, becauſe they are things gone long ſince.

CHAP. CLXIII.

Of Uſes.

1. *Uſe*, what.

A Uſe is, the profit or benefit of Lands or Tenements: Or as others define it, The equity and honeſty to hold the Land, *in conſcientia boni viri*: Or as others define it more fully, It is a truſt or confidence repoſed in ſome other, which is not iſſuing out of the Land, but as a thing collateral annexed in privity to the Eſtate of the Land, and to the perſon touching the Land, ſo that he for whom he is truſted ſhall take the profit of the Land, and the Terre-tenant ſhall diſpoſe of it according to his direction. As for an example: If a Feoffment be made to *J. S.* and his heirs, to the uſe, profit or behoof of *W. S.* and his heirs; in this caſe heretofore *J. S.* had the eſtate and property of the Land, but *W. S.* had and was to have the profits in honeſty and equity. So if one agree with *W. S.* for a piece of Land for Twenty pounds, and pay him the money, but hath no aſſurance of the Land, yet the equity and honeſty to have this Land is in him that hath contracted and paid his money for it: And this Truſt was called the Uſe of the Land. And hence came the courſe in Conveyances, to ſet down in the *Habendum* to whoſe uſe; as, *Habendum* to *A.* and his heirs, to the uſe of *A.* and his heirs. And he for whom this Truſt is, and that ought to have the profit of the Land by Conveyance as aforeſaid, is called *Ceſtuy que uſe*. There is a Uſe alſo of Goods and Chattels, which is properly called a Truſt or Confidence; for one may have ſuch things to the uſe of another. *Co.* 1. 121, 122. See the *Addition* to *Juſt. Doddr.* Treatiſe. *Co. ſuper Lit.* 271, 272.

Ceſtuy que uſe. *Truſt* or *Confidence*, what.

2. The kinds.

A Uſe is either expreſs, *(i.)* when the uſe or intent is openly declared and expreſſed between the parties upon the making of the Eſtate of Land whereunto the uſe is annexed: As when a Feoffment is made of Land to *J. S.* and his heirs, to the uſe of *W. S.* and the heirs of, or heirs males of the body of the ſaid *W. S.* or to the end or intent that *W. S.* and his heirs, or *W. S.* and the heirs of his body ſhall take the profits of it, and the like; or when I covenant to ſtand ſeiſed of the Land to the uſe of my wife for life, and after of my eldeſt ſon and the heirs of his body, or the like. Or it is implied, *(i.)* when the Uſe is not declared upon the agreement between the parties, but is left to the conſtruction, and made by the operation of Law: As when a man ſeiſed of Land makes a Feoffment in Fee, or doth levy a Fine, or ſuffer a Common-Recovery of it to another without any conſideration, and it is not agreed nor declared to what uſe or intent it ſhall be; this by conſtruction of Law ſhall be to the uſe of the Feoffor, Conuſor, or Recoveree: But if there be any conſideration of money or other thing paid or given, or any Rent or Tenure reſerved, then by conſtruction of Law it ſhall be to the uſe of the Feoffee, Conuſee, or Recoveror; for otherwiſe the Law preſumeth that the intent of him that did part with the Land was ſo, *viz.* That the other ſhould have the property of the Land to his uſe, and that he himſelf ſhould take the profits of it. So when one doth bargain and ſell his Land for money to another, and no Uſe is expreſſed; in this caſe the Law doth ſay, it ſhall be to the uſe of the Bargainee and his heirs. *Doct. & St.* 95. *Perk. ſect.* 533. *Co.* 2. 58. 9. 11. *Dyer* 18, 146.

A Uſe alſo is either in *eſſe*, and that in Poſſeſſion, Reverſion, or Remainder; as when a Feoffment is made to *J. S.* to the uſe of *J. W.* and his heirs, or to the uſe of *J. W.* and after to the uſe of *J. D.* and the heirs males of his body, and after to the uſe of *S T.* and his heirs for ever. Or it is in *poſſe*, or in contingencie; as when by poſſibility it may happen to be in Poſſeſſion, Reverſion, or Remainder: As where a Uſe is limited to me for life, and after to him that ſhall be my firſt ſon in Tail; this is only the poſſibility of a Uſe, for it may or may not be. *Co.* 1. 121.

3. The nature, incidents, and original of it.

A Uſe at the Common-Law, before the Statute hereafter ſpoken of was made, was, and where that Statute doth not take place, is nothing but a meer confidence and truſt collateral to, and diſtinct from the Land annexed in privity of Eſtate, and to the perſon touching the Land, to this purpoſe, That *Ceſtuy que uſe* ſhould take the profit of the Land, and the Feoffee or Terre-tenant that was truſted ſhould make Eſtates, and otherwiſe diſpoſe of the Land as the *Ceſtuy que uſe* in his life, or at his death by his laſt Will and Teſtament ſhould direct and appoint; and if he made no diſpoſition, then that it ſhould go to his heir. So that the Feoffee had the Freehold or ſole property of the thing in him; and *Ceſtuy que uſe* had neither *jus in re*, nor *jus ad rem*, (For if he againſt the Will of the Feoffee had entred into the Land, he had been a Treſpaſſor:) but a bare confidence or truſt, for which the *Ceſtuy que uſe* had no remedy but in Chancery upon breach of the truſt, and there to have the Feoffee impriſoned until he perform the truſt according to the Order of the Court. And theſe Uſes to ſome purpoſes were reputed in Law as Chattels, and therefore were deviſable by Will; and to ſome purpoſes as Hereditaments, and a kind of Inheritance, of which there was *poſſeſſio fratris &c.* And to ſome purpoſes neither Chattels nor Hereditaments; for they were not eſteemed Aſſets in the Heir or Executor, neither were they reputed as Commons, Rents, Conditions, and ſuch like Inheritances which are diſcontinued or taken away by the Alienation of the Terre-tenant, Eſcheat, Diſſeiſin, &c. But a Uſe is not ſo. *Co. in Chudleighs* Caſe, *in toto*; and *Shelleys* Caſe. *Kelw.* 160. *Dyer* 12. *Bro. Feoffm. al. uſes in toto. Conſc.* 25.

Incidents of it.

And to every of theſe Uſes there were two inſeparable Incidents; Confidence in the Perſon, and Privity in the Eſtate, expreſſed by the parties, or implied by the Law: And when either of theſe failed, the Uſe was either gone for ever, or ſuſpended for a time at the leaſt. And therefore if the Feoffee to uſe, upon good conſideration, had enfeoffed another of the Land that had not notice of the Uſe, the Uſe had been gone for ever; becauſe howſoever here was a Privity of Eſtate, yet here was no Confidence in the perſon. But if the Feoffment had been without Conſideration to ſuch a one; in this caſe the Uſe had remained ſtill, becauſe the Law did imply a Notice. *Trin.* 17 *Jac. Cancellaria.*

So alſo it ſeems the Law was, when it was made in conſideration of marriage only. And if a Diſſeiſor, Abator or Intrudor had come to the poſſeſſion of the Land whereof the uſe was, albeit he had notice of the uſe, yet the uſe was ſuſpended during their poſſeſſion, and they ſhould not have been ſeiſed to uſe as the Feoffee was; for they come not to the Land in the *per*, but in the *poſt*. And if a Lord by Eſcheat, Lord of a Villain, or one that had entred for Mortmain, or that had recovered in a *Ceſſavit, &c.* had come to ſuch Land, and had notice of the uſe, the uſe had been gone for ever; for theſe came to the Land in the *poſt* and above the uſe. And Tenant in Dower and by the Courteſie ſhould not be ſeiſed to uſes in being; for all theſe wanted Privity of Eſtate. And if there had been Tenant for life, the Remainder in Fee to the uſe of another, and the Tenant for life had made a Feoffment in Fee to one that had notice of the uſes; this ſecond Feoffee ſhould not have ſtood ſeiſed to the firſt uſes.

So if the Husband had made a Feoffment in Fee of the Land of his Wife, upon Conſideration, and without any Uſe expreſſed, the Wife ſhould not have had a *Subpœna*, becauſe the Feoffee was not in Privity of Eſtate of the Wife. And if *Ceſtuy que uſe* for life or in tail, the Remainder in tail, with divers Remainders over in uſe, had made a Feoffment to one that had notice; he ſhould not have been ſeiſed to the firſt uſes, *cauſa qua ſupra.* But otherwiſe it is of Commons, Advowſons, and ſuch like appendants or appurtenants: For if Tenant in tail, or Husband in right of

his Wife make a Feoffment of a Manor, or of part of it with an Advowſon appendant; the Advowſon at leaſt, after Preſentment, ſhall paſs as appendant to the Manor, or to part of the Manor, and not to the Eſtate of the Land which is diſcontinued by the Feoffment. So if a Diſſeiſor, Abator, Intrudor, or the Lord by Eſcheat, or the like, ſhall have theſe things as annexed to the Land, or the poſſeſſion of the Land. So that there is a difference between a Uſe, a Warranty, and ſuch like things that are annexed to the Eſtate of the Land in privity; and Commons, Advowſons, and other Hereditaments that are annexed to the poſſeſſion of the Land.

The original of it, and why ſo much lands were put in uſe.

And theſe Uſes began firſt when the cuſtom of Property began and was brought in, that one man knew his own from another mans, and then was to enjoy his own, and not to be deprived of it without conſent or order of Law. For then he that had Land, had two things in him; a poſſeſſion of the Land, and power to take the profits of it. And thoſe being to be diſtinguiſhed, he might give the Freehold or Poſſeſſion to another, and take the profits to himſelf. *D. & S. 96. Co.* 1. 123, 124. *Stat.* 27 *H* 8 *ch.* 10. *in the Preamble.*

And they were the rather allowed by the Law for a time as reaſonable, becauſe they gave a man power to diſpoſe of his Land by Will, which otherwiſe he could not have done but in ſome ſpecial caſes by Cuſtom of the place. But in time this uſe was turned into an abuſe; and the greateſt part of all the Lands in the Kingdom, eſpecially in the time of the Broil between the Houſes of *York* and *Lancaſter*, were put in Uſe, partly of fraud, and partly of fear. Which produced not a few inconveniences: For thereby many were deceived of their juſt and reaſonable rights, as namely, A man that had cauſe to ſue for his Land, knew not againſt whom to bring his Action, or who was Owner of it; the Wife was defrauded of her Thirds, the Husband of being Tenant by the Courteſie, the Lord of his Wardſhip, Relief, Harriot and Eſcheat, the Creditor of his Extent for Debt, the poor Tenant of his Leaſe, and other Purchaſors of their purchaſe. For theſe rights and duties were given by the Law from him that was owner of the Land, and none other, which at this time was the Feoffee of truſt; and ſo the Feoffor, the old owner of the Land, ſhould take the profits, and leave the power to diſpoſe of the Land at his diſcretion to the Feoffee: And yet the Feoffee was not ſuch a Tenant of the Land, as his Wife might have Dower, or the Land be extended for his Debt, or that he might forfeit it by Felony or Treaſon, or that his Heir ſhould be in Ward for it, or any duty of Tenure fall to the Lord by his death, or that he could make any Eſtates of it. Alſo Lands were many times conveyed by laſt Wills, by words only, and ſometimes by Tokens only in time of great extremity of weakneſs: And many perjuries for Trial of ſecret Uſes, were daily committed.

The miſchief of Uſes.

Uſes and Poſſeſſions united.

All which having been eſpied, have been laboured to be cured and holpen by divers particular Acts of Parliament in all ſucceeding ages. *Stat.* 1 *R.* 2. *ch.* 9. 4 *H.* 4. 7. 11 *H.* 6. 3. 1 *R.* 3. 1. 4 *H.* 7. 17. 1 *H.* 7. 1. 19 *H.* 7. 15. 27 *H.* 8. 10. But the makers of theſe Laws finding the continuances of theſe Uſes ſo miſchievous, that they did over-reach the policie of all Laws: For a general remedy, and a perfect cure of all the ſaid miſchiefs and abuſes, have at laſt provided; That where any are, or ſhall be ſeiſed of any Lands to the uſe or truſt of any other, by reaſon of any Bargain, Sale, Feoffment, Fine, Recovery, Contract, Agreement, or otherwiſe, by any means whatſoever, *Ceſtuy que uſe* or truſt, that hath any ſuch uſe in Fee-ſimple for term of life or years, or otherwiſe, or any uſe in Reverſion or Remainder, &c. ſhall have the poſſeſſion of the Land in ſuch quality, manner and condition as he had the uſe or truſt: And where any one is ſeiſed of Lands to the uſe or intent that another ſhall have a yearly Rent out of the ſame Lands, *Ceſtuy que uſe* of the Rent ſhall be deemed in poſſeſſion thereof of like eſtate as he had the uſe. By which Statute the uſe and poſſeſſion of Land is now at this day coupled, conjoined and married with an indiſſoluble knot, ſo as they cannot now ſtand apart and divided, but he that hath the one muſt have the other, and the one doth enſue the other as the ſhadow doth the body: And therefore now upon Fines, Recoveries and Feoffments, the Eſtate doth ſettle as the uſe and intent of the parties is declared by word or writing before the act done.

As

As for example, If a Writing be made between two or more, that one of them ſhall levy a Fine, make a Feoffment, or ſuffer a Recovery to the other, to the uſe and intent that one of them, or another man ſhall have it for life, and after another in Tail, and after a third in Fee-ſimple; in this caſe the Law ſetleth the Eſtate according to the uſe and intent declared: So that now what Eſtate a man hath in the uſe, the ſame he hath in the poſſeſſion.

To what uſes the Statute of 27 *H.* 8. doth extend, and to what not.

But herein for the more full underſtanding of this Statute, and the Law at this day, it muſt be obſerved, that this Statute doth not extend to all manner of uſes, neither are all uſes executed and united to the poſſeſſion hereby. For to every execution of a uſe within this Statute, four things are requiſite.

1. That there be a perſon ſeiſed.
2. That there be a *Ceſtuy que uſe* in *eſſe*.
3. That there be a uſe in *eſſe* in Poſſeſſion, Reverſion, or Remainder.
4. That the Eſtate out of which the uſes do ariſe, be veſted in *Ceſtuy que uſe*. So that when theſe four, *viz.* Seiſin in the Feoffees, *Ceſtuy que uſe in rerum natura*, Uſe in *eſſe*, and that the Eſtate of the Feoffees doth veſt in *Ceſtuy que uſe*, then there is an execution of the uſe within this Statute. But if any of theſe fail, there is no execution of the uſe within this Statute. *Co.* 1.126.136. *Plow.* 351. And therefore it is agreed, that this Statute doth not execute any uſe but only uſes in *eſſe*: So that the right of a preſent, and a future or contingent uſe are excluded until they come in *eſſe*, and then the Statute doth execute them. Alſo if no alteration be of the Eſtate of the Land before; and if *Ceſtuy que uſe* in tail with divers uſes in remainder had made a Feoffment, and died before the Statute, no execution ſhould have been of this right of a uſe until Entry by the Feoffees. *Co.* 1.126. *Dyer* 58. 88. 330. So if *Ceſtuy que uſe* in poſſeſſion had made a Feoffment before the Statute, no right of the uſe in poſſeſſion or remainder ſhall be executed by the Statute, until the regreſs by the Feoffees. So if a Feoffment had been made before the Statute to the uſe of the Feoffee for life, and after to the uſes of others in remainder, and the Feoffee had made a Feoffment in fee to another; this uſe ſhall not be recontinued, or the repoſſeſſion of the Land executed unto it by this Statute.

So that the right of uſes in *eſſe*, and uſes in contingencie, until they happen to be in *eſſe*, remain at the Common-Law as they were before the Statute. And therefore if the Eſtate of the Feoffees be in ſuch caſes diveſted by Diſſeiſin; or the King, or a Corporation, or an Alien, or a perſon attaint, &c. be enfeoffed of the Land before the uſe come in *eſſe*; or if the Land be aliened *bona fide* upon conſideration to one that hath notice of the uſe; this uſe can never be executed until theſe Poſſeſſions be removed by lawful Entry or Action of the Feoffees. And if their Entry and Action be barred, the uſe is gone for ever, and the party grieved thereby hath no remedy but in Chancery. And therefore if *Ceſtuy que uſe* in tail, the Remainder in tail reſtrained with a clauſe of perpetuity be diſſeiſed, no uſe in contingencie can be executed by this Statute.

And if before the Statute a Feoffment had been made in Fee to the uſe of *J. S.* for life, and after to the uſe of the right heirs of *J. N.* and the Feoffees had been diſſeiſed, and then the Statute had been made, and after *J. N.* die, and after his death *J. S.* die; this uſe ſhall never be executed in the right heir of *J. N.* *Co.* 1.138.

And ſo alſo if a Diſſeiſin be after the Statute, and before the death of *J. N.* no poſſeſſion ſhall be executed in the right heir of *J. N.* Alſo uſes that need no execution by the Statute, as when a man doth convey Land to *J. S.* and his heirs, to the uſe of *J. S.* and his heirs; this doth not need help of this Statute: Alſo uſes that are againſt the Rules of the Common-Law, ſhall not be executed by this Statute. And therefore if a Feoffment be made to the uſe of *A.* for life, and after to the uſe of every perſon that ſhall be his heir one after another for term of his life. So if one make a Feoffment to the uſe of another in tail, with divers Remainders over, with a Previſo that neither of them ſhall diſcontinue or alien, &c. Theſe uſes ſhall not be executed, becauſe theſe Limitations are wholly void. And in theſe caſes (it ſeems) there is no remedy to be had in Chancery againſt the Feoffees.

So that out of all this appeareth, that ſome Uſes are executed preſently, as Uſes in *eſſe*; and ſome are executed by matter *ex poſt facto*, if they be according to Law, and come in *eſſe* in due time. But if they be Uſes invented and limited in a new manner, and not according to the antient Common-Law, they are altogether void, and extinguiſhed and aboliſhed by this Statute. And where Lands are conveyed to others in truſt after this or the like manner, *viz.* That the Feoffees ſhall take the profits, and deliver them to the Feoffor and his Heirs, &c. or that the Feoffees ſhall convey it to the Heir of the Feoffor at his age of twenty one years: And where Lands are conveyed to certain uſes expreſſed and declared, and there be other ſecret uſes and intents agreed upon between the parties; theſe uſes or truſts are not within this Statute, neither will the Statute execute them, but they remain as they were before the Statute, determinable in *Chancery*.

Alſo Leaſes for years of Lands in uſe that have their being before, and are granted over in uſe, are not executed by this Statute. And therefore if a Leſſee for years of Land grant or aſſign over his Eſtate to *A.* and *B.* and their Aſſigns, to the uſe of the Grantor and his wife for the term of their lives; this uſe or truſt is out of the Statute, and not executed thereby: And therefore in this caſe all the Eſtate is in *A.* and *B.* and the Grantor hath nothing but a uſe, for which he hath his remedy in Chancery. *Dyer* 369.356. *Cromp. Jur.* 65.

So if one be ſeiſed of Land in Fee, and he bargain and ſell it, or make a Leaſe of it to another in truſt, and for the benefit of a third perſon; this is but a Chancery-truſt &c. in this third perſon, as was held clearly, *M.* 8 *Car. B.R.* And yet if a Feoffment be made to the uſe of *J.S.* and his Aſſigns for the term of twenty years, this term of years ſhall be executed by the Statute. And ſo in all ſuch like caſes and queſtions of Truſts and Uſes that are not within the Statute of Uſes, the Law is now as it was before the ſame Statute was made, and all thoſe matters are determinable in Chancery. For as the queſtios of Uſes and Truſts that are within the Statute, are to be decided and ruled by the Judges of the Common-Law; ſo are all other queſtions of Uſes and Truſts that are out of the Statute, to be ruled and decided by the Judges of the Chancery.

4. What ſhall be ſaid a good uſe of Land, or not, and when and where ſuch a uſe ſhall be raiſed, altered or created, or not. Firſt in reſpect of the manner of raiſing it, and the ſeveral ways whereby Uſes may be raiſed.

To make a good Uſe, or to make a Uſe to riſe, eſpecially ſuch a Uſe as may be within the Statute, reſpect muſt be had to divers things, *Co. ſuper Lit.* 271: *Plow.* 301.

Firſt, to the ways or means of creating and raiſing of Uſes: wherein it is to be obſerved, that albeit the quality of the Uſes be changed in moſt caſes by the Statute of Uſes, yet Uſes, and Uſes within this Statute are, and may be raiſed as they might before the Statute, either by tranſmutation of the Eſtate, as by Fine, Feoffment, Common-Recovery, &c. or out of the Eſtate of the Owner of the Land, as by Bargain and Sale, by Deed indented or inrolled, or by Covenant to ſtand ſeiſed to Uſes upon good conſideration.

And therefore a Fine, Feoffment, or Recovery may be had of Land, to the uſe and intent that either of the parties thereunto, or others, ſhall have it for any time or eſtate; and by this means what Uſes, and conſequently what Eſtates a man will, may be raiſed and created. And in theſe caſes the Conuſor, Feoffor, or Recoveree may appoint the Uſe of the ſame Fine, Feoffment, or Recovery to whom he will, without any reſpect of marriage, money, kindred, or the like; for in this caſe his will guideth the equity of the eſtate, *Brownl.* 2 *par.* 76.201. *Dyer* 186.

Or if a man make a Leaſe to *A.* for life, to the uſe of *B.* for life; this is a good uſe and eſtate in *B.* during the life of *A.* *Co.* 6.68.

Or if a man by Bargain and Sale for good conſideration ſell his Land to another, hereby the Uſe will riſe according to the Eſtate bargained and ſold, unto the Bargainee. But in this caſe if it be an Eſtate of Freehold, as of Fee-ſimple, Fee-tail, or for life, that is ſold; the Bargain and Sale muſt be made by Deed indented and inrolled within ſix moneths after in ſome of the Courts at *Weſtminſter*, or in the Seſſions Rolls of the Shire where the Land lieth, (except it be in Cities and Corporate-Towns where they uſe to inroll Deeds) otherwiſe no Uſe will riſe by it. But if it be an Eſtate or term for years only that is ſold, there the Uſe will riſe well enough without

without any ſuch matter, *Dyer* 155. *Co.* 2. 36. 7. 40. 8. 93. 4. 70. See *Bargain and Sale. Co.* 2. 35. 8. 94. Or if a man ſeiſed of Land in Fee, covenant to ſtand ſeiſed of it to the uſe of his wife, children, brethren, or other kinsfolk for life, in Fee-ſimple, Fee-tail: Or if one ſeiſed of Land in Fee ſimple, covenant to ſtand ſeiſed of it to the uſe of a woman he is to marry, or to the uſe of a woman his ſon or other kinſman is to marry, or the like: hereby the Uſes, and conſequently the Eſtates will riſe accordingly. And in theſe caſes there is no need it ſhould be by Deed indented, &c. or that the Deed be inrolled; for Uſes may be raiſed by Deed poll, as well as by Deed indented.

Uſes may be raiſed by Covenant for Jointures: But power to make Leaſes cannot paſs in this manner. But this muſt be done by Fine, Feoffment, or Tranſmutation of Poſſeſſion, if there be a Covenant that the Owner will ſtand ſeiſed to theſe uſes. And this alſo is the opinion and practice of the Chancery, *Car. Rep.* 22. 30. But if a man by Deed convey Land to his ſecond ſon, thus: I do give and grant this Land to *J. S.* my ſecond ſon, and his heirs after my death, and no Livery made; the ſon ſhall take nothing by this Covenant, nor will any Uſe ariſe, *Mar.* 50. *pl.* 78.

Alſo Uſes may be created (as ſome hold) by word or Parol-agreement, as well as by Deed or writing: For it is ſaid it hath been adjudged, That if a man ſay to his ſon and a wife that his ſon is to marry, that in conſideration of the ſame marriage they ſhall have the Land to them two in tail, that hereby a good Eſtate-tail will ariſe after the marriage: And that where one doth by word without Deed grant to his ſon and his wife in tail Land in conſideration of their marriage, that it was agreed by all the Judges, that the Uſe did riſe upon this agreement. *Cromp. Jur.* 61. 60. *Plow.* 301. 308. and the better opinion of the Judges in *Corbins* Caſe, 38 *Eliz.* Howſoever it is ſafe in theſe caſes to do it by Deed and in writing: For, *Dyer* 296. *Plow.* 22. ſeem to oppugn this.

And if a man make a Feoffment, levy a Fine, or ſuffer a Recovery to the uſe of his laſt Will, or to the intent to perform his laſt Will, or to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit by his laſt Will, and then afterwards by his laſt Will declare the Uſes, theſe are good Uſes, and this is a good way of raiſing of Uſes. *Lit. ſect.* 462, 463. *Co.* 6. 17.

So if a man deviſe his Land by Will to *J. S.* and his heirs, to the uſe of *J. D.* and his heirs; it ſeems that the Uſe will riſe to *J. D.* and his heirs by this means. And if a man by verbal agreement, in conſideration of money or the like, ſell his Land to another, or agree and promiſe that the Bargainee ſhall have it for any time, howſoever that hereby no Uſe nor Eſtate will ariſe (if it be a Freehold that is ſold) within the Statute, becauſe it is not by Deed indented, &c. yet it ſeems a good Uſe will ariſe at the Common Law, and that the Bargainee ſhall have relief in Equity for his Purchaſe. See *Stat.* 27 *H.* 8. of *Uſes. Fitz. Deviſe* 22. *Dyer* 229. *Conſcience.*

The ſecond thing whereunto reſpect muſt be had, is to the perſons truſted, or to him to whom the Conveyance is made: For to every good Uſe there muſt be a perſon ſeiſed to uſe, and he muſt be a perſon capable of ſuch a Seiſin. And for this it muſt be known, that any ſole perſon that may make an Eſtate to himſelf, may make an Eſtate to other uſes. Alſo a man may be ſeiſed of his own Land to other uſes, as in the caſe of a Covenant to ſtand ſeiſed to uſes. But the King, or any Body Corporate, Alien born, or perſon attaint, cannot be ſeiſed to other uſes no more by an original Feoffment to uſe, then when they come by the Land in uſe at the ſecond hand: In which caſe (as hath been ſhewed) neither ſuch Perſons, nor Diſſeiſors, Abators, or Intrudors, or Lords of Vilains, or by Eſcheats, ſhall be ſeiſed to other uſes: But in all theſe caſes the uſes are void, and the parties ſhall hold the Land to their own uſes, or to the uſes of the Feoffors &c. and not to the uſe of *Ceſtuy que uſe.* And a Bargainee of Land for valuable conſideration, cannot be ſeiſed of the Land to any other uſe but his own. *Co.* 1. 122. 127. 135. *Plow.* 238. *Dyer* 8. 283. *Reſolved in Doctor* Atkins *Caſe*, 44 *Q. Co. B. Dyer* 155. *Lit. Bro. ſect.* 60. Secondly in reſpect of the perſons truſted, and what perſons may not be ſeiſed to the uſe of another, but to their own uſe.

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Thirdly in reſpect of the perſons for whom the truſt is, or the *Ceſtuy que uſe.*

The third thing to be reſpected is the *Ceſtuy que uſe:* For to every good uſe, as there muſt be a perſon ſeiſed to uſe, ſo there muſt be a perſon to whoſe uſe he is ſeiſed, and he muſt be capable alſo. And for this it muſt be obſerved, that any man that is capable of an Eſtate directly and immediately to himſelf, is capable of the ſame Eſtate by way of uſe: But if the uſe be limited to a Corporation, there muſt be a Licence had, otherwiſe it will be an alienation in Mortmain. *(See before.)* And if future uſes upon Contingencies be limited to ſuch perſons as are not in being, theſe uſes, howſoever they are good at the Common-Law, yet they are not good within the Statute, neither doth the Statute execute them at all until they come in poſſeſſion. And if a Feoffment be made to *J.S.* and his heirs to the uſe of the Pariſhioners of *Dale*; this uſe is void, for they are incapable by this name; and it ſhall be to the uſe of the Feoffor. *Co.* 1. 136. *Bro. Mortmain*, 37. *Brownl.* 1 *par.* 193. *St.* 12 *H.* 7. 27. 49 *Ed.* 3. 4.

Fourthly in reſpect of the eſtate and poſſeſſion of him that doth create the uſe.

The fourth thing to be regarded, is the Eſtate of him that doth raiſe the uſe, in the Land whereof the uſe is raiſed. For howſoever the Tenant in Fee-ſimple of Land may create what uſes he will in Fee, for life, or years upon it, and ſuch uſes are good, and the Tenant in tail or for life may perhaps grant their Land for their own lives to the uſe of a third perſon: Yet if a Tenant in tail for good conſideration covenant to ſtand ſeiſed to the uſe of himſelf for life, and after of his eldeſt ſon in tail, no uſe will riſe by this Covenant. So if Tenant in tail of an Advowſon in groſs, grant it by Deed to one and his heirs, to the uſe of himſelf for life, and after to the uſe of another in Fee; this Grant is void by the death of the Tenant in tail. And if ſuch a Tenant in tail bargain and ſell his Land by Deed indented and inrolled, hereby the Bargainee hath an Eſtate deſcendible to his heirs, but determinable upon the death of the Tenant in tail. And if one covenant by Indenture to ſtand ſeiſed to the uſe of *B.* of White-acre, which he hath not then, but he doth afterwards purchaſe it; by this no uſe will riſe. And if one that hath but a term of years grant it to *J.S.* to the uſe of himſelf for life, &c. this is no good uſe within the Statute, but a Chancery-truſt only. *Hil.* 38 *Eliz. Co. B. Curia. Co.* 2. 52. *Paſch.* 13 *Jac. Co. B. Seignior Sav verſus Smith. Co.* 10. 96. *Yelvertons* Caſe, 37 *Q. B.R.*

Fifthly in reſpect of the eſtate and poſſeſſion of him that doth take by the Conveyance.

The fifth thing to be reſpected, is the Eſtate of him that doth take by the Conveyance out of which the uſes are derived: For howſoever where a man doth grant in Fee-ſimple to another and his Heirs, he may limit what uſes he will upon this eſtate; and if a man make an Eſtate for life to another, he may limit an uſe thereupon; yet if a man make a Gift in tail to another, he can limit no uſe thereupon, *Dyer* 369. *Co.* 2. 78. *Co. ſuper Lit.* 19.

And therefore if one grant his Land to *J.S.* and the heirs of his body, to the uſe of *J.S.* and his heirs in Fee; this limitation of uſe is void, and *J. S.* hath hereby an Eſtate in tail. And if a Feoffment be made to *J.S.* to have and to hold unto him and the heirs of his body, to the uſe of him, his heirs and aſſigns for ever, this uſe is void. *Trin.* 14 *Jac. B.R.* Adjudged, *Cooper* and *Franklins* Caſe.

And where one doth bargain and ſell Land for money, (in which caſe the Law doth make an expreſs uſe) no other uſe can be appointed. And therefore if *A.* for money bargain and ſell Land to *B.* and his heirs, to the uſe of *A.* for life, and after of *B.* in tail, and after of *A.* in fee; all theſe uſes are void, for a uſe cannot riſe out of a uſe. *Dyer* 169. *Cromp. Jur.* 53. *Lit. Bro. ſect.* 284.

So if *A.* make a Leaſe to *B* for years rendring Rent, to have and to hold to the uſe of the Leſſor; this uſe is void, as being againſt reaſon alſo. And if a Feoffee to uſe before the Statute of Uſes, had bargained and ſold the Land to one who had notice of the former uſe, no uſe had been made hereby; for there might not be two uſes in being of the ſame Land at one time. *Dyer* 155: *Co.* 1. 136, 137.

And if *A.* enfeoff *B.* to the uſe of *C.* and his heirs, with Proviſo, that if *D.* pay to *C.* an hundred pounds, that *C.* and his heirs ſhall ſtand ſeiſed to the uſe of *D.* and his heirs, this laſt uſe is void; for the uſe muſt ariſe out of the Eſtate of the Feoffee, and not out of the Eſtate of the *Ceſtuy que uſe.* See *Brownlows Reports*, 1 *par.* 40.

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The ſixth thing whereunto reſpect muſt be had, is the Cauſe or Conſideration. For howſoever in caſes where Uſes paſs by way of tranſmutation of poſſeſſion, as by Fine, Feoffment or Recovery, there the Conſideration is not at all material, for he that doth make the Eſtate, may appoint the Uſe to whom he will, without any reſpect to marriage, kindred, money, or other thing: For in this caſe his own will and conſideration guideth the uſe and equity of the Eſtate. Yet in Bargains and Sales, and Covenants to ſtand ſeiſed to Uſes, it is otherwiſe: for there Conſideration is ſo neceſſary, that nothing will paſs, neither will any Uſe riſe without a Conſideration, *i.e.* ſome matter that may be a cauſe or occaſion meritorious which amounteth to a mutual recompence in Deed or in Law, which muſt be expreſſed or implied in the Deed whereby the Uſe is created, or elſe ſupplied by averment and proof: For howſoever in this caſe an Averment ſhall not be allowed and taken againſt a Deed, that there was no Conſideration given, when there is an expreſs Conſideration upon the Deed; yet when the Deed expreſſeth no Conſideration, or ſaith [for divers good Conſiderations] or the like, there an Averment of a good Conſideration given ſhall be received, for this is an Averment that may ſtand with the Deed; and without Conſideration Inrollment will not help. And therefore if one bargain and ſell his Land to another by Deed indented and inrolled, without any Conſideration; it ſeems no Uſe will riſe by this to the Bargainee. *Dyer* 169. *Cromp. Jur.* 62. *Dyer* 146. *Co.* 1. 176. 11. 25. *Dyer* 312.

Sixthly in reſpect of the cauſe or conſideration of it, and what ſhall be a ſufficient conſideration to raiſe or alter a uſe, or not.

Averment.

So if one [for divers good Cauſes and Conſiderations, or for divers great and valuable Conſiderations] bargain and ſell his Land to another, or covenant to ſtand ſeiſed of his Land to the uſe of another that is not of his kindred, no uſe will riſe by this, unleſs it be proved that money or ſomething elſe was given for it. 41 *Q. adjudg.* But if a man by Deed in conſideration of money, as [in conſideration of the ſum of an hundred pounds to him paid, or in conſideration of a competent ſum of money to him paid, or otherwiſe promiſed to be paid, or in conſideration of other Land, or of giving of Counſel, or the like] bargain and ſell, or by ſuch like words grant his Land to another in Fee-ſimple, Fee-tail, for life or years; in theſe caſes the Uſe will ariſe to the Bargain well enough *Plow.* 301. *Bro. Fait. Inroll.* 9. *D. & S.* 99. *Cromp. Jur.* 60. 61. *Dyer* 90. *Cromp. Jur.* 61.

And therefore if I covenant with with *B.* that when he doth enfeoff me of White-acre, I will ſtand ſeiſed of Black-acre to the uſe of him and his heirs, and he doth enfeoff me accordingly; in this caſe the uſe of Black-acre will riſe to *B.* and he and his heirs ſhall have it according to the agreement.

So if I agree with my Leſſee for years, that if he pay me a hundred pounds within his term, that I will ſtand ſeiſed of the Land to the uſe of him and his heirs, and he do pay me the hundred pounds accordingly; in this caſe the Uſe will riſe, and he and his heirs ſhall have it according to the agreement. *Bro. Expoſition of words*, 44. So if I covenant that my ſon ſhall marry the daughter of *A.* and *A.* promiſe to give me a hundred pounds for the marriage-portion, and I covenant that if the ſame marriage do not take effect, I and my heirs will ſtand ſeiſed of the Land to the uſe of *A* and his heirs, until the hundred pounds be paid; in this caſe a good Uſe will riſe of the Land accordingly, if the marriage do not take effect.

But in all theſe and ſuch like caſes, the Covenant muſt be by Deed indented, and it muſt be inrolled; otherwiſe no Uſes will ariſe. And when the Deed is inrolled, it ſhall take effect as from the beginning by Relation, to avoid all intervenient Eſtates and Charges whatſoever. And in like manner it is, if one for no cauſe, or for no conſideration, as [becauſe he is of his antient acquaintance, or becauſe there hath been entire love or great familiarity between them, or becauſe he hath been his Chamber-fellow, School-fellow, or Fellow-ſervant, or becauſe he hath done him good ſervice, or becauſe he was his Maſter and taught him, or to the end that he may pay his Debts and Legacies, and diſcharge his Funerals, or for divers good cauſes and conſiderations:] If one for any of theſe, or any ſuch like cauſe and conſideration covenant with another that he will ſtand ſeiſed of his Land to the uſe of that other and his heirs, or that he and his heirs ſhall have the Land, &c. By this Covenant, whether it be inrolled or not, no Uſe at all will riſe. *Plow.* 302. 2 *H.* 7. 20.

Relation.

So

So if one covenant to ſtand ſeiſed to the uſe of *J. S.* (who is his Baſtard-ſon) and his heirs, no Uſe will ariſe hereby. And yet perhaps upon ſuch a Covenant as this, whereupon no Uſe nor Eſtate doth ariſe, an Action of Covenant may lie. *Dyer* 374. *Co.* 7. 11. 10. 143. 1. 83. *Plow.* 301. *Lit. Bro. ſect.* 284. *Co.* 1. 154.

Covenant.

But if one [in conſideration of nature, kindred, blood, or marriage with ones ſelf, or any of his blood, paiment of debts, or for the like cauſe] or without any ſuch expreſs Conſideration at all, covenant to ſtand ſeiſed to the uſe of himſelf, his wife, children, brothers, ſiſters, or couſins, or their wives; theſe are good Conſiderations, and the Uſes and Eſtates thereupon thus raiſed and made are good. And therefore if one covenant by his Deed, without expreſſion of any Conſideration, to ſtand ſeiſed of his Land to the uſe of himſelf for life, and after of his Wife for life, and after of his Child in tail or for life, and after of his Brother in tail or for life, or in fee, or in any ſuch like manner; theſe Uſes will riſe, and the Eſtates will be well made hereby accordingly.

So if I agree with another, That if he marry my daughter, that from the time of the marriage they ſhall have my Land to them and their heirs; in this caſe, and by this agreement, if he do marry my daughter, they will have my Land according to the agreement. So if I being about to marry with a woman, covenant with *J. S.* to ſtand ſeiſed of my Land to the uſe of my ſelf for life, and after to the uſe of the woman I am to marry for her life, and after to the uſe of the heirs of my body begotten on her; theſe are good Uſes and Eſtates that are made by this Covenant. *Plow.* 301. *Bro. Feoffment, al. uſes,* 54.

But here by the way, this difference muſt be obſerved, where a man doth covenant in conſideration of a Marriage to be had, to ſtand ſeiſed to Uſe, and the Marriage doth not take effect, there no Uſe ſhall ariſe. *Curia, Trin.* 10 *Car. B. R. Hoskins* Caſe. So alſo if the parties diſagree at their age of conſent: And ſo was it held in the Lord *Herberts* Caſe. But where one doth covenant to make a Feoffment, or levy a Fine to ſuch Uſes, and the Feoffment is made, or Fine levied accordingly; there notwithſtanding the Marriage doth not take effect, yet the Uſe ſhall ariſe: for there he is in by the Fine or Feoffment, in which caſe there needs no Conſideration. And therefore if *A.* covenant with *B.* that in conſideration *C.* is his Kinſman, and in conſideration of a Marriage to be had between *C.* and *E.* he will make a Feoffment and other Aſſurances to the uſe of himſelf for life, the Remainder to *C.* and *E.* and the heirs of their two bodies, and after Aſſurances are made accordingly by Fine or Feoffment, but they do not intermarry, but marry others; in this caſe notwithſtanding *E.* ſhall have a Moity of the Land.

So if I covenant (in conſideration of the love I bear to my Wife) to ſtand ſeiſed to the uſe of her and her heirs of my body begotten, and after to the uſe of my Brother; hereby the Uſe will riſe to my Brother alſo, albeit he be not within the expreſs Conſideration. *Co.* 7. 40. 11. 24. *Dyer* 374.

So if one covenant with his two Sons for the love he doth bear to them, to ſtand ſeiſed of his Land to the uſe of himſelf for life, and after of his Wife for life, and after of his two Sons in tail one after another; in this caſe the Conſideration is ſufficient to raiſe the Uſe to the Husband and Wife alſo.

So if one (in conſideration of the love he doth bear to his Brother) doth covenant to ſtand ſeiſed to the uſe of his Brother, and the Wife of his Brother for life, or in tail; in this caſe the Conſideration is ſufficient to raiſe the Uſes to them both. So if I covenant (in conſideration of the marriage of my ſon with the daughter of another) to ſtand ſeiſed to the uſe of my ſelf for life, and after of my ſon and his wife in tail; theſe are good Uſes, and will riſe accordingly.

If I covenant with *J. S.* to ſtand ſeiſed to the uſe of him, his Executors, &c. (he being none of my kindred) for twenty years, and after to the uſe of my Son in tail; in this caſe the Uſe will not riſe to *J. S.* but it will riſe to my Son well enough. For albeit the Conſideration of money given by one, may be a Conſideration to all the Eſtates; yet the Conſideration of blood, &c. is ſingular, and will raiſe the Uſe of that only to which it goeth. *Plow.* 307. *Dyer* 174.

But

But if I Covenant with *B* in conſideration of the marriage of my ſon with the daughter of *B* to ſtand ſeiſed to the uſe of *R* (a ſtranger) for life, and after to the uſe of my ſon and his wife in Taile; in this caſe the uſe ſhall riſe to *R*, albeit he be a ſtranger, and that for the ſupportance of the remainder, which cannot be without a particular eſtate: and in all theſe, and ſuch like caſes, no inrolement of the Deed is neceſſary. If I (in conſideration of 10.l. given to me by my ſon,) Covenant with him to ſtand ſeiſed of Land to the uſe of him and his heirs; in this caſe, no uſe will riſe without inrolement by the implyed conſideration, becauſe there is an expreſs conſideration, *Et expreſſum facit ceſſare tacitum.* Cook 11. 24, 25. 7. 40. Inrolement.

And yet if I Covenant, that in conſideration that *I S* is my ſon, and hath paid me 10.l. that I will ſtand ſeiſed of Land to the uſe of him and his heirs; in this caſe, the uſe will ariſe without inrolement. *Manrels caſe Trin. 3 Jac. B R. Broo. Feoffmental uſe*, 15 *Plow.*

And if I Covenant in conſideration of 100.l. and of a marriage, to ſtand ſeiſed to the uſe of my ſelf for life, and after of my ſon in Taile; hereby the uſe is raiſed, and the poſſeſſion charged without inrolement. *Manrels caſe.* 4.

So alſo where a Feoffment is made, fine levied, or recovery ſuffered, and no uſe declared thereupon; and the ſame is without any conſideration of fine or Rent; by this the uſe is not changed, for it doth reſult to the Feoffor, Conuſor, and Recoveree, and he hath the eſtate as he had it before; but if in theſe, and ſuch like caſes, there be but a penny or a penny worth of conſideration given, or any Rent reſerved upon the Feoffment; the uſe will riſe well enough to the Feoffee, &c. *Cook* 1. 24. *Doct. & St.* 97. 99, 101.

And if any Tenure be created, as where a Gift in Taile, Leaſe for life or years is made; in theſe caſes, albeit there be no conſideration given, yet the uſe will riſe well enough to the Donee or Leaſſee, and eſpecially, if any Rent be reſerved, for that is a kind of conſideration: But if a Leaſſee for years grant over his term to another without any conſideration at all, it ſeems by this no uſe at all will riſe to the Grantee, and therefore that the Grantee ſhall hold all it to the uſe of the Grantor; *ſed Quære.*

The Seventh thing whereunto reſpect is to be had, is the manner and form of words uſed in the making and raiſing of uſes, wherein there is much regard to the mind and intention of parties. Seventhly, in reſpect of the manner and frame of the words uſed in the raiſing of uſes, and what manner of uſes may be made, or not.

For if one Covenant in conſideration of 20.l. paid him by *I S*, to ſtand ſeiſed of Land to the uſe of *I S* and his heirs: or if one covenant that *I S* and his heirs ſhall have his Land; if this Deed be inrolled, this is a good bargain and ſale to raiſe the uſe, and will do it as well as when it is made by the words [*bargaine and ſell.*] Cook 8. 95.

So if one for good conſideration by words of Demiſe and Grant, make a Leaſe of his Land for a term of years; hereby the uſe will riſe to the Leaſſee as well as if the Leaſe were made by the words, *bargaine and ſell, Et ſic de ſimilibus. Cook* 2. *in Sir Rowland Heywards caſe.*

And yet if one by words of *bargaine and ſell*, convey his Land to his ſon, no uſe will ariſe by this, except there be mony paid, and the Deed be inrolled. *Wards verſus. Lambert. Co. B. Paſche* 37. *Eliz.* Inrolement.

And if one, in conſideration of Mony grant his Land to his ſon, or any other by the word [*enfeoffe*;] no uſe will riſe by this, unleſs Livery of Seiſin be made thereupon, becauſe the intent of the parties in theſe caſes doth appear to be to paſs it in another manner: And if in the laſt caſe Livery of Seiſin be made, then the uſe ſhall be guided by Law, that is, if nothing be given, it ſhall be to the uſe of the Feoffor, and not amount to a limitation of uſe to the ſon. *Reſolved in Stiles caſe.* 37. *Eliz.*

[If one Covenant with his ſon, that his Land ſhall remain, or that his Land ſhall deſcend to him; this is a good Covenant to raiſe the uſe according to the limitation: 21. *Hen.* 7. 18. *Plow.* 308. 301. *Broo. Feoffmental uſe*, 16.

And yet if one covenant with his Son upon his marriage, that his Land ſhall remain, revert, or deſcend to his ſon in Fee, or in Fee-Taile, by this no uſe will be raiſed; becauſe it is ſo incertain; but perhaps this may amount to a covenant, whereupon the ſon may have an Action of Covenant.

Covenant. If I Covenant for me and my heirs, that I and my heirs, and all others that are ſeiſed, ſhall be thereof ſeiſed to the uſe of &c. this is a good covenant to raiſe the uſe, albeit it be in words of the future tenſe.

If I Covenant with my eldeſt ſon and ſtrangers, to convey my Land to the ſame ſtrangers to the uſe of my ſelf for life, and after of my ſon in Taile &c. and I grant by the Deed, that the ſaid perſons ſeiſed of the ſaid Land, ſhall be from thence ſeiſed to the ſaid uſes, and none other uſe, and no other conveyance is made; it ſeems this is ſufficient to raiſe the uſe: And yet if I be ſeiſed of Land in Fee, and covenant with *I S*, that *A B* and *C D* and their heirs, ſhall ſtand and be ſeiſed of this Land to the uſe of &c. it ſeems this is not a good Covenant to raiſe the uſes: *Dyer* 374.

If a Feoffment, or other Conveyance be made to the uſe of the Feoffor and the heirs of his body, on the body of *M* the wife of *S T*, and for default of ſuch iſſue, to the uſe of him and the heirs of his body of *S* the now wife of *W K*, and for default of ſuch iſſue, then to the uſe and performance of his laſt Will for 10 yeares immediatly after his death, and after the term ended, to the uſe of the Feoffees and their heirs during the life of *W* (eldeſt ſon of the Feoffor,) and after his death, to the uſe of the firſt iſſue male of the body of the Feoffor lawfully begotten, and the heirs of the body of ſuch firſt iſſue male, and for default of ſuch firſt iſſue male, to the ſecond iſſue male &c. [in the ſame manner;] theſe are good limitations of uſes. So if a uſe be limited to *I S* for life without impeachment of waſte & after to the uſe of *B* & *C*, their executors & adminiſtrators for the term of twenty years, & after, to the uſe of *C* & the heirs males of his body &c. theſe are good uſes. So if a uſe be limited after this manner, *viz.* to the uſe of a mans laſt Will and Teſtament, or to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit and appoint by his laſt Will and Teſtament; or to the uſe of ſuch perſon and perſons, or to ſuch uſes and purpoſes as he ſhall by any writing under his hand and ſeal declare and appoint; theſe are good limitations. If I Covenant with another in conſideration of blood &c. that I will ſtand ſeiſed of my Land to the uſe of ſuch of my ſons, or ſuch of my couſins, as the Covenant ſhall name, in this caſe, after a nomination made, the uſe will riſe well enough. *Cook* 1. 120. *Cook* 1. 90. *Cook* 6. 18. *Litt. ſect.* 462. 463. *Cook* 1. 176.

Incertainty. But if I (for and in conſideration of 10 l. or the like good conſideration) Covenant to ſtand ſeiſed of Land to the uſe of ſuch perſons as the covenantee ſhall name; in this caſe, albeit the covenantee do nominate ſome of my couſins, or blood, yet no uſe will riſe by this for the incertainty of it. If a Feoffment or other conveyance be to the uſe of *I S* and his heirs, provided that if the Feoffor pay 10 l. at ſuch a day, that then it ſhall be to the uſe of the Feoffor and his heirs; this is a good limitation, and the uſe will riſe accordingly. A uſe may be limited to a woman *durante viduitate ſua*, and this is good. *Cook* 4. 3.

If a man be ſeiſed of two Manors, and covenant to ſtand ſeiſed of the ſame to the uſes following, *viz.* of the one to the uſe of the covenantor for his life, and after to the uſe of his wife for life, and after to the uſe of his eldeſt ſon in Taile &c. And for the other Manor, to the uſe of his ſecond ſon in Taile &c. theſe are good limitations, and the uſes will riſe accordingly. *Cook* 11. 23.

If a man ſeiſed of Land in Fee agree with another, that a Fine ſhall be levied of it, and that the ſame ſhall be to the uſes following, *viz.* that *I S* (the Conuſor) ſhall have one yearly Rent of 50 l. during his life to be iſſuing out of the ſame Land, and as touching the Land charged with the Rent &c. to the uſe of *I D* (the Conuſee) until default of payment of the ſaid yearly Rent, and then to the uſe of *I S* and his heirs for ever; this is a good limitation, and the uſe will riſe accordingly, *Et ſic de ſimilibus*. Cook 2. 69, 70.

If a Feoffment be made by *I S* to the uſes in certain Indentures Tripatite of the ſame date, and therein is declared that it ſhall be to the uſe of *A* for life without impeachment

ment of Waſte, and after to the uſe of ſuch Farmors, or Tenants to whom he ſhall demiſe any part of the premiſes for life, or lives, or for any term of years, as in any ſuch demiſe ſhall be limited and appointed; and after to the uſe of the performance of the laſt Will of the ſaid *L*, and to the uſe of ſuch perſon or perſons ſeverally to whom the ſaid *L* by his laſt Will and Teſtament ſhall appoint any eſtate; and after to the uſe of &c. theſe are good uſes, and the eſtates ſhall riſe accordingly. *Brownl.* 2. *part* 51.

A uſe may be limited upon condition, and the condition may be annexed to one of the uſes, and not unto another. *Cook* 4 14

If Lands be conveyed to *I S* and the heirs of his body, to the uſe of *I S* and his heirs, or to the uſe of a ſtranger and his heirs: this uſe will not riſe in this manner. And yet if lands be conveyed to *I S*, and his heirs, to the uſe of him and the heirs Males of his body, and after to the uſe of a ſtranger and his heirs, it ſeems this is a good limitation. *Cook ſuper. Littl.* 19.

If one grant Lands by Deed to husband and wife, To have and to hold to the uſe of the husband and wife, and of the heirs of their two bodies; this is a good eſtate Taile by this limitation, albeit he do not ſay *Habendum* to them and their heirs &c. but *Habendum* to their uſes; but otherwiſe it were if the uſe were limited to a ſtranger in this manner. *Hill.* 6 *Car. B R. Adjudge.*

If Lands be conveyed by *I S* to *I D*, to the uſe of *I S*, or to the uſe of his wife for life, or to the uſe of any other for life, the remainder to another in Taile, or for life, the remainder to a third, his Executors &c. for ſix months, and after the ſix months ended, to the uſe of a fourth and his heirs; theſe are good limitations, and the eſtates will riſe accordingly. *Dyer* 314.

If a uſe be limited to the Conuſee of a Fine, or a Recoverer in a Recoverie until he make a Leaſe for Fourty years, and after to the uſe of the Recoverees or Conuſors and their Heirs; this is a good limitation, and the uſe will riſe accordingly. *Dyer* 290.

Contingent uſes, or uſes in *poſſe* may be created as well as uſes in *eſſe*; and therefore if Lands be conveyed to the uſe of a man, and the wife he ſhall afterwards marry, or to the uſe of his firſt, ſecond, or third wife; or to the uſe of *I S* for life, and after to the uſe of the right heirs of *I D*, and *I D* is then living; or to the uſe of *I S* for life, and after to the uſe of him that ſhall be his firſt heir male, and the heirs of the body of ſuch heir male &c. all theſe, and ſuch like, are good uſes; but they are uſes at the Common-Law ſtill, and are not executed by the Statute until they come in *eſſe*. *Cook* 1 *in Chudleighs caſe*, 135.

'Eighthly, in reſpect of the Nature and Quality of the Uſe. Charitable uſes.

The laſt thing whereunto reſpect is to be had, is the Nature and Quality of the Uſe: And herein it is to be known, that a man may at this day by act executed in his life time, or by his laſt Will and Teſtament at his death, give his Lands, Tenements, or Hereditaments to any perſon or perſons not corporate, and their heirs, for any Religious, Charitable, or Civil Uſe, as well as for any private Uſe. *Cook* 1. 26. 8. 131. 4. 113.

And therefore a man may ſo diſpoſe of his Lands for the finding of a Preacher, erecting or maintenance of a School, Relief and comfort of Maimed Souldiers, ſuſtenance of poor people, reparations of Churches, High-wayes, Bridges, diſcharging of the poor Inhabitants of a Village of the common charges, to make a ſtock for poor Labourers in Husbandry, and poor Apprentices, and for the marriage of poor Virgins, or other ſuch like uſes, and theſe uſes are not prohibited by any Statute.

And it is good Policy upon every ſuch Feoffment or eſtate to reſerve to the Feoffer and his heirs ſome ſmall Rent, or to ſet down ſome ſmall Conſideration: But theſe uſes are not ſuch uſes as are executed by the Statute of uſes, neither are they to be reſembled to the uſes aforeſaid; for in this caſe, if there be any miſimployment of the Lands, or breach of the Truſt by the parties truſted, Redreſs is to be had by the Lord Chancellor or Lord Keeper by a ſpecial courſe of proceeding. For which, ſee the Statutes of 39 *Eliz. chap.* 6. 43 *Eliz. chap.* 9. 7 *Jac. chap.* 3.

Superſtitious Vſes.

But if any man have heretofore given, or heretofore ſhall give any Lands, Tenements or Hereditaments by act executed in his Life, or by his laſt Will at his Death to any perſon ſingular, or corporate, in Fee-ſimple, Fee-Taile for life, or years, to the intent, or upon condition to maintain any ſuperſtitious Uſe, as to finde a Chaplain, and have the ſervice of a Prieſt to ſay Maſſe, or to have a Prieſt or other man to Pray for the Soul of any dead man in ſuch a Church or other place, or to have or maintain perpetual Obites, Lamps, or Torches, &c, to be uſed at certain times to help to ſave the Souls of men out of the ſuppoſed Purgatory; all theſe and ſuch like uſes are void: And the Lands that are ſo given to ſuch ſuperſtitious uſes, are to be forfeited, and given to the King, and he ſhall have them; and yet ſo, that if there be any charitable uſe intermixed with the ſuperſtitious uſe, and they may be diſtinguiſhed, the King ſhall have only ſo much as is given to the ſuperſtitious uſe, and not that which is given to the charitable uſe alſo: For which, ſee *Adams* and *Lamberts* Caſe at large, *Cook* 4 104. *Stat.* 15 *Rich.* 2 *chap.* 5 37 *Hen.* 8 *ch.* 4. 1 *Edw.* 6. *cha.* 14.

5. Declaration of Vſes: And where a uſe of Land may bee declared upon any Aſſurance, and what ſhall be ſaid a ſufficient declaration of ſuch a uſe, or not.

As touching the Declaration of Uſes, *i. e.* the manifeſtation or agreement of the Parties, to what uſes and intents the Aſſurance made ſhall be, theſe things are to be known:

1. That uſes may be declared or averred on a Fine, Feoffment, or recovery of Land; but on a bargain and ſale of Land, no uſe may be declared or averred, but what the Law doth make, *Cook* 1. 175, 176. *Dyer* 169.

And upon a Covenant of uſes, no other uſe may be declared or averred, but what is contained within the Deed.

2. Every one may declare and diſpoſe the uſe of Land according to the eſtate that he hath in the Land; for the declaration and diſpoſition of the uſe doth enſue the ownerſhip of the Land *ſicut umbra ſequitur corpus*, *Cook* 2. 55. *Dyer* 290.

And at this day the uſe doth draw the Land to it, as the body or principal the ſhaddow or acceſſary: And therefore the owner of the Land, or he from whom the the land doth move, ought to limit and declare the uſe of the land; as if the Husband and Wife levie a Fine of the Land, whereof he is ſeiſed in the right of his wife; the Husband alone may declare the uſe of this Fine, and this declaration ſhall binde the wife, albeit her aſſent to the limitation of the uſes do not appear, if her diſaſſent doth not appear; but in this caſe, it is moſt proper to have a declaration of the uſes by the husband and wife both; for ſhe alone, becauſe ſhe is *ſub poteſtate viri*, cannot alone declare or limit any uſe; neither can the husband alone limit any uſe againſt her good will, becauſe he hath not the eſtate of the Land: And therefore, if *A* and *B* his wife be ſeiſed of land in the right of his wife, and ſhe without the conſent of her husband, covenant by Indenture with *C* and *D*, 14 *Martii* 14 *Eliz.* that a fine ſhall be levied of this Land, and that it ſhall be to the uſe of her ſelf for life without impeachment of waſte, and after to the Conuſees for their lives, to the intent that they ſhall ſuffer *I S* to take the proffits for his life with divers remainders over; and afterwards, and before the fine levied, the husband alone by another Indenture 31 *Febr.* 22 *Eliz.* (wherein the wife is named a party) without the conſent of his wife, doth agree that a fine ſhall be levied to the uſe of him and his wife, and after to the uſes limited by the wives Indenture, and after the fine is levied accordingly; in this caſe, albeit the variance be in one particular only, and the limitations in all the reſt of the uſes and eſtates do agree, yet all the ſame limitations by both Indentures are void, and the uſe upon the conveyance is left to conſtruction of Law, and therefore ſhall be to the wife and her heirs for ever: And yet if the husband and wife agree in the limitation of the uſes for part of the land, and differ in the reſt, the limitations for ſo much as they agree in, are good, and void for the reſidue: And in theſe caſes where the declaration is good, the wife and her heirs ſhall be bound by it. So if two Joynt-tenants are, and they, or two others having ſeveral eſtates, joyn in a fine, and one of them declare the uſe in one manner, and the other doth declare the uſe in another manner; this declaration is good for either of their parts; for the declaration ſhall be governed according to their eſtates. And if an Infant, or a man *de none ſane memorie*, doth declare the uſe of a fine levied by him, this declaration is good, and ſhall binde him ſo long as the fine ſhall continue in his force.

Husband and Wife.

Joynt-tenants.

Infant.
De non ſane memorie.

3. This

3 This declaration of Uſes may be made either by Deed indented (which is the moſt uſual and ſafe way,) or by Deed Poll : As where the parties do by ſuch a writing agree that an Aſſurance paſſed, or to be paſſed, ſhall be to ſuch and ſuch uſes: as that a fine ſhall be levied by ſuch a time, and that it ſhall be to the uſe of one for life, another in Tail, and another in Fee. *Cook* 2 73. 5 29

Or it may be made by a verbal agreement without any writing at all ; as where an agreement is ſo had and made between two or more, that a Fine or Recovery ſhall be had, and it ſhall be to ſuch and ſuch uſes, and the ſame is had accordingly ; in this caſe, this is a ſufficient declaration being proved ; but it is not ſafe in theſe caſes to depend upon ſlippery memory.

4. This declaration by word or writing, may be made before, at, or after the time of making the Aſſurance : and therefore one may covenant or agree that *I S* ſhall recover againſt him, or that he will levy a Fine, or make a Feoffment to *I S* of ſuch land, and that the ſame ſhall be to the uſe of &c. *Cook* 2 69 70. 6 29 63 *Dyer* 290 *Coo.* 7 40. *Coo.* 98. *Dyer* 136.

And if one make a Feoffment ; he may declare the uſes of it at the ſame time, and that within the ſame, or in another Deed at his pleaſure : And if the Aſſurance be paſt, and no declaration of uſes had before, or at the time of paſſing it, a declaration may be ſubſequent, *viz.* That the ſame Aſſurance was, and ſhall be, and the Recoverers &c. ſhall ſtand and be ſeized to ſuch and ſuch uſes ; for an Indenture ſubſequent may direct and declare the uſes of a Fine or Recovery precedent. But herein theſe diverſities are to be obſerved ; when precedent Indentures are made to direct the uſes of a ſubſequent Aſſurance, and after the aſſurance made accordingly, there no Averment ſhall be taken by word, that the ſame Aſſurance was to other uſes then are declared by the Indenture : But againſt an Indenture ſubſequent, declaring the uſes of an Aſſurance precedent, an Averment may be taken, that there were other uſes expreſſed and limited, before or at the time of the Aſſurance, then are contained in the Indenture. If a precedent Indenture be made to direct the uſes of a ſubſequent Aſſurance, when the Aſſurance comes, the land is bound, and the Conuſor or Recoveree cannot by any act of his, after the Recovery had, charge or avoid it ; but if the declaration be ſubſequent, if in the interim, between the Aſſurance had, and the declaration of the uſes, the Conuſor or Recoveree ſell, give or charge the Land to others ; this ſubſequent declaration will not ſubvert the mean eſtates, charges or intereſts, unleſſe it can be otherwiſe proved, that by a certain and complete agreement of the parties, the Aſſurance was had and made to theſe uſes. Averment.

5. When the agreement for the limitation of uſes is precedent, whether it be by writing or word, it is but directory, and doth not bind the eſtate until the ſame Aſſurance be afterwards had, and therefore by a new agreement or declaration made in the ſame manner as the former, *viz.* in writing, if the former be ſo, and between the ſame parties either before, or at the time of the ſame Aſſurance paſſed, new uſes may be made, and the former uſes changed ; but when the ſame Aſſurance is purſued accordingly, and no intervenient alteration is made, it ſhall be expounded to be to the ſame uſes, and ſhall bind the parties, and no naked Averment ſhall be received of any latter or other agreement contrary to the Indentures.

6. The declaration of the uſes muſt be certain, and that eſpecially in three things ; in the perſons to whom, in the Lands, *&c.* of which, and in the eſtates by which the uſes are declared ; and if there want certainty in either of theſe, the declaration is not good ; and it muſt be complete of it ſelf without any reference to Indentures or other writings to be made afterwards ; for then it is but an imperfect communication, and no complete declaration.

7 Where an Indenture precedent is to limit the uſes of a ſubſequent Fine or Recovery, and it is not purſued in ſome circumſtance of time, perſon, quantity or the like ; yet if no other new meane agreement may be proved, the Aſſurance ſhall be in judgment of Law to the uſes contained in the ſame Indenture ; but if the variance be in theſe particulars, and the form of the Indentnre be not purſued, there an Averment without writing may be taken, that the fine or other Aſſurance was to other uſes then are conteined in the Indenture ; and if none ſuch can be made, then it is left to

conſtruction

conſtruction of Law. And therefore if *A* be ſeiſed of divers Manors in Fee, and by his Indenture dated 10 *Martii.* 21 *Eliz.* doth covenant with *B* and *C*, That he, before the end of Trinity Term next, will by Fine or other Conveyance aſſure one of theſe Manors to them, and that the ſame Aſſurance ſhall be to the uſe of *A* and *E* his wife, and of the heirs of *A*, and the 28 day the Deed is inrolled, and the 29 day of the ſame month, he doth by another Indenture covenant with the ſame *C* and *D* to convey all the ſame Manors to the ſame *C* and *D* before the Annunciation next, and that the ſame Aſſurance ſhall be to the uſe of *A* and his heirs males of his body, and for default of ſuch iſſue, to the uſe of divers others in remainder, and by this Indenture doth covenant, that if he ſhall not ſufficiently convey this land by the day, that he will ſtand ſeiſed to the ſame uſes &c, and no Fine is levied by the end of Trinity Terme, but the 17 of *September* following, a note of a Fine is acknowledged to *B* and *C* and the heirs of *B*, of the land within the firſt Indenture; and the 18 of the ſame month, another note of a Fine is acknowledged to *C* and *D* of the ſame, and other land in the laſt Indenture, and both theſe Fines are entred in *Octabis Mich.* following, in this caſe, theſe Fines cannot be directed and declared by both Indentures, and therefore it ſeemes the declarations are void.

6. Averment of Uſes; & where a uſe of land may be averred upon any aſſurance; And what ſhall be ſaid a ſufficient averment, or not.

As touching Averment of Uſes; *i.e.* the proof of uſes by witneſſes, theſe things are to be known, That where any uſe is expreſſed upon a Charter of Feoffment, no other uſe *contra* or *preter* the uſe which is expreſſed, ſhall be admitted. But in caſes of Fines and Recoveries, wherein no uſes are expreſſed, other uſes then what Law conſtruction will make, may be ſhewed and proved to be agreed upon, and the ſame aſſurances ſhall be to ſuch uſes, as by proof ſhall be made to appear to be the intent of the parties: As if a man and his wife ſell her land for money, and after levy a Fine to the Vendee and his heirs; in this caſe it may be averred it was for money, and this ſhall carry the uſe to the Vendee without any declaration of uſe, which otherwiſe would reſult to the woman and her heirs: and yet if a Fine be with a Grant and Render, no averment to prove it to be to other uſes, then what are contained in the Fine, ſhall be received. *Cook* 9 8 5 20 25. *Doct. & St.* 95 *Cook* 2 57.

And where the uſes of a Conveyance be declared by Indenture before, or at the time of the ſame Conveyance, no averment ſhall be received of any other uſes then what are contained in the Indenture: But if the Indenture of declaration be ſubſequent, there an averment lyeth and ſhall be received that there were other uſes agreed upon, at, or before the time of the conveyance made. *Cook* 9 8.

And where no agreement is made to levy a Fine, or ſuffer a Recovery, before, or at a time certain, and that it ſhall be of ſuch and ſuch lands, and to ſuch and ſuch perſons; and after it falleth out the Fine or Recovery is not had by that time, or not of the ſame land, or not between the ſame perſons; in theſe caſes an averment may be had of other uſes and of another agreement.

7. To what uſe an aſſurance of land ſhall be by conſtruction of Law, and how the limitation of the Uſes of land by a Deed ſhall be conſtrued.

Where the uſes of an aſſurance are certainly agreed upon and declared between the parties thereunto, there regularly it ſhall be to ſuch uſes as are declared and agreed upon, and to none others. But if a conveyance be made of land by Fine, Feoffment or Recovery, and no uſes thereof declared and agreed upon, the Law will limit and appoint the uſe according to equity and conſcience. And therefore if a man levy a Fine, make a Feoffment, or ſuffer a Recovery of Land without any conſideration, the Law will adjudge the uſe to be in the Feoffor, Conuſor and Recoveree who doth part with the Land. And ſo if a man make a Feoffment to the intent to perform his laſt Will, or to the uſe of his laſt Will, or to ſuch perſons as he ſhall limit by his laſt Will; in all theſe caſes the uſe ſhall be in the Feoffor and his heirs whiles he doth live, to diſpoſe at his pleaſure. *Doct. & St.* 95. *Perk. Sect.* 533. *Cook* 1 24. *Dyer* 18. *Cromp. Jur.* 62. *Cook ſuper Litt.* 271.

And ſo if one make a Feoffment of Land to *I S* and his heires, to the uſe of *W S* for 20 years, and limit the uſe no further; in this caſe the reſidue of the uſe after the 20 years, ſhall be to the Feoffor and his heirs: But if in theſe caſes there be any conſideration of money or the like, though never ſo little given, or any rent reſerved upon the Feoffment, the Law will adjudg the uſe in the Feoffee, Conuſee, or Recoveror. *Bakers Caſe Co. B. Hill.* 37 *Eliz.*

And

And yet in that caſe alſo, if other uſes be expreſſed upon the Deed, it ſeems it ſhall go to the uſes expreſſed; as, if *A* for 20 l. paid by *B*, enfeoff *B* and his heirs to the uſe of *C* and his heirs. *Doct. & St* 95.

If the husband and wife levy a Fine of the wives land without conſideration, and without any declaration of uſe, the Law wil adjudg this to be to the uſe of the wife and her heirs; but if they ſell her land for money, and after levy a Fine thereof to the Vendee; this ſhal be to the uſe of the Vendee and his heires. *Coo.* 2. 57. 58.

And if a man be ſeiſed of Land, of the part of his Mother, and without any conſideration make a Feoffment in Fee of it, this ſhall be ſaid to his uſe in the ſame nature he had it before.

So if two Joint-tenants be of land, the one in Fee ſimple, the other but for life, and they without any conſideration levy a Fine of it, and make no declaration of uſe; the uſe ſhall be to them of the ſame eſtate as they had before in the land.

So if *A* tenant for life of land, and *B* in reverſion or remainder, levy a Fine of this land, generally this ſhall be to the uſe of *A* for life, and to the uſe of *B* in Fee afterwards as it was before.

So if *A* be ſeiſed in Fee of an Acre of ground, and he and *B* joyn together and levy a Fine of it to another without any conſideration; this ſhall be to the uſe of *A* and his heirs only.

If one make a gift in taile, or Leaſe for life, or years, albeit it be without any conſideration of Fine or Rent, yet the Law will adjudg the uſe in the Donee or Leſſee, and not in the Donor or Leſſor. *Perk. Sect.* 533

If one at this day by Deed indented, bargein and ſell his land to another for mony, and doth limit no eſtate, but the Deed is *Habendum* to him only, and not *Habendum* to him and his heirs, or to him and the heires of his body, or to him for life: howſoever in this caſe, before the Statute of uſes was made, it was otherwiſe; yet now the common received opinion is, that by this there doth paſſe only an eſtate for life, and not a Fee-ſimple. *Plow.* 539. *Cook* 1. 87. Yet ſee *Litt. Broo.* 538. *Cromp. Jnr.* 47. 27 *H.* 8. 6. *Cook* 1. 110.

If a Feoffment be made to *I S* and his heires to the uſe of *I D* without any more words; by this limitation *I D* hath only an eſtate for life: So if a Feoffment be made to *I S* and his heirs to the uſe of *I D* for ever, without ſaying, [*And his heirs*] hereby *I D* hath only an eſtate for life: and ſo of other uſes the conſtruction ſhall be according to the rules of Law. *Cook ſuper Lit.* 42. *Dyer* 169.

If a uſe be limitted to *I S* and his heires until *A* ſhall come from beyond the Sea, and attain his full age and dye, in this caſe if he come from beyond Sea, attain his ful age or dye, the uſe ſhall ceaſe. *Paſch.* 3 *Eliz. B. R. the Lord Mordants Caſe.*

If one covenant to ſtand ſeiſed to the uſe of *A* his eldeſt ſon, and the heirs males of his body, and after to the uſe of *B* his ſecond ſon in taile in the ſame manner, or according to the limitation to *A*; by this, *B* hath an eſtate taile to him and the heires males of his body, *Hil.* 17 *Jac. B. R. Rigwayes caſe.*

If a Feoffment in Fee be made to the uſe of a man and his wife for their lives, and after to the uſe of their next iſſue male to be begotten, in tail, and after to the uſe of the husband and wife, and of the heirs of their two bodies begotten (they having no iſſue male then;) by this the husband and wife are tenants in ſpecial Tail executed; and after they have iſſue male, they are tenants for life, the remainder to the ſon in tail, the remainder to them in ſpecial tail. *Cook ſuper Litt.* 28.

If one make a Feoffment to the uſe of himſelf for life, and after his deceaſe to the uſe of *Alice* whom he doth intend to marry, until the iſſue he ſhall beget of her ſhall be of the age 21 years, and after the iſſue cometh to that age, then to the uſe of the wife during her widow-hood, and the husband dye without iſſue: by this the wife ſhall have an eſtate, at leaſt during her widow-hood. *Dyer* 300.

If I covenant with *B* that in conſideration he will marry my daughter, that from the time of the marriage I will ſtand ſeiſed to the uſe of my ſelf for life, and after to the uſe of *C* a ſtranger. and the heires males of his body, and after to the uſe of *B* and my daughter, and the heires of their two bodies; in this caſe albeit the uſe limitted to *C* the ſtranger be void, yet it ſeemes *B* and my daughter ſhall

not

not have the Land till the death of *C* without iſſue, but that my heirs ſhall have it till that time. *Cook* 1.

If I covenant with *B* to ſtand ſeiſed to the uſe of my ſelf for life, and after my death to the uſe of *C* (a ſtranger) for the term of 20 years, and after the end of the term to the uſe of my ſon in tail; in this caſe the uſe limited to *C* is void, and my ſon after my death ſhall have the land: But if the words of the Covenant be, [*And after the end of* 20 *years*,] in ſtead of, [*And after the end of the term*,] my ſon ſhall not have the Land until the 20 years be expired. *Cook* 1. 155. See more in expoſition of Deeds.

8. Where and how uſes of Land may be extinguiſhed and deſtroyed or ſuſpended, or not; and where the ancient uſes ſhal be revived by the entry of the Feoffees, or not.

All ſuch uſes as are not within, nor executed by the Statute of 27 *H.*8. but remain at the Common Law, may be deſtroyed, diſcontinued or ſuſpended as uſes before the Statute might have been. And therefore contingent uſes may be extinguiſhed or ſuſpended at this day. As, if a man ſeiſed of land in Fee have three ſons, *A*, *B* and *C*, and he make a Feoffment of his land to divers Feoffees to the uſe of them and their heires during the life of *A*, and after to the uſe of the firſt ſon that *A* ſhall beget, and the heires males of the body of ſuch firſt ſon; or if a Feoffment be made to the uſe of a man and the wife that he ſhall marry, or the like; if in theſe caſes the Feoffees make a Feoffment over, before the contingent uſes happen to be in *eſſe*, as before *A* have any ſon, or the man take a wife, &c. albeit it be to one that have notice of theſe uſes, yet the uſes are deſtroyed for ever, and the Feoffees cannot enter and revive them contrary to their own Feoffment. And if in theſe caſes the Foeffees before the contingent remainder veſt be diſſeiſed, hereby the uſes are ſuſpended; but then by the Reentry of the Feoffees the ancient uſes will be revived again: And therefore if the Feoffees releaſe to the Diſſeiſor, and ſo bar themſelves of their entry, the uſes are extinguiſhed and ſhall not be revived, and the party grieved hath no remedy but in Chancery againſt the Feoffees for breach of truſt. And if the Feoffees in the firſt caſe before, dye before *A* have any ſon born, the contingent remainder is gone: As where a Feoffment is made to the uſe of the Feoffor for life, and after to the uſe of the right heirs of *I S* in Fee, and the Feoffor dye before *I S*; in this caſe the remainder is gone, for a remainder cannot be without a particular eſtate no more of a uſe then of an eſtate made in poſſeſſion: and ſuch a remainder muſt veſt during the particular eſtate, or at leaſt *eo inſtanti*, when the particular eſtate doth end. *Cook* 1. *Chudleighs caſe.*

If a Feoffment be made to the uſe of *I S* and the wife he ſhall afterwards marry, and of the heires males of their bodies; and *I S* make a Feoffment of this land to another before he take a wife; hereby the contingent remainder is deſtroyed. *Coo.* 1. 136.

If *A* enfeoff *B* and his heires to the uſe of *C* and *D* his wife, and the heires of the ſurvivor of them, and *C* makes a Feoffment to *E* and dyeth: this Feoffment doth deſtroy the contingent remainder, *Hillar.* 2. *Carol. Scaccar Adjudged.*

When the eſtate out of which the uſes do ariſe is gone, the uſes are gone alſo: As, if a Leaſe be made to *A* for his life to the uſe of *B* for his life, and *A* dye; hereby the eſtate of *B* is gone. *Dyer* 186.

Alſo uſes of lands may be gone by Revocation, whereof ſee in the next part.

9. Where a power to revoke uſes of land ſhall be good, and how they ſhall be taken; and what Revocation by reaſon of ſuch power ſhal be good, and what not. *Brownl. Rep.* 2. *part* 157.

Proviſoes and Powers of revocation of uſes of lands are very frequent in voluntary conveyances (whether by Feoffment or otherwiſe) that paſſe land by way of raiſing of uſes, and are executed by the Statute of 27 *H.*8. and the inheritances of many depend thereupon. *Cook ſuper Litt.* 237. 7. 11. 12. 10. 143. 1. 110. 173. 107. *Dyer* 372.

As, if a man ſeiſed of land in Fee have divers ſons, and he covenant to ſtand ſeiſed of that land to the uſe of himſelf for life, and after, of his eldeſt ſon in tail, and for want of ſuch iſſue, to the uſe of his ſecond ſon in tail, &c. with a Proviſo, that it ſhal be lawful for him at any time during his life to revoke any of the ſaid uſes, and to limit and appoint other uſes, &c.

Or if *A* by Indenture between him and *B* his heir apparant an Infant, covenant

with *B* for the advancement of his blood, &c. to ſtand ſeiſed to the uſe of himſelfe for life, and after to the uſe of his ſaid heire apparant, and the heires males of his body, and after to the uſe of his right heirs; provided that if *A* by himſelf or any other during his life ſhall deliver or offer to *B* a Ring of gold, to the intent to make void all the ſaid uſes, that then the ſame uſes ſhall be void, and he may limit new uſes. Or if *A* by Indenture Covenant with *B* to ſtand ſeiſed to the uſe of himſelf, and his wife, and his daughter for their lives, and after &c. provided that if the ſaid *A* during his life, and after the debts mentioned in the Schedule annexed to the Indenture ſhall be paid, ſhall be diſpoſed to determine, diſannul, change, alter, enlarge, diminiſh or make void the uſes or eſtates, or any of them, of the premiſſes or any part thereof, and by writing indented under his Hand and Seal ſubſcribed in the preſence of three Witneſſes ſhall declare his mind to be ſo, that then the ſame uſes ſhall be void: All theſe and ſuch like Proviſoes being coupled with a uſe, are allowed to be good, and not repugnant to the former eſtates. But in caſe of ſuch a Feoffment or other conveyance whereby the Feoffee or Grantee is in by the Common-Law, as where *A* doth enfeoffe *B* and his heires to the uſe of *B* and his heires, it ſaid ſuch a Proviſo is meerly repugnant and void.

And as touching theſe Proviſoes or Revocations, theſe things are to be known;

1. Theſe Revocations are favourably interpreted, becauſe many mens Inheritances depend upon it: And therefore he that hath this power may revoke part of the uſes at one time, and part at another time; and the revocation of the old, may be made by the making of new uſes without any expreſſe revocation: And by the ſame conveyance whereby the old uſes be revoked, the new uſes may be created and limited, and then the former uſes do ceaſe *ipſo facto* by this revocation without any entry or claim. As if one covenant to ſtand ſeiſed to the uſe of himſelf and his wife for their lives, and after to the uſe of *A* his daughter for life, and after to the uſe of *B* his Daughter in tail, &c. provided that if he ſhall be minded, &c. he may by writing *&c.* make void the ſame uſes, and declare the uſes to others; and he doth make void the uſe to his wife at one time and no more, and after by deed doth limit and appoint new uſes of the whole by a new Covenant to ſtand ſeiſed to other uſes; theſe are good revocations; for there needs no real and expreſſe revocation of former uſes, but the creating of new uſes is in Law an actual revocation of the old uſes, as the making of a latter is *ipſo facto* a revocation of a former Will.

2. The Proviſo muſt for the ſubſtance of it be purſued in the revocation, and all incident circumſtances thereof muſt be obſerved, as ſealing, ſubſcription of names, witneſſes, and the like; otherwiſe the revocation will not be good. And therefore if the Proviſo be, that if the Covenantor ſhall be minded to revoke, and ſhall declare his mind by writing indented under his Hand and Seal, delivered before three Witneſſes, the uſes ſhall be void; in this caſe a revocation by word without writing, or by a writing and not indented, or by writing indented and not under Hand and Seal, or under Hand and Seal, and before two witneſſes only, is not good. And yet if a Proviſo be, that if the Covenantor ſhall at any time during his life by writing under his Hand and Seale delivered before two witneſſes revoke the ſame *&c.* the old uſes ſhall be void, and the Covenantor by his laſt Will and Teſtament in writing under his Hand and Seal before two Witneſſes doth give the Land to another, and make no expreſſe revocation of the former uſes: this is a good revocation in Law. If the Proviſo be, that if the Covenantor be minded at any time during his life to revoke the ſame uſes *&c.* and ſhall pay or render to *A B* 20s. in ſuch a place; in this caſe tender of this 20 s. in that place at any time is not good, unleſſe he happen to meet with *A B* at the place, for then tender at any time is good, but otherwiſe the Covenantor muſt give notice to *A B* what time hee will render the twenty ſhillings, in that place, otherwiſe the revocation is not good. *Trinit.* 18. *Jacob. Com. B. Tibbet and Leas Caſe. Cook* 8. 92 1.

If one be to marry his daughter to the ſon of another man, and they do mutually covenant to ſtand ſeiſed of their lands to the uſe of their ſon and daughter

with Proviſo to revoke the uſes with the conſent of the mothers, if they or either of them be then living, and one of them dye; in this caſe a revocation, by the conſent of the ſurviving mother is ſufficient. *Trin.* 18 *Jac. B.R. Savil and Sterlings caſe.*

3. When the Covenantor doth make void ſuch uſes by vertue of ſuch a revocation, he is ſeiſed again of the Land in Fee-ſimple, as he was at firſt, without any entry or claim.

4 This power of revocation, whether it be preſent, as thoſe before and moſt are, or future, as when they are upon contingent, as if the Covenantor over-live *I S* or the like, when it is reſerved to the party himſelf that made the uſes, may by his Fine or Feoffment be utterly extinguiſhed: As if he make a Feoffment, or levy a Fine of the land, whereunto the uſes and Proviſo are annexed, by this the Proviſo is extinct: and yet ſo, as if he make a Feoffment, or levy a Fine of part of the Land only, this ſhall extinguiſh his power but to that part only: But if the power be reſerved to a ſtranger, it ſeemes the Fine or Feoffment of him that made it, will not extinguiſh it. This power alſo when it is preſent may be extinguiſhed by a Releaſe made by him that hath the power, to any one that hath any eſtate of Franktenement in the land in poſſeſſion, reverſion, or remainder; or it may be avoided by Defeaſance, whether it be preſent or future. *Cook* 1. 111. 112. 113. *ſuper Litt.* 237.

Releaſe.

Defeaſance.

10 Other truſts and Confidences of lands and of chattels real and perſonal, the nature of ſuch truſt, the duty of them that are truſted, and the remedy to be had againſt them for breach of their truſt.

If one convey his lands to certaine friends in truſt, to the intent that they ſhal convey it to ſuch perſons as he ſhall ſet down in his laſt Will and Teſtament; Or if a man deliver money to a friend in truſt to purchaſe land for him and his heires, to the end that he may have the profits thereof for his life, and to the end it may be conveyed to them afterwards: Or if a man deliver money to his friend to buy land for him that doth deliver the money in his owne name: Or if a man enfeoff his friend and his heires of land, to the intent that he ſhall alien the Land to whom *I S* ſhall appoint; Or if land be conveyed to me in Mortgage, and I pay all the money, but I (to prevent the Joynture of my wife, or for ſome ſuch like cauſe) name a friend Joynt-Purchaſor with me, and ſo the conveyance is made to us both; if in any of theſe caſes, or in any other ſuch like caſe the friend truſted prove falſe, and do not perform the truſt, but turn the profits of the land to their own uſe, or refuſe to ſettle it according to the truſt, or the like, the party grieved muſt have his remedy in Chancery, for theſe are not Truſts or Uſes within the Statute, nor ſuch for which there is any remedy at the Common-Law; And in that caſe where the land is ſettled to the intent that the friends truſted ſhall ſettle it where *I S* ſhall appoint, if *I S* do not appoint how it ſhall be ſettled, it ſeems the Feoffees ſhall have it to their own uſe. *Cromp. Jur.* 48. 59. 58. 54. *Dyer* 160. *Fitz. Accompt.* 122.

And if a man give or grant his goods or chattels, as Leaſes for yeares or the like, to friends in truſt, to the uſe of himſelf for life, and after to perform his Will, or the like; theſe are ſuch uſes and truſts as are not within the Statute of uſes, and for the breach of which there is no remedy at the Common-Law, but in Chancery only. So if an Obligation or Statute be made to *A B* to the uſe of *C D*; this is a truſt of the ſame nature: and if *A B* releaſe the Obligation without the conſent of *C D*, or get the money into his own hands, *C D* ſhall have relief in Chancery. *Cromp. Jur.* 65. *Dyer* 369. *Broo. Feoffment al uſe* 60. *Cromp. Jur.* 62. 45. 11. *Ed.* 4. 2. 7 *Ed.* 4. 29.

And in all theſe caſes, and ſuch like caſes, the general rules by which uſes were governed at the Common-Law are ſtill in force and to take place, as thoſe by which uſes and truſts are now for the moſt part governed.

As, 1. If there be any cauſe to ſue for or about the lands or goods wherewith the parties are truſted, as if they deny or delay to perform the truſt, they muſt be compelled thereunto by Suit in Chancery. 7. *E.* 4. 29. *Cro. Jur.* 62. 63. 65. 11. *E.* 4. 24. *E.* 4. 37.

2. The *Ceſtuy que uſe* or party for whom the truſt is, cannot of himſelf diſpoſe of the lands or goods, for the property and intereſt in Law is in the Truſtees; and if it be an Obligation or Statute that is made to the uſe of another, *Ceſtuy que uſe* cannot releaſe

releaſe it, but the Truſtee muſt releaſe it. *Cromp. Jur.* 62,63.65. 11. *Ed.* 4. 24. *Ed.* 4 37.

3. If the party truſted ſo with lands, goods or chattels, give, grant or ſell the ſame lands, goods or chattels to one that hath knowledg of the ſame uſes or truſts (as it is alwaies preſumed he hath where the truſts are expreſſed upon the ſame Deed, by which the lands, goods or chattels are given or granted,) or if the things ſo given or granted, be granted upon the ſame truſts, or to the ſame uſes, or without any conſideration at all; in theſe caſes he to whom the thing whereabout the truſt is, ſhall have the ſame thing upon the ſame truſt, and to the ſame uſe as he that did give or grant the ſame had it. But in caſe where no truſt or uſe is expreſſed upon the Deed, the Purchaſor or Buyer hath no notice or knowledge of the uſe or truſt, and he gives a valuable conſideration for the thing, there for the moſt part the ſale is good, and the party grieved thereby hath no remedy, but againſt the party firſt truſted in Chancery, and the Purchaſor ſhall have and enjoy the thing ſo bought to his own uſe for ever; but he that is the party truſted will be forced in Chancery to make the party grieved an amends in damages for this breach of truſt: And if there be any practice, packing, or combination between the buyer aud the ſeller in the matter, there perhaps the Suit may hold againſt them both, and the Buyer may be forced to reſtore the thing it ſelf. And yet if A enter into a Statute to B and C to the uſe of B, and A having notice of this uſe doth get a releaſe from C: in this caſe it ſeems B muſt have his whole remedy againſt C, and ſhall have no remedy againſt A. 11 *Ed.* 4.8.

4. If the Truſtor or *Ceſtuy que uſe* in theſe caſes commit Felony, &c. ſo that the things if he had the property of them were forfeit, in this caſe it ſeems that neither they nor their heirs, executors &c. nor yet the Lord, &c. ſhall have them, but the Truſtees ſhall keep them for ever. *Broo. Feoffment al uſe* 34.

5 If the *Ceſtuy que uſe* or Truſtors dye, and appoint how the ſame things ſhall be diſpoſed of, the Truſtees are bound to ſee it done; as if the Truſtor appoint it ſhall pay his debts, or provide Legacies, the parties truſted muſt take care it be ſo imployed; and in this caſe the Debtees and Legatees alſo may compel the Truſtees in Chancery. 15 *H.* 7.12. *Cromp. Jur.* 54.

6. In all theſe caſes regularly the thing whereof the truſt is, is in equity at the diſpoſing of him that is the *Ceſtuy que uſe*, unleſſe he do otherwiſe apoint it, and if at his death he make no diſpoſition thereof it ſhall go to his heire, executor &c. *Dyer* 49.

7. In all theſe caſes the Truſtees ſhall have their reaſonable allowance in Chancery for whatſoever they have laid out about the land, &c. in Suits or otherwiſe for the profit of the Truſtor. 8 *H.* 7.11.

Out of all which may appear how dangerous it is for a man to meddle with any lands, goods or chattles ſo conveyed or ſettled in truſt, for the *Ceſtuy que uſe* or Truſtors have no property in the thing, and therefore they cannot ſell or give it, and the Truſtee hath it but to anothers uſe: And it is not ſafe therefore to deal with either of them alone, nor yet indeed ſafe to deal at all in theſe caſes, unleſſe the buyer may have the Conſent, ſale, and aſſurance, or the Releaſe, &c. of the Truſtors and Truſtees altogether: And if there be any woman Covert, or Infant within the Truſt, it is moſt of all dangerous. And if goods or chattels be given to, or to the uſe of a Feme Covert, or Infant, and certain friends are truſted therewith, if they do ſell or give away theſe goods or chattels contrary to the Truſt, they muſt be ſure to anſwer it: if therefore they ſell them, let them ſee that the money made thereof be as beneficial, and be beſtowed for the wife or children; for it ſeems it is not ſufficient in this caſe, that the mony made thereof be paid to them. *Mar. f.* 44, *pl.* 69. 7 *Ed.* 4.14. *Fitz. Subpæna* 5.

CHAP. CLXIV.

Of Usury.

Usury, what. The kinds.

USury is the certain gain of a thing above the Principal, or that which is lent, exacted only in consideration of the loan, whether it be of money, corn, meat, apparel, wares or the like.

Or (as another defineth it) it is a certain profit that is received for the use of a thing lent.

Sect. 1.

Of this there are two parts, a tolerated or lawful Usury, or a forbidden and unlawful Usury.

Lawful Usury.

The first is where there is no more taken directly or indirectly for loan of any moneys, wares, merchandize, or other Commodities whatsoever, then the value of six pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.

Unlawful usury.

The unlawful Usury, is, Where there is taken directly or indirectly for loan of any money, wares, merchandize, or other Commodities whatsoever, above the value of six pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater and lesser sum, and for a longer and shorter time.

The punishment of it.

And the punishment of it is this, That he that takes it, is to lose three times so much as the value of that which he did so take; and all the Bonds, Contracts and Assurances for the having of more then after the rate of six pound for the hundred, are void. *Stat.*21.*Jac.*17. 37 *H.*8.9. 39.*Eliz.*8. 13.*Eliz.*8. *Act.*8.*Aug.*1651. *Plow.* 282. He may be punished also by Indictment and Fine. See my *Just.of Peace.* And so some hold of all Usury, and that all Usury is against our Law, which seems to be the better opinion. See *Cook* 3 *part. Inst.cap.*70.

1. What Contract shall be said to be usurious, against the Statutes and void. Or not.

For the answer of this Question, and Exposition of the Statutes concerning Usury; take some Rules, and some Cases. The Rules are these.

1, That an usurious Contract may be made up by Fines, Recoveries, or any kind of Assurance, as well as Bonds, and they are all void, of what kind soever they be. *Cook* 3.80. But a Judgment cannot be avoyded by a plea of an usurious Contract, as that the Defendant had one hundred pound of the Plaintiff, and agreed to give him twenty pound for the loan of it a year, and therefore that the Plaintiff desired a Judgment for 120 l. which is that for which the Suit is by *Scire Facias. Adjudg Midleton vers Hall M.* 39.40. *Eliz.B.R.*

2 Where the first Contract is usurious, all the Assurances that depend upon it are void. *Pasch.*7.*Jac. B.R. Corslets case.*

3 If a man do not pursue his Contract, and take what he hath agreed upon, he cannot be punished by the forfeiture of the treble value, but the Contract and Assurances thereupon are void. *Curia B.R.Trin.*13. *Car.*

4. Usury cannot be by taking something in the by, as a pawn for a Security. *Trin.*13 *Car.B.R.*

5. Nothing that is given to the Broker in the by, will make the Contract usurious, By *Just. Bridgman, Hill* 7. *Car.*

6. No usurious Contract can be regularly where the Principal is lost, especially if it be in a bargain of Land, unless it be where by notorious circumstances the contract doth appeare corrupt. *Corslets case Pasch.* 7 *Jac. B. R. Brownl.* 1. *part* 180.

7 If the Original Contract be not usurious, no matter *ex post facto*; *i.* no matter done afterwards can make it so. *Thurslies case Hil.*7 *Jac.Com.R. Brownl.*1.*part* 73.

8.No

8. No Stranger not privy to the corrupt contract ſhall be puniſhed for it. *Brownl. Rep.* 1. 85.

9. He that is bound in a Counter-bond to his Surety, cannot Plead in diſcharge of that, that the firſt Obligation was upon an uſurious contract. *Adj. Robinſons verſus May. M.* 39. 40. *Eliz. B R.*

10. When a Deed is perfected and delivered as a Deed, it cannot be avoided by any ſubſequent agreement as uſurious; but if it be part of the original contract, and made together, it may make all void, and may be pleaded in avoydance of any Deed. *Brownl. Rep.* 1. *part* 191.

11. A Woman that hath a Husband, or a man and his Wife and Third perſon cannot make an uſurious contract within theſe Statutes. *Trin.* 13. *Carol. B. R.* Feme Covert.

12. Where, upon the firſt Contract the Lender is not ſure of any benefit, but he doth ſecondarily hope for ſome at the will of the Borrower only, this is not corrupt. *Cook.* 5. 69.

For the further Opening and Illuſtration of which Rules, take theſe Caſes:

1. One borrowed 100.l. and for this, morgaged Land above 8.l. value by the year, on condition, that if the Morgagee pay ſuch a day (which is at the years end) the money, the eſtate to ceaſe; this was an uſurious contract. But if it were on condition, that if he pay the 100.l. before that day, *contra*; for then he may pay it when he will, and have his Land, and the Lender is not ſure of any ſuch recompence, as the nature of Uſury is; for hear it ſhall be taken only to be a penalty to the Borrower, and an Aſſurance to the Lender: So alſo, if one lend 10.l. and take ſecurity by Statute or Obligation, that the Borrower at a years end ſhall pay the Lender 20.l. for it, this is uſurious: But if it be, that if he pay it not within a year, then he ſhall pay him 20.l. it ſeems this is not uſurious; If one come to another to borrow 500.l. of him and tell him he is unable to pay it together, and therefore deſires to pay it in 12 or 13 years; and offers for his kindneſs to give him 200.l. over and above, if ſo be he will let him have it ſo with the uſe of it, and then they caſt the Principal, Uſe, and the 200.l. in an Annuity, and ſo agreed at laſt upon an Annuity for 14 years of 80.l. *per annum*, which they agreed would pay the Principal, Uſe, and 200.l; this is an uſurious contract, and therefore all Statutes and Bonds made to perform it muſt needs be void. *Adjudge Corſlets caſe, Paſ.* 7. *Jac. B R.*

2. If one take 10.l. in the 100.l. for uſe, and alſo in the ſame Contract, he cauſe the Obligor to take from him a Leaſe for 30 years of a Houſe, at 60 pound Rent, whereas in truth it is worth but 20.l. by the year; this is an uſurious contract. *Curia. Sanders caſe, B R.*

3. If upon the Loan of Money a Feoffment be made of Land for ſecurity of the Money, and Bonds beſides for the payment of the Intereſt after the rate of the Statute, and the Land be worth by the year more than the Intereſt; this is a corrupt contract: But if it be agreed the Feoffor ſhall take the profits of the Land, *contra*: and if the Feoffee take not the profits it ſhall be preſumed to be ſo, unleſs the contrary be ſhewed. *Witchel and Guiſel, M.* 8. *Car. B R.*

4. The 17 of *July* 1579. a Rent of 20.l. by the year was granted for the Loan of 100.l. and it was to be paid every half year; the firſt payment to begin at Chriſtmaſs, 1580. on condition, that if he pay the 100.l. the 17 of *July* 1580. then the Rent to ceaſe; this contract was not uſurious; for the Grantor might have paid the 100.l. before the firſt day of payment of Rent, and then the Grantee had had nothing for the Loan of his 100.l. all that time: But if there had been a private collateral agreement between the parties, that they ſhould not pay the 100.l. or redeem it, and that Clauſe were put in to evade the Statute; then the contract had been uſurious notwithſtanding, and ſo in all like caſes. *Cook.* 5. 9. *Sect.* 2.

5. One, the 6 of *December*, borrowed 30.l. till the ſecond of *June* then next following, to be paid then for it 33.l. for the Principal and Loan, if the ſon of the Obligee ſhall be then living; and if he die before, then that he ſhall pay 27.l. which is leſs then the Principal; this contract was agreed to be uſurious and naught. *Coo.* 5. 70.

6. If

6. If one borrow 100.l. after the rate of the Statute, and the borrower do after pay part of the Principal, and all the Use within the year, and the lender receive, or the lender sue for it within the year, this is no usury; for if the original Contract be not usurious, no matter *ex post facto*, that is, afterwards, can make it so. *Hill. 7. Jac. B R. Curia et H. 7. Jac. Cook. B.*

7. If one borrow of me 6.l. and bind himself to pay me 6.l. by a day; and bind himself moreover, that if he do not pay me the 6.l. by the day, that then he shall pay me 10.l. for that 6.l. this is no usurious Contract; for all Obligations with Conditions for Money lent, are to this purpose. *Thurslies case, Br. Oblig. 79.*

8. If *A* enfeoffe *B* upon loan of 100.l. to the use of *B* and his heirs, provided, that if *A* pay 100.l. at the years end that it shall be to the use of *A* and his heirs, and that land is of the value of 20.l. by the year, if in this case it be agreed the Feoffee shall take the profits, this is usury; but if it be agreed the Feoffor shall take it as it may be besides the Deed, *contra. ch. just. M. 4. Car.*

9. *Scire facias* was to execute a Judgement; The Defendant pleaded, that he borrowed of the Plantiff 100.l. to give him 120.l. for the loan thereof a year; and the Plantiff for his Assurance would have the Defendant confess this Judgement of 120.l. and so pleaded the statute of Usury in Bar, upon which the Plantiff demurred, and Judgement was given for the Plantiffe, and agreed to be too late, and that it should have been pleaded in the first Suit. *Middletons and Halls case, Trin. 39. Eliz. B R.*

10. —— Debt was brought for 60.l. on an Obligation; The Defendant pleaded the statute of Usury, and shewed, that a Ship went a Fishing to the *New found land*, which Voyage might be performed in 8 Months; and the Plantiff delivered 50.l. to the Defendant to pay 60 l. upon the Return of the Ship to *Dartmouth* from Fishing; and if the Ship should not come to the *New found land*, but by reason of Leakage or tempest should return to *Dartmouth*, then that he should pay the Principal Money; and if the Ship should never Return, that he should pay nothing; and it was adjudged no usury: for if it staid two years at the *New found land*, he was to Pay but 20.l. *Pasch. 6. Jac. Sharpley versus Hurrel. Co. B.*

11. *Warnes* was indebted to *Ader* 100.l. upon an usurious Contract; and *Ader* was indebted to *Ellis* in 100.l. just debt, for which *Warnes* and *Ader* were bound to the Plaintiff, and debt being brought upon this Obligation, *Warnes* pleaded the usury between him and *Ader* to avoid the Bond; and *Ellis* replyed, that he knew nothing of it; and it was adjudged against the Defendant. *Trin. 2 Jac. Co. B.*

12. A Replevin was brought, and the Defendant avowed for an Annuity of 20.l. granted for years: payable upon demand, and alleaged a demand, the Plaintiff demands Oyer of the Deed, where it appeared, that for 100.l. a Rent of 20.l. was granted for 8 years; and another of 20.l. for 2 years if *E R* and *T* should so long live, and the plaintiff pleaded the statute of usury; and it was Ruled, that if it had been laid to be upon a loan of Money, it had been usurious; but if it be a Bargain for an Annuity, it is no Usury. *Cotterel against Harrington, Pasch. 6. Jac. Cook B.*

13. An Action of Debt was brought for a Debt on a Bond, the Defendant pleads the Statute of Usury, and shews a corrupt Lending in the year 32, to be paid in 33; and after a new Bond in 35 for part of the first sum; And it was judged that this new Bond could not be corrupt if the first Contract were not corrupt. *Brownl. Rep. 1. part 73.*

3. *Dry Exchange*, what. These words, Dry Exchange, seem to be a cleanly term invented for the disguising of foul Usury, in the which something is pretended to pass of both sides, whereas in truth nothing passeth but on the one side. *Stat. 3. H. 7. 5.*

4. *Brokers*, what. Brokers are such as make Bargains, and drive Contracts between Buyers and Sellers, Borrowers and Lenders of Money.

No such kind of person, as a Broker, Scrivener, or Solliciter, may take directly, or indirectly, for driving any Bargain for loan or forbearance of Money, above the Rate of 5.s. for the forbearance of 100.l. for a year, and so rateably for more or less:

Nor

Nor above 12.d. for the making or renewing of a Bond or Bill, or for a Counter-Bond, under pain of 20.l. *Act.* 8. *Auguſt* 1651.

If a Broker that hath received any Goods wrongfully taken in *London*, *Weſtminſter*, *Southwark*, or within two miles of *London*, do not upon requeſt of the true owner thereof, diſcover of who he had them, and what is become of them, he ſhall loſe to the owner the double value thereof. *Stat.* 1. *Jac.* 21.

CHAP. CLXV.

Of an Utlawry.

IT is the puniſhment of a man, that being called into Law, and lawfully ſought, doth contemtuouſly refuſe to appear. And this is, and may be in and upon perſonal Actions, or in and upon Appeals and Indictments. In perſonal Actions, as Account, Debt, Replevin, Detinue, Action upon the Caſe, Treſpaſs, Covenant, Annuity. And in perſonal Actions it is and may be either before Judgement had in the Suits, or after Judgement; and in both Caſes it is after Writs of Exigent and Proclamation go forth, and upon the Proclamation in perſonal Actions the party hath been required to appear five ſeveral County Court dayes in the open County Court, and once in the open Seſſions, and once at the Church door where he hath or did lately dwell; And then, and thereupon if he appear not, Judgement is given by the Coroners of the County Court, that he ſhall be Outlawed, *extra legem poſitus, & pro exlige tenebitur cùm principi nec legi obediat.* And thereupon doth iſſue forth againſt him the Writ of *Capias utlegatum*; which is defined to be

Utlawry, what. *Sect.* 1.

In what Actions it lyeth.

The Kinds.

A Writ that lyeth againſt a man that is Outlawed in any Suit, commanding the Sheriff to take the Party for not appearing on the Exigent, and to bring him to priſon, that he may anſwer for his contempt, and there he muſt ſtay without Bayle or Mainpriſe, which is called a general *Cap. utlegatum.*

Or elſe, there may go forth a Writ called *A Capias utlegatum ut inquiras de bonis et cattellis*, for a ſpecial *Capias utlegatum*, to require the Sheriff to take his Body (as before) and withal to enquire of his Goods and Chattels which are forfeited by the Outlawry, and to ſeize them into the Kings hands, and to his uſe: And this may be directed to the Sheriff of any County.

And by this Outlawry, all his Goods and Chattels are not only forfeit, and therefore he can make no Teſtament of them; but he is diſabled to ſue in any Action as long as the Outlawry is of Record againſt him.

Teſtament.

Diſability to ſue.

And in this caſe hath a man no remedy but to Reverſe the Outlawry, if he can finde any Error in the proceedings, or elſe to get the Kings pardon.

How to be avoyded.

But if it be after Judgement, he muſt pay the Debt, or agree with the party plaintiff before he can have any pardon from the King.

And if it be before Judgement, the party muſt firſt come into the Court, and yield his body to the Priſon, and the Plaintiff ſhall be ſummoned to come in by *Scire facias*, to proceed upon the firſt original; and if he come not, the Pardon ſhall be allowed; if he do, they ſhall Plead.

And if it happen to be Reverſed for Error, the party Outlawed ſhall have Reſtitution of his Goods that are in the Sheriffs hands, or were ſold by him before.

And

And the Outlawry for Felony and Treaſon, or for Treſpaſs in an Appeal or Judgment, if after two *Capias* one after another, then if he appear not to anſwer the Fact, he is Outlawed.

Proces. For in Indictments of Felony, if the party indicted appear not, the Proces are 1. a *Capias*, and upon a *non eſt inventus* returned, another *Capias*; which being ſo returned, there goeth out an Exigent, and the Sheriff is commanded to proclaim him 5 County dayes, and then if he yield not his Body, he is to be Outlawed by the Coroners, which the Sheriff is to return.

Attainder. And then is the Party indicted Attainted, and from that time doth loſe his Land by Eſcheate.

Forfeiture. But for his Goods, he loſeth them aſſoon as the Proclamation is Awarded. *Doc. &*

Relation. *St lib 2 chap 3 FNB 161 Dyer 223 Stat 6 Hen 6 cap 1 31 Eliz 3 5 & 6 Ed 6 26 7 Hen 5 1 19 Hen 7 5 5 Rich 2 23 Hen 8 14 8 Hen 6 20 10 H 6 6 5 Edw 3 13 1 Hen 5 5 War 2 chap 11 25 Edw 3 17 6 Hen 8 4 49 18 Edw 3 Stat 1, 2, 3. Cook 5 85 7 1 Cook upon Litt 288, 289*

The condition of a man Outlawed, & what he forfeits by it. If a man be Outlawed for Treaſon or Felony upon an Indictment; by this he forfeits all his Lands, Goods, and Chattels: his Land from the time of the Return of the Outlawry by the Coroners upon the Exigent; and his Goods from the time of the Awarding of the Exigent. But as to the Lands, there is a Relation to make a Forfeiture of all the Lands he hath to the time of the Offence committed. For which, ſee *Relation and Forfeiture. Broo. Forfeiture* 400 447

For Felony.

If a man be Outlawed in a perſonal Action, or upon an Appeal of Maim, or Indictment of Treſpas; by this the Party Outlawed doth loſe and forfeit to the Lord Protector, all his Goods and Chattels that he hath at the time of the Outlawry pronounced, as Leaſes for years, Wardſhips of Tenants *in Capite*, (if any were) Cattel; Houſhold-ſtuff, Plate, Money, Jewels; alſo, all Debts by Eſpecialty and otherwiſe, all Statutes, Recognizances, and Obligations, and all things elſe as Emblements of Corn and Graſs, and whatever elſe is included within Chattels, that he hath to his own uſe, and in his own right.

So alſo he loſeth the profits of his Land for his life, the which the Lord Protector may take ſo as notwithſtanding he may not Manure it. *9 Hen 6 20 30 H 6 20 19 H 6 47 30 Aſſ pl 1 Stamf lib 3 chap 27 Cook 7 1 22 4 95 5 59 63 5 Hen 7 16 Plow 541 Broo Forfeiture 75 24 26*

And if two, or more perſons have joyntly, or in common, any Goods or Chattels, Bonds, or Debts, and one of them be Outlawed, all the Debts, Bonds, Goods, or Chattels, are forfeited to the Lord Protector, and the other Joynt-tenants or Tenants in Common, cannot be holpen. *Plow 343 322 Dyer 11*

And yet in *6 Car.* in the Court of Wards in the Lord *Brooks* caſe, it was held by the Judges aſſiſtants, That where the Lord *Brook* had bargained and ſold Land to *A B C* and *D* for years, and *C* and *D* were Outlawed, that by this *C* and *D* had forfeited but their Moyitie, and that they were Tenants in Common with the King.

But Inheritances and Freeholds, nor the Trees upon the Land, Doors, and other incidents annexed to the Land, nor Debts upon a ſimple Contract, nor ſuch cauſes of Action as for which Damages onely are to be recovered, as for Battery; nor Actions for Goods taken away, nor for matters of Account are not forfeited hereby.

So neither are things wherein the party Outlawed hath only a ſpecial Property, as a Pledge, Diſtreſs, Leaſe mortgaged, or the like, theſe are not forfeited hereby.

So neither are thoſe things forfeited which one hath to anothers uſe, as the Goods or Chattels one hath as Executor or Adminiſtrator to another. *Perk 388 5 H 7 16 Cook 4 63 20 H 7 13 16 Edw 4 4 50 Aſſ pl 1 29 Aſſ pl 47 50 Aſſ pl 5 28 Edw 3 92*

And yet in *M 9 Car. in Aſhfords caſe* in the Exchequer, the Caſe was this, There were divers Leaſes for years in Truſt for *I S*, and one of them was Outlawed: It is ſaid it was adjudged that the whole Leaſe was forfeit.

Excom-

Of Excommunication:

EXcommunication was a cenſure by the Eccleſiaſtical Judg, by which a man was deprived of the uſe of the Sacraments, and ſometimes of the fellowſhip of men. And thus if a man had remained forty dayes, and had not reconciled himſelf to his Ordinary, upon a Certificate of the Biſhop into Chancery, there did iſſue out thence a Writ called an *Excommunicato capiendo*, to the Sheriff to apprehend him, by which he was to be impriſoned without Bayle or Mainpriſe until he did ſubmit and were abſolved, and then he had a Writ of *Excommunicato Deliberando*; And by this he was to be delivered again after he had ſubmitted. But theſe things about Excommunication, now that Biſhops are gone, are out of uſe.

Excommunication, what.

Excommunicato Deliberando, what.

See *Throld* Statutes of theſe things, *Articuli ſuper Chartas*, 7. 12. 9 *Ed.* 3. 5. *Eliz.* 23.

CHAP. CLXVI.

Of Waiver, Waif, Eſtray, Treaſure-Trove and Warranty.

THis word Waiver (as it ſeems) is ſometimes applyed to an eſtate or ſomething that is made and conveyed to a man, and ſo it ſignifieth nothing elſe but the refuſal to accept of the thing ſo made and conveyed. And ſometimes it is applyed to a plea, and then ſignifieth a refuſal to ſtand to a former plea pleaded, and the pleading of a new: for which laſt ſenſe read 13 *Ed.* 4.8. 20 *H.* 6.22. *Relw.* 37. 21 *Ed.* 3.49. 5 *H.* 7.9.

Waiver, what. *Sect.* 1.

For anſwer to this Queſtion, take theſe Caſes.

1 If a Joynture be made to a Woman after marriage, ſhe after her husbands death may waive it by word in the Country; and this is good. *Cook* 3.27. *Dyer* 61.

Where one may waive a thing fallen to him, and how, or not

2 If an eſtate be made to a man and his wife in ſpecial Taile, and the husband deviſe to the wife for life; in this caſe if ſhe will, ſhe may waive the eſtate tail, and take by the deviſe. *Cook* 9.140.

3 A man or a woman cannot by the Common-Law waive or refuſe any eſtate of inheritance made to him or her by any verbal Waiver or diſagreement in the Country, but that he or ſhe may afterwards again in a Court of Record accept it. See more in other Titles. *Cook* 3.26. *Dyer* 61.

4 Where a particular eſtate is given with a remainder, there regularly he that hath the particular eſtate ſhall not be allowed to waive it, for the prejudice of him in remainder; but if one have a reverſion, *contra*, for that is not hurt by the waiver. 41 *Ed.* 3. *Ch. Inſt. B. R.* 13. *Jur.*

5 Infant, or if he dye before agreement, may waive an eſtate made to him. So may not a man, *De non ſane memory*, after he hath purchaſed Lands; but if he dye before agreement, his heire may avoid and waive it. *Cook* 1 *part. D. & S. Inſt. fol.* 23.

6 One cannot waive, or alter a Title of Inheritance that a man hath in the Country, though his title be but by Preſcription or Cuſtome. *Cook upon Litt. fol.* 114.

If a Feoffment be made to an Infant iſſue in tail, he may waive it at his full age. *Cook on Litt.* 348.

Of Waif, Eſtray, &c.

Waif, what. WAif is, when a Thief hath Feloniouſly ſtolne goods, and being neerly followed with Hue and Cry, or elſe overcharged with the burden or trouble of the goods, for his eaſe, or more flyeth away, and leaveth the goods or any part of them behind him; then the Kings Officer, or Reeve, or Bailiff of the Lord of the Manor, who by Cuſtome, Preſcription or Charter hath ſuch a Franchiſe of Waif, may ſeiſe the goods ſo waived to the Lords uſe, who may keep them as his own proper goods.

For the further opening of which, theſe things are to be known,

1. That if the Owner come with freſh Suit after the Felon, and ſue an Appeal, or he or any other for him, do give in evidence againſt him at his Araignment upon the Indictment, and he be by this meanes attainted thereof, *&c.* or outlaw him for want of appearing; in theſe caſes the owner ſhall have reſtitution of his goods ſo ſtolen and waived.

Reſtitution.

2 In this caſe it is wiſdom in the Lord to ſeize the goods preſently, for if the owner ſeize it before him, though it be twenty years after, he ſhall have it, though he made no freſh Suit after the Felon; but if a ſtranger take it away before ſeiſure, an Action of Treſpaſs doth lye. See *Doct. & St.* 176. 177. *Stat.* 21 *H.* 8. 11.

3 And it ſeems, that Lords that will have theſe Waifs, muſt cauſe them to be cryed in Churches and Markets thereabout, and then if they be not claimed within the year and day after, they are forfeit. *Dalton De Officio Vice-Comitis, fol.* 34.

4 But if the Priſoner had not the goods with or about him at the time of his flight, having hid or left them in his own or any other houſe, or left them in any ones cuſtody, or in any Manor, or hid them in any place before his flight, then they are no waifs nor forfeit, but the owner may take them. *Cook* 5. 109. 21. *H.* 8. 11.

5 Theſe Waifs belong to the King, unleſſe there be ſome that have a Patent from the King for it, or can preſcribe for the having of them time out of mind; and the only Remedy of getting them is by ſeizure only. *Cook of Copyholds* 51.

6 If Cattel ſtolen be driven by the thief, and men coming to take him, he flyeth, and whiles they run after him, the goods go out of one Manor into another, now the Lord of the Manor where they were left firſt, by his Bailiff muſt ſeize them in the other Manor, before the Bailiff of that Manor had ſeized them, unleſſe that other Manor were the Lord Protectors, for there the Law gives him ſeiſon without any actual ſeiſure. *Dyer* 338.

Seiſ. 2.

Wrack. Wrack is where a Ship loaden is caſt away upon the Coaſts, ſo that no living Creature that was in it when it began to ſink eſcapeth to land with life; then all theſe goods are ſaid to be wracked, and they belong to the Lord Protector, if they be found, except the Lord of the Soyl adjoyning can entitle himſelf to them by Cuſtome or Charter. See *Admiral.*

Eſtray, what. An Eſtray is where any tame Beaſt is found wandring about from its place within any Lordſhip, and not owned by any man.

As touching which theſe things are to be known,

1 Eſtrayes were Originally the Kings, and came from him; now may be had by Preſcription, as Waifs may; or they may be claimed and had by the Kings grant, and he that hath the one ſhall have the other.

2 It is to be ordered thus, The Lord of the ſoyle, after he hath ſeiſed it, and put a Withe about its neck, and made open Proclamation two Market dayes adjoyning at three Market Townes, as ſome ſay; and (as others ſay) at two of the next Market Villages, ſhewing the Marks of the Cattle, if the Owner do not come within a year and a day after and claim them, it is the Lord Protectors, the Lords of the ſoyle, or his that hath a Charter from any King, or can preſcribe for it. And if the owner do come

come within the year and the day, he is to give reasonable satisfaction for the keeping of it, and to have it again. And they that have it may detain it till he pay for the keeping of it.

3 Till the year and day be expired, the Lord hath no Property in it; and therefore if it be taken away before this time, the Lord or his Bailiffe may not have an Action of Trespasse for it, but the Owner of it may have an Action of Trespas. Property. Trespasse.

4 If the thing be the goods of an Infant, woman covert, Executrix or one beyond the sea, or in prison, yet are they subject to this hazard and loss, as much as the goods of any other person.

5 If the thing before the year be out, and after Proclamation, estray into another Manor, and be seised there as an Estray, the first Lord hath lost it, and he cannot go into the other Manor to re-take it.

6 The Lord or his Bailiff is bound to give the Beast meat till the year and day be up, and he cannot use it; if an horse or ox, may not work it, if a Gelding he may not fetter him, but if it be a Cow he may milk it.

For all this, see *Brco. Estray* 3 4. *Dyer* 338. 12 *H.* 8. 10. *Fitz Nat. Brev.* 90. *Co.k* 9.23. 5.108. 7.16. *Doct. & Stat.* 176. *Brownl.* 1. *Rep.*236. 2 *part* 219.

Of Treasure-trove.

TReasure Trove is where any Money, Gold, or Silver, Plate or Bulloigne is found in any place under ground, and no man knoweth whose it is, in this case the Lord Protector will have it: But if any have a Patent from any King for it, or can prescribe for it, he will have it. *Treasure trove,* what.

But if it be found above ground or in the sea, it is the mans that found it, and no Treasure trove: and yet it is held, that if it be Gold, Silver, Coyn, Plate or Bullion, where-ever it be found, it is Treasure trove. But for Mines of mettal (unlesse they be Mines of Gold and Silver, or Mines mixt wherein is most of the Gold and Silver Oar, which belong to the Lord Protector) they do belong to the owner of the ground wherein they are. *Plow.*322.314. *Stamf. Prer.ch.* 42.

Of a Warranty.

A Warranty is a certain Covenant real annexed to lands or tenements whereby a man and his heirs are bound to warrant the same. Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this Warranty is called the Warrantor, and he to whom it is made the warrantee. *Finch. ley* 39. *Cook super Litt.* 365. 1 *Warranty,* what. Warrantor. Warrantee.

There are two kind of warranties,

1. A warranty in Deed, or an expresse warranty, which is when the same is expressed; *i.* when a Fine or Feoffment by deed is levied or made in Fee, or a lease for life is made by deed, comprehending warranty, or which hath an expresse clause of warranty contained in it, as when a Conusor, Feoffor or Lessor doth covenant to warrant the Land to the Conusee, Feoffee or Lessee; which is in these words, *Ego* I S *& heredes mei Warrantizabimus & in perpetuum defendemus* VV S *& heredibus suis tenementa predicta contra omnes homines in perpetuum.* And by the Statute of *Bigamis Dedi* is made an expresse warranty during the life of Feoffor. *Cook* 1. 2. *super Litt.* 365. 4.18. 2. The kinds.

2. A warranty in law, or an implied warranty, which is when it is not expressed by the party but *tacite* made and implied by the Law, whereof see divers examples *infra.* The warranty in Deed also is either lineal, which is thus described, A Covenant real annexed to the Land by him which either was owner, or might have

inherited the Land, and from whom his heir lineal or collateral might by poſſibility have claimed the Land as heir from him that made the warranty. Or elſe it is collateral, which is thus deſcribed; A warranty made by him that had no right, or poſſibility of right to the Land, and is collateral to the title of the Land. Alſo there is a warranty which doth commence by diſſeiſin or wrong, of all which ſee divers examples afterwards. And note that all theſe things here are to be applied to warranties of Lands and concerning freeholds and inheritances, for there is a warranty of Goods and Chattels in contracts, of which we treat not here. *Cook ſuper* 383, 384. 370. 365.

3. The fruit and effect of it, and what uſe may be made of it.

The fruit and effect of this warranty in deed is, that it doth alwayes conclude and bar the warrantor himſelf of the Land ſo warranted for ever, ſo that all his preſent and future Rights that he hath or may have therein are hereby extinct. *Cook ſuper Litt.* 265. 372. 365. 384.

And therefore, if the Father be diſſeiſed, and the ſon in his life time releaſe all his right to the Land to the diſſeiſor, and make a warranty of the Land in the Deed, and then the father dieth, and the right of the Land deſcendeth to the ſon; in this caſe albeit the releaſe doth not bar the ſon, yet the warranty doth bar him. *Cook* 4. 121. 10. 97.

And for the moſt part alſo, it doth conclude and bar the heirs of him that made the warranty, to whom the ſame waranty doth deſcend, to demand the ſame Land againſt the warranty; for if it be a lineal warranty, it is a bar of an eſtate in fee ſimple without any Aſſets, *i.* without any other Land deſcended to him in fee ſimple from the ſame anceſtor that made the warranty: and with Aſſets, it is a bar of an eſtate in taile. And if it be a Collateral Warranty, it is with or without Aſſets a bar of an eſtate in fee ſimple or fee taile, and all poſſibility of right thereunto; and yet ſo as it doth not paſs any eſtate or right, but only bind the right ſo long as the warranty is in force: for if the warranty be avoided, the right may be revived. But neither the lineal or collateral warranty can enlarge an eſtate.

And therefore if a Leſſor by Deed releaſe to his Leſſee for life, and warrant the Land to him and his heirs; this doth not make his eſtate greater, neither will it bar Titles of Entry or Action in caſes of Mortmain, conſent to a Raviſher, Mortgage, or Dower. *Cook ſuper Litt.* 389. *&c.*

And therefore if an Anceſtor of the Lord hath title to enter upon an Alienation in Mortmain, and he releaſe, or make a feoffement with warranty; this warranty will neither bar him nor his heir.

So if a collateral Anceſtor will make a warranty which doth after deſcend upon one that hath title of entry upon a condition broken; this will not bar his entry, &c. neither will it bar any Right that ſhall Commence after the warranty made. And the warranty that doth commence by Diſſeiſin, doth not bind or bar any eſtate with, or without Aſſets.

And in Caſes where the lineal or collateral warranty is a bar, there if the party be impleaded by him or his heirs that made the warranty, the party impleaded that is Tenant of the Land, may plead and ſhew forth this warranty againſt him, and demand Judgement, whether he contrary to his own warranty ſhall be ſuffered or received to demand the thing warranted? and this in pleading is called a Rebutter. *Cook ſuper Litt.* 265. *Cook* 10. 98, 99. *Dyer* 42. *Cook ſuper Litt.* 101.

Rebutter, what.

And if he be impleaded or ſued by another for the Land, then he to whom the warranty is made or his heirs may vouch, *i.* call in the warrantor or his heirs to warrant the Land.

Voucher, what.

And this is an interpleader in the nature of an Action brought by the warrantor againſt the warrantee, wherein he that doth vouch, (called the vouchor) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the Action, and the vouchor is as it were out of the ſuit.

Vouchor.
Vouchee.

And this ſecond Tenant the vouchee is called the Tenant by Warranty.

Tenant by the Warranty, what.

And hereupon ſhall iſſue forth to the Sheriff a Writ to ſummon the Vouchee to appear, called a *Summons ad Warrantizandum*.

Summons ad Warrantizandum, what.

And if the Vouchee appear, he muſt plead to the Vouchor; and if he ſhew cauſe

why

why he ſhould not warrant, that muſt be tried, and this ſhewing of Cauſe is called a Counterplea to the Voucher: but if he plead in avoidance of the warranty, it is called a Counterplea to the warranty.

Counterplea to the Voucher. what.

Counterplea to the Warranty. what.

And if he cannot gainſay the warranty, the ſtranger ſhall recover the Land demanded againſt the Vouchor, and he ſhall recover as much other Land againſt the Vouchee of the Lands he hath or had at the time of the voucher.

Recovery in value, what.

And this Recovery of other Land is called a Recovery in Value.

And if the Vouchee hath at the time of the Vouchor and Recovery no Lands deſcended to him to anſwer the warranty, but hath afterwards Land happening to him by deſcent from that Anceſtor, then he may have a reſummons and recover the Land that doth after happen.

But if the Sheriff return upon the ſummons, that the Vouchee is ſummoned, and he doth make default, then he ſhall have a *Magnum cape ad valentiam,* when if he make default again, the Judgement ſhall be given againſt the Vouchor, and he ſhall recover over in value againſt the Vouchee; and if the Vouchee appear and then make default, the Voucher ſhall have a *Parvum cape ad valentiam,* and then if he make default, Judgement ſhall be given as before.

Sequatur ſub ſuo periculo, what.

But if the Sheriff return upon the ſummons, he hath nothing whereby he may be ſummoned, then may the Vouchor have a Writ called *Sequatur ſub ſuo periculo,* whereupon ſhall go an *Alias* and *Pluries*; and if the like Return be made, the demandant ſhall have Judgement againſt the firſt tenant, but he cannot recover in value againſt the Vouchee.

Dearraignment *del Garranty.* what.

And if the caſe be ſo the Vouchee had a Warranty from ſome other for the Land, he may Dearraign. *i.* maintain the Warranty over, and ſhall recover in value over alſo againſt his Vouchor in the ſame manner as before.

Warrantia chartæ, what.

Or the Warrantee to whom the Warranty is made or his heirs may at any time before they be impleaded for the Land, if they will bring a *Warrantia Chartæ* upon the Warranty in the Deed againſt the Warrantor or his heirs, and hereby all the Land the heir of the Warrantor hath by deſcent from the Anceſtor that made the Warranty at the time of this Writ brought, ſhall be bound and charged with the warranty into whoſe hands ſoever it go afterwards: ſo that if the Land warranted be after recovered from the warrantee, he ſhall recover ſo much land over again of the other land of the heir of the warrantor or of the warrantor himſelf if he be living. And albeit the warrantee or his heirs do recover in this Writ, yet he may after upon occaſion Vouch the Warrantor or his Heirs notwithſtanding. *F.N.B.* 134 *Cook ſuper Littl.* 102.

And herein obſerve it is good Policy, if a man ſuſpect any thing, to bring this Writ of *Warrantia Chartæ* betimes, becauſe it binds all the Land of the warrantor from the time of the Writ brought, and not any of his other Lands he had before that time, that are now aliened.

4. What words and clauſes in a deed will make a warranty. Or not.

The words *Dedi & conceſſi,* or *Dedi* only in a Feoffment do make a warranty when an eſtate of franketenement or inheritance doth paſs by the Deed. But the word *Conceſſi* only, or *Demiſi & conceſſi,* do not make ſuch a warranty. And by force of the Statute of *Bigamis chap. 6. Dedi* is made an expreſs warranty during the life of the Feoffor. *Cook ſuper Litt.* 383, 384. *Cook* 4. 81.

The word *Warrantizo,* or warrant, is the only apt and effectual word to make an expreſs warranty or a warranty in Deed, and therefore this word only is uſed in fines. And the words *Defendo,* or *Acquieto,* albeit they be commonly uſed in Deeds, yet of themſelves without the other will not make a warranty. *Litt. Sect.* 733. *Cook* 5. 17, 18.

If a man by Deed doth grant to warrant Land to *I S* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *I S* and his heirs, but to *I S* only; or doth warrant to *I S* and his aſſignes, and not to *I S* and his heirs; or doth bind himſelf and his heirs to warrant the land, but doth not ſay how long, nor againſt whom; theſe are good warranties, but how they ſhall be taken, ſee afterwards. *Dyer* 42. *Cook ſuper Litt.* 383.

A war-

5. To what things a warranty may be annexed and extended. And to what not. And how.

A warranty in Deed may be annexed to eſtates of inheritance or freehold, and that not only of corporeal things which paſs by livery, as houſes, lands, and the like, but alſo of incorporeal things which lie in Grant, as Advowſons, Rents, Commons, Eſtovers, and the like, which iſſue out of Lands or Tenements, and that not only to inheritances in *eſſe*, but alſo to ſuch as are newly created, as a man (ſome ſay) may grant a Rent &c. *de novo*, out of land for life, in taile, or in fee, with warranty. *Cook ſuper Litt.* 366. 389.

So a warranty in Law may extend to a Rent newly created, and therefore if ſuch a Rent be granted in exchange for an Acre of Land; this exchange and warranty thereunto annexed is good.

But a warranty may not be annexed to an eſtate or Leaſe for years, albeit it be a Leaſe of one thouſand years, nor to any other Chattel, and therefore in all actions the which Leſſee for years may have as treſpaſs &c, a warranty cannot be pleaded in bar.

A warranty may be made upon any kinde of conveyance, as upon fines, feoffments, gifts, &c. alſo a warranty may be made by and upon releaſes and confirmations made to the tenant of the Land, albeit he that makes the releaſe or confirmation, hath no right to the Land, &c. *Cook ſuper Litt.* 372. 385. *Litt. Sect.* 738. 745. 706.

And yet ſome ſay, That by a Releaſe or Confirmation where there is no eſtate created, or tranſmutation of the poſſeſſion, a warranty cannot be made to the Aſſignee.

But if *A* be ſeiſed of Land in fee, and *B* doth releaſe to him, or doth confirm his eſtate in fee with warranty to him, his heirs, and aſſignes; in this caſe all men agree this warranty to be good; and ſo alſo it ſeems it is in the caſe laſt before, and that both the party himſelf, and the Aſſignee may vouch.

6. What ſhall be a good warranty in Law. And how it ſhall bar and binde.

A warranty in Law may be good in his creation, albeit it be made without Deed, for if a man by his laſt Will and Teſtament deviſe Lands to another man for life, or in taile rendring Rent; to this eſtate there is a warranty in Law annexed. *Cook ſuper Litt.* 384. 386.

The words *Dedi & conceſſi*, or *Dedi* only in a Feoffment, make a good warrant in Law. *Cook ſuper Litt.* 384.

But the word *Conceſſi* only in fine or feoffment, doth not make a warranty in Law. *F N B* 134. *Cook* 4. 80.

And albeit there be an expreſs warranty in the Deed, yet this doth not take away the implied warranty of the Law.

And this warranty in Law by *Dedi & conceſſi*, or by *Dedi* only, is a general warranty during the life of the Feoffor.

Partition. Exchange.

Every Partition and Exchange implyeth in it, and hath annexed to it a ſpecial warranty in Law, and how it ſhall bar and be extended, ſee in *Exchange*. Cook *ſuper Litt.* 102 384.

Every Tenure by Homage Aunceſtrel, *i.* where a Tenant and his Aunceſtors have held Land of a Lord, and his Aunceſtors time out of minde by Homage hath a warranty in law annexed to it, by which the Lord is bound to warrant it to the Tenant and his heirs. *Cook* 4. 80.

If one make a Gift in Taile or Leaſe for life of Land by Deed, or without Deed, reſerving a Rent, or of a Rent-ſervice by Deed; in theſe caſes there is annexed an implyed warranty againſt the Donor or Leſſor, his Heirs and Aſſignes. *Cook ſuper Litt.* 334.

When Dower is aſſigned to a Woman, there is a warranty in Law included, which is that the Tenant in Dower being impleaded, ſhall Vouch and recover in value a third part of the two parts whereof ſhe is Dowable. *Cook ſuper Littleton*, 384.

And this warranty in Law is of the nature of a lineal warranty, and ſhall binde as a lineal warrantly only, for it doth never bar any Collateral Title. *Cook ſuper Litt.* 384.

And

And hence it is, that this warranty and aſſets in ſome caſes is a good bar; as if Tenant in taile exchange for other lands which are deſcended to the iſſue, and he hath accepted of them, or if not, that other lands are deſcended to him. But if tenant in taile of lands make a gift in tail or leaſe for life rendring rent, and dye; in this caſe this is no bar. And yet if other aſſets in Fee-ſimple deſcend, this warranty in Law and aſſets is a good bar.

To every good warranty in Deed that muſt bar and bind, theſe things are requiſite,

7. What ſhal be ſaid a good warranty in deed. Or not. And how it ſhall bar and bind.

1 That the perſon that doth warrant, be a perſon able, for if an Infant make a Feoffment in fee of land, and thereby doth bind himſelf and his heires to warrant the Land; in this caſe albeit the Feoffment be only voidable, yet the warranty is void. *Cook ſuper Litt.* 367.

Infant.

2. That the warranty be made by deed in writing, for if a man make a Feoffment by word, and by word bind him and his heires to warrant the Land; this is not a good warranty. So if a man give lands to another by his laſt will, and thereby bind him and his heires to warrant it; this warranty, although the will be in writing, is void. *Litt. Sect.* 703. *Cook ſuper Litt.* 386.

3. That there be ſome eſtate to which the warranty is annexed, that may ſupport it: for if one covenant to warrant land to another, and make him no eſtate, or make him an eſtate that is not good, and covenant to warrant the thing granted; in theſe things the warranty is void. *Cook* 10. 96. *& ſuper Litt.* 384.

4 That the eſtate to which the warranty is annexed, be ſuch an eſtate as is able to ſupport it, and therefore that it be a leaſe for life at the leaſt: for if one make a Leaſe for years of land, and bind himſelf and his heires to warrant the land; this is no good warranty, neither will it have the effect of a warranty: but this may amount to a covenant on which an action of covenant may be brought. *Cook ſuper Litt.* 378. 26 *H.* 8. 9.

5 That the warranty deſcend upon him that is heir of the whole blood by the common Law to him that made the warranty, and not upon another: for if Tenant in tail in Burrough Engliſh (where by cuſtome the youngeſt ſon is to enherit) diſcontinue the tail, and have iſſue two ſons, and the Uncle releaſe to the Diſcontinuee with warranty, and dieth; this is no good warranty to bind the ſon. *Cook ſuper Lit.* 12. *Litt. fol.* 161. *Sect.* 735.

So if in this caſe tenant in tail diſcontinue the taile, with warranty &c. having two ſons, and dye ſeiſed of other lands in the ſame Burrough in Fee-ſimple, to the value of land in taile; the younger ſon is not barred by this warranty.

So if one give his land to his eldeſt ſon, and the heirs males of his body, the remainder to the ſecond ſon, &c. and the eldeſt ſon doth alien with warranty, having iſſue a daughter, and dye; this is no good warranty to bar the ſecond ſon. *Lit. fol.* 161.

So if Tenant in taile have iſſue two daughters by divers venters, and dye, and they enter; and a ſtranger doth diſſeiſe them, and one of them doth releaſe all her right, and bind her and her heires to warrant it; in this caſe the warranty is not good to bar the ſiſter: but if they had been by one venter, *contra. Litt. Sect.* 737.

So if two brothers be by demy venters, and the eldeſt doth releaſe with warranty to the diſſeiſor of the Uncle, and dieth without iſſue, and the younger dyeth; this is no good warranty to bar the younger brother, for a warranty muſt evermore deſcend upon him that is heire at the common Law to him that made it. *Cook ſuper Litt* 387 *Lit. Sect.* 718.

6 That he that is heire do continue to be ſo, and that neither the deſcent of the title nor the warranty be interrupted, for if one bind him and his heires to warrant, and after is attainted of Felony, and dye; this warranty doth not bind his heir. *Lit. Sect.* 745. 746.

So if tenant in tail be diſſeiſed, and after releaſe to the diſſeiſor with warranty, and after

after the tenant in taile is attainted of Felony, and hath iſſue and dye; this warranty will not bind the iſſue.

7 That the eſtate of free-hold that is to be barred, be put to a right before or at the time of the warranty made, and that he to whom the warranty doth deſcend, have then but a right to the land, for a warranty will not barre any eſtate of Freehold or inheritance in *eſſe*, in poſſeſſion, reverſion or remainder, that is not diſplaced and put to a right before, or at the time of the warranty made, though after at the time of the deſcent of the warranty, the eſtate of freehold or inheritance be diſplaced and diveſted. And therefore if there be father and ſon, and the ſon hath a rent-ſervice, ſuit to a mill, rent charge, rent-ſeck, common of paſture, or other profit apprender out of Land of the father, and the father maketh a Feoffment in Fee with warranty, and dyeth; this ſhall not bar the ſon of the rent, common, &c. And albeit the ſon after the Feoffment with warranty, and before the death of the father hath been diſſeiſed, and ſo being out of poſſeſſion the warranty had deſcended upon him, yet this warranty ſhould not bind him. *Cook* 10.96,97. *ſuper Lit.* 388. 21 *H.*7.

So if my collateral Anceſtor releaſe to my tenant for life with warranty and dye, and this warranty deſcend upon me, this ſhall not bind my reverſion or remainder. But if in the caſe before, the ſon be diſſeiſed of the rent &c. and affirm himſelfe to be diſſeiſed by the bringing of an Aſſize (for otherwiſe he ſhall not be ſaid to be out of poſſeſſion of a rent, or the like) and after the father doth releaſe with warranty and dye; in this caſe the collateral warranty ſhall bind and bar the ſon of his rent &c. And if in the laſt Caſe my tenant for life be diſſeiſed, and my Anceſtor doth releaſe to the diſſeiſor with warranty and dye; this is a good warranty to bar and bind me.

8 That the warranty do take effect in the life time of the Anceſtor, and that he be bound by it, for the heire ſhall never be bound by an expreſſe warranty but where the Anceſtor was bound by the ſame warranty, and therefore a warranty made by Will is void. *Litt. Sect.* 734.

9 That the heir claim in the ſame right that the Anceſtor doth: for if one be a ſucceſſor only in caſe of a corporation, he ſhall not be bound by the warranty of a natural Anceſtor. *Cook ſuper Litt.* 370.

10 That the heire that is to be barred by the warranty be of full age, at the time of the fall of the warranty: for if my Anceſtor make a Feoffment, or a releaſe with warranty, and at this time I am within age, and after he dye, and the warranty deſcend upon me within age, this warranty ſhall not bind me: But if I become of age after the warranty of my Anceſtor, and before his death; in this caſe the warranty may bar me. And in the firſt caſe it will bar me alſo, whiles it is in force; but I may by my entry avoid it. And the ſame Law is of a woman covert. And yet if the entry of an Infant or a woman covert be not lawful, when the warranty doth deſcend; in this caſe the warranty ſhall bind them as well as any other, for ſuch a warranty cannot be avoided but by entry and avoiding the eſtate. And where the husband is within age at the time of the deſcent of a warranty to his wife, and the entry of the wife is taken away, there the warranty ſhall bind the wife. *Litt. Sect.* 726. *Cook* 1.67.140. *ſuper Lit.* 380.

If Lands be given to *A* for life, and after to the next heire male of *A*, and the heires males of the body of that heire male, and *A* having iſſue *B*, makes a Feoffment of the land with warranty to *I S*; this is a good warranty and a bar to the iſſue, for a man may be barred of his right by a warranty, which he could never avoid: as where Leſſee for life is diſſeiſed, and a collateral Anceſtor of the Leſſor doth releaſe to the Diſſeiſor with warranty and dye, and this doth deſcend upon the Leſſor; by this he is barred. *Cook* 1.66. 44 *Ed.*3.30. 44 *Aſſ. pl.*35.

A warranty made for life or in tail is good, and ſhall bind for ſo long only: as if Tenant in taile of land let it for life, the remainder to another in Fee, and a collateral Anceſtor doth confirme the eſtate of the tenant for life and dye, and the tenant in tail hath iſſue; this is a bar to the iſſue during the life of the tenant for

for life. And in this caſe upon a voucher the recovery in value ſhall be put for life only. *Litt. Sect.* 738. *Cook ſuper Litt.* 387.

If one make a Gift in taile, and grant to warrant the land given according to the Gift; this warranty is good no longer then the eſtate doth laſt. And no warranty that a Donor can make in this caſe can bar him of the land if the Donee die without iſſue, and the eſtate determine. *Cook* 10 96.

And where a warranty doth bar, it is entire, and doth extend to all the Land, and to all perſons upon whom it doth deſcend, and is a bar of all the right that every one of them hath in the land; ſo that if they have all right joyntly or ſeverally, or one onely hath all the right, and the reſt none, he that hath the right is barred. And therefore if lands he given to *A*, and the heirs of his body; and for want of ſuch iſſue, to *E* his ſiſter, and the heirs of her body; and *A* doth make a Feoffment with warranty, and die without iſſue, having two ſiſters, *E* and *S*; this is a bar to *E* for the whole, albeit the warranty deſcend on her and another. *Cook* 8. 52. *ſuper Litt.* 373

If there be tenant for life, the remainder to his ſon and heir apparant in tail, and the father doth make a feoffment in fee with warrantie, and dieth; in this caſe this is a warranty, and will bar the ſon, albeit it be made of purpoſe to bar him. But if by agreement and covin between him and *A* and *B*, he makes a leaſe to *A*, who makes a feoffment in fee to *B*, to whom the father doth releaſe with warranty, thinking by a collaterall warranty to bar his ſon; this is no bar, for this warranty began by diſſeiſin: and if in the firſt caſe the ſon doth enter in the life time of the father, upon the land, he doth avoid the warranty. *Cook* 5.79

If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of ſuch next heir male; aad the father makes a feoffment to *I S* with warrantie, and dieth; it ſeems this warranty is a good bar to the heir; and in this caſe the heire cannot enter in the life time of his father; for he cannot be heire male unto his father untill his fathers death. *Cook* 1. 66.

If tenant for life make a feoffment with warranty, or be diſſeiſed, and releaſe with warranty, and he in reverſion being heir to the tenant for life, doth not enter, but ſuffers the leſſee for life to die, and thereby the warranty to fall and deſcend upon him: in this caſe, this warranty generally is a barre without any aſſets. But if he that doth ſo alien &c. be tenant by the courteſie, this is no bar to the heire without aſſets in fee ſimple, from the tenant by the courteſie; and then it is a bar for ſo much. *Cook ſuper Litt.* 366, 365. *Cook* 1. 67. *Stat. Glouc. chap.* 6 *Litt. Sect.* 724. 725.

And if the heir for want of this aſſets, at the time doth recover the land from his mother, and after aſsets doth deſcend from the father; in this caſe the tenant ſhall recover the ſame land of the mother again. And if ſhe that doth ſo alien, &c. to be tenant for life of the inheritance, or purchaſe of her deceaſed husband, or given unto her by any of the Anceſtors of her Husband, or by any other perſon ſeiſed to the uſe of her Husband, or of any of his Anceſtors; in this caſe her alienation, releaſe, or confirmation with warranty ſhall not bind the heir, whether he hath aſsets or not. *Stat.* 11. *Hen.* 7. *chap.* 20. *Litt. Sect.* 727. *Cook ſuper Littleton* 365.

But if a man convey lands to the uſe of himſelf, *B* his wife, and the heires of his body, and they have iſsue C. and the father dieth, and C diſſeiſeth his mother, or getteth a feoffment from a diſſeiſor, and then ſuffereth a recovery with a ſingle voucher, and after the wife doth releaſe to the recoverer with warranty; in this caſe the warranty is a bar to the iſsue, and not void by the Statute of 11. *H.* 7. *Co.* 3. 58.

If the Husband that is ſeiſed of lands in the right of his Wife levie a fine, or maketh a Feoffment in fee with warranty, and the Wife dieth and then the Husband dieth; this warranty ſhall not binde the heir of the Wife without aſſets of other land in fee ſimple from the father, albeit he be not tenant by the courteſie; but it is before her death that he doth make the eſtate and the warranty. But a Fine levied by the Husband and Wife, in this caſe is a good bar to the heir. *Cook ſuper Litt.* 366, 381. *Stat. Glouc. ch.* 6. *Lit. Sect.* 332.

If tenant in taile that is in of another eſtate, *i.* either by diſſeiſin, or by the feoffment of a diſſeiſor, doth ſuffer a common recovery, and a collateral Anceſtor of the Tenant in taile doth releaſe with warranty to the recoverer, and after the recoverer doth make a feoffment to uſes executed by the Statute of 27 *Hen.* 8. and after the collateral Anceſtor dieth; in this caſe albeit the eſtate of the land be transferred in the poſt before the deſcent of the warranty, yet it ſhall binde. So if he, to whom the warranty is made, ſuffer a common recovery, and after the Anceſtor dieth. But if tenant in Dower enfeoffe a villain with warranty, and the Lord of the villain enter into the land before the deſcent of the warranty, and after the woman dieth; this warranty ſhall not binde the right of the Heir. So if a collateral warranty be made to a Baſtard and his heirs, and living the Anceſtor, the Baſtard dieth without iſſue, and the Lord by Eſcheat doth enter, and after the Anceſtor dieth; this warranty ſhall not binde. *Cook* 3. 62. 22 *Aſſ. pl.* 37. 29 *Aſſ. pl.* 34.

A Collateral Warranty may deſcend upon an iſſue in taile before the right deſcend, and yet be good with this difference, that the right be in *eſſe* in ſome of the Anceſtors of the Heir at the time of the Deſcent of the warranty: As, if Tenant in taile diſcontinue the taile in fee, and the diſcontinuee is diſſeiſed, and the brother of the Tenant in Tayle releaſeth all his right &c. to the diſſeiſor with warranty, and dieth without iſſue, and the Tenant in taile hath iſſue and dieth; in this caſe the iſſue is barred. But otherwiſe it is where the right is not in *eſſe* in the heir or any of his Anceſtors at the time of the fall of the warranty, as if Lord and Tenant be, and the Tenant make a Feoffment in fee with warranty, and after the Feoffee doth purchaſe the Seigniory, and after the Tenant doth ceaſe; in this caſe the Lord ſhall have a *Ceſſavit*, for a warranty doth never bar any right that doth commence after the warranty. *Litt. Sect.* 7 *Hen. Cook ſuper Litt.* 388.

8. What ſhall be ſaid a lineal warranty. And how ſuch a warranty ſhall bar.

If the caſe be ſo, that if no ſuch warranty had been made by the Father or other Anceſtor, the right of the Lands or Tenements ſo warranted, had or might have deſcended or come from the ſame Anceſtor, and that from and by him that made the ſame Warranty, ſuch a Warranty is a lineal Warranty. *Litt. Sect.* 703. 711.

As if a man be ſeiſed in fee of Land, and make a feoffment of it to another, and bind him and his heirs to warrant the Land, and hath iſſue and die, and the warranty doth deſcend upon the iſſue; this is a lineal warranty, for that if none ſuch had been, the right of the Land had deſcended to him as heir to his father, and he muſt have made his deſcent by him. *Cook ſuper Litt.* 371.

And if there be Grandfather, Father and Son, and the Grandfather be diſſeiſed, and the Father releaſe to the diſſeiſor being in Poſſeſſion with warranty &c. and dieth, and after the Grandfather dieth; this is a lineal warranty to the Son, and albeit in this caſe the warranty deſcend before the right, yet it is a good bar. And if there be two brothers, and the father is diſſeiſed, and the eldeſt brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and the warranty doth deſcend to the younger ſon; this is a lineal warranty to him. *Litt. Sect.* 707.

And if Lands be given to *A* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty. And if two parcenors be, and the eldeſt enter into all the Land to her own uſe, and then doth make a feoffment with warranty and dieth without iſſue; this, as to her own part, is a lineal warranty, but as to her ſiſters part is a collateral warranty. *Cook* 1. 66, 67.

And in every caſe where one doth demand any eſtate taile, if an Anceſtor of the iſſue in taile, whether he had poſſeſſion of the Land or not, hath made a warranty, and if the iſſue, that were to bring a writ of Foremedon, may or might have by poſſibilty by ſome matter that might have been done, conveyed to himſelf a title by force of the Gift by him that made the warranty; this is a lineal warranty. *Cook* 8. 52.

As if a man be ſeiſed of land of an eſtate taile to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath iſſue and dieth; this warranty deſcending upon the iſſue is a lineal warranty.

And if lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heirs females of his body, and the Donee doth make a feoffment with warranty, and hath iſſue a ſon and a daughter and dieth; this warranty is lineal to the ſon, and if the ſon dieth without iſſue male, it is a lineal warranty from the father to the daughter. But if the Brother in his life time releaſe to the diſcontinuee &c. with warranty &c. and after dieth without iſſue; this is a collateral warranty to the daughter. *Litt. Sect.* 709.

If Lands be given to the Husband and Wife, and the Heirs of their two bodies engendred, and they have iſſue, and the Husband diſcontinue and die, and after the Wife doth releaſe with warranty and die; this is a lineal warranty. *Litt. Sect.* 714.

And if Lands be given to a man and a woman unmarried and the heirs of their two bodies, and they intermarry, and are diſſeiſed, and the husband doth releaſe with warranty and dieth, and after the wife dieth; this is a lineal warranty to the iſſue for all the Land. *Cook ſuper Litt.* 375.

And if Tenant in Taile have iſſue three ſons and diſcontinue, and the middle brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and after the elder brother dieth without iſſue, ſo that the warranty doth deſcend to the younger brother; this is a lineal warranty to him. *Litt. Sect.* 718.

And if a father give land to his eldeſt ſon and the heirs males of his body, &c. the remainder to the ſecond ſon, &c. if the eldeſt ſon alien in fee with warranty, &c. and hath iſſue female, and dieth without iſſue male; this is a lineal warranty to the ſecond ſon. And in all theſe Cales of a lineal warranty if the right of the eſtate to be barred be the right of an eſtate in fee ſimple, it is a bar without any aſſets; for the rule is, That as to him that demandeth fee ſimple by any of his Anceſtors, he ſhall be barred and bound by a lineal warranty that doth deſcend upon him, unleſs he be reſtrained by ſome Statute. *Litt. Sect.* 711, 712. *Doct. & Stud.* 152, 153. *Cook* 8 52.

But it doth not bind the right of an eſtate in fee taile without aſſets, for in that caſe the rule is, That as to him that demandeth fee taile by Writ of Formedon in the Deſcendor, he ſhall not be barred by a lineal warranty, unleſs he hath aſſets by deſcent in fee ſimple of other land from the ſame Anceſtor that made the warranty; and then it is a bar for ſo much only as doth deſcend to him, no more. And yet if the iſſue in taile do alien the aſſets deſcended and die; in this caſe the iſſue of that iſſue is not barred by this warranty and aſſets. But if the iſſue to whom the warranty doth deſcend bring his Writ of Formedon, and is barred by Judgement by reaſon of the warranty and aſſets; in this caſe albeit he alien the aſſets afterwards, yet the eſtate taile is barred for ever. *Cook ſuper Litt.* 393 *See Brownl.* 1 *Part* 153.

9. What ſhall be ſaid a collateral warranty. And how ſuch a warranty ſhall bar.

If Tenant for life do alien in fee with warranty, or be diſſeiſed and releaſe to the diſſeiſor with warranty and die, and the warranty deſcend on him in reverſion or remainder; this is a collateral warranty. So if the Leſſee for life be deſſeiſed, and a collateral Anceſtor of him in reverſion releaſe with warranty and die, and the warranty deſcend on him in reverſion; this is a collateral warranty. for that is collateral which is collateral to the title of the Land. *Cook* 1. 67. 21 *Hen.* 7. 10. *Litt. Sect.* 725.

And if a man ſeiſed of Lands in fee have iſſue two ſons, and the father dieth, and the younger ſon doth enter, and doth alien the land with warranty, and die without iſſue; this is now a collateral warranty that is deſcended on the elder brother. *Litt. Sect.* 707. *Doct. & St.* 152.

And if a ſon be diſſeiſed of his own land, and bring an Aſſiſe, and after the father doth releaſe to the diſſeiſor with warranty and dieth; this warranty that doth deſcend to the ſon is a collateral warranty. 21 *Hen.* 7. 10.

And if a Father diſſeiſe his ſon of the Land he hath of his own Purchaſe without any intent to alien afterwards and to bar his ſon, and after he doth make a feoffment with warranty and die before the entry of his ſon, ſo that the warranty doth deſcend; this is a collateral warranty. *Litt. Sect.* 704.

If there be father and two ſons, and the father is diſſeiſed, and the younger ſon doth releaſe with warranty to the diſſeiſor and die without iſſue, and then the father dieth; in this caſe the warranty now deſcended, is a collateral warranty. *Litt. Sect.* 707.

If a Leaſe be made for life to the father, the remainder to his next heir, and the father is diſſeiſed and doth releaſe with warranty and dieth; this is a collateral warranty to the heir. And if the husband diſcontinue the right of his wife, and an Anceſtor collateral to the wife to whom ſhe is heir doth releaſe with warranty and die, and after the husband dieth; this is a collateral warranty, and a bar to her. *Cook ſuper Litt.* 388.

And in every caſe where a man doth demand an eſtate taile by a Writ of Formedon, if any Anceſtor of the iſſue in taile which hath or hath not poſſeſſion, maketh a warranty, and the iſſue that is demandant cannot by any poſſibility that may be done convey to him a title by force of the gift from and by him that made the warranty; this is a collateral warranty: as if Tenant in taile diſcontinue the taile and die, having iſſue, and the uncle of the iſſue doth releaſe with warranty to the diſcontinuee, and die without iſſue, ſo that the warranty doth deſcend on the iſſue in taile; this is a collateral warranty. So if ſuch a diſcontinuee make a feoffment in fee, or be diſſeiſed, and the uncle releaſe with warranty to the diſſeiſor, or feoffee, and die without iſſue, and the warranty doth deſcend on the iſſue; this is a collateral warranty. *Cook* 10. 96. *Litt. Sect.* 709. *Plow.* 234. *Kelw.* 78.

If a Tenant in taile have three ſons, and diſcontinue the taile in fee, and the middle brother doth releaſe to the diſcontinuee with warranty, and after the Tenant in taile dieth; this is a collateral warranty to the elder brother. *Litt. Sect.* 708.

If one have iſſue three ſons, and giveth land to the eldeſt, and the heirs of his body; and for want of ſuch iſſue to the middle, and the heirs of his body; the remainder to the third, and the heirs of his body; and the eldeſt doth diſcontinue the taile in fee with warranty, and die without iſſue; this is collateral to the middle ſon. In the ſame manner it is in caſe where the middle ſon hath the ſame land by force of the ſame remainder, becauſe his elder brother made no diſcontinuance but died without iſſue of his body, and after the middle brother doth make a diſcontinuance with warranty, &c. and dieth without iſſue; this is a collateral warranty to the youngeſt ſon. And in this caſe if any of the ſons be diſſeiſed, and the father that made the Gift, &c. releaſeth to the diſſeiſor all his right with warranty; this is a collateral warranty to that ſon upon whom the warranty doth deſcend. *Litt. Sect.* 716.

If Lands be given to *A*, and the heirs of his body, and for want of ſuch iſſue to *E* his ſiſter, and the heirs of her body, and *A* doth make a feoffment with warranty, and die without iſſue, having two ſiſters *E* and *S*; this is a collateral warranty to *E*. *Cook* 1. 52. *Litt. Sect.* 713.

If lands be given to a man and the heirs of his body begotten, who taketh a wife and hath iſſue a ſon by her, and the husband doth diſcontinue the taile in fee and dieth, and after the wife doth releaſe to the diſcontinuee with warranty and dieth, and the warranty doth deſcend to the ſon; this is collateral to him. If Tenant in taile diſcontinue the taile in fee, and the diſcontinuee is diſſeiſed, and the brother of the tenant in taile doth releaſe to the diſſeiſor with warranty in fee, and dieth without iſſue, and the tenant in taile hath iſſue and dieth; this is collateral as to the iſſue. If tenant in taile have iſſue two daughters, and die, and the elder enter into all to her own uſe, and thereof make a feoffment in fee with warranty, and die without iſſue, this warranty as to the other ſiſters part is collateral, but not as to her own. *Litt. Sect.* 741.

If the husband and wife, tenants in ſpecial taile, have iſſue a daughter, and the wife dye, and the husband by a ſecond wife have iſſue another daughter, and diſcontinueth

tinueth in Fee, and dyeth, and a collateral Anceſtor of the daughters releaſe to the Diſcontinuee with warranty and dyeth, and the warranty deſcend upon both the daughters; this is a collateral warranty to them. *Cook ſuper Litt.* 373.

If lands be given to one, and the heires males of his body, and for want of ſuch iſſue to the heirs females of his body, and the father dy, and the brother releaſe with warranty, and dye without iſſue; this is collateral to the daughter.

If tenant in tail make a Leaſe for life, the remainder to another in Fee, and a collateral Anceſtor doth confirm the eſtate of tenant for life with warranty and dye, and after the tenant in tail die having iſſue; this is a good binding collateral warranty during the eſtate for life.

And in all theſe and ſuch like caſes of a collateral warranty, whether the right be the right of an eſtate tail, or the right of an eſtate in fee ſimple that is to be barred, it is a bar without any aſſets; for in this caſe the rule is, That a collateral warranty is a bar to him that demandeth fee ſimple, and alſo to him that demandeth fee taile, without any other deſcent of lands in fee ſimple, ſo that the heir on whom the ſame warranty is deſcended, can never have the land ſo warranted whiles the warranty doth continue in force, but is bound thereby, except it be in ſome ſpecial caſes reſtrained by Act of Parliament, as where the husband alone during his wives life, or after her death, being Tenant by the courteſie, makes a Feoffment by Fine or Deed of his wives land, which ſhe hath by deſcent or purchaſe, with warranty; this will not bar her heir without aſſets of other Lands in fee ſimple deſcended from the ſame Anceſtor that made the warranty. *Litt. Sect.* 712. *Cook ſuper Lit.* 374. *Cook* 10. 96. *Stat. of Glouc. chap.* 3. *Cook ſuper Litt.* 365. *Stat.* 11 *H.* 7. *chap.* 20.

Or where a wife after her husbands death ſhall alone or with her ſucceeding husband alien, releaſe, confirm or diſcontinue with warranty, the land ſhe holdeth in dower or in tail of the gift of her former husband, or any of his Anceſtors; this warranty is voidable, and will not bind with aſſets.

10. What ſhall be ſaid a warranty that doth begin by diſſeiſon And what ſuch a warranty doth work.

If the ſon purchaſe land &c. and after let it to his father or any other Anceſtor for years or at will, and he by his Deed doth infeoff a ſtranger, and that with warranty, and after dyeth, whereby the warranty doth deſcend upon the heir; this warranty doth commence by diſſeiſin. *Litt. Sect.* 699. 700. 701. 702. *Finch.* 82. *Cook ſuper Litt.* 367.

So if tenant by Elegit, Statute Merchant, Guardian in Chivalry, or Soccage, or becauſe of Nurture, make a Feoffment with warranty, and this warranty doth deſcend on his heir; this warranty doth commence by diſſeiſin.

So if one that hath no right at all enter into my land, and make a Feoffment to another with warranty.

So if one Coparcenor enter into the whole land, and make a Feoffment in fee with warranty; this warranty as to the one moyety doth begin by diſſeiſin.

So if father and ſon purchaſe lands to them jointly &c. and the father alien the whole to another with warranty &c. and after the father dieth; this warranty as to the one moity doth begin by diſſeiſin.

But if the purchaſe be to them two and the heirs of the ſon, it is otherwiſe; for if the ſon enter in the life time of the father, the warranty is avoided for all: but if he do not enter, then as to the fathers moity it is a collateral warranty. And if the purchaſe be to the father and ſon and the heirs of the father, and the father alien with warranty &c. in this caſe the warranty is good for the whole.

If the father be tenant for life, the remainder to his ſon and heir in fee, and the father by covin and conſent, of purpoſe to bar the heir by a collateral warranty, maketh a leaſe for years, to the end that the Leſſee ſhould make a Feoffment in fee that the father may releaſe to the Feoffee with warranty, and all this is done accordingly, and the father dyeth, and the warranty doth deſcend to the ſon; in this caſe the warranty ſhall be ſaid to begin by diſſeiſon. But if the father in this caſe make a Feoffment in fee with warranty and dye; this is a good warranty to bind the ſon, albeit it be done of purpoſe to bar him. *Cook* 5. 80. *ſuper Litt.* 366. 367.

So

So if one brother make a gift in taile to another, and the Uncle doth diſſeiſe the Donee, and enfeoff another with warranty, the Uncle dieth, and the warranty deſcendeth on the Donor, and then the Donee dieth without iſſue; this warranty doth begin by diſſeiſin.

So if the father and ſon, and a third perſon be Joint-tenants in fee, and the father maketh a Feoffment in Fee of the whole with warranty, and dyeth, and then the ſon dyeth; in this caſe as to the part of the third perſon, and to the part of the ſon, the warranty ſhall be ſaid to begin by diſſeiſin.

But releaſes at this day by a tenant for life to a diſſeiſor or any other without covin, albeit it be to the intent to bar him in reverſion, ſhall bar him; for intent without covin and diſſeiſin ſhall not avoid a warranty.

And examples of Warranties that do begin by diſſeiſin, have theſe qualities.

1. That for the moſt part the diſſeiſin is done immediately to the heire that is bound by the warranty.

2. The warranty and diſſeiſin are *ſimul* and *ſemel*. And yet if a man diſſeiſe another, with intent to make a Feoffment with warranty, albeit the Feoffment be made twenty years after the diſſeiſin, yet it ſhall be ſaid to be a warranty, that doth begin by diſſeiſin.

But in all theſe caſes of warranties that do begin by diſſeiſin, this is the rule, That they are altogether void and without force as to all others but to the parties themſelves that do make them, and therefore they do not bar or bind any others at all of their right that have any.

And the ſame Law is of a warranty that doth begin by abatement or intruſion; that is, when an abatement or intruſion is made of purpoſe to make a Feoffment in fee with warranty.

And ſo alſo it is where the tenant dyeth without heire, and an Anceſtor of the Lord doth enter before the entry of the Lord, and make a Feoffment in fee with warranty; in this caſe this ſhall not binde the Lord, becauſe it doth begin by wrong.

11. How a warranty ſhall be taken.

All warranties in general are favourably taken in Law, becauſe they are part of mens aſſurances. Every warranty in Law is taken for, and hath the effect of a lineal warranty.

The warranty that is made by *Dedi & Conceſſi*, or *Dedi* only in a feoffment, is and ſhall be taken for a general warranty againſt all perſons to the Feoffee and his heirs, during the life of the Feoffor only, albeit there be no ſervice reſerved by the Deed nor heir named: but it ſhall not extend to the Aſſignee of the Feoffee. And if there be any ſervice reſerved on the Deed, then it ſhall extend againſt the heir alſo. *Cook* 4.81. 5.17.

The warranty in Law that is made upon the gift in tail, or leaſe for life, rendring rent, is a ſpecial warranty againſt the Donor and Leſſor, and his heires and aſſignes, ſo that the Donee or Leſſee may vouch the grantor after the grant of the reverſion, or the grantee of the reverſion after the atturnment of the Tenant at his election. *Cook* 4.81. *ſuper Litt.* 384.

The warranty in Law that is made upon an Exchange, is ſpecial in divers reſpects, for it extendeth reciprocally to, and againſt the heires of both parties, and it doth extend only to the ſame land that is given in exchange, and none other, and no uſe can be made of it but by Voucher, for no *Warrantia Cartæ* doth lye upon it. So alſo the warranty that is made in dower is taken to extend only to the other two parts of the land. *Cook* 4.121. *ſuper Litt.* 384.

The warranty in law that is made upon the tenure of Homage Anceſtrel, extendeth reciprocally to the heires, and againſt the heires of both parties. *Cook ſuper Litt.* 384.

If a Feoffment be made of land to three jointly, and the Feoffors do warrant the land to the Feoffees, and every of them; this warrantie ſhall be joint and not ſeveral. But if the eſtate be ſeveral, as if one grant white acre to *A*, and black acre to *B*, and grant to warrant the land to them, and either of them; in this caſe the warranty ſhall be ſeveral. *Cook* 5.59.

If a

If a man of full age, and an Infant join in a Feoffment with warranty; this ſhall be taken for a good warranty as to the whole for him that is of full age and void for the Infant, and not void in part, and good in part. *Cook ſuper Litt.* 367.

If a man make a Feoffment in fee, and bind his heirs, but not himſelf to warranty; in this caſe and by this his heires ſhall not be bound, and it ſeemes alſo that it will not bind the warrantor himſelf. But if a man bind himſelf to warrant, and not his heires by the Feoffment; in this caſe the Feoffor himſelf is bound to the warranty, but not his heires, for it is a maxime of Law, That the heir ſhall never be bound to any expreſſe warranty, but where the Anceſtor was bound by the ſame warranty. *Cook ſuper Litt.* 47. 385. *Dyer* 42. *Kelw.* 108. *Cook* 6. 69.

If one make a Feoffment to *B* and his heires, and thereby doth grant to warrant the land, and doth not ſay to *B* and his heirs; yet this warranty ſhall be taken to extend to them. But if the Feoffor doth grant to warrant the land to *B*, and doth not ſay to his heires, this ſhall not extend to his heires. And if in this caſe the warranty be to *B* and his Aſſignes, it ſhall not extend to his heires, neither ſhall the Aſſignees take the advantage of it after the death of *B*. And if the warranty be to *B* and his heires, and not to his Aſſignes alſo; this ſhall not extend to his aſſignes. If one make a Feoffment to *A*, *habendum* to him and his heires, and bind himſelf and his heires to warrant the Land *in forma prædicta*; in this caſe the warranty ſhall extend to the Feoffee and his heirs.

If one grant to warrant land to another and his heires, and doth not ſay againſt what perſons, this ſhall be taken for a general warranty againſt all men. *Cook* 1. 1.

If one make an eſtate, and grant to warrant the land, but doth not ſay how long; this ſhall be taken for as long as the eſtate to which the warrantie is knit doth laſt.

If a warranty be made againſt any ſpecial perſons, it ſhall extend to them, and no further, and it ſhall extend in all caſes for, and to all titles, and entries upon title; and it ſhall not, in any ſuch caſes extend to tortious and unlawful entries *Dyer* 328.

If a man be ſeiſed of rent-ſeck, iſſuing out of the Manor of Dale, and he take a wife, and the husband doth releaſe to the terre-tenant, and warranteth *tenementa prædicta*, and dieth; this warranty ſhall extend to the rent as well as to the land; and therefore if the wife ſue for her thirds of the rent, the terre-tenant may vouch the heire. *Cook ſuper Litt.* 366.

And regularly the warranty doth extend to all things iſſuing out of the land, *viz.* to warrant it in the ſame manner and plight as it was in the hands of the Feoffor, and he ſhall vouch as of lands diſcharged. And therefore if grantee of a rent grant it to the tenant of the land on condition, and the tenant doth make a Feoffment of the land with warranty; in this caſe the warranty ſhall not extend to the rent, albeit the Feoffment be made of the Land diſcharged of the rent. *Cook ſuper Litt.* 388, 389.

And if a woman have a rent-charge in fee, and ſhe doth intermarry with the tenant of the Land, and a ſtranger doth releaſe to the tenant of the land with warranty; this warranty ſhall not extend to bar any action to be brought after the death of the wife for the rent. But if in this caſe the tenant make a Feoffment in fee with warranty and dieth, the Feoffee in a *cui in vita* brought by the wife ſhal vouch as of lands diſcharged at the time of the warranty made.

So if tenant in tail of a rent-charge purchaſe the land and make a Feoffment with warranty, and the iſſue bring a Formedon of the rent, the tenant ſhall not vouch. &c.

All thoſe that are parties to the warranty, *i.* ſuch as are named in the Deed regularly, ſhall take advantage of the warranty; as if one doth warrant land to another, his heirs and Aſſigns; in this caſe both the heirs and the aſſigns ſhall take advantage of it, and they both may vouch or rebut, or have a *warrantia cartæ*, ſo as they come in privity of eſtate, for otherwiſe the heirs or Aſſigns cannot vouch, or have a *Warrantia cartæ*, and yet he may rebut notwithſtanding in divers caſes. *Cook ſuper Lit.* 365. 5. 17.

11. Who may take advantage of a warranty And how. And againſt whom it may be taken. Aſſignes.

But

But thoſe that are not named for the moſt part ſhall not take advantage of the warranty, and therefore if land be warranted to *I S*, and not to him and his heirs, or to him and his Aſſigns, or to him his heires and aſſigns; in this caſe neither the heir nor the aſſignee may vouch or have a *Warrantia Cartæ*; and yet in ſome caſes where it is ſo, the aſſignee or tenant of the land may rebut.

The warranty annexed to an Exchange, a Partition, by *Dedi.* and by homage Anceſtrel, doth alwayes go in Privity, and therefore an aſſignee in theſe caſes can take no advantage of it. And yet in caſes of Exchange and *Dedi*, an Aſſignee may rebut. But the aſſignee of a leſſee for life may take advantage of the warranty in Law annexed to his eſtate. *Cook ſuper Litt.* 384.

If one grant to warrant Land to another, his heires and Aſſignes; in this caſe the heirs or Aſſigns, heir of the Aſſignee, or Aſſignee of the heirs of the Feoffee, or Aſſignee of Aſſignees *in infinitum*, ſhall take advantage of the warranty. *Cook* 5. 17. *ſuper Litt.* 384. 385.

And therefore if one enfeoff *I S* to have and to hold to him, his heires and aſſigns, and warrant the land to him his heires and aſſignes, and *A* doth enfeoff *B* and his heires, and *B* dyeth; in this caſe the heire of *B* ſhall vouch as Aſſignee to *A*. And if one enfeoff *A* and *B*, *Habendum*, to them and their heires, and warrant the land to them, their heirs and aſſignes, and *A* dye, and *B* doth ſurvive and dye, and his heire enfeoffe *C*; in this caſe *C* ſhall take advantage of this warranty as Aſſignee. If one enfeoff *A* with warranty to him, his heirs and aſſigns, and *A* doth enfeoff *B*, and *B* doth re-enfeoff *A*; in this caſe neither *A* or his Aſſigns ſhall ever take any advantage of this warranty. And yet if *B* enfeoff the heir of *A*, he may take advantage of the warranty.

If one make a Feoffment by deed with warranty to the Feoffee, his heirs and aſſigns and the Feoffee doth make a Feoffment over to another by word without deed: in this caſe the ſecond Feoffee ſhall have all the advantage of this warranty, for an aſſignee by word ſhall have the ſame advantage that an Aſſignee by Deed ſhall have.

If a Feoffment be made with warranty to a man and his heires and aſſignes, and he make a gift in tail, the remainder in fee, and the Donee make a Feoffment in fee; this Feoffee ſhall not vouch as aſſignee, but he muſt vouch his Donor upon the warranty in Law; and yet he may rebut.

If lands be given to two brethren in fee ſimple, with warranty to the eldeſt and his heires, and the eldeſt dye without iſſue; in this caſe albeit the other brother be his heire, yet he ſhall have no advantage at all by the warranty, becauſe he comes in above the warranty. But generally all that claime under the warranty ſhall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a Feoffment to two, their heires and aſſigns, and one of them doth make a Feoffment in Fee, this Feoffee in this caſe ſhall not take advantage as aſſignee.

An aſſignee of part of the land ſhall take advantage of a warranty, as if a man make a Feoffment of two acres with warranty to him, his heirs and aſſignes, and the Feoffee doth make a Feoffment of one acre of it to another: in this caſe the ſecond Feoffee ſhall take advantage of the warranty as aſſignee. And therefore herein there is a difference between the whole eſtate in part, and part of the eſtate in the whole or in any part, for if a man have a warranty to him, his heirs and aſſigns, and he make a leaſe for life, or gift in tail; in theſe caſes the leſſee or donee ſhall not take advantage of the warranty as aſſigns: but they may vouch the leſſor or donor upon the warranty in Law. *Cook ſuper Litt*, 385

But if a leaſe for life be made, the remainder in fee; ſuch a leſſee may vouch as aſſignee upon the firſt warranty. *Cook ſuper Litt.* 384.

If the father have a Feoffment made to him and his heires with warranty, and he make a Feoffment to his ſon and heir with warranty; in this caſe the ſon may take advantage of the firſt warranty after the fathers death. *Cook ſuper Litt*, 384.

If a man enfeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the husband, the wife is received; in this caſe ſhe may vouch her husband. *Et ſic è converſo.* Cook ſuper Lit. 390.

If

If a woman enfeoff a man with warranty, and they intermarry and are impleaded; the husband in this caſe ſhall vouch himſelf and the wife. *Cook ſuper Litt.* 390.

He that comes into the land meerly by act of Law in the poſt, as the Lord by Eſcheat or the like, ſhall never take advantage of a warranty; and therefore if tenant in dower enfeoff a villaine with warranty, and the Lord of the villain enter: or a Feoffment be to a Baſtard with warranty, and he dye without iſſue, and the Lord enter by Eſcheat; in theſe caſes the Lord ſhall never take advantage of theſe warranties. 26 *H.* 8 3. 22 *Aſſ. pl.* 37. 29 *Aſſ.* 34. *Cook* 3 62 63.

But otherwiſe it is where a man comes to land by limitation of uſe or a common recovery, which is by the act of the party, for if tenant in taile being in of another Eſtate, *i.* by diſſeiſin, or Feoffment of a diſſeiſor ſuffer a common recovery, and a collateral Anceſtor of the Tenant in tail doth releaſe with warranty to the recoveror, and after the recoveror doth make a Feoffment to uſes, which are executed by the Statute of 27 *H.* 8. and after the collateral Anceſtor dieth; in this caſe the terre-tenants may take advantage of the warranty by way of rebutter, albeit the eſtate be transferred in the poſt.

So if he to whom the warranty is made, ſuffer a common recovery, and after the Anceſtor dieth; the recoveror may take advantage of this warranty by way of rebutter, for any man that hath the poſſeſſion of land, albeit he have no deed to ſhew how he came by the poſſeſſion of it, or how he is Aſſignee, may rebut the Demandant, and ſo bar him and defend his own poſſeſſion: And therefore the tenant by the courteſie, donee in tail that is in of anothers eſtate, an Aſſignee by force of a warranty made to a man and his heires, Feoffee of a Donee in tail may rebut and bar the Demandant by the warranty.

If one enfeoff another of an acre of ground with warranty, and hath iſſue two ſons, and dyeth ſeized of another acre of land of the nature of Burrough Engliſh; in this caſe albeit the warranty deſcend upon the eldeſt ſon only, yet both the ſons may be vouched. And ſo alſo it is of heires in Gavelkind; the eldeſt ſhall be vouched as heir to the warranty, and the reſt in reſpect of inheritance. *Cook ſuper Litt.* 376. 1 *Ed.* 3. 13. 5 *H.* 7. 2.

And in like ſort the heir at the common Law, and the heir of the part of the mother ſhall be vouched, or the heire at the Common Law may be vouched alone at the election of a Tenant. And in like ſort the heire at the Common Law ſhall be vouched with the heire in Burrough Engliſh. And ſo alſo a baſtard ſhall be vouched with a *mulier.* And if a man die ſeiſed of certain lands in fee, having iſſue a ſon and a daughter by one venter, and a ſon by another, and the eldeſt ſon entreth, and dieth, & the land doth deſcend to the ſiſter, in this caſe the warranty doth deſcend on the ſon, and he may be vouched as heir, and the ſiſter alſo may be vouched as heir to the land.

If two make a Feoffment with warranty, and the one dye; the ſurvivor ſhall not be charged alone with the warranty, but the heire of him that is dead ſhall be charged alſo. And if two be bound to warrant land, and both of them dye; the heirs of both of them ought to be vouched, and ſhall be equally charged. And if the heir be vouched in the ward of three ſeveral perſons, the one of them only ſhall not be charged, but they ſhall be charged equally. *Cook* 3 14 *ſuper Litt.* 386. 16 *H.* 7 13. 48 *Ed.* 3 5.

If a woman an heir of the diſſeiſor enfeoff me with warranty, and after ſhe is married to the diſſeiſee; in this caſe I may take advantage of this warranty againſt the diſſeiſee and rebut him upon it if he ſue me for the land. So if the husband and wife ſue me for the land of his wife, and I have a warranty of a collateral Anceſtor of the husbands deſcended to him; in this caſe I may make uſe of this to bar the husband and wife. *Cook ſuper Litt.* 365.

A warranty lineal or collateral may be defeated, determined or avoided in all or in part. And this is ſomtimes by matter in law, & ſomtimes by matter in deed. *Con L.* 392

13. When a warranty ſhall be ſaid to be defeated, determined or avoided. And how. Or nor.

If the eſtate to which the warranty is annexed be gone, the warranty annexed thereunto is gone alſo. And therefore if an eſtate tail to which a warranty is annexed be ſpent, the warranty is determined. And if a man make a gift in tail with warranty, and after the Donee doth make a Feoffment and dye without iſſue, the warranty is gone. *Cook* 10 96 1, 2, 3. 62. *Lit. Sect.* 641. *Cook ſuper Lit.* 392.

So if tenant in tail diſcontinue the taile,and the diſcontinuee be diſſeiſed, or make a Feoffment on condition,and a collateral Anceſtor of the iſſue releaſe to the diſſeiſor, or feoffee on condition,with warranty, and after the diſcontinuee doth enter upon the diſſeiſor, or on the Feoffee for the condition broken; in theſe caſes the warranty made by the collateral Anceſtor is gone. So if a Seigniory be granted with warranty, and the tenancy eſcheat ſo that the Seigniority is extinct; hereby alſo the warranty is defeated. So if a collateral anceſtor heretofore had releaſed with warranty, and then had entered into Religion, this warranty had bound; but if after he had been de-arraigned the warranty had been defeated. *Brownl. 2 part* 169.

If the father make a Feoffment to his ſon and heir apparant,with warranty and die, ſo that the warranty doth deſcend upon the ſon; hereby the warranty is gone.And yet if a feoffment be made to a man and his heirs,and he dyeth,leaving iſſue daughters: in this caſe the warranty ſhall be divided and is not determined. *Cook ſuper Lit.* 384. *Broo. Warranty* 27.

If tenant in tail doth make a Feoffment to his Uncle,and after the Uncle doth make a feoffment in fee with warranty &c. to another, and after the feoffee of the Uncle doth re-infeoff again the Uncle, and after the Uncle doth infeoff a ſtranger *in fee* without warranty, and dyeth without iſſue, and the Tenant in tail dyeth; hereby the warranty made to the firſt Feoffee is defeated. So if the Uncle make the warranty to the Feoffee, his heirs and aſſigns,and take back an eſtate in fee,and after doth enfeoff another. But if one make a feoffment with warranty to the Feoffee his heires and aſſigns, and the Feoffee doth re-infeoff the Feoffor and his wife,or the Feoffor and a ſtranger; in theſe caſes the warranty is not defeated,but doth continue ſtill. So if two do make a feoffment with warranty to one,his heirs and aſſigns, and the Feoffee doth re-infeoff one of the Feoffors; in this caſe the warranty is not gone. And if in the firſt caſe the Feoffee make an eſtate to his Uncle in tail or for life,ſaving the reverſion,or a Leaſe for life the remainder over &c.in this caſe the warranty is only ſuſpended. *Lit. Sect.*743 *Cook ſuper Lit.*390. *Lit.Sect.*744. If one make a Feoffment or releaſe with warranty,and after is attainted of Treaſon or Felony; hereby the warranty is gone; and albeit he do afterwards obtain his pardon,yet the warranty is not revived.*Coo.ſuper Lit.*391. If a feoffment with warranty be made to two or more,and they being Joyntenants do after by deed make partition; by this the warranty is determined. *Cook* 6.12. So if two Jointenants be,and one of them diſſeiſe the other,and he that is diſſeiſed doth recover in an aſſiſe and hath judgment to hold in ſeveralty; hereby the warranty is determined. *Adjudg.Hill.*22 *Jac. B R Euſtace and Sholes Caſe.* So if *A* and *B* be Jointenants of white acre for life, and *A* by fine doth grant to *B totum & quicquid habet in tenementis*,hereby the warranty is gone. But if a partition be made by Judgment upon a Writ by force of the Statute of 13 *H.* 8. this doth not defeat the warranty fallen to them, but it ſhall be divided between them, and they ſhall all of them take advantage of it.

If one enfeoff three,with warranty to them and their heires,and one of them releaſe to one of the other two; hereby the warranty is gone for that part. But if one of them releaſe to the other two; in this caſe the warranty is not gone,but doth continue,and they may vouch upon it. *Cook ſuper Litt.* 385.

If one enfeoff two men and their heirs,and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithſtanding. *Cook ſuper Lit.*385. If the party that hath the warranty, or the eſtate to which the warranty is annexed, releaſe to him that is bound to warrant all warranties, or all covenants real, or all demands; by either of theſe releaſes the warranty is gone. So alſo if by a Defeaſance made between the parties it be agreed the warranty ſhall be void,by this defeaſance the warranty may be avoided alſo. Or if it be ſo agreed that the Warrantee or his heirs &c.ſhal not vouch,or have a *Warrantia cartæ* by this the warranty is avoided in part. *Cook ſuper Litt.*393.392. *Lit.Sect.*748.

Releaſe.

Defeaſance.

If tenant in tail doth enfeoff his Uncle,which doth enfeoff another in fee with warranty,if in this caſe the feoffee releaſe the warranty to his Uncle; hereby the warranty is extinct.But if a gift in taile be made with warranty,in this caſe a releaſe made by the Tenant in tail of this warranty will not extinguiſh it. *Cook ſuper Lit.*391.

If

If the parties between whom the warranty is, intermary, hereby the warranty is ſuſpended during the Coverture in ſome caſes. *Cook ſuper Litt.* 390.

If tenant in tail doth make a Feoffment in fee with warranty, and diſſeiſeth the Diſcontinuee, and dieth ſeiſed, this doth ſuſpend the warranty. *Cook ſuper Litt.* 330.

If two make a Feoffment in fee, and warrant the land to the Feoffee, and his heires, and the Feoffee doth releaſe the warranty to one of the Feoffors; this doth not determine the warranty of the other as to the moyety. So if one doth enfeoff two with warranty, and the one of them doth releaſe the warranty; this doth not extinguiſh the warranty for the other moity, but it doth continue ſtill.

A warranty alſo may loſe his force by taking benefit or making uſe thereof; for after a man hath once taken advantage thereof, in ſome caſes he can make no further uſe of it: of which read *Cook ſuper Litt.* 393.

CHAP. CLXVII.

Of Wales, War, and Waſte.

FOR *Wales*, ſee *Stat.* 28 *Ed.* 3. 2. 9 *H.* 4. 4. 2 *H.* 5. 2. 26 *H.* 8. 4. 26 *H.* 8. 6. 27 *H.* 8. 7. 33 *H.* 8. 13. 34. 35 *H.* 8. 36. 1 & 2 *Ph.* & *M.* 15. 18. *Eliz.* 8. 27 *Eliz.* 9.

For propagation of the Goſpel in *Wales*, *Act* 22. *Feb.* 1649.

War.

For War, Muſters, Soldiers, Captaines, Armour and Armed men, ſee the Statutes, *Magna Charta* 5. 1 *Ed.* 3. 5. 7. 18 *Ed.* 3. 7. 5 *R.* 2. 10. 7 *Ed.* 1. 2 *Ed.* 3. 3. 20 *R.* 2. 1. 4 *H.* 4. 15. 18 *H.* 6. 18, 19. 7 *H* 7. 1. and 7. 11 *H.* 7. 18. 3 *H.* 8. 5. 2 and 3. *Ed.* 6 2. 4 and 5. *Ph.* & *Mar.* 3. 5. *Eliz.* 5. 31 *Eliz.* 2. 19. *H.* 7. 1. 3 *Car.* 1. *Cromp. Jur.* 83. 90. Theſe Lawes are of little uſe now.

The Militia is governed now by the ſtanding Council of War only.

For the Committee of the Army, ſee Ordinance *January* 28. 1653. *July* 1653.

Relief of maimed Soldiers.

For the relief of maimed Souldiers and their widowes, and their children. See *Act* 13 *September* 1651. See my Book of *Juſtice of Peace*, *chap.* 35.

Billetting ſoldiers and Free-Quarter.

For billetting Souldiers, ſee 19 *Decemb.* 1651. 12 *May* 1649. and Free-Quarter. *Ord.* 24. *Decemb.* 1647.

Of Waſte.

Waſte, what.

THis word, (*Waſte*) is ſometimes taken for a wrong done by a Tenant to him in Reverſion, where a Tenant for his own or anothers life, in Dower, for years, or by the courteſie of *England*, or a Guardian in Chivalry, when he to the prejudice of him in reverſion, or the heir, doth make waſte or ſpoile in the Houſes, Woods, Gardens, Orchards or Lands he doth hold. And ſo it is either voluntary, when the Tenant doth willingly do it: or it is permiſſive and negligent, when the Tenant doth ſuffer it to be done. *Termes Ley. Cook upon Litt.* 1. *part* 53. 57.

How many kinds there are.

Writ of Waſte what it is.

This word is ſometimes alſo taken for the Action or Writ that is given to relieve a man againſt ſuch a wrong done, which is defined to be a Writ lying where any Te-

nant for life, years, in dower, by the courteſie, or Guardian in Chivalry, doth make waſte; then he in Reverſion ſhall have this Writ.

How many kinds of it there are. *Sect.* 1.

And this is either in the *Tenet*, when it is brought againſt him that hath the preſent eſtate, or in the *Tenuit*, when it is brought againſt him that had, but now hath not the eſtate in the land: and by this Writ in the *Tenet*, the waſte being found, he ſhall recover treble damages, and *locum vaſtatum*, the place waſted, (*i*) The Leſſee for life or years that is convicted of this offence, ſhall loſe, and the Plaintiff in this ſuit, if he recover, ſhall recover treble damages, and the place waſted: that is, if it be in a whole houſe, the houſe, the whole houſe; if it be in one or two roomes *ſparſim*, thoſe roomes; if it be in a Cloſe, as much of the Cloſe as is waſted; if it be in Trees or Hedg-rowes, the circuit of the root and no more; and if it be in the corner of a Wood here and there, that corner of the Wood only; but if it be in divers places of the Woods *ſparſim & circumquaque*, here and there, perhaps the whole wood; and this he ſhall recover, diſcharged of all incumbrances. So that if Leſſee for life make a Leaſe for years, and after enter into the Land and make waſte, and the Leſſor recover the Land, in this Action he ſhall avoid the Leaſe made before the waſte done. And if Leſſee for life do waſte, and after grant a rent out of the Land, and after in this Writ the Land is recovered, the Leſſor ſhall hold it diſcharged. But if the waſte be before the grant of the Rent, *contra*. *Cook upon Litt.* 233. But if it be in *Tenuit* nothing can be recovered but damages. And if the waſte be done by a Guardian in the Wards land, to the value of twenty ſhillings, the Ward may ſue this Writ, and ſhall hereby gain his liberty; and the Guardian ſhall loſe the wardſhip of body and land: And if this be not ſufficient, the Ward alſo ſhall recover damages beſides. *Marlb. chap.* 23. *Weſtm.* 2. 14. *Stat. Waſte* 10 *Ed.* 1. *Glouc. ch.* 5. *Old N.B.* 36. *Cook* 1 *part* 54. *Cook* 11. 50. *Dyer* 281. 15 *H.* 17. 14 *Ed.* 3. 10. 13. *Fitz Waſte* 62. 75. *F.N.B.* 49.

Where this Action lieth or not. 1. In reſpect of the perſon wronged; and who may have this Action or not. And for what Waſte. *Sect.* 2.

This Action lyeth and may be had by him that is in Reverſion or next in Remainder, in fee ſimple or fee tail, after the particular eſtate for life &c. ended; or by his Heire, or by the Grantee of the Reverſion or Remainder, or by the Grantee of ſuch Heire or Grantee: and ſo by any Grantee of the Reverſion *in infinitum*. *Cook* 1 *part* 53. *F.N.B.* 57.

But a Tenant for life, or he that hath a leſſe eſtate then of fee ſimple, or fee-tail, may not have this Action. *Noy* 26. *Cook upon Litt.* 273. But it will not lye for an heir or grantee, for a waſte done by the Tenant in the time of the Anceſtor or Grantor: Nor can the Grantor, after this grant, bring an Action of Waſte for Waſte before or after the grant. Nor will it lye for the Grantee of a Reverſion for a waſte done by the Tenant before or after the Grant until Attornment; nor after Attornment will it lye for any waſte done before Attornment; though it were not puniſhed before by the Grantor. *Dyer* 31. *Cook* 6. 68. *Perk.* 93. 48 *Ed.* 3. 15. 9 *H.* 7. 20. And yet it is ſaid, if an Action of waſte be depending, and the anceſtor dye, that the heir may finiſh this Action. *Stat.* 11 *H.* 6. 5.

And if two Copartners be of a Reverſion, and a waſte is committed, and one of them dye; in this caſe the Survivor and the Aunt may maintain the Action. *Cook* 1 *part* 53. A body politick, and the Succeſſor or Grantee of ſuch a body that hath a Reverſion, may have this action. But yet ſuch perſons cannot have this Action for any waſte done in the time of their Predeceſſors. *F.N.B.* 54.

If a Leaſe be made for life, the remainder in tail to another, the remainder in fee to Leſſee for life, and the Tenant for life do waſte; he in the next remainder ſhall have the action againſt him, *F.N.B.* 90. *Cook* 1 45.

And if there be tenant for life, the remainder to another for years, the remainder to a third in fee, or in tail to a third, or a third have the reverſion, and the Tenant for life doth waſte; in this caſe the action may be brought againſt him preſently; but execution for the land may not be had till the Leaſe for yeares be ended. But if the mean leaſe be a leaſe for life, no Action will lye till the death or ſurrender of the Leſſee. *Remoto impedimento emergit Actio*, *Cook* 5. 76. 2. 92. *Fitz N. B.* 59.

And if one make a Leaſe for life, and after grant the Reverſion for years, no Acti-

on

on will lye during the yeares. But, if after a Leaſe for life the Leſſor ſhall make a Leaſe for yeares to begin after the eſtate for life ended: this is no impediment. *Fitz. Waſte* 18.

Alſo the Lord that hath a Reverſion by Eſcheat, and one that had had a Reverſion granted from the King, and he that hath a Reverſion by deviſe; though the Tenant have not atturned, may have this Action for waſte done by Tenant, *F.N.B.* 60. And yet it ſeems in *Kelw.* 109. That this Action is not maintainable without a privity which is not in the caſe of the Lord in by Eſcheat.

If Tenant in tail make a leaſe for life of the Land, and the leſſee for life do waſte; the Tenant in tail ſhall have the Action. *Brownl.* 1. *part* 238.

If two Jointenants, Partners or Tenants in common be, and one of them before partition made, make a Leaſe to a ſtranger, and he do commit waſte, they muſt both of them bring the Action; but he only that made the leaſe ſhall recover the damages. *M.* 8. *Jac. Curia. Cook* 1. *part* 53. *F.N.B.* 60. Joynder in Action.

And if *A* and *B* be Jointenants for life, the fee ſimple to *B*, and they two make a Leaſe for life, and the Leſſee do waſte; in this caſe they two muſt joyn in this Action. 13 *H.*7, 15. *F.N.B.* 59. For one Tenant in common of a Reverſion cannot have an Action of waſte alone without his companion. *M.* 36. 37 *Eliz. Cook B. Hill* and *Harts* Caſe. Jointenants. Tenants in common.

And if Tenant for life and he in Reverſion or remainder in Fee joyn in a Leaſe for life or years, and this Leſſee do waſte, they muſt both joyn in this Action, and the firſt Leſſee for life ſhall recover the place waſted, and the firſt Leſſor the treble damages. 27 *H.*8. 13. 22 *H.*6. 24. *Cook* 1 *part* 42.

If the Lands be granted to two, and the heires of one of them, and the Tenant for life do waſte; in this caſe the other Jointenant cannot have this Action, but his heirs may. *F.N.B.* 87. *Cook* 1 *part* 53. 200.

If a woman covert have any cauſe to bring this Action, ſhe and her husband muſt joyn in it: and if they two make a Leaſe of their, or of the wives land, and the husband dye, and ſhe take another husband, and the Leſſee do waſte, the husband and wife muſt bring the Action. Husband and Wife.

So if three Copartners divide the land, and one of them hath a Reverſion to her part, and then ſhe marry a husband, and after the Tenant do waſte; in this caſe the husband and wife muſt joyne in the Action. 9 *H.* 6. 43. *F.N.B.* 57.

If there be husband and wife in remainder in ſpecial taile, and the wife dyeth without iſſue; in this caſe the Husband cannot now have this Writ againſt the Tenant; and if the Suit were begun, it will now abate by her death. *Cook upon Litt.* 285. Abatement.

This Action lyeth againſt a Tenant for life, either his own or anothers life occupant, a general or ſpecial tenant in Dower, or by the Courteſie, a Tenant for years, though but for one year or half a year. *Glouc. chap.* 5. *F.N.B.* 60. *Cook* 109. 6. 37 6. 73. But not againſt a Tenant in fee ſimple, fee tail, in taile after poſſibility of iſſue extinct or againſt him that hath an eſtate of Frank-tenement only diſtendible; as if tenant in tayle make a Feoffment or bargain, and ſell his land to another and his heirs *Cook* 10. 98. Nor againſt a Tenant by *Elegit*, Statute-Merchant, or Staple, Tenant in Mortgage, or Tenant at will. *Cook* 50. 89. 1. 57. 6. 41. *N.B.* 41. *F.N.B.* 59. Nor will it lye againſt Leſſee for years or life after ſurrender of his eſtate to the Reverſioner, and his acceptance thereof, *Old N.B.* 36. *M.* 4. *Jac. B.R. in Morlayes Caſe.* In reſpect of the perſons that do the wrong and againſt whom it lyeth, or not. And for what waſte. *Sect.* 3.

It lyeth againſt Leſſees for life and yeeres, for waſte done by themſelves or ſtrangers, and that whether they come by their eſtate by leaſe or deviſe. *Plow.* 10. *Cook* 1 *part* 53.

If Leſſee for life make a Leaſe for yeers, and the Leſſee for yeers do waſte; he in reverſion muſt have his remedy againſt the Leſſee for life, and he ſhall have his counter remedy againſt the Leſſee for yeers by Action of the Caſe. *Paſch.* 38. *Eliz. B. R.*

If Leſſee for yeeres grant away part of his term, the Action muſt be brought againſt the firſt Leſſee, and not againſt this Leſſee of part of the term.

If

If Tenant in Dower, or by the Courteſie, aſſign or grant over his or her eſtate, and afterwards the Grantee do or ſuffer waſte, the Tenant, not the aſſignee, muſt be ſued. *F.N B.* 56.

If a Leſſee for life or yeares grant over his eſtate in the Land, but doth ſtill take the profits of it, or grant it over to that end, that he in reverſion may not know againſt whom to bring his Action; in this caſe he may bring his Action againſt the Leſſee or his Aſſignee at his choice. *Stat.* 11. *H.* 6. 5. *Cook* 5. 77.

It lyeth againſt a Leſſee for life or years, after he hath aſſigned his terme for the waſte done by him before the Aſſignment. But for the waſte done after the Aſſignment, the Action muſt be brought againſt the Aſſignee; and ſo each of them are to be charged for his own time. And yet if the Leſſee begin a waſte, and then grant over his eſtate, and the Grantee continue the waſting; in this caſe the Action may be laid againſt the Aſſignee. *F N B* 56 *Old N B* 37.

If Tenant *pur auter vie* do waſte, and the life dye; yet the Tenant may be puniſhed in this Action, *Cook* 1 *part* 285. *Cook* 7 2. 5 12.

If the Tenant grant his eſtate over on condition, and the grantee do waſte, and the Tenant enter for the condition broken; the Action muſt be brought againſt the Grantee, *Cook* 1 *part* 54.

Executors. It will not lye againſt Executors or Adminiſtrators for a waſte done by the Teſtator, for *moritur cum perſona*, *Kelw* 105 *F N B* 57.

And yet it will lye againſt the Executors of a Leſſee for years, for waſte continued by them: as if a Leſſee for yeers begin a new waſte by digging a Mine or the like, and deviſe the term to another; and the Executors enter and continue the waſte, go to dig in the Mine or the like, and after aſſent to the Legacy; this Action will lye againſt the Executors for the continued waſte, *Cook* 5 12. 10 *Ed* 4 1. *Brownl* 1 *part* 238. 2 *part* 133.

Infant. This Action lyeth againſt an Infant, not only for a waſte done by himſelf, but alſo for a waſte done by a ſtranger. *Cook* 1 53.

Husband and Wife. This Action lyeth againſt Husband and Wife. If a Leaſe be made to the wife alone for life or yeers, and ſhe or her husband do make waſte, this Action muſt be againſt them both whiles they are living, and it will not lye againſt one of them, *F N B* 57. But if it be a Leaſe for life, and ſhe dye, the Action is gone, and will not lye againſt the husband, albeit he did joyn in the waſte: and yet if the husband be poſſeſſed of a term in the right of his wife, and he do waſte, and then the wife dye; in this caſe he may be ſued for this waſte, *Cook* 1 *part* 54. *Cook* 5 75, 2 *H.* 43. And if ſhe be Leſſee, and take a husband that doth waſte and dye, ſhe may be charged for this. *F N B* 58 59. *N B* 36.

If lands be given to husband and wife, and the heires of the body of the husband, or the heires of the body of the wife, and he dye, and ſhe do waſte; or ſhe dye and he do waſte; in this caſe the heire may have this Action againſt the husband or wife, as the caſe is *F N B* 57.

It is ſaid, That if a Husband and wife have a joyint eſtate, and the husband do waſte and dye, and the wife agree to the eſtate, that the Action will lye againſt the ſurviving wife, for this waſte of the husband. *Sed quære Cook* 1 53. *N B* 36 58 59. *Broo. Waſte* 11.

Tenant in dower by the Courteſie. *Sect.* 4. If a Tenant in Dower, or by the Courteſie, grant over her or his eſtate, and afterwards waſte is done; for this waſte the Action muſt be brought by the heire againſt the Tenant, not the Aſſignee; and yet if ſuch a Tenant by the Courteſie grant over his Eſtate to a ſtranger, after he hath attorned to the Grantee of a Reverſion upon a Grant thereof made before, and the Aſſignee doth waſte, in this caſe the Action muſt be brought againſt the Aſſignee, and not againſt the Tenant by the Courteſie. So if the wife Tenant in Dower grant her eſtate to a ſtranger, and after the heir grant the Reverſion in Fee to another, and the Tenant atturn, and after the Aſſignee doth waſte; in this caſe the Action muſt be brought againſt the Aſſignee or the Tenant in Dower: not the Tenant her ſelfe; for in both caſes after the heire hath granted away his Reverſion, the Tenants after Aſſignment of their eſtates ſhall not be charge, *Cook* 1 *part* 54 310.

If

If there be two Jointenants, or Tenants in common, in Fee or for life, of a Wood or Common of Turbary, or fiſhing, or the like; and one of them doth waſte againſt the will of his companion, he may ſue the other, and he may be ſued for this: otherwiſe it is of Partners. *Cook* 1 *part* 200. Tenants in Common. Joyntenants, &c.

If Tenant for life be diſſeiſed of his eſtate, and the Diſſeiſor commit waſte; the Leſſee for life, not the Diſſeiſor ſhall be charged in this Action for this wrong. *Broo. Waſte* 36. *N B* 37. Diſſeizor.

If a ſtranger againſt the will of the Leſſee, Tenant in Dower, &c. do waſte; this Action may not be brought againſt the ſtranger, but the leſſee or tenant for this waſte: and he ſhall by an Action of Treſpaſſe recover as much as he loſeth againſt the ſtranger. *D & St* 34 *Cook* 1 *part* 54. Stranger.

It lyeth againſt the Guardian in Chivalry, for waſte done by himſelf; but not for waſte done by a ſtranger. *Cook* 67. 1 *part* 54. And ſo alſo his Grantee of the Wardſhip; but againſt each of them for the waſte in his owne time only. And yet it is ſaid, it will lie againſt the Aſſignee of this Gardian, for the waſte done by the Gardian. *Cook* 5 12. *Fitz Waſte* 10. If two Jointenants be of a Ward, and one of them do waſte, both of them muſt be ſued for it. *Cook* 1 *part* 54. Gardian in Chivalry.

It is ſaid it wil lye againſt a Guardian in Soccage for waſte done by himſelf; though not for waſte done by a ſtranger, *F N B* 59. But the conttary is affirmed by *Cook* 1 *part* 54. In Soccage.

Voluntary and negligent waſtes are alike puniſhable. *Dyer* 281. The Leſſee or Tenant is bound by Law to keep the houſen in as good caſe and plight as they are when he comes to them; and if he doth not ſo, but ſuffer any part of it by his negligence to grow ruinous; this is waſte for which the Leſſor may ſue the Leſſee in this Action, *Broo Waſte* 130. In reſpect of the thing in which the wrong is pretended to be done.

But for the further opening of this point, take theſe things, In Houſes. *Sect.* 5.

1 To ſuffer it to decay, is waſte; albeit there be no Timber upon the thing to repair it; for the Tenant muſt procure timber at his own charge.

2 To proſtrate, abate or break down any of the houſen, either the whole or part (that is) any of the principal walls, or walls of partitions in chambers; or elſe; whether they be of ſtone or mud, is waſte. *Broo Waſte* 26. *Kelw* 37 10 *H* 725 *F N B* 59. And yet to throw down the poſts or frame of a houſe remaining of an old building, or ſet up for a new building, it ſeemes is no waſte, *Broo Waſte* 107.

3 If the houſe be uncovered by tempeſt, and the Tenant do not repair it in convenient time, this is waſte. *Cook* 1 *part* 53

4 To ſuffer the houſe to be burnt by negligence or miſchance, is waſte. *Cook* 1 *part* 53

5 If the houſe be ruinous when the Tenant comes firſt into it, and hee pull it downe, and do not build it up againe, this is waſte. *Cook* 1 *part* 53

6 It is waſte in the Tenant (as ſome ſay) to build up a new houſe, though with timber of his own; yet others doubt of this: And if after it be new builded the Tenant ſuffer the houſe to decay, this is another waſte. And yet to pull down an old houſe ready to fall, and to ſet up another with his own charge of the ſame length and breadth, is in the Tenant no waſte. So neither to ſet up a houſe with his own timber that was blown down by wind or tempeſt, though it be leſſer then the former houſe. *Broo Waſte* 39 93 *Cook* 1 *part* 53 12 *H* 4 6 11 *Ed* 2 *Statham.*

7 To take away, pull off, or break downe the Wainſcots, Doors, Windowes, Benches, Furnaces, or any other the inſeparable incidents of the houſe, being ſet up and faſtned by the Leſſor or Leſſee, or whomſoever, is waſte. *Cook* 4 94 1 *part of his Inſt* 53

8 To ſuffer the houſes, covered at the time of the tenants taking to it, to be uncovered ſo long, as that thereby the principal pieces of timber of the houſe (*viz.*) the Beames, Rafters, Sparres, Planchers, &c do putrifie and rot, is waſte. But the not covering of a new frame of building uncovered when the tenant comes to it, is not waſte. And if it be uncovered when the tenant comes to it, though by this meanes

meanes the houſe fall down, it is no waſte: and if the uncovering do not produce the effect of marring the timber, this is not a waſte. *Cook 1 part* 53 *Broo Waſte* 69 455 82. 12 *H* 4 4. 10 *H* 7 2. *F N B* 59.

9. If the houſe be proſtrate by tempeſts, floods, or burnt by lightning, or be proſtrate by enemies, without any default or power to prevent it in the Tenant; or if at his coming into it, it be ſo ruinous, that it cannot be kept up, and it fall down; and the Tenant build it up again with ſuch materials as remaine, and other timber of his own; or (as ſome ſay) the timber upon the ground, and build it no larger then it was, this is no waſte. *Cook 1 part* 53, 54 *Broo Waſte* 117 82. Yet I doubt of the laſt, for he is not in theſe caſes bound to repaire it, nor are theſe ſpoiles any ſuch waſte, for which the Tenant is at all puniſhable. *Cook* 10 139 11 41 4 64 *F N B* 59 *Broo. Waſte* 19 130 *Dyer* 36 *F N B* 60 20 *H* 7 2.

In Trees and Woods. The Tenant is to preſerve the Timber Trees on the Land, and if he make ſpoyle in them, this is waſte; for which he in reverſion ſhall have this remedy.

But for the further opening of this point take theſe things.

1 To cut or break down or root up Trees that are or may be timber; as Oak, Aſh, which are timber in all Countries; or other trees in ſome Countries where Timber is ſcarce: Elme whether young or old, above or under twenty yeares of age, to ſell, build a new houſe or a new roome, or to any other purpoſe then towards the neceſſary repair of the old houſe or houſing, being on the land at the time of the Leaſe, and in decay by age or tempeſt, is Waſte. 15 *H* 7 21 *Kelw.* 95 11 *H* 4 11 12 *H* 7 1 *Dyer* 314 11 *H* 6 1 *F N B* 99 7 *H* 6 40 *Cook 1 part* 53.

2 To cut down timber for reparations at unſeaſonable times that it dye; or to cut it, and after to ſell it, or employ it to any other uſe, is waſte: And though after ſale he buy it again, and imploy it to reparations; yet it is ſaid this wil not help the caſe. 12 *Ed* 3 *Waſte* 28

3 Some ſay, To cut downe timber to build new houſes, broken or burnt down by fire, water, enemies, or the like hand of God, is waſte; becauſe he is not bound to repaire it; nor is it any waſte in the Tenant. *Dyer* 36 *Perk.* 738. It hath been ſaid, That if a Tenant cut down timber-trees, before there is need of reparations, and keep them till the timber be ſomewhat ſeaſonable; or to cut down more then enough, ſo he keep it for that uſe, and do not miſ-imploy it, is no waſte. *M* 37 & 38 *Eliz. per curiam.* But it ſeems the contrary hath been adjudged. *M* 39 40 *Eliz. Com. B. in Gorges caſe.* But if an apparant need appear, it may be cut a little before it be uſed. *Cook* 1 139 11 48 664 *F N B* 59.

4 So it is ſaid, That to cut down timber for neceſſary reparations, and then to ſell it and uſe his own, or ſo much thereof for reparations, or repair the houſes with the money, is waſte, 12 *Ed* 3 *Waſte* 20. I doubt this firſt caſe. *Cook 1 part* 53.

5 To cut down timber to repaire the houſes decayed by the Tenants default, it is waſte, and a double waſte, *F N B* 59. *Cook* 1 53. If a houſe be ruinous at the time of a Leaſe, and after fall, and the Tenant cut down timber to repaire it; this is no waſt *Cook 1 part* 54.

6 To cut young timber trees to repair, when there is enough of fitter timber beſides, is waſte, 11 *H* 6 1 13 *H* 7 21 *F N B* 60.

7 To cut down all the under woods in a wood where no high-woods are growing amongſt it, is waſte, *Broo. chap.* 411. So, to cut down ſuch a wood, and then to ſuffer Cattel to crop it, being newly felled, and kill it, or to root and ſtub it up, this is waſte, *F N B* 59 *Cook* 1 53.

8 To cut down timber trees for fire-boot and hedg-boot, when there is enough other boot, is waſte, *per* two Juſtices. *P. 7 Jac. B. R.*

9 To cut down ſuch trees for fire, as are not fit for fire, being timber, and only hollow and dry at the top, is ſaid to be waſte: but if they be hollow and dry and dead, that they bear not fruit nor leaves in Summer; if then the Tenant cut down ſuch trees for fire-boot this is not waſte. And by this, it ſeems, otherwiſe they are not to be cut down for fire-boot, *Dyer* 332 *Cook 1 part* 53. And yet trees that will never be fit for timber (it ſeems) may be cut for that uſe, 11 *H* 6 1.

10 If

10. If a man leaſe his land wherein is an open Mine, to another, with all the Mines in it, for years; and the Leſſee cut timber trees upon the land, to uphold the earth about the Mines, to keep it from falling; it ſeems this is no waſte, *Paſch* 17 *Jac Cook B.*

11. To cut down more fire-boot, hay-boot, hedg-boot and houſe-boot (to keep it as he found it) than is neceſſary; or to cut down the green wood, when there is ſufficient dry and dead wood, is waſte, *Broo* Waſte 130 *F N B* 59 *Cook* 1 part 53 88.

12. It is ſaid, That to cut down Willows, Beech, Birch, Maple, or Aſpe that grow in the ſight and view of a Manor-Houſe, or are a ſafeguard to it, is waſte, 40 *Edw* 3 25 *Cook* 1 part 53.

13. To cut great Hazles in a Wood and Country, where is no other wood, may be (as ſome ſay) waſte, 40 *Edw* 3 25 *Broo* Waſte 21.

14. To ſhroud timber trees at ſeaſonable times; to cut down, or fell Willow, or other trees that will not be timber, dead wood, or under wood, for fire, is no waſte, *F N B* 59 60.

15. To fell Copices and under-woods, to fell every five, ten, or twenty years, as the courſe of the Country is, and Tenants have been uſed to do, is no waſte, 10 *H* 7 2 *F N B* 59 60 11 *H* 6 1.

16. To cut or moote Thorns or Buſhes growing in a ground for the bettering of it, is no waſte, *Dyer* 37 43. So to cut up black-thorn to burn; though it be in a Champion Country, where fuel is ſcarce, *M* 8 *Jac Curia.* And yet it is ſaid, it may be waſte, to cut white-thorn in ſuch a country; unleſs it be for reparations. So to ſuffer it to be deſtroyed. So it is ſaid by ſome, That to cut down, or grub up quick-ſet hedges in a country where fuel is ſcarce, may be waſte, *Broo Treſp* 136 134 411 *Cook* 1 part, *folio* 53. for that may be waſte in a field-country, that is not waſte in a wood-land country. The breaking of a hedge in other caſes, is no waſte, *Broo* Waſte, 34 See *Brownl* 1 part 2 part 46 167. Thorns.

To cut down Fruit-trees, Apple-trees, or Pear-trees, or Plum-trees, or the like, growing in an Orchard or Garden; though it be for reparations, is waſte. So to take away, cut, or pull up ſuch trees half broken by the wind, or otherwiſe, whiles they do yet bear fruit, or the young ſprings of them that may bear fruit, is waſte, 10 *H* 7 2 48 *Edw* 3 44 *Broo* Waſte 19. And yet it is no waſte to cut, or deſtroy ſuch fruit-trees growing in the fields, out of an Orchard or Garden, nor in an Orchard and Garden when they are utterly ſubverted and fruitleſs, *Broo* Waſte 82 39 *Cook* 1 part 53. In Gardens or Orchards.

To dig or eare up the ground, to make gutters or gripes to the hurt of the ground, may be waſte. So to eare up ancient deep Meadow, not ploughed in any mans memory; grub up wood and turn it into earable, or turn earable into a Wood, is waſte, *Dyer* 37 *Cook* 1 p. 53. But to dig or gripe a foggie Meadow, for the bettering of it, is no waſte: Or to let ones earable, or other ground lye freſh; or let Thorns or Weeds over-grow it; or to plough up ground that hath been ploughed within the memory of man; or that is ſometimes earable, and ſometimes Meadow; or ſometimes Meadow, and ſometimes Paſture; this is no waſte, *Dyer* 361 *F N B* 59 2 *H* 6. 11 *Hill* 8 *Jac B R Treſhams caſe.* If the Tenant being bound to repair the Banks, for lack hereof ſuffer the water to overflow, and much to hurt the ground; this may be waſte: But if the over-flowing be by ſome extraordinary flood, *contra,* Cook 10 139 1 part 53. Inlands.

If the Tenant ſhall open, or dig new Quarrs for Coal, Stone, Brick, Metal, Gravel, Lime, Clay, or the like; this is waſte; unleſs there be ſpecial words in his Leaſe, to warrant it: But it is no waſte for the Tenant to dig forwards, in an old Mine that was open before. And if a Leaſe be made with the Mines; yet if the Leſſee open any other Mines, than what was open before; this is a waſte: But if no Mine were opened before; then it is ſaid the Leſſee may open the Mines, and not do waſte, *Cook* 5 12. 1 part 53 54. It is no waſte to dig the Land for Gravel, and ſuch like neceſſaries for reparations, *Cook* 1 part 53 54. To ſow earable ground to Woad, is ſaid to be waſte; becauſe it will bear no corn the next year; *Treſham's* caſe. To ſuffer earable to be Mines

drowned, ſo that it turn to clay; or to ſuffer Medows to be drowned, ſo that it turn to be hereby Ruſhie, and little worth, may be waſte, 20 *Hen* 6 1 *Brownl* 1 part 241.

In Parks or other things.

To ſuffer the Walls, or Pale of a Park to be ſo decayed, that it want incloſure, that the Deer are, or may be diſperſed, may be a waſte, *Broo* 130 *Cook* 1 part 53. So to kill or deſtroy all the Fiſh in a Pond, may be waſte, 6 *R* 2 *Statham.* So to take ſo many young out of a Pigeon-houſe, Warren, Park, Vivarie, Eſtagnes, or the like, not maintaining that ſtore that was there when the Tenant came firſt, may be a waſte, *Cook* 1 part 53. It is ſaid, That to ſuffer a mud-wall, thatched, or tyled, to be uncovered, whereby it periſh and fall, is a waſte. *Bro* Waſte 39. But if it be uncovered when the Tenant comes to it, it is ſaid to be no waſte; and ſo though he take it down, *Bro* Waſte 94 *Cook* 1 part 53. But none of theſe things will be waſte in a Tenant, where he doth them by the leave or command of the Landlord, *Dyer* 37 *Kelw* 37. 8 *H* 8 5. nor when his Leaſe is without impeachment of waſte.

In reſpect of the Caſe. *Sect. 6.*

If one demiſe a Cloſe, *Habendum* the Cloſe with the Trees; and the Leſſee cut the Trees, this is a Waſte: for the Trees do not paſs by the *Habendum*, being not in the premiſes of the Deed, *Paſch* 7 *Jac Co B Sir Francis Leakes caſe.*

If one make a Leaſe for years or life, by words of Demiſe and Grant of a Cloſe with all the Timber-trees except Oaks, and the Leſſee cut the trees that are not Oaks, this is waſte, *Dyer* 375 314 *Cook* 11 48. If the Leſſor make his Leaſe to the Leſſee excepting the Trees, and the Leſſee cut the trees; in this caſe the Leſſor muſt have an Action of Treſpas for the Wrong, and not an action of Waſte: for the Trees were not let, *Dyer* 19 *Purfrayes caſe* *M* 9 *Jac Goldſb* 1 *pl* 1. If the Leſſor be bound to repair; and the Leſſee do it himſelf; this is not waſte, *Cook* 1 part 54. If the Leſſee cut down timber, or pull down houſes, and the Leſſor take it away, yet the action lyeth againſt the Leſſee for this, *Cook* 4 64 11 48. So, if a Leſſee cut timber for Repaire, and ſell it, and then buy it again and repair the Houſes with it, yet the Action will lie for the cutting of it, *Broo* 112. If the Leſſee have covenanted not to do waſte, and he do waſte; yet the Leſſor may have this Action, and remedy upon his Covenant alſo, *M* 9 *Jac. Coventries caſe.* If the Leſſor Covenant with the Leſſee that he ſhall take as much timber as he will, and he cut Timber: it ſeems either this is no waſte, or the Covenant may be pleaded by way of *Rebutter*, *Purfrayes caſe*, *M* 9 *Jac.* If the Leſſor and Leſſee together, do ſuch an act as is waſte, no action will lie for this. So if the Leſſor himſelf do the thing, *Dyer* 37 *Kelw* 37 *Perk* 182 203. So, if the Leſſee do it by leave or warrant from the Leſſor, 18 *H* 8 5. If the Leſſee do any thing upon the Land, which is a waſte, before the Leaſe begin, it ſeems this is not actionable, *Perk Sect* 602. If the ruine be cauſed by the extraordinary hand of God, as by Fire, Wind, or Water; this Action will not lie for this, *Cook* 64 *Broo* Waſte 31

Treſpaſſe.

If the Leaſe be made without impeachment of waſte, the Leſſee cannot do waſte.

But for the opening of this clauſe, *Without Impeachment of Waſte*, and to ſhew the Law herein, theſe things are to be known.

Without Impeachment of Waſte, How it ſhall be taken. *Sect. 7.*

1. An Impeachment of *Waſte*, doth ſignifie a reſtraint from committing of Waſte in Lands or Tenements: And *without Impeachment*, doth ſignifie a liberty to do waſte, and an eſtate without any ſuch reſtraint, *Cook* 11 82.

2. Theſe, or the like words inſerted into the Deed, are ſaid to be annexed to the Eſtate, do change the quality of the Eſtate, and make the Tenant, herein, in the nature of a Tenant in taile; and it addeth a priviledge thereunto, and they give the Leſſee a power and intereſt to make waſte, and to diſpoſe the thing to his own uſe; ſo that now he hath a general property in that thing wherein before he had only a ſpecial property; ſo that now he may cut down Trees, or pull down Houſes, and then; or if they be thrown or cut down by others, he may take the Wood and Timber to himſelf: And if the Leſſor ſue this Action for this waſte, the Tenant may bar him with this clauſe, *Cook* 11 81 2 81 1 14 *Marlb chap* 23 *Plow* 135 141 *Cook* 6 63.

3. But it muſt be thoſe very words, or of the like ſenſe: For if the words be without

without Impeachment of waſte by any Writ of waſte; theſe words are not ſo large, they do not give ſuch a power to the Tenant, nor alter the Property, but only diſcharge the Action; ſo that the Landlord can bring no Action againſt the Tenant for the waſte done. *Dyer* 204 *Cook* 11 82 83.

4. The words muſt be inſerted in the ſame Deed whereby the Eſtate is made, or another Deed made at the ſame time; for if he make his Leaſe without this Clauſe, and after willeth that the Leſſee ſhall hold without Impeachment of waſte, it is ſaid, theſe words work nothing to diſcharge Action or give an Intereſt, *Cook* 11 82 83 *Plow* 556 557.

5. And yet if *A* make a Leaſe for years to *B*, and among other Covenants doth inſert this. And the ſaid *A* doth for him and his heirs covenant with *B* that he, his executors and aſſignes, ſhall at all times during the ſaid term, fell, cut down, all the wood, trees and hedges growing upon the land, and the ſame carry away and convert to his own uſe, without any let of the Leſſor, his heirs or aſſignes; it is thought that theſe words will amount to this clauſe, and diſcharge the Leſſee; And this was the Opinion of divers Councellors, *M.* 10 *Car.* If a Leaſe be made with this clauſe, *Proviſo, quod non proſternet domus voluntarie*; if in this caſe the Leſſee throw down any of the houſes, it will be waſte, *Plow.* 153. 9 *Hen.* 6. 35. So if one make a Leaſe for life, and by Deed grant, that if any waſte be done, it ſhall be redreſſed by neighbours, and not by Suit or Plea; yet an Action of waſte will lye, *Cook* 1 part 53.

6. This priviledge where it is, may be loſt; for it is annexed only to privity of Eſtate. And therefore if one that hath this priviledge annexed to his Eſtate, agree to change his Eſtate, the priviledge is gone. And therefore, if he that hath a Leaſe for years, with this clauſe in his Deed, accept of a Deed of confirmatiom of his Eſtate, without this clauſe: Or if a Leaſe be made to a man for anothers life, with this clauſe, the remainder to him for his own life without this clauſe; the priviledge by the extinguiſhment of the eſtate is gone. So if Tenant in tayle, after poſſibility of iſſue extinct (which holdeth after this manner) granteth away his eſtate to another; by this the priviledge is gone, *Cook* 11. 83. And yet it is held, if Leſſee for years, having this clauſe in his Leaſe, do aſſign over his term, to a ſtranger, that this priviledge is not gone; but ſhall go to the Aſſignee, and the Aſſignee of the Aſſignee *in infinitum*; for the Tenant in taile hath only a perſonal priviledge, or priviledge in Law: but this is an actual priviledge, annexed by the Leſſor to the Eſtate; and ſhall go with it. And of this opinion were divers Councellors in *Mich. Term* 10 *Car.*

A man makes a Feoffment to the uſe of himſelf and his wife, *et alterius eorum diutius viventis abſque impetitione vaſti durantibus vitis ipſorum*; in this caſe if the husband die, the wife ſhall hold the land without Impeachment of waſte, *Goldſb.* 31. *pl.* 5.

Some have ſaid, That this Action lyeth not, except the damage come to ſix-pence; and that the Plaintiff cannot have Judgement where the waſte comes but to twelve-pence; others where it comes but to three-pence; for *de minimis non curat Lex.* And yet *Cook* in his 1. *part* of his *Inſt. f.* 54. ſaith, That waſte done in trees, to the value of three ſhillings four-pence, is adjudged waſte; and that many little waſtes may make up a Value. And it ſeems, by the common practice, it will lye for any value; only the Plaintiff muſt be ſure to declare for enough; otherwiſe the Declaration is not good. But if ſo he declare: then if the Jury find but one peny damage, it is good, *Broo.* Waſte 20. 70. 74. *Plow.* 329. 9. *H.* 6. 66. 38. *H.* 8. 7. Value.

If Tenant in tayle bring this Action, and hanging the Action, the Eſtate in taile determine, and the Plaintiffe become Tenant in tail after poſſibility of iſſue extinct: hereby the action of Waſte is gone. So if the Tenant or he in Reverſion die, the Action is gone; and if the Suit were begun, it muſt abate. So, if after the waſte is done the Reverſion be put out of that eſtate, wherein it was, as if it be granted away to a ſtranger; and in this caſe the taking of it back again will not revive the Action. If he that hath the Reverſion grant it to the uſe of himſelf, and his wife, and his heirs; the waſte in theſe caſes is diſ-puniſhable, *Cook* 1 part 53. By what means this Action may be determined, or not. *ſect.* 8.

The Pleas to this Action may be either general or ſpecial; the general Plea is *Nul waſte fait.* The ſpecial Pleas are many, either in a way of Juſtification, or Excuſe, as the Pleas: What ſhall be ſaid a good Plea in this Action, or not.

Sect. 9. the caſe is. It is a good Plea, if the waſte be laid to be in not reparations; that it was repaired before the Action brought: This muſt be pleaded ſpecially. But to ſay, it was repaired after the action was brought, is no good Plea, *Cook* 5. 119. 13. *H.* 7. 20. *Cook* 4. 64. 11. 48. So it is a good Plea to any waſte, that the Leſſor gave authority to do it, *Kelw.* 37. *Broo. Done* 13. It is no good Plea to ſay, That the Plaintiff did covenant to deliver Timber from off the thing to do it, and refuſed; for the Defendant in this caſe, may take it. But if the agreement were, That he ſhould have it from another thing, perhaps the Plea may be good, *Broo.* Waſte 36. *Brownl.* 1 part 240. 241.

It is a good Plea to ſay, The Houſe, or Trees, were burnt or ſpoyled with fire, with water, or by wind; that the ruine was cauſed by ſome extraordinary Act of God, *Broo.* waſte 31. *Cook* 4. 64. So it is a good Plea to ſay, the houſe fell before the Leaſe; or that the Leaſe is ſurrendered to the Leſſor, and he hath accepted it; or that the Plaintiff hath entred upon the land, and before his entrie there was no waſte done; or that the Plaintiff himſelf did the waſte; or that the houſe was ſo decayed, at the time of the Leaſe, that it could not be upheld; or that the houſe fell with tempeſt, or was burnt; or that the Plaintiff hath granted away his Eſtate, and before the Grant there was no waſte done; or that the Plaintiff hath by good words releaſed it; or that the Leaſe was made without Impeachment of waſte, 12. *H.* 4. 6. 8. *H.* 5. 8. *Broo.* waſte 18. 29. 33. 54. *Finches ley* 55. But it is no good Plea for the Defendant to ſay, He had nothing in the land at the time of the waſte done, *Broo.* waſte 22.

It is no good Plea in this action, for cutting down timber, or pulling down the houſe, that the Leſſor took away the timber or materials, *Cook.* 4. 64. 11. 48. Nor that the Leſſor hath a Covenant from the Leſſee, not to do waſte, *Curia M.* 9. *Jac.* in *Coventries* caſe.

It is not a good Plea, for the Tenant, in an Action of waſte, for cutting Timber, to ſay, That he cut it, and keeps it till there ſhall be need. Adjudg. *Gorges verſ. Stanfield, M.* 39. 40. *Eliz. Cook B.* Nor to ſay, He cut for neceſſary reparations; unleſs he ſay withal, That he imployed it to that purpoſe, *Dyer* 332. And yet no doubt, it may be juſtified to cut it a little before it be uſed, when an occaſion of uſe is apparently at hand.

It is a good Plea, to ſay, He cut it to make Poſts to part Incloſures; if he can withal preſcribe, that there have been alwayes ſuch an Incloſure there, *Dyer* 332. And in all theſe caſes, upon the general iſſue, the Defendant may give in Evidence, any thing that is no waſte, as by Enemies, Tempeſt, Lightning, or the like. But he cannot give in Evidence, juſtifiable waſte, as to repair the houſe, or the like; nor that which is in excuſe, as, That he repaired it before the Action brought; and ſo for the like, *Dyer* 276. 212. *Cook* upon *Litt.* 283. 12. *H.* 8. 1. 29. *Edw.* 3. waſte 30. But now by the late Act of 23. *Octob.* 1650. Not guilty, or ſome ſuch other general iſſue may be pleaded, and the ſpecial matter may be given in Evidence.

Evidence.

Eſtreupement is ſometimes taken for the Waſte it ſelf, and ſometimes for a Writ in the nature of a Prohibition to forbid the making or doing of any Waſte, *F. N. B.* 60. 61.

Eſtreupement. Prohibition.

CHAP.

CHAP. CLXVIII.

Of Watch and Ward, Waters, Wax, Wild-Fowle, Wine, Witchcraft and Woods:

AS to Watch and Ward theſe things are to be known,

1 It muſt be made and done by the Inhabitants of the Town only, muſt be made by men of diſcretion, of able bodies, and well armed. Watch and Ward.

2 It muſt be by turn, or by the houſe, according to the cuſtome and uſe of the place.

3 The Conſtable is by his Office, without any other Authority to order it, and he may enlarge it, as there is occaſion, but he may not change the courſe of it, and make ſome watch, and excuſe others at his pleaſure.

4 If any neglect or refuſe to do his Duty herein, the Conſtable may preſent it to the Aſſizes or Seſſions, or complain to the Juſtices of Peace out of Seſſions.

5 This Watch is to be kept from Aſcenſion to Michaelmas, and muſt be kept from Sun to Sun, and then the Warding (in reaſon) muſt be the reſt of the twenty four houres.

6 Theſe Watch and Wardſmen are to poſe all men, to ſtay and ſecure ſuch as they do ſuſpect till the morning (if it be in the night) and bring them to a Juſtice to be examined, or if they will they may deliver them over to the Conſtable, who muſt take care of them. And if any reſiſt them and flye away, they may ſend Hue and Cry after them, and upon this any man may arreſt them.

7 For neglect of this watch and ward, the Town may be puniſhed. *Stat. Winch.* 1 *Ed.* 3 4 5 *Ed.* 3 14

Of VVaters and VVears:

AS to Waters and Wears, ſee Statutes, 25 *Ed.* 3 4 45 *Ed.* 3 2 1 *H* 4 12 4 *H* 4 11 1 *H* 5 2 6 *H* 6 5 8 *H* 6 3 12 *Ed* 7 22 *H* 8 3 23 *Eliz.* 24 8 *Jac* 12 *Magna Charta* 23 7 *Jac.* 19 3 *Jac.* 12 18 10 1 *Jacob.* 23 1 *Eliz.* 17 ſee *Sewers.* Waters and Wears.

Piſcary ſignifieth a liberty of Fiſhing in anothers mans waters. Piſcary, what.

For paſſage and arrivage *Stat.* 8 *H* 6 27 9 *H* 6 5 19 *H* 7 18 23 *H* 8 12 26 *H* 8 5 2 & 3 *Ph & Mar* 16 1 *Jac* 16 21 *Jac* 32. Paſſage and Arrivage.

And for fiſh and fiſhing. See *Stat.* 13 *Ed* 1 46 13 *R* 2 19 17 *R* 2 9 2 *Ed* 6 6 1 *Eliz* 17 5 *El* 21 22 *Ed* 4 2 11 *H* 7 23 13 *El* 11 5 *El* 5 21 1 *Jacob* 25 31 *Ed* 3 1 2 39 *El* 10 43 *El* 9 3 *Jacob* 12 1 & 2 *Phil & Mar* 5 53 *H* 8 33 1 *Jac* 23. Fiſh and Fiſhing.

For Havens, ſee *Stat.* 2 *H* 6 16 4 *H* 7 16 23 *H* 8 8 27 *H* 8 23 18 31 *H* 8 4 34 *H* 8 9 27 *El* 20 21 22 3 *Jac* 18 4 *Jac* 12. Havens.

For Wax and Honey. See *Stat.* 23 *El* 8 11 *H* 6 12. Wax and Honey.

Of

Of VVild Fowle.

Wild Fowle.

HE that takes away or deſtroyes the eggs of any wild Fowle, forfeits for every egg of a Crane or Buſtard 20 d. of a Bitterlyerue or Shovelar 8 d, and of a Mallard, Tele, or other Wild Fowle 1 d. *Stat.* 25 *H* 8 11.

Of VVines.

Wines.

FOR Wines, ſee the Statutes 27 *Ed* 3 5 6 7 8 31 *Ed* 3 5 38 *Ed* 3 11 45 *Ed* 3 23 6 *H* 6 5 2 *R* 2 1 4 *R* 2 1 6 *R* 2 7 28 *H* 8 14 24 *H* 8 6 4 *Ed* 3 12 37 *H* 8 23 5 *&* 6 *Ed* 6 18 7 *Ed* 6 5 14 *El* 1 1 *Jac* 25.

Who may ſell wine, and how, ſee *Stat.* 7 *Ed* 6 5.

For the prices of wine, ſee *Stat* 37 *H* 8 23 28 *H* 8 14 6 *R* 2 *Stat* 1 7 4 *Ed* 3 12 27 *Ed* 3 *Stat* 1 *cap* 5.

Of VVitchcraft and Conjuration.

Witchcraft and Conjuration.

NOne may uſe Invocation or Conjuration of Evil Spirits, or take up any dead perſon, or any part of it to be uſed in Witchcraft or Inchantment, if any do ſo, whereby any perſon is killed or lamed, this is Felony.

None may take upon him by VVitchcraft, Enchantment, Charm or Socery to diſcover any thing loſt, or any place of hidden Treaſure, or to provoke any perſon to unlawful love, or to deſtroy or hurt any cattel or goods, or to hurt any perſon in his body, although it be not effected. He that doth ſo is for the firſt fault to be impriſoned a year without Bail, once a Quarter to ſtand in a Pillory in a Market Town, and confeſſe his fault, and for the ſecond it is Felony. *Stat.* 1 *Jac.* 12. See for this *Cook* 3 *part Inſt. chap.* 6.

Of VVood and Trees.

What wood & trees m y be cut, and how. And how they muſt be diſpoſe. *Sect.* 1

AS to this theſe things are to be known,

1 He that doth fell or cut any Copice or Underwoods, or wood or trees in waſte ground, if it be not above twenty four yeares growth (unleſſe it be in ſome ſpecial caſes) muſt leave ſtanding and unfelled in every acre twelve Standils or ſtorers of Oak, if there be ſo many there, or otherwiſe ſo many of Elme, Aſh, Aſp, or Beech to make them up twelve. And thoſe of ſuch as are like to make timber, and were left the time the wood was cut laſt before, and if there be not ſo many of them, then ſo many others of thoſe that are ſtanding at the time of the fell of the moſt lively trees, and thoſe ſtandils ſo left muſt be preſerved and not cut until they be ten inches ſquare within three foot of the ground, under pain of three ſhillings and four pence for every tree ſo cut and not left before, or not preſerved or cut after; and if the wood be above twenty four yeares growth, then he muſt leave ſtanding twelve great Oaks, or if there be not ſo many, other trees, and theſe muſt afterwards be preſerved and not cut down twenty years after (except it be to repair the Owners houſe, waterworks, garden, Pales of Parks, or the like) under the pain of 6 s 8 d for every tree not ſo left, and being left, not after preſerved. *Stat* 13 *El* 25 35 *H* 8 17.

Standils.

2 He that is Lord or owner of a wood wherein others have common, cannot fell any part of it, (except it be for his own private uſe, (*i.*) for reparations of his houſe, for fire, or the like) until he hath a fourth part divided from the reſt, and fenced and incloſed

incloſed by agreement between him and the Commoners and Tenants, or (if they cannot agree upon the diviſion) by order of two Juſtices of the Peace, and then he may fell the fourth part (but he muſt leave and preſerve the Standils as before) and after that diviſion and felling, the Commoners are to have Common there, but in all the other three parts they muſt take their common as before time, and therein during the Incloſure, the Lord is to have no Common. *Stat.* 13 *El* 25 35 *H* 8 17. Incloſure. Standals. Common.

3 No perſon may convert or imploy to Coal, or other fuel for the making of Iron or Iron metal, any part of any timber tree or Oak, Beech or Aſh, of the breadth of one foot ſquare at the ſtub, growing within fourteen miles of the ſea, or any part of any the great Rivers by which carriage is uſed by boat, nor any other wood or underwoods within twenty two miles of the City of *London*, and ſome other places (for which ſee the Statute) and Iron mills. *Stat* 1 *El chap* 15 23 *El chap* 5. And for Iron and Iron-mills, ſee *Stat* 27 *El* 19. Coal. Iron-Mils.

4 No perſon, nor the Protectors Purveyor himſelfe (unleſſe it be for neceſſary timber for houſes, ſhips and mills) may fell any Oaken trees meet to be barked, where it is worth two ſhillings a Cart load, beſides the charge of barking and pilling, but between the firſt day of *April* and laſt day of *June*, under pain of the loſſe of the double value thereof; and if the Protectors Purveyor take any ſuch tree, the Owner may keep back the Bark, Lop and Top thereof. 1 *Jacob chap* 22. Bark.

5 None may deſtroy any woods, or convert into Tillage or Paſture any wood or underwood, that is two acres or more in quantity, and two furlong diſtant from the houſe of the Owner of the wood, or to which the wood doth belong, under paine of forty ſhillings for every acre. 35 H 8 *chap* 17 13 *El* 25.

6 And whoſoever doth cut down any underwoods or Copice of twenty four years growth or under, not only may, but muſt incloſe it, or preſerve it from cattel ſix yeers after: And if it be of the growth of fourteen years, and under twenty foure yeers, he muſt incloſe and preſerve it eight yeers after: and if it be above the growth of twenty four yeers, he muſt encloſe it or preſerve it nine yeears, under pain of 3 s 4 d for every Rood, not ſo incloſed or preſerved. But if it be in a Park where is Game, there he muſt incloſe or preſerve it four years only, and no more under the like pain. But if any ſtranger ſpoile the bounds, he muſt bear the penalty, not the Owner the ſame. 13 *El* 25 Incloſure.

7 Any perſon may fell and incloſe all their woods and underwoods in any waſte grounds which have been uſed to be incloſed and kept for the maintenance of wood and underwood.

8 For the Aſſize, (*i*) the bredth and length of fuel (*i.*) Tal wood, Billet, Faggot, in and about *London* amd other Townes Corporate and Cities, and who may buy the ſame. See *Stat.* 7 *Ed* 6 *chap* 7 23 *El chap* 14. Aſſize of wood. Fuel.

If a ſtranger treſpaſs me in my wood or Trees, I may have an Action of treſpaſſe, for which ſee *Treſpaſs*. If it be my Tenant, there in ſome caſes I may have an Action of waſte (for which ſee *Waſte*) And if the ſoyle of the wood be mine in proper, there I may have the ſame remedy againſt a treſpaſſer, as if it were in any other ſeveral Cloſe. But if it be in ſuch a wood, wherein other have Common of Paſture, there for any treſpaſſe to the woods in cutting them down, or the like, I may have an action of Treſpaſſe. But if it be in the paſture of a Common wood, I can bring no Action more then another Commoner. *Cook* 8 138. What remedy a man ſhall have for wrong done in his woods and Trees. *Sect.* 2. Treſpaſſe. Commoner.

If the Lord have the fourth part of a wood by a due incloſure to himſelf (as above) no Commoner may put in any Cattel there untill five years after the time of incloſure, and then but Calves and yeerling Colts only, until ſix yeers, if the wood were under the age of fourteen yeares, at the laſt fall, or elſe until the age of eight years, if the wood were about twenty four years, under pain to forfeit four pence a Beaſt. But if the Cattel of the Commoner be put in, the Lord can have no Action of Treſpaſſe againſt him; for by the Common Law until this Statute, he that had a wood wherein another had common could not incloſe it. and exclude the Commoner. *Cook* 8 138 *Stat* 35 H 8 17 13 *El* 25.

If a

If a man ſuffer his ſwine to come into ſuch an incloſed wood during the time of the Incloſure of it as above, unringed or unpegged, he ſhall forfeit 4 d for every ſwine 55 *H.* 8. 9.

If a man do purpoſely burn a heap or pile of wood, or bark any Apple, Pear, or other fruit trees, the owner ſhall recover trebble damages in an action of Treſpaſſe, and he that doth it, looſe 10 l. to the Protector. *Stat.* 37 *H.* 6. *chap.* 6.

If any cut or take away any hedge, pales, rails or fence, cut or ſpoile any woods or underwoods, or dig or take up any fruit trees, beſides that the party grieved may have an Action of Treſpaſſe, he may complain to a Juſtice of Peace, and he muſt compel the Offendor to make the party offended an amends, or elſe the Delinquent muſt be whipped. *Stat.* 43 *Eliz. chap.* 7.

For the Woods and Forreſts. See *Stat.* 1 *Ed.* 3. 2. 9 *H.* 3. 9. 12. 13. 22. *Ed.* 4 7. *Cook* 8. 36.

Tree

For Trees theſe things are to be known,

1 The property of the Trees upon the ground of a Leſſee for years or life be partly in him that hath fee, for the body of the timber trees ſtanding and fallen are his, but the boughs and fruit are the Tenants, and the trees, when dead, for fireboot, alſo ſo much of the timber as is neceſſary for houſe-boot, plow-boot, &c. The bodies of trees not timber, the Leſſee may cut down and burn alſo. See *Waſte Sect.* 5. *Treſpaſſe Sect.* 18. *Property.*

2 If one that is Leſſee for years have a Leaſe without impeachment of Waſte, here the trees fallen, and ſtanding are the Tenants or Leſſees, and not the Leſſors. See *Waſte.* See *Eſtates for years, and Houſe-boot, &c.*

See *Act* 29 *Novemb.* 1650. *Act* 2 *April* 1651.

See the Statutes for wood. 7 *Ed.* 6. 7. 43 *Eliz.* 14.

CHAP. CLXIX.

Of Wayes and Bridges, and Women.

Way, what.

A Way is a paſſage for men to travel in. And there be three kinds of wayes.

The Kinds.

1 A foot-way; and this was the firſt way.

2 A foot and horſe way, and this is commonly called a pack and a prime, becauſe it is both a foot way, which is the firſt and Prime way, and a pack and drift way alſo, which doth contain the other two. And alſo 3. A Cart-way; and this is it which in the Law Books is called *Chimin.* And from hence doth come the word *Chiminage*, which doth ſignifie a Toll due by Cuſtome for the having of a way through a Forreſt (which is ſometimes in ancient Records called *Pedagium.*) And this way alſo is twofold.

Chiminage, what.

Pedagium. what.

Sect. 1.

1 Publick, the which is called the Lord Protectors high-way, or the Royal way, which is the way that leadeth from one Village to another, and to Market Townes; this is a way for all men, and wherein every man ought to paſſe to and fro without let; which is called the Lord Protectors high-way, becauſe the Lord Protector hath at all times paſſage in it for himſelf and all his people, and he may puniſh all the Nuſances and abuſes done in it.

2. Private, and then it is either *vicinalis*; (*i.*) That which doth belong to a Village or Town, or that which is in, or leadeth to or from a Village, or doth ſerve for a Village, to lead to the high-way, Church,

Chuch, Market, field, or the like. And this way is called, Common. 2 Particular. And this way is where one or more, hath by grant or Preſcription, through another mans ground, either from one cloſe to another, or from his houſe into the field, high-way or the like: And this way is ſometimes appendant (that is) adjoyning to ſome other thing, as houſe or land, and appertaining thereunto; as if a man hire a cloſe or paſture, and hath a Covenant for ingreſſe and egreſſe to and from the ſaid cloſe, through the ground of ſome other man, through which otherwiſe he might not paſſe: or it may be that which is called Real, which is when a man purchaſeth a way through the ground of another man, for ſuch as do, or ſhall dwell in ſuch a houſe, or for ſuch as ſhall be owners of ſuch a Manor for ever; Or it is in groſſe (*i.*) Such a way as a man doth hold principally and ſolely by it ſelf: As where one doth Covenant for a way through the ground of another man for himſelf and his heires. So that there are high-wayes, common-wayes, and private wayes. *Terms of the Law. Cook upon Litt* 56. *Kytch.fol.*137.35.

As touching the Lord Protectors High-way, theſe things are to bee knowne, 2 The nature of wayes, and the intereſt of the Protector and Subject in the High wayes.

1 That the Protector hath not, nor claimeth more therein but the free paſſage of him and his ſubjects as an eaſment, the which if any man do deny or interrupt them in, he may be puniſhed for it.

2 That the ſubject hath not, nor claimeth more therein of right, but a liberty and freedom for his travel and paſſage, the which he may juſtifie by Preſcription, and no man can deny it to him.

3 The ſubject can make no other uſe of it but for his travel, and therefore he may not build houſes or lay his ſoyle or blocks upon it, but he will be puniſhable for it, nor will a Preſcription in this caſe enable him ſo to do Preſcription.

4 The ſoil and the freehold of the ſame and all the profits thereof, as trees, graſſe, and the like, do belong to the Lord or Owner of the Soil or Manor, and not to the L. Protector or his Subjects in general, nor to him whoſe ground is next adjoyning: And therefore the Lord or owner of the ſoyle may lay the Hills there, or do any thing for the bettering of the high-way; or he may take the profits, the Trees, Mines or the like, ſo as he do not prejudice the way thereby; for this he may not do, albeit he pretend a preſcription for it. And the Franchiſe of the high-way doth belong to the Lord of the ſoil, and he ſhall have a Purpreſture. And hence it is that by the Common Law the Lord or Owner of the Soil, is bound to cut down the trees and buſhes therein that do offend. And hence it was that if one had given a Manor, rendring rent, and within this Manor there had been a great ſtreet, that the Donor might have diſtrained for his rent in this ſtreet, for it was reputed within the Fee, until the Statute of *Marlbridg* came, which did forbid the taking of a diſtreſſe in the high way; and yet in caſes where the high-way doth go through a mans ſeveral grounds, the Owner of the ground and not the Lord of the Manor ſhall have the trees and profits of the high-way. *Inter Cautrel & Church, Hillar.* 42. *Eliz. Rot.*473. *Broo. Nuſance* 28 *H.*7.5. Diſtreſs. Trees.

And any man (as it ſeemes) by Preſcription may have Common of paſture and feeding for his Cattel in the high-way, albeit the ſoile belong to another. Common.

5 The Lord Protector and ſubject hath ſuch a right to this eaſement, that they cannot by any act they can do, ſuſpend or extinguiſh it. Extinguiſhment.

6 As touching the private wayes to common fields and the like, it is held, that the freehold of them, and all the profits thereof do belong to him that hath the ground next adjoyning, and therefore that he may cut the trees, and take the profits thereof.

7 As touching the particular way; this with all the profit thereof doth belong to the Owner of the Soile, but he that hath the way hath intereſt in the ſame according to his Title by Preſcription or grant; but this is ſuch an intereſt as may by Acts done by him that hath this title, be ſuſpended or extinguiſhed. *Fitz. & Broo. Chimin in toto* 13 *H.*8.10. *Brro. Leet* 3. 8 *Ed.*4.9. 27 *H.*6.9. 2 *Ed.*4.9. *Dalt. Juſt. of P.*60. 32 *Ed,*3. *Barr.*261. *Statham. Chimin.*2. *Fitz. Reſcous* 14. Extinguiſhed.

Preſcription.

8. The Inhabitants of a Pariſh by the Common-Law are to Repair all the High-wayes of the Pariſh, unleſs Preſcription do binde any other to it. *March* 26.

3 Where a way may be by preſcription: And how, and in what form, and by what perſon the preſcription ought to be made and alleaged. Preſcription. *Sect.* 2.

Every man by the Common-law may Preſcribe to paſs and repaſs in the Lord Protectors High-way; and by preſcription men may have a private way: and therefore the Inhabitants of a Village, being but Tenants at will, may preſcribe to have a way to Church, or to Market, or into their Fields; and if they ſay, that the Cuſtom and Uſage of the Village of *D*, hath been time out of minde, that the Inhabitants of the ſame Village have had a way over ſuch a Ground or Cloſe, this is good. Alſo, one or ſome few men, may preſcribe to have a way to his Field or Cloſe, through another mans Cloſe. And in theſe caſes it is held, men may preſcribe to have a way through a Church or Church-yard, and therefore much more through a common houſe, or through an Orchard or Garden. But in all theſe caſes when a man is to make or ſet out his title by his preſcription, he muſt take care how he doth preſcribe; *viz.* By what Perſons, and in whoſe Names to make the preſcription, and to ſet forth the particulars, what way he doth claim, and which way it is to go: As if a man claim a way from his houſe, to ſuch a Cloſe called *B*, he muſt ſet forth what way, whether Horſe or Foot way he claimeth, and by and through what places his way is to go, or otherwiſe his pleading will be faulty, *Dyer* 71. 18. *Edw.* 4. 3. *Broo. preſcript.* 76. *Cook* 6. 60. 18. *Edw.* 4. 8. *Broo. preſcript.* 91. & 76.

Pleading.

4 What ſhall be ſaid a Diſturbance. And the remedy for a wrong or Diſturbance in a publick or private way.

To erect a Houſe, or Wall upon the High-way, to ſet up a Houſe of Office, to lay Soyl or Carrion in or upon the high-way, if it be an annoyance to the Traveller; to dig a ditch athwart the way, or any way to ſtraiten and leſſen the way, not to ſcour the ditches, but to ſuffer them to fill, that the water doth over-flow into the way, or otherwiſe not to repair but to ſuffer the way to be decayed; all theſe, and ſuch like things, in caſe of the Lord Protectors high-way, are diſturbances, and wrongs to the Lord Protector and his Subjects. By the Common Law and Cuſtom of *England*, no Carrier or other man ought to draw or carry above 2000 weight, and with a Waggon having but two wheels and but four horſes, and he that doth draw more and hurt the wayes, may be fined and impriſoned for it. And now by the new Law, if he draw with more than 5 Horſes, or 6 Oxen and a Horſe, it is under pain of 20. s. *Ord. April* 12. 1644 *March* 135. *pl.* 220. For the puniſhment and redreſs whereof, no one man in particular may have an Action of the Caſe, for then every man might have an Action. But this is to be puniſhed and redreſſed moſt properly at a Leet, or the Upper-Bench, or in the Exchequer at the Sheriffs Turn by Preſentment, or at the Seſſions by Indictment; in which caſe any Subject that will, may be a proſecutor in the Lord Protectors Name: Or if the common Nuſance in this caſe be in erecting, any man may proſecute the thing erected. If the fault be in not repairing, the party that ought to repair, muſt be puniſhed: as, if it be the Inhabitants of the Pariſh that ſhould repair, and they do not, they muſt be puniſhed: and if any man be bound by his Tenure or otherwiſe to repair, and do not, he is to be puniſhed for it; and yet the Lord of the Soyl may have a private Action againſt a man that ſhall dig in the ſoyle of the Lord Protectors high-way: Alſo if any man in particular ſhall meet with any ſpecial harm by the publick Nuſance, as if a man lay a tree, or dig a pit in the high-way, and my Horſe ſtumble at it and hurt me, or himſelf thereby, albeit there be a great deal of room beſides in the high-way; in this caſe he may have a ſpecial action of the caſe, *Agreed in Sir Edward Duncombes caſe, Trin.* 10. *B. R* But if the high-way lead through a Corn-field, or ſuch like place, and a man hath land on both ſides, and he incloſe on both ſides leaving the way broader than it was before, this ſtraiting of the way in this caſe is not puniſhable: And yet in this caſe of a common field, if the high-way lying in it be ill for travelling, the Paſſengers may go into the land adjoyning, and if the next land be deep, into the next to that, and if the land be incloſed, and the way deep, he may break the incloſure, and go on the other ſide, *Cook* 9. 113. 3. 73. 27. *H.* 8. 27. 13. *H.* 8. 16. *Cook upon Litt.* 56. 27. *Broo. Action of the Caſe*, 93. 5. *Edw.* 4. 2. 2 *Ed.* 4. 9. *Kytch.* 34. 35. 3. *H.* 6. 26.

Action of the Caſe.

Tenure.

Action of the Caſe.

The ſame things for the moſt part that are Diſturbances to a man in the Protectors high-way, are Diſturbances to men in other wayes, but they are not to have the ſame Remedy; for if the Inhabitants of a Village have a way to their Church, or otherwiſe,

therwiſe, and they are diſturbed by any means that they cannot uſe their way as formerly they have done; in this caſe every man of them may have an Action of the Caſe againſt the diſturber, as every Commoner may have againſt a Stranger, that doth diſturbe them in their Common: for otherwiſe they were without Remedy; for they cannot puniſh this wrong in a Leet: and if any one, or more men have a private way to a Cloſe, &c. and another diſturbe him in it, he is to have an Action of the Caſe, or in ſome caſes an Aſſiſe of Nuſance: Or if his way be ſtopped, he may open it, or go beſides it; and therefore in an Action of Treſpaſs for breaking of ones Cloſe, the Defendant pleaded, That time out of mind he hath had a way through it, and that the Plantiff being owner of the land hath plowed it, and ſtopped the way with thorns, whereby the Defendant being barred of his ancient way, went beſides it upon the land adjoyning to his way. And this was adjudged a good Plea in *Horn and Winſlades caſe, M. 6. Jac B. R.* But in theſe things ſome take Differences, and ſay, Where a man hath the Freehold of the thing whereto the way is appendant, or appurtenant, there he muſt have an Aſſiſe, and where not, an Action of the Caſe: And where the way is wholly ſtopped, there the party grieved ſhall have an Aſſiſe; but where it is but ſtraitned only, there an Action of the Caſe: and where the ſtopping is by the Ter-tenant an Aſſiſe lyeth, but when it is by a ſtranger, an Action of the Caſe lyeth: and where one doth not repair ſo that I cannot paſs, there I muſt have an Action of the Caſe, but where he doth erect or levy any Nuſans in it, I muſt have an Aſſiſe, *F. N. B.* 183. 184. *Br Nuſans* 13. *Dyer* 250. *Cook* 5. 73. 27. *H.* 8. 27. 14. *H.* 8. 31.

Action of the Caſe.

Treſpaſſe.

Amongſt Copy-holders, who can have no Aſſiſe nor Action of the Caſe for wrong done in their wayes, it is uſual to enquire at their Courts, and to pain the parties that do wrong, and to Aſſeſs the pain, for in this caſe they may do ſo, becauſe they have no other remedy, *Kytch.* 35.

Sect. 3.

All men that have Ditches adjoyning to the high-wayes, are bound to cleanſe them, though there be no Preſcription againſt them for it; (But for the Ditches that do not adjoyn, thoſe they are not bound to cleanſe, unleſs there can be alledged ſome Preſcription againſt them in it.) And it ſeems to me by the ſame Reaſon, that thoſe that have trees, whoſe boughs do over-hang and annoy the high-wayes, are bound to lop them; yet the Opinion of *Richil* is contrary, in 8. *Hen.* 7. 5. But now by the Statutes, they are bound to ſcour their Ditches, and cut their Trees and Buſhes, under pain of ten ſhillings for every default, 8. *Hen.* 7. 5.

5. Of Amendment of Wayes and Bridges. And how it ſhall be.

Preſcription.

The Conſtables and Church-wardens of every Pariſh, with ſome of the Pariſhioners muſt upon *Eaſter tueſday* or *wedneſday*, yearly appoint and chooſe Surveyors for that year for amending the high-wayes: thoſe Surveyors are to ſee to the amendment of the wayes, and for that end to require the ayd and help of the neighbourhood, according to the Statutes, which ſee at large, 2. & 3. *Ph. & M. cap.* 8. 18. *Eliz. chap.* 9 3. *Jac. cap.* 19.

Surveyors.

But now by a new Additional Law, made by the Lord Protector and his Council, 31 *March* 1654. There is a further Proviſion for the Repair of the high-wayes. The Heads whereof are theſe:

1. That two, or more of every Pariſh that have 20.l. a year, or 100.l. in Goods, muſt be choſen yearly in every Pariſh the firſt *tueſday* after the 25 of *March* for Surveyors.

2. They are to be ſworn before a Juſtice of Peace.

3. They muſt look to, and amend all the High-wayes and Bridges in the Countries, Streets, and Pavements of Towns, and reforme Nuſances therein.

4. They may with conſent of one Juſtice, make and levy any Rate not exceeding twelve pence a pound upon the Inhabitants of the Pariſh to amend the high-way.

5. With this Money they may hire men and Plowes and amend the High-wayes, &c.

6. Take Materials in any mans Earable or Paſture.

7. Force men to ſcour their Ditches, turn their Waters, &c.

8. If the Pariſh be Poor and not able to do it, it ſhall have help from other Pariſhes.

9. If any thing be given to the Repair of High-wayes and miſ-imployed, the Juſtices at their Quarter Seſſions may order it.

10. Theſe Surveyors may ſeize and keep every Horſe, or Mare, above 5 in a Plow, or Horſe, Ox, that is above 6 Oxen and one Mare in a Plow or Cart that paſſeth through the Town, and keep it 7 dayes till the Owner pay twenty ſhillings a Horſe, Mare, or Ox above the ſame number; and if the Owner will not pay it, he may ſell the ſame, and pay the twenty ſhillings, and give the Owner the reſt.

By-lawes. 11. The Pariſh may alſo make By-laws for their High-wayes, and being confirmed at the Quarter Seſſions muſt be obeyed.

12. All the Fines and Forfeitures by this Law, and the former Laws, are to go, and be imployed by theſe Officers towards the Repair of the High-wayes. But for all theſe things, ſee them at large in my Juſtice of Peace Office, the Third Edition.

By the Ancient Common-Lawes, Villages are bound to Repair their High-wayes, and may be puniſhed for their Decay; and if any do break down, ſtraiten, corrupt, or mar the High-wayes, he is puniſhable in the Kings Bench, or before *Juſtices* of the Peace, Oyer and Terminer, Leet, or the like, 27. *Aſſ.* 63. *Cromp. jur.* 76.

So all Purpreſtures or Nuſances made upon the Protectors high-way by Land or Water, to the damage of the Protector and his people, is unpuniſhable there. *idem.* And he that hath land adjoyning to any high-way, by the common-law (before any ſtatutes) was, and is chargeable of common-right to cleanſe and ſcour the ditches adjoyning to the high-way, *H.*8.7. *Broo.* Nuſance 28. If a man incloſe the high-way and put it within his own ground, the pariſh is not to repaire it, but he muſt repair it himſelf, *Trin.* 10 *Car. B.R. per curiam in Sir Edw. Duncombes caſe.* By an ancient Statute the high-wayes from one Market town to another ought to be enlarged, and all the Buſhes and ſmall Woods neer it to be cut down, that there be no lurking places for Theeves within two hundred foot of either ſide; and if by default of the ſame any Robbery were done, the Lord of the place ought to anſwer it; and if any Murther, the Lord ſhall be fined. And ſo the wayes within the Kings Forreſts and demean lands ought to be enlarged; and by the ſtatute it is provided, That if a Park be taken from the high-way, the Lord ſhall ſet his Wall or Pale two hundred foot from the high-way, or that he may make ſuch a Wall, Dike, or Hedge, that Offenders may not paſs to and fro to do evil, *Stat. of Wincheſt.* 13. *Edw.* 1 5.

Bridges. If Bridges be decayed, and any one or more is bound by Preſcription to repair them, he or they ſhall be compelled to it. And for this purpoſe it ſeems is the ancient Writ in the Regiſter called *Pontibus Reparandis*, which is a Writ directed to the Sheriff, to will him to command one or more to repair a Bridge to whom it belongeth. And for this was the *Pontage*, which doth ſignifie either a Contribution towards the maintenance or re-edifying of Bridges, or a Toll taken for this purpoſe of all thoſe that paſs over Bridges, *Weſt* 2 *chap.* 2. 39. *Eliz.* 24. *Crompt. jur. fol* 199 *Regiſt. Orig. fol.* 153. Four Juſtices, whereof one of the *Quorum*, may take order for amendment of Bridges in the high-wayes, and compel them to it that ought to mend them: and if it be uncertain who ought to do it, they may ſet a Rate upon the Neighbor-hood, and make them do it, and appoint Surveyors to ſee it done: But no man unleſs it be in this courſe ſhall be diſtrained to make any Bridges, but ſuch as have been uſed to do it, *St.* 22 *H.*8. 5 9 *H.*3. *cap.* 15. *See For Bridges Cook* 2. *par. juſt.* 697. *the Expoſition of theſe Statutes.*

Pontibus reparandis, what

Pontage, what.

See who ſhall maintain Eden and Preſtback Bridges, Stat 43 *Eliz* 2 *chap* 16. *Newport and Carlion Bridges, Stat* 39 *Eliz chap* 23. *Wilton Bridge*, 39 *Eliz chap* 24 *Rocheſter Bridge in Kent Stat* 9 *H* 5 *chap* 12 18 *Eliz* 16 27 *Eliz* 25. *Stamford and Tulhamford in Oxfordſhire Stat* 8 *H* 6 28 *Chepſtow Bridge in the Counties of Glouceſter and Munmouth Stat* 18 *Eliz* 17 3 *Jac* 23. *Cardiff Bridge in the County of Clamorgan Stat* 23 *Eliz* 11. *Upton Bridge upon Severn* 3 *Jac* 24. *Staines Bridge in the County of Middleſex Stat* 1 *H* 8 *cap* 9. *The Bridges over the River of Lee Stat* 13 *Eliz cap.* The old Statutes for High-wayes, *See* 2 *&* 3 *Ph. & M.* 8. 5. *Eliz.* 13. 18. *Eliz.* 10. 39. *Eliz.* 19.

Of

Of Women, Maids, and Widows.

AS to Women, Maids, and Widows, theſe things are to be known: (1) If any abuſe a young Maid under 10 years of age, and have the Carnal knowledge of her, though with her conſent, it is Felony. *See for this, Crown.* (2) If any one by force or fraud, ſteal, or cauſe to be ſtoln away a Maid under 21 years old with intent to Marry her, he forfeits all his Eſtate, and ſhall be put in Bridwel in Priſon during life; and the Aiders and Abettors be impriſoned in Bridwel 7 years. (3) The Guardian or Overſeer of ſuch Child that ſhall betray her in a Marriage, ſhall forfeit the double of the Marriage-portion of ſuch Child, the one half to it, the other to the Common-wealth by the new Law, 24 *Auguſt* 1653. (4) If any take a Woman by force or by ſubtilty get her into their cuſtody, and then procure her to enter into Obligations or Statutes, ſuch woman may be relieved by the Lord Chancellor, and the Bonds will be made void, *Stat.* 32. *H.* 6. 9. (5) To take away unlawfully any Maid, Widow, or Wife, that hath any Lands or Goods, or is an Heir to her Anceſtor, againſt her will, is Felony, and the Felon ſhall loſe the benefit of his Clergy, *Stat.* 3. *Hen.* 7. 2. 39. *Eliz.* 9. *See Cook* 3. *part Inſt. cap.* 12. (6) No perſon muſt by flattery, fraud, or force, help to convey away any Maid under the age of 16 years, out of the cuſtody, and againſt the will of her Parents, or ſuch as have the lawful cuſtody of her, under pain of Impriſonment two years without Bayl. But Guardians, Maſters, and Miſtreſſes may take the bodies of their Wards and ſervants notwithſtanding, *Stat.* 4. *&* 5. *Phil. & M. chap.* 8. *Crompt. jur. fol.* 30. (7) In caſe where any ſhall be ſeiſed on by force, and carried away here or beyond Sea againſt her will, or ſhall have words wreſted from her whereupon a marriage is pretended; the Lords Commiſſioners of the Great Seal may ſend a Commiſſion to whom they think fit to hear and end, and as they judge it, ſo it ſhall be a marriage or no marriage, *Act* 10 *January* 1650. And if any perſon ſhall deflowre ſuch a Maiden, or contract marriage with her without the Agreement of her Parants or Governors, he ſhall be impriſoned 5 years without Bayl. And if any ſuch Maiden after 12 years of age before 16 ſhall conſent to any ſuch contract againſt her Parents or Tutors agreement or liking, the next of Kin ſhall have her Land during her life, *Stat.* 4 *&* 5. *Ph. & M. chap.* 8. (8) The Widow is to have her Dower *Paraphernalia Quarrentine, &c.* after her Husbands death freely without Money, *See for this Dower Mag. Charta* 7. (9) The Kings Tenants wife could not have married nor took her Dower, but by the Kings leave in the Court of Wards; but this is altered now, and ſhe is in the caſe of another Tenants wife, *Prerog. Regis* 4. (10) If ſhe have any eſtate in taile, or for life made to her Husband, or any of his Anceſtors, of his or their land, ſhe muſt not alien it, to bar the Heir; and if ſhe do, ſhe ſhall forfeit her eſtate, and he may enter preſently upon her, and put her out, (*ſee more in Diſcontinuance,*) but ſhe may diſpoſe it for her own life. (11) The wife of a Copyholder, that holdeth by Widows Eſtate, muſt do ſuit of Court, be ſubject to forfeitures, is to be admitted Tenant, and appear and be ordered at the Court as other Copyholders, 20 *Jac. curia.* (12) If her Husband die Inteſtate, or the Executors, named by his Will, do refuſe the Adminiſtration of his Goods, it doth moſt properly belong to her, and the Ordinary ought to grant it to her, or the next of his Kin, or both, at his diſcretion, *See Stat.* 2. *Hen.* 8. *chap.* 5. (13) She may by Will deviſe the Crop of Corn growing upon the Ground ſhe holdeth in Dower, *Stat.* 20. *H.* 3. *chap.* 2.

Sect. 1.

Widow.

CHAP. CLXX.

Of Words.

Abiſherſing Miſherſing. Biſherſing or Miſherſing is to be quit of Amercements before whomſoever of Treſpaſſe proved. *Terms of the Law.*

Acquit. A To acquit is nothing elſe but to diſcharge or keep in quiet from trouble. *Cook upon Litt.* 100.

Agiſtment and Agiſt. This word Agiſtment and Pawnaye, it ſeemes, doth ſignifie the ſame thing, and it was uſed for that taking in and feeding of the Cattel of ſtrangers in the Forreſt, and the gathering of the money due for the ſame. See in my Book of the ſecond part of the *Marrow of the Law, page* 53.

Advent. Advent is a time which containeth about a Month next before the Feaſt of the Nativity of our Saviour Chriſt. *Weſtm.* 1 *Chap.* 48.

Alnetum Alnetum is a word of Elders, *Ubi Alni Arbores creſcunt*, and by the grant of twenty Acres Alneti, the wood and ſoil will paſſe. And ſullings are taken for Elders. *Cook* 4.6.

Allodarii Allodarii, ſignifieth free-holders, or ſuch as have Fee ſimple of Lands. *Cook* 1. 5.

Angel Angel is the name of a piece of Gold uſed among us, in value 11 s which hath the form of an Angel pictured upon it.

Allocations Allocations are allowances made upon an account.

Array Array is the ranking or ordering of a Jury or Inqueſt of men, that are impannelled upon any Cauſe; and hence cometh to array a pannel (that is,) to let forth one by another the men that are impannelled. *Stat.* 18 *H.*6. *chap.* 14. *Old N.B. fol.* 157.

Arraign Arraign is to put a thing in order, or in his place; alſo a priſoner is ſaid to be arraigned when he is indicted and put to his tryal. *New Terms of Law.*

Arreſted Arreſted is he that is convented before any Judge, and charged with any Crime. *Terms of the Law.*

Aſſize The Aſſize of Bread and Beer, is the ſetting down of the prizes and quantity of bread and Beer; and hence it is that to aſſize or to tax, is to ſet down rates upon men for payment of duties to the King or otherwiſe; and ſuch as ſo do are called Aſſeſſors: And thoſe are in many caſes; (amongſt others) ſuch Officers as divide and aſcertaine the Contribution Rates in pariſhes, are called Aſſeſſors.

Averpeny Is to be quit of divers ſummes of money for the Kings Carriages or Carts. *Terms of the Law*

Averia This word it ſeems is ſpecially applyed to tame Beaſts, as Oxen, Kine, ſheep and ſuch like, and to no other thing. See 18 *Ed.*4.14.

Aumone The tenure by Divine ſervice was anciently called by this name. *Cook upon Litt.* 97. *a* 9

Average It ſeems to be a ſervice one doth owe to his Lord, to be done by horſe and Cart for carriage. See *Averpeny.*

Avoir de pois It ſignifieth two things. 1. A kind of weight diverſe from the Troy weight, which doth contain but twelve ounces to the pound, which is ſixteen ounces. 2 Such Merchandizes as are bought by this weight and not by the other. *Stat. of York* 9 *Ed.*3.

SECT. 1

Bailiff errant. Bailiff-errant or Itinerants, be ſuch as go hither and thither about the County to ſerve

Writs, and ſummon the County to Seſſions or Aſſiſes, &c. and theſe are made by the Sheriff, *Cook ſuper Litt* 126.

Berewica, or Berewit. It ſignifieth a Town.

Berneth Berneth, it ſignifieth the ſervice of a Plow and Cart

Benevolence Benevolence was a charge or payment exacted by the Prince of the people of this Nation in the time of *R* 3 *ſtat Chap* 2.

Berquarium, or Bercaria It ſignifieth a tan-houſe, or a heath-houſe, where barks or rinds of trees are laid to tan withal. It ſignifieth alſo a ſheep-coat, *Cook ſuper Litt* 36 *a*

Black book It is a Book lying in the Exchequer, *ſee Stat Annals f* 154 191.

Bordarii vel Bordanni They are cottages, or husband-men that have a cottage, and a little land of husbandry belongs to it, *Cook ſuper Litt* 5 *b*

Blodewit Blodwit, to be quit of Amearcements for blood-ſhedding, *Terms of the Law.*

Bord-lands It doth ſignifie the Demeaſnes that Lords of Manors kept in their hands for the maintenance of their Bord or Table, *Bract lib* 4

Borrowhead It ſignifieth he that is the chief of the Frankpledges, and him that had the principal Government of them within his own pledge: And he had divers other names, according to the diverſity of the country, as Burſhoulder, Third-borrow, Third-borrow, Tythingman, Chief Pledge, Borrow-elder. It doth ſignifie now a Conſtable or Tythingman, *ſtat* 20 *H* 6 *chap* 8 *Cook* 6 77 78

Burrow, or Chief Pledge

Boote Boote ſignifieth help, ayd, or advantage, and is uſually joyned with another word, as Fire-boot, &c.

Borrowholders or Borſholders And Borrowholders or Borſholders they are the elder or ancienteſt Pledges for Borrows.

Boſcus By this word Boſcus is underſtood not only the trees growing on the ground, but the ground it ſelf whereon they grow, *Cook* 4 6

Boſens It ſignifieth ſomtimes an amearcement or compenſation, and ſometimes a freedom from the ſame, *Cook ſuper Litt* 127 *a*

Bovata terre Una Bovata terre is an Oxgauge, or as much as an Ox can til, *Crompt jur* 220 *Cook ſuper Litt* 5 *a*

Briga Briga, it ſignifieth wrangle, contention, or intracacy, *idem* 3 *b*

Bragboote Bragboote is to be quit of giving aid to the repair of bridges, *Terms of the Law.*

Bruera By this is underſtood the ſoyl where Heath doth grow: And this will paſs, or may by Writ be demanded by this name, *Cook ſuper Litt* 4 *b*

Burgboote It is the exemption and freedom by ancient Charter from contribution towards the building and repairing of Caſtles or borrow Towns, *Terms of the Law.*

Bullion Bullion-money is taken for ſilver or Gold in the marſs or billot, and ſometimes for the place where ſuch ſilver or Gold in the marſs is brought to be tryed or exchanged for the King, 9 *Edw* 3 *ſtat* 2 *chap* 2 27 *Edw* 3 *ſtat* 2 *chap* 14 4 *Hen* 4 *chap* 10.

Balkens Of Balk, becauſe they ſtand higher as it were on a balk or ridge of land to give notice of ſomething to others, *ſee Conders.*

Barkarie A houſe where they put bark of trees, or a heath-houſe, that which we ſometimes call a tan-houſe.

Bouge of Court Bouge of Court was cloſet-diet for him and his Officers in the Kings Court.

Burrow elder, Burrowhead, or Borſholder, Third Borrow. Theſe words do either of them ſignifie the Conſtable or Tythingman of a place in ſome Counties, in ſome places he is called a Chief Pledge, in ſome places a third borrow, or Third borrow.

SECT. 2.

Cantred Cantred is as much in Wales as a hundred in England, *ſtat* 28 *H* 8 *cap* 3

Canon, or Canonſhip Canon doth ſometimes ſignifie a peece of Ordnance, ſometimes a ſpiritual perſon reſident in, and depending upon a Cathedral Church; ſometime an Ordinance made by the clergy in the convocation-houſe, or in a lawful council, *ſee Clergy.*

Cark Cark is a quantity of Wall whereof thirty make a Surpler, 27 *H* 6 *cap* 7

Carvage Carvage is to be quit, if the King ſhould tax all his land by Carves of land (*i.*) by the plow-land, *Termes Ley*

A Carve

Carve of Land A carve of Land or plow-land, is (it ſeems) as much land as may be plowed in one year and a day with one plow, which is alſo called a Hide of land, or Hild of land: and by this quantity of land the ſubjects have been heretofore taxed, whereupon the tribute ſo levyed is called Carvage; *Termes Ley, Stowes Annals page* 271

Carno It was a kind of Immunity from a payment, *Crompt. jur. fol.* 291. *Terms Ley.*

Cell Cell was a private place where Hermites did live and repoſe themſelves.

Chamber de Kins They were Iriſh beggers which by the Statute of *Hen* 5 *cap* 8 were by a certain time therein limited, appointed to avoid this land.

Chevage Chevage or Chivage is ſometimes taken for a ſum of Money paid by Villains to their Lords, in ſigne and acknowledgement of their ſubjection: And ſometimes it ſignifieth a ſum of Money or other Gifts yearly in the name of Chivage given by one man to another of power and might for his avowment, maintenance and protection, as to their head or leader, *Cook ſuper Litt fol* 140 *a.*

Cheviſance This word is uſed for bargaining, 37 *Hen* 8 9 13 *Eliz* 5.

Childwit Childwit is that you may take a fine of your bond-woman defiled and begotten with child without your licenſe.

Choral Choral, it ſeemeth to be thoſe that by vertue of any of the Orders of the clergy, were in ancient time admitted to ſerve God in the Quier.

Churcheſſet, or Chirchſed. It ſignifieth a certain meaſure of wheat-corn which in times paſt every man on *Martins* day gave to the holy Church, *Terms Ley.*

Clack force et bard To clack wooll, is to cut off the mark of the ſheep which makes it weigh leſs, and ſo to pay the leſs cuſtom to the Lord Protector. To Force wooll is to clip the upper and moſt hairy part of it. To bard or beard wooll, is to cut the head and neck from the other part of the Fleece, 8 *Hen* 6 22 *Terms Ley.*

Cocket A Cocket is uſed for a Seal belonging to the cuſtom-houſe, *Regiſt* 192. Alſo for a Scrowl of parchment delivered there to Merchants to ſhew that their wares are cuſtomed, 11 *Hen* 6 *chap* 16. Alſo for a kind of Bread.

Cognizans, or Conuſans This word doth ſignifie ſometimes the acknowledgement of a Fine, or other act, and ſometimes a priviledge that a Town hath, as Conuſans of Pleas is a priviledge to hold Pleas, *Manwood Forreſt Lawes.*

Coleberti It ſignifieth ſuch tenants as hold in free Soccage by a free rent.

Conders Conders are ſuch as ſtand on the Sea-coaſt at Herring fiſhing time to ſhew the fiſhers which way the ſholes of Herrings paſs, ſometimes called Huers and Balkers, 1 *Jac* 23 *Cook ſuper Litt* 86 *a* 5.

Collateral Collateral is that which cometh in, or adhereth to the ſide of any thing, as collateral Aſſurances is ſaid to be that which is made beſides the Deed it ſelf. For Example, If a man covenant with another and enters into Bond for the performance of his covenant, the Bond is ſaid to be collateral Aſſurance, becauſe it is external, and that which is without the nature and eſſence of the covenant. And *Cromp.* 185 ſaith, That to be ſubject to the feeding of the Kings Deer is collateral to the Soyl within the Forreſt. So the liberty to pitch ſhades or ſtandings for a Fair in the Soyl of another man, is collateral to the land. The private woods of a common perſon cannot be cut down without the Lord Protectors licenſe, for it is a prerogative collateral to the ſoyl. The Anceſtor or heir that is on the one ſide, that is Uncle or Nephew, &c. is ſaid to be collateral and oppoſed to him that is lineal, as father or ſon, &c. See *collateral Warranty, Terms Ley.*

Commandry Commandry was the name of a Manor or chief Meſuage with which lands or Tenements were occupied, belonging to the late priory of *St. Johns of Jeruſalem in England,* until they were given to *Hen.* 8. *Termes Ley.*

Committee Committee is he to whom the conſideration and ordering of a thing is referred either by ſome court, or conſent; as in Perliament a Bill being read is either conſented unto and paſſed, or denied, or referred to the conſideration of ſome certain men appointed by the Houſe who were called Committees. And ſomtimes it is uſed to ſet forth him that hath the Grant of the Wardſhip of the Kings Tenant from the King: But in *Kitch* 160. the Widow of the Kings Tenant, is called the Committee of the King, becauſe by Law ſhe was committed to the Kings Protection. *Terms Ley.*

Com-

Commotes, or Commoythes. Commotes ſignifieth in *Wales*, part of a County or Hundred: And in 4 *H* 7 17. it is uſed for a gathering made upon the people of this or that Hundred, by Welſh Minſtrels. *Termes ley.*

Conge de Eſlier. Conge de Eſlier, was the Kings permiſſion to a Dean and Chapter, to chooſe a Biſhop in the time of vacancy. *F N B* 169 *Termes Leg.*

Contenement. Contenement is a mans countenance, which he hath together with and by reaſon of his Free-hold; as the Armor of a Soldier, the Books of a Scholar is his countenance, and the like, *Cook* 2 *part of Inſt* 28.

Cornage. Cornage, It was an extraordinary payment of corn impoſed upon the Subject by the King, upon ſome ſpecial occaſion. *Bract lib* 2 *ch* 16.

Coram non Judice. Is a term to expreſs a thing done without Authority, and ſubject to queſtion, where a man taketh upon him to have Authority as a Judge, *Cook* 8 Caſe of the Marſhalſey.

Cordiner. It ſignifieth nothing but a Shoo-maker, 3 *H* 8 10 5 *H* 7 7.

Cote, Sheep-cote. This word ſignifieth ſometimes a kinde of refuſe Wool clung together, that it cannot be pulled aſſunder, 13 *R* 2 19. Sometimes it is taken for a little poor Cottage, or ſlight built houſe; ſometimes for a little place where they fold ſheep, called a Sheep-cote.

A Cotterel or Coſte. Theſe words in old Engliſh, it ſeems, did ſignifie a little houſe or cottage.

Covenable or Convenable. Covenable or Convenable, doth ſignifie fit, convenient, and ſuitable, 4 *H* 8 12. It is ſometimes written Convenable, 27 *Ed* 3 2 17 *Termes Leg.*

Couthentlaugh. Couthentlaugh was one that did receive, cheriſh and hide an Outlawed perſon, which was to have been puniſhed with the ſame puniſhment; but it is not ſo now.

Countenance. Countenance is uſed ſometimes for credit or eſtimation, old *N B* 111 1 *Ed* 3 *St* 2 *ch* 4.

Coucher. Coucher ſeems to ſignifie a lying down, or ſetling in a place of couch, a little bed; or a Factor lying in a place for Traffique, 37 *Ed ch* 16. or for the Regiſter book of the Corporation.

Cranage. Cranage is the liberty to uſe a crane for the drawing up of Wares from the Veſſel at any Creek of the Sea, or Wharf, unto the Land, and to make profit of it: It ſignifieth alſo the money paid and taken for the ſame: *New Book of Entries, fol* 3.

Creanſon. Creanſon ſignifieth a creditor, or one that truſteth another with any debt, be it for Money or Wares. *Old N B* 67.

Creaſt tile. Creaſt tile, or Roof tile, is that tile which is made to lie on the Ridge of the houſe 17 *Ed* 4 4.

Creek del Sea. Creek of the Sea in our Law, it ſeems, doth intend a part of a Haven, where any thing is landed or disburdened from the Sea: So that ſo many landing places you have in a Haven, ſo many Creeks may be ſaid to belong to that Haven, *Cromp Jur* 110 5 *Eliz* 5.

Croft. It is a little Cloſe or plot of ground lying and belonging to a houſe, ſometimes uſed to Corn, and ſometimes to hemp, *&c.* as the owner pleaſeth

Croiſes. Croiſes ſometimes did intend ſuch Pilgrims as were ſigned with the ſign of the Croſs; ſometimes Knights of the Order of St. *John* in *Jeruſalem*, created for the defence of Pilgrims, *Bracton. Britton.*

Cuinage. Cuinage, it is a word uſed for the making up of Tin into ſuch faſhion as it is commonmonly framed into, for the carriage thereof into other places, 11 *H* 7 4

Cuntey. Cuntey was a kinde of a tryal, *Bract l* 4. and is conceived to intend nothing but tryal by the Country or a Jury: *Terms of the Law.*

Curate. Curate, this word is ſometimes taken largely for any one that hath *curam animarum*: But it ſeems to be uſually taken for ſuch a one as is hired to ſerve a cure, for and under another. Statute of *non*-Reſidence.

Curtein. Curtein is a ſword of that name that was uſed to be carryed before the King.

Curtilage or Courtilage. Curtilage is a Garden or piece of void ground, lying near and belonging to a Meſſuage or Houſe. 39 *Eliz* 2 35 *H* 8 4 *Coo* 6 64.

SECT 3.

Damage cleer. Damage cleer was a kinde of payment unto Kings, now taken away. *Ord.* 17 *Jan.* 1650. *March fol.* 76 *pl.* 116.

Dane geld, or Dane guilt Dane guilt: This is to be quit of a certain cuſtom which the *Danes* did leave in *England*. *Terms of the Law.*

Deciners or Dozinors. Deciners *alias* Dociners, or Dozinors, were ſuch as had the overſight and Check of 10 Friburies, for the maintenance of the Kings peace. *Fleta*, *Bracton.*

Defender of the Faith. Defender of the Faith was a peculiar Title given by the Pope to the Kings of *England*. *Stows Annals.* 863.

Derein. Derein in our Law ſometimes ſignifieth to prove, as to derein the warranty, 30 *H.* 8. 1. *Plow.* 7. 6. Sometimes for a Religious mans forſaking of his Orders and Profeſſion. *Kitch* 152.

Devoire, Devoires of Calais. Devoire is nothing but a mans duty or endeavor, and that which by the rule of Law and Reaſon a man is bound to do, and is applyed to Merchants of *Calais*, who were wont to pay a duty or cuſtom due to the King, when the King of *England* had it. 2 *R* 2 *Stat* 1 *ch* 3.

Dieta Rationabilis. Dieta rationabilis is ſometimes uſed for a days Journey. *Brac.* 3.

Dioceſs. *Dioceſs* was the Circuit of the Juriſdiction of every Biſhop: For this Realm hath two kindes of Diviſions; the one in Shires or Counties, in reſpect of the Temporal Policy; the other into Dioceſſes, in reſpect of the Eccleſiaſtical Juriſdiction.

Diſtrictus or Diſtrict. Diſtrictus is uſed for a Circuit or place, wherein a Lord hath ſome Juriſdiction above others. *Britton ch.* 20.

Dividents. *Devident* was a word uſed in the Statute of *Rutland*, *Anno.* 10. *Ed.* 1. where it is provided that the Chamberlains of the Exchequer ſhall not make to the Sheriffs or any of their Bayliffs, Dividents, unleſs they firſt receive of them particulars; in which particulars, he would have ſuch Dividents parted, *&c.* See *Anno* 28. *ejuſdem. Stat* 3 *ch* 2.

Docket. Docket is a little piece of Paper or Parchment written, which containeth in it the effect of a greater writing. *Stat* 2 *&* 3 *Phil & Mary*, *ch* 6

Dogger, Dogger fiſh, Dogger men. Dogger is a kinde of Ship, and Dogger men ſuch as went in thoſe Ships: Dogger fiſh, the fiſh carryed in thoſe ſhips. 31 *Ed* 3 *St* 3 *ch* 1.

Dole fiſh. Dole fiſh ſeem to be the fiſh which the Fiſhermen yearly imployed in the North Seas, do of cuſtom receive for their allowance. 35 *H* 8 *ch* 7.

Dorture. Dorture was a common Room, place or Chamber, where all the Fryars of one Covent ſlept and lay all night. *Anno* 25 *H* 8 *ch* 11.

Dotkins. Dotkins was a kinde of coyn now out of uſe. *Stamf. pl. Cor. f.* 37.

Doubles. Doubles did ſignifie Letters Patents. 14 *H* 6 *ch* 6.

Double quarrel. Double quarrel was a complaint made by a Clerk or ſome other, to the Archbiſhop againſt an inferior Ordinary: Now gone and out of uſe. *Terms of the Law.*

Drawlatchet. Drawlatchet, It was taken for a certain kinde of an eminent Thief in the days of old. 5 *Ed* 3 *ch* 14 7 *R* 2 *ch* 5.

SECT. 4.

Eaſement. Eaſment is a Service that one Neighbor hath of another by Charter or Preſcription, without profit: As a way through his ground, a ſink, or ſuch like. *Kitch. fol.* 105.

Empannel. Empannel, It ſignifieth the writing or entring the names of a Jury into a Parchment, Schedule, or Roll, or Pape, by the Sheriff, which he hath ſummoned to appear for the performance of ſuch publique Service as Juries are imployed in. *Terms of the Law.*

Engliſhire. Engliſhire is an old word, ſignifieth nothing but to be an Engliſhman. *Terms of the Law.*

Entendment. Entendment, It ſignifieth the true meaning or ſignification of a Sentence or word. *Kitch.* 124.

Entire Tenancy enternes ſeveral Tenancy. Entire tenancy is contrary to ſeveral Tenancy, which ſignifieth a ſole poſſeſſion in one man; whereas the other doth ſignifie a joynt or common poſſeſſion with one or more. *Broo. ſeveral Tenancy.*

Equivalent. Equivalent is of equal power and virtue with another.

Enure. Enure ſignifieth to take place or effect to available: Example, A Releaſe ſhall enure by way of Extinguiſhment. *Lit. cap. Releaſe.* And a releaſe made to a Tenant for tearm of life, ſhall enure to him in the Reverſion.

Errant

Errant, or Itenerant. This word is ſometimes uſed to Juſtices going in their Circuit, ſometimes to Bayliffs at large.

Eſcambio. Eſcambio is a Licenſe granted to one for the making over a Bill of Exchange to a man over the Sea. Regiſt. Original, fol. 199.

Eſtabliſhment de Dower. Eſtabliſhment de Dower ſeemeth to be the aſſurance of Dower made to the wife by the husband or his friends, before or at Marriage.

Ex Mero Motu. Theſe words, Ex Mero Motu, are formal words uſed in Letters Patents *Kitch.* 251.

Ex Aſſenſu partium. Ex Aſſenſu partium, is a form of Entry, of a day given by conſent of Parties in an Action. For which ſee Action.

Expeditate. To Expeditate Dogs, is to pare their feet that they cannot go abroad.

Expectant. Expectant is uſed in the common Law with this word (Fee) and thus uſed it is oppoſite to Fee-ſimple. For example, Lands are given to a man and his wife in Frank-Marriage, To have and to hold to them and their heirs; In this caſe they have a Fee-ſimple: But if it be given unto them and the heirs of their Bodies, *&c.* they have Tail and Fee-expectant. *Kytch fol* 153.

Ex poſt facto. Ex poſt facto ſignifieth nothing but a thing that is done after another thing.

SECT. 5.

Falkland. This word Falklord or Falkland, heretofore did ſignifie Copyhold Land.

Faint Action or Pleading. Faint Action, as *Lit. fol.* 154. ſaith, is as much as to ſay in Engliſh, A faint Action; that although the words of the writ be true, yet for certain Cauſes he hath not cauſe nor title by the Law to recover by the ſame Action: And a falſe Action is, where the words of the VVrit are falſe: So faint-pleading is a covenous and coluſory maner of pleading to the deceit of a third party.

Faitor. Faitor doth ſignifie a bad doer, or idle liver. *7 R 2 ch 5* 34 & 35 *H 8. ch* 24.

Farding. A Farding of Gold was a coyn uſed in ancient time, and now out of uſe. *9 H 5 2 Stat 2 ch 5.*

Fat. Fat is a great wooden Veſſel uſed among Brewers in *London*, *Stat 1 Hen 5 chap* 10.

Ferdwit. Ferdwit, It is to be acquit of Murther in an Army. *Fleta.*

Fordfare. Fordfare is an acquitment of a man to go into the wars.

Fewd or Fee. Fewd or Fee ſignifieth a deadly hatred and enmity, or an open profeſſion of it.

Fendum. Fendum is a kinde of Fealty that one oweth to another.

Fine force. This word Fine force ſeemeth to intend an unavoidable neceſſity. old *N. B.* 78.

Form. Form is an order or decorum to be uſed in VVrits and Pleadings, which in ſome caſes is regarded, and in ſome caſes not. *Bro.* 442.

Fledwit. Fledwit is to be quit for Amearcements, when an Out-lawed Fugitive came to the Kings Peace of his own will, or by Licenſe. *Terms leg.*

Fletwit. Fletwit is to be quit from contention and convicts, and to have the Plea thereof in your Court. Terms of the Law.

Flemiſwite. Flemiſwite is a liberty or Charter, whereby to challenge the Cattle, or Amearcements of a Fugitive. *Raſt. exp.* of words.

Florences. Florences was a kinde of cloth. *Stat 1 R 3 ch* 8.

Fodder. Fodder was a Prerogative that the Prince had, to be provided for meat for his horſes in the wars, now out of uſe.

Folgers. Folgers or Folgheres, doth ſignifie followers.

Folkmoot. Folkmoot is a Court in *London*. Mamood.

Forbar. Forbar is for ever to deprive. *Stat 9 R 2 chap* 2.

Foregoers. Foregoers did ſignifie Purveyors for the King, that went before him to provide for him.

Forejudger. Forejudger ſignifieth a Judgement, whereby he is deprived of the thing in queſtion. *Bracton. lib.* 4.

Formapauperis. *Formapauperis* doth ſignifie, the admiſſion of a poor man to follow his Suit in Law without paying any Fees in any Court.

Fourcher. Fourcher doth ſignifie the delay and putting off an Action. *Weſt* 1 *ch* 24.

Frankbank. Frankbank was uſed for Lands the wife had in Dower, which in ſome places is more, in ſome places leſs. *Terms of the Law.*

Frank Fee. Frank Fee, To hold Lands in Frank Fee, is to hold them in Fee ſimple pleadable at the Common Law, and not in ancient demeſm, *Terms of the Law.*

Frank Ferm. Frankferm is ſaid to be Land wherein the nature of Fee is charged by Feoffment, out of Knights Service for certain yearly Services, and where neither Homage, VVardſhip, Marriage, nor relief, nor any other Service but what is contained in the Feoffment is to be demanded. *Britton.*

Freſh Fine. Freſh fine is that Fine which was levied within a year paſt. *Weſt.* 2. *ch.* 45.

Freeborgh. Freeborgh is a Frankpledge. See *Frankpledge.*

Freſh force. Freſhforce is a force done within 40 days. *F. N. B.* 7.

Friperer or Pawntaker. A Friperer is one that buyeth old Apparel to ſell again; or a kinde of Broker in and about *London.* *St.* 1 *Jac. ch.* 21.

Fuer. Fuer is flight, which is either in Deed, or in Law, when being called in the County, he appeareth not, but is out-lawed, *Stamf. pl. Cur. lib.* 3. *ch.* 22.

SECT. 6.

Gable. Gable was taken for a kinde of Toll paid for Goods moveable, that are carryed from one place to another. *Britton.*

Gainage. Gainage it ſignifieth the Land that is held by ſome Villains or Soakmen. *Bracton.*

Galedge or Gallocks. Galedge or Gallocks, were a certain kind of ſhooes worn by the *Gauls* in old time in foul weather. *Stat* 4. *Ed* 4. *ch* 7.

Garble. To Garble any thing, is to cull the good from the bad of the thing.

Garb. Garb is a bundle or ſheaf of corn: And a Garb of Arrows, a ſheaf of Arrows. *Stat* 1. *R* 3 11.

Gare. Gare is courſe wool full of ſtaring hairs, that groweth about the peſil or ſhanks of Sheep. *Stat* 3. *Ed* 3. *ch* 8.

Gig-Mills. Gig-Mills were for the Fulling of wollen-cloth. *Stat* 5 *Ed* 6 *ch* 22.

Gild or Geld. Geld doth ſignifie money or tribute.

Graffer. Graffer ſignifieth a Scrivener or Notary. *Stat* 5 *H* 8 *ch* 1.

Grange. Grange is a Houſe or Building, where not onely corn is laid up, and Barns be, but alſo where be Stables for Horſes, Stalls for Oxen and other cattle, Sties for Hogs, and other neceſſaries for Husbandry: Sometimes it ſignifieth a whole Farm of Land. *Linwood.*

Gree. Gree ſignifieth contentment, good liking; as to make gree, is to ſatisfie for an offence done. *Stat* 1 *R* 2 *ch* 15.

Green Wax. Green wax is uſed for Eſtreats delivered to Sheriffs out of the Exchequer, under the Seal of that Court to be levyed in the Country. *Stat* 42 *Ed* 3 *ch* 9.

Greeve. Greeve doth ſignifie as much as *Dominus*, or *Præfectus*, and ſeems to have been all one with *Reeve.*

Grith-breach. Grith-breach is a breach of the Peace.

Groom. It ſeems is an Engine to ſtretch cloth. *Stat* 43 *Ed* 3 *ch* 10.

Guardian. Guardian is but a cuſtody.

Guidage. Guidage is a thing given for a ſafe conduct through a ſtrange Countrey.

Guild. Guild is a Brotherhood, or Company of Men Incorporate into one combination, ſupporting their common charge by mutual compoſition

Gula Auguſti. Gula Auguſti is the firſt of *Auguſt*, or Lammas day. *F. N. B.* 62.

Gultwit. Gultwit ſignifieth an amends for a wrong.

Gueſt. Gueſt is a Stranger that lodgeth the ſecond night.

SECT.

SECT. 7.

Haberjects Haberjects, Pawnes. *Mag. Ch. ch.* 25.

Hables This word Hables is uſed for a Port or Haven. *St.* 27 H. 6. *ch.* 3.

Haga Haga was a Latine word uſed for a houſe.

Half Seal Half ſeal was a word uſed in Chancery for the ſealing of Commiſſions to Delegates in Cauſes Eccleſiaſtical. 8 *El.* 5.

Half Mark. The half Mark is 6 s. 8 d. *F. N. B.* 5.

Hallage. Hallage is a Fee due for Cloathes brought to be ſold in Blackwel Hall in *London.*

Hallymote. Hallymote (as ſome ſay) did ſignifie in ſome places a Court Baron in ſome places, the ſpiritual or holy Courts. *Manwood. Cook* 4 *part Inſt. ch.* 74.

Hamlet. Hamlet is an old houſe or cottage decayed; a place where a houſe was.

Hamble To Hamble dogs is to pare their feet that they may not go about.

Haukwit. Haukwit is a liberty granted to a man, whereby he is quit of puniſhment for a Felon hanged without judgment, or eſcaped out of cuſtody. *Raſt.*

Haque or demi-haque Haque or Demi-haque, is a hand-gun about three quarters of a yard long. *St.* 2 & 3 *Ed.* 6. *chap.* 14.

Hawkers Hawkers are cheating fellowes, that goes about buying and ſelling pewter and other Merchandizes. 25. *H.* 8. 26.

Hemfare Hemfare did ſignifie the departure of a ſervant from his Maſter. *Stat.* 3 *Edw.* 4. *chap.* 5.

Henchman is uſed for a Footman that attends a great man.

Herbage Herbage doth commonly ſignifie a mans liberty to feed his Cattel in anothers ground. *Crompt Jur.* 197.

Heck Heck is an Engine to take fiſh. 23 *H.* 8. *chap.* 18.

Head-Borrow, Borrow-Head. Head-Borrow or Borrow head, is an Officer like to the Conſtable or Tithing-man.

Hereditament. Hereditament doth ſignifie all that a man hath by way of Inheritance, and will diſcend to his heires if he bequeath not; And that which is not Goods and Chattels wil go to an executor after his death.

Hide de terre. A Hide of Land or Plow-land is a certain quantity of Land in ſome Countries more, and in ſome leſſe: In ſome Countries an hundred Acres, and in ſome countries as much as a Plow can plow in a year; in ſome places it doth ſignifie a houſe and wood, Meadow and Paſture thereunto belonging. *Plow.* 168. *Cook* 1 *part Inſt.* 56.

Hidage Hidage was an extraordinary Tax to be paid for every Hide of Land, or ſometimes the word did intend to be quit of this payment. *Bract. Term ley.*

Hidel Hidel ſeems to ſignifie a place of protection, 1 *H.* 7. *chap.* 6. or Sanctuary.

Hine Hine was uſed for a ſervant. *St.* 12. *R.* 2. *chap.* 4.

Hithe. Hithe is a little Haven to land wares in out of a Veſſel or Boat, *New Book of Entries.*

Hoghenhive Hoghenhive was he that did come Gueſtwiſe and lye the third night, then he was reckoned one of the family, for whom the Maſter muſt have anſwered. *Bracton.*

Hoblers. Hoblers were ſuch as by the tenure were to keep a horſe to ride to diſcover enemies 18 *Ed.* 3. *St.* 2. *ch.* 7.

Homeſoken Homeſoken did ſignifie a liberty to invade a houſe. *Raſt.*

Horn gelt Horngelt is a Tax within the Forreſt to be paid for horned beaſts. *Cromp. Jur.*

Hors de ſon fee. Hors de ſon fee, is without his fee.

Hoſpitallers Hoſpitallers were certain Knights of holy Order. *St.* 13 *Ed. ch.* 33.

Hoſtlers Hoſtlers ſignifieth with us him that is an Inn-Keeper. 9 *Ed.* 3. *St.* 2. *ch.* 12.

Houſage Houſage is a kind of fee paid for houſing of ſtuff in a place of ſafety by a Carryer, or at a Wharf, or the like.

Houſe An houſe can intend nothing but building.

Hudegeld Hudegeld doth ſignifie a diſcharge from a Treſpaſs. *Fleta.*

Huſeans Huſeans did ſignifie a boot. *St.* 4 *H.* 4. *ch.* 7.

Husfaſtene Husfaſtene was he that did hold houſe and land. *Bracton.*

SECT

Sect. 8.

Jarrock Jarrock was a kind of Cork. *St. 1 R. 3 ch. 8.*

Implead To implead is to sue,

Infangthiefe Infangthief is taken for a Franchise that thieves, taken in your Demesn or Fee, convicted of thefts, shall be judged in your Court.

Indorsement Indorsement doth signifie something written on the back side of an Obligation or other Conveyance. *West. Symb. 2 part.*

Intakers Intakers are a kind of thieves. *St. H. 5. chap. 8.*

Invest To invest doth signifie to give possession.

Journ-choppers Journ-choppers were Regrators of yarn. *St. 8 H. 6 ch. 5.*

Jour

Ipso facto Ipso facto signifieth nothing but in very deed.

Jure Corone These words Jure Corone did signifie nothing but the Kings being seised of any thing as King in right of his Crown, or in his politick capacity, to distinguish from the things he had in his natural capacity as another man.

Sect. 9.

Laghstite Laghstite doth signifie a kind of mulct or fine.

Land Land doth include earable, Meadow, pasture, woods, meers, marishes, furzes, heaths, houses, &c. *Cook 1 part Inst. 4.*

Lastage. or Lestage Lastage is to be quit of certain customes exacted in Faires and Markets, for carrying a mans goods whither he will. Or the custome it self.

Letters de Exchange. Letters of Exchange. *Regist. Orig. 294.*

Levant et couchant Levant and Couchant is where the Cattel of another man that is a stranger, are come into another mans ground, and there have remained a good time.

Levy To levy is to set up, to levy a mill, or to cast up, to levy a ditch, or to gather and exact, as to levy money.

Lobbe Lobbe a kind of sea fish, *32 Ed. 2 St. 3.*

Local Local is as much as tyed to a place certain, and it is used in opposition to transitory, as Trespasse for battery is transitory, and the place of the battery need not be set downe in the declaration, nor can the other say it was not done in that place. *Kytch 180.*

Locus partitus Locus partitus is a division between two Townes or Countries, to try in whether the land or place in question lyeth. *Fleta.*

Lollards Lollards were such as in account and reputation were Hereticks, *2 H 5 ch 7*

Lode manage Lode manage is the hire of a Pilot for conducting of a Ship from one place to another.

Loriners Loriners is one of the Companies in *London* that make bits for horses bridles. *St 1 R 3 12*

Lodeworks Lodeworks are works belonging to the stanneries in *Cornwal.*

Lotherwit Lotherwit is that you may take amends of him that doth defile your Bondwoman. *Termes of the Law.*

Lushborrow Lushborrow was a kind of base Coyn heretofore used. *25 Ed 3 Stat 4 chap 2.*

Sect. 10.

Mace griefs Mace griefs were such as did buy and sell stolen flesh. *Cromp Just P 193.*

Manbote Manbote is a recompence for killing a man.

Male tenant Male tenant is a Toll for wooll. *29 Ed 1 chap 7.*

Mandatum Mandatum signifieth a Commandment of the King or his Justices, to have something done for the dispatch of Justice.

Mannel

Manuel Manuel ſignifieth that whereof preſent profit may be made, and a thing not Manuel is that whereof no preſent profit is to be made, but ſomewhat hereafter when it falleth. *Stamf Prer* 54.

Marches Marches do ſignifie bounds or limits, as between us and *Wales*, or betweene us and *Scotland*: ſomtimes it doth ſignifie all that was the Kings dominions.

Matter in Deed Matter in Deed is nothing but a truth to be proved though not by a Record. And matter of Record is that which may be proved by ſome Record.

Mark Mark did ſignifie a piece of money, thirty ſilver pence; now it ſignifies thirteen ſhillings and four pence.

Medeleſe Medeleſe ſeemes to be a quarrel. *Cromp Jur* 293.

Meſſuage Meſſuage ſignifieth no more properly then a dwelling houſe. But in this word is comprehended ſometimes, and may paſſe a Courtilage, which is a yard or piece of void ground garden, orchard and out-houſes, as a Dove-houſe, ſhop, mill, barn or the like. *Trin* 22 *Jac B R Plow* 199 170 171.

Mineral Mineral is any thing that growes in Mines, and contains metals.

Miſe Miſe hath had many ſignifications, but properly now it means nothing but the point whereon the parties do proceed to tryal.

Mortling Morling or Mortling is the wooll taken from dead ſheep. *Stat* 1 *H* 6 *ch* 2.

Moyety Moyety is nothing but the one half of a thing.

Multure Multure doth ſignifie the Toll that the Millard taketh for grinding corn.

Murage Murage doth ſometimes mean a Toll or Tribute to be levied for building a wall, and ſometimes a liberty granted to a Town by the King for the gathering of money towards the walling of it. *F N B*, *f* 227 *St* 3 *Ed* 1 *chap* 30.

Naam Naam did ſignifie the taking of another mans goods.

SECT. 10.

Oblations Oblations were taken for ſuch things as were given to God and his Church by Chriſtians.

Obventions Obventions did ſignifie the ſame thing. *Stat* 30 *Ed* 3 1.

Orgeis Orgeis is a kind of fiſh. 31 *Ed* 3 *St* 3 *ch* 2

Ordel Ordel was uſed in old time for a kind of Legal Purgation. *Lamb* in his Expoſition of words.

Ordelf Ordelf, it is where one doth claime to have the Oar that is found in his own ſoile or ground. *Terms Law.*

Outfangthief Outfangthief was a kind of priviledg that ſome had, that certaine felons ſhould be brought to their Court to be judged. *Termes Law.*

Out-riders Out-riders were a kind of Bailiffs-errants that the Sheriffs did formerly uſe. *St* 14 *Ed* 3 1 *Ch* 9.

Owelty des ſervices Owelty des ſervices, thoſe words ſignifie an equality, when the tenant paravayl oweth as much to the meſme, as the meſm doth to the Lord Paramount. *F N B* 136

Out-parters Out-parters were a kind of thieves. *Stat* 9 *H* 5 *chap* 8.

Oyer and Terminer Oyer and Terminer is a Commiſſion granted to one or more to heare and determine cauſes. They were granted formerly upon ſudden riſings. *Cromp Jur* 231

Oyer de Record Oyer de Record was a deſire to the Judges that they would look on a Record.

SECT. 11.

Pardoners Pardoners were ſuch as carryed about the Popes pardons. 22 *H* 8 *ch* 12

Paramount Paramount doth ſignifie the higheſt Lord of the fee: For there may be a tenant to a Lord, who holdeth over of another Lord. *Kytch* 209

Paravil And Paravail ſignifieth the loweſt Tenant, or him that is tenant to one who holdeth his fee under another. *F N B* 135.

Pares

Pares or Peers. Pares or Peers ſignifie thoſe that are ſworn in an Enqueſt. *Kytch* 78. It hath another ſignification for Noble men.

Paſſage Paſſage doth ſignifie the money one payes for being tranſported over ſea. 4 *Ed.* 3 *chap.*7.

Pelt-wool Pelt-wool is the wool taken off a dead ſheep. *St.*8 *H* 6 *ch.*22.

Pedage Pedage did ſignifie money given for paſſing through a Countrey on horſe back, or on foot.

Pernor of Profits. Pernor of profits, or Tenant, i. he that taketh the profits. *St.*1 *H* 7 *ch.*1.

Perquiſites. Perquiſites ſignifie profits; as the perquiſites of Courts, the profits that grow to the Lord by vertue of his Court, over and above the certain and yeerly profits of his land, as Eſcheats, Marriages, Fines for Copyholds, and the like. *New Terms of Law.*

Perſonal and Perſonality. Perſonal being joyned to things, goods or chattels, doth ſignifie any corporeal or moveable thing belonging to any man, be it quick or dead. *Kitch* 119 *Weſt. Symb.* Perſonality is an abſtract of perſonal. *Old N B* 92.

Pipe Pipe is a Roll in the Exchequer called a great Roll. *St.*37 *Ed.*3 *ch.*34. It ſignifieth a meaſure alſo.

Pikel or Pitle. Pikel did ſignifie a little Cloſe or Incloſure.

Plite Plite of Lawne was a quantity of bane. *St.*3. *Ed.*4 *ch.*5.

Placats Placats ſeem to ſignifie an Inſtrument of the Prince for Licenſe giving, or ſome other purpoſe. *St.*2 & 3. *P & M ch* 7.

Plonkets Plonkets is a kind of woollen cloth. *St.* 1 *R* 3 *ch* 8.

Plow land Plow land in ſome Countries doth ſignifie as much as a plow can dreſſe, in ſome Countries more, in ſome leſſe.

Polein Polein was a kind of ſhoe that was worne. 4 *Ed* 4 *ch* 7.

Portſale Portſale is a preſent ſale of fiſh in the haven. *St* 35 *H* 8 *ch* 7

Portgreve Portgreve doth ſignifie a chief Magiſtrate in ſome Towns.

Portmote Portmote is a Court kept in ſome Haven Townes. *St* 43 *Eliz ch* 15

Poſſe Comitatus Poſſe Comitatus is the Aid and attendance of all Knights, Gentlemen, Yeomen, Labourers, and others of men kind and Lay, who are bound, being lawfully required by them that have power, to aſſiſt them in keeping the peace, and doing of Juſtice. *St* 2 *H* 5 *ch* 8.

Poſt diem Poſt diem is the return of the Writ after the day.

Poſteriority and priority. Poſteriority and priority are words of compariſon and correlatives, relating to tenure for a man holding Lands or tenements of two Lords, holdeth of his ancient Lord by priority, and of his latter Lord by poſteriority.

Poſt term Poſt term is the return of a Writ, not only after the day aſſigned for the return thereof, but after the term alſo, which is not to be received by the Officer without the conſent of the Judges.

Poſtea Poſtea is a word uſed for a matter tryed by *Niſi prius*, and returned into the Court for Judgment, and there afterwards recorded. *Plow* 210

Pour party Pour party is oppoſed to *pro indiviſo*, for to make pour party, is to divide and ſever the lands that fall to partners, which before partition they held joyntly and *pro indiviſo*. *Old N B* 11.

Powndage Powndage it ſeemes is a ſum of money to be paid for the impounding of cattle: But properly it is taken for a kind of ſubſidy. *St* 12 *Ed* 6 *ch* 13.

Præceptories Preceptories were a kind of Benefices held by the Templers.

Præpoſitus villæ Prepoſitus villæ hath been taken for the Conſtable. Alſo for an Officer in the Foreſt. *Cromp Jur* 205.

Preſt money Preſt money is taken for a kind of earneſt money to bind a man to a thing to be done. Alſo taken for ſome money the Sheriff was to pay upon his account. *St* 2 & 3 *Ed* 6 *ch.*4

Priſage Priſage doth ſignifie the cuſtome that belonged to the King out of Merchandizes taken at ſea by way of lawful prize. *St* 31 *Eliz.ch* 5

Procurator Procurator was taken for him that did gather the fruits of a Benefice for another man. *St* 3 *R* 2 *ch* 1.

Profer Profer is the time appointed for the Account of Officers in the Exchequer.

Proviſor Proviſor was one that did ſue to the Court of *Rome* for proviſion. *Old N B* 193.
Province Province was taken for the circuit of an Arch-Biſhops Juriſdiction.
Provincial Provincial for a Governour of an Order of Fryars. *St.* 4 *H* 4 *ch* 17.
Proviſion Proviſion was taken for the Popes providing of a man for an Eccleſiaſtical Living before it falls. *St.* 3 *H* 5 *ch* 4.

SECT. 12.

Quadrageſſima. Quadrageſſima is the firſt Sunday in Lent; the Sunday before that is Quinquageſſima, and ſo backward the ſecond Sexageſſima, the third Septuageſſima.
Qualified Qualified did ſignifie a man enabled to hold two Benefices.
Querens non invenit plegium Querens non invenit Plegium is the Return of a Sheriff on a Writ that runs thus, *Si venit plegium. A fecerit de ſecurum, &c.*
Quarrels Quarrels doth comprehend not only Actions real and perſonal, but cauſes of Actions alſo; ſo that by a Releaſe of Quarrels both are releaſed. *Terms ley.*
Quorum Quorum is a word of diſtinction uſed in Commiſſions to Juſtices of the Peace and other Officers, whereby direction is given that ſome buſineſſe of importance ſhall not be done, but before them, or one of them; and it is given by this word, *Quorum vos A B C unum eſſe volumus.*

Rack Vintage Rack vintage did ſignifie the ſecond Vintage, or Voyage for Wines into *France* for Rackt Wines, that is, Wines cleanſed and purged that it may be drawn from the Lees. *St* 32 *H* 8 *cb* 14.
Ran Ran did ſignifie ſuch an open felony that could not be denied.
Ranſom. Ranſome is a ſum paid for the redeeming of a Captive, or for the pardoning of ſome great Crime.
Ratification Ratification was the confirmation of a Clark in a Prebends place, given by a Biſhop where the right of Patronage was doubted to be in the King.
Ray Ray did ſignifie cloath never coloured or dyed. *St* 11 *H* 4 *ch* 6.
Recluſe Recluſe was where a man was ſhut up in his cloyſter by his Order of Religion. *Lit.* 92
Recogintors Recogintors was a word uſed for a Jury impannelled upon an Aſſize.
Rectus in curia. Rectus in Curia is one that doth ſtand at a Bar of Juſtice, and no man hath any thing to object againſt him. 6 *R* 2 *St* 1 *ch* 12.
Redubbors Redubbors are they that buy cloth which they know to be ſtolne, and turn it to ſome other form or faſhion. *Cromp f* 193
Render & Prender There are certain things that lye in Render in a Manor, that it muſt be delivered by the Tenant, and the Lord cannot take it without his delivery, as Rents, Releaſes and Heriot ſervices: But others that ly in Prender, and the Lord may take without delivery, as Wards and Heriot cuſtomes, which he may ſeize and take.
Repeal Repeal is nothing but a Revocation; as to repeal a Statute is to revoke it.
Reprieve To Reprieve is to take back a priſoner for that time from the Execution and proceeding of Law.
Repriſes Repriſes are deductions that go yearly, and are paid out of a Manor or Land; as rents out of the Manor, Fees of Stewards, Bailiffs &c. *Terms of the Law.*
Repugnancy Repugnancy is a contradiction of ſayings or doings. *Plow* 153.
Reſciance, and Reſciants Reſciance ſignifieth a mans continuance or abode in a place. *Old N B* 85. And hence comes Reſciant, which ſignifies continual abiding in a place. It is all one with Reſidence, but that this is applyed to Eccleſiaſtical perſons only. *Kytch* 33.

SECT. 13.

Sac Sac is a Royalty or priviledg touching plea and correction of Treſpaſſes of men within a Manor. *Raſtal.*
Sake Sake is a plea and correction of Treſpaſſe of men in a Court. *Termes ley.*

Scavage or Scewage. Scavage was a kinde of cuſtom exacted in ſome Cities, now taken away. *Stat* 19 *H* 7 *ch* 8.

Schedule. Schedule is a little Roll, or long piece of Paper or Parchment.

Scot & lot. Scot and lot ſeemeth to ſignifie a Cuſtomary contribution laid upon all ſubjects after their ability, *St* 33 *H* 8 *ch* 19.

Selio terre. Selio terre, or a ridge of Land, is taken for an incertain quantity of Land; ſometimes more, and ſometimes leſs, *Weſt. Symb.*

Shewing. Shewing, is to be quit of Attachment in any Court, and before whomſoever, in Plaints ſhewed and not avowed.

Soke. Soke is a kinde of Suit of men in a Court or Precinct, to which divers Manors come to do Suit: *Terms of the Law*, *Gouldſ.* 105.

Stanneries, or Stenneries. The Stanneries are certain Mines in *Cornwal*, *Plow* 327 *Stat* 4 *H* 8 *chap.* 8.

Surſiſe. Surſiſe is a penalty or Forfeiture.

Sterling. Sterling is currant Money in this Realm.

Sumage. Sumage was a toll for carryage on Horſe-back, *Cromp. Jur.* 191.

SECT. 14.

Taylage. Taylage was a kinde of Tribute.

Tail or Tally. Tally, it ſeems, is a ſcore uſed in the Exchequer about Accounts.

Tant amount ou æquivalent. Tant amount ou æquivalent, is where one thing doth amount to another, and then it is all one as if it were the ſame: As a Leaſe and Releaſe amounteth to a Feoffment, So 14 *H* 8 13 5 *H* 7. A Licenſe to occupy Land for years, is a Leaſe for years: So a Leaſe for 1000 days, is a Leaſe for years.

Team. Team was a kinde of Royalty granted by the Kings Charter, 4 *Ed* 4.

Templers. Templers were an Order of Knights ſometimes in *England.*

Taſſels. Taſſels was an Inſtrument uſed by Cloathiers in making cloth.

Tend. To tend is to endeavor to offer or ſhew forth.

Talwood. Talwood a kinde of fiſh, *Stat* 35 *H* 8 *ch* 3.

Tenement. A Tenement doth ſignifie any thing that may be held, and is much of the ſignification and extent of Hereditament, but moſt properly it ſignifieth a Houſe or Home-ſtall

Terre Tenant. Terre Tenant, is he that hath the actual Poſſeſſion and Occupation of Land. He is,

Termor. Termor is one that holdeth Lands for a Tearm of years.

Teſte. Teſte is a word uſed for the laſt part of every Writ, as *Teſte me ipſo*, for the King; or *Teſte Edwardo Cook*; or *Franciſco Hobbart*, according to the Court whence it comes.

Thanus. Thanus had divers ſignifications; it did ſignifie ſometimes a Noble man, ſometimes a Free Man, ſometimes a Magiſtrate, *&c.*

Theft boot. Theft boot doth ſignifie the receiving of Goods from a Thief, to the end to favor and maintain him.

Thirdborrow. Thirdborrow is a Conſtable in ſome Countries, *Stat* 28 *H* 8 *ch* 10.

Theme. Theam or Team, did ſignifie a Royalty granted by the Kings Charter.

Tholl. Tholl was a liberty to buy and ſell in a mans own Land.

Thrave de corn. A Thrave of corn was two ſhocks, of ſix Sheaves apiece, *Stat* 2 *H* 6 *ch* 2.

Title in Law. Title in Law, is where a lawful cauſe is come upon a man to have a thing which another hath, and he hath not Action to recover it, as Title in Mortmain; or to enter for breach of condition. *Terms of Law.*

Toft. Toft is a piece of Ground, wherein a houſe now decayed and gone, did ſtand. *Plow.* 170.

Totted. Totted is a word uſed in the Exchequer, of a debt, which the Foreign oppoſer, or other Officer there, noteth for a good debt to the King, by writing this word (*Tot*) unto it. *Stat* 42 *Ed* 3 9.

Tronage. Tronage was a kinde of Toll.

Turney

Turney or Turnament Turney is a Marſhall exerciſe of Knights or ſouldiers, fighting one with another for ſport.

Turbary Turbary is an intereſt to dig turves in a Common. *Kytch* 94

SECT. 15.

Veſtura terre The veſture or herbage of land ſeems to intend nothing but the profits & poſſeſſion of it

Very Lord and very Tenant Very Lord and very Tenant, are they that be immediate Lord and Tenant one to another.

Vaccaria Vaccaria ſometimes ſignifieth a houſe to keep Cowes, ſometimes a piece of ground in the Forreſt.

Villain Judgment Villain judgment is ſuch a judgment as caſteth ſhame on a man, as for Conſpiracy, Perjury, when it is that their lands and goods be ſeiſed to the Kings uſe, trees rooted, &c.

Vicountiel Vicountiel Writs are ſuch as belong to the Sheriff, and are tryable in his Court. *Old N B* 109.

Villain-fleeces Villain fleeces were the fleeces of wool taken off ſhabbed ſheep. *St* 31 *Ed* 3 *ch* 8.

Vierge Vierge ſignifieth the compaſſe about the Kings Court that bounded the Juriſdiction of the Lord Steward, and Coroner of the Kings houſhold, which was twelve miles. 13 *R* 2 *ſtat* 1 *ch* 3.

Virgata terre Virgata terre ſignifieth a yard land.

Utas Utas is the eighth day following any Term or Feaſt.

Waive Waive, a woman outlawed is ſaid to be waived.

Wage To wage, is but to do or performe ſomething; to wage Law, is to do his Law.

Wapentake Wapentake is all one with that we call an hundred.

Ward penny Ward-penny was money given towards Watch.

Warſcote Warſcote was a payment towards the Wars.

Warwit or Wardwit. Warwit is to be qnit of giving money for keeping Watches. *Termes of the Law.*

Wild of Kent The VVild of Kent is the woody part of the Country.

Were or Werre This word Were did ſignifie once as much as the price of Redemption of him that had killed a man.

Wharf & Wharfage Wharf is a broad place neer the water, to put goods on that are brought to or from the water to be tranſported into other places. And Wharfage is a fee due for any thing that is there laid down. And Wharfager is the Keeper of it. *N. Book of Entries.*

Wool-winders VVool-winders are ſuch as make up fleeces of wool. *ſt* 8 *H* 6 *ch* 22.

FINIS.